Notes for the guidance of Counsel in written and oral proceedings before the EFTA Court

INTRODUCTION

The procedure before the EFTA Court may be unfamiliar to many lawyers, since it differs in many respects from the court systems of the EFTA States. The procedures are modelled on the ones in place at the Court of Justice of the European Communities (hereinafter the "ECJ"), although there are important differences.

First, although the national courts of the States that are party to the EEA Agreement use German, Icelandic and Norwegian, the language of the EFTA Court is English. Accordingly, its reports for the hearing, advisory opinions as well as other decisions are in English. In the case of advisory opinions, the reports for the hearing as well as the advisory opinions are translated into the language of the requesting national court. Both language versions of an advisory opinion are authentic. When an advisory opinion is published in two languages, the different language versions are published with corresponding page numbers to facilitate reference.

Secondly, various rules govern the operation of the Court. The principal text is the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (hereinafter "Surveillance and Court Agreement"). Other instruments are inter alia Protocol 5 to the Surveillance and Court Agreement on the Statute of the EFTA Court (hereinafter "Statute"), the Rules of Procedure (hereinafter "RP) and the Instructions to the Registrar. These texts are all available on the Court's website www.eftacourt.int

There is no Advocate General at the EFTA Court, as there is at the ECJ.

This guide should be seen as a working tool intended to assist Counsel in presenting their written and oral pleadings in the form the EFTA Court considers most fitting. It is not intended as an exhaustive enumeration or authoritative interpretation of the relevant legal texts and does not bind the EFTA Court in any way. For complete information, the reader is referred to the documents themselves and invited to contact the Registry of the Court concerning questions of procedure.

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A. GENERAL POINTS

1. Bringing a case before the EFTA Court

Two types of cases may be brought before the EFTA Court: direct actions and requests for advisory opinions.

Direct actions are cases brought directly before the EFTA Court and for which judgment is given with final, binding effect for the parties. Direct actions may take three forms. The first is when an EFTA State brings an action against another EFTA State alleging breach of treaty or other obligations (this has not occurred in practice). The second is when the EFTA Surveillance Authority brings an action for breach of treaty obligations against an EFTA State. The third is when the addressee or potential addressee of a decision by the EFTA Surveillance Authority complains about that Authority's decision or failure to take a decision.

Requests for advisory opinions involve cases pending before national courts and for which the national court may, under certain conditions, ask the EFTA Court for an interpretation of the relevant rules of EEA law. The opinion is intended to assist the national court in reaching a decision in the case before it.

Proceedings before the EFTA Court normally comprise two stages: written and oral (Article 18 Statute).

The written procedure includes the originating application from an applicant (in a direct action) or request for an advisory opinion from a national court (in an advisory opinion case), and the written pleadings submitted by the parties to the case, governments and institutions and interveners, if any. It may also include replies and rejoinders in direct action cases, as well as further information if the Court so requests or directs.

The oral procedure includes the presentation of the report for the hearing presented by the Judge-Rapporteur, the oral argument presented by Counsel for the parties and the agents of governments and institutions, and the hearing of witnesses and experts, if any, as well as questions posed by the Court to those presenting oral arguments.

Once a case is referred to the EFTA Court, it takes on an EEA significance, as it may have an impact on subsequent cases anywhere in the EEA raising similar or identical points of law. The questions referred to the EFTA Court are translated into all of the official languages of the European Economic Area States and published

in the Official Journal of the European Union as well as the EEA Supplement to the Official Journal. Parties to the dispute before the national court should bear in mind that, when they suggest to their national court how the request to the EFTA Court should be formulated, the formulation should be such that it presents in a clear manner the facts of the case and the provision of national legislation at issue, so as to enable governments and institutions as well as the EFTA Court to make a proper assessment of the questions and to facilitate correct translations of the questions asked.

2. Representation

a. The rule

Article 17 of the Statute requires that parties normally be represented by Counsel. The EFTA States, the EFTA Surveillance Authority, Member States of the Community and the EC Commission (generally referred to hereinafter as "governments and institutions") are represented by their agents, while other parties must be represented by a lawyer authorized to practise before a Court of an EEA State. An exception to this rule is legal aid applications, for which a lawyer is not necessary (see Article 72(2) RP and 4.b below).

The representation requirement differs slightly in advisory opinion cases in that any person empowered to represent or assist a party in proceedings before the national court may be allowed to do so before the EFTA Court. Consequently, if the rules of procedure applicable to proceedings before the national court do not require parties to be represented, the parties to those proceedings may be allowed to submit their own written and oral observations (Article 97(2) RP).

