Identification of the participant

Nationality: Dutch
Functions: Councillor of State
Length of service: 6 years

Identification of the exchange

Hosting jurisdiction/institution: CJEU
City: Luxembourg
Country: Luxembourg
Dates of the exchange: 9/10/2017 – 20/10/2017

SUMMARY

First of all I would like to express my gratitude to all staff members of the Court who gave an enormous effort to make our visit a success. The members of the Protocol and Visits Directorate were extremely attentive and did their utmost best to set up the program and adapt it in the course of the exchange so as to meet as much as possible our individual wishes and desires. Furthermore, all judges, référendairs and other staff members, all having to cope with a very high workload, still managed to spare some of their precious time for us deserve big thanks! The visit was very well organized!

I was in a group of three judges, the other two being Belgian and Polish. Unfortunately I had to be in Brussels on the second and third day where I had to attend a meeting that had been planned already when I submitted for this exchange. I consequently missed the last part of the first day and the entire second and third day.

During the first two days we were joined with a large group of judges visiting the Court in a programme of EJTN. During the first two days there were general presentations on the Court of Justice and the general Court, the proceedings at the Court, the role of the Advocate General and the preliminary ruling procedure, a presentation on recent case law of the Court and the role of the Lawyer Linguist.

Activity co-funded by the Justice programme of the European Union
The group attended a hearing of the Court of Justice in case C-119/16, concerning a request for a preliminary ruling by a Danish court on Directive 2003/49.

From the third day onwards the program was specially devised for our group and included meetings with the President and judges of the Court of Justice and the General Court, an Advocate General and several référendairs. Besides there were several presentations on subjects we or one of us was particularly interested in. We attended hearings in four cases, two of the Court of Justice and two of the general Court.

ANNEX
GUIDELINES FOR DRAFTING THE REPORT

I- Programme of the exchange

Meetings

During the visit I met with two judges and an advocate-general of the Court of Justice and four judges of the General Court.

With all of them we had very open conversations in which they were prepared to share very interesting information about the way both Courts work. The judges of both Courts have their cabinets in which three référendairs and a junior référendair are working. The judges have a strong influence on the selection of their référendairs, whom they usually choose from different member states so as to include knowledge of several national legislations and judicial systems.

Both the Court of Justice and the General Court have as a policy that the judges and the référendairs are not specialized in any field of law. The only “exception” to this is the so called connexity principle, based on which cases are usually attributed to a judge rapporteur who recently had a similar case. Specialization would make the workload, which in both courts is extremely high, less heavy, which would be an advantage, but would include the risk of a too narrow approach and of inconsistency in the jurisprudence between the different fields of law. Moreover, it would not be desirable to have a connection between a specific field of law and the nationality of one of the judges.

In the General Court the number of judges is now 45 and will be increased to 56 in 2019, when there will be two judges per member state.

The Court now has 9 chambers. As a consequence it has become more difficult to have conformity in the jurisprudence within the Court and to avoid divergence between the chambers. Legal unity increases predictability and so decreases the number of appeals to the Court as well as appeals against the Court’s judgments to the Court of Justice. There is no formal mechanism to stimulate legal unity. Within the Court ways are searched to increase legal unity by informal methods, such as a mechanism by which all the judgments are read by one person who draws attention of the chambers
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to contradicting judgments. We were told the Court is interested in how this is done in national judiciaries.

With the judges and the Advocat General of the Court of Justice we discussed mainly the preliminary rulings procedures. They made us all even more aware than we were already of the importance to follow the Court’s Recommendations to national courts and tribunals to the initiation of preliminary rulings proceedings and pointed especially at the maximum number of pages of a national judgment that can be translated. Later on the head of the Dutch translating unit gave us numbers of pages of original judgments from our country and the numbers that were left for translation. Since it is the Lawyer – linguist who makes the selection, it is out of the hands of the national referring judge and there is always a – be it very small – risk that in this selecting process parts of the judgment that can not be missed are left out for the translation and so will not come to the attention to the Court. Keeping in mind that in many cases the judge of the Court of Justice of the nationality of the referring judge is not a member of the chamber dealing with the case, it may be that the full text of the referring judgment is not read by the Court of Justice. The only way for the referring judge to avoid this risk is to keep the judgment within 10-20 pages and to make clear which parts of the judgment does not need translating, e.g. a decision on one of the litigated points in the national cases which is not relevant for the question to the Court of Justice.

