Identification of the participant

Nationality: Greek

Functions: Associate Judge in the Greek Council of State

Length of service: 19 years

Identification of the exchange

Hosting jurisdiction/institution: Supreme Administrative Court of Austria

City: Vienna

Country: Austria

Dates of the exchange: 03.09.2018 – 14.09.2018
SUMMARY

I was offered the opportunity to participate in the exchange program for judges of administrative courts via the Association of Councils of State and Supreme Administrative Jurisdictions of the European Union (ACA-Europe) in the Supreme Administrative Court of Austria (Österreichischer Verwaltungsgerichtshof [VwGH]) during the period between 03.09.2018 to 14.09.2018.

The VwGH is the final jurisdiction in matters of administrative law. In the VwGH I was given the opportunity to attend conferences of several Sections and to read and analyze a case study. The exchange program also included participation in public hearings before the Administrative Court of Vienna (Verwaltungsgericht Wien [VGW]) and the Federal Administrative Court of Austria (Bundesverwaltungsgericht [BVwG]). The last visit of my exchange program concerned the Austrian Supreme Court of Justice (Oberster Gerichtshof [OGH]).

ANNEX
GUIDELINES FOR DRAFTING THE REPORT

I-

Programme of the exchange

My exchange program covered the visit to the hosting institution (VwGH) and visits to the VGW, the BVwG and the OGH.

The main visit to the hosting institution between 03.09.2018 to 14.09.2018 included:

i) a tour around the outstanding building of the VwGH (03.09.2018 and 14.09.2018),

ii) the basic information about the jurisdiction of the VwGH, the procedural law before it and the way it works, that were given to me by the judge responsible for my exchange program, Dr. M. K., President of Section in the VwGH (03.09.2018),

iii) participation in conferences of three Sections in the VwGH (12th Section [05.09.2018], 16th Section [11.09.2018] and 8th Section [12.09.2018]),

iv) discussion and exchange of views with the President of the VwGH, Prof. Dr. R. T. (07.09.2018), and the Presidents of the above Sections (05.09.2018, 11.09.2018 and 12.09.2018) concerning the systems of administrative jurisdiction in Austria and Greece and

v) reading and analyzing a case study (10.09.2018 to 13.09.2018).

The second visit to the VGW (04.09.2018) included:

i) participation in three public hearings before the VGW,

ii) discussion with the competent judge, Dr. G. M., about the fact and legal issues of the pending cases and a brief look at the files of these cases.
The third visit to the BVwG (06.06.2018) included:

i) a tour around the building of the BVwG,

ii) participation in one public hearing before the BVwG and

iii) presentation by the judge Dr. K. W. of the course of proceedings and the procedural law before the BVwG.

The last visit to the OGH (13.09.2018) included a brief presentation by the judge Prof. Dr. Bydlinski, President of Section in the OGH, of the jurisdiction of the OGH and of main legal issues concerning the Austrian State Liability Law.

More specifically, in the VwGH I was given, during the entire visit, a private office equipped with a computer, internet connection and access to a printer. I also had the ability to access the library, the opportunity to borrow legal books and commentaries e.g. on the Federal Constitutional Law (Bundesverfassungsgesetz [B-VG]) and the procedural law before the VwGH. I also used the Legal Information System of Austria (RIS), a platform and data base providing information on Austrian legislation (federal and local) and case-law.

In the VwGH, I was privileged to meet besides its President and the Presidents and some of the Judges of the above mentioned Sections, the office director, the head of the library and research associates.

The conferences I had the opportunity to participate in concerned cases in the fields of civil servant law (12th Section), fiscal law (16th Section) and social security law (8th Section). Finally, for the purpose of the case study, I read the administrative and legal documents of the file, the petition for review (revision) of the contested decision of an Administrative Court of First Instance and I conducted a research on the relevant legislation and jurisprudence. The case study concerned the refusal of the competent administrative authority to allow an Austrian citizen, who had completed studies at a University of Applied Sciences in another member state of the European Union (EU), to sit for the exams in order to obtain the license to engage in the relevant occupation. The legitimate reason for the above refusal was that the completed studies of the Austrian citizen were, according to the internal law provision, not equal and equivalent to the studies offered by an Austrian University of Applied Sciences in the same field.

The hearings before the VGW concerned cases in the fields of residence law (Application for residence/Threat of public order and security) and administrative penalty law (i) Hit and run/Traffic accident with compensation/No information of the police station and ii) Disturbance during the resting time).

