

Practical Guidance for Advocates appearing before the Court of Justice in appeal proceedings

2016



This practical guidance is addressed principally to lawyers appearing for the first time, or appearing infrequently, before the Court of Justice of the EU. It has been drafted by the Council of Bars and Law Societies of Europe – CCBE’s Permanent Delegation to the Court of Justice and the General Court of the European Union and the EFTA Court, in order to enhance the efficiency for lawyers of appeals against decisions of the General Court

The 2012 consolidated version of the Rules of Procedure of Court of Justice, as amended in 2016, and the other texts governing the procedure before the said Court are available online at the following address: http://curia.europa.eu/jcms/jcms/Jo2_7031/

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This guidance addresses three topics:

1 The notion of appeal

2 Written pleadings

3 Oral pleadings

4 Practical Issues

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#1

The notion of appeal

- » The appeal is a remedy whereby a party requests that the Court of Justice set aside a decision of the General Court. It can be based only on grounds relating to the infringement, by the General Court, of rules of law, to the exclusion of any plea relating to the facts. As judicial statistics indicate, the risk of an application being rejected by the Court by way of an order declaring the appeal manifestly inadmissible is high. It is therefore crucial for the appellant and its lawyer that the appeal should be well reasoned and present as precisely as possible the complaints raised against the decision being challenged, clearly distinguishing the issues of law referred to the Court from the factual elements of the case, which are normally already established. A simple, brief and well-structured drafting on a limited number of pleas can only make the work of the Court easier and increase the chances of success of the appeal.

#2

Written Pleadings

GENERAL

- » The appeal must contain the pleas in law ("*moyens*") and legal arguments relied on, and a summary of those pleas in law
- » In appeal proceedings against a decision of the General Court, the applicant and the other parties may, in principle, submit only an appeal and a response, respectively. The possibility of lodging a reply (and a rejoinder) is subject to express authorisation from the President of the Court
- » Where the President grants the appellant's application to lodge a reply, he or she may limit the number of pages and the subject-matter of that reply and of the rejoinder(s) that may be submitted subsequently. Non-compliance with these instructions will result in the pleadings being sent back to their author
- » The appeal will be served on all parties of the proceedings before the General Court, including any interveners (also those who had supported the appellant in the proceedings before the General Court). If any of these parties, including any intervener at first instance, wants to partake in the written part of the appeal proceedings, it must lodge a response
- » Written pleadings may be the sole opportunity to influence the outcome of the case: an oral hearing will not necessarily be held in all cases
- » Keep written pleadings as short as reasonably possible, having regard to the 25-page limit indicated by the Court's *Practice Directions to Parties* (<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ:L:2014:031:TOC>) (the "Practice Directions")
- » Remember that the services of the Court do not automatically translate annexes to the pleadings. Consider, where appropriate, providing a courtesy translation into French (the Court's working language) of important supporting documents
- » Lawyers who have created an e-Curia account (<https://curia.europa.eu/e-Curia/access-request-step1.faces>) can lodge and receive all their procedural documents via the e-Curia application. In that case, it is not necessary, after transmission of a document, to send the original thereof and the required certified copies also by post. Lawyers who have not created an e-Curia account may send written pleadings to the Court's Registry at the following address: Rue du Fort Niedergrünwald, L-2925 Luxembourg. Transmission by fax or as an attachment to an e-mail is also allowed, provided that the original documents are also lodged at the Registry within the next 10 days. Where an e-Curia account has been created for the proceedings before the General Court, it is also valid for the proceedings before the Court of Justice



CONTENT

- » Appeals must be confined to points of law: the Court of Justice has no jurisdiction over findings of fact, and the parties are not entitled on appeal to challenge the factual findings made by the General Court or to adduce evidence that the lower court did not consider. Accordingly, grounds of appeal that merely take issue with factual appraisals made by the General Court are inadmissible except in exceptional cases where facts were grossly distorted ("*dénaturation*"). The parties may nevertheless challenge the application of the rules concerning the burden of proof, the taking of evidence or the required standard of proof
- » The difference between errors of law and errors of fact is fundamental. A wrong legal characterization of the facts found by the General Court is an error of law and, as such, can be reviewed on appeal
- » An appeal can only be based on grounds alleging, alternatively or cumulatively: a lack of competence of the General Court, a breach of procedure which appreciably affected the appellant's interests, or an infringement of EU law by the General Court. Infringement of EU law is typically the most important ground of appeal, and includes infringement of EU procedural law, such as breach of the rights of defence or the General Court's obligation to state reasons in the decision being challenged on appeal
- » The appeal and the response(s) must contain all matters of fact and law relied on by the party. At the same time, the application defines the scope of the proceedings. In principle, new pleas or additions to the forms of order may not be adduced later in the course of the proceedings
- » An appeal may not simply repeat arguments or grounds submitted in the proceedings before the General Court but must precisely identify the points in the grounds of the decision of the General Court that are contested, and clearly set out the reasons why these are legally incorrect
- » The appellant may, in principle, not introduce any grounds or raise legal arguments concerning the act challenged before the General Court that were not raised in the first instance proceedings. It may nonetheless raise any pleas of public interest ("*moyens d'ordre public*") and claim that the General Court was bound to raise them of its own motion
- » All pleas and legal arguments must be set out in the pleading and cannot be made in the annexes (which in any case are not usually translated into French and will not necessarily be read by the members of the chamber hearing the case)