In advisory opinion cases, the Power of Attorney requirement is dispensed with respect to the parties to the case, as it is assumed the national court has verified and accepted Counsel.

b. Representation in direct action proceedings

Pursuant to Article 33(3) RP, Counsel must, when lodging an application, attach a document certifying that he or she is authorized to practise before a court of a Contracting Party to the EEA Agreement. A copy of the lawyer's identity card is accepted for this purpose, although it must be accompanied by a translation into English if the original document is not in English. Counsel must, moreover, provide the Court with a document, usually in the form of a Power of Attorney, certifying that Counsel is authorized to represent the party he or she purports to represent (Article 33(5) RP). All documents must be submitted in English or accompanied by a translation into English (Article 25(3) RP).

3. Use of languages

The language of the Court is English (Article 25 RP). As a general rule, all communication, written and oral, concerning a case is to be in English or accompanied by a translation into English (Article 25(3) RP). The parties to the dispute, interveners and governments and institutions must all submit their documents in English (Article 25(2) RP), although the Court has the discretion to make an exception for the parties to the dispute and arrange for translation of their documents as well (Articles 25(3) and 27(2) RP).

Direct action cases take place entirely in English and judgments in direct actions are given in English only.

Advisory opinion cases are, in practice, bilingual for the national court and the parties to the case. National courts are entitled to submit requests for advisory opinions and supporting documents in the language of the case before that court and, in such a case, the Court is responsible for the translation of the request into English (Article 27(1) RP). The Report for the Hearing, prepared by the Judge-Rapporteur, is in English and translated into the language of the proceedings before the national court (Article 27(3) RP).

At the oral proceedings stage of an advisory opinion case, parties to the dispute are entitled to address and be addressed by the Court in the language of the dispute in the national court, but must inform the Court at least two weeks prior to the hearing that they wish to avail themselves of that possibility (Article 27(4) RP). It is however preferable that this is indicated much earlier, e.g. when submitting written observations. All other parties must address and be addressed by the Court in English, although the Court has discretion to allow parties other than governments and institutions to address the Court in a language of one of the EEA States, and to allow witnesses and experts unable to express themselves adequately in English to give evidence in another language (Articles 25(2) and 25(4), 26 RP).

Advisory opinions are given in English and the language of the national proceedings, and both language versions are authentic.

4. Costs and legal aid

a. Costs

Proceedings before the EFTA Court are free of charge in the sense that no charges or fees of any kind are payable to the Court. The costs referred to in Article 66 et seq. RP include what are usually “recoverable” costs, i.e. remuneration of parties’

agents, advisers and lawyers, including their travel and subsistence expenses, and expenses of witnesses and experts.

In direct action cases, the unsuccessful party is ordered to pay the costs, meaning that it bears its own costs and those of the other parties, except for governments and institutions, which bear their own costs. For costs to be awarded, the successful party must have included a request to that effect as one of the orders sought. If no such request is made, the parties bear their own costs.

However, the Court may, depending on the circumstances of the case, order that the parties bear their own costs wholly or in part or even award costs against the successful party.

In advisory opinion cases, the costs of the parties to the dispute are a matter for the national court to rule on (Article 97(5) RP). Thus, in its advisory opinion, the EFTA Court simply refers to the decision on this matter to be taken by the national court that made the request. Governments and institutions submitting written or oral observations must bear their own costs.

b. Legal aid

Article 72 RP provides for the possibility of legal aid. A party may at any time apply to the Court for legal aid if he or she is “wholly or in part unable to meet the costs of the proceedings”. The right to make such an application is not conditional upon the nature of the action or procedure. Thus, legal aid may be applied for in an advisory opinion case, although the party concerned must first seek legal aid from the competent authorities at the national level. In order to establish lack of means, the party concerned must provide the Court with all relevant information, in particular a certificate from the competent authority to that effect.

When legal aid is applied for before the commencement of proceedings, the party concerned must give a brief description of the subject-matter of the application in order to enable the Court to consider whether the application is not manifestly unfounded. The party need not be represented by Counsel at the stage of applying for legal aid.

It must be emphasized that the grant of legal aid does not exclude the recipient from being ordered to pay the costs in an appropriate case. Moreover, the Court may take action to recover sums disbursed by way of legal aid.

B. WRITTEN PROCEDURE

1. The purpose of the written procedure

Regardless of the nature of the proceedings (direct action or request for an advisory opinion), the purpose of the written procedure is always the same, viz. to put before the Court an exhaustive account of the facts, pleas and arguments of the parties and the forms of order sought. Indeed, the written phase of the proceedings is the principal part of the case before the EFTA Court; the oral hearing serves merely as an opportunity to supplement the written pleadings and answer or rebut arguments from other parties or interveners that have not been addressed in the written pleadings.

Consequently, it is important to focus considerable effort and reflection on the written observations. It is important to note that the entire procedure before the Court, in particular the written phase, is governed by the principle whereby new pleas may not be raised in the course of the proceedings, with the sole exception of those based on matters of law and fact which come to light in the course of the procedure (Article 37(2) RP).

