REPORT

Identification of the participant

Nationality: Dutch

Functions: State Councillor at the Dutch Council of State and part-time professor of the law of European Integration at Radboud University in Nijmegen.

Length of service: 2 years (State Councillor) and 8.5 years (professor)

Identification of the exchange

Hosting jurisdiction/institution: Court of Justice of the European Union (CJEU)

City: Luxemburg

Country: Luxemburg

Dates of the exchange: 7 – 18 December 2015

SUMMARY

I. Summery and conclusions

The CJEU is the highest court of the EU judiciary system. One of its main tasks is to answer preliminary questions posed by domestic courts of the Member States of the EU. Preliminary rulings play a key role in EU law. The success of this procedure is highly dependent on the co-operation between the CJEU and the domestic courts. The aim of my visit was to learn more about the process of handling preliminary questions at the CJEU.

To start with, it should be pointed out that drafting a preliminary reference requires special skills and gives raise to great challenges. The facts should be established as clearly as possible: a balance has to be struck between clarity and details. Of utmost importance is that the referring court explains with great care how the relevant provisions of national law must be interpreted. A national judge should not take for granted that the CJEU, Member States and other stakeholders are experts of a particular area of national law. Whether the CJEU is able to give useful answers depends for a great part on the discussion of the relevant provisions of national law in the reference.
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Judge Exchange Appendix 3

If possible, complicated sentences should be avoided in a reference. Furthermore, the number of questions should be as limited as possible. On top of that, in the reference it should be made clear why EU law is relevant for solving the case at hand.

The task of the CJEU to address preliminary questions is complex and challenging given the importance of the matters and issues referred: the rulings may have their bearing on the social welfare state, national tax systems, national criminal law, etc. This task must also be very rewarding to the CJEU. The proper drafting of the preliminary questions by domestic courts will be of great help for the CJEU in fulfilling its task.

To conclude, I would like to point out that I was impressed by the hospitality of the CJEU. Everybody was very friendly and open, which highly contributed to the fruitful discussions I had. My special thanks go to Judge Prechal: it was a great privilege to be part of her cabinet during the two weeks of my visit. The programme she drafted was excellent and well balanced: this made it possible for me to enhance my understanding of the preliminary reference procedure. I consider being part of the cabinet of a judge of an institution hosting a visiting judge as a good practice for the ACA programme of the exchange of judges.

II. Programme of the exchange

I visited various divisions of the CJEU, including the library, the Research and Documentation Directorate, the Dutch translation unit, the registry of the Court and the communication directorate. I furthermore attended hearings in different cases, had a guided tour of the buildings and met with various staff members and judges of the Court, the General Court and the Civil Service Tribunal. A detailed program is enclosed, cleared of the names of the persons I met with.

I had these meetings with the goal of further understanding the process of preliminary references at the CJEU. Insight in both the substantive and administrative processes involved benefits my work as a referring judge. Below is a summary of my meetings I had with the various divisions of the CJEU and elaborates on what I have learned from these visits.

Library Directorate
The guided tour on my first day was particularly useful to find my way around the buildings of the Court. The meeting I had with the Head of Unit of the Library Directorate was very interesting as it was pointed out that the ambition of the Courts library is to purchase every book (written in the official language of one of the Member States) that deals with EU law. Furthermore, the most important law journals of each Member States are part of the collection of the library. These books and journals are used by Recherché and Documentation Directorate, by the various cabinets of the judges and by linguistic services (interpreters). Books and journals written in languages such as Dutch reveal how the interplay between EU law and national law evolves. These publications contribute considerably to the proper and efficient handling of preliminary questions by the CJEU.

Research and Documentation Directorate
My meeting with the Research and Documentation Directorate focused on the role of national law in the preliminary references. The importance of properly outlining the legal framework of national law
With a financial support of the European Union Judge Exchange Appendix 3 was stressed. The explanation of the relevant rules should be clear, transparent and to the point. Furthermore, terms that are special about a particular area of national law have to be explained with great care. If possible, preliminary references should not exceed 20 pages; however, if a proper and transparent discussion of the national legal framework requires more pages, priority should be given to this discussion. Furthermore, it was explained that an independent (stand-alone) reading of the preliminary questions is necessary, as only the questions (and not the reference containing them) will be published in, for example, the Official Journal of the EU.

