

# A Wheel Within a Wheel: The Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union

Johan C. van Haersolte<sup>1</sup>

*EU lawyer at the Office of the Secretary of the Dutch Council of State*

## Abstract

*This short article offers a description of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union. This association is active in the field of European and comparative administrative law. Its website, its databases and its symposia deserve the attention of legal researchers and practitioners alike. Hopefully this article will underscore the achievements made by the long-standing cooperation of 30 national and European institutions.*

## I Introduction

After giving the reader some factual and institutional information about the association this article will discuss its aims and its various activities. Then it will focus on two of the main activities being Forum and Jurifast. Finally some observations and remarks will be made.

The Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union has its origins in a Belgian-Italian meeting that took place in 1963. More than 45 years later the European Association as I will refer to hereinafter,<sup>2</sup> has members from all 27 Member States of the European Union (EU). In addition, the Court of Justice of the European Union (ECJ) is a full member while institutions from both Croatia and Turkey have observer status.

As the full name of the association indicates there are two types of organisations which may be a member: first, Councils of State and second, a country's highest administrative court. Countries such as France and the Netherlands are represented by their *Conseil d'État* and *Raad van State*, respectively, while Portugal and Sweden, for example, participate through their *Supremo Tribunal Administrativo* and *Regeringsrätten*, respectively. Luxembourg, and Romania have two institutions which are members. These are their *Conseil d'État* resp. *Consiliul Legislativ* and their *Cour Administra-*

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<sup>1</sup> This article was written in a personal capacity and any opinion expressed therein can only be attributed to its author.

<sup>2</sup> The abbreviation in English would be ACSSAJEU but for obvious reasons that is never used. In June 2009 an agreement was reached on a new abbreviation: ACA-Europe. ACA stands for 'Administrative Courts Association' as well as for 'Association Cours Administratives'.

tive resp. *Înalta Curte de Casatie si Justitie*.<sup>3</sup> As for Luxembourg, the double membership is a direct consequence of the 1995 judgment of the European Court of Human Rights (ECHR) in the *Procola* case.<sup>4</sup> Whereas all members in the European Association participate through their highest administrative courts, only a few participate on the legislative level. Therefore, the emphasis of the European Association lies more on administrative justice and less so on legislative matters.

The governing body of the European Association consists of a board of seven members headed by a two yearly rotating presidency. The Secretary General is at present a member of the Belgian Council of State. This Council of State also provides practical and technical support.

## 2 Its Aims and Activities

In a nutshell the aims and activities of the European Association amount to what I would call ‘comparative law in action’. According to its Statutes “[t]he purpose of the Association is to promote within its financial limits exchanges of views and experience on matters concerning the jurisprudence, organisation and functioning of its Members in the performance of their judicial and/or advisory functions, particularly with regard to Community Law.” Not always, however, is Community or EU law in a strict sense at the centre of the activities. More generally speaking one could characterise the activities of the Association as comparative law in the context of European integration. Depending on where and how the activity takes place, the approach is practical or documentary in form (such as Forum and Jurifast, to be discussed below) or academic and in-depth (colloquia, publications).

Apart from Forum and Jurifast there are some other activities worthy of attention.<sup>5</sup> The first and most significant is the biannual colloquium. The most recent colloquium by the time of writing this article was held in Warsaw in 2008 and dealt with the influence of Community law on national

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<sup>3</sup> The Statutes stipulate that there can not be more than two members from each state. Administrative law, however, is in many member states applied at the highest instance by various courts. In the Netherlands, for example, the Administrative Jurisdiction Division (*Afdeling Bestuursrechtspraak*) of the *Raad van State* has an extensive competence in administrative law cases (environment, spatial planning, aliens and miscellanea) but the Court of Cassation/Supreme Court (*Hoge Raad*) has competence in tax cases, the Trade and Industry Appeals Tribunal (*College van Beroep voor het bedrijfsleven*) in competition and telecommunication cases and the Higher Social Security Court (*Centrale Raad van Beroep*) in social security cases.

<sup>4</sup> ECHR judgment of 28 september 1995, *Procola*, Series A, Vol. 325.

<sup>5</sup> Information about the European Association and its activities can be found on its website at [www.juradmin.eu](http://www.juradmin.eu).

administrative case law, more specifically the effects of incompatibility with EC legislation of administrative decisions and final rulings at the national level.<sup>6</sup> Two years earlier, in Leipzig, the colloquium was dedicated to a specific environmental case study involving the construction of a motorway in a protected area.<sup>7</sup> For 2010, there are plans to hold a colloquium on potential methods for accelerating the preliminary ruling procedure, not necessarily only at the ECJ level but also at the national judicial level. These colloquia offer a recurrent opportunity for the members of the participating institutions to discuss substantive matters as well as to meet again and strengthen their ties.

