The Conseil d'État in 2011

CONSEIL D'ÉTAT

Contents

Advising

Average period of consideration

Laws

95%
within two months.

Decrees

80%
within two months.

Type of legislation

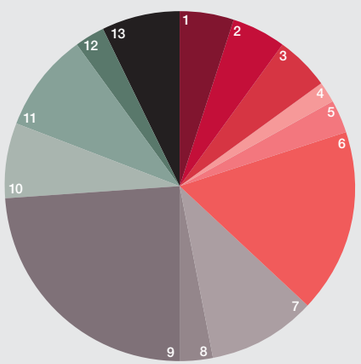
133
Executive draft bills.

5
parliamentary draft bills.

48
draft ordinances.

1,012
draft decrees, including 199 individual decrees.

Breakdown of draft legislation by ministry



1. **5%** Foreign Affairs
2. **5%** Agriculture
3. **5%** Budget – Public sector employment
4. **2%** Culture - communication
5. **3%** Defence
6. **17%** Ecology - Transport - Housing
7. **10%** Economy
8. **3%** National Education – Further Education
9. **24%** Home Affairs – Overseas Territories
10. **7%** Justice
11. **9%** Employment
12. **3%** Health – Youth and Sport
13. **7%** Other ministries

Judging

Cases adjudicated

9,801
before the Conseil d'État.

29,314
before administrative courts of appeal reflecting an increase of 127% in ten years.

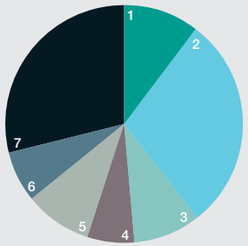
186,493
before administrative tribunals reflecting an increase of 54% in ten years.

Quality

In **96%**
of cases, the ultimate resolution of the litigation reflects the decision reached by the judge giving the preliminary ruling.

Breakdown of actions referred for preliminary ruling

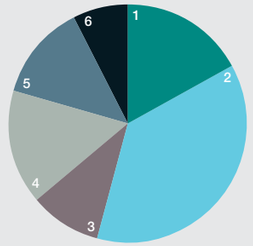
Administrative tribunals



1. **10.5%** Tax-related
2. **29.2%** Foreign nationals
3. **9.1%** Civil Service
4. **6.3%** Housing
5. **9.1%** Police
6. **7%** Development and planning
7. **28.8%** Other matters

Breakdown of actions by method of submission

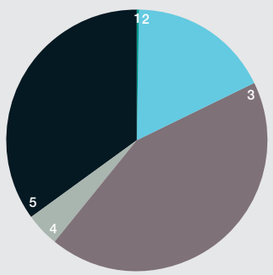
Conseil d'État



1. **17%** Preliminary ruling
2. **37.4%** Appeals against ACA decisions
3. **9.6%** Appeals against AT judgements (in chambers)
4. **15.7%** Appeals against AT judgements (other)
5. **13%** Appeals against decisions reached by specialist administrative jurisdictions
6. **7.3%** Other

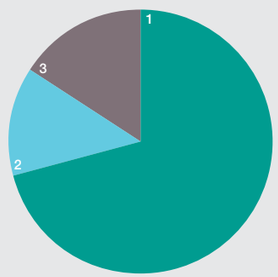
Breakdown of cases judged by adjudicating body

Conseil d'État



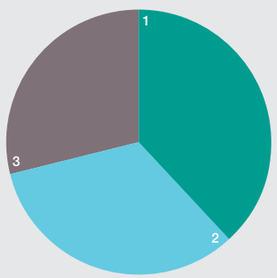
1. **0.5%** General Assembly, actions section
2. **17.4%** Sub-sections acting together
3. **43%** Sub-sections acting alone
4. **4.3%** Rulings by judges in chambers
5. **34.8%** Other rulings

Administrative courts of appeal



1. **71%** Sitting as a bench
2. **13.3%** Single judge and judges in chambers
3. **15.7%** Rulings

Administrative tribunals



1. **38.2%** Sitting as a bench
2. **33%** Single judge and judges in chambers
3. **28.8%** Rulings

Managing

Highlights

1st
promotion of magistrates graduated from the administrative justice learning center.

