Identification of the participant

Nationality: Hellenic

Functions: Master of Requests at the Hellenic Council of State

Experience: 23 years, including 15 years as master of requests

Identification of the internship

Host institution/court: Council of State of Belgium

City: Brussels

Country: Belgium

Internship dates: 17 September to 28 September 2018

SUMMARY

This report presents the programme of the study visit conducted by the participant in the Belgian Council of State (I), as well as the institution of the host country (II). It then deals with the main aspects of Belgian administrative law (III) and emphasises some points of comparison between this law and the Greek administrative law, such as: the organisation of the supreme administrative court, the administrative litigation procedure and the advisory powers of the Council of State (IV). This report is also intended to list the “good institutions” as well as “good practices” in the Belgian Council of State which deserve to be studied more deeply with the aim of possibly introducing them into the Greek jurisdictional system. My colleagues could also benefit from the lessons learned from this internship (IV). Finally, this report makes some suggestions (V).
I- Internship programme

During the twelve days of an internship comprising very few people, I had the privilege of meeting esteemed legal officers (magistrates, auditors, clerks, assessors) in the Council of State of Belgium. It was an extremely interesting experience and, from a professional point of view, extremely rewarding. The welcome was warm, professional, and addressed all my questions. The detailed programme prepared by the magistrate delegated for international relations was excellent and allowed me to get acquainted with the functioning of the Belgian Council of State in greater depth and to visit the Constitutional Court.

More specifically, first and foremost, I was received by the First President and by the President of the Court, with whom I had a fruitful exchange of information for a good half-hour concerning the jurisdictional organisation of the Council of State of Belgium and that of the Hellenic Council of State; he reminded me of the importance of the function of two Sections - Litigation, chaired by the First President and Legislation, chaired by the President of the Court. The Chief Secretary of the Administrative Litigation Section subsequently presented to me in detail the operation of this section and provided me with a copy of the coordinated law of 12.1.1973 governing the Council of State of Belgium. Thus, I was informed of the entire procedure from the filing of a request for annulment until the drafting of a reasoned opinion by the competent member of the auditor’s office. Likewise, the Chief Secretary of the Legislation Section gave me an overview of the entire notice procedure in this section, while providing me with a practical guide to this procedure.

The auditor general and the assistant auditor general explained to me very clearly the role of the Auditor’s office in the Belgian Council of State, which helped me understand the particularities of this institution in relation to the role of auditors in the Hellenic State Council (see Part IV of the report). Furthermore, my reception by the Presidents of chambers for civil service and cassation as well as the preparation by the heads of the corresponding Registries of a copy of the files, which were examined during the hearings (single or three judge panel) that I attended, made this experience even more fruitful.

It should also be noted that the meeting with the Court’s spokesman, an exemplary function voluntarily managed by members of the Court - in this case a Chamber President - as well as the presentation of the Coordination Office and databases of this Court by the relevant First Rapporteurs who provided me with an explanatory note of the organisation of this Office.

Finally, I should note that following a proposal made by the organiser of this internship in the Council of State of Belgium, I made a presentation - using Power Point - on “the impact of the crisis on the judicial review of economic policy measures by the Council of State of Greece”. The ensuing discussion was able to eloquently demonstrate all the peculiarities and similarities of the two legal systems.

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1 See attached document (Programme of my internship).
II- Host institution

The Council of State of Belgium \(^2\) is the supreme administrative court created by a law of 23 December 1946 and installed on 9 October 1948, whose functions including handling appeals against administrative acts emanating from the administrative authorities and exercising an advisory role for Belgian governments (federal, regional and community) in legislative and regulatory matters. These tasks are carried out respectively by the Administrative Litigation Section and the Legislation Section. The magistrates who make up the Council are divided into 15 chambers: 7 French-speaking chambers (including 5 chambers for administrative litigation and 2 chambers for legislation), 7 Dutch-speaking chambers (including 5 chambers for administrative litigation and 2 chambers for legislation) and a bilingual chamber.

