TRAINEESHIP REPORT AND SUMMARY

Identification of the participant

Nationality: Belgian
Position: auditor at the Belgian Council of State
Seniority: 10 years

Identification of the traineeship
Host institution/court: Italian Council of State
City: Rome
Country: Italy
Dates of the traineeship: 14 - 25 October 2019

SUMMARY
In October 2019, the Italian Council of State was the host court for the 2-week traineeship that I could attend thanks to the exchange programme organised by the Association of the Councils of State and the Supreme Administrative Courts of the European Union (ACA-Europe).

This report includes the traineeship programme (I), and a description of the host institution (II). The report then clarifies a matter of principle highlighted during the traineeship, concerning a type of appeal specific to the Italian system protecting the litigant against the acts of the administration, the ricorso straordinario al Presidente della Repubblica (extraordinary appeal brought before the President of the Republic against an administrative act) (III). It then discusses the representation of the State before the Italian administrative courts, i.e. the Avvocatura dello Stato (IV). The report then dwells on the protection of fundamental rights by the Italian administrative courts (V), concluding with the “good practices” (VI), the review of the traineeship (VII), a suggestion and acknowledgements (VIII).

TRAINEESHIP REPORT

I. Traineeship programme

The traineeship programme was very diverse, giving me a complete overview of the organisation and operation of the administrative courts in Italy. Additionally, the first week of my traineeship coincided with that of some colleagues, including judges from Austria, Finland and Poland, which allowed me to grasp the operation of the administrative courts of these other countries as well.
This programme consisted of theoretical sessions, with different consiglieri, concerning the Italian legal system, jurisdictions and the organisation of the Italian Council of State, interpretation of the concept of legitimate interest of the appeal or the pleas submitted, protection of fundamental rights in administrative litigation, enforcement of decisions of the administrative court, contribution of the Italian Council of State in the regulatory training process, the azione di ottemperanza (which aims to obtain the enforcement of judgements by injunction), etc. These discussions led to an interesting exchange of views, both with the different members of the Italian Council of State, and with my co-trainees. During the traineeship, I was able to attend the hearings of different judicial sections, through which I learned about a wide variety of disputes and work methods practiced by these different sections. I was also given the opportunity of attending an advisory session dealing with the ricorsi straordinari al Presidente della Repubblica (extraordinary appeals brought before the President of the Republic against an administrative act; see below). The schedule allowed me to attend a session of the General Assembly, in which the consiglieri discussed the conditions of admissibility of such extraordinary appeals (see below).

The programme included two visits to institutions extra muros. During a visit to the Tribunale Amministrativo Regionale (T.A.R.) of Lazio-Rome, I could attend a preliminary hearing, after being received by the President of the T.A.R. I visited the Consiglio di Presidenza della Giustizia Amministrativa, the self-government body of magistrates of the T.A.R.s, of the Consiglio di Giustiza Amministrativa per la Regione Siciliana and the Italian Council of State. On the last day of the traineeship, I even had the opportunity of attending a part of the Consiglio di Presidenza della Giustizia Amministrativa session open to the public.

I also had the opportunity of participating in the ACA working group seminar called “Better Regulation”. There, I met many judges of other European countries and could participate in the discussions, which certainly gave the exchange a more international dimension.

Finally, the programme included a guided cultural tour of the prestigious building housing the registered office of the Italian Council of State, called the Palazzo Spada and the neighbouring museum, the Galleria Spada.

II. The host institution: the Italian Council of State

The Italian Council of State has a dual function, i.e., an advisory and judicial mission, as prescribed by Article 100 of the Italian Constitution.¹ Under its judicial role, the Italian Council of State has the dual mission of advising on legal and administrative matters and overseeing the administration of justice.

¹ Article 100 of the Italian Constitution states the dual mission of the Italian Council of State:
“100. The Council of State is an advisory body for legal and administrative matters and oversees the administration of justice.”
Council of State has become the Court of Appeal and the court of last instance since the regional administrative courts (T.A.R.s) were established, in 1971.