In addition to the aforementioned biannual colloquia, other seminars are held often on an ad-hoc basis and in different locations. Recent topics include the preliminary ruling procedure (2009), administrative jurisdiction and e-Justice (2009), environmental law (2008), the convergence of EU supreme administrative courts in the application of Community law (2008), and comparative administrative justice (2007). Other activities include the publication of a Newsletter two or three times a year, the finalisation by a working group of a report in 2008 with practical suggestions to reduce the delays involved in the preliminary rulings proceedings and organising exchanges of judges of different supreme administrative courts.<sup>8</sup>

Two activities merit a separate, albeit brief, discussion. The first is the so-called Tour of Europe. Under that heading information is provided given for each Member State about their system of administrative law. The structure of the information is based on a *questionnaire* with 76 questions and divided into five parts: (1) history, definitions etc., (2) bodies competent to review administrative acts, (3) judicial review of administrative acts, (4) non-judicial settlement of administrative disputes and (5) statistical data. The result of this uniform approach is a unique overview of how administrative law is organised in the Member States of the European Union. It shows the differences, and sometimes peculiarities of the national jurisdictional structures as well the similarities and recurring themes (judicial protection against administrative acts, the influence of European law etc.). Tour of Europe originates from an initiative taken by the European Association and a French *groupement d'intérêt public* called *Mission de recherche Droit et Justice*<sup>9</sup> involving two French universities (Paris 1 and Limoges) and the French *Conseil d'État*. The results of the research project were discussed

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<sup>6</sup> *Consequences of Incompatibility with EC Law for Final Administrative Decisions and Final Judgments of Administrative Courts in the Member States*, S. Biernat e.a. (eds.), 2008, ISBN: 83-923258-9-3.

<sup>7</sup> *Road Planning in Europe*, R. Rubel and Eva I. Silbermann (eds.), 2006, ISBN: 978-3-00-020498-2.

<sup>8</sup> Documents relating to most of the activities discussed here can be found on the website of the European Association: [www.juradmin.eu](http://www.juradmin.eu).

<sup>9</sup> [www.gip-recherche-justice.fr](http://www.gip-recherche-justice.fr).

during a colloquium held in Paris in March 2007.<sup>10</sup> Currently new versions of the national reports are being prepared.<sup>11</sup>

The website also offers access to *Reflets*.<sup>12</sup> This is a French-language publication of the Library, Research and Documentation department of the ECJ, published three times a year. Discussions are being held as to whether an English version of *Reflets* will also be produced in order to increase its readership. *Reflets* provides information on legal developments outside the ECJ which may be relevant for EU law: judgments by the EFTA court, the European Court of Human Rights and national courts as well as national legislation and scholarly comments. The national judgments included in *Reflets* are a selection of the ones contained in Dec.Nat, a database which is discussed in more detail below.

### 3 Forum

Together with Jurifast, the Forum is the main activity of the European Association. As its name clearly indicates it is a means for discussion with others. In ancient Rome the Forum was located between the Palatine and the Capitol but nowadays *fora* are on the World Wide Web. The European Association's Forum is to be found on its website and it is the only part of the site which requires registration. Registration is only available to those working for the participating institutions. These persons may be judges and state councillors but in practice most of them are members of staff. The Forum is a sort of chat box through which professional information can be shared. Its actual use, however, depends on practical aspects such as whether one is able to communicate on legal matters in English or French,<sup>13</sup> whether one is inclined to use the computer and the internet at all,<sup>14</sup> whether one is inclined to ask a question to someone from a different culture and whom one may not know personally, whether one has the time to wait for an answer, whether one in due time is willing to give an answer to other people's questions etc. In the questions submitted to the Forum three categories can be distinguished: questions 'purely' on European law,<sup>15</sup>

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<sup>10</sup> For more information see [www.juradmin.eu/seminars/Paris2007/content\\_en/presentation/index.htm](http://www.juradmin.eu/seminars/Paris2007/content_en/presentation/index.htm).

<sup>11</sup> For example, a new version of the Dutch report was put on the website in May 2009.

<sup>12</sup> *Reflets* can also be found on the website of the ECJ.

