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REPORT

Identification of the participant

Nationality: Belgian

Functions: Auditor at the Belgian Council of State

Length of service: 10 years

Identification of the exchange

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

City: Luxemburg

Country: Luxemburg

Dates of the exchange: 9-20 October 2017
SUMMARY

In October 2017 the Court of Justice of the European Union (CJEU) was my hosting jurisdiction during a period of two weeks. I participated in the exchange programme with a judge of the Council of State of the Netherlands and a Polish judge.

I was particularly interested in the role of the Advocate-General at the Court of Justice, since his role is comparable to the position of the auditor at the Belgian Council of State.

Furthermore it was a valuable experience, since I learned more about both the preliminary ruling procedure and EU public procurement law, which were the most important points of interest during my visit. I even had the rare opportunity to attend a hearing of the Court where a reference for a preliminary ruling sought not only the interpretation of EU law, but also the review of the validity of an act of EU law. Next to the official “recommendations to national courts and tribunals in relation to the invitation of preliminary ruling proceedings” our meetings also led to more concrete information about how to draft a request for a preliminary ruling to the Court.

I also gained a better understanding of the procedure and the functioning of the CJEU and of the General Court. Some of the practical aspects we learned from our meetings with the judges and their staff members cannot be found in EU text books. They came to light by mere interaction between judges, both from the CJEU and different national courts, and will certainly help to improve the procedures at our national courts.

I- Programme of the exchange

During the first two days we joined several larger groups of judges, in particular judges taking part in a training programme offered by the European Judicial Training Network, and a delegation from the Courts of Appeal of Karlsruhe, Liège and Colmar. The programme included a general presentation of the Court of Justice and the General Court, the procedure before both Courts, the role of the Advocate-General, the preliminary ruling procedure, recent case law of the Court, as well as a presentation on multilingualism and the role of the lawyer-linguist at the Court. It also included a presentation of the research tools, the Curia website and the Library and its electronic catalogue and it was followed by a visit of the Library. We also got a guided tour of the buildings.

During my stay, I attended several hearings of the Court of Justice and the General Court and often received a short briefing of the case beforehand:

- 10/10/2017: Hearing of joined cases C-115/16, C-118/16, C-119/16, C-299/16, C-116/16, C-117/16 (Court of Justice – Grand Chamber)

These six rather complicated cases concerned preliminary references with respect to Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, and,
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amongst others, the concept of “beneficial owner” as mentioned in article 1 of the Directive and the concepts of “Fraud” and “Abuse” in the sense of article 5 of the Directive. It especially concerned the application of article 5.2 of the Directive, which stipulates that in case of transactions for which the principal motive or one of the principal motives is tax evasion, tax avoidance or abuse, Member States may withdraw the benefits of this Directive or refuse to apply this Directive. After the pleadings, many questions were asked by the judges and the Advocate-General. The parties were amongst others asked to give their opinion about the division of the burden of proof.

- 12/10/2017: Hearing of joined cases T-554/15 and T-555/15 Hungary/Commission (General Court – 9th Chamber): These joined cases concerned actions for annulment against decisions of the Commission with respect to State Aid. The point at issue was not the qualification of State Aid as such, but the use of suspension injunctions in state aid cases. According to the applicant the use of such procedure should not be left to the entire discretion of the Commission. It was argued that other criteria should be taken into account before suspension measures can be used and that the Commission should state reasons when it uses such a procedure. Apparently, these were the first cases that the Court treated where the suspension injunction itself was being discussed. The final decisions of the Commission have surprisingly not been contested by the applicant.

- 16/10/2017: Hearing of case C-441/17 R Commission/Poland (Court of Justice – Grand Chamber): this case concerned an application for interim measures with respect to Directives 92/43/EEC and 2009/147/EC and the conservation of natural habitats as well as the wild fauna and flora in Polish woods. It was argued that it is necessary to define the notion of “public safety” in the final order. A very particular aspect of this case was that the Commission also asked the application of a fine which had to be imposed on Poland. However, the legal basis for the Court to impose such a fine was discussed.

- 18/10/2017: Hearing of case C-518/16 ZPT AD (Court of Justice – 1st Chamber): this case concerned a request for a preliminary ruling referred by a Bulgarian judge with respect to state aid and Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid. It also happened to be one of the rare cases where a reference for a preliminary ruling seeks not only the interpretation of EU law, but also the review of the validity of an act of EU law. In this case the question has arisen whether article 1.1. (d) of Regulation No 1998/2006 (aid to export-related activities towards third countries or Member States) is compatible with article 35 TFEU concerning the prohibition of quantitative restrictions on exports between Member States.

- 19/10/2017: Hearing of joined cases T-639/15 until T-666/15 and T-94/16 (General Court – 5th Chamber - Extended Composition): in these cases the applicants were journalists of different Member States who requested the annulment of decisions of the European Parliament rejecting the applicant’s application for access to certain documents relating to information on travel expenses, subsistence allowances, general expenditure allowances and staffing arrangements expenses of Members of the European Parliament.

