EXCHANGE REPORT AND SUMMARY

Identification of the participant
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Nationality: Greek
Exchange country: France

Publication
In order to share feedback and inform future participants in the programme, please note that ACA-Europe may publish your report on its website.

REPORT

Identification of the participant
Nationality: Greek
Functions: Master of Requests at the Council of State
Experience: 15 years as Master of Requests, in total 23 years of service at the Council of State

Identification of the exchange
Host institution/court: Council of State
City: Paris
Country: France
Exchange dates: 29 October to 9 November 2018.

SUMMARY
This report is the result of a two-week exchange, organised as part of the ACA exchange programme, in the French Council of State.
The exchange was very interesting and highly rewarding. It is essential to note that the organisers took steps to adapt it to the interests of the participants (as there were two people benefiting from this experience, myself and a colleague from another court of a member country of the ACA), as well as to plan a programme presenting the organisation of the Council as well as the different aspects of its activity, both in its advisory and jurisdictional functions.

This report raises some points of comparison between the two institutions: the Council of State of France and that of Greece, and then, highlights some features of the French system that deserve to be implemented in Greece.

I- Exchange programme

The programme included discussions with Council of State members on various topics as well as the follow-up of the Council’s work.

The detailed programme was as follows:

Monday, 29 October

- Welcome and visit to the Palais-Royal and discussion with the Councillor of State, delegate for international relations.
- Discussion with an auditor, rapporteur in the 3rd chamber of the litigation section.
  Topic: The role of the rapporteur in the litigation activity of the Council of State.

Tuesday, 30 October

- Discussion with a master of requests, rapporteur in the public works section.
  Topic: The role of the rapporteur in the advisory function of the Council of State.
- Interview with an auditor, assistant deputy secretary-general.
  Topic: The internal organisation of the Council of State.

Wednesday, 31 October

- Discussion with a master of requests, public rapporteur in the 3rd chamber of the litigation section.
  Topic: the role of the public rapporteur in the litigation activity of the Council of State.
- Discussion with a member of the TA-CAA corps, in charge of the inspection functions with the Presidency of the permanent inspection mission of administrative courts (MIJA).
  Topic: presentation of the permanent inspection mission of administrative courts.
Thursday, 1 November
Public holiday

Friday, 2 November
Personal work

Monday, 5 November
- Discussion with a master of requests, delegate for the enforcement of court decisions.
  Topic: Presentation of the delegation for the enforcement of court decisions.
- Discussion with a master of requests, public rapporteur in the 1st chamber of the litigation section.
  Topic: Presentation of the judgment session of the 1st/4th chambers of the litigation section taking place in the afternoon.
- Discussion with the Deputy President of the litigation section.
- Follow-up of the judgment session of the 1st and 4th chambers of the litigation section

Tuesday, 6 November
- Discussion with a deputy President of the administration section, judge in chambers.
  Topic: Judge in chambers.
- Discussion with the President of the social section.
- Session of the social section.

Wednesday, 7 November
- Discussion with a Councillor of State, assessor in the 5th chamber of the litigation section
  Topic: Responsibility in administrative matters.
- Investigation session of the 1st chamber of the litigation section.
- Discussion with the President of the 1st chamber of the litigation section.

Thursday, 8 November
- Judgement session of the 2nd chamber of the litigation section.
- General assembly (Draft of the public order code - public procurement and concessions).

Friday, 9 November
- Welcome and presentation of the role and functioning of the Senate by the head of inter-parliamentary cooperation actions - Visit to the Palais du Luxembourg.
- Discussion with a master of requests, rapporteur in the social section.
II- Host institution

The Council of State, the supreme administrative court, has a dual function: a judge and at the same time an advisor to the administration, which might surprise some foreign jurists, for whom the two functions would be incompatible. In addition to these functions, it fully manages the administrative court. In addition, its organisation and its work methods are especially interesting.

A) The jurisdictional function.

i. The Council is currently both a court of first and last instance, a court of appeal and, above all, a court of cassation. With regard to its first function, it is the award court, i.e. the administrative justice code draws up an exhaustive list of matters in which it is the first and last instance court (e.g. appeal for abuse of power against a decree), notwithstanding the principle that administrative courts are the courts of first instance.

From the 1987 reform and the creation of the administrative courts of appeal, the appellate jurisdiction of the Council has greatly diminished, although it does exist in some cases.

