



Association of the Councils of State and Supreme Administrative
Jurisdictions of the European Union i.n.p.a.

Association des Conseils d'Etat et des Juridictions administratives
suprêmes de l'Union européenne a.i.s.b.l.

Identification of the participant

Surname: MELOTTE

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Nationality: Belgian

Seniority: 1 year (junior auditor)

Identification of the internship

Host jurisdiction/institution: Bundesverwaltungsgericht (Federal Administrative Court)

Town/city: Leipzig

Country: Germany

Dates of the internship: 4/9/2022 – 14/9/2022



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SUMMARY

First of all, I would like to thank all the people (judges and staff of the Federal Administrative Court and the Administrative Court) who gave me such a warm welcome during my internship in Leipzig.

I had the opportunity to attend different phases of the administrative process (preliminary opinions and reports, pre-deliberations, public hearings, readings of verdicts), covering a range of subjects. In particular, I would highlight the importance of the pre-deliberation stage.

The Federal Administrative Court rules in principle (but there are increasing numbers of exceptions) in the third and final instance. It normally deals only with matters of federal law. Cases are divided into panels of five judges, who adjudicate collegially in review proceedings. The review eligibility filter¹ is quite effective. On average, a case lasts 1 year.

As regards the '*comparative law*' aspect, it may be noted that the German Federal Administrative Court rules in principle in the third and final instance, whereas the Belgian Council of State, Administrative Disputes Section, rules in principle in the first and final instance. In Germany, unlike in Belgium, there is no court of first instance dedicated exclusively to asylum and immigration proceedings. At the Federal Administrative Court of Germany, there are only judges (but also research associates who are often trial judges seconded for a year or two), whereas the Council of State is composed of councillors and auditors who form two separate bodies. The research associate produces a report for the judges only, while the Belgian auditor produces a report for the parties and gives an opinion at the hearing. The research associate is present at the pre-deliberation and deliberation stages, which is not the case for the Belgian auditor. At the Federal Administrative Court, the hearing is a genuine interactive debate in which the judges ask questions useful to resolving the dispute, whereas at the Belgian Council of State, the hearing is traditionally limited to hearing the pleadings of each party in turn, followed by the opinion of the auditor.

The '*European law*' aspect is very important in Germany I was able to attend a case that led to the drafting of a preliminary question to the Court of Justice of the European Union. Furthermore, the German legal principle of prior recognition of environmental associations is not easily reconciled with European (Directive 2003/35/EC) and international (Aarhus Convention) law.

Among the '*good practices*' within the courts visited, the following can be noted. In urban planning law, site visits and mediations are frequent (with a success rate of +/- 50%). Research associates at the Federal Administrative Court are more actively involved than auditors, since they are present at the pre-deliberation and deliberation stages (without voting rights). In

¹ This filter is limited to three hypotheses.



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Germany, some lower courts have a system of *échevinage* (non-professional judges chosen from a list of volunteers who, in practice, sit two or three times a year for a 5-year term).

I have benefited from this internship at least in legal, linguistic and cultural terms.



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REPORT

I. Internship programme

I had the opportunity to visit mainly the Federal Administrative Court (*Bundesverwaltungsgericht* or *BVerwG*) and, on one morning, the Administrative Court (*Verwaltungsgericht* or *VG*) in Leipzig.

1. Federal Administrative Court

Since 2002, the Federal Administrative Court has been located in the immediate vicinity of the centre of Leipzig in a magnificent building erected at the end of the nineteenth century and originally intended to house the civil and criminal supreme courts of the Second German Empire. Prior to 2002, the Federal Administrative Court was located in Berlin.

I was able to observe the organisation and operation of the Federal Administrative Court, particularly in the areas of asylum law, urban planning and environmental law, municipal taxation, fundamental freedoms including freedom of expression, and administrative procedure law.

I had the chance to meet many of the Court's judges and staff (including the President of the Court, presidents of the senate, judges and research associates). These numerous formal and informal contacts enabled me to gain a better understanding of how the Court operates.

I was given the opportunity to examine a case from A to Z, i.e. from the introduction of the dispute at first instance through the appeal proceedings to those before the Federal Administrative Court.

Similarly, I was able to consult an environmental impact assessment for a motorway project. This gave me a real insight into the way these studies are carried out in Germany and showed me the points of convergence and divergence with Belgian practice (for example, in Germany, great importance is attached to examining alternatives).

I was also able to visit the library (modern and functional; it includes a valuable stock of very old books, access to legal databases and an almost exhaustive collection of everything related to German administrative law), as well as the museum dedicated to the history of the Court and the building.

