REPORT

Participant

Nationality: Belgian

Position: Conseiller d’Etat (Councillor of State)

Time in post: 4 years

Training course

Host jurisdiction / institution: Court of Justice of the European Union

City: Luxembourg

Country: Luxembourg

Course date: 19 - 30 November 2018

SUMMARY

Course at the Court of Justice of the European Union; enhanced understanding of the mechanism for dealing with preliminary questions, and in particular the submission of preliminary questions by supreme jurisdictions such as the Conseil d’Etat (Council of State); in-depth analysis of the Charter of Fundamental Rights, its scope of application and the conditions for its application

APPENDIX

GUIDELINES FOR WRITING THE REPORT
I- Course outline

**Monday 19 November 2018**

1) First session: ‘Referrals of preliminary questions: recent case law on procedural aspects’, chaired by President K. L.; theme presented by Mrs. E. S., advocate general and Mr. J. M. D.S. L., judge at the Court of Appeal in Coimbra, Portugal

2) Second session: ‘The scope of application of the Charter of Fundamental Rights of the European Union’, chaired by Mrs. R. S. d. L., Vice-president of the Court of Justice; theme presented by Mrs. S. P., President of the 3rd chamber of the Court of Justice and Mr. D. M., judge at the District Court in Krakow, Poland

3) Workshop I, ‘Asylum and immigration’ conducted by Mr. C. L., President of the 10th chamber of the Court of Justice and Mr. S. B., First President of the Litigation Council for Foreigners, Belgium

4) Session: ‘Recent developments and case law in the General Court of the European Union’, chaired by Mr. C. M. E., judge in the General Court; theme presented by Mr. G. D. B., judge in the General Court

**Tuesday 20 November 2018**

1) Presentation of case C-616/17 B. e.a. by Mr. L. B. L., judge at the Court of Justice, attending the hearing of verbal submissions in case C-616/17 B. e.a. (*Environment – Commercialization of plant protection products – Validity of regulation (EC) n° 1107/2009 in the light of the precautionary principle – Reliability and impartiality of the assessment procedure – Accumulation of active substances – Pesticides – Glyphosate*) before the Grand Chamber of the Court of Justice

2) Continuation of the hearing of verbal submissions or debriefing after the hearing by Mr. L.B.L., judge at the Court of Justice

3) Conversation with Mr. K. L., President of the Court of Justice

**Wednesday 21 November**

1) Presentation of case C-620/17 H.S.M.F. by Mr. F. M., law clerk, Office of the President of Chamber V.

2) Hearing of verbal submissions in case C-620/17 (Appeal procedures with regard to the awarding of public contracts – Liability of member States with regard to contraventions of Union law – Contravention attributable to a national jurisdiction –
Failure to take full account of a ruling by the Court of Justice – Rectification of / compensation for detriment caused)

3) Individual research

4) Conversation with Mr. F. P., administrator, Management of the library

5) Visit to the library

**Thursday 22 November 2018**

1) Hearing of verbal submissions in case C-649/17 A. (Consumer protection – Obligations to provide information with regard to distance and off-premises contracts - Failure to provide adequate information regarding the means of contacting the trader – National regulations requiring businesses to provide a telephone number)

2) Individual research

3) Conversation with Mr. P. N., judge in the General Court

**Friday 23 November 2018**

1) Talk by Mr. S. V.D.J., Press officer, Communications Directorate : "The communications policy of the Court of Justice"

2) Individual research

**Monday 26 November 2018**

Talk by Mr. K. L., President of the Court of Justice : "The Charter of Fundamental Rights of the European Union"

Talk by Mrs. C. N., law clerk, Office of Judge R. "The procedure for dealing with preliminary questions"

Talk by Mr. D. D’E., law clerk, Office of Judge J. "The institutions and powers of the European Union : impact of the Lisbon Treaty"

Talk by Mrs. V. G., administrator, Greffe of the Court of Justice : "The Court of Justice
of the European Union: organisation, powers and procedure"

Presentation of case C-621/18 A.W. e. a. by Mrs. F. B., law clerk, Office of Judge F.