The hearing before the BVwG concerned a case in the field of disability law (Entry in the disability passport of the complainant’s inability to use the public means of transport).

In both Administrative Courts of First Instance (VGW/BVwG) the judges interrogated the complainants, the witnesses and the technical experts during the public hearings. At the end of the hearings, the decisions were officially announced by the judges.
II- The hosting institution

The Amendment to the B-VG on Administrative Jurisdiction (Verwaltungsgerichtsbarkeits-Novelle 2012), which entered into force on the 1st January 2014, has brought important changes regarding the administrative jurisdiction and the administrative procedure.

More specifically, approximately 120 authorities have been abolished and their competences have been transferred to the Administrative Courts of First Instance. 11 Administrative Courts of First Instance have been established (9+2 model): 9 Administrative Courts in the Provinces (Landesverwaltungsgerichte [LVwG]), one in each Province (Land), and 2 Administrative Courts of the Federation, one for general administrative matters (BVwG) where the contested decision is issued by a (federal) administrative authority (e.g. Public Employment Service Austria, Social Ministry Service or Data Protection Authority) and one for federal tax matters (Bundesfinanzgericht [BFG]). The Administrative Courts of First Instance not only have to function as courts of cassation but are also entitled to decide on the merits of the case. The decisions of the Administrative Courts of First Instance can be reviewed by the VwGH (petition for review/revision) which has to decide as Administrative Court of Second Instance.

The VwGH is one of the three supreme courts of Austria, having the final jurisdiction in matters of administrative law. The other two supreme courts are the OGH, which is the court of last instance in criminal and civil trials, and the Constitutional Court (Verfassungsgerichtshof [VfGH]), which is competent, between others, for the judicial review of the constitutionality of statutes, the control of the legality of ordinances and the constitutionality of decisions of the Administrative Courts of First Instance.

The VwGH consists of one President, one Vice President and 67 more Judges (Presidents of Sections and Counsellors). The President and Vice President are appointed by the Federal President on the recommendation of the Federal Government. The Counsellors are appointed by the Federal President on the recommendation of the Federal Government which is bound to a three candidate recommendation provided by the Plenary Assembly of the VwGH. The President, the Vice President and the other Members of the VwGH constitute the Plenary Assembly. The VwGH exercises its jurisdiction in Sections. The Sections consist of five judges (five-member Sections) and, in administrative criminal cases, of three judges (criminal Sections). It also happens that the decision is taken by a reinforced Section which is consisted of nine judges. This is the case when the decision would deviate from the settled case-law or where the legal question to be solved has not been answered in a uniform manner in the case-law.

The VwGH is competent of deciding:

i) on petition for review (revision) of a decision of an Administrative Court of First Instance,

ii) on remedy in case of failure to decide in time by an Administrative Court of First Instance (Fristsetzungsantrag) and

iii) in cases pertaining to the conflict of competences between Administrative Courts of First Instance or Administrative Courts of First Instance and the VwGH.

The revision against the decision of an Administrative Court of First Instance is admissible if it depends on the solution of a legal question of fundamental importance, as the decision deviates from the settled case-law of the VwGH, or such case-law does not exist, or the legal question to be solved has not
been answered in a uniform manner by the VwGH (see Article 133, paragraph 4 B-VG). The Administrative Courts of First Instance have to add to each of their decisions a dictum concerning the admissibility of the revision according to the prescribed principles. The VwGH is not bound by the opinion of the Administrative Court of First Instance on the admissibility of the revision. If the Administrative Court of First Instance has declared the revision inadmissible the party can launch an “extraordinary revision” stating the reasons why, in its opinion, there is a question of fundamental importance. If the VwGH does credit to the petitioner, it annuls the contested decision of the Administrative Court of First Instance and sends it back to that Court which is bound to apply the interpretation given by the VwGH.

The remedy against the failure to decide in time by the Administrative Court of First Instance is called Fristsetzungsantrag. In case an Administrative Court of First Instance fails to decide in time, the VwGH has to set to that Court a time limit that can be extended once. If the Court does not take the decision within the allowed time the VwGH, by judgment, has to issue an order setting a new time limit within which the Court has to issue the decision.

Finally, the legislation can provide for motions of the ordinary courts in State liability cases aiming at the review of the legality of administrative acts, the legality of which is prejudicial in a case pending before the ordinary court. The VwGH, according to Article 11 of the State Liability Act (Amtshaftungsgesetz [AHG]), has been exercising this competence under the former system.

