



INTERNSHIP REPORT AND SUMMARY

Identification of the participant

Surname: Saby

First name: Olivier

Nationality: French

Seniority: 12 years, including 2 years as Master of Requests

Identification of the internship

Host jurisdiction/institution: Hellenic Council of State

Town/city: Athens

Country: Greece

Dates of the internship: 22-27 October 2023



SUMMARY

This summary report presents the main features of the internship programme (I), as well as the main characteristics of the host institution (II). This is followed by a discussion of the similarities and differences between the Greek and French systems of administrative law (III), followed by a closer look at the issues of member assessment and dematerialisation that are currently driving the Hellenic Council of State (V), as well as the European perspective on the issues of asylum, the economic crisis and the COVID-19 epidemic (V). Some suggestions for the future are then made (VI).



I. Internship programme

The internship, conducted in conjunction with a member of the Italian Council of State, involved alternating observation of meetings and hearings with bilateral meetings.

From a litigation point of view, it was possible to attend a judging session of the Fourth Division and a pre-deliberation session of the Sixth Division. Several discussion sessions were devoted to recent issues that have shaped Greek case-law: international protection, the economic crisis and the health crisis, and so on. It was also possible to attend, at first instance, a panel hearing, a summary hearing (single judge) and to exchange views with trial judges during a pre-deliberation hearing.

In terms of consultative activity, the programme included a session on the preparation of a draft regulatory text.

From a more general point of view, we were able to discover the court's IT system, used in particular to dematerialise hearings, as well as the Council of State's physical library, which contains a large number of works in French.

It should be noted that the members of the host institution were very willing to open their doors to those taking part in the internship, and I would like to extend my warmest thanks to them all.

II. The host institution

Article 93 of the Constitution proclaims that justice is organised between administrative, civil and criminal courts, and Article 94 that the Council of State and the ordinary administrative courts and tribunals hear administrative disputes.

The successor to the King's Council created under the reign of Otto I (1833-1843), the Hellenic Council of State was founded in its current form in 1929, when it was chaired by Konstantinos Raktivan (1929-1935). The 1975 Constitution, revised in 1986, 2001 and 2008, proclaims it as one of the three supreme courts, alongside the Court of Cassation and the Court of Audit. Since 4 July 2022, Evangelía Níka has presided over the Council and its 53 Councillors of State, including 10 vice presidents heading six divisions, 57 masters of requests and 50 auditors, whose duties, as defined by Article 95 of the Constitution cover both litigation and administrative matters.

The first mission covers the judicial powers of cassation (decisions handed down by administrative tribunals and administrative courts), but also of first and last instance (for appeals on grounds of ultra vires directed against regulatory or individual acts), and of appeal in certain matters defined by law. It also intervenes in constitutional matters to ensure the uniformity of case-law in the absence of an autonomous court. All the courts are required to rule on the constitutionality of the provisions they apply and are obliged to set them aside if they infringe the supreme law. However, Article 100 of the Constitution creates a special constitutional court made up of four Councillors of State, four Councillors of the Court of Cassation, their respective

presidents and two professors of law, which meets in the event of a difference of interpretation between the supreme courts or to settle a conflict of jurisdiction between the two levels of court.

The second mission concerns the consultation of the Council by the Government on draft presidential decrees of a regulatory nature. In accordance with Article 43(2)(1) of the Constitution, the Presidency of the Republic has regulatory powers by virtue of a special legislative delegation. When the Council is consulted, it issues a simple opinion, but in practice this is almost always followed. It also gives opinions on bills, but only when they concern the organisation and operation of the administrative courts. Its Fifth Division, which also examines appeals relating to town planning, the environment and public investment, has a monopoly on this activity, with a panel of three or five judges and no government commissioners. It may refer the matter back to the plenary assembly if the draft or the enabling legislation does not comply with the Constitution.

Proof among other things of the Council of State's successful integration within the country, President Mikhaíl Stasinópoulos (1966-1969) became the first President of the Third Hellenic Republic, and President Ekaterini Skellaropoulou (2018-2022) has been President of the Republic since 2020.

III. Points of comparison between the legal systems

The first thing that stands out for a French intern is the similarity between Greek and French concepts of law and procedure — reinforced by the very common use of French among members of the Hellenic Council, particularly but not only among Councillors of State, such as the fact that:

- individual decisions must be substantiated and, in the case of unfavourable decisions, taken in accordance with an adversarial procedure;
- the unilateral administrative act is fully enforceable;
- an implicit dismissal decision arises in the absence of a response from the administration;
- the hierarchy of standards and the principle of legality must be respected;
- internal measures are not subject to appeal;
- independent administrative authorities have a regulatory role or a role in defending fundamental rights;
- emergency procedures enable the judge to intervene as quickly as possible;
- European law feeds into decision-making and helps national systems to evolve, as in the case of the environment and public procurement, for example;
- the judge may modulate the effects of an annulment over time;
- the court of cassation rarely settles the case on the merits, etc.