Accordingly, the procedure before the Court does not have the same flexibility as that allowed by certain national rules of procedure.

2. The conduct of the written procedure

The course of the written procedure varies according to the nature of the proceedings (Article 32 et seq. RP).

In direct actions, each litigant may submit two sets of written pleadings: the applicant submits the originating application and may submit a reply, whilst the defendant may submit a defence and a rejoinder (Article 36 RP).

In advisory opinion proceedings, the parties referred to in Article 20 of the Statute may, within a mandatory period of two months after notification of the order for reference, submit their written observations (see B.9 below).

In either type of case, the Court may require further written information or statements from the parties.

3. Lodging of pleadings

All pleadings must be sent to the Registry of the Court in order to be registered in accordance with Article 32 RP. The original must be signed by Counsel for the party concerned. Copies must be certified by the party lodging them.

All documents relied on must be annexed to the relevant pleading, which must be accompanied by a list of annexes.

The original pleading and all the annexes to it must be lodged together with five copies for the Court and, for the purposes of notification (see B.4 below), a copy for every other party to the proceedings.

Any pleading may be delivered by post, messenger or by hand during the official opening hours of the Court (Article 32 RP). The official opening hours of the Court are from 9.00 hrs to 12.00 hrs, and from 14.00 hrs to 16.00 hrs Monday to Friday, except on official holidays. In urgent cases, pleadings may be filed with the Registry by fax (+352 43 43 89) or other technical means of communication available to the Court (RP 32(5). The fax or e-mail (eftacourt@eftacourt.int) must be received in full at the latest by the end of official opening hours on the last day of the time-limit, and the original and required copies must be received by the Court within ten days after that time-limit (Article 32(5) RP). If a pleading is initially sent by fax or e-mail, a list of attachments will suffice; the annexes themselves may be sent with the original documents in the post.

If pleadings are sent by post, the envelope must bear the following address:

EFTA Court
- Registry -
1, rue du Fort Thüngen
L-1499 Luxembourg

4. Notification

a. The addressees

In direct actions, the parties concerned are notified of inter alia the following: applications, defences, replies, rejoinders, applications for interim measures and applications for leave to intervene (Articles 36, 80 and 89 RP).

Advisory opinion requests from national courts, and the observations of those entitled to submit them under Article 20 of the Statute, are communicated to the parties to the proceedings before the national court and to the governments and institutions.

In all cases, the Report for the Hearing and the Advisory Opinion, Judgment, Decision or Order, as the case may be, are sent to the parties taking part in the proceedings before the Court and to governments and institutions.

b. Address for service

In direct actions, Article 33 RP states that parties are to give an address for service in Luxembourg. The address given may be that of any natural person residing in Luxembourg, with the exception of officials of the EFTA Court. The same rule applies for interveners (Article 89(1)(d) RP). However, the giving of an address for service is optional. If no address for service is given, pleadings are sent by registered post to Counsel for the party concerned.

In advisory opinion cases, there is no obligation to give an address for service. Service is thus effected by registered post with a form for acknowledgement of receipt.

5. Procedural time-limits

Procedural time-limits are calculated in accordance with Article 76 et seq. RP. It must be emphasized that some of the time-limits cannot be extended, in particular the time-limit for instituting proceedings (Articles 36 and 37 ESA/Court Agreement) and for lodging written observations (Article 20 Statute).

a. Calculation of time-limits

A period which starts with the service of a pleading is reckoned from the date the Court Registry hands the document to the postal authorities in Luxembourg for service by registered post.

Note that there are no extensions of time-limits on account of distance, as is the case for the ECJ.

b. Calculation of time-limits for intervention in direct actions

Applications in direct actions are published in the Official Journal of the European Union and the EEA Supplement to the Official Journal. The time-limit for interventions in direct actions starts to run 15 days after the date of publication in the Official Journal and the EEA Supplement. Interveners then have six weeks in which to lodge an intervention with the Court (Articles 77, 14(6) and 89 RP).

c. Cessation of time-limit

The period within which a pleading must be lodged stops running when the original thereof is lodged, or when the pleading is received by fax or e-mail by deadline and the original is received within ten days (see B.3 above).

d. Extension of time-limits

Certain time-limits laid down in the Rules of Procedure may be extended under Article 78 thereof, such as the period within which a defence must be lodged.

An application for any such extension must always be made by the party concerned. *The application must be made a reasonable time before the prescribed period expires and reasons for the application must be given.*

The President decides on all applications for extensions.

6. Direct actions

a. Originating applications in direct actions

The originating application must be submitted in accordance with Articles 32 and 33 RP. It is important to note that Article 33(1) is strictly applied (Article 33(6) RP). Failure to observe mandatory conditions may, in certain cases, render the application formally inadmissible.