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Next to the hearings, there were very interesting meetings with the President of the CJEU and other individual judges, both of the Court of Justice and the General Court, as well as with an Advocate-General.

Since I have a particular interest in public procurement, I was also invited to attend both a seminar about the Public Procurement in the EU Institutions in general and the Court in particular, and a seminar about recent case law on Public Procurement.

My meetings with members of the translation service, legal secretaries and other staff members were also very informative.

Since we had our own offices in the Court’s buildings during our stay, we could really feel the atmosphere at the Court and we had the opportunity to meet people in a more informal way.

II- The hosting institution

The Court of Justice constitutes the judicial authority of the European Union. It actually consists of two courts: the Court of Justice and the General Court (former Court of First Instance). It is important to note that the Civil Service Tribunal ceased its activities on 1 September 2016. Its competences were transferred to the General Court.

The CJEU offers a highly developed system of judicial protection in the European Union, but it is only operational through the national courts. Up to 65 or even 70 % of the workload of the Court consists of requests for preliminary rulings.

Being an independent thinker, the Advocate-General plays a unique role at the Court of Justice. He or she wants to bring to the Court’s attention all possibly relevant matters that will help the Court to decide the case. The Comparative Law method thereby takes a special place in the EU legal order.

Although the functioning of the Court of Justice and the functioning of the General Court show many similarities, during my stay it became clear to me that there are also some important differences. To this day there are no Advocates-General appointed at the General Court. Contrary to the practise at the Court of Justice, the cases at the General Court are automatically assigned to one of het Court’s chambers and it is the president of that chamber who appoints a reporting judge. At the Court of Justice those decisions are taken by the full court at the General Meeting on Tuesday evening.

Both the Court of Justice and the General Court are supported by many staff members. Every judge has his or her own cabinet. Furthermore, the Registrar of the Court of Justice is in charge of the different departments or so-called “Directorates” such as the Interpretation Directorate, the Directorate of Protocol and Visits, the Directorate-General for Library, Research and Documentation, the Directorate-General for Personnel and Finance, the Directorate-General for Infrastructures, the Directorate-General for Translation and the Communication Directorate.

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Contrary to the European Court of Human Rights, all the official languages of the European Union are being used at the Court of Justice. The interpreters and the lawyer-linguists thus play an important role in the functioning of the Court. It is intended to bring justice closer to the national jurisdictions and the EU citizens.

Nevertheless, French is the working language at the Court which implicates that the preliminary report is also drafted in French.

Finally the Library of the CJEU is worth mentioning. Its staff is coming from 18 different Member States. Apparently it is typical of the Library’s policy to continue to acquire many books and articles on paper. Its aim is not only to serve its users but also to preserve the information for future generations. The digital catalogue of the Library is also made accessible to external users by the Curia website.

III- The law of the host country

I was particularly interested in the role of the Advocate-General at the Court of Justice, since his role is comparable to the position of the auditor at the Belgian Council of State.

The Advocate-General plays a sui generis role. His function cannot be compared with the function of a general prosecutor. The Advocate-General at the Court of Justice is considered to be an independent thinker, having the same status as the Court’s judges. His or her primary duty is to submit an opinion and to bring to the Court’s attention all possible relevant matters that will help the Court to decide the case. His or her opinion contributes in many ways to the richness of EU jurisprudence, in particular when having recourse to the comparative law method. We were informed that the “Advocate-General” was actually a last-minute addition in order to compensate for the lack of dissenting opinions at the Court.

The Advocate-General’s opinion is not binding on the Court. Nevertheless, it plays an important role in the EU jurisprudence, for instance by promoting further development of the case law.

How often the Advocate-General’s opinion is being followed by the Court is a difficult question to answer, also taken into account the secrecy of the deliberations. Even if it is not followed by the Court, it can nevertheless be of much influence. The most important opinions are often not followed at first, but they provide arguments for the future development of case law.

Since there are only 11 Advocates-General at the Court, they only give an opinion in the most important cases. It is the full Court which decides at the beginning of the procedure whether or not an opinion should be given by an Advocate-General. As a rule, he or she will never have the same nationality as the reporting judge.

With respect to my question which criteria are being used by the Court to determine whether or not an opinion should be asked for, reference was made to article 20 of the Statute of the Court of Justice of the European Union. This article stipulates that, after hearing the Advocate-General, the Court may decide that the case shall be determined without a submission from the Advocate-General, when it considers that no new point of law is being raised by the case. In the preliminary
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report the reporting judge has to explain why according to him or her the case raises no new point of law. If the Advocate-General and the reporting judge disagree on this matter and if they cannot come to an agreement, the question is discussed and decided by the full Court at the General Meeting. Apparently, the Court also applies a more informal rule, that is that if an Advocate-General wants to write an opinion, it should be allowed.

