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## IMPORTANT MILESTONES OF A TRIAL IN FRANCE AND BELGIUM

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### *Legal framework*

#### *Main principles*

#### *Important milestones of a trial*

- The introduction of the case
- Pleadings and pre-trial
- Public hearing
- Judgement
- The Appeal
- Cassation (national Supreme court)

#### *The preliminary ruling question before the European Court*

#### *Lawyers' fees*

#### *Criminal proceedings*

Etienne WERY  
Partner  
Lawyer at the Brussels Bar  
Lawyer at the Paris Bar (toque R 296)  
[etienne.wery@uly's.net](mailto:etienne.wery@uly's.net)

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## Legal framework

The judicial process is one of those matters which has been only harmonised a little within the European Union. Each country is relatively free to set the rules for procedures conducted before its national courts. However, states must act in accordance with the general principles, issuing, in particular, from the European Convention on Human Rights.

## Main principles

There are trends that can be observed, at least with regard to France and Belgium:

1. In civil and commercial matters, each party must notify the other, in principle at the beginning of the proceedings, regarding the pieces of evidence on which the legal action is based. The risk of a last minute surprise or of a hidden item, discovered during the hearing, is relatively low.
2. Most proceedings require the preparation of written position. Even when the law allows itself to be limited to oral considerations, it is recommended at most times to file, in addition, written evidence.
3. Especially in France, judges do not like pieces of evidence written in a foreign language. If there are correspondence or contracts to be produced in court, they must be translated into the language of the proceedings. Otherwise, one risks seeing the piece of evidence altogether excluded from the proceedings in court. On the other hand,

BRUSSELS

224 BC, Crown  
1050 Brussels  
Such. 32 (0) 2 340 88 10  
Fax 32 (0) 2 345 35 80

Civil society in the form of SCRL  
RPM Brussels  
VAT: BE 0476.702.936

PARIS (branch)

33, rue Galilee  
75116 Paris  
Such. 33 (0) 1 40 70 90 11  
Fax 33 (0) 1 40 70 01 38





most of the time, a simple translation is admitted (it is not necessary to use a sworn translator).

4. There is a significant difference between substantive proceedings and injunction proceedings. Substantive proceedings are basically intended to definitively decide the dispute (subject to a party making an appeal). In injunction proceedings, the judge does not decide the dispute but has the power, under certain conditions, to arrange a provisional situation. Injunction proceedings are increasingly common, especially in cases related to IP and innovation.
5. In some matters (often intellectual property), there may be special proceedings that seek to resolve the dispute definitively, but give rise to judgement as rapidly as injunction proceedings. This is one of the first things to check, because if this is the case, there is no time to lose!
6. The adversarial principle is the basic guideline; unilateral measures are the exception. Unilateral measures are those taken at the request of a party, without the judge hearing the other party. They are generally reserved for cases in which the judge recognises that the element of surprise is necessary. Sometimes, it is extreme urgency that justifies the assumption but it is relatively rare (it must be demonstrated that the urgency is such that it is necessary to derogate from the fundamental principle of adversarial proceedings in court).
7. There is a very important dispute concerning the question of whether the judge is territorially competent. Indeed, the EU is a fairly small area with plenty of intra-Community trade, and it happens very often that a dispute involves several countries. This is even more true when the internet comes into play. The first thing to do is to identify the country in which the proceedings will be introduced (in defence, one will check also the means of challenging the jurisdiction of the court, if necessary). The issue is regulated by European legislation, but that legislation is very complex.
8. Once a judgement is rendered in a civil or commercial matter, its execution within the European Union is greatly facilitated by the adoption of a number of texts that arrange virtually automatic recognition of decisions in the European Union.

## Important milestones of a trial

### THE INTRODUCTION OF THE CASE

Generally, the case will be introduced via a writ to which is attached a text in which the plaintiff presents their case file. This text, usually written by the plaintiff's lawyer must contain sufficient information to enable the defendant to understand why a lawsuit is being filed.





In France, it is common to attach the exhibits in the file directly to this document. In Belgium, the exhibits will be transmitted between lawyers, later on.

If the defendant is outside the EU, there are deadlines to allow them to take cognizance of the existence of a trial and organise themselves taking into account the distance. To counter this, it is not uncommon that the plaintiff attempts to obtain parallel emergency measures (see-above), which multiplies the number of simultaneously administered legal proceedings.

## **PLEADINGS AND PRE-TRIAL**

The purpose of the Pre-trial is to allow the parties to draw up their pleadings. This is a text in which they each explain why they believe themselves to be justified. The findings conclude with a summary of what the party is asking the court to grant them.

In principle, it is the defendant who initially produces a submission. The applicant responds. The defendant may further respond, and so on. Respect for the rights of the defence means that the defendant has in principle the last word.

