Identification of the participant

Nationality: Belgian

Functions: Councillor at the Council of State, Advisory Division

Length of service: 5 years and seven months as Councillor, previously ten years as Auditor

Identification of the exchange

Hosting jurisdiction/institution: Council of State, Advisory Division

City: The Hague

Country: Netherlands


I- Programme of the exchange

The Council of State of the Netherlands initially already proposed numerous meetings for me with several councillors and staff members. My requests, both before and during my visit, to meet other persons both from the Council of State as from external institutions were met in a very expedient way.
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I had the pleasure to have very informative meetings with the Vice President of the Council of State, with each of the Section Presidents of the Advisory Division and with the President of the Administrative Jurisdiction Division. I also met several members of the internal constitutional review panel and the internal European law review panel, as well as several staff members of the Advisory Division and of the library. The interviewees were very clear and frank in their answers and did certainly not shun from questions on the practical internal workings of the Council of State.

A meeting with the staff of the Press unit of the Council of State was set up as well, permitting me to confront my experiences as a press magistrate in the Belgian Council of State with the very professional organisation and extensive experience of said Press unit.

I also met with representatives of the Ministry of Justice and of the Academy of Legislation to broaden my view on the role of the Council of State in relation to the quality of legislation.

My request to participate as much as possible to the actual proceedings of the Advisory Section of the Council of State was satisfied promptly and extensively. I was able to assist to each and every phase of these proceedings and was provided with all the necessary materials, for which I am very grateful. This provided me with a very comprehensive and detailed view of the practical organisation and workings of the Advisory Division and of the role of and the interaction between the councillors and the lawyers of the advisory department, as well as between the sections and the Advisory Division itself.

I was also able to attend two hearings before the Administrative Litigation Division, as well as the deliberation in chambers that followed those hearings.

II- The hosting institution

The Dutch Council of State is composed of an Advisory Division and an Administrative Jurisdiction Division. The Administrative Jurisdiction Division is the highest general administrative court, whereas the Advisory Division advises both government and parliament on draft legislation and draft by-laws. For the purposes of this report, this description will focus on the Advisory Division.

The Advisory Division issues its advisory opinions in a plenary session every Wednesday afternoon, but draft opinions undergo a preliminary discussion in one of the four sections. Each section has (approximately) eight members, whereas every member of the Advisory Division serves in two sections. Every section is tied to several departments and is therefore specialised in certain fields. Once a request for an advisory opinion has been registered, it is transmitted to the competent section. One (or sometimes more) of the section members are designated to prepare a draft advisory opinion. The sections are assisted by a dedicated and very competent staff of experienced lawyers (the advisory department), who perform the research and write a first version of the draft opinion, under supervision of the designated section member(s).

The draft opinion is distributed among the section members, who can submit their amendments and comments, preferably in written form. The sections convene every Wednesday morning to discuss the pending requests for advisory opinions. For every draft opinion, the designated member summarizes the draft, as well as the comments and amendments of the section members, and proposes adaptations in order to reach an agreement on the draft opinion within the section. It is
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also possible that the draft opinion is deferred to a next meeting of the section, e.g. to do additional research or to rewrite a substantial part of the draft. When the section agrees on a draft opinion, it is distributed among the other members of the Advisory Division. These members can then submit their comments and amendments.

The Advisory Division (i.e. the plenary meeting, comprising the members of all the sections) meets every Wednesday afternoon and discusses the draft opinions that were adopted in the respective sections. Again, the designated member of the section summarizes the draft, as well as the comments and amendments of the other members and proposes adaptations in order to reach a general agreement. When there are substantial amendment or remarks, the draft opinion can be sent back to the section, but in the large majority of cases, the draft opinion is adopted with mostly rather formal changes.

The advisory opinions are issued after a final revision. Advisory opinions on proposed legislation are made public as soon as the draft bill has been introduced in Parliament. Advisory opinions on proposed by-laws are made public as soon as the by-law has been enacted and published in the official gazette. A summary of the advisory opinion is published as well, if the interest of the public at large in the matter at stake warrants it.

The government has to file a follow-up report in which is detailed how the advisory opinion has been followed. When the government decides not to heed the advice, it must indicate the reasons for doing so. If the Advisory Division finds these reasons to be inadequate, it will respond in writing to the minister in question. The advisory opinion and the follow-up report is included in the draft bill that is introduced in Parliament, so that MP’s can read the arguments of both the Advisory Division and the government and form their own opinion.

The advisory opinions are drawn up using a specific assessment framework, which not only comprises a legal appreciation and a formal/technical appreciation, but also a policy analysis. The latter includes questions as whether the issue at stake can be resolved using a legislative measure at all and whether the proposed legislative measure is adequate, efficient and proportional to the costs incurred.

III- The law of the host country

With regard to the activities you took part in during the exchange, please develop one aspect of the host country’s national law that you were particularly interested in.

Before the exchange, I made myself familiar with Dutch constitutional law. One of the interesting aspects of Dutch constitutional law is the absence of judicial constitutional review (pending a parliamentary initiative on the implementation of this type of review, although no one seems to believe it will pass). The Advisory Division can, however, point out unconstitutionalities in its advisory opinions, but these opinions are not binding for the government nor for the Parliament. There is no danger of seeing the legislation ultimately declared void by a constitutional court. Although this might at first sight seem like a drawback from the perspective of a comprehensive system of judicial review, the existence of judicial review concerning the compatibility of legislation with international treaties and with EU law compensates to a large extent for the lack of judicial constitutional review.
It was also interesting to notice that within the Dutch Council of State, there exists an internal constitutional review panel on the appreciation of the conformity with constitutional law and with international treaties on human rights. This advisory commission deals with questions that arise both in the Advisory Division as in the Administrative Jurisdiction Division.