The two missions are carried out by seven sections within the Italian Council of State, of which two sections have an advisory mission and five sections have a judicial mission. The advisory mission is divided in a sezione normativa, which renders a non-binding opinion on certain draft laws, and a sezione consultiva, which renders a binding opinion concerning the ricorsi straordinari al Presidente della Repubblica (extraordinary appeals brought before the President of the Republic against an administrative act; see below). The judicial mission is overseen by five sezioni giurisdizionali and consists mainly of ruling in appeal on the T.A.R.s. judgements. The litigants have many types of remedies that they may exercise – first before the T.A.R.s, then in appeal before the Italian Council of State – such as the application for annulment, the application for conviction, the appeal against the silence of the administration and the appeal for nullity. Additionally, they have the azione cautelare, which aims at obtaining precautionary measures on an emergency basis, and the azione di ottemperanza, aiming at obtaining the enforcement of judgements by injunction. The Code of Administrative Procedure (Codice del processo amministrativo), which came into effect in 2010, is a compilation of and replaces a lot of legislative and regulatory texts, confirming the role of the Italian Council of State as the head of the administrative justice system and governing the said judicial administrative procedures, as well as the enforcement of judgements and rulings of the administrative court.

The Italian Council of State is chaired by the President and the Vice-President and has approximately 115 consiglieri, including 24 section Presidents. Under the judicial function, the panel consists of five councillors; a Adunanza plenaria (plenary assembly), with judicial functions, consists of the President and 12 councillors, while the Adunanza generale (general assembly), with advisory functions, consists of all the magistrates of the Italian Council of State and the Consiglio di Giustiza Amministrativa per la Regione Siciliana.

III. The law of the host country: ricorso straordinario al Presidente della Repubblica

During my traineeship, I could attend an advisory session which gave opinions on a type of appeal specific to the Italian law, the ricorso straordinario al Presidente della Repubblica. The Italian law states in Article 103 of the Italian Constitution defines the extent of the jurisdictions of the Italian Council of State: “103. The Council of State and other bodies of administrative justice have jurisdiction to ensure the protection of legitimate interests before the public administration and subjective rights in specific matters determined by the law.” As in Belgium, the rulings of the Italian Council of State can only be challenged before the high-instance court on grounds of jurisdiction.
Repubblica. I also had the opportunity to attend an Adunanza generale which addressed a question of principle concerning this type of appeal.

It was an appeal that the applicant can make to the President of the Republic. This appeal is brought against any administrative decision, all levels of authority included. The appeal guarantees broad access to the Council of State and can be introduced without a counsel and within a period of 120 days from the day of notification of the contested act. The procedure also allows for the application for suspension and is so similar to the application for annulment that certain applicants forego the period of 60 days to lodge such an appeal and indirectly lodge an extraordinary appeal before the President of the Republic. The Italian Council of State issues an opinion binding on the President, which is semi-judicial.

From a historical point of view, this extraordinary appeal was designed as a purely administrative procedure. Over time, this type of appeal has become more and more like a judicial appeal, which is due, amongst other things, to the influence of the European case-law concerning Article 6 of the ECHR.

Initially directed against the decisions of the central administration, the extraordinary appeal, at present, by evolution of the structure of the Italian administration, is often directed against the decisions of the regional administrations. Hence, the applicant is supposed to direct their appeal against the Minister of the Federal State, and then involve the regional administration in the procedure.

In the specific case which gave rise to a question of principle before the Adunanza generale, the applicant challenged a decision of a regional administration. He had directed his extraordinary appeal against the Federal Minister in the allotted period, but informed the regional administration only after a period of 120 days. The question thus raised was whether the extraordinary appeal was admissible or not.

Since this was a question of principle, it was referred to the Adunanza generale, which discussed it in a session that I was able to attend. Since one of the consiglieri had presented a draft text, a lively discussion took place before the Adunanza generale, where many consiglieri and the President of the Italian Council of State presented their point of view. Finally, the consiglieri highlighted the original reason of this extraordinary appeal, i.e.: an informal method of administering justice, without lawyers, but also without the same guarantees as those of the judicial procedure. Bearing this in mind, it was decided that from now on, the applicant can introduce his extraordinary appeal within 120 days, without having to inform the regional administration of the same.