Originating applications must place before the Court all matters of fact and law which justify the commencement of proceedings. At the same time, the applications define the scope of the proceedings. In principle, it is not permitted to raise new issues or add to the forms of order sought in the course of the proceedings (see B.1 above).

b. Summary of pleas and arguments

It is desirable for all pleadings to contain a summary of no more than two pages setting out the pleas and arguments put forward. The summary ensures that the pleas and arguments relied upon are clearly identified for the purpose, in particular, of preparation of the Report for the Hearing by the Judge-Rapporteur. The summary may also be used to prepare a text for publication in the Official Journal.

7. Advisory opinions

In advisory opinion cases, proceedings before the Court are set in motion by the national court's decision to refer questions on EEA law (Article 34 ESA/Court Agreement). The order for reference, the form of which is governed by the rules of the national jurisdiction, is forwarded to the EFTA Court either by the registry of the national court or by the judge in the case. The EFTA Court has drawn up guidance notes (EFTA Court Notice 1/99) for use by national courts for submitting requests for advisory opinions.

The litigants before the national court are not entitled to make a reference to the EFTA Court on their own initiative, nor may they take any action before they are served with a copy of the order for reference and an invitation to submit written observations by the Registry of the EFTA Court (see B.2 and B.4 above).

If Counsel proposes the text of the request for an advisory opinion, it is important that they give a clear account of the factual and legislative background so that the meaning of the questions is clear.

8. Other documents submitted in direct actions

a. Defence

The substantive conditions governing the defence are set out in Article 35 RP. The defendant must set out all matters of law and fact available to him or her when drafting the defence. Counsel should keep in mind the prohibition on putting forward new pleas in law, which applies to all stages of the proceedings, unless fresh matters of fact or law come to light in the course of the procedure. If a party does put forward a new plea in law in the course of the procedure, the other party may be allowed the opportunity to respond to that plea (Article 37 RP).

b. Reply and rejoinder

The reply is intended merely to respond to the pleas and arguments raised in the defence. Unnecessary repetition must be avoided. Similarly, the sole purpose of the rejoinder is to respond to pleas and arguments put forward in the reply.

Both replies and rejoinders are subject to the requirements of Articles 36 and 37 RP and may not, in principle, put forward new pleas in law.

Lodging a reply or rejoinder is optional. With a view to expediting the written procedure, the parties are requested to consider the possibility of waiving the right to lodge them.

An extension of the time allowed for lodging replies and rejoinders is granted only in exceptional circumstances.

c. Summary of pleas and arguments

As for originating applications, it is desirable for all pleadings to be accompanied by a summary of no more than two pages setting out the pleas and arguments put forward.

9. Written observations in advisory opinion proceedings

After receiving a copy from the Court Registry of the request for an advisory opinion, the “interested parties”, i.e. the litigants before the national court and the governments and institutions may submit a document, referred to as written observations, within a period of two months. As with direct actions, this two-month time-limit is mandatory and may not be extended.

The purpose of the written observations is to set out succinctly but completely the reasoning on which those answers should be based. It is important to bring to the attention of the Court the factual circumstances of the case before the national court and the relevant provisions of the national legislation at issue. The observations may also suggest the answers the Court should give to the questions referred to it.

It must be emphasized that none of the parties is entitled to reply on its own initiative in writing to the written observations submitted by the others. The Court may, if it deems necessary, request further clarification or information from the parties but, otherwise, any response to the written observations of other parties must be made orally at the hearing. For that purpose, the written observations are communicated to all the parties once the written procedure is completed and the necessary translations have been made.

The submission of written observations is strongly recommended since the time allowed for oral argument at the hearing is strictly limited. However, any party who has not submitted written observations retains the right to present oral argument, in particular his or her responses to the written arguments, at the hearing, if a hearing is held. The Court may limit the time it allows a party at the hearing.

10. Stay of proceedings

Pursuant to Article 79 RP, the proceedings may be stayed by decision of the President. For a *direct action*, the decision is taken after the views of the Judge-Rapporteur and the parties have been heard. In the case of a request for an *advisory opinion*, the decision is taken by the President and the Judge-Rapporteur.

Whilst the proceedings are stayed, time shall cease to run for the purposes of prescribed time-limits.

11. Applications for interim measures

Applications for interim measures may be entertained only in direct action cases and only if they are made by a party to the proceedings pending before the EFTA Court and relate to those proceedings. The application for interim measures must be made in a separate document and must meet the conditions laid down by Article 80 RP. It may be presented at the same time as the application originating the proceedings.

In view of the fact that applications for interim measures are made as a matter of urgency, applicants are requested to set out succinctly in their applications the pleas in fact and law on which their application is based. The application for interim

measures should itself provide all the details needed to enable the President or the Court, as the case may be, to decide whether the requested measure should be granted.

