REPORT

Participant

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Time in post: member since March 2005

Training course

Host jurisdiction / institution: Court of Justice of the European Union
City: Luxembourg
Country: Luxembourg
Course date: 2 weeks

Summary

This two-week course provided me with an understanding of the functioning of the two jurisdictions comprising the Court of Justice of the European Union (CJEU), as I attended five hearings before the Court of Justice and the General Court, each one following a meeting with a law clerk working for the judge rapporteur in the case, and had formal or informal meetings with the president of the Court of Justice, with the judges at the Court of Justice and the
General Court, with the law clerks, and with officials in the institution, as well as numerous magistrates from member-State jurisdictions. I was able as a result to deepen my understanding of the CJEU, both in terms of comparative law between supreme administrative jurisdictions and with regard to the cooperation that takes between national jurisdictions within the EU and the CJEU for the application of European Union law.

I- Course outline

The start of the course coincided with the magistrates’ forum, an annual event attended by 150 first-instance and appeal judges from all member States.

Numerous contributions were organized, enabling a clear idea to be gained of the functioning of the CJEU in its various dimensions, whether judicial (the production of rulings; functioning of a ‘judge’s office’; roles of the judge rapporteur and the advocate general; role of the General Court etc.), linguistic (duties carried out by lawyer-linguists, readers of rulings, etc.) or more general (communications, literature research, library services).

Thematic workshops were also held, focussing on themes such as the procedural aspects of preliminary rulings, case law on asylum and immigration, and the charter of fundamental rights of the EU.

Thanks are due to each of the participants for the quality of the discussions arising from these events.

A considerable part of the course naturally focussed on the hearings which we were able to attend and which dealt with four preliminary questions being examined by the Court of Justice (including one ‘assessment of validity’ question) and an action for annulment against a decision relating to State aid before the General Court. Two of the cases were from France, with the three others originating in Great Britain, Germany and Hungary respectively. Each of these cases was preceded by a discussion with a law clerk working for the judge rapporteur handling the case, providing those in attendance with key pointers enabling comprehension of the points under consideration in each instance.

- case : Wightman (C-621/18, plenary assembly of the Court of Justice)
- case : Blaise (C-616/17, grand chamber of the Court of Justice)
- case : Amazon EU (C-649/17, first chamber, five judges)
- case: Hochtief solutions (C-620/17, five-judge chamber)
- case: CCI métropolitaine Bretagne-Ouest v Commission (T-754/17, General Court of the Union, three-judge chamber).

II - III - The host institution - Law of the host country

The Court of Justice of the European Union is one of the seven institutions mentioned in article 13 of the TFEU. According to article 19 of this treaty, the CJEU comprises the Court of Justice, the General Court and the specialist tribunals. With the demise of the civil service tribunal, whose duties were taken on by the General Court, the institution of the CJEU now therefore actually consists of two jurisdictions.

IV - V - The ‘comparative law’ aspect of your course - The European aspect of your course

Roughly speaking, the General Court serves basically as a judge of the legality of actions of the European institutions with the majority of applications for annulment (the largest category relating to disputes over intellectual property, accounting for 1/3 of cases, followed by issues around the actions of public bodies, state aid and competition), while the Court of Justice serves to ensure the proper application of EU law throughout the Union, with three forms of action accounting for virtually all of its workload: preliminary questions (72% of cases taken on in 2017), appeals against rulings by the General Court (19%) and actions for non-fulfilment of obligations (6%).

With these figures, the activities of the General Court are those that are most similar to those of a French administrative judge, with applications for annulment broadly mirroring claims of ‘ultra vires’ actions, but with a narrower conception of legal interest in bringing proceedings. The activities of the Court of Justice are however well worth considering, in particular with regard to the unique cooperation procedure arising from the ‘preliminary questions’ mechanism provided for in article 267 TFEU.

Entering the courtrooms, with their spacious public areas and simultaneous translation facilities, one is struck by the institution’s emphasis on the public nature of the hearings, which is viewed not merely as an obligation arising from the rules
ensuring due process, but also as an opportunity to demonstrate European justice in action, including in its singular dimension of multilingualism. Indeed, in addition to the parties, numerous groups of visitors, whether judicial magistrates, judges dealing with asylum cases, students of law or interpreting or others, were present at the hearings, in rooms that were sometimes nearly full, even in cases that had no particular significance.

The paradox is that the hearing of submissions is merely the visible phase of the process deployed by the Court of Justice to produce rulings. Thus an understanding of the production process has therefore to some extent remained notional for the course participants, given that the equivalent of the deliberations in the Conseil d’Etat, in chambers or in a formation of judges, is in part in written form, and so does lend itself to in situ observation, and its verbal component is only open to the judges concerned.