<sup>13</sup> The Statutes stipulate that English and French are the working languages of the European Association and that official documents are to be available in both languages. In practice, however, English is more widely used than French.

<sup>14</sup> Judicial organisations may in general be considered less advanced in that respect than the rest of society.

<sup>15</sup> E.g. a question on whether under Directive 69/335/EEC a prohibition of double-taxation also applies to the capital contribution which was a subject of two operations, the first one

questions on the effects of European law on national law<sup>16</sup> and, probably the biggest group, questions on other matters of (comparative) national law.<sup>17</sup> Obviously, the more answers are given from different Member States to a specific question, the more useful the Forum becomes, and the better it performs as a tool of comparative law.

The Forum can not only be used for questions but also for announcements on seminars that are organised, new referrals to the ECJ, and recent appointments in the participating organisations etc. The Forum is easy to work with and allows for informal communication with others. Although most entries relate to administrative justice it is also used in the context of the legislative advisory work.<sup>18</sup>

## 4 Jurifast

Jurifast, the other important project, is a database of case law in which European law is applied. In most cases the judgments stem from the supreme administrative courts which are a member of the European Association. Some judgments are, however, from other national administrative courts.

In January 2010 Jurifast contained approximately 800 national judgments but that number is growing by the week.<sup>19</sup> Often one can find together with the national judgment requesting a preliminary ruling, in due time the subsequent judgment of the ECJ and eventually the final national decision.<sup>20</sup> Jurifast, however, also contains judgments (and these may be the more interesting ones) in which European law is applied in a ‘stand alone’

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before the accession of the Member State concerned to the EU and the second one after the entry into force of the Directive (that is after the accession to the EU).

<sup>16</sup> E.g. a question on how to deal with answers given by the ECJ to questions which have not been asked by the national judge in its order for reference.

<sup>17</sup> E.g. a question on whether members of Councils of State and Supreme Administrative Jurisdictions in other member states, can seek part-time employment (example: lecturing at a university) during their term of office.

<sup>18</sup> E.g. for inquiries on the rules governing the making public of opinions of the Councils of States or on an eventual ban of facial coverings (burka’s, niqab’s).

<sup>19</sup> In January 2010 it contained approximately 725 documents. By ‘document’ is meant one file which can contain up to three judgments. When it concerns preliminary ruling cases one may find (1) the order for reference, later followed by (2) the judgment of the ECJ and eventually (3) the final national judgment. However, more than two thirds of the documents in Jurifast contain a (single) national decision in which Community law is being applied autonomously, i.e. without any preliminary reference to the ECJ.

<sup>20</sup> F.ex. the judgment of 29 March 2006 of the French *Conseil d’État* followed by the judgment of the ECJ of 12 February 2008 in case C-199/06 (*CELF*) and finally the judgment of the *Conseil d’État* of 19 December 2008.

fashion, i.e. without any involvement of the ECJ. The national judgments are provided in their original language and in the original lay-out. In order to introduce the visitor to the case they are accompanied by a summary in English and in French. Jurifast has a strong do-it-yourself character as it is continuously being fed by the members themselves. Each member of the European Association has the possibility to upload pdf-files of the judgment as well as of the summary written in either English or French. The secretariat in Brussels will subsequently provide a translation of the summary into the other languages. The database is searchable by subject, date and provision of EU law.

Often the summary will be the only document that is consulted. This is due to the fact that, as said above, the full text judgments themselves are made available in their original language. Therefore, one may assume that judgments in English, French and German will probably find a larger audience than the ones in e.g. Portuguese, Dutch or Greek. The quality of the summary is of key importance as the reader will have to use that in order to determine the relevance of the judgment and to decide whether to have it translated for further use. Conciseness, preciseness and clarity are essential.

Jurifast can be consulted by everybody and on the website, next to the access to Jurifast, one can also find access to a similar database called Dec. Nat, an acronym which stands for *Decisions Nationales*. Dec.Nat is a database set up and maintained by the Research and Documentation Service of the ECJ, originally for internal use only and only available in French. A few years ago, with the help of the European Association, Dec.Nat has been translated into English and transformed into a database with free access, surprisingly enough not on the website of the ECJ but of the European Association. It currently contains references to more than 20,000 national judgments in which EU-law was applied. Information is given about the national and European provisions applied, where it has been published, keywords relating to the judgment, and relevant comments in national legal journals etc. The main difference with Jurifast, however, is that Dec.Nat does not provide for the full text of the judgment itself. But there are plans to insert at each reference in Dec.Nat a hyperlink to the judgment when that is included in a national public case law database.<sup>21</sup> Other differences are the elaborate search possibilities of Dec.Nat, the fact that in Dec.Nat more information is given about each national judgment but on the other hand, also the fact that Dec.Nat is only updated once a year (by the ECJ). Plans exist to make Dec. Nat available through Eur-Lex.<sup>22</sup> For that purpose an agreement has recently been concluded between the European Association, the ECJ and the Office for Official Publications of the European Communities. It is expected that