**Translation Unit**

My meeting with the head of the Dutch Translation Unit gave me a good insight on how the linguistic unit deals with translations of preliminary question references. I was shown two examples of files resulting from references made by the Dutch Council of State. Lines of the judgment that were not necessary for solving the EU law issues raised, were crossed out. The process of removing such lines is carried out with great care, as misunderstandings regarding the national legal framework must be prevented. The document that results from this process is sent to the cabinet of the judge rapporteur. A summary of the case is sent to the parties and to the intervening parties. He further explained that the rule that a reference exceeding 20 pages will be summarised is not written in stone. As regards the formulation of the questions, double negative questions must be avoided, since such questions cause translation problems. Furthermore, the reference should only discuss those provisions of national law that are relevant for the matter of EU law to be solved. It does not matter whether those provisions are cited or paraphrased, as long as the non-relevant parts of it are left out. The working language is French, which is a very subtle and rich language. The Dutch language is very concrete, to the point and from time to time even down to earth. Translating from French to Dutch could give rise to some challenges. Comparing the Dutch version with the French and English versions may increase the proper understanding of the judgment concerned. The effectiveness of the translations is subject to a permanent system of monitoring and control. For example, a new IT programme facilitating the interpreters is implemented (trados).

**Registry of the CJEU**

I had an instructive meeting the head of the Registry of the CJEU. He explained in great detail the course of a preliminary proceeding from the start (when the reference is registered at the CJEU) until the end (when the answers are sent back to the domestic court). Amongst others, the possibilities of the referring court to express its views during the proceeding before the CJEU were discussed. A letter could be sent to the CJEU. To what extent it will play a role depends on the judge rapporteur. A letter written in Dutch will only be read by the judges of the formation (handling the case), if it is translated. It goes without saying that this takes time, whereas the CJEU could decide not to translate it as well. The national court could also send an addendum to its reference. Furthermore, it could decide to pose new questions, but this will delay the procedure considerably and this possibility must be considered only in highly exceptional circumstances. An interesting avenue to explore is to opt for an Article 99 order of the CJEU. If the domestic court feels it knows how to solve a case but it is not entirely sure, it could suggests the CJEU to confirm its view by making use of the competence of Article 99 Rules of Procedure. An important matter to pay attention is the issue of anonymity. It is up to the domestic courts to point out which parts of a reference are anonymous, as the registry of the CJEU is not capable of implementing an anonymity policy systematically to all its rulings. As the CJEU is not familiar with the national rules and customs, it cannot take decisions in this regard.
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Communication Directorate
My visit included a meeting with an administrator at the Communication Directorate of the CJEU. He outlined the press policy of the CJEU. Co-operation between the domestic courts and the CJEU with regard to communication matters could be fruitful. We also discussed the possibilities of the national referring court to inform the CJEU about the outcome of a case, after it has received the answers and handled the case on the basis of these answers.

Court hearings
I attended court hearings in different cases.

- C-25/15

The first one was case C-25/15, Balogh. This case concerned a preliminary reference with regard to the translation of judgments in criminal law proceedings. The hearing made me clear that it is very important that the referring judge establishes the facts of the case concerned with great care. Furthermore, the legal framework should be made clear, and, more in particular, the special features of this legal framework should be explained, in so far as they are relevant to the case.

- C-122/15

The hearing in case C-122/15 was also attended by me. This case concerns taxation on supplementary pension benefits. At issue is the question whether the Directive on equal treatment applies to such levies. If so, the CJEU is called upon to decide whether old people are discriminated against, as employees do not pay a levy similar to the ones imposed on supplementary pension benefits. At the hearing it appeared to me that the facts of the case were clear, as the questions posed by the member of the CJEU concerned legal issues such as the scope of the Directive and the main characteristics of the Finish pension schemes. Although complicated matters related to pension schemes, national taxation schemes and the EU rules on equal treatment were at play, the discussion was structured and to the point during the hearing. In my view, the comprehensive drafting of the questions by the referring court contributed to this.

- C-43/15

I also attended a hearing in an appeal case (case C-43/15 BSH). This case concerned a dispute about a trademark. Although this case did not concern preliminary questions, at issue were important principles of administrative law, such as the principle of reformation in peius, the question of putting forward new arguments at a late stage of the proceedings and the scope of an in incidental recourse.