The delay of several months between the hearing and the reading of the ruling is a further obstacle to understanding the overall process. As a paradox within the paradox, the important Wightman case, relating to interpretation of article 50 of the Union Treaty and to the conditions under which a member State may reverse its decision to exit the EU, which was the subject of a preliminary question case on the 3rd October 2018, and of a hearing during our course, was dealt with in a ruling issued on the 10th December 2018 when we were finishing off this report.

While this physical inability to observe the non-public part of the process could lead us to share the frustration of Judith before the final door in Bluebeard’s castle in the opera by Bartók, I must once more emphasize the quality of our discussions with all the officials we met, which left us with a very clear view of the specific nature of the process for producing rulings, beyond its visible components.

It is interesting to note that a number of the officials we met emphasized that to some extent the collegiate aspect of the ruling process could be likened to the functioning of the COREPER in the drafting of legislation within the Council of the EU, in other words to a technique for intergovernmental negotiation. The advocate general, in the first place and uniquely, provides an analysis of the case, thus offering a pivot upon which to base the collegiate reasoning of the chamber, which may involve various points of view, in most cases (around 80%) to support this opinion and in the remainder to present a contradictory solution.
This in-depth attempt to obtain the consensus of the greatest number, inherent in a jurisdiction that does not use the technique of dissident opinion, may therefore result in case law progressing in ‘baby steps’.

In the first place, evolutions in case law rarely take the form of genuine about-turns that are presented as such, but rather use the technique of ‘distinguishing’, with a new ruling retaining an earlier solution but presenting a situation in which the case may be distinguished from previously-judged precedents, such that a new and distinct solution does not contradict the solution obtained from these precedents.

In the second place, the deliberation process frequently seems to result in the Court of Justice favouring case-by-case solutions, specifically responding to the question at hand rather than setting out ‘instructions’ that enable national judges to understand and implement a European-level provision subject to interpretation in cases similar to those already dealt with by rulings of the Court of Justice. The risk inherent in an excessively case-based approach being for the Court of Justice to face a mushrooming number of preliminary questions for the interpretation of a single Europe-wide provision applicable in frequently similar scenarios.

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

Two aspects were particularly noteworthy:
- Management of the length of proceedings;
- The role of national judges in preliminary questions.

The resources available to the European jurisdiction as it attempts to regulate the material produced by the parties and to limit - notably in the most complex cases - the duration of case processing are extremely interesting, and may serve as inspiration for national jurisdictions. I shall focus on the control exerted over the length of the parties’ written submissions.

Both the procedural rules of the Court of Justice (article 58) and those of the General Court (article 75) provide for a maximum length to be set for case statements.

The Court of Justice has not as yet laid down a binding rule with regard to the length of such statements, except in the case of emergency proceedings. It has merely indicated, in
a decision dated 21st January 2014, published in the OJEU, and entitled ‘Practical instructions for parties in cases before the Court of Justice’, that the comments made by the parties regarding preliminary questions must not exceed 20 pages in length. In the case of direct applications, it stipulates that the written comments should not be more than 30 pages long.

In the case of the General Court, control of the volume of the material produced is subject to imperative rules, which may give rise to applications for regularization and to inadmissibility. Points 105 to 107 of the practical provisions for enforcement of the procedural rules of the General Court set various limits depending on the category of case and the stage of the procedure, as summarized in the following table:

<table>
<thead>
<tr>
<th>Statement of case and defence</th>
<th>Direct application: ‘public bodies’</th>
<th>Intellectual property cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Direct application</td>
<td>50 p.</td>
<td>20 p.</td>
</tr>
<tr>
<td>Reply and rejoinder</td>
<td>25 p.</td>
<td>15 p.</td>
</tr>
<tr>
<td>Statement alleging inadmissibility and response</td>
<td>20 p.</td>
<td>10 p.</td>
</tr>
<tr>
<td>Intervention and comments on this statement</td>
<td>20 p. and 15 p.</td>
<td>10 p. and 5 p.</td>
</tr>
</tbody>
</table>

These restrictions may be explained in part by the need to limit the amount of translation to be carried out of the material produced by the parties, which gives rise not only to financial costs but also to delays in examining the cases. This is only a partial justification, as in cases before the General Court the documents produced in the language of proceedings are only translated into another working language (although member States retain the option of producing material, when taking part in the case, in their own official languages).