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<sup>21</sup> For the Netherlands, that would be [www.rechtspraak.nl](http://www.rechtspraak.nl). Not in each member state of the EU, however, does the state provide free access to its own case law. Germany appears to be a remarkable exception.

<sup>22</sup> The portal to gain access to European Union law. See [eur-lex.europa.eu](http://eur-lex.europa.eu).

the first results should be available to the general public by 2010. Meanwhile cross-references between Dec.Nat and Jurifast are starting to be applied in these databases, further enhancing their practical usefulness.

Jurifast is a good example of a trend where judgments of national courts applying international law (including European Law) are increasingly considered to be relevant for everyday legal practice. Obviously the ECJ is the ultimate 'standard setter' so to speak and has the final word on EU law. But there are many provisions of Directives and Regulations which have not (yet) been submitted to the ECJ. Domestic courts nevertheless may have to deal with them. Obviously it is not only with regard to that type of details that foreign judgments can be relevant. How courts in the Member States apply European law can be a source of inspiration in many respects for their counterparts in other countries. Foreign judgments can for example help a national judge to determine whether or not a preliminary reference would concern an *acte clair* and could be skipped (although that would require some self-confidence). And not only judges but also private practitioners (advocates) may find arguments in foreign judgments to substantiate their claims.

This trend is exemplified by Caselex, an electronic publication.<sup>23</sup> Its origins can be traced back to 2003 and has grown quickly in recent years. At present it contains national case law from almost all EU and EFTA Member States, currently amounting to 3,500 national decisions. Although financially still supported by the European Commission, Caselex is a commercial project and therefore has a price tag on it. Coverage was initially focusing on areas of commercial interest such as competition law and intellectual property law. Gradually, however, more areas are being included such as environmental law and freedom of movement which were introduced in the course of 2009. Caselex offers good search systems as well as a summary in English of each judgment. Furthermore, in the course of this year, Caselex will introduce a completely new module, allowing for an integrated search of decisions rendered by national competition authorities on concentration control.

At an academic level mention should be made here of the Oxford Reports on International Law in Domestic Courts (ILDC) which since 2007 have been published by Oxford University Press (OUP).<sup>24</sup> ILDC offers national judgments from 70 jurisdictions over the world. It aims at covering the decisions that are the most relevant<sup>25</sup> for understanding how public international law is applied by national courts: recent developments, new approaches to solving problems and controversial points. The full texts of the decisions are published together with an English translation of the whole judgment or its

<sup>23</sup> See [www.caselex.com](http://www.caselex.com).

<sup>24</sup> See [ildc.oxfordlawreports.com](http://ildc.oxfordlawreports.com).

<sup>25</sup> This means that the screening of judgments to be included is strict. OUP on its website formulates it thus: '...only key domestic cases will be listed, as focusing too much on domestic case law is a distraction for the international law researcher.'

key paragraphs, headnotes, summaries of the facts and holdings and scholarly analysis. Furthermore, the relevance of foreign judgments has been underscored in academic circles. In the Netherlands notably by publications of Michiel Scheltema, a Dutch scholar in administrative law<sup>26</sup> and by activities of the Hague Institute for the Internationalisation of Law (HIIL).<sup>27</sup>

It may therefore be said that a ‘beautiful friendship’<sup>28</sup> may develop between lawyers and foreign case law. One has to add, however, that some standardisation of databases and sources of information would be helpful in that respect.<sup>29</sup>

## 5 Concluding Remarks

The European Association does not operate in a void but moves like a wheel within a wheel. The Association is a network connecting 30 national and European institutions and this network in turn collaborates in various ways with similar network organisations. One of them is the Network of Presidents of Supreme Judicial Courts of the European Union.<sup>30</sup> That collaboration includes the participation in the colloquia and seminars of the European Association. Another related organisation is the European Judicial Training Network (EJTN) which brings together the national institutions responsible for the training of the judiciary.<sup>31</sup> The European Association has recently started to participate in exchange programmes set up by the EJTN to enable judges to make working visits to each other’s institutions. In 2008, the European Association participated in a meeting of the EJTN on the training of administrative judges.