Today, the Council is above all a court of cassation. The majority of appeals lodged with the Council of State are cassation appeals (about 65%), directed against the judgments of the substantive courts, whether they are under general or specialised jurisdiction. To avoid overburdening the High Court, the Administrative Justice Code (AJC) has created a preliminary procedure of admission which allows the appeals to be filtered and enables those that are very likely to fail to be promptly resolved.

ii. In addition to the jurisdictions, which might be considered conventional in the area of litigation, we must quote the litigation opinion, which consists of an opinion issued by the Council if it is seised by a lower court on "a new question of law presenting a serious difficulty and arising in many disputes" (L. 113-1 AJC). Although it is a simple opinion, in practice it binds the lower courts and thus this procedure greatly contributes to speeding up the judgment of cases and ensuring legal certainty.
iii. In an effort to make recourse to courts even more effective, the administrative procedure involves a series of interim measures, introduced by a law in 2000. The most important seem to be the liberty measure and the suspension measure. It should be noted that the latter can be exercised even in the absence of an administrative decision, even without the prior exercise of an appeal on the merits; it is sufficient for the judge to be faced with a serious and manifestly unlawful attack on a fundamental freedom for him to order any measure necessary to safeguard that freedom.

B) The advisory function.

i. The Council of State participates in the preparation of normative texts, whether they are draft decrees, ordinances or laws. The Council is not limited to giving some advice on the drafting of the text; it plays a much more important role, starting from legislative drafting, including the control of compliance of the text with the higher rules (compliance with the Constitution, the European and conventional law), and administrative expediency, while avoiding any incursion into the political choices of the government. Majority of the opinions are made public on the ConsiliaWeb database. The government is not obliged to follow the opinion; however, in the case of decrees, if it decides not to follow it, it can only include its own text, and cannot combine its own text or that proposed by the Council.

With respect to draft laws, the government is free to proceed as it sees fit, i.e. retain its text, modify it or abandon it. A reflection has begun recently on the possibility of consultation on government amendments. In addition, since the constitutional revision of 2008, the Council can be consulted on the proposed laws. In this case, it is seised by the President of the Senate or the National Assembly.

ii. The Council may, at the government's request, carry out studies on a subject of general interest; it is therefore "consulted ... on the difficulties that arise in administrative matters" (L. 112-2 AJC). It may also carry out a study on its own initiative, in order to "draw the attention of the public authorities to the reforms...which seem to it to be of general interest" (L. 112-3 AJC). Every year, it performs a study in which it tackles a broader subject.

C) Organisation of the Council of State.
i. The Council is presided over by its "Vice-President". This title is shaped by history because previously the presidency was ensured by the Head of State or the Prime Minister. Currently, the Prime Minister can preside over the General Assembly, which is an advisory formation and not a jurisdictional one, something that happens rather exceptionally for protocolary sessions. The Vice-President is appointed by decree in the council of ministers on the proposal of the garde des Sceaux (Keeper of the Seals).

ii. The Council is divided into sections: A jurisdictional section and six advisory sections. The seventh is the report and studies section.

iii. The President of the litigation section is appointed by decree in the council of ministers on the proposal of the garde des Sceaux, but in practice the proposal emanates from the Council of State itself. He is assisted by three deputy Presidents, who are also appointed by decree, after presentation of the Vice-President deliberating with the section Presidents.

iv. The jurisdictional section is divided into ten chambers (called sub-sections until 2016). Each chamber is presided over by a Councillor of State, assisted by two assessors and comprises about ten other members of the Council. The section Presidents as well as their assessors are appointed for a four-year term, by order of the Prime Minister, on the proposal of the garde des Sceaux, after the presentation of the Vice-President and after the opinion of the President of the litigation section and deputy Presidents. The chamber hears the cases assigned to it by the President of the section.

The judging panels are: a) the chamber judging alone (3 members), competent for the simplest cases, b) the two chambers together (9 members), for cases that raise difficulties, and finally, c) the litigation section (15 members) and the litigation assembly (17 members) for the cases that raise issues of principle.

In recent years, the single-judge method of judgment has been developing, in summary proceedings and for settlement, by order, of cases "whose nature does not justify the intervention of a collegiate formation" (L. 122-1 AJC). These cases are listed in Art. R. 122-12 AJC.

v. The report and studies section essentially has the following tasks: a) each year, it prepares the public report of the Council of State, which presents the jurisdictional and advisory activity of the administrative court; b) it contributes to the preparation of the annual studies of the Council of State and c) it is responsible for assisting the enforcement of
judgments, in particular, of the Council of State and specialised administrative courts. The delegation to international relations works as part of this section; it was also in charge of our reception and organised our stay at the Council of State.

vi. The Centre for legal research and dissemination (formerly documentation centre) is headed by an auditor or master of requests who works with two other auditors. It is within the centre that the publication of decisions in the ‘Lebon Recueil’ is prepared, according to sheet A, B or C decided by the “Troika” (i.e. the President of the Litigation Section and his three deputy Presidents), accompanied by an analysis and with regard to the most important cases, which will be commented on in the AJDA or the Journal of tax case law.

vii. The Council consists of approximately 300 members, belonging to three grades: councillor, Master of Requests and auditor. About one-third of these members also have functions outside the Council of State (this is the case, for example, of the current French Prime Minister and the French Ambassador in Athens).