**Tuesday 27 November 2018**

Hearing of verbal submissions in case C-621/18 A.W. e. a. (member States - Withdrawal from the Union - Notification - Unilateral revocability)

Talk by Mr. C.G., law clerk, Office of the President of Chamber B., "How the office of a judge works"

Presentation of case T-754/17 Metropolitan Chamber of Commerce and Industry B-O-P-B, by Mr. S.T. law clerk

Talk by Mr. J. W., law clerk, Office of the Advocate general H. "European citizenship"

**Wednesday 28 November 2018**

Hearing of verbal submissions in case T-754/17

Talk by Mr. J. R., office manager for the Registrar, "How the Court of Justice of the European Union works"

Talk by Mr. F. L., law clerk, Office of the President of Chamber T., "Recent developments in European consumer law"

**Thursday 29 November 2018**

Talk by Mr. P. D.L., law clerk, Office of Judge J. "Judicial cooperation in civil matters" *(T.B.C.)*

General presentation of the General Court by Mr. S. G., chamber president, General Court

Talk by Mr. G. S., lawyer-linguist principal, French-language translation unit "The role of the lawyer-linguist"

Talk on the role of the advocate general by Mrs. I. G.R., law clerk, Office of advocate general B.
Talk by Mrs. M. V., law clerk, Office of advocate general B. "The area of freedom, security and justice"

**Friday 30 November 2018**

Talk by Mrs. P. D., administrator, Research and documentation directorate "A presentation of the Research and documentation directorate and its research tools"

Talk by Mr. B. S., reader of rulings, Office of Mr. L., President of the Court of Justice "Duties carried out by the reader of rulings"

Conversation with Mrs. Z. A., head of unit, Protocol and visits directorate "Evaluation of the seminar"

II- The host institution

Court of Justice of the European Union; Supreme court at the apex of the European judicial hierarchy; responsible for interpreting European law in the twenty-eight member States, notably via the mechanism for dealing with preliminary questions. The Court of Justice is also empowered to overturn judgments of the General Court of the European Union.

III- Law of the host country

cf. point V : course exclusively devoted to the CJEU and Union law.
However, in the course of meetings with the other participating magistrates, we learnt through informal discussions about the procedures used in the jurisdictions of Luxembourg and France relating to administrative litigation and the overturning of rulings.

IV. The ‘comparative law’ aspect of your course

Not applicable, cf. point V : course exclusively devoted to the CJEU and European law

V. The European aspect of your course

The programme focussed entirely on European law and procedures before the Court of Justice and the General Court. The course as a whole took the form of meetings with judges, workshops to
enhance our understanding of the mechanism for dealing with preliminary questions and the scope of application of the Charter of Fundamental Rights, with vital explanations of the attitude that we should adopt as a supreme jurisdiction, with regard both to our handling of preliminary questions and to the manner in which these are to be formulated in our rulings (cf. point VII)

VI. The ‘good practice ’ aspect of the jurisdiction visited

Cf. VII.

VII. Benefits derived from the course

A. Applications for preliminary decisions (APDs)

Importance of compliance with the procedural rules (article 94 of the procedural regulations of the Court of Justice) as regards the way in which a PQ is formulated in our rulings. The various workshops and contributions by judges drew my attention to the manner in which a PQ is formulated, emphasizing the description of the relevant national law, the national case law and, as an aspect of which I was unaware, the response that we as an internal supreme jurisdiction would make to the PQ being raised if we were tasked with answering it, enabling the Court of Justice to gain the clearest idea of the issues raised in it.

The vital importance of the Conseil d’Etat explaining and establishing the way in which the response to the question is necessary to enable resolution of the case (e.g. : case C-24/18 and C-692/15 : PQ inadmissible due to a lack of information in la question, which describes an excessively internal situation without explaining its connection to the application of EU law).

Please note : reminder of the obligation for a supreme jurisdiction such as the Conseil d’Etat to present all the PQs it receives, on pain of an action for non-fulfilment of obligation (analysis of the first casus of this kind since the creation of the Union : CJEU, 4 Oct 2018, C-416/17 : implementation of a 2011 ruling and the auditor had suggested presenting a PQ, which the French CE failed to do → doubt as to the application of EU law should have led the jurisdiction to present the PQ).

Continuation (week two)

Importance of anonymization as from the point at which we issued a ruling of referral of a preliminary question (pt 22 of the recommendations ; the identifying details of the parties may feature in the letter of notification or the appendices ; indicate in our ruling for the attention of the Court of Justice that we have already anonymized), recommendations in the APDs, and the appendices thereto, published in the ‘Journal Officiel’ or legal gazette (latest edition, July 2018).