Besides the revision to the VwGH there is still the possibility for an appeal to the VfGH in the case the complainant claims that the Administrative Court of First Instance has infringed his rights guaranteed by the Constitutional Law or has infringed his rights by the application of an unlawful ordinance, an unlawful announcement on the renotification of a statute, an unconstitutional statute or an unlawful interstate treaty (see Article 144, paragraph 1 B-VG). If the VfGH finds that a right within the meaning of Article 144, paragraph 1 B-VG, has not been infringed by the decision of the Administrative Court of First Instance it will, at the request of the complainant, assign the appeal to the VwGH so that the last decides whether the complainant has been infringed by the decision of the Administrative Court of First Instance in any other right (see Article 144, paragraph 2 B-VG).

III- The law of the host country

As a member of the 1st Section of the Greek Council of State (CS), which deals, between others, with cases belonging in the field of State Liability Law, I was particularly interested in the Austrian State Liability Law.

The State Liability in Austria is provided in the State Liability Act (AHG) that consists of 17 Articles. In Austria the cases in the above field of law fall within the jurisdiction of the regional courts, as courts of first instance (see Article 9, paragraph 1 AHG), and of the OGH as last instance, whereas in Greece the relevant cases fall within the jurisdiction of the Administrative Courts of First Instance, the Administrative Courts of Appeals and the CS as last instance. Consequently, I will refer to some of the provisions of the AHG. According to Article 1, paragraph 1 AHG, the Federation, the Provinces, the municipalities, other bodies of public law and the social insurance institutions are liable in accordance with the provisions of civil law for
the damage to the property or to the person that the persons acting as their organs in the execution of the law have culpably caused by unlawful conduct. The damage is only in money to replace. According to Article 1, paragraph 2 AHG, organs within the meaning of the AHG are physical persons, if they act in the execution of the laws (jurisdiction or administration), regardless of whether they are permanent or temporary or ordered for the individual case, whether they are elected, appointed or otherwise ordered organs and whether their relationship to the legal entity is to be assessed according to public or private law. According to Article 2, paragraph 1 AHG, when a claim for compensation is asserted, it is not necessary to name a particular organ. It is sufficient to prove that the damage could have been caused only by the infringement of an organ of the defendant legal entity. The claim for compensation will, according to Article 2, paragraph 2 AHG, not exist if the injured party could have averted the damage by appeal to the Administrative Court of First Instance or by revision to the VwGH. According to Article 3, paragraph 1 AHG, if the legal entity has compensated the injured party for the loss on the basis of the AHG, it may claim compensation from the persons who acted as its organs and who committed or caused the infringement intentionally or through gross negligence. According to Article 3, paragraph 2 AHG, if the organ has committed or caused the infringement through gross negligence, the court may, for reasons of equity, moderate the restitution. According to Article 4 AHG, no restitution may be sought from an organ on account of an action taken on the instruction of a superior, unless the organ has followed the instruction of an apparently incompetent superior or in compliance with the instruction has violated penal provisions. According to Article 6, paragraph 1 AHG, claims for damages pursuant to Article 1, paragraph 1 AHG, will become statute-barred within three years after expiration of the day on which the injured party became aware of the damage but in no case before one year after the legal force of an infringing decision or order. If the injured party has not become aware of the damage or if the damage has arisen from a judicially punishable act which can only be committed intentionally and is punishable by imprisonment of more than one year, the claim for compensation will not become statute-barred until ten years after the damage has been caused. Finally, according to Article 7 AHG, if Austrian nationals in a foreign State are unable to assert claims for compensation within the meaning of the AHG at all or under the same conditions as nationals of the State concerned and if their interests are not taken into account in any other way by the State concerned, the Federal Government may by ordinance determine that the nationals of the State concerned are not entitled to claims based on the AHG.

IV- The comparative law aspect in your exchange

The Greek CS (Symvoulio tis Epikrateias) is, like the VwGH in Austria, one of Greece’s three supreme courts. The other two supreme courts are the Supreme Civil and Criminal Court (Areios Pagos) and the Court of Audit (Elegktiko Synedrio). The Greek Constitution provides for two jurisdictions, the civil/criminal and the administrative, which are organised in three instances: the courts of first instance, the courts of appeals and the supreme courts. The administrative jurisdiction is organised in the following three instances: the Administrative Courts of First Instance, the Administrative Courts of Appeals and the CS. The Administrative Courts and the CS decide on all matters of administrative law disputes. Contrary to Greece,
in Austria the administrative jurisdiction is organised in two instances where the LVwG, the BVwG and the BGH are the Administrative Courts of First Instance and the VwGH acts as Administrative Court of Second Instance (see above II).