IV- The comparative law aspect in the exchange

One of the most important similarities I observed between the Belgian Council of State and the CJEU is the position of the Advocate-General as established above. Nevertheless, a huge difference is that the Advocate-General at the CJEU only gives his opinion after the hearing. We have been told that it could constitute an advantage for the unsuccessful party if he were to have given his opinion before the hearing. It was also underlined that it is important to keep an open mind at the hearing itself. When a request for annulment is lodged at the Belgian Council of State, the auditor already drafts “conclusions” after receiving the written observations of the parties. The parties then have the opportunity to react to these conclusions both in their final written observations and at the hearing.

Furthermore, several members of the Court emphasized that judges at the Court have no specialisations. Although ad hoc specialism is possible in case of clusters of cases and in view of efficiency, subject matters are often changed. It is found useful to obtain different points of view and to avoid a “tunnel vision”. At the Belgian Council of State more specialism is allowed given the division in chambers and sections, although every judge has to be able to deal with all kinds of cases.

V- The European aspect of the exchange

Since the CJEU was my host institution I had the privilege to get to know a wealth of European law aspects.

I just regret that during our stay there were no hearings about public procurement cases since that is one of my main fields of practice.

Nevertheless, I had the opportunity to attend very interesting hearings about Tax evasion, State Aid, Environmental protection, Access to documents, European procedural law, etc. During those hearings which were held in different official languages of the European Union and during which interpreters supported the judges, the parties and the audience showed the core business of the CJEU which is to bring justice closer to the national jurisdictions and the EU citizens.

Furthermore, I learned more about both the preliminary ruling procedure and EU public procurement, which were the most important points of interest during my visit. I even had the rare chance to attend a hearing of the Court where a reference for a preliminary ruling sought not only the interpretation of EU law, but also the review of the validity of an act of EU law (Hearing of case C-518/16 ZPT AD).
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VI- Good practice within the host jurisdiction

The preliminary report (cf. article 59 of the Rules of Procedure) drafted by the reporting judge certainly qualifies as a good practice within the CJEU and it could be useful to introduce it also in the highest courts of the Member States. In this report the reporting judge proposes to which chamber (3-5-15 or plenary) the case will be assigned, whether or not a request for clarification should be sent out, whether or not an opinion of an Advocate-General/a hearing is needed, etc. It is interesting to see that the General Meeting of the Court decides on these matters every Tuesday evening.

Furthermore, it will not surprise that I was impressed by the Advocate-General’s role at the Court and that I think that it would be wise to export it to the Member States, as well as to the General Court, at least as far as the most important cases are concerned.

In order to avoid unreasonable delays the Court constantly monitors the process time and workload of the different chambers. If not already established, such a monitoring system might also be helpful for Courts and Tribunals in other countries.

Finally, the Court aspires to consistent judgements and the system which is being used to obtain that is worth mentioning. In such circumstances a case can not only be referred to the Grand Chamber, but there are also more informal “conferences of judges”, where such problems can be discussed. The latter conferences lead to a non binding summary.

VII- The benefits of the exchange

The exchange programme proved to be an informative experience and I can certainly recommend it to other colleagues.

As mentioned above, I learned more about the preliminary ruling procedure and that will help both me and my colleagues when we have to deal with future requests for preliminary rulings. Next to the official “recommendations to national courts and tribunals in relation to the invitation of preliminary ruling proceedings” our meetings also led to more concrete information about what to do and what to avoid when sending a request for a preliminary ruling to the Court.

I have certainly gained a better understanding of the case law of the Court of Justice by attending all kinds of hearings and thanks to the explanation given by judges and legal secretaries.

I also learned more about the way the CJEU and the General Court function and about their procedures. Some practical aspects we have learnt from our meetings with the judges cannot be found in EU text books. They came to light by mere interaction between judges, both from the CJEU and different national courts, and will certainly help to improve the procedures at our national courts.

I am very pleased that I had the opportunity to inform the Court about some problems national judges may encounter with respect to the preliminary ruling procedure. During every meeting I felt that the members of the Court and its staff were really interested in these matters.

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In order to ensure that my colleagues will benefit from the knowledge I gained during my work exchange, I promised to give an internal lunch seminar at the Belgian Council of State in the near future. In this way the knowledge I acquired will certainly be shared with the interested colleagues.

VIII- Suggestions

I already mentioned that I followed the programme with a judge of the Council of State of the Netherlands and a Polish judge. In my opinion this was an additional advantage since we did not only get a better insight in the way the CJEU functions but also in the way the other national courts function. Therefore I would strongly recommend to continue the exchange programme in the same way.

As far as the preliminary ruling procedure is concerned, one might consider organizing a particular seminar on the drafting of questions for preliminary ruling based on the “Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings”. It would be interesting to get an even better insight in the most common problems which can be encountered when phrasing requests for a preliminary ruling.

The exchange programme was very well organized by the Directorate for Protocol and Visits. Before the very beginning of our stay we already received a proposal and it was almost every day adapted and improved according to our own wishes. I am very grateful to the judges and the Advocate-General for having spent some of their precious time with us and for their genuine interest and for the interaction. Furthermore, I would like to join in thanking the staff of the Directorate for Protocol and Visits for the elaborate programme and for giving us such a warm welcome.