Please note : only the ruling requesting the PQ is translated, never the appendices.
Distinction to be made between orders and rulings. The former do not involve a written or verbal procedure (and so no comments by the parties) cf. art. 53 and 99 of the procedural regulations: when the PQ is identical to one that has already been presented, when the response can clearly be deduced from case law or when there is no reasonable doubt as to the response → quicker than rulings.

Importance of clearly identifying the parties in our ruling for the attention of the Court of Justice (no party other than those identified may participate in a procedure before the Court of Justice; if a party becomes involved after the APD, the Court of Justice should be notified as promptly as possible (art. 23 procedural regulations)).

The facts set out in our ruling must be accepted by the Court of Justice: neither of the parties may dispute them before it (judge - judge dialogue) or assert that they have been misunderstood.

Please note: NOT: ‘does national law contravene Union law (...)’ but: ‘Is Union law to be interpreted as contradicting national legislation that (...)’

Talk on the duties of the advocate general: important elements for rulings containing an APD:

- preference for citing the provisions of the relevant laws and regulations between quotation marks;
- number sections / paragraphs;
- feel free to propose a solution

B. Purely internal situations

‘Purely internal’ situations are those that only concern disputes in which no element of European law (free movement, application of European law, etc.) is a priori a factor, and so which are not liable to give rise to a preliminary question.

The case law of the Court of Justice has however evolved to the point of declaring that it holds jurisdiction when certain elements lead to the conclusion that European law is applicable (e.g.: case L. 197/11). Thus in a recent U.D.S. ruling (C-268/15), the CJEU once again declared that it holds jurisdiction to issue a preliminary ruling as to the extra-contractual liability of the State with regard to non-compliance with primary (rather than secondary) European law (§§ 43, 50 - 51).

C. The Charter of Fundamental Rights

The Charter can only be invoked subject to the sine qua non condition that its alleged contravention is combined with the ‘mise en œuvre’ (implementation) of another principle of European law (primary or secondary) that the national judge must clearly identify. A PQ that only invokes contravention of the Charter is inadmissible (articles 51 of the Charter (and its notes) and 94 of the
**procedural regulations**) Ruling C-617/10 + examples illustrating the term ‘mise en œuvre’:
transposition of a directive (C-528/13 L.) even if the State has the discretionary power to do this or
legislation that ensures that the directive is effective (without transposing it as such : C-682/15),
when the national judge applies European law (European arrest warrant), the regulations (even if
there is no need for a transposition measure, there may be application measures (C403/16 and C-
258/14), analysis of the justifications put forward for restrictions on free movement (C 260/89,
368/95, 609/17, 610/17, 390/12, 78/18, 235/17 and 66/18)...

C-216/18 dated 25 July 2018: example of the General Court being impartial under the terms of article 47 of the Charter (disciplinary system
for judges in Poland).

**Continuation (week two)**

Thus the Charter is not applicable in an autonomous way, but rather constitutes the standard
governing the protection of fundamental rights whenever EU law is applied. The French term ‘mise en œuvre’ of Union law is broader, and covers more situations, than the English term ‘implementation’ which only appears to cover transposition.

Once again, vital importance of article 94 of the procedural regulations and the obligation to state in
our APDs why we consider the Charter to be activated.

**Practical applications:**

- an interpretation of Union law that is more in line with the Charter must be favoured (e.g. : case of the Portuguese magistrates C-64/16)
- the measures enacted by Union institutions must be compliant with Union law (example : difference in the insurance premiums payable by men and by women, Belgium transposes the optional clause of a directive providing for this → actional for annulment of the law by the Administrative Court, and the Constitutional Court submits a PQ to the CJEU → The Court of Justice agrees with the CC and annuls the clause of the directive).

**D. Hearing in case C-616/17**

Does the precautionary principle (119 TFEU) require the annulment or rectification of a regulation
that is contrary to it (according to the complainants, regulation 1107/CE does not contain adequate
measures to assess the impact, and provide for the subsequent prohibition, of glyphosate) notably
when subsequent scientific studies indicate that the products authorized are, according to the
complainants, harmful ? Claims of inadmissibility (no necessity for a response in the dispute before
the national judge + the precautionary principle is not evidently disregarded).

