



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.

INTERNSHIP REPORT AND SUMMARY

Identification of the participant

Surname: **MOURGIA**

First name: **Eleni**

Nationality: **Greek**

Seniority: **Master of Requests at the Council of State – A total of 22 years and 3 months' service at the Council of State (12 years at the rank of Master of Requests)**

Identification of the internship

Host jurisdiction/institution: **Council of State of France**

Town/city: **Paris**

Country: **France**

Dates of the internship: **from 21 November to 2 December 2022**



**Co-funded by
the European Union**

SUMMARY

This report presents the programme of my internship at the French Council of State. During this study visit, I participated in sessions of the advisory divisions and hearings of the adjudication and examination panels, and I attended a colloquium on the debate on urban planning and construction law and the role of the administrative judge. Several bilateral meetings with French magistrates were organised, which focused in particular on the organisation and workings of the French administrative jurisdiction and on the case-law of the Council of State in relation to environmental law and urban planning. I also made three visits, the first to the Court of Cassation, the second to the Administrative Tribunal of Paris and the third to the National Assembly.

I. Internship programme

Monday 21 November 2022

Council of State – Place du Palais Royal – Paris 1

- Reception in the Hall of Honour
- Meeting with the Vice-President, general rapporteur to the Report and Studies Division
- Heritage tour of the Palais-Royal
- Meeting with a Master of Requests, public rapporteur to the Sixth Chamber of the Administrative Claims Chamber
- Adjudication session of the combined Sixth/Fifth Chambers of the Administrative Claims Division (panel of 9 judges)

Tuesday 22 November 2022

Council of State

- Meeting with the President of the Report and Studies Division
- Session of the Public Works Division
- Meeting with the President of the Public Works Division
- Interim relief hearing

Wednesday 23 November 2022

Council of State

- Meeting with a Councillor of State, rapporteur to the Third Administrative Claims Chamber

Theme: 'The relationship between the Council of State and the Court of Justice of the European Union, in particular the development of our preliminary referrals to Luxembourg'

- Meeting with a Councillor of State, Delegate for International Relations

Theme: 'The international action of the Council of State'

- Lunch at the invitation of the Delegate for International Relations
- Meeting with a Councillor of State, President of the Sixth Administrative Claims Chamber
- Examination session of the Ninth Administrative Claims Chamber



Thursday 24 November 2022

Administrative Tribunal of Paris – 7, rue de Jouy – Paris 4

- Meeting with the President of the Fifth Division of the Administrative Tribunal of Paris

Theme: *'The right of access to administrative documents'*

Council of State

- General Assembly

Friday 25 November 2022

Council of State

- Plenary session of the Report and Studies Division
- Meeting with a Councillor of State, rapporteur to the Administrative Claims Division

Theme: *'Administrative liability'*

Monday 28 November 2022

Court of Cassation – 5, Quai de l'Horloge – Paris 1

- Heritage tour of the Court
- Meeting with an honorary member of the Court of Cassation, President of the Advisory Committee on the *'Court of Cassation 2030'*



Tuesday 29 November 2022

Council of State

Colloquium-Administrative claims talks: Urban planning policy, the right to build and the administrative judge

- Introductory remarks by the Vice-President of the Council of State
- 1st round table: What does urban planning law seek to achieve?
- 2nd round table: Who makes decisions in urban planning law?
- 3rd round table: What recourse to the judge in urban planning law?
- 4th round table: What is the role of the urban planning law judge?
- Closing session

Wednesday 30 November 2022

Council of State

- -Discussion on the enforcement of court decisions with the person in charge of the delegation on the enforcement of court decisions
- -Training: presentation of the Administrative Claims Division by the Secretary of the Administrative Claims Division



Thursday 1 December 2022

Council of State

- Adjudication session of the Sixth Administrative Claims Chamber (panel of 3 judges)

Friday 2 December 2022

National Assembly – 126, rue de l'Université – Paris 7

- Heritage visit to the National Assembly
- Meeting with the head of the Interparliamentary Division in the National Assembly's International and Defence Affairs Department

Theme: *"Missions of the National Assembly"*





II. The host institution

Organisation and composition of the administrative jurisdiction

The administrative courts ('the administrative jurisdiction') consist of the administrative tribunals [TAs], the administrative courts of appeal [CAAs] and the Council of State at the top of the administrative jurisdictional order.

