

CCBE response to the EFTA Court's Consultation paper on the report for the hearing in Advisory Opinion Cases

15 April 2024

The CCBE represents the Bars and Law Societies of 46 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 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.

The CCBE wishes to thank the EFTA Court for providing the opportunity to send comments to the **open consultation on the report for the hearing in Advisory Opinion Cases**.

1. Context of the consultation

The EFTA Court is considering the removal of the current practice of drafting and publishing the report for the hearing in Advisory Opinion Cases. This report has already been shortened following the decision to no longer record the arguments but only the answers submitted by each participant in the case. This document is made available to the public in English, and in the language of the case (of the referring court). It is usually regarded as a tool which provides better transparency in the judicial process.

The EFTA Court indicates: *"Drafting, revision and translation of the report for the hearing generally accounts for around 4–6 weeks in the handling of each request for an advisory opinion at the Court. The Court currently endeavours to complete these cases in 8–11 months. However, the Court would like to reduce that time and ending the process for preparing the report for the hearing would contribute to achieving that aim."*

The current reflection lies on the now established practice with the publication of the requests for advisory opinion and written observations on the Court's website, although the latter only occurs after the advisory opinion is given¹. The CCBE strongly supported this development².

There is now the assumption that, since anyone can already access detailed information on the case and arguments of the parties/interveners through the availability of the above-mentioned documents, there is

¹<https://eftacourt.int/the-court/guidance-for-advisory-opinion/> "All written observations, lodged in Advisory Opinion cases, shall be published on the Court's website as soon as the judgment in the case has been delivered, unless the oral hearing in the case has taken place *in camera*;" (Paragraph 1 of the EFTA decision, published in May 2021)

² [CCBE response to the EFTA Court's Consultation on the possible publication of Written Observations in Advisory Opinion Cases](#) (5 March 2021, available in English)

no longer an absolute need for the report of the hearing. This will allow a reduction of the time allocated for each case and would place the EFTA Court in a better position to deliver advisory opinions more quickly to the requested national courts.

Finally, the CCBE notes that this change does not concern the report for the hearing in direct action cases, lodged under Articles 31 and 36 of the Surveillance and Court Agreement. As outlined in the Consultation, the EFTA Court has no plans to change its practice in that regard.

2. Views from CCBE

While we welcome the efforts put forward by the EFTA Court to increase transparency by publishing advisory opinion requests and written observations, the CCBE would like to express its concerns with the discontinuity of the report of the hearing:

- We believe that the efforts toward greater transparency does not justify terminating such practice. This is even more important if the main parties' arguments brought forward before the Court are to be found only in the written observations after the closing of the case. Therefore, it will be an important limitation towards the transparency and overall, the quality of the proceedings, especially for the public.
- In general, the CCBE regrets that the report has been shortened and that now, there is an extended wish for its disappearance. The report of the hearing has a wider function that benefits not only the participants in the case, in particular because it allows to see if arguments brought in the written submissions have been noted and been sufficiently clear, but also the citizens in general. It is an instrument that provides for a better understanding of the legal issues at stake through the lens of the Court. It also provides a transparent overview of the comprehension of positions of each party in one document, after the hearing has taken place. Overall, this tool provides more accountability on the judicial system in general³.
- If there will be no longer the report of the hearing, any interested party is then left to consult the written observations after the judgment is delivered, and having regard to the delay in delivering this judgement, there will be no opportunity before that, to understand the legal positions of the parties. Therefore, it is crucial for the understanding of the judicial process that the report of the hearing remains a tool accessible in each case handled by the EFTA Court.

3. Conclusions

The CCBE believes that if the EFTA Court were to decide to end the current practice of drafting and publishing the report of the hearing, careful consideration should be given on the importance of this instrument from the standpoint of the general interest and effectiveness of the judicial review.

Since the report has already been shortened, we believe it is essential to strike a balance in the search for an efficient use of the Court's resources. Therefore, and for the above-mentioned reasons, the CCBE would not support the removal of the report for the hearing in Advisory Opinion Cases.

³ See above CCBE response to the 2021 EFTA's Court Consultation, expressing our concerns as far as the report for the hearing was touched upon: *"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"*.