FORM AND STRUCTURE

- » Written pleadings are usually structured as follows: a summary of the relevant facts and/or procedure; a presentation of the pleas in law, and a formulation of the form of order sought.
- » As regards the appeal, the form of order sought must necessarily seek to have set aside, in whole or in part, the judgement of the General Court, not the annulment of the measure that was originally challenged before the General Court. Where the Court sets aside the decision appealed and is in a position to rule on the substance of the case, it may give final judgment (which it does in approx. 70% of cases). It is recommended that the form of order sought should also include the form of order originally sought before the General Court. In the alternative, the appellant should explain to the Court why, should the decision be set aside, it would be necessary or preferable to refer the case back to the General Court
- » Organize your written pleading clearly and logically – a division into sections with clear headings and numbered paragraphs is recommended
- » Avoid repetitions and dressing up the same arguments in different ways
- » Check that your formatting conforms with § 35 of the Practice Directions
- » In addition to the summary of the facts and main arguments, a table of contents is useful in complex cases
- » A schedule of annexes must be provided in all cases.
- » Apply the new method of citing the case-law as explained at http://curia.europa.eu/jcms/jcms/P_125997/



DRAFTING STYLE

- » Keep the style concise and easy to translate – punchy uncomplicated sentences are best – avoid use of national legal jargon which may be difficult to translate correctly
- » If possible, consider asking a non-native speaker to read your text to check for likely ease of translation
- » Short sentences should be preferred. Repetition, parenthetical and subordinate clauses should be avoided



#3

Oral Pleadings

GENERALLY

- » Parties do not have a right to an oral hearing, including where the President of the Court has not granted leave to file a reply and a rejoinder
- » The Court may decide, where it considers that the case raises no new point of law, to dispense with the Advocate General's Opinion
- » Where a party wishes a hearing to be held, it must file with the Registry a duly reasoned request within three weeks of service of the notification of the closing of the written part of the procedure
- » Requests for hearings should not exceed 3 pages, and should contain the party's assessment of the added value that the hearing would provide (e.g. a discussion of recent developments in the case law, or of the arguments developed by one of the other parties, to which no response was provided in writing). Referring to the importance of the case is deemed insufficient
- » Where the Court accepts the request for hearing, parties must respond promptly to the Registry's letter informing them of the hearing date, and name the lawyer who will plead. In principle, only one advocate per party is permitted to plead orally, although permission for more than one advocate may be granted on advance written application
- » Time allotted for the main pleadings (normally 15 minutes) must be strictly adhered to. Extensions may be granted on written application filed with the Registry at least two weeks before the date of the hearing
- » Where the Court sends a letter to the parties in advance of the hearing, asking them to address specific aspects of the case at the hearing, parties should comply with the Court's request
- » Before the hearing begins, the Grand Chamber or the Chamber hearing the case usually holds in the deliberation room behind the courtroom a short meeting with the representatives of the parties about the organization of the hearing. At that meeting the President, the Judge-Rapporteur and/or the Advocate General may invite those representatives to provide further information on certain points or to develop one or more specific aspects of the case in the course of the hearing
- » Normally, the procedure at the hearing consists of three parts: the oral submissions, questions from the members of the Court (and answers by the parties), and the parties' closing remarks. During the Q&A session, lawyers thus must be prepared and ready for questions that test the strength of their case, including on the factual background
- » The order of the initial pleadings normally consists of the appellant, followed by any other parties or interveners supporting its position, and then the respondents and interveners opposing the appellant's position
- » If the Court has requested the parties to deal with particular issues, consider whether it is necessary to focus exclusively on them. In general, only the decisive points for the purpose of the Court's decision should be brought to its attention during the oral phase



- » If your client has the same interest as other parties (such as intervening Member States), discuss in advance who is going particularly to focus on which points
- » Closing remarks must be kept short and should be limited to points that arise from the discussion - they can be dispensed with, unless you really have something new to say (e.g., where a new point is raised during the hearing)
- » If possible, send in advance to the interpreters your speaking notes or at least a summary thereof – including references to any judgments which you intend to cite – at the following e-mail address: interpret@curia.europa.eu. In the alternative, hand out a hard copy of the notes to the interpreters before the hearing
- » If you intend to refer in your presentation to case-law that has not been cited in the written pleadings, bring copies to the hearing
- » Lawyers wear robes at the hearing (except in interim proceedings). Bring your own – however, a few robes are usually available in the "*salon des avocats*" for those who forget