In addition, I was present at various stages of proceedings within the Court, which can be summarised as follows: preliminary opinions and reports, pre-deliberation, public hearing, deliberation and reading of the verdict.



A. Preliminary opinions and reports

Depending on the importance of the case, a research associate (*Mitarbeiter*) will have prepared a very detailed written opinion (*Gutachten*) (it contains numerous legislative, case-law and doctrinal references; it is several dozen pages long) that includes, in particular, a summary of the facts, an examination of the legal issues and a proposed decision.

This research associate is often a trial judge who is delegated for 1 or 2 years to the Federal Administrative Court.

For each case, two judges are designated as rapporteur (*Berichterstatter*) and co-rapporteur (*Mitberichterstatter*). The rapporteur draws up a report with the opinion of the research associate at his or her disposal, and the co-rapporteur also draws up a report on the basis of the opinion and the first report. Both reports have the same level of detail as the opinion.

B. Pre-deliberation (*Vorberatung*)

Before the pre-deliberation, each judge and research associate will have carefully read the opinions and reports. The judges are therefore fully aware of the case at this stage.

The pre-deliberation brings together the judges of the senate (i.e. the chamber) as well as the research associates.

The research associate begins by presenting his or her opinion orally, followed by the rapporteur and then the co-rapporteur. The other judges then speak in order of seniority, and finally the President of the Senate concludes. There may also be an informal discussion.

The pre-deliberation is fundamental to the process, as it is very thorough. For example, the pre-deliberations I attended were each devoted to the examination of one to three files in half a day.

At the end of this pre-deliberation, it is possible to have a clear idea of what the solution to the dispute will be. At first glance, this approach might seem to suggest that there is a risk of '*prejudging*' the case before the hearing, but in reality, the fate of the case is not definitively sealed. Above all, it helps to prepare the hearing properly and make it constructive and effective. Moreover, as the proceedings are essentially in writing and the written material has normally been exchanged prior to this pre-deliberation, the magistrates have sufficient knowledge of the case at this stage to be able to discuss it without bias.



C. Public hearing (*Mündliche Verhandlung*)

The public hearing follows the pre-deliberation by a few days.

The President of the Senate begins by opening the session and confirming that the parties are present. He or she or the judge-rapporteur gives a brief presentation of the case. The President or the Registrar gives a very brief summary of the parties' claims.

This is followed by a genuine interactive debate where the President or the judges ask the parties specific questions. At this stage, the parties may see where the case is heading.

Finally, the parties are allowed to briefly address the court (a few minutes).

The President closes the proceedings and advises the parties of the time for the reading of the verdict. A public hearing lasts on average 1 hour, but can take much longer in complex cases.

D. Deliberation

As a general rule, deliberations immediately follow the hearing. Deliberations are held behind closed doors.

The rapporteur, then the co-rapporteur, then the judges in order of seniority, then the President of the Senate, give their opinion.

There is then room for genuine discussion (the decision is not limited to a collection of opinions; on the contrary, it is a matter of pooling efforts). Where appropriate, research associates attend the discussion when asked to do so.

The judges carefully agree on the operative part as well as the press release. A judge is responsible for drafting the statement of reasons.

E. Reading of the verdict and press release

The President of the Senate reads the operative part of the decision and, following this, a press release is published on the Court's website based on the importance of the case.



2. Leipzig Administrative Court

I was able to visit Leipzig Administrative Court, which is located in a character building rented by the *Land*.

It was very interesting to see the workings of a court of first instance, which therefore examines not only questions of law but also questions of fact. In this respect, the work of this court is closer to that of the Belgian Council of State, which in the majority of cases only rules in the first and last instance.

Formal and informal contacts between the '*lower*' courts and the Federal Administrative Court facilitate dialogue between them and encourage their decompartmentalisation.

During my visit, I was able to meet the President of Leipzig Administrative Court, as well as a judge and a chamber president. These contacts were extremely productive, and taught me a lot. I was also given a case allocation plan, a recent press cutting and statistics on the status of the Court's cases.

I attended an asylum hearing devoted to the examination of a single case. It lasted around 90 minutes. It focused very much on examining the facts; a full hearing instruction took place (with the help of a dictaphone for the drafting of the minutes of the hearing). An interpreter was also present.

II. The host institution

The Federal Republic of Germany is a federal state consisting of a federal entity (the *Bund*) and federated entities ('*Länder*' in the plural; '*Land*' in the singular).