The CS consists of one President, Vice-Presidents, Counsellors, Associate Judges and Auditors. The President and Vice Presidents are chosen by the cabinet and are placed to their posts by a presidential decree. The Counsellors and Associate Judges are promoted by decision of the Supreme Judicial Council of the CS and the Administrative Justice and posted to their places by a presidential decree. The Auditors are appointed by a presidential decree, after their graduation of the National School of Judges. The CS exercises its jurisdiction in plenum and in Sections. The Sections consist of five judges (five-member Sections) and of seven judges (seven-member Sections). The Auditors are not members of the Sections. They assist the Counsellors with the preparation of the cases. Contrary to the CS, the VwGH does not have the judges’ grades of Associate Judge and Auditor and the Counsellors are assisted with the preparation of the cases by research associates who are not judges.

The CS is competent of deciding:

i) on petitions for annulment of regulatory decrees, regulatory administrative acts and individual administrative acts, in case the last ones do not fall into the jurisdiction of the Administrative Courts, for excess of power or opposition to the provisions of the Constitution or the law,

ii) on appeals against decisions of the Administrative Courts which have been issued on petitions for annulment of individual administrative acts,

iii) on appeals against disciplinary acts in cases of dismissal or downgrading of civil servants where the CS exercises full jurisdiction,

iv) on petitions for review (revisions) of final decisions of the Administrative Courts which have been issued in cases where the Administrative Courts exercise full jurisdiction (e.g. in cases of fiscal law, social security law, state liability law) and

v) on question of preliminary ruling which is submitted before the CS by an Administrative Court, which deals with a case in which arises an issue of general interest whose consequences affect a wider range of people. In this case the Administrative Court is bound by the decision of the CS.

Furthermore, the elaboration of all regulatory decrees falls into the jurisdiction of the CS which has the competence to give an opinion on the legality thereof. This opinion has an advisory character.

The Procedural Law before the CS (Order 18/1989) provides in Article 53, paragraph 3, as amended by Law 3900/2010 and Law 4446/2016, that the revision before the CS is admissible if the party claims, with specific allegations contained in the revision, that case-law of the CS does not exist or that the contested decision of the Administrative Court is contrary to the case-law of the CS or another supreme court or to an irrevocable decision of an Administrative Court. However, the inadmissibility of the revision can be covered if, until the first hearing of the case, falls into the knowledge of the CS in a written way at the initiative of the party, even if it is not invoked in the revision, a decision of the CS or another supreme court or an
irrevocable decision of an Administrative Court which is contrary to the contested decision. According to the case-law of the CS concerning the above requirements of admissibility of the revision, the petitioner is obliged, on the ground of total or partial inadmissibility of his revision, to substantiate, with specific and particular allegations contained in the revision, that for each of the alleged grounds arises a specific legal question, which is crucial to the outcome of the proceedings before the CS for which either case-law of the CS does not exist or the relevant judgements and assumptions of the contested decision are contrary to the case-law, on the same legal question and under the same conditions of necessity for the diagnosis of the relevant cases, of the CS or another supreme court or to an irrevocable decision of an Administrative Court. More specifically, if the petitioner alleges absence of case-law or contradiction of the contested decision with the above mentioned case-law, that absence or contradiction should not refer to issues of statement of reasons relating to the facts of the case but should solely concern the interpretation of a provision of law or of a general principle of law, irrespective of whether that interpretation is expressed in the major or minor proposition of the judicial reasoning of the contested decision.

Concerning the admissibility of the revision before the VwGH (see above II), according to the case-law of the VwGH, the question whether the specific circumstances of the individual case could also justify another decision of the Administrative Court of First Instance does not raise a legal question of fundamental importance. Similarly, the assessment of evidence does not raise a legal question of fundamental importance. However, there is a legal question of fundamental importance in connection with the evidence evaluation if the Administrative Court of First Instance has undertaken the evidence in an unjustifiable manner which undermines the legal security. That is the case when the evidence evaluation can be recognized as grossly erroneous. Furthermore, in the case of a procedural defect there can also raise a legal question of fundamental importance when a relevance of the procedural defect for the outcome of the proceedings is demonstrated, namely in the case of a procedure without defects there must be in an abstract level the possibility of arriving to a different -for the petitioner advantageous- circumstance basis.