What could strike a foreign observer is the fact that the members of the Council are not considered as magistrates but as civil servants. Despite this characteristic, they enjoy strong guarantees of independence and their security of tenure has never been questioned, although it is not based on any text. Thus, promotion is based on seniority and the management of the career of its members is the responsibility of the Council itself.

D) The management of the administrative court.

i. The General Secretariat of the Council of State, headed by a member of the Council and his deputies, assisted by about 300 officials, working under the authority of the Vice-President, manages the administrative jurisdiction (Council, Courts and Tribunals, specialised courts), including not only members of the courts but also the staff of the registry, buildings, IT implementation etc. The administrative jurisdiction does not depend, as is the case of civil and criminal justice, on the Ministry of Justice, but its management is carried out by the General Secretariat, which, as was pointed out during our visit, acts as a "Ministry of Administrative Justice", a guarantee of its independence. The budget that the General Secretariat manages is about 400 million euros a year.

ii. In order to guarantee the independence and the proper functioning of the administrative justice, an inspection mission of the administrative jurisdictions functions within the
Council presided over by one of its members. Other members of the Council and members of the administrative courts and tribunals are also involved. The essential task of the mission involves the control of the organisation and functioning of the lower courts (not magistrates). The mission may conduct site visits, conduct studies on a particular subject and make recommendations for dealing with excessive duration of proceedings. It also participates in the career management of magistrates.

iii. The Higher Council of Administrative Courts and Administrative Appeal Courts (presided over by the Vice-President and which involves the President of the inspection mission and the Secretary General of the Council) is presided over by the Vice-President and includes, among others, the President of the inspection mission of the administrative courts and the Secretary-General of the Council of State. The Higher Council is responsible for managing the career of the administrative magistrates (external appointments outside the region, promotions, transfers, exercise of disciplinary power, etc.) with a view to guaranteeing their statutory independence. It is also involved in the preparation of the Code of Ethics of the administrative jurisdiction.

III- The law of the host country

Some points of the procedure followed before the Council of State are to be noted. In particular:

i. The evolution of a case is of great interest. The handling of a case in litigation is “luxurious”: appointment of a rapporteur, who is the first to discover the case, preparation by the latter of a note and the draft judgment in collaboration with the rapporteur and the assessor, the investigation session, which involves a majority of the members of the chamber, handling of the case by the public rapporteur and preparation, in complete independence, of his or her detailed conclusions, which will be presented orally at the hearing, the judgment session, any filing by the parties of a note for deliberation, deliberation and, finally, reading and notification of the final decision.

Despite this procedure, which may seem burdensome, the Council of State was able, in order to respect a reasonable judgment period, to deliver its judgments with remarkable promptness, knowingly using the order procedure (which has already been mentioned) or the possibility granted by the investigation exemption texts (R. 611-8 AJC). The 2017
activity report, which everyone can refer to on the Council website, is revealing: the average judgment period is 5 months and 24 days, while 48.9% of cases are settled by order.

ii. The preliminary procedure of admission in cassation is also to be retained, because it constitutes a highly effective system of filtering, which, in spite of the extremely succinct reasoning of the non-admission decision, respects the rights of the applicant, particularly thanks to the detailed conclusions presented by the public rapporteur.

iii. Finally, the way in which the advisory function is exercised, which allows the Council to act as a true co-author of the normative text (although legally this statement is not correct), which ensures the quality of the latter.

IV- The comparative law aspect of your exchange

i. It is not by chance that Michel Fromont in his Droit administratif de Etats européens (Puf edition, Themis, 2006) includes Greece in a set of countries called the "French group". The Greek administrativist is in France surrounded by well-known notions, similar to those he uses on a daily basis: Duality of jurisdictions, Council of State, adversely affecting unilateral administrative act, administrative contract, discretionay power, bound jurisdiction, remedy for abuse of power, full remedy action, regulatory act and so many others. Recently (L. 4274/2014), the legislator granted the Greek court dealing with instances of misuse of power, like its French counterpart, the authority to modulate over time the effects of its decision, an option used by the case-law, particularly in these times of financial crisis, in the case of annulment of administrative acts implementing decrease in wages or retirement pensions; another law (L. 3900/2010) provided for a procedure called "pilot judgment", which resembles the opinion on a question of law, prescribed by the AJC.

