Committee on Legal Affairs

Hearing on the *Reform of the Court of Justice of the European Union*

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European Committee Room, Brussels

Access to Court documents: a practitioner's perspective

Michael Patchett-Joyce, Barrister
Outer Temple Chambers, London[1]

Opening words

May I begin by expressing my thanks to the Chairman of the Committee on Legal Affairs, Herr Klaus-Heiner Lehne, and to the Committee, for their kind invitation to address this Hearing on "*Reform of the Court of Justice of the European Union*". It is a privilege to be here.

I would also like, at the outset, to recognise the enormously valuable work that has been undertaken by the Court of Justice of the European Union ("CJEU", or "the Court"). Its contribution to the development over the past 60 years of what is now the European Union has been remarkable. Over that period, and to a much greater degree in recent decades, ever-increasing demands have been placed on the Court. It has needed to rise to the complex and ever-present challenge of achieving coherence, uniform application, and respect for Treaty and other constitutional principles within a plural continent of legal, linguistic and cultural diversity. As the EU has grown and continues to do so, its workload has increased exponentially. However, even good institutions (perhaps, particularly, good institutions) should be challenged to improve, so that the standard of "best practice" is always being raised.

Introduction

The topic for the hearing is broad. My invitation is specific: both as to subject-matter (access to Court documents), and as to view-point (that of the practitioner).

In view of the need to keep my contribution short, I shall summarise a few of my ideas. There is much more to say, and I hope this hearing will provide a useful opportunity to point the way to fuller discussion. I am keen to continue to contribute.

As a practitioner, I owe professional duties to the courts/tribunals before which I appear, and to the clients whom I represent. I must strive to represent the client's interests, and put forward their case,

[1] I can be contacted at michael.patchett-joyce@outertemple.com

to the best of my professional ability. I must therefore be able (1) to research the relevant law, and (2) to apply it to the particular facts.

Those professional duties are owed to national courts/tribunals in cases involving EU law, just as much as to cases before the CJEU itself.

Thus, information (and knowledge derived from that information) is vital to me, as a practitioner:
(1) to obtain an accurate understanding of the relevant law, (2) to enable proper legal advice to be given to my client, (3) to enable my client's case to be properly pleaded and argued in law, (4) to ensure that my client's case is accurately presented in fact, and (5) to be able to identify contentious points of law and ensure that the court (whether national or CJEU) is fully and accurately assisted as to the relevant law.

Access to documents is important in all of those respects.

The study on national practices with regard to the accessibility of court documents ("the Study")

I have had the benefit of reading, with great interest, a draft of the Study for which Ms Vesna Naglič[2] has been responsible. I have learnt a great deal about how the issues under consideration are dealt with in some other jurisdictions, notably Finland, Slovenia and Canada, as well as by other European institutions. If I may say so, the Study provides a thorough and well-reasoned analysis of important problems of accessibility with useful *recommendations*. It has clearly articulated current problems, and discussed those issues in Section 6.2 of the Study. I can see much force in the *Key Findings* (Study, p.8) and in its *Recommendations* (Study, §6.2.3), and in its *Conclusion* (Section 7). Some of my own experience has been described in the Study, and much of my experience is consonant with the Study's analysis.

How I come to be here

My participation today stems from my attendance at an oral hearing held by the CJEU in March 2012.

I was not present in the CJEU as a practitioner-*advocate* (in which case I would have had access to the case-papers), but as a practitioner-*observer*. I was, therefore, able to experience at first hand the way in which the CJEU could be seen to operate from the perspective of an ordinary citizen of the EU.

In the course of the hearing, advocates addressing the Court made specific references to the *Written Observations*("WOs"), in particular to numbered paragraphs of the *Observations* of the European Commission[3]. Without sight of those *Observations*, the submissions made in open court were, in important respects, meaningless to me (and to any other ordinary EU citizen who might have been present).

Immediately after the hearing, I asked the advocates for the European Commission how I could obtain copies of the *Written Observations*, referred to in argument. I was told that the documents were not openly available, even though they had been referred to in open Court, and that I would

[2] administrator with the *Citizens' Rights and Constitutional Affairs* Policy Department of the European Parliament
[3] express reference was also made to the WOs of the Government of Spain

need to apply for disclosure under Article 10 of Regulation(EC) No. 1049/2001. I did so, but received a letter informing me that the Commission's *Written Observations* would not be publicly available until after Judgment had been delivered because "*of the need to ensure that, throughout the court proceedings, the exchange of arguments by the parties and the deliberations of the Court in the case before it take place in an atmosphere of total serenity*"[4]. As a result, it was not until several months later that I was able to obtain a copy of those *Written Observations*. In a sense, I was fortunate that the delay between oral hearing and delivery of judgment was not longer. Nonetheless, the material which I was seeking was of direct relevance to cases on which I was instructed in England. Even as a lawyer with a direct professional interest in the material in question, I was not able to obtain it. In consequence, I was not able fully to advise clients, nor was I able to provide complete information to tribunals or courts before which I was appearing.

My experience gave rise to two-fold concerns: (1) on a general level, on grounds of access to justice, and (2) on a more specific level, as regards the impediment to fulfilling my professional duties as a lawyer to my clients, and to courts and tribunals.

