REPORT

Identification of the participant

Nationality: Italian

Functions: President of a Chamber at the Italian Council of State

Length of service: 29 years

Identification of the exchange

Hosting jurisdiction/institution: Court of Justice of European Union

City: Luxembourg City

Country: Luxembourg

Dates of the exchange: 18 to 29 November 2019
SUMMARY

The work-exchange I was involved in took place at the Court of Justice of the European Union in Luxembourg since November 18th to 29th of 2019, consisting of several meetings and discussions with judges of the EU Court and the General Court of different nationality as well as the participation to many hearings in which the Court dealt the main topics of the EU law. Furthermore the program of the exchange included visits to crucial offices of the EU Court, e.g. the Research and Documentation Directorate and the Library, allowing to know better those fundamental instruments of EU judges activity.

In the days of November 18th and 19th the exchange developed along with the participation to the General Meeting of Judges of the Supreme Court of the European Union. The following days were dedicated to the participation to the hearings and the visits and individual meetings above mentioned, according to a specific program provided by the Directorate of Protocol and Visits. Such program was made available some days before the beginning of the exchange, allowing me to know in advance the contents of the activities scheduled with the possibility to change one or more of them, choosing different hearings than those included in the program itself (a panel with the complete indication of the hearings scheduled in the two weeks of the exchange was also provided to me). I did not exploit this possibility, because at a first sight it seemed to me all of the hearings scheduled were of special interests to me for their subjects and parties. Such impressions was confirmed when I actually participated to those hearings, so I can tell the choice of the hearings included in the program was very wise and spot-on. Anyway the original program has had many changes also during the exchange itself. I shall try to attach to this report the most recent version provided to me.

The personnel of the Directorate of Protocol and visit has always been extremely courteous and helpful in receiving and helping me during the whole work-exchange, doing everything in their possibilities to make me feel not only a mere visitor but actually a “part of the family” itself. The decision to provide to me a workstation in the Court offices, endowed with PC as well as every kind of documents concerning generally the Court’s activities and the specific cases dealt according the program, had a main part in it, allowing me to spend the free time to deepen the knowledge of the host institution as well as to follow my personal work even during the exchange.

As a matter of fact I found this exchange very important not only for the widening of my knowledge of the EU Court’s activities (as well as those of all the EU Institutions), but also in order to acquire specific and useful tools in order to better carry out the activity in my home jurisdiction.
I. Programme of the exchange

I took part in an individual work-exchange at the Court of Justice of European Union in Luxembourg, along with a colleague of the Greek Council of State. The work-exchange took two weeks since November 18th to 29th of 2019 and allowed me to experience the different aspects of the activity of the EU Court, enriching my knowledge of it both under the theoretical and practical respect.

In the first two days of the exchange, we were involved in the General Meeting of Judges of the Supreme Courts of EU which annually takes place at the Luxembourg Court. This year, the subject of the meeting assumed as a starting point the tenth anniversary of the Charter of Fundamental Rights of EU in order to develop a wider reflection about the role of the EU Court and the Supreme Courts of member State, both acting individually and in their mutual relationship, in enforcing and strengthening the protection of the human rights all over the Union. In such process, it is crucial the research of homogeneity in the means through which European judges enact the above mentioned protection as well as in the level of protection of individual rights such means are able to reach.

Under this specific point of view, the exchange of experiences and opinions with colleagues of the EU Court and the Courts of different member States is extremely useful in order to pursue that horizontal cooperation which is a major objective of ACA Europe’s action at the current time. I am specially sensible to such themes, being involved in helping the President of Italian Consiglio di Stato in the organization of the meetings connected to the Presidency of ACA Europe, in which the Consiglio di Stato will be in charge since the beginning of 2020, with its interest focused right on the strengthening and development of horizontal dialogue between EU Supreme Courts as a way to pursue a deeper and more effective protection of the rights of EU citizens.

Among the subjects involved in the discussions in the two-days Meeting of 18th-19th November, what I found most interesting were those concerning the requirements for referring for preliminary ruling and the independence of National judges.