The judges also emphasized the importance of the recommendation to the national judge to propose an answer. National judges may have hesitations, either because they do not want to put undue pressure on the Court, or for fear of being accused of being biased if the Court comes to a different conclusion which forces the national judge to distance himself from his original view. The Court however highly appreciates those proposals because they make more clear what the crucial point of the case is.

Asking for more do’s and don’t’s we were told that the Court prefers referrals with as few subquestions as possible.

The advocate general we met stressed the utmost importance of independence in this function. Whereas judges have to be consistent with former judgments of the Court, the advocate general is absolutely free to differ. The great value of the opinion of the advocate general is that it may force the judge to reflect critically on his own or his colleagues former judgments. It is therefore of great importance for the development of jurisprudence. It is the general assembly of judges that decides on the attribution of cases to chambers and whether the advocate general is requested to give an opinion. The advocate general however is free to give an opinion even if not requested. The advocate general we met found it appropriate, in order to safeguard his independence, not to discuss a case with any person outside his cabinet.

Other visits and meetings

We met a press officer of the Communication Directorate, responsible for the CURIA website.
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He gave an explanation on how to find things on the CURIA website and the practice and policy for publication. Special attention is given to press releases, which are usually issued on request of the Chamber dealing with the case. The text of a press release has to be approved by the president of the Chamber before it is published.
Not all judgments are published on CURIA, which means that they are there in all 24 languages; some may be decided by the Chamber to be “non-published”, which means that they are made available only in the language of the procedure and French, the working language of the Court.

We visited the library which possesses an amazing collection and gives digital accessibility to a great number of other works.

The Dutch Language department gave us a more detailed explanation of the process of translation. One of the big challenges of the courts is to keep the costs of and the time consumed by translating all text into 23 other languages within acceptable limits.

The national judgment is first of all submitted to the so called “omissis” process, in which the lawyer linguist deletes parts of the text that do not need to be translated. Then the general rule is, that not more than 20 pages can be translated; if a judgment contains more than 20 pages the lawyer linguist makes a summary. We were shown a list of Dutch judgments with the numbers of pages before and after the omissis procedure. The difference was bigger than I had expected.

As a result of the fact that French is the Court’s working language, the majority of the lawyer linguists in the Dutch department are of Belgian origin because not so many Dutch lawyers master the French language.

We were once more provided with interesting documents and a number of do’s and don’ts.

Hearings

General Court case T-554/15

The Commission had decided that a Hungarian Food Chain Act was incompatible with Article 107 TFEU in so far as it provided a progressive fee structure, applicable to operators of stores selling fast-moving consumer goods and, applying article 11(1) of Regulation 659/1999, ordered the immediate suspension of the measure.

The Hungarian government did not challenge the Commission decision itself but it did appeal against the provisional injunction.

The central issue was whether there was an interest in deciding about the legality of the provisional injunction, taking into account that it had no effect after the main decision had become final. The Hungarian government did not dispute that the provisional injunction had no effect anymore, but underlined that they felt discriminated against because no provisional injunctions were issued against other countries and the Commission had not given any reason for the provisional injunction.

The Commission replied to this argument that they were not obliged to give reasons because art. 11 of Regulation 659/1999 did not require them to and denied having acted in a discriminatory way.

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Although the first and final question for the court seemed to be whether there was still an interest to a decision on the appeal, the questions the Court posed during the hearing revealed that they were nevertheless very much interested in why the Commission had not given any reasons in the provisional injunction and whether there was a general policy on which the decision was based. Underneath the exchange of legal arguments, a lack of trust between the representatives of the Commision and those of the Hungarian government was clearly visible.