THE PLEADING ITSELF

- » Open your oral pleading with a brief statement of what you consider the case is about
- » Do not repeat your written arguments in detail but rather seek to convey the fundamental reason why the Court should adopt your position
- » Focus on the two or three most important points while showing that you are ready to respond to questions later during the hearing
- » Focus on any relevant developments in the case law since the date of filing of your last written pleading
- » Avoid repetition of points made by others – if appropriate, refer briefly to points made by others during the hearing, without further elaboration
- » Comply promptly with requests from the Bench, including a request to stop speaking
- » Focus on the Reporting Judge, the President of Chamber and the Advocate General Stand at the lectern at all times when you speak (including in reply to questions) and prepare your papers, earpiece etc. accordingly
- » Speak into the microphone (make sure it is switched on - otherwise the interpreters cannot hear you!) and adjust it for height
- » If possible, avoid reading out a written speech. This runs the risk that you speak too quickly and that the interpretation of your pleading will be poor
- » Make sure you can address any points made by others during the hearing. Ideally, speak freely, with your head up, using a normal conversational style and speed. Do not feel bound to follow any speaking notes given to the interpreters
- » Shorter sentences without subordinate clauses work better than longer ones
- » Speak clearly and slowly (think about the interpreters), particularly when giving numbers and references
- » Literary flourishes, jokes and idiomatic speech risk being misunderstood
- » Do not interrupt the other party's submissions without the President's permission

WHAT TO EXPECT

- » Find your allocated courtroom and the closest robing room ("*salon des avocats*") where you can leave any luggage you may have and put on your robes
- » After arrival at the courtroom, one of the interpreters is likely to ask for a copy of any speaking notes you have for your oral pleading – so bring a spare copy



- » Although seats for litigants are not specifically allocated, counsel for the appellant and any supporting party usually sit on the right, and counsel for the respondents and any supporting party on the left when facing the judges
- » Normally, lawyers sit at the desks in front of the Bench, while their clients sit on the front row of the seating immediately behind these desks. Ensure that your team is seated sufficiently close by so as to be able to assist the speaker (e.g. in responding to the questions)
- » Do not attempt to sit on the "sideways"-facing desks: these are for the Court clerk and "*référéndaires*" who assist the Judges
- » Where there are multiple parties, it is necessary to take turns to use the lectern and the microphone, which can be inconvenient. Listen to the full question through your headphone before moving to the lectern to respond
- » Check that your interpretation headphone works and verify that it is on the correct channel for your language of choice - for channel numbers, check the number on the windows of the interpreters' booths
- » The lectern can be adjusted to your height if necessary
- » Power points are provided for laptops
- » There will often be a comfort break after approximately 2 hours if the hearing is not over yet. In case of longer hearings, a lunch break may be held necessary (typically at 13.00, with the resumption of the hearing at 14.30) - plan your day accordingly
- » You will be invited to switch off your mobile phone at the beginning of the hearing
- » Free high-speed broadband Wi-Fi access is available in the courtroom. Once you have Wi-Fi switched on, look for the "Guest" network. No password is required



#4

Practical Issues

ADVANCE PREPARATIONS

- » The Court of Justice is situated on the Kirchberg Plateau in Luxembourg (see map at: http://curia.europa.eu/jcms/jcms/Jo2_7021)
- » The entrance to the Court for lawyers is on Rue du Fort Niedergrünwald
- » There are several hotels within 5 minutes' walking distance away from the Court and staying at one of those may facilitate a reconnaissance visit the day before
- » Kirchberg is close to Luxembourg Airport - direct buses from the airport stop outside the Philharmonie, which is 3 minutes' walking distance away from the Court's entrance, see www.vdl.lu
- » Luxembourg City's roads - including the motorway to and from the airport (in both directions) - suffer bad congestion at peak times, in particular in the morning, so plan your arrival accordingly

ARRIVING AT THE COURT

- » Arrive in good time for the hearing and in any event no less than 45 minutes beforehand – security checks can be time consuming
- » Bring your ID card for security checks, identify yourself as a lawyer (e.g. using CCBE card available from your national Bar) and go to the security official at the head of the security desk marked "Avocats" (do not wait in the queue for visitors!)
- » Ask for the name or number of the courtroom ("*salle d'audience*") in which your case is scheduled and ask for directions
- » Outside security, go straight up the wide stairs near "*Le Penseur*", a sculpture by Auguste Rodin
- » At top of the stairs you are in the *Salle des Pas Perdus*. On the left is the "*Grande Salle d'audience*". The last office in the corridor immediately to the right hand side is the robing room ("*salon des avocats*")
- » Lockers are available for personal items, and a few computers are available with printers and internet connection
- » Do not count on being able to make photocopies at the Court
- » There is an alternative robing room on level 6 – coming out of the lift, it is on the right across the hall.