As for the first topic, being myself a member of a last-instance Court it is not difficult to understand the special interest I have developed about the jurisprudence of the EU Court involving the scope and borders of the preliminary filter the domestic judge is allowed to do before referring to the Court (with special focus on the analysis of previous EU Court’s judgements about the same topics, the cases of clear interpretation of EU law, and so on). This represents a crucial point for Italian judges, in that they are trending to referring for preliminary ruling more and more frequently in the last years, due to many reasons including the special insistence of the parties of the case on that (especially in specific matters, e.g. public procurement) and the most recent domestic legislation about civil liability of judges. During the discussion I appreciated the wideness with which the problem is perceived in many member States apart from Italy, in that the distinction the EU Court often uses in the instructions addressed to the domestic judges isn’t always fully able to solve the doubts the latter may have in single cases. More specifically, it isn’t simple to trace a definite border between interpretation of EU law, for which referring for preliminary ruling is mandatory for last-instance domestic judges in presence of doubts, and enforcement of it, which is always up to domestic judges. On this specific topic, I found very useful the confrontation with single EU judges during the meetings we had with them. More specifically, those meetings helped me to understand the reasons why references for preliminary ruling are in many case declared inadmissible, even following simplified and not totally guaranteed procedures. In my opinion, it is necessary to know the working of the EU Court in every passage and the way and times with which they deal the cases coming from the
national jurisdictions to fully appreciate such peculiar issues of the Court, which often arise doubts and bewilderment among Italian judges.

As for the second matter above mentioned, it was very interesting to compare the different visions and experiences of the member States about the requirements for independence of judiciary body, considering the different historical and constitutional contexts. Apart from the obvious interest for the way the EU Court emphasizes the different and specific respects under which the theme may be faced (relating the relationship between judiciary and other powers of the State, the absence of interest of the judge in the specific case or of involvement with the parties of it, and so on) and the attention for the way judges’ independence may be endangered even in some EU States at the present time, Italian legal order is traditionally distinguished for a difficult relationship between magistracy and political power, so that in many cases judges’ independence has been held — rightly or wrongly — at risk due to specific initiatives of the government (e.g. the already recalled recent law about civil liability of judges).

Last but not least, I found interesting the meeting with judges of the General Court, who submitted to the audience some specific problems concerning cases about the protection of environment. Considering my job as an administrative judge, in charge for the legitimacy review of administrative acts challenged by private citizens and bodies in the Italian system, one can easily understand why I’ve been interested and puzzled by the way EU jurisprudence has not completely solved questions concerning the protection of collective interests like the environmental protection and the possible identification of bodies who may be allowed to challenge acts damaging those interests (matters on which Italian law has adopted peculiar solutions since more than 30 years now).

The General Meeting ended on November 19th with our participation to the Grand Chambre hearing concerning a preliminary ruling referred by the French Court de Cassation during a case involving the City planning of Paris, more specifically the part of it which introduced limitations to the possibility of short-duration lease of apartments located in the City Center, with the aim to prevent the proliferation of such contracts with consequent increasing difficulties in finding apartments available in that zone and increase of market prices of them. Many member States participated to the hearing, showing the wide interest aroused by the matter; the question posed by the Court de Cassation was related to the possible conflict between French law which allows to issue such restrictive provisions in the seat of City planning and the Directive (2006/123/EC) about the freedom to provide services in the EU territory. During the discussion, however, another perspective emerged in that some judges speculated that the provisions in question represented in fact limitations to the faculties connected to the right of propriety and not to the freedom to provide service (those provisions were in fact essentially addressed towards non-professional leasing operations enacted by private citizens on apartments they own and in which they don’t reside).

The hearings we participated in the following days, as well as the first before the Grand Chamber, were always preceded by a short “briefing” enacted by one of the referendaires of the judges which made up the Chamber in charge for the case. During those briefings, for which we were associated to groups of students, lawyers and other operators visiting the Court for the single day, the fact of the case was shortly summed up and the main theme of the questions submitted to the Court were synthetically examined (anyway, I often had the possibility to read myself the reference for preliminary ruling and the connected documents the day before on the Curia database to which we could accede during the free time for study).
The following hearings took place before 5 judges Chambers (except for the last day of the exchange, when we participated to an hearing of the General Court) and involved – as already underlined above – themes of peculiar interest for my judicial past and present experience. The matters concerned were the possible violation of EU law about State aid measures related to economic benefits recognized in favor of fishermen operating in a zone interested by bad weather events (preliminary reference by French Conseil d’Etat), the possible conflict between some provisions of Directive 2001/83/EC and German law by which pharmacists were allowed to receive free samples of medical products from the producers “for demonstration purposes” (preliminary reference by the Bundesgerichtshof), the possible liability of the operators of Internet video platforms in presence of publications of contents which are covered by copyright without the consent of the right-owners, according to the Directive concerning the protection of copyright (preliminary reference by a German Court), the enforcement of judicial decisions concerning maintenance obligations issued in different member States according to EU law (preliminary reference by German Amtsgericht), the legal status of Italian Judges of Peace and the assumed necessity to qualify them as subordinate workers according to EU law definition (preliminary reference by Italian judge of peace), the challenging of restrictive measures issued by EU against Iran by some citizens (hearing of the General Court).