The application for interim measures shall be served on the other party, and that party may be allowed to submit written observations within a short period.

The President decides whether a hearing will be held and whether he or she will decide the matter or refer it to the full Court.

In cases of extreme urgency, the President may make an order immediately, that is to say, without awaiting written observations from the other party. In such cases, the order is provisional in that it does not bring the procedure on the interlocutory application to an end. The other party is then invited to submit written observations. The final stage is a (second) order concluding the interlocutory proceedings which confirms or amends the first (provisional) order.

12. Intervention

Intervention is governed by Article 36 of the Statute and Article 89 RP and is allowed only in direct actions. The forms of order sought in the application to intervene must be limited to supporting the arguments of one of the parties. It must be borne in mind that the intervener must accept the case as it stands at the time of intervention.

The intervention procedure is two-fold, comprising: (a) the application for leave to intervene; and (b) the actual participation of the intervener in the proceedings.

a. Application for leave to intervene

A person wishing to intervene must submit an application for leave to intervene. That document must contain all the information needed to enable the President or, in certain cases, the Court, to make an order granting leave to intervene. Before the President or the Court makes an order, the parties are invited to submit written observations and, in exceptional cases, even oral observations as to whether or not intervention should be allowed. At the same time, the parties are asked to inform the Court whether they intend to avail themselves of the right of confidentiality (Article 89(3) RP). If leave to intervene is granted, the intervener is invited to lodge non-confidential versions of its observations.

b. Participation of the intervener in the proceedings

Once leave to intervene has been granted, the intervener is given a time-limit to submit a statement in intervention. The statement in intervention may be followed by observations from the parties.

13. Practical advice

a. Drafting and lay-out of pleadings

The basic formal requirements for pleadings are set out in Article 33 RP. The basic substantive requirement for pleadings is that they must be clear, concise and complete.

In view of the time and effort involved in inter alia translation, repetition must be avoided. The Court should be able, on a single reading, to apprehend the essential matters of fact and law.

Since pleadings are, in advisory opinion cases, sometimes read by the Judges in a language other than that in which they are written, Counsel must bear in mind that if the meaning of a text is obscure in the original language, there is a risk that the translation will deepen the obscurity. That risk is aggravated by the fact that it is not always possible, in the transition from one language to another, to find an accurate or even satisfactory translation of the legal jargon which may be used before national courts.

Counsel should also remember the strict rule concerning the introduction of fresh pleas in law (see B.1 above); they are not entitled to “reserve”, even conditionally, pleas or arguments for subsequent pleadings or the oral hearing.

Ideally, the structure of pleadings should be clear and logical and they should be divided into separate parts with titles and paragraph numbers. In addition to a summary of the pleas in law and arguments, a table of contents may be useful in complex cases.

b. Pattern of originating applications

Originating applications should set out:

– details of the type of dispute involved and the kind of decision sought: action for annulment, application for interim measures, etc.;
– a brief account of the relevant facts;
– references to relevant provisions of the EEA Agreement and secondary legislation;
– all the pleas in law on which the application is based;
– the arguments in support of each plea in law; they must include relevant references to case law of the ECJ and the EFTA Court;
– the forms of order sought, based on the pleas in law and arguments.

It is desirable for the defence and similar documents to follow closely the structure of the reasoning set out in the pleadings to which they constitute a response.

c. Pattern of written observations

Written observations in advisory opinion proceedings should set out:

- the relevant facts and the relevant provisions of EEA and national law;
- legal argument, including relevant references to case law of the ECJ and the EFTA Court;
- proposals for answers to be given by the Court to the questions submitted by the national court.

However, if the party concerned accepts the facts of the case as set out in the order for reference, he or she need merely say so.

d. Documents annexed to pleadings

Pursuant to Article 32 RP, documents relied on by the parties must be annexed to the pleadings. Unless there are exceptional circumstances and the parties consent, the Court will not take account of documents submitted outside the prescribed time-limits or at the hearing.

Only relevant documents, on which the parties base their arguments, must be annexed to pleadings. Where documents are of some length, it is not only permissible, but indeed desirable, for the relevant extracts only to be annexed to the pleading and for a copy of the complete document to be lodged at the Registry.

Since annexes are not translated by the Court unless a Judge or the Registrar so requests, the relevance of every document must be clearly indicated in the body of the pleading to which it is annexed.

The Court does not accept notes on which oral argument is to be based for inclusion in the file (See C.4 below regarding the forwarding of notes for interpretation).

Counsel may in all cases send unofficial translations of pleadings and annexes.

e. Facts and evidence

The initial pleadings must indicate all evidence in support of each of the points of fact at issue. However, new evidence may be put forward subsequently (in contrast to the rule excluding new pleas in law), provided that adequate reasons are given to justify the delay (Article 37(1) RP).