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2 This is contrary, in principle, to judicial appeals brought before the administrative courts.
This was a particularly interesting discussion to follow because the opinions suggested that the question of principle dealt with a type of appeal specific to Italian law, which was close to the hearts of Italian judges and legal practitioners, and involved diverse sensibilities. It also showed how an administrative appeal can evolve into a semi-judicial appeal.

IV. The aspect of comparative law of your traineeship: the Avvocatura dello Stato

In the Italian system, an applicant before the Italian Council of State is obliged to be represented by a lawyer, with some exceptions. In Belgium, an applicant may proceed before the Council of State without a lawyer, except in case of a high-instance appeal.

During the hearings, I was able to note that the administrations that depend on the State are mandatorily represented by a lawyer of the Avvocatura dello Stato. This Avvocatura presents itself as a sort of law firm responsible for representing the Italian State.

Contrary to the Belgian situation, the legal departments of the ministries cannot, therefore, defend the State before the administrative courts. The Avvocatura is formally distinct and independent from the State, but is bound to it on an exclusive basis: only lawyers of the Avvocatura can defend the State before the courts and only the State can be defended by these lawyers. A certain lawyer who is not a member of the Avvocatura dello Stato, may be authorised to plead before the superior courts such as the Italian Council of State, but he will only represent the “other” applicants, and therefore can never represent an administration that depends on the State. In Belgium, a lawyer may represent the State in one case, and a natural person or a private legal entity in another case.

It was surprising to see that, during the hearing, the lawyer of the Avvocatura did not stand before the panel of Consiglieri, next to the applicant – as in Belgium –, but very close to the consiglieri, thus standing at the same level as that of the Italian Council of State, facing the applicant. This may give the false impression that the Avvocatura is closer to the Italian Council of State than the applicant, which may raise questions of equality of arms between the parties. However, the members of the Italian Council of State confirmed that this was not intended by the parties in question.

V. The European aspect of your traineeship: the protection of fundamental rights

During one of the theoretical sessions, I had the opportunity to discuss, with a councillor of the Italian Council of State, the question of protection of fundamental rights in Italian administrative litigation. This question was of great importance in the division of powers between the ordinary court, on the one hand, and the administrative court on the other.

For a long time, questions on fundamental rights have been ruled on by ordinary courts – which have jurisdiction over all matters concerning “subjective rights”. In this matter, the
Italian case-law decided that the administrative court – which examines questions of ‘legitimate interests’ – did not have adequate jurisdiction to rule on fundamental rights because ‘when the latter are at stake, there is no question of legitimate interests or decisions taken on the basis of the public authority’. Or, conversely: ‘when a decision is taken on the basis of the public authority, fundamental rights are not involved’. The Italian High-instance Court ruled, in particular, that the right to a healthy environment – that is, for example, at the heart of a discussion concerning the appropriate location for a nuclear plant – is the fundamental right of a citizen, which therefore has nothing to do with the public authority, such that the jurisdiction of the administrative court is excluded.

The Italian case-law progressively evolved, maintaining that the application of fundamental rights is inextricably related to the public authority, since fundamental rights may not be applied without an appeal to the public authority. In fact, a citizen cannot visit a hospital unless this hospital is authorised – if the public authority does not authorise it, the fundamental right to health cannot be exercised in practice.

This evolution of the case-law is also a result of the new role of the administrative court, which, under the influence of the European case-law, may offer more efficient protection to individuals. While, in the past, the administrative court could not decide on the annulment of an administrative act, they can now also award damages.

In 2007, the Italian Constitutional Court ruled that no rule gives an ordinary court jurisdiction over the protection of fundamental rights, excluding the administrative court. Since this pivotal year, the Italian Council of State has found itself to have jurisdiction over the protection of fundamental rights of citizens.