The meeting we had with several judges of EU Court and General Court, including the President of EU Court and the Advocate General, helped me to gain a full knowledge not only of procedural rules but also of the specific ways in which the Court works, and every single passage of the process of instruction and examinations of the references coming from domestic judges since the moment they reach the Court offices. Talking with the President of EU Court helped me to understand the complex role the chairman plays in ruling the judges’ discussion before and after the hearing, and how it is possible to take in account the contributions coming from each judge of the Chamber interested and operate a synthesis of different opinions in the final judgement (the peculiar way the Court’s judges use to study and discuss and decide the cases explains much about what at first sight may look like strange features of EU Court judgements in the eyes of national judges). Talking with the Advocate General helped me to understand the precise role he plays in the preliminary studies of the case and the preparation of the judgement (the formula “amicus curiae” we read in books isn’t fit to fully explain the real contributions of the A.G.). Talking with the judges’ referendaires helped me to appreciate the peculiar ways in which the preliminary study of the case and the case law research are held, and the enrichment deriving from being the judge rapporteur helped by more assistants who contribute to the preparation of the judgment and confront with him (this is a specially enviable feature for me as a judge operating in the Italian context, in which the traditional lack of human and economic resources causes the judges being totally alone in studying and preparing the case as well in writing the final judgement).

II. The hosting institution

The Court of Justice of European Union was instituted by EU Treaties in order to ensure the enforcement and effectiveness of EU law all over the member States, acting through a peculiar and clever system of cooperation with the domestic judges. In fact, the EU Court’s judgements are about two main topics: infringement procedures started by the EU Commission against member States
charged with violation of EU law and references for preliminary ruling coming from domestic judges. The analysis of the latter is most interesting and effective for both the enforcement of EU and the enrichment of knowledges and instruments every National judge must possess in order to guarantee full respect of the so-called primauté of European law on domestic law.

More recently, the General Court was instituted with the task to deal cases concerning the challenging of acts issued by EU Institutions, when private citizens and bodies hold they damage their rights and are illegitimate, as well as cases concerning the employment relationship of the personnel who works for the EU Institutions. Since the start of General Court’s activity, EU Court has acquired a third main task, acting also as a second-instant judge competent on appeals against the General Court’s judgements.

EU Court is made up of 27 judges, one coming from each of the member States of EU but not representing the National governments (though they’re designed by it) and acting only in the interest of EU law enforcement. It is interesting to notice that, while in the tradition of some member States (including Italy) the judges designed by the government are selected among well-known academics or lawyers, in other member States they may be also domestic judges: that happens e.g. in Greece, and so the Greek judge we met was in fact coming from the same jurisdiction my colleague engaged in the exchange belongs. Instead, personnel of the General Court has been increased very recently, and now it’s made up of two judges for each of the State members (in fact, 54 judges).

Peculiar is the way the cases coming from member States are dealt. First of all, each reference coming from a domestic judge is sent to the staff of translators operating at the Court to be translated in every EU language, as well as the attached documents; this first step is fundamental to ensure the full understanding of the matter involved by each of the judges of the Court, though the case will be discussed in the language of the Country of origin. At the same time, the reference and the attached acts are sent to the judge rapporteur, who cares to prepare a synopsis of the case and the question involved to be submitted to the General Meeting of the judges and Advocates General. In that, as well as in every following step of the study and preparation of the case, the judge in question – who is designed by the President in compliance with given criteria (e.g. he cannot have the same nationality of the referring judge) – is helped by one or more referendaires, like already noticed above.

The General Meeting is a crucial moment in the preparatory phase of the hearings for two reasons: at first, the synopsis written by the rapporteur is submitted to all the judges of the Court, and each one of them may contribute to the decisions to be taken (the same is for the Advocates General, as well as for the one of them who’s appointed for the single case); secondly, that’s the moment in which the whole assembly decides the composition of the Chamber which’ll deal each single case, if it’ll be a 5 judges Chamber, a 3 judges Chamber or the Grand Chamber. That decision is very relevant, including a first opinion on the merits of the case in that the Grand Chamber is competent for the questions of interpretation of EU law most relevant for the enforcement of it, while the 3 judges Chamber is usually chosen for the references doomed to be declared inadmissible following a specific and faster proceedings (not including necessarily the public hearing with the presence of the parties). It is important to underline that not every reference coming from domestic judges is dealt in a public hearing: not only for what I’ve noticed above, but also because the hearing takes place only if the parties of the case ask for it and the Court holds it’s in fact opportune or necessary.