In my view the main justification is the idea that the parties must do all they can to be as concise as possible, depending upon the difficulty of the cases submitted to the jurisdiction, which may mean focussing only on the arguments that the interested party believes may really prevail. This takes the form of a distinction being made between general direct applications (which for the most part involve proceedings relating
to state aid and to anticompetitive practices) and applications relating to public bodies and to intellectual property, on the understanding that it is always possible, if justified by the complexity of the case, to obtain an exemption from these limits.

This control is merely one of the tools at the disposal of the CJEU. It could be argued, particularly in the case of complex economic cases, that the resources deployed at a European level could serve as an inspiration for national judges, most other cases only rarely giving rise to the production of material of a length that a national judge would find hard to manage.

Our colleague Frédéric Lénica already declared, in his submissions regarding the complex economic case n° 324642 Société Orange France n° 324687 SFR dated 24th July 2009: “We can only see advantages in the provision to parties of a timetable for processing of a case in such proceedings that require a rapid judgment, both for the parties and for the regulator. We do however believe that in future such a timetable, which shall frequently provide for a case to be heard in court, (...), should include an end-date for processing the case that provides your formation tasked with said processing with enough time to consider a final document not subject to further developments. In truth, we also consider that you should grant yourselves the power to negotiate with the parties a processing agreement leading them to concentrate solely upon some of their original arguments in return for a rapid judgment, as is the case for example in the European Community court of first instance.”

The second aspect I wish to touch on concerns preliminary questions and the place of referrals by national jurisdictions for preliminary rulings in the dynamic of hearings before the Court of Justice.

Article 94 of the rules of the Court of Justice stipulates that in addition to the preliminary question itself, the application for a preliminary decision must include three sets of elements:
- an explanation of the subject of the case and the relevant facts;
- the applicable provisions of national law;
- an explanation of the reasons that led the referring jurisdiction to query the interpretation or validity of certain provisions of European Union law, and the link made by it between these provisions and the national legislation applicable to the main part of the case.
These elements are reiterated in the ‘Recommendations for national jurisdictions regarding the introduction of preliminary proceedings’, published by the Court of Justice on the 20th July 2018.

Both this document and our discussions at the Court of Justice revealed that **much is expected of the decisions by national judges to refer preliminary questions**: this mechanism for dialogue and cooperation is not viewed solely as an obligation or option relating to the transfer of a preliminary question. The national judge is expected to present the factual context of the case (even if the referring jurisdiction is a supreme court that is not expected under domestic law to take a position on the facts of the case) and the context in terms of national law, for the benefit of the Court of Justice. **Thus the national judge is rightly seen as the institution best placed to establish a certain number of parameters for discussion, upstream of the response provided for the preliminary question.**

In the general document provided to the parties to assist with the process as referred to above, the Court of Justice also indicates that, with regard to the written submissions made to it, there is no need to re-examine the legal or factual context of the dispute as set out in the referral decision, unless further comments are called for.

In the magistrates’ forum, a judge from member State submitted a question lamenting the fact that the jurisdiction presenting the request for a preliminary question is not involved in proceedings before the Court of Justice. The response he received was that the referral decision was the basis upon which proceedings before the Court of Justice were to be constructed, and that this decision should contain the judge’s clarification of all the elements of use to the European court in its reflections.

**Significantly and perhaps surprisingly, national jurisdictions are also expected to take a position on the applicable Community law.** Indeed the above recommendations indicate that “The referring jurisdiction may also succinctly present its opinion on the appropriate response to the questions being raised on a preliminary basis. This will prove useful to the Court of Justice, in particular if it is called upon to rule on the application within the context of an accelerated or emergency procedure.”

**Thus a distinction is made between the parts played in preliminary proceedings by the national jurisdiction, by the parties and by the Court of Justice, with the role of the national jurisdiction not necessarily a passive one.**
VII- Benefits derived from the course VIII- Suggestions

The quality of the welcome and instruction we received cannot be overstated, and the work carried out by the CJEU’s protocol directorate was excellent. The duration of the course, as well as the discussions organized, enabled us to gain an in-depth understanding of the functioning of the CJEU, and this would not have been the case with a purely academic approach. Carrying out this course in the company of a colleague from the French Conseil d’Etat and of other from the Belgian Conseil d’Etat also provided for very stimulating exchanges regarding previous experience.

One aspect that could be developed, in the interests referred to above of opening all the doors to the castle, would be the organization, in the form of practical work, with a judge from the Court of Justice or from the General Court, or indeed a law clerk, of a reading and discussion of a recently-pronounced ruling. We had the chance to carry out such an exercise with a judge from the General Court with regard to a case for which he was a judge rapporteur and the resulting very concrete exchange was a useful addition to our overview.