- C-63/15 and C-155/15

I attended a very interesting and important hearing in a case resulting from the Dublin III Regulation. One of the references was made by a Dutch court and is, as a result, of special interest for Dutch administrative law, more in particular Dutch migration law. In this case the CJEU is called upon to address the question to what extent the interstate decisions concerning the allocation of the applications of asylum seekers must be subject to judicial review by the national courts.

- C-479/14
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I attended the hearing in the case Hünnebeck, in which a German court asked questions about the compatibility of a German tax law with the Treaty provisions on the free movement of capital. This is an interesting case, as it concerns the limits of the competence of a Member State to enact tax laws. Although the matter was complicated, the debate at the hearing was well structured and clarified the interpretation of the German tax rules at stake.

Meetings with judges of the Court

I had meeting with a number of judges of the Court, the General Court and the Civil Service Tribunal and an Advocate General. These meetings were very much appreciated by me as I could discuss the internal procedure of preliminary references in great detail.

- Judges of the Court

As for the drafting of preliminary questions, the national judge must explain in transparent wording how the relevant provisions of national law have to be interpreted. The added value of a preliminary proceeding depends partly on the explanation given by a domestic court of these rules. Such an explanation will not only help the CJEU fulfil its task but will also facilitate the intervening parties (such as the governments of the Member States) when giving their views on the issues at play.

The number of questions to be asked by a referring judge should be, if possible, limited. Reformulating may be an avenue for the CJEU, if a reference contains many questions. A result of this action may be that some questions will be taken together. Various techniques of reformulating questions can be distinguished: in some cases, the questions are slightly adapted, whereas in other cases the changes made are of a more substantial nature. Furthermore, the questions should be to the point and not be too complicated. It is very important that the doubts and difficulties of the national court are outlined in the paragraphs preceding a particular preliminary question. The national court could indicate which answers should be given in its view in order to explain which consequences a particular outcome of a judgment of the CJEU may have for the national legal order. As long as the domestic court makes clear that at the current stage of EU law several lines of reasoning are possible, such an approach is very helpful.

I also had an explanation of the internal work process of the Dutch cabinet of the CJEU. It is of great help that référendaires or other lawyers with expertise in Dutch law work at the Dutch cabinet. For example, internships of official servants of Dutch departments or the judiciary contribute considerably to the good understanding of Dutch law, which is helpful for preliminary proceedings dealing with Dutch law.

On Thursday, December 10th, I had dinner with the Dutch judge of the Court and a few of her colleagues at her residence. This hospitality was much appreciated by me.

In a meeting with another judge to the Court, we discussed problems that could affect the proper functioning of the preliminary reference procedure. The training of the national judges in EU law is of great importance. It is important for national courts to have a good understanding of EU law. This knowledge is required in order to pose well-structured preliminary questions, which are to the point and identify the relevant issues of EU law. It should be prevented at all costs to ask hypothetical questions. We discussed the case law of the CJEU on the EU Charter of fundamental rights. Cases
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such as Ackerberg and Meloni were debated and their significance for the establishing the scope of this charter was pointed out.

- **Judge of the General Court**

Following the hearing in case C-122/15 C, I met with a judge at the General Court. We discussed at great length the debate at the hearings of a judicial body and exchanged experiences. We agreed that the questions posed by the judge rapporteur are of great importance to enhance the understanding of the case of a court. Also the cooperation of a judge with its staff was discussed. We further focused on special issues of administrative law and competition law. As for competition law, we explored the objectives and principles underpinning this system of law. The competition rules are applied in parallel by the Commission and the national competition authorities. As a result, both EU and national courts are called upon to decide on disputes of competition law.

- **Judge of the Civil Service Tribunal**

My meeting with a judge at the Civil Service Tribunal was focused on the technique for drafting preliminary questions and how the CJEU deals with them, since this judge had experience with the preliminary reference procedure. Rephrasing the questions asked by the domestic courts is a technique frequently used by the CJEU. In this regard, the number of questions referred does matter. If many questions are raised, the fair chance exists that the CJEU will take them together. In other words, if a domestic court feels that one or more particular questions matter the most in order to solve a case, it could better leave out the other questions, which are of less importance. Long questions should be avoided and, if possible, the questions should fit on one or two pages. It is important that questions are as simple as possible and are to the point. Matters that are only of relevance for issues of national law should not be included in the reference. How civil servant cases relate to important principles and doctrines of EU law was furthermore outlined. We also compared notes with regard to solving cases and questions of law in the deliberations of a judicial body.