In any case, despite the similarities, differences exist, for example with regard to the conditions of implementation of the responsibility of the public authority or the organisation of control of constitutionality of the law (in Greece the control of constitutionality is unclear, a posteriori, being exercising by way of exception and not action).
ii. I would like to highlight a few points of difference, which I think are interesting and which could inspire the Greek legislator to carry out a possible constitutional review or legislative amendments:

a) The distribution of jurisdictions within the French administrative jurisdiction is more rational than in Greece. In France, administrative tribunals are the common law courts for administrative litigation, while the Council has jurisdiction as the first and last instance court for fairly well-defined disputes, which is not the case in Greece at all. The Greek Council of State is the first and final instance court in litigation proceedings for abuse of power, but the law may transfer jurisdiction to lower courts for specified categories of cases; in practice, this transfer is mainly in favour of the administrative courts of appeal. This situation sometimes gives rise to a fairly detailed case law in order to determine the competent court for a particular case, which does not result in a prompt resolution of the disputes and which moreover can lead to a dissociation of the same case, leading to contradictory judgments (e.g. if someone requests for the annulment of an act refusing an allowance, he must apply to the Council of State, but if he asks for the sum of money due, he must address the trial court);

b) The Council of State of Greece renders opinions on the legality of regulatory presidential decrees and does not have such jurisdiction with regard to draft laws, as it is the case with the French Council. The adoption of such jurisdiction would greatly contribute to the improvement of the quality of legislative texts, from a reactive as well as purely legal point of view;

c) The two courts seem overwhelmed by the influx of cassation appeals. The answer in France was the introduction of the preliminary procedure of admission, leading to a summarily reasoned decision of non-admission, which seems to provide flexibility to the Council of State if it wants to review its case law, through the handling of the "serious pleas" (term used by the law; L. 822-1 AJC). In Greece, however, the reaction of the legislator (Law 3900/2010) and the case law to the same phenomenon was marked by very marked rigidity: The appeal is inadmissible if the amount of the case is less than 40,000 euros and if it exceeds this amount, the appeal is admissible only if the trial court has interpreted the applicable text contrary to the case law of the Council of State or if there is no case law on the (strictly legal) question posed by the case.
V- The European aspect of your exchange
The exchange mainly concerned French law and the procedures followed before the Council of State. Nevertheless, the European aspect was not absent from the discussions we had with the members of the Council, whether it was the role of the government commissioner, who became the public rapporteur, the respect for the adversarial principle or the duality of the advisory and jurisdictional role and the precautions taken, in particular by the decree of 6 March 2008, to avoid any appearance of partiality.

VI- The aspect of “good practices” in the court visited
Among the elements and characteristics of the French system that one might wish to introduce into the Greek system, with the necessary adaptations to the constitutional framework and the legal traditions of the country, I could mention the following:

i. The possibility for the members of the Council of State to exercise, for a limited time, the function of an administrator. Unfortunately, the Greek Constitution strictly prohibits it for fear that the administrative court becomes very understanding towards it. This is, in my view, an exaggerated approach, which should be revisited in order to give the administrative court the opportunity to know its functioning, its needs and its methods, with the aim of better judging it and make it benefit from its legal competence.

ii. The French Council’s rapporteur begins the deliberation with a draft judgment, which is known to all the members of the panel. In Greece, the draft judgment is drafted after the deliberation and the President of the panel checks whether the rapporteur has presented the chosen solution and the opinions expressed during it (in the Greek tradition, constitutionalised in 2001, dissenting opinions are mentioned in the judgment). We should consider introducing a system similar to that of the Council of State of France, so that the Greek rapporteur prepares his draft judgment before the deliberations. This would facilitate the procedure and, subsequently, more prompt publication of the decision.

iii. Without repeating what has already been said above (see point iv), it is worth reiterating: (a) the possibility of granting the Greek State Council jurisdiction to render an opinion on draft laws, as is the case with other French-style European Councils, (b) the
possibility of a new filtering procedure with regard to the admission of cassation appeals, inspired by the one in France, which less rigid than the current one; and c) the need to reflect on a new distribution of powers within the Greek administrative jurisdiction, to make it more rational than that which exists today.

VII- The benefits of the exchange
The alternation of discussions, which made it possible to meet Council members of different ranks and discuss various issues with them, and the follow-up of the work of administrative sections and jurisdictional chambers, made it possible to better understand the functioning of and the role played by the Council of State among the French institutions.

VIII- Suggestions
The program was enriching and varied, and met my expectations.
Reciprocal knowledge of jurisdictional institutions and their case law, which the judges of supreme courts can acquire through exchanges, which leads to their mutual enrichment, is the main reason for the exchange program, which should be maintained, if not intensified.

Finally, I would like to thank the French Council of State, its members and its officials for the warm welcome, as well as the Greek Council of State and the ACA, for the opportunity to participate in this extremely interesting, informative and rewarding exchange.