Contrary to Austria, in Greece there is no Constitutional Court. According to the Greek Constitution (see Article 93, paragraph 4), the courts are obliged not to apply statutes whose content is contrary to the Constitution. Thus, all courts are obliged to control the conformity of a statute, a regulatory decree and a regulatory administrative act with the Constitution.

V- The European aspect of your exchange

In the framework of one of the conferences I had the opportunity to participate in, the members of the relevant Section of the VwGH had to deal with a legal question concerning the conformity of the following mentioned Austrian legislation with the provisions of Article 14 of the Agreement of the European Economic Area (EEA), according to which “No Contracting Party shall impose, directly or indirectly, on the products of other Contracting Parties any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products ...”. According to the Austrian legislation, only a second hand car imported to Austria from a member state of the European Community (already EU) is subjected to a lower tax burden. In so far the above Austrian legislation does not provide the same privilege
in the case of a second hand car imported to Austria from a member state of the EEA, there may raise a question of conformity of the above internal law provision with the EEA. During the above conference case-law of the European Court of Justice concerning the application of the EEA has been presented.

The case study I mentioned above (see I) also displayed the possibility of application of the European Union Law (Directive 2005/36/EC of the European Parliament and of the Council) and the relevant case-law of the European Court of Justice.

VI- **Good Practice within the host jurisdiction.**

In the VwGH the adjudication of the great majority of the cases does not take place in public hearings. The cases are being discussed directly in the conferences of the Sections. This litigation practice allows a great saving of time and working energy. It could be exported to other countries where the Supreme Administrative Courts decide on the basis of a written procedure but, at the same time, public hearings take place as well.

Furthermore, in the conferences of the VwGH the judge present a draft decision of their case which has been already shared by email to the other Members of the Section. This way of working could also be exported to other countries, as it allows a better understanding of the case by the other Members of the Section.

Finally, according to the case-law of the VwGH and contrary to the relevant case-law of the CS, a legal question of fundamental importance as requirement of the admissibility of the revision against a decision of an Administrative Court of First Instance can also raise, under specific conditions, in case of evidence evaluation or procedural defect (see above IV). Thus, the legal question of fundamental importance does not concern exclusively the interpretation of a provision of law or of a general principle of law. This case-law of the VwGH surely provides for a more complete and effective judicial protection in case of a revision against a decision of an Administrative Court.

VII- **The benefits of the exchange**

I consider one of the most significant benefits gained from the exchange program that I was offered the opportunity to study closely the Austrian system of administrative jurisdiction which means to get to know from inside the organization, the competences and the way of working of the hosting institution (e.g. preparation of cases, mode of research in the legislation and case-law data base, conduct of conferences) and the chances to meet Austrian judges with whom I developed professional and friendly relations.

The gained experience can be very useful in my professional practice, particularly in case I should refer to foreign legislation and case-law for the purpose of a case study with legal questions which have not been encountered in the case-law of the CS. I intend to share with my colleagues this important experience gained from the exchange program and, in particular, to discuss with them how the Greek system of administrative jurisdiction could benefit from the good practices within the host jurisdiction (see above VI).
VIII- Suggestions

In my opinion, the exchange program in the VwGH was perfectly organized. On the first day of my visit I was given by the judge responsible for my visit, who was assisted by two research associates, a detailed schedule containing the court visits, the Sections of the VwGH for the conferences and other activities. In that way, I could prepare myself in advance for the activities of the next day. I could always address myself to the above mentioned colleagues not only for legal questions but also for practical issues (e.g. the functions of the RIS). The two week visit was a sufficient time period in order for me to acquire basic knowledge of the jurisdiction of the hosting institution, its organization and the way it works. Based on the above observations, I would not have to suggest any improvements concerning the organization of the exchange program.

I want to express my deepest gratitude i) to the ACA-Europe who chose me for this exchange program, ii) to the former President of the Greek Council of State, N. Sakellariou, who has allowed the promotion of my request to the ACA-Europe and iii) to the President of the VwGH, Prof. Dr. R. Thiel, the judge responsible for my visit, Dr. Martin Koehler, and to all the other judges and research associates I had the honor to meet during my visit for the appreciation, attendance and care they showed to me.