Case C-441/17 Court of Justice, Grand Chamber

The subject of the case was an order given on 27 July 2017 by the vice-president of the Court of Justice, on request of the Commission against Poland, based on article 279 TFEU. By the order, the Polish government was ordered to stop maintenance works in the Białowieża Forest (a Natura 2000 area on Poland’s eastern border), including cutting trees and removing dead trees. The vice-president had applied article 160 (7) of the Rules of Procedure of the Court - which provides that an order may be given without hearing the opposite party - because of the risk of irreversible damage to species living in the Natura 2000 area.

As a follow up, the Commission had requested to impose a penalty payment to trespassing of the order. The vice president had heard the case in september 2017 and decided to refer it to the Grand Chamber. The hearing of the Grand Chamber had been scheduled at a week’s notice.

The Polish ministry of Agricultural Affairs alleged that it was necessary to cut trees for preservation and safety reasons because the trees were threatened by the Spruce Bark Beetle. The Commission replied that the Spruce Bark Beetle was not really threatening the forest because the natural balance was strong enough to cope with this insect. On the other hand, the cutting of trees in the forest contained a threat to a number of protected insects and birds and was therefore incompatible with the Habitat en Birds directives.

The most interesting question discussed was whether a penalty payment can be imposed by way of a provisional measure: can it be based on article 297 TFEU, which gives the Court of Justice a general competence to decide a provisional measure, or does it need a specific legal basis which does not exist in EU legislation?

Furthermore the judges asked the Commission to clarify what in their view should happen if the provisional measure would be trespassed: would it be for the Commission to execute the fine or would this have to be referred to the Court?

The Polish government supported their pleadings by slides showing, a.o., pictures of the protected beetles and the Białowieża woods.

The Polish representatives complained that the Commission did not have sufficient knowledge of the local customs, because the Commission’s decision allowed for trees to be cut for safety of the public only along roads and paths, while in Polish tradition masses of people go into the woods to pick berries and mushrooms and they never stick to the paths! Their presentation clearly revealed a sentiment of not being taken seriously by the European institutions.

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Before closing the hearing the president announced that the A-G would be heard orally, in camera, and that the judgment would follow soon.

**Court of Justice case C-518/16**
The case was about request for preliminary ruling by a Bulgarian court of first instance. The Bulgarian fiscal authority had refused to apply to a company the national regulation according to which a tax reduction of 10% might be granted for export activities, because this would be forbidden state aid. The company had appealed, and the administrative procedure had ended by a judgment of the Bulgarian Supreme Court, dismissing the claim of the company, which was now final. The company had then brought a claim for damages against the fiscal authority, the Bulgarian supreme court and the Bulgarian government before the civil court. This court had asked for a preliminary ruling on the question whether the 10% tax reduction would be compatible with Article 1(1)(d) of regulation 1998/2006 “de minimis”. Although the referring court had not explicitly asked this, the Court of Justice was apparently first of all interested in the question whether the de minimis regulation is compatible with article 107 TFEU, the ban on state aid, and, if so, would it be compatible with article 35 TFEU, which forbids limitations on export, not to grant de minimis aid. From the point of view of comparative law it was interesting that the company had submitted a claim for damages against the Bulgarian parliament, the Bulgarian Supreme Administrative Court and the Bulgarian fiscal authority. The representative of the Supreme Administrative Court clarified that, if the claim would be allowed, it would be upon the Court’s budget.

**General Court case T-639/15 e.a.**
The case was initiated by 29 requests made by journalists to access to documentation concerning financial claims by Members of European Parliament. The journalists had asked for documents relating to travel expenses and subsistence allowances. The request was denied on the basis of article 4(1)(b) of Regulation 1049/2001 on access to European Parliament, Council and Commission documents and article 8(b) of Regulation 45/2001 on protection of personal data. The most interesting questions addressed during the hearing were:
- Do the requested documents contain personal data within the meaning of article 4(1)(b) of Regulation 1049/2001?
- Is the fact that MEP’s are more exposed relevant for their right to protection of personal data?
- Can the request be denied because supplying the documents, including partial anonymization, would put an excessive burden on European Parliament?
- Could the European Parliament refuse to confer with the applicants, as provided in article 6(3) Regulation 1049/2001, to find a solution for the great number of documents requested, because the deadlines for supplying the documents would be too short anyway?
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referred to the Strack judgment (C-127/13), in which it had been decided that deadlines could not be lengthened, so that conferring could not lead to a solution anyway.