- **Advocates-General to the CJEU**

In one of the meetings with an Advocate-General, the issue concerning the number of preliminary questions was raised. It was stressed by this Advocate-General that the number of questions was not the most important issue for him. Of more importance is the line of reasoning in the reference leading to the questions posed. Here, it should be made clear why the questions are relevant for solving the dispute concerned. It should be crystal clear how the relevant provisions of national law have to be interpreted. It should be reminded that the CJEU is not an expert at all kinds of national law systems and is depending on what the domestic courts put forward in this respect. If necessary, the national framework should be described in a detailed way, even if this means that the ‘threshold’ of 20 pages is exceeded. Sometimes the CJEU asks questions for clarification to the domestic court, but the réunion général (of the members of the CJEU) has to agree with this; often no approval is given, because the procedure to be followed is too time-consuming. As for the internal situation we discussed the case law of the CJEU. We focussed on the various options for establishing an effect on the trade between the Member States.

The meeting I had with another Advocate General focussed on some important issues of EU law. For example, we paid attention to the internal situation and the Services Directive.
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- Judges at the CJEU and former State Councillors

I had meetings with two judges at the CJEU who previously worked at the Council of State of their country. We exchange experiences concerning the work as a judge at the Council of State. During my meeting with one of them, for example, we focussed on the daily work of a judge, the composition of chambers and the role of a judge rapporteur and the president of the chamber. It appeared that in his country the judge rapporteur has an important task, also in rulings leading to preliminary questions. He drafts the questions and discusses them with the president of the chamber concerned. The practice of the Council of State of the country concerned is to limit the number of questions and to concentrate on the main issues at play.

I also compared notes as regards the work as a State Councillor, during my meeting with the other judge/former State Councillor. We explored how to draft preliminary questions. On the one hand the reference should be compact and to the point and on the other hand the national legal framework must be explained in a clear and transparent way. If possible, the reference should not be too long and exceed the limit of 20 pages. As for the number of questions, it is up to the national court to decide on this. However, a large number of questions could make the CJEU to rephrase considerably. If questions are broken down in sub-questions, it could be difficult for the CJEU to find out which problems the domestic court is confronted with. In the view of this particular judge, Dutch courts usually work out with great care their questions and elaborate on various issues. This is a good technique, but is should be avoided that some issues will be complicated, especially by asking a great number of detailed questions. The number of questions could be reduced by the domestic courts by starting to solve some issues of EU law on the basis of the case law of the CJEU. Subsequently, they pose only questions with regard to the issues that are significant and cannot be solved on the basis of the case law of the CJEU.

Other meetings

My visit also included attending a solemn session under the auspice of the CJEU, in which a recently appointed member of the Court of auditors took her oath. Subsequently, I had a meeting with a member of the Court of auditors. He explained to me how the Court of auditors works and what the differences and similarities with the task of a judicial body are. Furthermore, we explored the EU context of the case law of the CJEU, the work of auditors as well as the recent measures taken in relation to economic governance (in the banking sectors). Furthermore, he shared his experiences as a judge with me. Moreover, we discussed various views on the task of the judiciary.

I also had a meeting with a référendaire to one of the Cabinets of the Court. We explored the possibilities of improving the handling of preliminary questions. It is important to include the facts into the reference. A balance should be struck in this respect: a poor description of the facts would render it impossible for the CJEU to provide useful answers, whereas a detailed account of the facts would make it very difficult to identify the issues to be solved. Outlining the facts in a reference is required, but the facts must be left out in the questions posed. He stressed that the domestic court is the master of the case and, if it feels necessary to clarify particular issues, as regards for example the interpretation of national law, it should do so.

My last meeting was with one of the Legal Advisers at the CJEU. He also used to be a référendaire at one of the the cabinets. He explained what the task of the Legal Adviser is. This official deals with the
legal aspects of administrative matters and sometimes represents the CJEU in some proceedings and sessions. He also shared his experience as a référendaire with me. He pointed out the importance of the comprehensive and transparent drafting of preliminary questions. He explained some important matters to me, by, amongst others, referring to a judgement, which was recently handed down by the CJEU (case C-342/14).