Identification of the participant

Nationality: Belgian

Functions. Councillor of State

Seniority: 5 years

Identification of the internship

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

City: Luxembourg Plateau de Kirchberg

Country: Luxembourg

Dates of the internship: from 19 to 30 November 2018

RÉSUMÉ

In November 2018, the European Court of Justice (CJEU) was my host jurisdiction for a period of two weeks in the framework of an exchange programme organised by the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union. I participated in this internship with 3 colleagues of the Belgian Council of State, including another Councillor of State, 2 auditors of the Belgian Council of State, and 2 colleagues

Activity co-funded by the Justice programme of the European Union
from the French Council of State. In total, we thus formed a group of six participants.

In my request for admission I had specified that, given the growing number of requests for preliminary referral in procedures on the merits before the Council of State relating to matters of public finance law, I was particularly interested in the procedure and the technique of preliminary referral and the “dialogue” which may arise between the Court of Justice and the national judges with regard to the application of Community law (and its actual effect) in national law via the technique of preliminary questions.

Thanks to the oral pleading sessions which I was able to attend, it became even clearer that the task of the national judge in the drafting of their decision of referral for clarification by the Court of Justice was very important, with regard to the precise context in which the preliminary question is posed and to the extent to which it is judicious to give the largest amount of information possible; and above all to be precise concerning all of the elements to which reference is made in article 94 of the Rules of Procedure of the Court of Justice of 25 September 2012 and to even go beyond this, by giving, if applicable, their own point of view and the questions/consequences which may later arise.

Particularly instructive in this respect was an oral hearing which took place on 21/11/2018 in the case C-620/17 concerning a preliminary referral involving the fact of knowing if a ruling (in the case C-218/11) of the Court of Justice rendered in response to a (previous) preliminary referral in the same proceeding may, according to national law, be categorised as a “new fact” in the context of a later jurisdictional appeal before the national courts, having as its object the revision (extraordinary appeal proceeding) of a jurisdictional decision regarding non-compliance with Community law of public tenders, failing which it seemed impossible (according to national law) to take into account the ruling C-218/11 which had been rendered by the Court. If applicable, there would exist, according to the applicants, a sufficient breach to invoke the responsibility of the Member state concerned for having violated Union law, with the latter violation being attributable to one of its national jurisdictions (cfr. the Köbler jurisprudence).

I also gained greater knowledge of the operation of the CJEU and of the proceeding itself, up until the final drafting of the Court’s ruling. The practical view which we obtained of the interaction among the actors in the case (the parties in the framework of a referral procedure, the opinion of the Commission, etc.) and then among the actors of the Court (the legal secretaries, the advocate general, the judges) was very enriching.
APPENDIX
GUIDELINES FOR DRAFTING THE REPORT

I- Internship programme

During the first two days of our first week or our internship, we were able to join a wider group of national magistrates from all member states of the Union who were participating in the annual training programme “Forum of Judges”, which has the aim of familiarising the national judges with the work of the European Court. In the second week, we were able to join a group of French judges who were following the internship programme of the Ecole Nationale de la Magistrature.

Over these two weeks we participated, among other things, in a general presentation on (1) preliminary referral and recent jurisprudence on the procedural aspects in this context (on 19 and 26/11/2018), (2) the field of application of the Charter of Fundamental Rights of the European Union (19 and 26/11/2018), (3) the news and the recent jurisprudence of the Tribunal of the European Union, etc. (see infra.)

During our stay, we also had presentations on multilingualism and the role of the jurist-linguist, on the research methods and tools, the Curia website, and the relations between the CJEU and the media. Finally, we visited the library and the buildings of the Court and the Tribunal.

On 21 November 2018 I participated in a workshop on the theme “Combating abuses (tax law, consumer law, employee secondment), which I chose from among three proposed themes. The workshop was hosted by a judge, the President of the Court Chamber, and also by a national judge. Reference was made to the current jurisprudence of the Court of Justice on the notion of “abuse of rights”, including the ruling of 06 February 2018 in the case C-359/16 rendered on the preliminary referral of the (Belgian) Court of Cassation concerning the interpretation to be given to articles 14, point 1, sub-paragraph a), of Regulation no. 1408/71 and 11, paragraph 1, sub-paragraph a), of Regulation no. 574/72.
Over the two weeks, our ACA group was hosted for privileged contact with multiple members of the Court and advocates general.

Finally, over our stay, we also attended multiple hearings of the Court of Justice and the Tribunal, each time preceded, just before the hearing, by an excellent explanation by a legal secretary and the opportunity to ask questions.