Currently, the Italian Council of State is faced with questions of fundamental rights in very diverse contexts on a daily basis: immigration, healthcare, anti-mafia laws, etc. Thus, in matters of immigration, the regulation concerning family reunification has been focused since a long time on the ‘nuclear’ family and requested that the people concerned be bound by a ‘civil union’. This posed problems for foreigners who applied for family reunification for people who were not their spouse, it being understood that till 2016, Italy had no laws on same-sex marriages. Since the European Court of Human Rights had decided on multiple occasions that family reunification cannot be limited to ‘nuclear’ families, the Italian Council of State reiterated in 2017 that the in concreto situation should be reconsidered, even if there is no question of matrimonial ties.

VI. The “good practice” aspect in the visited court

During my traineeship, I was able to observe that IT plays a major role in the work of the Italian Council of State. Thus, since 1 January 2017, the ‘telematic’ process (processo
amministrativo telematico, PAT) is generalised as an exclusive means to refer a matter to the Italian Council of State, submit exhibits and pleadings, and for any other exchange of correspondence. This helps in not only saving time in the processing of files, but also allows councillors of State, most of whom do not live in Rome and/or do not have an office in the Palazzo Spada due to limited space, to work from home. Additionally, during the hearings, each councillor of the Council of State is provided with a laptop and can draft the summary of its decision. It goes without saying that the modern and efficient IT system used within the Italian Council of State contributes to the performance of the Italian Council of State, which can deliver its judgements and decisions promptly.

What also surprised me was the efficient organisation of the hearings and deliberations. Here I would like to refer to the detailed report of my Belgian colleague, Ms M., who had done a traineeship with the Italian Council of State in 2011. Her descriptions and conclusions are still relevant.3

Finally, a last point that can be taken, is the limitation on the scope of the applications. In order to overcome the backlog, it was decided to limit the applications to 30 pages. This practice shows that this had a positive effect on the performance and efficiency of the procedures.

VII. Benefits of the traineeship

The traineeship offers a unique opportunity of observing from the inside an institution that is both similar and different vis-à-vis the original institution. The comparison of the organisation, jurisdictions, procedures and work methods contribute to better understanding of the Italian administrative litigation and developing a more comprehensive view of the administrative litigation.

At the same time, this comparison and the interactions with colleagues from Italy, Austria, Finland and Poland, have given me a deeper and more refined view of the legal and administrative system and the role of the Belgian Council of State. This particularly leads to the conclusion that the things that go without saying in your national legal system, cannot always be taken for granted. The specific status of the Italian Avvocatura dello Stato makes you think about the fact that – except in cases of a conflict of interest –, the Belgian lawyers may represent private litigants as well as the administration.

VIII. Conclusion, suggestion and acknowledgements

Finally, I would just like to reiterate the conclusion of various other reports of co-trainees: my participation in the ACA-Europe exchange programme has been a very enriching experience.

As a suggestion, I would like to reiterate that the simultaneous presence of judge-trainees from different European countries undoubtedly reinforces the international dimension of the exchange and contributes to the broadening of mutual knowledge. So, as much as possible, there should be more simultaneous traineeships with judges from different countries.

At the end of this report, I would like to thank ACA-Europe, which accepted my application for this traineeship and financed it, and the Auditor General L.V., and the First Chief Auditor of the section W.W. of the Belgian Council of State, for allowing me to be a part of this traineeship.

I would like to add my heartfelt gratitude to all the members and officials of the Italian Council of State, for being very warm and attentive hosts to me. Everyone guided me through their institution and their laws, taking the time out to explain the legal system to me and to answer all my questions, allowing me to share my own experience of Belgian administrative justice. I would like to particularly thank the First President F.P.G., who allowed me to attend the General Assembly of the Italian Council of State and the Consiglio di Presidenza della Giustizia Amministrativa, and to all the members of the Italian Council of State who were my mentors in each of the sessions that I attended, particularly the Section President R.G., who also guided me during the visits to institutions extra muros.

Finally, I would like to sincerely thank the Consiglieri diplomatico M.A., who planned and organised my visit and ensured its success, and the members of the Servizio relazioni internazionali, P.C. and W.D.D., who guided and helped me during these two weeks, which included an inspiring guided cultural visit (twice) to the Palazzo Spada and the Galleria Spada.