**Interest of this case within the context of the ACA course (examine the ruling when it is pronounced):** impact of the precautionary principle, and so of the Charter, on the regularity of
secondary European law.

Conclusions by the advocate general on 14th February 2019.
E. Conversation with President K.L.

A lesson about European law delivered with simplicity and conviviality. Importance of the independence of judges and vital role of national judges who are the prime actors in European law prior to referral of a preliminary question; importance of the case C. c. Roumanie 673/16 (same-sex marriage) with regard to purely internal situations: choice of the State when there is no ‘free movement’ element in a dispute regarding individual rights based upon a precise factual situation, but an obligation to comply with EU law when free movement rights have been materially exercised. In ruling L. 197/11, it was not a factual situation that was the subject of the question, but rather a query submitted to the Constitutional Court in the context of an objective dispute regarding the interpretation of Union law, with no specific connection to a precise and purely internal factual situation.

F. Hearing in case 620/17 (Hungary)

Public contracts, tenderer rejected on the basis of an economic and financial criterion, namely the obligation not to have made any losses (negative results) during the three years preceding the tender, imposed by the adjudicating authority. Internal legal action taken by the tenderer rejected at first instance, and the Court of Appeal submits a preliminary question leading to ruling C218/11 according to which, essentially, selection criteria may be imposed but must be proportionate. The Court of Appeal then rejects the action, considering that the criterion is not discriminatory, without however examining its proportionality (are the results a relevant criterion?). The Procedural Appeals Court then rejects the appeal because the argument of non-compliance with the ruling was not made at first instance. The application for judicial review is then itself rejected on the grounds of an absence of new factors (a criterion imposed by Hungarian procedural regulations): ruling 218/11 was pronounced in mid-proceedings without a preliminary question being submitted. The complainant then initiated a tort action against the Hungarian State.

*Interest of this case within the context of the ACA course (examine the ruling when it is pronounced):* ‘res judicata’ authority of a ruling of the Court of Justice pronounced during litigation proceedings + impact of European law upon a provision of national law that provides *grounds for inadmissibility without examining the merits of the case*, and could therefore be interpreted as rejecting the action with no need even to examine the consequences of a CJEU ruling.

Ccl of the advocate general dated 27 February 2019.

G. Session on the library of the Court of Justice

Coaching in online research and explanations regarding the ECLI nomenclature used notably for the classification of rulings in the EJN

*Very useful information*: will enable inclusion of our rulings from the Belgian Conseil d’Etat on le EJN site, with ECLI n°s

H. Hearing in case C-649/17 A.
Activity co-funded by the Justice programme of the European Union

Directive D 2011/83: must an industrial company provide a contact telephone number for consumers, or is an email address sufficient?

*Interest of this case within the context of the ACA course (→ examine the ruling when it is pronounced):* what to be done in the case of passages in a directive that differ according to the translations carried out by member States? How to interpret them (→ cf. 443/14, point 27)

Ccl of the advocate general dated 28 February 2019.

I. Meeting with judge J. B., chamber president

Conseiller d’Etat in France then judge at the Court of Justice → open discussion comparing the Conseil d’Etat in France and its equivalent in Belgium, notably regarding the role of the ‘public rapporteur’

H. Meeting with the Spanish judge at the General Court of the European Union

Conseiller d’Etat then judge at the Court of Justice → open discussion comparing the Conseil d’Etat in Spain and its equivalent in Belgium: no litigation section in Spain

K. Meeting with P.N., a judge in the General Court of the European Union and Mr. S.G., chamber president in the same General Court

Open discussion on the importance of administrative litigation and the place of the administrative judge in dealings with the administrative authority, whether Belgian or European. Analysis of a ruling by the General Court and examination of the manner in which it is to be read (structure and various parties). Examination of the manifest error in appreciation which, in cases before the General Court, need not be evident as is the case with us, but must merely be based upon ‘non plausible’ evidence in disputes relating to competition → more extensive examination and enhanced intervention by the judge in these areas (in other areas, the General Court shall maintain the habitual distance, precluding it from censoring aspects that are manifest).