In addition to the constitutional court (at federal level, the Federal Constitutional Court or *Bundesverfassungsgericht*), there is the system of ordinary courts, which rule in civil and criminal matters, the labour courts, the social courts, the financial courts and the administrative courts. Each of these five court systems is headed by a federal supreme court (respectively, the *Bundesgerichtshof*, *Bundesarbeitsgericht*, *Bundessozialgericht*, *Bundesfinanzhof* and *Bundesverwaltungsgericht*).

The administrative court system has three levels.

At the first level are the administrative courts (*Verwaltungsgericht*). There are one or more per *Land* (usually one administrative court per district). They rule on questions of law and fact.

At the second level are the administrative courts of appeal (*Oberverwaltungsgericht* or *Verwaltungsgerichtshof*). In principle there is one per *Land*. They rule on questions of fact and





law. They examine compliance with the law by the *Länder* in the last instance (in other words, the Federal Administrative Court does not in principle have jurisdiction to examine federal law).

At the third level is the Federal Administrative Court (*Bundesverwaltungsgericht*), which was my host institution.

The Federal Administrative Court is organised and financed by the *Bund*, whereas the administrative courts and the administrative courts of appeal are organised and financed by the *Länder*.

The Federal Administrative Court rules in principle in the third and final instance. Nevertheless, there are more and more cases in which the Court rules in the first and last instance. This is the case, for example, for major rail or motorway infrastructure projects.

When the Federal Administrative Court rules on appeals (*Revision*), it only hears questions of law and no longer questions of fact (see below, III).

However, the Federal Administrative Court is not competent to review the constitutionality of laws. This is a prerogative of the Federal Constitutional Court. Mechanisms for submitting preliminary questions are in place.

The Federal Administrative Court is composed of 55 judges divided into 12 '*Senate*' (senates, i.e. chambers).

In principle, each senate consists of five judges. Some senates are overstaffed with six judges because of an increased workload, but they then formally decide with only five judges.

Each senate is also assisted by one or two research associates who are in fact judges from lower courts seconded by the *Länder* for a period of 1 or 2 years. This also strengthens the links between the levels of the court hierarchy.

For cases with a public hearing (review), the senate decides with all its members, while for cases without a public hearing (appeals against decisions on inadmissibility of the review), it decides with three judges.

According to the principle of the *Gesetzlicher Richter* ('statutory judge'), every litigant must know in advance by which judge his or her case will be tried. This requirement implies not only being able to know which court or tribunal will have jurisdiction, but also which chamber or senate within these courts and tribunals will be responsible for the case. Thus, a case allocation plan (*Geschäftsverteilungsplan*) is adopted by a *Präsidium* (composed of several judges elected for this purpose) and marginally adapted each year. This plan therefore



allocates cases to the senates and assigns each judge to a senate. It is published on the website of the Federal Administrative Court².

On average, it takes 1 year from a case being brought to the reading of the verdict by the Court, which is relatively short compared with the backlog of the Belgian Council of State.

The Court deals on average with between 1,000 and 1,500 cases per year, of which about 150 to 200 are under review and about 50 in the first and last instance, the remainder being devoted in particular to the examination of appeals against the inadmissibility of the review.

III. The law of the host country

Not every case is eligible for review. There is a filter for the admissibility of the application for review, which seems to be very effective, since only 1% of the cases brought before a court of first instance will reach the Federal Administrative Court.

There are thus three cases, listed exhaustively³, in which review is admissible:

- 1/ the case involves a matter of principle;
- 2/ the judgment appealed against deviates from a decision of the Federal Administrative Court, the Joint Senate of the Supreme Federal Courts or the Federal Constitutional Court and the judgment is based on this deviation;
- 3/ a procedural error, on which the contested judgment may be based, has in fact been committed.

It is interesting to note that the administrative courts of appeal themselves decide on the admissibility or otherwise of the review. This means that they are given a great deal of responsibility, since they can, for example, themselves determine whether the case before them raises a question of principle.

If the Administrative Court of Appeal decides in its judgment that the application for review is admissible, the Federal Administrative Court is bound: it must examine the review on the merits.

If, on the other hand, the Administrative Court of Appeal declares in its judgment that any application for review is inadmissible, the party contesting it must then lodge an appeal against this decision of inadmissibility (*Nichtzulassungsbeschwerde*) with the Federal Administrative Court, which may in turn declare the application for review admissible and

² <https://www.bverwg.de/rechtsprechung/geschaeftsverteilungsplan>

³ § 132 para. 2 VwGO (Verwaltungsgerichtsordnung).



then, only afterwards, examine the application for review on the merits. The decision is made by order of three judges without a hearing. The success rate is approximately 10%.