The General Assembly of the Administrative Litigation Section is responsible for ensuring the harmonisation of its case-law on the initiative of the First President or at the request of the Chamber concerned or the auditor general.

At the hearing of chambers for administrative litigation, the chambers sit with three members. However, they sit with one member (single judge) when examining applications for suspension and interim measures (administrative summary proceedings) or when the appeal is to be declared inadmissible or struck out of the list.

The Council of State consists of two sections:

- **The Administrative Litigation Section**, which decides:
  
  (a) by way of judgments on actions for annulment for violation of rule of form, either in terms of substance or where required, on pain of nullity, for excess or misuse of powers, brought against administrative acts and regulations,
  
  (b) by way of judgments on cassation appeals lodged against the contentious final decisions delivered by the administrative courts for infringement of the law or for violation of rule of form, either in terms of substance or where required, on pain of nullity.

- It should be noted that until the recent constitutional review of 2014, an applicant who obtained an annulment judgment at the Council of State was obliged to initiate a second trial in civil courts in order to obtain compensation for damage suffered. Since the revision of Art. 144 of the Constitution in 2014, the Council of State has the power to rule on the civil effects of its judgments, in that it can now award a “restorative allowance” to the litigant who has suffered the effects of the annulled administrative act\(^3\). Thus, it avoids the path of a double procedure to obtain compensation for damage caused by the annulled act.

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\(^2\) V.F. Perin, P. Lewalle, The Council of State, Weekly mail of the Center for Socio-Political Research and Information (CRISP) 1984/30 (No. 1055).

\(^3\) V.J. Sohier, Action for damages against public authorities: to be brought before the judicial courts or, since 2014, before the Council of State? General review of Insurance and Responsibilities, 2015.

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• **Legislation section**

Each of the four chambers of legislation comprises three members of the Council and two assessors. These assessors are appointed by royal decree for a term of five years which can be renewed. They are chosen from competent persons owing to their contribution in legal matters and are therefore necessarily lawyers and at the same time highly qualified people, for example professors, lawyers, senior officials.

The legislation section has an advisory function in legislative and regulatory matters. Its task is to enlighten and assist both the legislator and the Government, both at federal level and at the level of municipalities and regions. Thus, texts are submitted to this section for an opinion on the compliance of the texts with the national as well as European law which is formulated in the language(s) in which these texts are to be enacted or adopted.

When the request for an opinion raises a question relating to the respective powers of the State, Communities or Regions, the First President shall refer it to the combined Chambers of the section. These consist of two Chambers of different languages (a French-speaking room and a Dutch-speaking room).

It was only recently, in 2016, that the law of 16 August amending the laws on the Council of State provided for the publication of the opinions of the Legislation Section posted on the website and in the corresponding section.

It should be noted that so far only opinions on legislative standards have been included in the Parliamentary Documents, whereas a large majority of the opinions of the Council of State that do not concern legislative or regulatory standards, were not accessible to citizens. The confidentiality of the opinions was based on the idea that they were the property of the body that requested them, and that it was within the discretion of the body whether to disclose them. For years, the principle governing the legislation section is that it is above all a procedural and legislative tool for legislator(s) of the country and not for its citizens.

Several attempts to change the opinion publication system of the Council of State have been made but without success. The law of 16 August 2016 finally organised the publication of all the opinions for which the standard federal legislator is recognised as competent, with the exception of the opinions on the texts of the “incomplete” laws, i.e. the texts whose authors have chosen not to pursue the process leading to their adoption. The opinions on the complete texts are published

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5 According to the 2015-2016 annual report, “of the 1,930 requests for opinions to the Council of State, 611 were for projects or proposals for legislative standards, i.e. only 31.65%”. See this report, in [http://www.raadvst-consetat.be](http://www.raadvst-consetat.be), pp. 35-39.
without any delay\(^6\) through the Council of State’s website dedicated to the “opinion of the legislation section of the Council”.