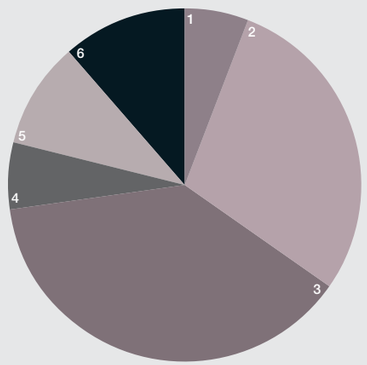
100,000
visitors per month consult the Conseil d'État website at www.conseil-etat.fr

Courts and tribunals

8
administrative courts of appeal established since 1989. The most recent was established in Versailles in 2004.

42
administrative tribunals in 2011, including three opened in recent years (Nîmes in 2006, Toulon in 2008 and Montreuil in 2009).

Administrative justice system staff*



1. **215** Members of the Conseil d'État
2. **1,065** AT and ACA judges
3. **1,400** AT and ACA officers
4. **227** Judicial Assistants working in the CoS, AT and ACA
5. **355** CNDA officers
6. **412** Conseil d'État officers

*Figures at December 31, 2011

Profile

The Conseil d'État… At the heart of the relationship between citizens and public authorities

Advising. The Conseil d'État advises the Government on its own draft bills, orders and key decrees. Since 31 July 2009, it may also be consulted by the National Assembly and Senate presidents for advice on draft parliamentary legislation.
Judging. Only the administrative justice system can quash or revise decisions made by the State, regional authorities, public authorities or public bodies. The Conseil d'État is the supreme jurisdiction for administrative disputes.
Managing. The Conseil d'État is responsible for the general management of the administrative tribunals, the administrative courts of appeal and the National Court of Asylum (CNDA).

The Conseil d'État is the safeguard of the legal relationship between citizens and public authorities.

"As a central forum for public debate and adapting the law to meet the needs of our changing society the role of the Conseil d'État is that of an explorer, enabler and guarantor."

Interacting openly and transparently with the world and the society within which it operates, the Conseil d'État enters increasingly into discussion with its partners to achieve its goal of aligning justice with day-to-day public concerns.

Jean-Marc Sauvé,
Vice-President of the Conseil d'État

The Conseil d'État is becoming increasingly active as a contributor to public debate. Have you set yourselves a new mission?

Our missions are set for us by law, but to provide effective advice and judgements, it is first necessary to understand the realities addressed by the law. The old idealised impression of an administrative judge presiding in an ivory tower and laying down the law without taking reality into account or the practical consequences of its jurisprudence became obsolete a long time ago. The best ruling is the ruling that comes as a result of discussing and comparing ideas. That is our firmly held belief. It is also the reason behind the symposia and conferences we host, some of which are organised in relation with other partners: for example, with the European Court of Human Rights on the subject of European human rights legislation, the Court of Cassation on hospital liability and the National Bar Council in relation to the first-ever Convention on administrative law. Events like these provide a forum for in-depth discussion with government, universities, the legal profession and society's economic and social actors. This openness can also be seen in the way the French administrative justice system contributes to the wider networks of administrative justice in Europe and around the world. All these attitudes and initiatives are simply a natural extension of our normal internal practice of listening, discussing and debating.

The topic of the 2011 Conseil d'État public report is: "Consulting differently, participating effectively…"

It is desirable to involve citizens more effectively in public decision-making, without creating administrative obstacles and disputes. Our thoughts have therefore been focused on developing new, less formal and more substantive methods of decision-making that will enable participation by all those concerned. Our report suggests a number of possible ways forward to broaden the process of administrative democracy *(see p. 14)*.

Of all the rulings made by the Conseil d'État in 2011, which stand out most prominently?

2011 was a very eventful year, so any selection is inevitably arbitrary. However, a number of rulings reflect the guardianship role played by the Conseil d'État in today's world where technology is constantly evolving. The ruling on biometric passports illustrates the balance that must be achieved between the reasonable justifications of why it is necessary to collect personal data and the need to protect

The bureau

The 'bureau' is the steering committee of the Conseil d'État.

It works as a team to consider and act on management decisions and the proposals and opinions it is required to give the public authorities on these matters.