Whenever pleadings are exchanged, they must be accompanied by the exhibits (contracts, letters, documents, etc.) referred to therein, unless these exhibits have been previously submitted.

In France, the pre-trial is frequently assigned to a judge who takes care of this matter only. This has the advantage of flexibility, because the deadlines can be changed as and when required by the investigation and, if a problem arises, the judge decides on it immediately. Once the case is ready, it is sent to a different judge who will decide the dispute.

In Belgium, the pre-trial is more automatic. Deadlines are set early in the process and it is extremely difficult to change them later. This has the advantage of predictability, but the rigidity of the system is sometimes excessive.

## **PUBLIC HEARING**

Once the case is ready, the lawyers will be heard at the hearing. They propound their arguments orally. In civil and commercial matters, arguments rarely extend over several hearings. The purpose of the hearing(s) is to summarise the case and not to pass to full review as it would be done in an international arbitration or a criminal matter.





## **JUDGEMENT**

After the hearing, the lawyers will receive the judgement, often by post or electronic transmission. This may take a few days to weeks, depending on the number of cases to be treated, their complexity and the potential urgency.

## **THE APPEAL**

Most of the time, an appeal can be made.

The appeal is a new proceeding. The procedure follows the same principles as those outlined above. Despite rumours, it has never been demonstrated that having won or lost in the first proceedings has any impact on the chances of success at appeal.

## **CASSATION (NATIONAL SUPREME COURT)**

The appeal in cassation is relatively rare.

The Cassation court is not concerned with the facts and does not say who is right or wrong. It will only verify that the procedure has been followed, and that the judge has applied the law correctly. It is therefore not a matter of re-hearing the case, contrary to what occurs on appeal.

## **The preliminary ruling question before the European Court**

In disputes involving technology, IP and/or innovation, the rules are very often derived from a European directive or regulation.

When a judge in a national court has doubts as to the exact scope of a European directive or regulation or questions the compatibility of national legislation with the European statute from which it is derived, the judge has opportunity to ask a question to the Court of Justice of the European Union.

There is only one Court of Justice for the whole of the European Union, located in the Grand Duchy of Luxembourg. It is the sole authority to interpret a directive or European regulation. In principle, all lawyers are admitted to plead before the CJEU; however, it is recommended to hire someone with some experience of this specific procedure.

In its considerations, the Court will not decide the dispute submitted to it. It will only inform the judge in the national court on the exact scope or meaning of the Directive or the European law in question, and tell the judge whether national law is compatible with the European statute.





It will then be for the judge in the national court which has asked the question to settle the dispute, in strict interpretation of what has been laid down by the European Court.

## Lawyers' fees

At the end of the proceedings, the judge has the opportunity of imposing all or part of the defence costs of the winning party on the unsuccessful party.

In France, the scope of the judge is relatively wide. Most of the time, the judge can take into account all the elements that are submitted to determine the amount that he/she considers appropriate. Of course, the fact that one of the parties is foreign can be taken into account because it creates an additional cost of defence, translation, etc.

In Belgium, the scope of the judge is limited. A base amount is provided for in law and the judge may only increase or decrease this to some extent to take into account the specificities of the case. The basic amount is determined according to what is at stake.

In both countries, it is rare that this system makes it possible to cover all lawyers' fees.

## Criminal proceedings

Criminal proceedings operate under different rules. Without going into the details of these specific proceedings, we can report the following main thrusts:

- In most cases, once a complaint is filed, the plaintiff loses control over it, so much so that it is often impossible to stop the complaint even if an agreement is reached with the other party (it is some sort of "fire and forget" missile).
- On the level of evidence, the complainant has not much to do. Once the criminal authorities are notified of a complaint, they will organise the investigation and take the necessary measures. This has a significant advantage in terms of costs. On the other hand, this shows once again the loss of control of the complainant in relation to their complaint.
- The investigation is conducted by authorities who are neutral in principle. They will instruct on uptake and completion. The prosecutor and the investigating judge do not judge, they investigate. Once the investigation is complete, they pass the case to another judge who will make a judgement after having heard the parties at a public hearing.





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- The investigation is secret in principle. Depending on the circumstances, this secrecy may even be opposed by the parties that are involved. Whether you are suspect or complainant, it is often difficult to know in which direction the investigation is moving. Moreover, regular leaks in the press are to be deplored. In sensitive cases, this means that one must be always ready to respond in terms of communication.
- When a case involves both a criminal investigation and civil or commercial proceedings, it is the criminal investigation which takes precedence. Civil or commercial proceedings will normally be suspended while the criminal investigation is ongoing.
- As a result of the workload of the investigators and also the frequency of cases that involve several countries, it is not uncommon for criminal proceedings to last for several years.