Obviously the European Association has significant ties with the European Commission (EC). The first and most important tie is financial as the EC subsidises up to 80% of the budget leaving the rest to be paid by the member institutions. The EC is also regularly represented or participates in seminars of the European Association. Furthermore, some of their interests coincide, for example, as the EC is developing plans to enhance the role of the national courts in the application of Community environmental law.

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<sup>26</sup> See i.a. his inaugural lecture *Het recht van de Toekomst – De gevolgen van de internationalisering van het recht*, delivered on 1 December 2004 at Utrecht University.

<sup>27</sup> E.g. by way of the research project ‘National Courts as Community Courts’ and the 2006 colloquium ‘Supreme Courts in an internationalised world: challenges for the trias politica and the coherency of law’.

<sup>28</sup> Expression used in the famous last lines of the movie *Casablanca* (1942).

<sup>29</sup> See Identifiers, Metadata and Document Structures: Essential Ingredients for Inter-European Case Law Search, a paper presented by Marc van Opijnen at the European Legal Access Conference, Paris, 10-12 December 2008, [http://www.legalaccess.eu/IMG/doc/223\\_Marc\\_van\\_Opijnen\\_Paris\\_2008.doc](http://www.legalaccess.eu/IMG/doc/223_Marc_van_Opijnen_Paris_2008.doc) (visited in September 2009).

<sup>30</sup> See [www.rpcsjeu.org](http://www.rpcsjeu.org) which also includes a Common Portal of Case Law.

<sup>31</sup> See [www.ejtn.net](http://www.ejtn.net).

Other areas of cooperation include topics such as e-Justice<sup>32</sup> and professional training, both originating in the Forum for discussing EU justice policies and practice (the so-called Justice Forum)<sup>33</sup> and, as mentioned above, the linking of Dec.Nat to Eur-Lex. In September 2008, the EC published a draft Commission notice on the enforcement of state aid law by national courts. The European Association was involved by DG Competition in the consultation exercise and eventually three member courts submitted their commentaries to the EC.<sup>34</sup>

Other organisations and entities with which the European Association keeps in close contact include the European Network of Councils for the Judiciary (ENCJ),<sup>35</sup> the Association of European Administrative Judges (AEAJ),<sup>36</sup> and the Working Party on Legal Data Processing of the Council of the EU.<sup>37</sup>

Looking ahead one should first look back and that is what has been done in this article. In the past decade the association has experienced strong growth and development. One may expect and at least express the hope, that the European Association will keep following the same course. Administrative law being the main vehicle by which EU law permeates through national law, a platform such as this association is useful in many respects. It can contribute to the development of 'best practices' in the judiciary application of European administrative law.<sup>38</sup> It can also function as an interest group on behalf of a field of law which has a long tradition of accommodating the consequences of European law. The relevance of the work of the European Association is enhanced by the fact that it is based on the actual practices of judges. Finally, the association follows up on the global trend of networks, both personal and professional. The present growth of networks is fuelled by increasing technical possibilities (software, internet etc.) as well as a changing attitude of people who, wanting to connect with one another, are making use of fading borders. Networks also work well for law and lawyers and the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union is not an obvious but nevertheless a good example of that.

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<sup>32</sup> See COM(2008) 329, Towards a European e-Justice Strategy (30 May 2008). E-justice is also one of the many elements in the Stockholm Programme as proposed by the European Commission (COM(2009) 262, 10 June 2009) as well as in the Commission Recommendation on measures to improve the functioning of the single market (OJ EU 2009, L 176/17).

<sup>33</sup> COM(2008) 38, Communication from the Commission on the creation of a Forum for discussing EU justice policies and practice (4 February 2008).

<sup>34</sup> The definitive version was published in OJ EU 2009, C 85/I.

<sup>35</sup> See [www.encj.eu](http://www.encj.eu).

<sup>36</sup> See [www.aeaj.org](http://www.aeaj.org).

<sup>37</sup> Involved in i.a. e-law, e-justice, legal databases and the European Case-Law Identifier (ECLI).

<sup>38</sup> See in this context para 3.2. of the Stockholm Programme as proposed by the European Commission (COM(2009) 262, 10 June 2009) and as adopted by the European Council of 11-12 December 2009.