The Council of State

The Council of State is currently governed by the Order of 31 July 1945, which has been amended several times and supplemented in particular by the Decrees of 30 July 1963, 6 March 2008, 10 February 2010 and, more recently, by the Decree of 7 February 2019 amending the Code of Administrative Justice [CJA].

Its organisation reflects the diversity of its remit. The Council of State not only has a litigation function in which it rules on administrative disputes. It advises Government and Parliament. It also provides for the management of the administrative jurisdiction through a general secretariat.

- The litigation function

The Council of State carries out its litigation function within the Administrative Claims Division, which comprises 150 members, including a president, three vice-presidents, an administrative claims secretary and a secretary.



It consists of 10 chambers, which have replaced the former subdivisions, each comprising a president, two public rapporteurs and a secretary. Disputes that fall within the jurisdiction of the Council of State are divided between these 10 chambers, each of which specialises in a particular field.

The Council of State rules on these disputes as a judge in cassation, as an appeal judge or as a judge of first and last instance.

In principle, the case is examined by a single chamber or by two, three or four chambers combined [CJA, Article R.122-11]

Judgment on the most sensitive cases as well as those that are likely to set precedents or have a remarkable legal impact is referred to the Administrative Claims Division, which has 15 members [CJA, Article R.122-18], or to the Administrative Claims Assembly, which has 17 members, including the Vice-President of the Council of State [CJA, Article R.122-20].

- Advisory and study functions

The advisory and study functions of the Council of State are carried out by the advisory divisions and the Report and Studies Division respectively.

There are five advisory divisions responsible for issuing opinions on draft texts, laws, orders or decrees: the Interior Division, the Finances Division, the Public Works Division, the Welfare and Social Security Division and the Administrative Claims Division.

The Report and Studies Section prepares legal studies commissioned by the Prime Minister, draws up the Council of State's annual activity report, which is published by Documentation Française, and also prepares an annual study report on a legal issue that it believes merits the attention of the public authorities [CJA, Article R.123-5]. It now has three delegations attached to it: (a) the delegation for international relations, which organises the Council of State's international cooperation activities, (b) the delegation

for European law, which monitors all issues of European law, and (c) the delegation for the enforcement of judgments, which is responsible for the administrative phase of enforcement proceedings arising from the Council of State's judgments in disputes involving administrative claims.

- Managing the administrative jurisdiction

The management of the Council of State and the administrative jurisdiction as a whole is entrusted to the General Secretariat, which is made up of six departments (human resources, finance, equipment, etc.), the Training Centre for the Administrative Jurisdiction and the Centre for Legal Research and Dissemination (CRDJ), which is responsible for the filing and dissemination of Council of State decisions. The Council of State's decisions and opinions on matters of litigation, as well as the conclusions of the public rapporteur, can be obtained from this body by sending a written request or an email.

The main task of the General Secretariat of the Council of State is to manage the magistrates and staff of the CAAs, TAs and the National Court of Asylum, with a special focus on the registrars, who are partly managed by the Ministry of the Interior. In managing the careers of administrative magistrates, the General Secretariat is assisted by the High Council of TAs and CAAs (CSTA), chaired by the Vice-President of the Council of State. In particular, this Council is involved in the appointment and promotion of administrative magistrates. It draws up the list of promotions, gives its consent to the appointment of public rapporteurs and presidents of the TAs. It exercises disciplinary authority. It also gives its opinion on texts concerning

the organisation and workings of the administrative jurisdiction.

III. The law of the host country

- The aspects of French national law that were covered in particular during my internship were: administrative liability, environmental law, the right of access to administrative documents, the priority question of constitutionality, the management of the Council of State and the administrative jurisdiction, the freedom summary procedure and European law.
- The aspect of the law of the host country that particularly interested me is an aspect of the litigation procedure: *'The freedom summary procedure'*.

The freedom summary procedure allows the administrative judge to be asked to take all the necessary measures to put an end to an act or behaviour of a public person or private body entrusted with a public service mission that seriously and obviously infringes a fundamental freedom. The judge rules within 48 hours [CJA, Article L.521-2].

The conditions

Under the terms of Article L.521-2, the exercise of the freedom summary procedure is subject to three cumulative conditions (urgency, infringement of a fundamental freedom and serious and manifestly unlawful infringement). These three conditions are restrictive and are assessed rigorously by the judge, which represents the counterpart of the flexibility with which this procedure can be initiated and the extent of the powers available to the freedom summary procedure judge.