This filter is effective since, according to the contacts I had, the judges at the Federal Administrative Court have sufficient time to examine the cases conscientiously and provide high-quality decisions. Unfortunately, the courts of first instance do not seem able to enjoy the same level of comfort in terms of time, given the backlog they are experiencing.

IV. The comparative law aspect of your internship

Among many others, the following similarities and differences can be noted.

1/ The Federal Administrative Court is in principle a third-level court that rules in the last instance (however, there are more and more exceptions where it is competent in the first and last instance), whereas in principle the Belgian Council of State rules in the first and last instance (with certain exceptions such as, for example, appeals in administrative cassation against the decisions of the Council for Asylum and Immigration Proceedings).

2/ In Germany, there is no court exclusively dedicated to asylum and immigration law. In the Administrative Court (Verwaltungsgericht), I visited, this matter is divided between all the chambers, whereas in the Federal Administrative Court, a senate deals exclusively with it.

In Belgium, there is a court exclusively dedicated to this (the Council for Asylum and Immigration Proceedings or 'C.C.E.'). Within the Council of State, appeals in administrative cassation in matters relating to asylum and immigration proceedings are assigned, by linguistic role, to a single chamber of the Council and to a single section of the Prosecutor's Office.

3/ The German Federal Administrative Court is composed of only one category of magistrates (judges), whereas the Belgian Council of State is composed of two categories (councillors and auditors).

To a certain extent, the work of the Belgian auditor can be compared with that of the German research associate (who is not a magistrate, however).

Both prepare written reports.

But there are differences:

- the German research associate issues a report that is not communicated to the other parties to the proceedings (it is only intended for the judges of the senate), whereas the Belgian auditor's written report is an instrument that is sent to all parties and influences the course of the proceedings;



- the German research associate attends the pre-deliberation and the deliberation. However, he or she only gives an opinion when asked and does not have the right to vote (formally, he or she is not a member). Par However, the Belgian auditor does not take part, within the Administrative Disputes Section⁴, in the deliberations;
- the German research associate does not participate in the hearing, whereas the Belgian auditor gives an oral opinion at the hearing.

4/ In principle, at the German Federal Administrative Court, each senate deliberates in a panel of five or six judges on appeals for review and in a panel of three judges on appeals against decisions of inadmissibility for review. The formation is the same even for (relatively rare) cases of summary proceedings.

In the lower courts, depending on the law of the *Land*, the chambers sit in principle with three professional judges (and, if necessary, two non-professional judges). For non-complex cases, they can sit as a single judge (in the Administrative Court I visited, this was, for example, the case for 99% of cases involving asylum and immigration law).

At the Belgian Council of State, in the case of annulment proceedings, the chambers sit in principle with three councillors and, in summary proceedings, with a single councillor. Even in complex cases, only one auditor is appointed to hear the case, prepare a written report and give an oral opinion at the hearing.

5/ The number of documents and deadlines are not fixed at the German Federal Administrative Court. In other words, even on the eve of the hearing, new arguments may be received from the parties.

In contrast, at the Belgian Council of State, exchanges of documents and deadlines are strictly regulated by the general rules of procedure.

6/ At the Belgian Council of State, the hearing is traditionally limited to hearing the parties' submissions in turn, followed by the auditor's opinion.

At the German Federal Administrative Court, the hearing is not just a succession of submissions.

Rather, it is a genuine interactive debate in which the judges question the parties on issues relevant to resolving the dispute.

⁴ The Belgian Council of State not only has an Administrative Disputes Section, but also a Legislation Section responsible for examining draft laws, decrees, orders and ordinances with a regulatory scope.

Of course, at this stage, the parties may be able to see where the case is heading, but in my opinion, this does not mean that the magistrates lack impartiality. Procedural records and administrative files are the most important documents in the administrative process. Oral proceedings are secondary. However, at this stage, the magistrates already have a very thorough knowledge of the case (they have read the reports and opinions and have deliberated in advance). They therefore have enough information to form an unbiased opinion. Moreover, nothing is definitively fixed before the hearing (it is possible that, depending on the submissions, the direction of the decision and/or its reasons may change).

This seems to me to be a very efficient way of proceeding, since the verdict is often delivered on the same day as the hearing.

Finally, at both the German Federal Administrative Court and the Belgian Council of State, the hearing time for each case is short (a few dozen minutes to an hour as a rule).

V. The European aspect of your internship

European law is also very important in Germany.

As in Belgium, it is not always easy in Germany to reconcile EU or international law with national law. Sometimes there are also differences in case-law between European and national courts and tribunals.

