

CCBE response to the EFTA Court's Consultation on the possible publication of Written Observations in Advisory Opinion Cases

05/03/2021

1. Introduction

The Council of Bars and Law Societies of Europe (CCBE) is pleased to have the opportunity to present its views in response to the present Consultation.

The CCBE represents the Bars and Law Societies of 45 countries, and through them more than one million European lawyers. The CCBE is recognised as the voice of the European legal profession, and in this regard, the CCBE represents European bars and law societies in their common interests before European and other international institutions. The CCBE regularly acts as a liaison between its members and the European institutions, international organisations, and other legal organisations around the world.

One of the CCBE's fundamental concerns is to improve the overall experience of litigants seeking justice before the Union Courts and the EFTA Court, most acutely with regard to the substantive quality of the judicial process and the judgments rendered, at all levels of the European judiciary, so that the said Courts can deliver impartial, high quality justice in the coming years. Indeed, access to justice constitutes one of the most important pillars of the Rule of Law.

2. Publication of Written Observations in Advisory Opinion Cases

The CCBE is pleased to note that the EFTA Court is considering the possible publication of Written Observations in Advisory Opinion Cases. The CCBE agrees that this is an important step towards greater transparency. In addition, the CCBE believes that such a development should not be problematic as certain EEA Member States already publish their Written Observations.

The CCBE also suggests that, within the context of publishing the Written Observations in Advisory Opinion Cases, the same approach should be followed and applied with respect to additional observations or clarifications provided in response to requests from the Court.

The Consultation provides that, *“If the Court decides to publish written observations in Advisory Opinion cases, the publication would take place after the judgment has been handed down and placed on the Court’s website.”* In this respect, the CCBE is aware of the risk that publication of written observations before delivery of the judgment may result in these documents (particularly written pleadings filed by the EFTA Surveillance Authority) being used, by the parties before the EFTA Court or by third parties, in separate contentious proceedings, including before a national court (in an EFTA or EU State), so as to unduly interfere with the latter’s deliberation process. Nevertheless, the CCBE believes that publication of written observations **prior to delivery of the judgment** should be considered as the preferable option, on the following grounds. First, except for cases heard in camera, the parties’ pleadings are public as of the date of the hearing, (often through press reporting). Indeed, in a number of Supreme Courts across the world, hearings can be followed simultaneously through video stream, and the US provides an example of working with the principle that documents filed with courts in civil proceedings are almost immediately published/made available to the public (on the docket) during the proceedings. Secondly, it is submitted that, in proceedings that deal with points of law only and have a constitutional nature, transparency should prevail at any stage of the proceedings over the concern of a possible interference with the serenity of proceedings. Lastly, the need to preserve the serenity of judicial deliberations seems not to have been an obstacle to the publication of full-fledged Reports for the Hearing before such publication was discontinued.

Other points

3. Publication of requests for Advisory Opinions

The CCBE notes that the EFTA Court intends to publish requests for Advisory Opinions on its website, both the full text of the original, in the language of the referring court, as well as an English translation. It is also mentioned that this decision applies to all requests registered at the Court as of 1 January 2021. The CCBE agrees with the EFTA Court’s view that such publication provides additional transparency to the judicial dialogue, between the Court and the national courts in the EFTA States. The CCBE is pleased with this development.

4. Report for the Hearing

In contrast to the positive developments regarding the possible publication of Written Observations in Advisory Opinion Cases and the publication of Advisory Opinions on the website, the CCBE considers the Court’s decision to shorten Reports for the Hearing – by restricting their content to the answers proposed by each participant, with a view to achieving a more efficient use of the Court’s resources – to be an unwelcome development. Such Reports have always been a very important tool for the parties to judicial proceedings, allowing them to be confident that their written pleadings have been fully understood, and to correct the Judge-Rapporteur’s comprehension of their pleas and arguments as appropriate. The unfortunate loss of such an opportunity in the current regime cannot be endorsed from the standpoint of protection of the rights of defence and effective judicial review.

5. Articles 31 or 36 of the Surveillance and Court Agreement

The CCBE notes that the Court does not envisage, and is not proposing, to publish documents submitted in cases pursuant to Articles 31 (infringement cases) or 36 (direct action proceedings) of the Surveillance and Court Agreement. The CCBE would suggest that in these situations there is a strong argument for maintaining the Report for the hearing because of the aforementioned function and importance of the Report for the Hearing.

6. Live streaming

The CCBE appreciates the objective of the EFTA Court to increase transparency. The CCBE also appreciates, in the context of COVID-19 consequences, the measures introduced by the EFTA Court in order to make the hearing accessible. In this regard, the CCBE believes that continuation of the live streaming of hearings post COVID-19 would be most welcome with a view to bringing the EFTA Court closer to European citizens.

7. Conclusion

In conclusion, the CCBE believes that many Courts have overcome perceived barriers and advanced with respect to introducing measures to improve transparency and efficiency. In this regard, it is encouraging to see that the EFTA Court will join other courts towards taking further steps to improve transparency, in addition to enhancing the possibilities for the legal community at large to follow the proceedings. The CCBE is supportive of measures that increase transparency and efficiency, in addition to measures which improve the quality and legitimacy of proceedings and decision-making.