- 20/11/2018: oral pleadings in the case C-616/17 (Grand Chamber) concerning a preliminary referral relating to the validity of Regulation (EC) no. 1107/2009 of the European parliament and Council of 21 October 2009 concerning the marketing of plant protection products, repealing directives 79/117/EEC and 91/414/EEC of the Council regarding the prudence principle. The applicants accuse the mentioned regulation of a shortcoming in that it does not permit the attainment of its main purposes, notably to guarantee a high level of protection to human and animal health and to protect the population and its vulnerable people, notably pregnant women, infants and children. According to the applicants, the regulation violates the prudence principle, since the system which it implemented cannot ensure that the industry demonstrates that the substances or products manufactured or marketed have no harmful effect on human or animal health, nor any unacceptable effect on the environment. The preliminary question was posed in the context of a national criminal procedure; the response of the Court on the validity or invalidity of the said Regulation could have, if applicable, an impact on the level of the criminal sanction imposed upon the accused persons, who claimed to have acted through necessity.

- 21/11/2018: oral hearing in the case C-620/17, already mentioned supra

- 22 November 2018: oral hearing in the case C-649/17 in the context of a preliminary referral relating to the interpretation to be given to article 6, 1, c) of Directive 2011/83/EU of the European Parliament and Council, of 25 October 2011, relating to consumer rights, amending Directive 93/13/EEC of the Council and Directive 1999/44/EC of the European Parliament and Council and repealing Directive 85/577/EEC of the Council and Directive 97/7/EC of the European Parliament and Council. The central legal question is to know whether the words “where they are available” in article 6.1., c) may be interpreted in the sense that this provision allows a (wide) discretionary power to the professional to choose the (and thus to inform potential clients) - in addition to their
geographical address - method(s) of communication which are used to come into contact with their client, as long as it is a rapid and efficient means, or if the professional is, in fact, obliged to inform the client not only of their geographical address but also of their telephone number, fax number and email address from the moment that their methods of communication are available on their professional website; notwithstanding the fact that other methods of communication may be used.

- 27/11/2018: oral hearing in the (historical) case C-621/18 (Full chamber) bearing upon the ruling of 10 December 2018 of the CJ where the latter ruled that article 50 of the TEU must be interpreted in the sense that when a Member state has notified to the European Council (in compliance with this article) its intention of leaving the European Union, said article permits such Member state, while a withdrawal agreement concluded between said Member state and the European union has not entered into force (or, failing such an agreement, while the timeframe of two years laid down in article 3 of said article, possibly prolonged in compliance with said paragraph, has not expired) to unilaterally revoke, in an unequivocal and unconditional manner, such notification by a written notification addressed to the European Council, after the concerned Member state has taken the decision to revoke in compliance with its constitutional rules. Such a revocation has the object of confirming the membership of said Member state of the European Union in the same conditions as its previous Member state status, with such revocation ending the withdrawal procedure.

II- The host institution

The CJEU is the highest jurisdiction of the EU judicial system. One of its main tasks is to respond to preliminary questions posed by national courts of the Member States (in 2017: 533 of 739 cases initiated, that is an increase of +13% with respect to the previous 2016 record 2016). For obvious reasons, this is the aspect which interested me most. The Court of Justice also deals with appeals in cassation against judgements of the European Union Tribunal. It is also competent to take provisional measures. The Court is essentially a general administrative court, competent to hear appeals formed against the decisions of the European institutions. Indeed, the European Union Civil Service Tribunal
ceased its activities on 01 September 2016, the date upon which its competences were transferred to the Court. It is interesting to note that in 2017 only 39 of the 917 cases introduced before the Court concern “State Aid”, then 346 cases concerning “Other direct appeals” (including restrictive measures, right of access to institutional documents, etc.), 38 cases regarding “Competition”, 86 cases for “Civil service,” 298 cases concerning “Intellectual property,” and finally 110 cases on “Special procedures.” The Court is comprised of a president, a vice-president and (currently) 44 other judges. There are many similarities with a national administrative court such as the Belgian Council of State. During my stay, it was clearly apparent to me that there were also significant differences; today, for example, there is no advocate general appointed at the Court.