During my stay, I was able to attend two cases that illustrate the difficulty of coordinating domestic law with international and European law.

In a first case, the German administration refused a foreigner's request to be recognised as a refugee but granted him subsidiary protection status, while the Greek administration had previously granted him refugee status. Could the German administration do this or was it bound by the earlier decision of the Greek administration?

The question of how German law, which provides for a four-stage gradation of protection, fits in with EU law is not obvious. For this reason, the Federal Administrative Court decided to ask the Court of Justice of the European Union for a preliminary ruling in this case⁵.

In a second case, an association working for the protection of the environment had received recognition after bringing the action at first instance but before the judgment. The question was whether, in these circumstances, the association was entitled to bring its appeal or whether, on the contrary, it should be declared inadmissible.

⁵ <https://www.bverwg.de/de/pm/2022/56>



This raises the question of the conformity of German law and its principle of prior recognition of associations⁶ with the Aarhus Convention and Directive 2003/35/EC⁽⁷⁾.

VI. The 'good practice' aspect within the jurisdiction visited

Among many other '*good practices*', the following can be noted.

1/ During my visit to the Administrative Court of First Instance, I was told that, in urban planning law, it is common to have recourse to site visits and even to mediation procedures (behind an urban planning dispute between a citizen and the administration, there is often a neighbourhood conflict).

The site visit allows for a better understanding of the case.

Mediation is quite effective: out of 20 urban planning cases mediated last year, around half ended favourably.

2/ While it is true that the comparison between the German research associate and the Belgian auditor has its limits (see above, IV), the participation of the German research associate is more active during the pre-deliberation and deliberation, since he or she participates and, if necessary, gives an opinion when asked. In contrast, the Belgian auditor does not take part in the deliberation in administrative disputes.

The German way of proceeding seems to me to be interesting because it allows for a solution based on more opinions. Transposed to Belgium, it would not seem to me to undermine the principle of 'double examination' in that everyone would remain well aware of his or her role and would respect it (the auditor's role would not be to decide, merely to advise). In a way, the double examination would still take place since the auditor would give his or her opinion and the councillors would draft the judgment independently of each other.

3/ In the lower courts, depending on the law of the relevant Land, the bench consists of three professional judges and two 'non-professional' judges chosen from among volunteers from the population for a limited term of office (e.g. 5 years). In practice, they meet two or three times a year.

This system was presented to me as advantageous from three points of view: for democracy, a shared justice with non-professional judges is a justice better accepted by the population

⁶ § 2, Gesetz über ergänzende Vorschriften zu Rechtsbehelfen in Umweltangelegenheiten nach der EG-Richtlinie 2003/35/EG (Umwelt-Rechtsbehelfsgesetz - UmwRG).

⁷ Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC.

(inclusive approach rather than 'top-down'); for the professional judges, it pushes them to express themselves during deliberations and in decisions with a clear language; for the non-professional judges, who are not remunerated but defrayed, it gives them a good experience and a practical insight into the judicial world.

However, such a configuration does not exist in the Federal Administrative Court, which in principle only hears questions of (federal) law and not of fact.

But this possibility deserves to be discussed.

4/ It is common for a press release to be published on the Federal Administrative Court's website at the same time as a verdict is handed down, explaining in a didactic manner what is at stake in the dispute and its conclusion⁸.

VII. Benefits of the internship

I have benefited from this internship at least in legal, linguistic and cultural terms.

At a legal level, I found it very interesting to study a different system from mine, to see the points of convergence and divergence. In particular, I have identified a series of 'good practices' (see above). These benefits will clearly be useful in my professional life. I could try to share the knowledge gained during the internship with my colleagues through formal and informal conversations, workshops and by writing articles. Learning about a foreign legal system is also very useful for comparative and open-minded purposes when processes of reform of judicial institutions are envisaged or under way at home.

On a linguistic level, the fact of being immersed for a fortnight in a German-speaking environment enabled me to improve my knowledge of German.

On a cultural level, the city of Leipzig stands out in particular for its influence in classical music (Johann Sebastian Bach spent a large part of his professional life there). The transition from the regime of the German Democratic Republic (GDR) to that of the reunified Federal Republic of Germany (FRG) is also remarkable.

VIII. Suggestions

The Judges Exchange Programme is very well organised and I cannot see how it could be improved. I appreciated the warm welcome I was given, the opportunity to discover several

⁸ https://www.bverwg.de/suche?lim=10&start=1&db=p&q=*





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phases of court proceedings and to visit several courts, while also having a lot of freedom in my schedule.



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