- Last but not least: is Article 8(b) of regulation 45/2001 compatible with the European Charter?

Interestingly, just before the hearing a copy of the report for the hearing of the judge rapporteur was made available for all attendants of the hearing.

From the point of view of comparative law it is noteworthy that the Court had not – confidentially – seen the requested documents; in procedures about access to documents in the Netherlands the Court would always look at the requested documents under the confidentiality clause in the Administrative proceedings Act, unless the appealing party would have refused permission for this.

II- The hosting institution

The CJEU is the highest court of the EU judiciary system. One of its main tasks is to answer preliminary questions posed by national courts of the member states. This is – for obvious reasons – the aspect I was most interested in. Besides, the Court of Justice also deals with appeals of judgments of the General Court of the EU and it has the competence to give interim measures.

The General Court is basically an administrative court, competent to deal with appeals against decisions of European institutions. There are many similarities to a national administrative court.

III- The law of the host country

Relevant EU law I am particularly involved in in my daily work is the legislation on immigration. During my visit there were no hearings in immigration cases. During my meeting with one of the judges of the Court of Judges I had the opportunity to discuss recent developments. A piece of legislation that particularly gives rise to complicated preliminary questions is the Dublin Regulation. This Regulation aims to provide a system for deciding which EU member state is responsible for dealing with asylum claims made in one of the member states and therefore contains a highly technical scheme for attributing this responsibility. It apparently aims to solve disputes between member states on which of them is responsible. At the same time it aims to guarantee basic rights for the applicants. Those two aims do not seem to go very well together, which gives reason to a great number of requests for preliminary rulings.

IV- The comparative law aspect in your exchange

The preliminary ruling proceedings are unique because of the unique character of these proceedings, so it is not very useful to compare them to national proceedings.

One aspect I find noteworthy, which is that parties do not have the right to react to the opinion of the Advocate-General. In Dutch (administrative) procedural law this right is granted. It might be argued that the Rules of Procedure of the Court are at variance with Article 47 of the Charter. However, the Court of Justice ruled that based on the Rules of Procedure, the oral fase in the
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proceedings before the court ends with the opinion of the A-G, so thereafter there can be no opportunity for the parties to make further submissions. The Court ruled in the judgment in Emesa, 4 February 2000, C-17/89, that the position of the Advocate-General in the Court’s proceedings, being independent and not in a hierarchical relation to the Court, was such that there was no reason to give parties the opportunity to comment on the Opinion. ECHR had ruled in the Borgers Case (30 October 1991) that in the Belgian national system there should be an opportunity to react to the Opinion. So far, the Court has not distanced itself from Emesa; however in a judgment of 25 October 2017 (C-201/16), it dismissed a request for reopening the case so the parties would to be able to reply to the opinion, reasoning that the question of law addressed by the A-G, on which the party wanted to comment, did not have to be answered in the judgment.

V- The European aspect of your exchange

See above

VI- Good Practice within the host jurisdiction.

I am impressed by the organization of both courts. Everything seemed to be very well organized, as a result of which the cases of the CJEU are now decided in a period of average 15 months. Given the amount of time needed for translations and the fact that deliberations in Chambers of 3, 5 or 15 judges of different nationalities necessarily must be time consuming, this is really a major achievement.

VII- The benefits of the exchange

From the descriptions above it becomes clear that I learned a lot about proceedings with both European Courts. The exchange programme gave many opportunities to get a better view of what happens after a request for a preliminary ruling is made. More detailed knowledge about that will certainly help me in future cases in which I consider to request a preliminary ruling.

VIII- Suggestions

Either ACA or the Court might ask the participants in advance of the visit what their specific interests are and what their level of experience is. Now this question was included in a sub-sentence in the accompanying letter to the first draft program, which did not make it very clear to me that there was so much room for making special wishes. ACA and the Court might consider to link a participant to the cabinet of one of the judges so that one would get a more in-depth impression. An ACA group usually consists of high court judges who have at least some experience with preliminary rulings. During the first day, although the presentations we attended were of very good quality, I did not hear much that was new to me.

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