1 **Jean-Marc Sauvé,** Vice-President

2 **Bernard Stirn,** president of the litigation section

3 **Christophe Devys,** secretary general

4 **Olivier Dutheillet de Lamothe,** president of the social section

5 **Michel Pinault,** president of the administration section

6 **Henri Toutée,** president of the finance section

7 **Marie-Dominique Hagelsteen,** president of the public works section

8 **Yves Robineau,** president of the home affairs section

9 **Olivier Schrameck,** president of the report and research section

10 **Brice Bohuon,** deputy secretary general

11 **Stéphane Verclytte,** deputy secretary general

the privacy of individuals. This ruling challenges neither the principle of these passports nor the creation of a central database, but it does prohibit the collection and retention of those digital fingerprints not strictly necessary to identify a passport holder or for the process of identifying counterfeit documents *(see p. 24)*. Turning to the environment, the Conseil d'État overturned the authorisation to market the Cruiser insecticide, which had been evaluated using a method that did not sufficiently measure its effects - and specifically long-term effects - on bee populations *(see p. 25)*. The primary role of the Conseil d'État is to act as a guardian by ensuring that legislation is properly applied. It is precisely this role that led to the quashing of an order prohibiting the cultivation of GM maize subsequent to an interpretation of the applicable regulation by the Court of Justice of the European Union, since the Government had failed to provide the required proof of a clear risk to health or the environment.

The Conseil d'État is also in charge of managing the administrative justice system. What improvements were made in that respect in 2011?

The Conseil d'État and the administrative justice system have never been consulted more often for its opinions, nor has it ever been faster to respond to applications received. The administrative justice system has therefore contributed to implementing the procedure that allows applicants to raise a claim during a case, arguing that an applicable statute is unconstitutional. During 2011, the Conseil d'État received 212 Preliminary Requests for Constitutional Rulings. These were heard within two months and five days on average, and in all cases we complied with the three-month period set for this procedure. 51 of these cases were passed on to the Constitutional Council. This procedure offers a better guarantee of rights and freedoms for the citizens.
The administrative justice system is also getting faster all the time. The average predicted period for judgement is now a year or less for preliminary rulings, appeals and hearings before the Conseil d'État. For example, the Paris administrative tribunal, which accounts for more than 13.5% of the work done by all administrative tribunals, has reduced the number of cases in progress by 70% in ten years, and cases pending for more than two years now stand for less than 5% of this total, compared with more than 50% ten years ago. Its average predicted period for judgement is now less than seven months.
The administrative court of appeal in Paris has reduced its average judgement period to ten months, from more than three years in 2002. Lastly, substantial efforts are underway to further reduce judgement periods in the National Court of Asylum, which average is now nine months and five days.

We are experiencing a time of serious crisis, with the result that our society will have to reinvent itself. What role could the Conseil d'État play in this new world?

As a central forum for public debate and adapting the law to meet the needs of our changing society the role of the Conseil d'État is that of an explorer, enabler and safeguard. In a world where so much emphasis is placed on what is ephemeral and transient, it provides an effective response to the essential need for continuity, adaptability and guaranteed rights. As an explorer, it anticipates future developments, helps to provide an understanding of future challenges, and contributes to collective considerations on how we can respond successfully to future challenges. As an enabler, it works with a view to facilitate the transition towards new decision-making methods, new public structures and new responses to economic and social challenges by helping to identify solutions to the problems faced by our society: it does so by keeping a close eye on legal security and ensuring that the draft legislation submitted to it is in line with the aims that are pursued. As a safeguard, it supervises respect for the law, defends the public interest and monitors the progress of the rule of law and the quality of public governance.

Advising

The law making process

Many of the legal texts submitted to the Conseil d'État during 2011 related to issues dealing with consumer protection, transparency of the mechanisms used to market medicines, the relevance of legislation relating to the handling of personal data and the constitutionality of rules governing psychiatric confinement without consent… The Conseil d'État also fulfilled its role as a defender of citizen rights by delivering legal opinions on matters of public involvement and liability in healthcare and the justice system.