Peculiar is also the enactment of the hearing itself. The lawyers of the parties – who are the parties of the case in which the reference has been aroused, the government of the State of the case, the
government of other member States interested in the matter which can participate and the EU Commission – are enabled to explain their position in a given time, after which each judge of the bench as well as the Advocate General can ask questions to all the parties or some of them (practically, it happens that some question are anticipated to the parties by the Court in order to address the discussion straight). Once that phase is ended, each party has the possibility to do a very short final reply. Then, the President of the Bench asks the Advocate General to communicate the date when he’ll present his conclusions, and he does so. Till that day, no one of the judges and parties involved will talk about the case any more.

Advocate General’s conclusions have the task to prospect a possible solution for the case, with the answers to the questions posed by the referring judge. They are not compulsory for the Bench in its decision, but if it diverge from them it’s necessary to explain in the judgement the reasons why the A.G.’s opinion is not shared by the Court.

The final decision is taken in the following discussion who takes place after the A.G.’s conclusions. It is important to notice that EU Court’s system doesn’t contemplate any “dissenting opinion”, so that the judgement issued in the end is the result of the decision of the majority of judges involved (that’s no surprise for me, being the ordinary system adopted by all the Italian jurisdictions, including Consiglio di Stato e Corte costituzionale). Most remarkable is also the way the judgement is written, being it sent by the judge rapporteur to all the colleague of the Bench, each one of whom can propose changes or additions before the issuing, so that the final result is an effective result of real collegiality (in that phase the role of the President in essential in pursuing a clear and coherent synthesis of the different opinions coming from judges having different cultures and ways of thinking).

III. The European aspect of your exchange

The clear and complete knowledge of the working of the EU Court is crucial, in my opinion, to fully understand the reason why it has been able to enact its task of enforcement and development of EU law even in a period of the last 10-20 years, in which of course the European integration process has not made many steps forward. In the same way, it is possible appreciate the way in which the Court is able to preserve the strong nucleus of EU law even in its relationship with member States whose Institutions aren’t very favorable to such process at the present day.

On a different ground, I had the possibility to appreciate how the matters involved in the preliminary rulings dealt in the hearings I participated are in fact crucial for the future of the European Union, including both economic and market issues (as in the cases concerning protection of copyright, freedom to provide services, and so on) and themes about individual rights and their protection (e.g. the case concerning the free distribution of medical products to pharmacists involved also issues related to protection of citizens’ health). The way all the judges in charge of the cases face them, and how they examine the problems aroused by the relationship between EU law and domestic law, show an effective effort to pursue a real harmony in the European law, contributing to build that “community of law” which remains the main purpose of all the EU Institutions.

Most of all, the meetings with single judges of EU Court and General Court helped me to understand the complete change of mind a National judge must go for in case he is designed to take part in the Courts itself. It is not a simple task, being apparent the effort of every EU judge to preserve a balance...
between two opposite needs: the necessity to ensure the full enforcement of EU law against domestic interpretations and praxis conflicting with it and the absolute necessity to avoid every “invasion” of the field which is reserved to domestic judges (not only the application of the domestic law to the single case, but first yet the research of every interpretation of it in harmony with EU law). I must add also that more enrichment of this baggage of knowledges has come to me from the confrontation with judges of different origins, which gave to us the possibility to compare the different legal systems, traditions and praxis in the first two days of the exchange (as well as, of course, the confrontation with my Greek colleague who shared with me the two-weeks staying at the Court and with whom I had many exchange of impressions about similarities and difference between our Institutions of provenance). In that it’s possible to concretize that “horizontal dialogue” between the European Courts in which, apart from the differences in substantial and procedural legal systems, maybe it could be possible reach a shared way of approaching the cases concerning the protection of fundamental human rights and the resolution of problems involving the relationship and conflicts between domestic law and EU law.

IV. Good Practice within the host jurisdiction.

The way of working of EU Court, as I’ve described it above, is so peculiar – and for reasons understandably connected to its historical and political origins and task – to make difficult selecting single aspects which may be qualified as “Good Practice” to export in my domestic jurisdiction. For example, the peculiar way the hearings take place before the Court is clearly impossible to reproduce in the Italian administrative trial, not only because it’s always been historically a written trial but above all for the not comparable number of the cases Italian Consiglio di Stato must deal with annually (and in fact, I’ve noticed that some of the peculiarity underlined above – e.g. the simplified proceedings for the references which are apparently inadmissible – arise from the concern that the increasing of case numbers may compromise the good working of the Court).