Accordingly, I raised the matter and, having done so, was invited to attend today.

Transparency, access to justice, due and open process and the serenity of deliberations

The arguments in favour of disclosure and public availability seem to me to be overwhelming. Principles of legal transparency, access to justice, and due and open process point to only one conclusion: the Observations should be available for public inspection, particularly when they have been referred to, and relied on, in open court and their availability is necessary to understand the submissions that had been made.

I should say immediately that I fully recognise and appreciate the CJEU's need to promote and preserve the serenity of its deliberations. But I do not see why the Court's need and the principles just mentioned are, in any sense, opposed.

It is seldom the case that an oral CJEU hearing generates mass attendance. Those present tend to be those interested in the legal principles of the case, as practitioners, academics, media or individuals. As a practitioner, I attended (and would attend in future) because the arguments were directly relevant to cases on which I was, and am, instructed in my own jurisdiction. It is not a threat or challenge to the serenity of the Court for me to be better informed, and better able to convey that information to my clients and the domestic tribunals and courts before whom I appear.

Nor will academic comment and analysis of arguments addressed to the Court, even if of a critical nature, call into question the serenity of the Court. Academic comment and analysis is only of value if it is advanced on a tenable basis. The Court should, therefore, be receptive to such comment and analysis. Moreover, the possibility that information might flow, in this instance, from commentator to court, should not be regarded with concern; it does not interfere with a court's serenity for it to be better informed. Concern would only arise if, in the face of academic argument, a court were to suspend its own forensic faculties, abdicate its responsibility, and treat outside comment and analysis, without more, as determinative. But that obviously would not happen. If it exists at all, such concern is ephemeral. By appearing to protect itself against an insubstantial fear, the Court risks weakening, rather than enhancing, its standing.

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[4] those words being taken from the judgments of the Court in Joined Cases C-514/07P and others, *API*, 21 September 2010.

In this regard, it might also be recalled that, on the "Case Information" page on the CJEU's CURIA website for cases referred, there is express provision for "*Notes on academic writings*". It is unsurprising in the present circumstances that the heading is usually followed by the words "*Information not available*".

Likewise, the Court should be receptive to fair and constructive media comment. There will be few oral hearings that create any real media interest. Of those that do, what is the worst that can happen? A very small minority of cases *might* provoke an even smaller number of media outlets to engage in an ill-considered diatribe. The risk of even that happening must be very slim when what would be reported would be *argument*, not *findings*; and, a partisan and ill-informed article will usually be seen to condemn itself. As a matter of principle, no court should be unduly influenced by public opinion, but that does not mean that courts should be isolated from public opinion (a practical impossibility, in any event). The requirement of judicial independence, inherent or explicit in the oath of office, is an appropriate, and sufficient, bulwark.

My essential point, therefore, is that the CJEU could be more open and transparent and could, thereby, better promote access to justice. By doing so, the CJEU would not, in my opinion, jeopardise its serenity and, through improved accessibility, would achieve greater public approval and recognition.

The "essential point" applied to some other aspects of the Court's process

In the original written version of my contribution, I had described the situation that I had experienced as creating an "information deficit". Thinking about that description further, it had appeared to me that the same expression, "information deficit", could apply at other points in the Court's process.

Rather than extend this written summary with those further thoughts, which I was not able to develop orally, I have excised those further points here, but would be happy to re-introduce them in subsequent discussion, as appropriate and convenient.

There was, however, one further particular point to which I referred in my oral remarks, as follows:

- ***a specific comment as regards the abolition of the Report for Hearing***

The Study (referred to above) has already noted that, under the new Rules of Procedure adopted with effect from November 2012, a *Report for Hearing* is no longer drawn up, and hence will not be available to the public **at all**[5]. This is clearly a retrograde measure. The first *recommendation* made under §6.2.3 of the Study would remedy this backward step.

The value of the *Report for Hearing* being available in French (the publication of the French text would involve neither additional time nor cost) as well as in the language of the case is self-evident.

A final point

The Chairman of the Bar Council, Maura McGowan QC, has referred earlier to the possibility of establishing a Rules Committee, which could advise on any future changes to the Rules of Procedure.

[5] see, Study, §1.1 and §6.2.1.

I would support that proposal, and wonder whether a properly-representative[6] ***Court Users' Committee*** might also be useful.

It is right to acknowledge that some discussion does take place between the Court and the CCBE (*Conseil des Barreaux Européens*). However, as I understand it, this interaction is *ad hoc* and infrequent. There may be benefit in making those arrangements more formal and more frequent, with regular meetings. In England, there are several such committees, especially in the specialist courts of the High Court (*e.g.*, in the Commercial Court). I have no doubt that similar arrangements exist in many other member states (but I am not able to speak from direct or immediate experience). In jurisdictions beyond the EU, such committees have also been successfully set up (see, *e.g.*, the *Court Users' Committee* in Dubai at the DIFC Courts).

Conclusion

It only remains for me to thank the Committee for its attention, and to indicate a willingness to participate in any further discussion.

Michael Patchett-Joyce
Barrister

Outer Temple Chambers
222 Strand
London WC2R 1BA

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[6] *i.e.*, representative of private parties' interests as users, as much as of the interests of member states