Furthermore, the organisation of the administrative courts is in itself quite familiar to a French intern:

- there are three levels of jurisdiction: around 30 administrative tribunals and 10 administrative courts of appeal employ around 1 000 administrative magistrates (compared with more than five times that number for judicial magistrates);

- administrative judges dealing with the substance of cases belong to a different body from that of the members of the Council of State, which has four grades: auditor, Master of Requests, Councillor of State and Head of Division;
- appeals are filtered: to be admitted, the amount in dispute must be greater than EUR 40 000 (EUR 200 000 for public contracts) and the case must raise a novel issue or the contested judgment must be contrary to the case-law of a supreme court. Otherwise, it is examined by a panel of three judges, who can dismiss it without a hearing;
- to examine appeals that have been admitted, the ordinary panel comprises five judges (three Councillors of State and two Masters of Requests), the enlarged panel comprises seven judges (five Councillors of State and two Masters of Requests) and the full court comprises at least 25 judges;
- the 'pilot judgment' procedure allows applicants to request that their case be examined by the Council of State as a matter of priority if it has significant legal implications. An administrative tribunal may also refer this type of case directly to it for a preliminary ruling.

However, there are a number of notable differences:

- the members of the Greek Council of State are not civil servants but are members of the judiciary. Since 1995, they have been trained at the National School for the Judiciary, which prepares successful candidates in two divisions: an administrative division and a civil and criminal division. Students in the administrative division choose the level of court they wish to join according to their ranking. Career management is the responsibility of the High Council for the Judiciary of Administrative Justice. As the number of jobs per grade is limited, it is necessary to wait for a vacancy to become available in the higher grade before moving up. And while careers are watertight between levels of jurisdiction, 20% of Councillor of State posts are reserved for magistrates of the administrative courts of appeal;
- magistrates are constitutionally prohibited (Article 89(3)) from being seconded to the administration. They may only carry out teaching activities and occasionally sit on an administrative committee;
- only Councillors of State have the right to vote on panels of judges. Auditors assist them in investigating the case but do not sit in court or take part in deliberations, while Masters of Requests report their cases, sit in court and take part in deliberations but do not vote;
- the hearing takes place without the intervention of an independent voice from outside the panel of judges. The rapporteur sets out the background to the case, the issues at stake and the arguments put forward. The docket includes a large number of cases (over a hundred at the hearing observed), and only those ready for trial are called (fewer than 10 on that day). The examination of the files is not the subject of an appraisal session: it is during the deliberations that the rapporteur sets out his position, and it is after the deliberations that he begins drafting his proposal. On average, the decision is notified within 8 months;

- lastly, a particularity closely linked to national tradition: the Greek courts apply the law of worship (see, for example, full court judgment No 2399/2014 on the public funding of a mosque in the centre of Athens) and the ministers of the Orthodox Church are public servants.

IV. Focus on two current challenges: assessment and dematerialisation

During the internship, the Greek Council of State was more particularly involved, on the one hand, in a reflection on the development of the assessment of its members, which made it possible to compare the systems of each institution, and, on the other hand, continued to work towards the development of the dematerialisation of the appraisal process.

Assessment of members

Introduced for the first time in 2006 by Act No 3514/2006 (judged to be in conformity with the Constitution by a majority vote at the General Assembly of the Council of State in 2007), which amended Act No 1756/1988 on the organisation of the courts and the status of magistrates, the assessment applies to all magistrates in all courts, with the exception of Councillors of State.

In 2022, it was largely reformed by Act No 4938/2022 on the organisation of the courts and the status of magistrates, which, in order to improve efficiency and strengthen equality between those assessed, introduced a system consisting of guidelines, instructions and good practice, a vademecum and standard assessment forms for use by assessment advisers (vice presidents of the Council of State in the case of Masters of Requests), to be adopted by the general assembly of the supreme court of each jurisdiction.

In 2023, after consultation with the General Commission for Administrative Tribunals and Administrative Courts of Appeal and the Union of Administrative Judges, an initial, rather formal framework was adopted by the General Assembly of the Council of State for the administrative tribunals and courts, and, after discussion with the Union of Magistrates of the Council of State, a second, less detailed framework was approved for two thirds of the staff of the Council of State, who are assessed by the other third of the members (Decision 26/2023 of the General Assembly).

Although it is envisaged that each division will set its own quantitative objectives for the Masters of Requests and determine the notification deadlines, the system does not provide for salary adjustments based on the achievement of statistical objectives, as is the case in France, where salary adjustments are decided each quarter based on the quality and quantity of the work carried out by the members.