(a) Urgency

The condition is assessed more stringently than in other urgent referrals and in a different way. For example, the balance between the various private and public interests involved, which makes it possible to characterise the condition of urgency in summary proceedings, is rarely applied in freedom summary procedures. Presumptions of urgency are also much rarer in freedom summary procedures. The condition of urgency is examined before and independently of the other conditions of the freedom summary procedure, in particular that of the existence of a serious and manifest infringement of a fundamental freedom. In addition, the condition is assessed in the light of the role of the freedom summary procedure judge, who makes his or her decision within a very short period of 48 hours. According to the case-law, this implies that the freedom summary procedure can only be used if the situation at issue requires the necessary safeguard measures to be taken 'within a very short time' and if these measures are those that the administration will be able to take very quickly.

Although the referral to the freedom summary procedure judge is not subject to any condition of timing and does not require an administrative decision when one does not exist, the granting of the measures requested on this basis does presuppose the existence of a 'particular urgency', of an 'extreme urgency'.

(b) Infringement of a fundamental freedom

The concept of fundamental freedom is assessed broadly by the judge, who draws on the freedoms guaranteed by the Constitution, those protected at European level, and on the rights of claim to recognise the existence of a fundamental freedom within the meaning of Article L.521-2.

The rights and freedoms recognised as fundamental freedoms within the meaning of these provisions are rights and freedoms that are considered essential in the domestic legal order and whose content is sufficiently precise. The right to respect for life, the freedom to come and go, the free administration of local authorities, the right to property of private and public persons, and the right to schooling for disabled children are some examples of fundamental freedoms within the meaning of these provisions.

However, the case-law denies the character of a fundamental freedom to rights and freedoms with these characteristics. Thus, the principle of equality does not constitute a fundamental freedom protected under the freedom summary procedure. This is also the case for the right to housing.

The freedom summary procedure is envisaged as a 'special procedure', exceptional and subsidiary in nature compared with summary proceedings. In case of urgency, the latter constitutes 'the normal way' to put an end to an intolerable act or behaviour of the administration, while the trial judge, who must be consulted, decides on its lawfulness.

(c) A serious and manifestly unlawful infringement

The exercise of the freedom summary procedure requires a sufficiently serious infringement of a fundamental freedom. To assess this condition, the judge balances the justifications for the administrative conduct or act criticised against the actual impact of the alleged infringement on the legal or material situation of the applicant or the persons concerned. An administrative act or conduct that deprives the victim of this freedom or impedes its exercise thus constitutes a serious infringement of a fundamental freedom. Similarly, in view of their purpose and effects, certain measures constitute in themselves a serious infringement of a fundamental freedom (e.g. expulsion orders).

It is also necessary for the administrative act or behaviour at the origin of the alleged infringement to be 'manifestly unlawful'. As shown by the numerous 'COVID-19' orders,

this condition has become the most restrictive in relation to freedom summary procedures. The judge assesses this condition in the light of the means available to the administration to put an end to the alleged infringement. The judge also takes into account the measures already adopted or envisaged, 'in the near future' by the administration, to remove or mitigate the alleged infringement. When, in the course of its examination, the court does not have sufficient information to enable it to assess the means available to the administration, it may postpone its decision and 'ask the administration to produce, within a time limit that it shall determine, all additional information'.

The powers of the judge

The freedom summary procedure judge has the most extensive powers to guarantee the preservation of the fundamental freedom that is being infringed.

He or she may order 'any measure necessary' [CJA, Article L.521-2]. He or she can therefore issue a suspension order, or instruct the administration to do or not to do something, and these measures may be accompanied by a fine, which the summary proceedings judge may tax in the event of non-compliance.

He or she is also responsible for verifying 'materially' whether the application of a law by the administration, with regard to the purpose of the legislative provisions in question, does not excessively affect the rights and freedoms protected by France's European and international commitments. If this is the case, he or she may set aside this law and order the administration to take measures to safeguard the fundamental freedom in question.

His or her powers are adapted and limited to his or her office: he or she rules within 48 hours to put an end to a serious and manifestly unlawful violation of a fundamental freedom. His or her powers are thus freed from the constraints that govern their exercise in other procedures. For example, conclusions seeking the suspension of an

administrative decision are admissible, in matters of freedom summary procedures, without the applicant needing to produce the decision whose suspension he or she is requesting or to justify the impossibility of doing so.