L. Meeting with Mr. I.M., office manager for the president, regarding the European Judicial Network (EJN)

A very productive meeting with regard to improvements in the functioning of the EJN site. Request by the Court of Justice that internal research notes are also made available online, in addition to the rulings already provided. This request had not been clearly formulated at the time of the meeting held to launch the site in September 2017, and therefore merits consideration and in any case approval from the Premier president of the Belgian Conseil d’Etat, above all if - as the Court of Justice wishes - the site is extended to cover all jurisdictions and no longer merely the three supreme jurisdictions.

Discussion regarding the issues around the anonymization of rulings: the reflection phase does not yet appear to have been completed, either in the Court of Justice or in Strasbourg, but in any case collaboration is required between the European and national jurisdictions in order to avoid both duplicating the work carried out and accidentally compromising the anonymisation already
completed. A question that requires further work or concerted study, and that may constitute one of the subjects of an upcoming meeting of all the administrators of the EJN site.

M. Impact of the Lisbon Treaty

The EU Treaty, TFEU and Charter = primary law. Seven institutions (Parliament, European Council, Council, Commission, CJEU (+ General Court), ECB and Court of Accounts).

The Parliament, with the Council, carries out legislative and budgetary duties – elected on the basis of universal suffrage with a system of joint decisions providing for exceptional cases in which the Parliament is merely consulted or notified.

The European Council is the political body that defines the political strategies of the EU.

The Council (or Council of Ministers): no fixed composition, depends on the subjects to be dealt with (ten formations, including foreign affairs, with rotating presidency). It negotiates and adopts regulations with the Parliament as well as agreements with other non-EU States.

The Commission (with one member per State → 28 commissioners proposed by the Council and elected by the Parliament, unlike our ministers). It takes the initiative as regards the regulations and directives that it executes. It initiates actions for non-fulfilment of obligation before the CJEU.

The CJEU (art. 19 and 24 UT and 251-281 TFEU) 11 advocates general at the Court of Justice (not the General Court), six of which are permanent and the others in rotation every 3 years. Procedure of entry examination before the ‘255 Committee’ (art. of the TFEU).

Articles 7 and 2 EUT: risk of infringement by a State of the fundamental rights (unanimous vote in the European Council to formally note this violation and impose financial penalties)

E.g. :

- at the initiative of the Commission in December 2017: Poland (+ urgent order before the CJEU dated 19 October 2018 C-619/18R); → it appears that Poland withdrew its legislation in the Supreme Court;
- at the initiative of the Parliament in September 2018 against Hungary, which cited the provisions of article 269 (this was a first).

N. Hearing held on 27 November 2018 C-621/18 A.W. e. a. (emergency procedure)

Historic plenary hearing (extremely rare) within the context of an APD presented by the Scottish Court of Appeal regarding the possibility of the United Kingdom withdrawing its request to leave the European Union.

According to the position taken in the hearing by the Commission and the European Council, and in the absence of any precisions in the Treaties, and notably in article 50 of the EUT, such an option may only be envisaged if the European Council unanimously accepts it.
This position is disputed by applicants (British parliamentarians), who describe a veritable right to veto as being contrary European law and to the spirit of the Treaties. The United Kingdom did not deal with the merits of the case, either in its written submissions or at the hearing, as it considered that the question was purely hypothetical, and so inadmissible, and that in any case the Court of Justice would be interfering in the sovereign law of the United Kingdom by responding, as it could in this way exert an influence over the vote by parliamentarians scheduled for the 11 December, in contravention of the principle of separation of powers.

O. Hearing held on 28 November 2018 before the General Court of the European Union in case T-754/17

Importance of interaction between the judge and litigants during the verbal phase. Sustained questioning by the Court in order to clarify the positions of the parties and the factual elements.

P. Presentation of the research and documentation directorate

Explanations regarding the digital research resources on the site and at the library.

VIII. Suggestions

A very positive and enriching experience, not just with the three colleagues from the Conseil d’Etat and the Auditorat (Judge Advocate’s department) who were with me (a form of very precious team building), but also and above all with the magistrates from other national jurisdictions and principally from the Court of Justice and the General Court of the EU. These encounters enabled one to grasp, through practical experience and concrete - rather than theoretical - explanations, the mechanism for dealing with preliminary questions and the Charter.

Suggestions for improvement:

1) arrange this form of experience on a more regular basis, perhaps with a larger group of colleagues from the Conseil d’Etat

2) suggest that work sessions more frequently take the form of small work groups, like actual seminars dealing with concrete and specific cases (subject of course to a confidentiality clause), rather than a conference