The various forms of evidence upon which parties may rely are set out in Article 50 RP.

f. Citations

Counsel are requested, when citing a judgment of the ECJ, the CFI or the EFTA Court, to give full details, including the names of the parties or, at least, the name of the applicant. In addition, when citing a passage from a judgment of any of those Courts or from an opinion of an Advocate General of the ECJ, they are requested to specify the page number and the number of the paragraph in which the passage in question is to be found ("pin cite").

To facilitate its work, the Court suggests as an appropriate form of citation that used in the judgments of the ECJ, the CFI and the EFTA Court, for example:

For the EFTA Court: Case E-2/97 Mag Instrument Inc. v California Trading Company Norway, Ulsteen [1997] EFTA Court Report 127; or, for cases not yet published: Case E-8/97 TV 1000 Sverige AB v Norwegian Government, represented by the Royal Ministry of Cultural Affairs, Advisory Opinion of 12 June 1998, not yet reported.

For the ECJ: Case C-129/96 Inter-Environnement Wallonie v Région Wallonne [1997] ECR I-7411.

For the Court of First Instance: Case T-67/94 Ladbroke Racing v Commission [1998] ECR II-1.

C. ORAL PROCEDURE

1. Preparation for the hearing

Once the written procedure is completed and the necessary translations have been made, the Judge-Rapporteur prepares a preliminary report before a meeting of the Judges. At that meeting, the Judge-Rapporteur proposes any procedural or preparatory measures to be taken by the Court.

In most cases, the Court, at the suggestion of the Judge-Rapporteur, decides to open the oral procedure without any preparatory inquiries. The exact date for the hearing is fixed by the President.

Exceptionally, preparatory measures may be decided upon at a later stage by the Judge-Rapporteur.

a. Preparatory measures

At the meeting of the Judges, the Court decides on any preparatory measures to be taken, on a proposal from the Judge-Rapporteur. The parties may be asked to provide better particulars of the form of order sought by them and of their pleas in law in order to clarify obscure points. Or, they may be asked to discuss in greater detail issues which have not been adequately canvassed or to concentrate their pleadings on the decisive issues or to commence their oral submissions by answering certain questions put to them by the Court. The parties' replies to those questions should be given either in writing before the hearing within a period laid down for that purpose, or in writing on the date of the hearing or orally during the hearing.

A situation can arise where the Court considers it useful to request co-ordination of oral submissions by several Counsel who are putting forward essentially the same views. This may happen, for example, when several parties defend the same point of view before the Court (a situation that arises particularly where there are interventions or cases are joined). Counsel are then invited to confer with each other before the hearing so as to avoid any repetition. Counsel are encouraged generally to take the initiative themselves to co-ordinate their oral submissions with a view to limiting the duration of the oral procedure.

b. Report for the Hearing

About three weeks before the hearing, the Report for the Hearing is sent to Counsel for the parties to the proceedings, each EEA State, the EFTA Surveillance Authority and each institution that has submitted observations, as well as the other participants in the proceedings. The Report for the Hearing, drawn up by the Judge-Rapporteur, summarizes the facts and the pleas and arguments in direct actions, and the facts and the observations lodged in advisory opinion proceedings. It does not set out all the details of the parties' arguments.

After receiving the Report for the Hearing the parties may be invited to satisfy themselves that the basic arguments have been correctly summarized and that the report adequately reflects the views of the parties as expressed in the pleadings. If Counsel finds that this is not the case, they are requested to inform the Registrar before the hearing and to propose any corrections or amendments they consider to be necessary or appropriate. It must, however, be emphasized that the Report for the Hearing is, by its very nature, a report presented by the Judge-Rapporteur to the other Judges and it is for him or her to decide whether it needs to be amended. Counsel will have another opportunity to comment on the Report during the oral hearing.

2. The purpose of the oral procedure

In both direct actions and advisory opinion cases, the purpose of the oral procedure is:

- to answer the written and oral arguments put forward by the other parties;
- to recall, if necessary, by way of a highly condensed summary, the positions taken by the parties, with emphasis on the essential submissions in support of which written argument has been presented;
- to submit any new arguments prompted by recent events occurring after the close of the written procedure which, for that reason, could not be dealt with in the written pleadings;
- to explain and expound on the more complex points and to highlight the most important points;
- to answer the questions put by the Court.

In advisory opinion proceedings, the oral procedure enables lawyers to reply briefly to the main arguments set out in other written observations.

The oral procedure must, however, be seen as supplementing the written procedure and should involve no repetition of what has already been stated in writing.

3. Conduct of the oral procedure

Before the hearing commences, the President usually invites Counsel to a brief preparatory meeting in order to settle arrangements for the hearing. In some cases, the Court may indicate the matters it would like to see developed in the oral observations or questions it may ask.