The internship provided an opportunity to compare this system with that of the French Council of State, which provides in particular that:

- members are paid an amount in recognition of the importance and value of the services rendered and which takes account of the hardship associated with the performance of their duties, in accordance with the provisions of the Decree of 6 October 2000. In the

Administrative Claims Division, rapporteurs are assessed at the quarterly meeting of the chamber presidents with the deputy heads and the head of the division responsible for bonuses, in the light of the statistical obligations imposed each quarter depending on the type of assignment. In the administrative division, it is based on the number and size of cases assigned by the Head of Division. This allowance, which is paid monthly, is made up of a performance bonus, an additional performance bonus and a fixed bonus. The performance bonus is a percentage of the gross indexed salary: its rate is set for each member by a quarterly order of the Vice President issued on the recommendation of the heads of division on the basis of the quantity and quality of the work carried out during the previous quarter. (Members of the Council of State whose personal contribution to activities is highly inadequate may be awarded a performance bonus of zero.) The additional performance bonus is awarded to members whose performance bonus rate exceeds 26 %. The Vice President's quarterly order setting the performance bonus rate determines the number of additional bonus points allocated to each member. In principle, it is equivalent to the number of performance bonus points above 26. This number of points, multiplied by the value of the additional performance bonus point, is used to calculate the amount of the additional performance bonus. The fixed bonus is determined taking into account the nature of the duties performed. When the performance bonus rate is less than 13, the amount of the fixed bonus is zero. An order sets out the assignment arrangements for members of the Council of State and the associated statistical obligations;

- an appraisal interview is held annually: this is an informal exercise, and the exchange of views can be based on a model report proposed by the General Secretariat, according to the wishes of the participants. This is a discussion between the president of the chamber and the member, lasting approximately 1 hour. It should provide an opportunity to take stock of the member's activities and to review training needs and career prospects. This meeting should provide an opportunity to discuss the organisation of work within the Council and to share best practices. (It also exists for members of administrative tribunals and courts, and is more formalised in the form of an assessment grid.) This applies to all members, including those in managerial positions.

Dematerialisation

The Greek Council of State has developed a dematerialised portal (OSDDY-DD) with the same objective as the deployment of Télérecours in France: to give citizens easier access to administrative justice as soon as they are connected, to reduce the use of paper and the associated costs as much as possible, and to enable members to work remotely. The two applications have functions in common, in particular the ability to consult and download digitised case files, search for case-law and track the progress of cases.

The filing of case documents by citizens and their availability to judges on a secure network, with access via a virtual private network, is now a reality in both countries. Although it has been observed that Greek administrative tribunals still make extensive use of paper files, the process has been launched.

In 2022, Greece also launched a contract for the provision of services (2022/S 056-147047) for the development of machine learning and artificial intelligence tools for the administrative

justice system, worth around EUR 10 million. The aim is to assist judges in the decision-making process and offer new services to users.

V. European perspectives

Bilateral discussions have shown the importance of comparative law issues and the influence of European law on both the Greek and French legal systems. They concerned: the processing of asylum applications, the judicial review of economic policy choices at a time of public debt crisis, and the role of the supreme court in the context of the health crisis linked to the COVID-19 epidemic.

Asylum

The Greek system was reviewed in 2016 following the judgments of the CEDH ECtHR of 21 January 2011 *MSS v Belgium and Greece* No 30696/09 and of the CJEU of 21 December 2011 *Secretary of State and ME v Refugee Applications Commissioner* No C-411/10 based on Articles 3 and 5 of the ECHR and the EU Charter of Fundamental Rights. Asylum seekers are accommodated in open temporary reception centres while their application is being examined.

As in France, although the majority of appeals are dealt with by the lower courts (but without a specialised court such as the National Court of Asylum), the case-law of the Greek Council of State structures progress in this area of law. For example, in the context of the joint declaration between the European Union and Turkey of 18 March 2016 stating that all new irregular migrants departing from Turkey on or after 20 March 2016 to the Greek islands must be returned, the Council of State, meeting in assembly, in two judgments, Nos 2347/2017 and 2348/2017, dismissed the action on grounds of *ultra vires* brought by two Syrian nationals challenging the rejection as inadmissible of their applications for international protection on the grounds that, under Article 33 of Directive 2013/32/EU, Turkey can be considered a 'safe third country'. Although it was invited to do so by a strong minority of 12 out of the 25 members who made up its assembly in this case, the Council decided not to ask any preliminary questions and to apply the theory of the '*acte clair*'.

The public debt crisis

The case-law on the measures taken in application of the memoranda during the public debt crisis led the Hellenic Council of State to innovate: for example, it refused to validate measures restricting fundamental rights on the sole grounds of the State's cash-flow interests, and used the concept of 'major national interest' to validate the balanced budget aimed at preventing the country's economic collapse.