The freedom summary procedure judge is not bound by the request and can issue injunctions *ex officio*, which the summary proceedings judge cannot do. He or she may also impose a penalty *ex officio*.

On the other hand, the freedom summary procedure judge cannot order the administration to take measures whose conditions of adoption or effects do not make it possible to put an end to the infringement 'within a very short time'. Moreover, he or she may not order the annulment or reversal of an administrative act or its withdrawal because such measures are 'in all respects identical to those that would be pronounced' by the judge in the main proceedings.

The freedom summary procedure judge may, however, order irreversible measures, which are no longer provisional in nature and prejudice the main proceedings, when such measures are essential to safeguard a fundamental freedom.

IV. The comparative law aspect of your internship

The litigation and advisory functions of the French Council of State are largely similar to those of the Greek Council of State. In my opinion, two significant differences should be highlighted with regard to the litigation function:

- There is a marked difference in the status of members of the French and Greek Councils of State.

The French Council of State has approximately 300 members, some of whom are not active within the Council of State itself. Several of its members are in fact made available or seconded to administrations, the government or the private sector. The members of the Council of State do not have the status of administrative magistrates but that of civil servants, even though, among their various functions, they perform the role of judge. The statutory provisions concerning them are to be found in Title III of Book I of the CJA, which is devoted to the Council of State. The statutory provisions of the State civil service also apply insofar as they are not contrary to those of the CJA [CJA, Article L.131-1].

The Council of State is composed of auditors, masters of requests, councillors of State, presidents of divisions, a vice-president. Although the President of the Council of State is, in law, the Prime Minister, in practice, the Council is chaired by its Vice-President. Auditors are chosen from among the former students of the École Nationale de l'Administration (ENA). They become rapporteurs in one of the chambers of the Administrative Claims Division of the Council of State. The masters of requests, assigned to a chamber of the Administrative Claims Division as well as to an administrative division, are either auditors who reach this grade 3 years after their graduation from ENA or outside persons appointed 'in the external round' by the Head of State. These councillors of State, who are politically appointed, are only appointed for a limited period of 5 years [CJA, Article L.121-5] and may either only perform advisory functions, which means that they cannot sit in the Administrative Claims Division, or, if they are qualified individuals who meet certain conditions [Article L.121-4-111], may only perform jurisdictional functions within the Administrative Claims Division [Article L.121-4-111]. Progression between the grades of auditor and senior auditor, master of requests and councillor of State is based on seniority. Appointments in the external round make it possible to integrate magistrates from the corps of the TAs and CAAs into the Council of State, with a proportion of these appointments being reserved for them.

In contrast, the members of the Greek Council of State are magistrates belonging to the judiciary and not civil servants. The Constitution guarantees the 'personal' independence of magistrates [Article 87-91]: they are irremovable, appointed for life

until they reach the age limit, and their careers are managed by the Higher Council of the Judiciary of Administrative Justice. However, promotion to the ranks of President and Vice-President of the Council of State is decided by the Council of Ministers. Moreover, the Constitution [Article 88(6)] does not allow a magistrate to change jurisdiction, for example from one court to another. The only exception allowed concerns the appointment of administrative judges of first instance or appeal to the rank of Councillor of State. Finally, and this is a considerable difference from the French Council of State, magistrates are formally prohibited from taking up a position in the active administration [Article 89(3) of the Constitution], although it is possible to engage in teaching activities or to take part, exceptionally, in an administrative commission or disciplinary board.

Moreover, since the establishment of the National School of Magistracy in Thessaloniki [by Act No 2236/1994], there has been a single competitive entrance examination for the National School of Magistracy, which has two divisions: an administrative division and a civil and criminal division. The highest-ranking candidates in the Administrative Claims Division usually join the Council of State as auditors.

- Another major difference concerns 'separate opinions'.

Normally, all courts observe the confidential nature of deliberations. The public is of course entitled to know the judgments and these are public, but what each judge decided and what he said during the deliberations.

In France it is not even known, in general, whether a judgement has been given by a unanimous vote of the judges or by a majority. The opinion of each judge is therefore not disclosed: only the overall judgment counts, which is collegial - except, of course, in the case of a single judge.