The composition of the Council of State is regulated by the coordinated law of 12 January 1973, in accordance with Article 160 of the Constitution.

- The members of the Council of State are part of a body of magistrates \textit{sui generis} without being part of the judiciary\(^7\). They are appointed on the basis of proposals made to the King, through the Prime Minister and the Minister of the Interior respectively, by the Parliament.

With regard to the selection of members of the Council of State, a first proposal is issued by the Council of State itself. The first members were chosen in the judiciary, the Bar and the High-level Administration, in accordance with the linguistic proportion imposed by the law. To be a member of the Council of State, one must demonstrate competence (doctorate, bachelor’s or master’s degree in law) with certain professional experience (10 years at the Bar, in the administration, in the judicial functions or in the Faculties of law of the Belgian Universities), and the average age is 40 years.

The members of the Council of State enjoy security of tenure, and thus choose their first President, their president and their Chamber presidents from among themselves. The term of office of the First President and the President of the Court is renewable only once.

It should also be noted that several members of the Council of State have applied for and become members of the Constitutional Court, and certain magistrates of the Council of State are assigned tasks by the Government.

- The Auditor’s Office, whose role is to report on the cases, comprises a hierarchy of magistrates, headed by an auditor general, an assistant auditor general (for the other linguistic role), first auditors, auditors and assistant auditors.

The auditors are recruited by way of examination from candidates aged 30 or above and with at least three years’ experience at the Bar with judicial, administrative, scientific and academic functions.

The Auditor’s Office is an independent institution in relation to the members of the Council. The role of the auditors is very important for the investigation of cases, drafting of reports on the case in question or the draft law under examination. The report of the appointed auditor is followed by his opinion on all matters considered, both in the Litigation Section and the Legislation Section.

This task of the Auditor’s Office, even if it appears incidental to that of the Council of State members, it is neither subordinate to the latter, nor dependent on the directives of the members. Each auditor

\(^{6}\) According to order no. 149/2017 of 21.12.2017 of the Constitutional Court, the opinions of the Council of State before the entry into force of the Law of 16 August 2016 - on 1 January 2017 - “are published no later than 1 January 2019, as defined by Royal Decree to the Council of Ministers”.

prepares a report and verbally express his opinion at the litigation hearing; he cannot give his opinion verbally during the legislation session, as he votes.

The task of the Auditor’s office could be similar to that of the ‘commissaire du gouvernement’ before the French Council of State, since “in litigation, it is actively involved in the appeals process and, following the principle of double review, gives his opinion at the hearing” 8.

There is also a coordination office under the authority and management of the first president or the president for the legislation section. Its tasks consist of keeping the legislation status updated, preparing the coordination, codification and simplification of the legislation as well and above all, providing the public, according to the conditions determined by royal decree deliberated in the Council of Ministers, with the Office documentation regarding the legislation status.

The legislation is then updated from the recording of each selected text in a database (called “Chrono”) by adding any modifications to these texts. The Coordination Office aims to provide accurate and complete information on the current and past status of the recorded text. For the convenience of users, whenever data is available in the form of a searchable electronic document, access to this document is made possible.

Since 13 September 2004, all data are available to the public. More specifically, the Coordination Office databases, referred to as “refLex” (“ref” for references and “Lex” for “law”), are now available online free of charge 9.

The tasks of the Coordination Office are carried out by “first rapporteurs” assisted by rapporteurs and assistant rapporteurs. There are also “documentalists”, or people with a university degree in documentary information science and who therefore have competence in addition to that of rapporteurs who are only legal officers.