However, maybe it is possible to export some of the praxis I’ve described, like e.g. the anticipation of questions to the parties by the judges or the transmission of the judgement’s draft to all the judges involved in the Bench for their observations, at least in the proceeding which take place before the Supreme Colleges of Italian magistracy – Sezioni unite di Corte di Cassazione, Adunanza plenaria of Consiglio di Stato – whose decisions are in fact compulsory in their interpretation of the law, so that even single passages of the judgement (s.c. obiter dicta) may arise doubts about their actual and effective nature.

Apart from it, the other main practice which have caught my attention have to do with the organization issues and general working of the Court. Above all, I was interested by our meeting with the colleague in charge of Press and Media office, whose task is to deal with the communication between the Court and media and more generally with the problem to make the Court’s decisions understandable for the public opinion. That’s a problem whose importance has been fully understood in Italy now, especially because of the permanent conflicts between judiciary and political power of the last two or three decades, but I think Italian judges are still very far from acquiring the competence and the instruments to be effective on such ground. For example, the fact that a judiciary Institution may operate on the social network, as the EU Court does, is simply unthinkable in Italy, and the way of preparing and writing the press releases to accompany the issuing of a decision is still artisanal in my Country, compared with the practice followed in the
Luxembourg Court (e.g. the fact that the personnel in charge for Press and Media may receive a draft of the judgement to be issued and read it even long before the issuing itself, though of course useful to study correctly and quietly what to communicate to media and how to do it, is also unthinkable in my Country).

V. The benefits of the exchange

The most important profit I think I get from the exchange at EU Court is the clear and full understanding of the way the Court works on references coming from the domestic judges. This is essential, in my opinion, for a complete appreciation of the reasons why in many cases the Court seems to give unsatisfying answers to the questions asked in the references. One must know deeply the peculiar sensibility which encompasses the approach with which the Court faces the references coming from member States, if he wants to avoid such inconvenience; instead among my Italian colleagues an attitude of intolerance is very frequent and many just think the Court doesn’t make the minimum effort to understand the “domestic” problems, this being the simplest and fastest explanations for such unsatisfying decisions.

On the other hand, my experience in Luxembourg has made me understand clearly that, above all, it is necessary to develop a common language between EU Court and domestic judges, that’s to say the latter must adapt his/her way of writing to the Court’s needs when he/she refers to her in compliance with a number of simple and mean rules (succinctness, essentiality, clarity) which are necessary to make both the matter of fact and the questions of interpretation of EU law fully understandable for every judge of the Court, no matter his/her nationality. For example, not many of my colleagues know that if the reference is excessively extensive it’s summed up by the translator before the translation itself, and the judges in charge of the case get the translation of such synopsis and not of the original reference: this could harm the correct understanding of the real reasoning of the domestic judge, so he/she’d better restring him/herself right in the moment of writing the reference, with an effort of succinctness.

That’s a topic very relevant in Italy, in that Italian judges have sent more and more references to the Court in the last decades, for the reasons I’ve analyzed above. So I think my experience might be useful for the Institution where I work if I could be able to transmit the impressions above described to my colleague, cooperating with them in learning and developing specific technics to approach and manage the relationship with the EU Court, with the aim to restring the number of references to the really and in fact necessary cases as well as to provide reference able to allow the Court to give clear and useful answer for our domestic needs.

VIII. Suggestions

It is difficult to find suggestions to improve the Exchange Program, because the panel I’ve gone for is almost perfect in its conception (like I think it’s clear form what I’ve written till now).

If I wanted just find some points which might be furtherly improved, I could focus the attention on two specific topics. The first is related to the database Curia, which is apparently a crucial tool for the...
knowledge and circulation of EU Court’s jurisprudence so that it’d be necessary to favor a deeper knowledge of it – even on practical level – even in mere visitors like we were. Instead, our program contemplated only a short introduction to it by the personnel of Research and Documentation Directorate, without any further explanation or exercise about its use; I think this aspect might be strengthened, because it’s fundamental for the widespread knowledge of the Court’s judgements through speed and effective researches to be done even from a simple PC in each member State.

Secondly, and on a different ground, it could be very useful to contemplate the possibility for guests engaged in the exchange to meet the judges involved in the hearings they participate, before or after the hearings themselves, to deepen and comment the questions of law implied in them. We casually had the opportunity to do it during our meeting with the Advocate general, who had been present to an hearing we participated few days before, so we could talk about the sense and purpose of some questions he had asked to the parties during the hearing. I think this could be done very easily and without serious risks for the secrecy of the decisions to be taken on the cases dealt in the hearings (for what matters, when some EU judges come in Italy for work-exchange at Consiglio di Stato or in other jurisdictions, they are always involved in discussions concerning the cases to be discussed in the hearings in which they take part).