It thus delimited the legislator's discretionary power to take measures restricting public spending that have negative effects on fundamental rights, on the basis of the constitutionally enshrined principles of equality before public burdens and respect for human dignity. The Council of State has focused in particular on the guarantee for citizens to have material conditions that ensure a decent life, basing itself on the constitutional principle of the social constitutional state, and drawing inspiration from the German *Existenzminimum* theory and

Article 3 of the European Convention on Human Rights (judgment of 23 April 2002 in *Larioshina v Russia*).

The health crisis linked to the COVID-19 epidemic

Like its European counterparts, the Council of State had to deal with restrictions on freedoms and vaccination requirements. The government issued ministerial orders for very short periods, sometimes even on a weekly basis, to take measures that could affect personal and professional freedom, freedom of assembly, freedom of worship and freedom of movement. Many of these measures were challenged before the Council of State on the grounds of *ultra vires*, with an application for a stay of execution of the administrative act concerned.

With regard to emergency decisions, for example, the Council of State:

- rejected the request for suspension of a measure banning the holding of services in the presence of worshippers in places of worship for the period from 16 March 2020 to 11 April 2020 on the basis of the overriding reason of public interest based on the need to protect public health against the risk of propagation of the coronavirus (judgment No 1684/2022);
- rejected the request to suspend a compulsory vaccination measure for civil servants serving in the special units of the fire brigade, on the basis of the overriding reason of general interest arising from the need to ensure the uninterrupted operation of the unit, which was based on the need for personnel to be fully available. It also assessed the damage, finding that the alleged damage to health caused by the vaccination did not exist, since the applicants were not obliged to be vaccinated and retained the option of not being vaccinated while remaining in the fire brigade but assigned to another service (judgment No 133/2021).

Among the decisions taken on the merits, for example, the Council of State admitted in plenary session (judgment No 1684/2022) the existence of a discretionary power on the part of the administration to reconcile distinct and often conflicting interests in order to arrive at a decision that serves the general interest in the context of an appeal by the national federation of public hospital workers against a ministerial order made under the 2021 Act requiring staff of public and private health institutions to be vaccinated against the coronavirus, and specifically employees of public-sector institutions (failure to comply with this obligation resulting in suspension from duty, without pay). At the time, around 15 % of medical staff and 31 % of nursing staff had not been vaccinated (i.e. 25 000 to 30 000 staff). In particular, the Council ruled that:

- the vaccines, even if they had received conditional marketing authorisations, were not experimental or trial vaccines, referring explicitly to decision No 455623 of 30 August 2021, in which the interim relief judge of the French Council of State had given such a ruling. It also referred to similar measures taken in France and Italy and to the conclusions of the medical community, published by official Greek and foreign bodies, on the basis of which it had been established that vaccination reduced the transmissibility and severity of COVID and that the potential benefits for public health outweighed the undesirable side effects, both at the level of the individual and at the level of the general population;
- in the light of these data, and taking into account the evidence in the file showing an increase in the number of cases of COVID and deaths in intensive care units, the full court of the Council of State finally ruled that the compulsory vaccination of healthcare workers did not

- constitute a manifestly disproportionate measure to achieve an objective of general interest, and emphasised that medical and nursing staff were obliged, by virtue of their position and mission, to accept stricter restrictions than the rest of the population;
- in order to refute the applicants' strong reservations regarding the side effects of vaccines, the same judgment expressly refers to judgment No 07045/20-10-2021 of the Italian Council of State in holding that the precautionary principle operates in the opposite way to the usual principle, in that it requires that the use of vaccines which, although marketed on the basis of non-exhaustive clinical data, present more advantages than risks, given that the possible adverse reaction for an individual is much less significant than the actual damage for an entire society in which that vaccine is not used.

VI. Best practices and suggestions

Exchanges between members of the European courts provide a rich source of information for our respective day-to-day practices and for the construction of a legal order at EU level. It is vital that we continue to develop them.

It is interesting to note that many of the issues being discussed are shared and echoed, even though collaboration has not yet begun on some of these areas of work. The informal links that continue after internships are intended to strengthen exchanges, but it could be useful to structure them better once the internship is over.

In this respect, setting up thematic units that would meet by videoconference once a quarter to discuss the problems encountered by each institution would stimulate reflection and exchange best practices that could be disseminated throughout the European Union. Over and above the litigation aspects, this could include, for example, a unit dealing with dematerialisation issues along the lines of the national working groups on Télérecours, since technological deployment could usefully be adapted across borders.

Finally, as suggested by previous interns, it would be advisable to develop translations, into French or English, of the main rulings of the Hellenic Council of State in order to foster legal reflection both in France and at EU level.