Last but not least is the court spokesman department. In fact, the Council of State was - unlike the Court of Cassation - relatively unfamiliar to the public. The press alluded to its powers only incidentally, on the occasion of the events it covered. So, approximations and errors were not rare; as the press could present the judgments of the Court as it pleased and thus ensure their repercussion on public opinion as quickly as it desired. For this reason, 4-5 years ago the institution of court spokesmen was inaugurated in the Belgian Council of State. They are trained by a media training institute and include all civil servants. In addition to their main task, the court spokesmen also keep in touch with journalists and newspaper editors and to formally bring judgments that are made public but concern current issues and are of interest to the public to the latter’s knowledge, through press releases.

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8 See on this point, Fr. Gosselin, Gr. Delannay, P. Lewalle, op.cit.
9 See: [http://reflex.raadvst-conseiletat.be/reflex](http://reflex.raadvst-conseiletat.be/reflex). For the dissemination of the principles of the legislative technique, contact techniquelegislative@conseildetat.be
III- The law of the host country

The aspect of Belgian national law that I found particularly interesting is the advisory function of the Council of State in legislative matters. The Legislative Section provides opinions for the preparation of federal laws and decrees and orders of communities and regions. It is also consulted on the draft royal decrees and the draft decrees of the governments of the communities and regions, when it comes to drafts of general texts (regulations). While the opinions are mandatory for draft legislation, decrees or orders, and for draft regulatory orders, they may also be sought by the presidents of the legislative assemblies. The opinions of the legislation section relate to the legal nature of the texts that are the subject thereof and even if they are not legally binding, these opinions carry considerable weight, as they provide a legal perspective on these texts, highlighting issues relating, for example, to the legal competence of the author, the basis of his action, compliance with preliminary formalities or possible drafting faults. Thus, the Council of State becomes a major player in the process of developing the standards of the Federal State, Communities and Regions.10

I deliberated on this, following the discussion I had with the auditor-rapporteurs on two preliminary drafts of an order and a regulatory order, after all the files concerning the examination of these drafts were handed over to me. I deliberation on this even further during a session of the legislation section that I had the opportunity to attend.

First of all, on a request for opinion from the Minister of Environment of Wallonia, the competent rapporteur presented within 30 days - as this was not an emergency procedure which provides for a 5-day period - his opinion on a preliminary draft order “determining the sectorial conditions relating to fuel distribution facilities”. The comments made by the three members at the hearing as well as by the assessor, as this preliminary draft dealt with technical issues and required the opinions of qualified persons, as well as the identification of drafting faults and other rather substantive remarks, confirms the value of this prior check carried out by the Council of State. Similarly, the second report dealt with a preliminary draft framework order aimed at ensuring a policy of diversity and anti-discrimination within the local public service in Brussels. The report focuses on the need for this framework order, with the aim of overcoming failures in the transposition of European anti-discrimination directives, all the more so since in Belgium there is diversification of legislation based on whether it concerns the different Regions or Communities.

IV- The comparative law aspect of your internship

Several points of comparison can be raised in terms of both the jurisdictional organisation of the two Administrative High Courts and the methods used by the members of these Courts.

Similarities can be found in the methods of judicial review exercised by the Belgian Council of State as well as by its Hellenic counterpart. Since the two judicial systems are governed by the principle of separation of powers, the Administrative High Court can never substitute its assessment for that of

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the administrative authority. When acting within the scope of its discretion, the Belgian and Hellenic Council of State may, at most, censure a manifest error of assessment or a decision that is manifestly disproportionate or manifestly unreasonable.

In terms of organisation, the main difference is the fact that within the Belgian judicial system, there are no administrative courts of first instance and courts of appeal with general powers. In addition, the Belgian Council of State hears final judgments pronounced by the administrative courts with special powers in cassation. Moreover, the Auditor’s Office in the Belgian Council of State is, as already explained, an institution that does not resemble the first rank auditors of the Hellenic Council of State; however, since the Hellenic courts do not have public rapporteurs or a public prosecutor’s office, it is up to the rapporteur of the case (the rank of the counsel or master of requests) to present, at the hearing, the facts of the case and the questions asked.