As a rule, the hearing starts with oral argument from Counsel for the parties, beginning with Counsel for the plaintiff or applicant, followed by Counsel for the defendant, then Counsel for agents, etc., representing the governments and institutions. This is followed by questions put by the Judges to those presenting oral argument. The hearing generally concludes with brief closing arguments from those Counsel who wish to make them.

4. The constraints of simultaneous interpretation

The Judges do not necessarily follow the oral submissions given in a language other than English but may, in some advisory opinion cases, be dependent on simultaneous interpretation into English. This imposes certain constraints to which Counsel should, in their own interests, be attentive in order to ensure that what they say is fully understood by the Judges. Counsel must therefore regard the interpreters as essential partners in the presentation of their oral argument.

In the first place, it is highly inadvisable to read a text prepared in advance. The reason for this is that an address prepared in writing is made up of longer and more complicated sentences and is delivered at a greater speed than one which is largely extemporaneous. It is preferable to speak on the basis of well-structured notes, using simple terms and short sentences.

In cases where Counsel prefers to follow a text, the same advice applies: simple terms and short sentences should be used and the text should be read at normal talking speed.

For the same reason, it is desirable for Counsel to give details of the proposed structure of their submissions before dealing with any matter in detail.

Before attending the hearing, the interpreters carefully study extensive documentation on the case. If, as soon as possible, Counsel forward a manuscript or outline of the probable content of their oral submissions (possibly the notes on which their presentation is to be based), the interpreters will be able to complete their preparatory work, give a better rendering of the oral submissions and ensure that they are not disconcerted by technical terms, citations of texts or figures.

It is preferable to communicate such information early. Needless to say, the confidentiality of texts will be preserved. To obviate any misunderstanding, the name of the party must be indicated in the text.

Lastly, it should be borne in mind that Counsel must speak directly into the microphone.

5. Time allowed for addressing the Court

As a general rule, the period allowed to each main party is normally limited to a maximum of 30 minutes. The time allowed to interveners is normally limited to a maximum of 15 minutes. This limitation applies only to oral argument and does not include the time taken to reply to questions put by the Judges. The invitation to the public hearing will set a time-limit for advising the Court of how long Counsel wishes to speak, usually set at two weeks prior to the date of the hearing.

Exceptions to the time rule may be allowed by the Court when circumstances so warrant. For that purpose, an application must be sent to the Registrar of the Court, giving a detailed explanation and indicating the time considered necessary. In order to be taken into consideration, such applications should reach the Court at least two weeks prior to the date of the hearing. The applicant will be notified of the decision on the application at least one week before the hearing.

The time allotted to a party must be adhered to, regardless of the time that party requested.

When a party is represented by more than one Counsel, no more than two of them may present oral argument and their combined speaking time must not exceed the time-limits indicated above. The answers to the questions put by the Judges and replies to the observations of other Counsel may, however, be given by Counsel other than those who addressed the Court.

6. The need for oral submissions

It is for each Counsel to judge, in the light of the purpose of the oral procedure, as defined above, whether oral argument is really necessary or whether a simple reference to the written observations or pleadings would suffice. The Court would like to stress that if a party refrains from presenting oral argument, this will never be construed as constituting acquiescence in the arguments presented by another party.

In that connection, it goes without saying that the Court takes account of the procedural constraints inherent in advisory opinion cases, in which only the oral procedure gives the parties an opportunity to respond to the written observations of another "interested party" and, if necessary, to take a position regarding new developments.

7. Omission of the hearing

The oral procedure may be dispensed with in certain cases.

In direct action cases, Article 41(2) RP requires that the parties consent if a hearing is to be dispensed with.

In advisory opinion cases, Article 97(4) RP provides that the Court may decide to dispense with the oral procedure following a report from the Judge-Rapporteur, provided that none of the parties and others entitled to submit statements and written observations have asked to present oral argument.

8. Hearing of applications for interim measures

As a general rule, before an order concerning interim measures is made, the views of the parties concerned are heard by the President, with the Judge-Rapporteur in attendance in some cases. Such hearings are much less formal than the main hearing. In practice, the President starts by summarizing, orally, the difficulties involved in the case. The President then invites the parties to express their views on those difficulties. The hearing ends with questions put to the parties.

It must be borne in mind that such hearings are not intended to enable the parties to address the merits of the case. Moreover, the decision of the Court on an interim measure is without prejudice to its decision on the merits of the case (Article 83(4) RP).

9. Practical advice

a. Postponement of hearing

The Court grants requests for postponements only for compelling reasons.

b. Dress

Lawyers are required to appear before the Court in the robes they use before their national courts. This rule does not apply to hearings concerning interim measures, at which neither the judges nor the lawyers wear robes.

c. Addressing the Court

The normal manner of addressing the Court is “Mr President and Members of the Court” or “My Lords”. This may occasionally be shortened to “the Court”, as in “the Court will be aware that ...”.