In Greece, on the other hand, as in the United Kingdom and the United States of America, it has long been the practice that a judge who disagrees with the majority of his or her

colleagues and thus with the judgment has the right to make his or her minority opinion public. It is called dissenting if it disagrees with the solution, concurring if it agrees with the solution but disagrees with the reasoning leading to that solution.

In international jurisdictions, both practices exist. In particular, it is the Anglo-Saxon tradition that has been introduced at the European Court of Human Rights in Strasbourg. The judgments of the Court therefore indicate by which majority they were adopted (unanimity, five to two, six to one, etc.), and the judges are entitled to write a separate, dissenting or concurring opinion, which is attached to the text of the published judgment. In Luxembourg, on the other hand, at the Court of Justice of the European Union, the rule is the opposite: separate opinions do not exist and, logically, judgments never say whether they were adopted unanimously or by a majority.

There are advantages and disadvantages to both systems. When judges are allowed to express their separate opinions, the principle of the confidentiality of deliberations is violated, and each judge may be criticised either for implicitly agreeing with the majority's solution or for explicitly diverging from it. Moreover, a judgment given by a small majority (e.g. four votes to three) is somewhat weakened in its authority, at least psychologically (in law every judgment has the same authority). However, the main advantage of this practice is that it makes it possible to present different possible points of view on the same legal problem, which is of great interest to legal experts but also to litigants, their lawyers, etc.

Conversely, in a system such as that in Paris, the absence of separate opinions protects judges from individual criticism and reinforces the idea that all judgments have the same authority (unanimity is somehow presumed, at least fictitiously). The possibility of confronting different points of view on the issues at stake does not, however, exist.

It should be noted that in Athens there are only judges, whereas in Paris there are also public rapporteurs who play a role comparable with that of the Advocates General of the Court of Luxembourg. Before the hearing and therefore before the judgment, the public rapporteur publicly expresses his or her own opinion on the case (these are the conclusions). On the other hand, he or she does not take part in the deliberations and

the adoption of the solution: he or she is a sort of independent legal counsel, whose opinion informs the judges, without constraining them.

This observation shows that the two major European systems are somewhat symmetrical. The presentation of the different possible legal solutions is ensured in Athens by the existence of dissenting or concurring opinions, and in Paris by the existence of the conclusions of the public rapporteur. While there are advantages and disadvantages to each practice, experience shows that each Court is satisfied with its system, and no one is seriously thinking of changing it.

V. The European aspect of your internship

The internship focused mainly on domestic law. Nevertheless, the relationship between the Council of State and the Court of Justice of the European Union, and in particular the development of referrals from the Council of State of France to Luxembourg for preliminary rulings, was discussed during an interview with a Councillor of State acting as rapporteur to the Third Chamber of the Administrative Claims Division.

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

- the fact that the electronic procedure has become compulsory for all parties and that, therefore, everything is digitised.

- the presence of the Government Commissioners at the meetings of the Advisory Divisions.

In my opinion, there is a need to reflect on a new distribution of competences within the Hellenic Council of State, more rational than the one that exists today, using the French model as an example. In fact, the advisory role of the Greek Council of State is not carried out by several specialised divisions, as in France, but only by the Fifth Division, which is also responsible for examining appeals concerning urban planning, the environment and public investment. It examines draft decrees in a panel of three or five judges. In accordance with the case-law of the European Court of Human Rights, particular attention is paid to the fact that the judge reporting on the draft decree must defer if the latter is examined in the context of an appeal brought before the Fifth Division. The latter may also decide to refer its examination to the Plenary Assembly if the draft submitted or the enabling legislation is not in conformity with the Constitution [Article 100 § 5]. Moreover, unlike the French system, this examination is not carried out in the presence of government commissioners, but only brings together members of the Council of State.

- informal meetings such as that of the Troika.

VII. Benefits of the internship

By attending meetings of the advisory divisions and hearings of the adjudication and examination panels, and through the cases dealt with, I had the opportunity to gain a better understanding of the Council of State's tasks, its institutional role and its organisation, as well as to keep abreast of French legal news and recent administrative case-law.



VIII. Suggestions

The internship completely met my expectations on a professional level and its organisation was flawless. Therefore, I would like to express my deepest thanks to the ACA, the Council of State of France (especially the Reporting and Studies Division, which organised the internship and oversaw its smooth running), as well as the President of the Hellenic Council of State for giving me the opportunity to live this enriching and unforgettable experience.

Produced in Athens, 12 December 2022

Eleni Mourgia