III- The law of the host country

Over my internship, I was in the first place particularly interested in preliminary referral, the preferred mechanism of co-operation between the national jurisdiction and the Court of Justice. We attended two conferences on this topic. The Court emphasises its desire to initiate a dialogue between the Court and the national jurisdiction. The preliminary referral has a triple objective: 1° the interpretation of Union law in order to have a sole interpretation in the whole of the Union, 2° the possibility to evaluate the validity of an act of the Union through a centralised decision (of the Court) since the preliminary question is a method to allow the litigant to contest the validity of an act of the Union and thus - it must again be highlighted –, 3° to provide the litigant with effective legal protection. Given that the Court may not rule on the referred decision unless Union law is applicable to the case as a main cause, it is obviously indispensable to state all the relevant factual and legal elements which cause the referral judge to consider that the provisions of Union law may apply in this case. Drafting a referral decision is a painstaking piece of work which requires precise and meticulous explanation, without superfluous elements. Indeed, it must be taken into account that the referral decision serves as a foundation for the procedure before the Court, and that it is notified to all of the interested parties mentioned in article 23 of Protocol no. 3 of the Statute of the CJEU, and thus to all of the Member states. This means that the text will be translated into all the official languages of the EU. The referral decision may be synthesised by the (departments of) the Court, in the knowledge that it will be in any case translated in its entirety into French, the internal working language of the Court. As the Court mentions in its recommendations (Official Journal, C-257 of 20 July
2018) – and this was underlined multiple times during our internship – the referral jurisdiction is not only invited but encouraged to (succinctly) give its point of view on the response to be made. Such an indication turns out not only to be useful for the Court but also gives a real sense to the desired “dialogue” between the Court and the national jurisdictions.

In the context of “economic and fiscal” cases, which I regularly process at the Council of State, I was very interested by the jurisprudence of the Court and the Tribunal concerning, among other things, State aid. In this context, on 28 November 2018 I had the opportunity to attend an oral hearing in the case T-754/17, the object of which was a petition based on article 263 TFEU requesting the annulment of the decision (EU) 2017/2116 of the Commission of 27 July 2017, concerning the regime of State aid SA.38398 (2016/C, ex. 2015/E) implemented by a Member state. After a sectoral study, the Commission made it known to the concerned Member state that it categorised the tax regime in force as State aid (exoneration of corporation tax for the ports) and specified the reasons for which it considered this as being incompatible with the internal market. After an exchange of observations, and having noted that the response of the Member state concerned did not constitute an unconditional and clear acceptance of the proposal of useful measures, the Commission initiated the procedure laid down in article 108, §2, TFEU, in application of article 23, §2, of Regulation (EU) no. 2015/1589 of the Council of 13 July 2015 ‘laying down application procedures of article 108 TFEU’. On 27 July 2017, the Commission adopted the final decision concerning the aid regimes no. SA.38398 (2016/C, ex C/2015/E, which is the contested decision (Official Journal 14 December 2017), ordering the Member state, in the timeframe laid down by the Commission, to remove the tax exoneration for the companies in question and to subject those companies and entities benefiting from such exoneration to corporate tax. At the heart of the legal debate, among other things the interesting question arose of the admissibility of appeal for annulment, namely if the applicant was directly and individually concerned by this decision, to which it was not a party. According to the Commission, a company may in principle only appeal a decision of the Commission bearing upon a regime of sectoral aid if it is concerned by this decision due to its belonging to the concerned sector. At the time of the decision, the sector concerned did not comprise a “closed circle” in the sense of the jurisprudence (e.g. Montessori) and the company could not avail of an acquired right to the maintenance of the tax regime in force. Other interesting legal questions were also posed, notably: the interaction between access to administrative documents of the Commission in the context of a sectoral
investigation and the defence rights of the applicant (for more information, see case T-39/17); and the question of knowing to what extent the tasks of a (maritime) port must be considered as “services of general (economic) interest”, accompanied, if applicable, by the obligations of public service and/or commercial activities.

IV- The comparative law aspect of your internship

There are many similarities between the Council of State and the Court. Indeed, both jurisdictions have the power to annul judicial acts; they have the same approach concerning questions of admissibility, processing the grounds invoked, etc. However, significant differences exist:

1. The absence of an advocate general’s office or an advocate general (with the exception for example T24/90);
2. There is (thus) no report from an auditor or an advocate-general prior to a oral pleadings (and the making of it available to the parties followed by a final statement of case) in which the auditor already formulates a position concerning the exceptions and the grounds invoked;
3. After the oral hearing, the parties only have a “hearing report” in which the judge rapporteur details the facts, as well as the questions of admissibility and the grounds raised. In this hearing report, the divergent positions of the parties are clearly detailed, as well as the legal questions submitted to the Court;
4. Another divergent point is the hearing of the case in itself, which is remarkably interactive, both at the Court of Justice and at the Tribunal. Multiple judges participated in the discussion and asked questions. At the Belgian Council of State (in principle) less questions are posed and, if applicable, they stem mainly from the president of the court or the judge rapporteur. It is true that, possessing a report from the advocate general’s office and having already been able to react in written form in the latest statement of case, most of the questions have already received a written response or reaction of the parties concerned;
5. We also realized the importance of the role of the president in the processing of cases before the Court of Justice. It is also the prerogative of the president to designate the judge rapporteur on the basis of objective criteria (such as the specialisation, the workload, etc.);
6. the first advocate general designates the advocate general who will process the case. The system (point 5 and 6) does not however meet with unanimous approval, as some people prefer the concept of the “legal judge.” However - and it must not be overlooked - it is indeed during the general meeting “on Tuesday” that the Court, on the basis of the preliminary report, decides if the case shall be heard by a chamber of 3, 5 or 15 judges or, if applicable, in full bench (e.g. case C-621/18 - the possibility of a unilateral revocation of the notification of the intention of a member state to withdraw from the EU);