IV- The comparative law aspect in your exchange

What main similarities and differences could you observe between your own country and your host country in terms of organisation and judicial practice, substantial law...? Please develop.

There are a lot of similarities, as well as a lot of differences between the Advisory Division of the Dutch Council of State and the Legislative Division of the Belgian Council of State. They can be summarized briefly as follows:

- The Belgian Legislative Division has a far larger workload in comparison with the Dutch Advisory Division (last year: more than 2,000 advisory opinions by the former vs. some 600 by the latter), which to a great extent explains the greater depth of the advisory opinions of the Dutch Advisory Division.
- The Belgian Legislative Division does not address the policy issues in its advisory opinion, contrary to the Dutch Advisory Division. This self-restraint of the Belgian Legislative Division can be explained by the recruitment of its members, which are exclusively lawyers and have practically no political experience, as opposed to the Dutch Advisory Division, that comprises several former ministers and chamber speakers. Their personal experience with policy issues certainly fosters the willingness to address these issues in advisory opinions.
- The Belgian Legislative Division has a more decentralised organisation, because its four chambers each give their advisory opinions separately. The larger workload makes this unavoidable, but the drawback is a lesser unified case law than in the Dutch Advisory Division.
- In the Belgian Legislative Division, the draft advisory opinions are not prepared by lawyers working together with a designated member of the Legislative Division. A separate and independent body within the Belgian Council of State, the Auditor’s Office, gives a report on every request for an advisory opinion. This report is presented by an auditor to the chamber. After a discussion within the chamber, one of the members of the chamber draws up the advisory opinion, based on the report and the exchange of views in the chamber.

V- The European aspect of your exchange

Have you had the opportunity to observe the implementation or references to the instruments of law of the EU, or/and of the European Convention on Human Rights, etc.? Name some of the main issues encountered within these contexts, and explain them

Questions concerning EU law and the ECHR frequently appear in the advisory opinions of the Dutch Advisory Division, in my experience more or less to the same extent as in the advisory opinions of the Belgian Legislative Division. In the advisory opinions I examined, these questions ranged from the
With a financial support of the European Union compatibility with primary EU law (e.g. free movements of goods/services and state aid) to the implementation of EU regulations and directives, as well as the compatibility with the ECHR. Much like the internal constitutional review panel I mentioned before, there exists an internal European law review panel that deals with EU law issues. This semi-formal internal centralisation of EU law expertise is very interesting and constitutes an example for other Councils of State. Also, at least one member of the Dutch Council of State is specifically recruited for its experience and expertise in EU law questions.

VI- Good Practice within the host jurisdiction.

What are some of the characteristics of administrative law or administrative litigation within the host country which should be exported to other countries (i.e. restrictive deadlines on proceedings, obligatory prior access to administrative aid, correction of contraventions to the law during the proceedings, etc.).

Not applicable. My exchange program was not specifically targeted to the Administrative Jurisdiction Division, so I was unable to identify one of these characteristics that are essentially tied to a litigation function, rather than to an advisory function.

VII- The benefits of the exchange

What have you gained from your work exchange? Could these gains be useful within your professional practice? How will you ensure that your colleagues benefit from the knowledge that you gain during your work exchange?

The observation on a very detailed and practical level of the proceedings of the Dutch Advisory Division yielded a lot of insights that may prove useful for the Belgian Legislation Division. Even when taking into account the fundamental differences between both institutions, there are several lessons we can learn from our Dutch colleagues. I drew up a detailed internal report for my Belgian colleagues that concludes with the identification of several issues in our practical organisation that can be improved, profiting from the experience in the Dutch Advisory Division. The systematic follow-up of the advisory opinions, for example, is something that is completely unexplored in Belgium, but that looks very interesting. Also, the importance that is attached to "operational conclusions", as well as the presentation of purely technical remarks in an annex to the advisory opinion, are very interesting ideas to explore.

Also, being a press magistrate in the Belgian Council of State, the meeting with the staff of the Press unit of the Council of State gave me valuable insights in the organisation and evolution of our own press communication policy and organisation.

VIII- Suggestions

In your opinion, what aspects of the Exchange Programme could be improved? How?

I have absolutely no improvements to suggest concerning my stay in the Netherlands, as the organisation of my exchange program by the host institution was really excellent.
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On the other hand, I would like to suggest that hosting institutions should also be able to gain some insight from the exchange program from the person they accommodate. Candidates for the exchange program should be encouraged to offer their hosting institute a presentation on a topic that is of interest to the hosting institution. In my view, candidates should not need to suggest topics in their application for the programme. The selection of an interesting topic could in fact be made after the first contacts with the hosting institute have been established.

I gave a presentation on the recent State Reform in Belgium, which proved interesting for the hosting institution, if only for the reason that the Netherlands and Belgium are neighbouring countries. Also, because the existing dual membership of the Advisory Division and the Administrative Jurisdiction Division (even when restricted to maximum 10 members of the Council of State) is a very controversial topic in the Netherlands, I was able to share the experience in the Belgian Council of State, where a more strict separation of the membership of both divisions is observed. I have the impression that this presentation was well appreciated by my Dutch colleagues and I was happy to be able to feel to give something back in exchange for the experiences I was able to glean from my stay with the Dutch Council of State.