Another key difference between the two Courts, previously analysed (III), concerns the lack of jurisdiction of the Hellenic Council of State to give an opinion on government draft laws before they are tabled in Parliament.

V- The European aspect of your internship

Access to the court
During my internship and after following hearings in the different sections, a number of aspects were highlighted including compliance with the adversarial principle, the principle of equality of arms, transparency, and even the characteristics of the procedure that are influenced by the case-law of the European Court of Human Rights.

More specifically, the Council of State hearings are public. It is the counsel who first reports on the case under examination. The President then gives the floor to the petitioner, then to the opposing party and, where applicable, to the intervening parties. The member of the auditor’s office gives his opinion in the end, having heard the arguments of both parties and - as witnessed during a hearing - can change his mind on the spot, when new details are presented to the court by either party and are obviously brought to the attention of the opposing party.

Moreover, in order to combat the excessive delay in judgment, measures have been taken in favour of the litigants to accelerate the course of the proceedings. Thus, when a request for suspension of an applicant has not been granted, it is presumed to be withdrawn if he has not filed a request for the continuation of the proceedings within thirty days following the notification of the judgment.

Similarly, the effective creation of the Council for Alien Law Litigation should also be pointed out. In fact, until 2006, the jurisdiction to hear individual decisions in applications for suspension or annulment taken pursuant to laws on aliens’ rights fell under the Council of State; however, the legislator adopted the law of 15 September 2006 instituting a Council for Alien Law Litigation, an

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11 See on this point, Fr. Gosselin, Gr. Delannay, P. Lewalle, op.cit.
administrative court with special powers in matters of foreigners, now in charge of this jurisdiction. The decisions of this body may, however, be referred to the Council of State for review. In addition, in the context of the introduction of simplified proceedings to combat the excessive delay in judgment, it should be noted that in a large number of cases\textsuperscript{12} - when the appeal must be declared inadmissible, or calls for withdrawal or has to be removed from the list, or when it comes to handling requests that involve only brief debates - the judgment is delivered by a single judge.

However, it is necessary to think about supplementing the publication of the decisions delivered by the Council of State with the possible "dissenting opinions". However, as it has been repeatedly referred to me by the members of the Council of State, it does not matter according to the Belgian legal system.

In fact, ideas evolve in this regard: today, we see dissenting opinions as a guarantee of the transparency of deliberations, an effective means of encouraging judges to substantiate their judgments more rigorously and, for litigants, an opportunity to better anticipate their chances of success on appeal or in cassation\textsuperscript{13}.

VI- The benefits of the internship

I. Lessons from the two institutions

Two institutions missing from our Court could be created following the model of the Belgian Council of State: the court spokesmen and the Legislation Section, as an advisory authority in addition to that which already exists for all regulatory acts.

Nowadays, the challenge is less the use of the most contemporary communication techniques than a cultural transformation of the judiciary, imbued with secrecy and hierarchical communication, and which today requires more internal democracy and more transparency towards the outside. Beyond the publicity of hearings and the pronouncement of decisions, we now want a better flow of information between the members of the courts, between the judicial system and other players in the legal and social world. The importance of communicating justice with the press\textsuperscript{14} is also recognised. This is all the more so in times of crisis, as administrative case law settles issues that affect the application of economic policy. The public thus expects to find in the press - as is

\textsuperscript{12} During the judicial year 2016-2017, of the 3,339 judgments delivered by the Council of State, approximately 52\% were in simplified or abridged proceedings which (in the vast majority of cases) were heard by a single judge. See on this point, Fr. Gosselin, Gr. Delannay, P. Lewalle, op.cit.


\textsuperscript{14} F. Ost, From obedience to collaboration: new ethics for judges?, op. cit.
written\textsuperscript{15} - “a health report of the judicial institution, its condition and its failures, whether structural or temporary”.