7. furthermore, a significant difference also resides in the fact that the conclusions of the advocate general are only pronounced after the hearing, without there being (provisional) conclusions made available to the parties in advance. In Belgium (cfr. supra) the report of the auditor is part of the debate;

8. finally, there is no cabinet of judges at the Council of State. The auditors - the legal adviser’s office is comprised of a body of magistrates who are wholly independent with relation to the Council of State - are allocated to a matter/case and not - like the legal secretaries at the Court - to a judge.

Finally, another highly interesting aspect of comparative law is the fact that the technique of preliminary referral provides a view of the other legal systems of the Union’s Member states and/or the discovery of other legal concepts leading to the research of points of comparison in national law, such as the “declarator” in Scottish law (C-621/18), categorised by the Court as a “declaratory judgement”, which seems to correspond to a legal concept known in Belgian law (e.g. the recognition by the judicial judge of the existence of a subjective right of a litigant, or the recognition, in the order of a court, of their capacity (e.g. their nationality).

V- The “European” aspect of your internship

With the CJEU being my host institution, I had the privilege of experiencing a multitude of aspects of European law. It was very instructive to dive into European law full-time over two consecutive weeks. Not only were we invited to attend multiple hearings (cfr. Supra), we also each time benefited from interesting presentations and interpretations in the light of the jurisprudence and its recent development.
Here are two examples from among many, concerning:

1. the interpretation to be given to the notion of a “regulatory act” in article 263, fourth paragraph, TFEU since the Lisbon Treaty and the interference with the notion of “limited circle” (ruling of 6 November 2018 in the combined cases C-622/16 P to C-624/16 P);
2. the notion of a “purely internal situation” through the rulings Dzodzi 297/88 in C-197/89, Dereci (C-256/11) and Ullens de Schooten (C-268/15).

In addition, the numerous lectures were presented to clarify to us not just the operation of European justice (general presentation of the Court and the Tribunal; presentation on multilingualism and the role of the jurist-linguist, the role of the research and documentation department and of its research tools (cfr. supra), but also of the various domains of European substantive law, such as “the space of liberty, security and justice” (asylum and migration), or presentations (including one by the president of the court) on the field of application of the Charter of Fundamental Rights of the European Union.

VI- The “good practices” aspect of the visited jurisdiction

The preliminary report (see article 59 of the rules of procedure) drafted by the judge rapporteur certainly constitutes a good practise within the CJEU and it may also be useful to introduce it before the highest jurisdictions of the Member states. In this report, the judge rapporteur proposes the chamber (3-5-15 or full bench) to which the case will be allocated, specifies whether a request for clarification is sent or not, and if the opinion of the advocate general must be requested and/or a hearing should take place or not. This technique seems to me not only to be a guarantee of the coherence of the jurisprudence but also a guarantee for a large consensus concerning new developments which may be widely supported.

VII- The benefits drawn from the internship

As indicated above, it was very instructive for me to immerse myself in European law over two weeks. The acquired knowledge of the developments in recent jurisprudence in various domains or concerning the technique of preliminary
referral will certainly be useful for my practise as a national judge, and thus “ordinary court” of the Community legal order. The exchange programme gave me the opportunity to have a better idea of what happens at the Court after the referral decision, which will be very useful to me in future cases where preliminary referral is required.

VIII- Suggestions

The exchange programme was very well organised by the Department of Protocol and Visits. Before the start of our stay, we had already received a detailed programme, which was adapted and improved according to our own wishes. I am very grateful to the president, the judges and the advocate general for having spent a part of their precious time with us, and to have shown a sincere interest in our discussions. The several meetings which the ACA group was able to have with the judges of the Court and the tribunal were particularly instructive; they enabled us to ask questions on the operation of the Court and the challenges for effective and efficient European legal protection, but also on the administrative jurisdiction of their country of origin. The same applies to our exchanges with our colleagues of the French Council of State.

In this respect, it would be desirable that the national origin of the participants in the internship be more diversified, even if this diversity partially depends on chance and circumstances. Finally, a suggestion for the future consists in organising a practical seminar on the drafting of a referral decision on the basis of “Recommendations to national jurisdictions regarding the opening of a preliminary procedure.”

Lastly, I would like to join my colleagues in thanking the personnel of the Department of Protocol and Visits for its detailed programme and for its very hospitable welcome. In short, an unforgettable experience which I can heartily recommend to my colleagues of the various Member states of the Union.