IX

Notice 1/99

Note for guidance on requests by national courts for advisory opinions

NOTICE 1/99

(OJ C 223, 5.8.1999, p. 4)

NOTE FOR GUIDANCE ON REQUESTS BY NATIONAL COURTS FOR ADVISORY OPINIONS

The development of the EEA legal order is, inter alia, the result of co-operation between the EFTA Court and national courts and tribunals through the advisory opinion procedure under Article 34 of the ESA/Court Agreement.[1]

In order to make this co-operation more effective and enable the EFTA Court to better meet the requirements of national courts by providing helpful answers to questions, this Note for Guidance is addressed to all interested parties, in particular to all national courts and tribunals.

It must be emphasized that the Note is for guidance only and has no binding or interpretative effect in relation to the provisions governing the advisory opinion procedure. It merely contains practical information based on the experience in applying the advisory opinion procedure.

1. Any court or tribunal of an EFTA State which is party to the EEA Agreement (at present Iceland, Liechtenstein and Norway) may ask the EFTA Court to interpret a rule of EEA law, whether contained in the EEA Agreement or in acts of secondary law, if it considers that this is necessary for it to give judgment in a case pending before it.[2]

2. The request for an advisory opinion must be limited to the interpretation of a provision of EEA law, since the EFTA Court does not have jurisdiction to interpret national law. It is for the referring court or tribunal to apply the relevant rule of EEA law in the specific case pending before it.

3. The request for an advisory opinion to the EFTA Court may be in any form allowed by national procedural law. It generally involves a stay of the national proceedings until the Court has given its opinion, but the decision to stay proceedings is one which it is for the national court alone to take in accordance with its own national law.

4. The request for an advisory opinion to the EFTA Court may be expressed in the language of the national Court.[3] If so, the questions will be translated into English,

[1] Case E-1/95 *Samuelsson* [1994-1995] EFTA Court Report 145.
[2] Case E-1/94 *Restamark* [1994-1995] EFTA Court Report 17.
[3] See Article 27 (1) of the Rules of Procedure.

the language of the Court. Questions concerning the interpretation of EEA law are frequently of general interest and the EEA Member States, the EFTA institutions and the Community institutions are entitled to submit observations. It is therefore desirable that the reference should be drafted as clearly and precisely as possible.

5. The request for an advisory opinion should contain a statement of reasons which is succinct but sufficiently complete to give the Court and those who must be notified (the EEA Member States, the Community, the EFTA Surveillance Authority and the Commission) a clear understanding of the factual and legal context of the main proceedings.

6. In particular, it should include[4]:

   – a statement of the facts which are essential for a full understanding of the legal significance of the main proceedings;
   – an exposition of the national law which may be applicable;
   – a statement of the reasons which have prompted the national court to refer the question or questions to the EFTA Court; and
   – where appropriate, a summary of the arguments of the parties.

   The aim should be to put the EFTA Court in a position to give the national court an answer which will be of assistance to it.

7. The national court should ensure that the order for reference itself includes all the relevant information. The reference should normally not be accompanied by annexes. However, the EFTA Court may ask for relevant documents, if necessary.

8. A national court or tribunal may refer a request for an advisory opinion to the EFTA Court as soon as it finds that an opinion on the point or points of interpretation of EEA law is necessary to enable it to give judgment. It must be stressed, however, that it is not for the EFTA Court to decide issues of fact or to resolve disputes as to the interpretation or application of rules of national law. It is therefore desirable that a decision to refer should not be taken until the national proceedings have reached a stage where the national court is able to define the factual and legal context of the question. Moreover, the questions asked should be of actual relevance for the case at hand. Hypothetical questions should not be referred.[5] On any view, the administration of justice is likely to be best served if the request is not made until both sides have been heard.

[4] See Article 96 (3) of the Rules of Procedure
[5] Case E-6/96 *Wilhelmsen* [1997] EFTA Court Report 53.

9. The request for an advisory opinion should be sent by the national court directly to the EFTA Court, by registered post, addressed to:

   EFTA Court
   - Registry -
   1, rue du Fort Thüngen
   L-1499 Luxembourg
   Telephone (352) 421081
   Telefax (352) 434389

10. The Court Registry will remain in contact with the national court until the advisory opinion is given, and will send copies of the various documents (in particular written observations and Report for the Hearing). The Court will also send its advisory opinion to the national court. The Court would appreciate being informed about the application of its advisory opinion in the national proceedings and being sent a copy of the national court's final decision.

11. Proceedings for an advisory opinion before the EFTA Court are free of charge. The Court does not rule on costs.