Undeniably, the way in which the media projects justice always has an impact on the citizen’s understanding and trust in it. It is for all these reasons that the institution of court spokesmen within our Council of State could carry out better communication between the judiciary and the media, with the aim of bringing justice closer to the citizen. It would even be advisable for the court spokesmen to be able to devote themselves exclusively to this task and to benefit from permanent and continuous training.

In addition, one could consider granting the Council of State an advisory competence in legislative matters, apart from the one already exercised, only for regulatory acts. In fact, prior checking of the compliance of a draft law with the Constitution or other rules of supra-legislative value exercised by the Council of State could undeniably contribute to increasing the effectiveness of the parliamentary check already performed but also to reducing the number of disputes that may arise once the law is published. In any case, the role of the judge is limited to examining the legal aspects of the draft texts submitted to him, without dealing with the political opinions on which these texts are based. Nevertheless, some legal questions require the legislation section to examine the political choices made, but from a legal point of view.

Providing the public with the opinions on draft laws subject to prior checking by the Council of State could, on the one hand, make the drafting process of legislative texts more transparent and, on the other hand, encourage the government to provide the clear rationale underlying a draft law.

II. Procedures to be followed that could shorten the duration of the proceedings before our Court

- Single judge panel for applications for suspension or interim measures: it is the President of the Chamber, or one of the other judges of the Chamber concerned, who decides on applications for suspension or interim measures.

- The judges of the Court are assisted in their functions by the Registry, comprising specialised legal officers. Any document that is sent to the Council of State and that relates to a future or pending proceeding before it is sent to the Registry. The registry ensures that the proceeding of the section is carried out correctly. In addition, some legal administrative attachés help the magistrates in their research. Thus, judges are able to focus on their main tasks.

- Scheduling of hearings. Apart from the “scheduling” of the cases that will be called for the hearing, the Presiding Judge prescribes and brings to the attention of the parties the duration of the argument (the requesting party, the opposing party and, if any, the intervening party), in order to determine \textit{a priori} the duration of the entire proceedings and to avoid lengthy arguments.

- The need for an electronic information network accessible to the public

\textsuperscript{15} Ph. Gerday, Press freedom and judicial secrecy: for shared regulation, Communication research, no. 9, p. 96.
VII- Suggestions

The organisation of the internship was perfect and beyond my expectations; the program was rich and well structured, allowing deeper knowledge of the functioning of an administrative high court equivalent to the one of which I am a member. This allows me to testify to the particular benefit that the exchanges that ACA Europe organises present, in terms of reciprocal knowledge of administrative rights and supreme administrative jurisdictions, but also dissemination of case-law. Their pursuit and development are truly essential. For all these reasons, I would also like to thank all those who enabled me to complete this internship within the Belgian Council of State, and both ACA Europe and the Hellenic Council of State.
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<td>10 am</td>
<td>Welcome by the First President Roger Stevens and by the President Jacques Jaumotte</td>
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<td>Hearing of the 11th chamber (cassation)</td>
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<td>Meeting with the First chief auditor of the Section Xavier Delgrange – Presentation of legislation cases from 24/09</td>
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<td>10:30 am</td>
<td>Presentation of the functioning of the Administrative litigation section (F and N) by Chief Secretary Cécile Bertin</td>
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<tr>
<td>11:30 am</td>
<td>Presentation of the functioning of the Legislation section (F and N) by Chief Secretary Hélène Lerouxel</td>
<td>11:00 am Visiting the Constitutional Court</td>
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<td>Welcome by the Auditor General Luc Vermeire and by the Assistant</td>
<td>Welcome at the Coordination Office by</td>
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<td>Auditor General E. Thibaut</td>
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<td>rapporteur Michel Paul</td>
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<td>Office JDL 306</td>
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<td>Presentation of databases of the</td>
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<td>3 pm</td>
<td>Tour of the buildings of the Council of State by Administrative</td>
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<td>Attaché Martine De Saint-Georges</td>
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<td>Meeting with the first auditor Claudine Mertes</td>
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