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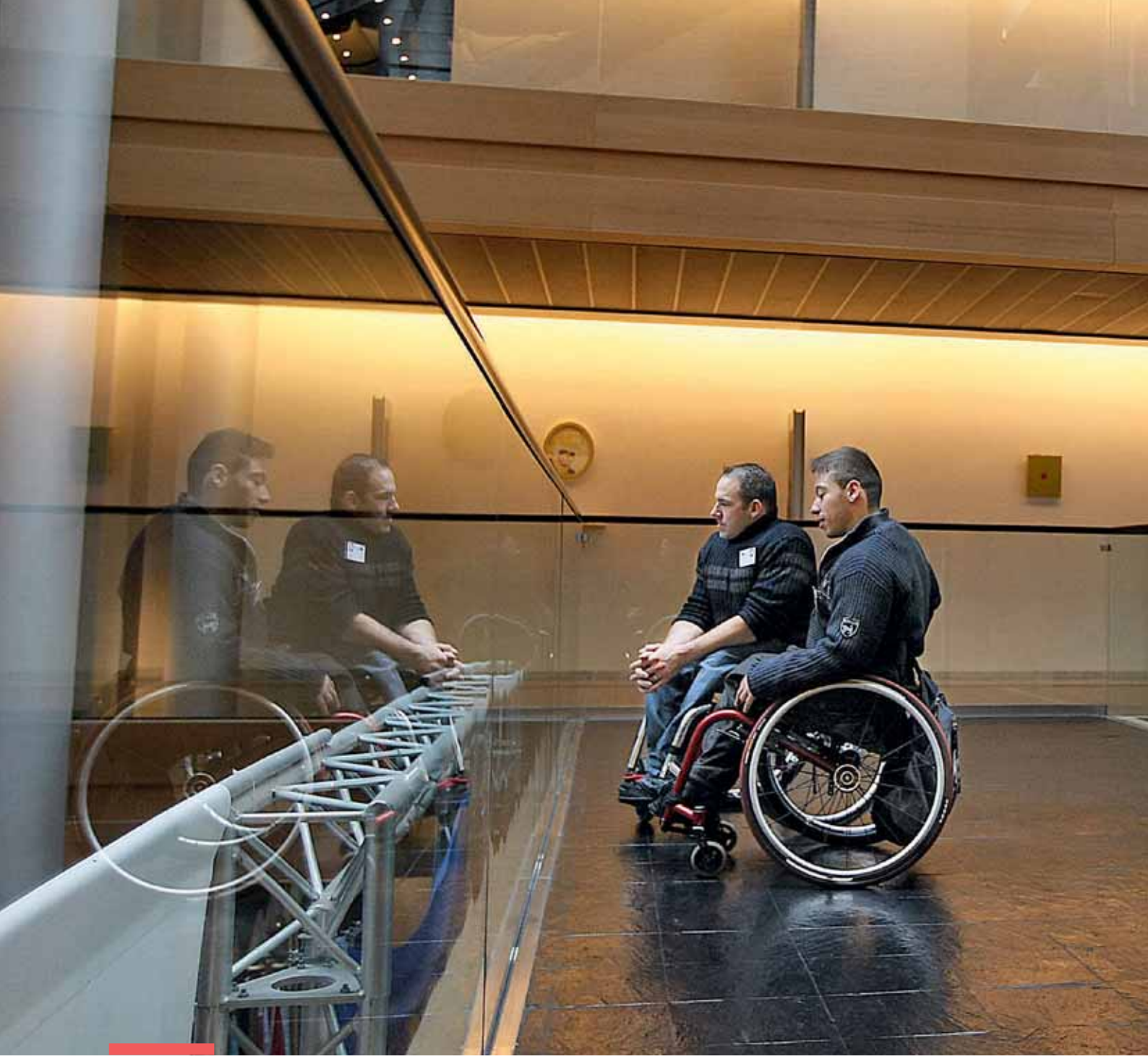
Track record / p. 19



Disability

Workplace fire evacuation

A draft decree on workplace safety and evacuation provisions for disabled employees was reviewed and considered by the Conseil d'État. The purpose of the legislation was to require the formation of safe refuges for workplaces in new buildings or in new extensions to existing buildings. In the event of fire, such refuges would provide at least one hour of protection for disabled staff who could not be immediately evacuated. The Conseil d'État ruled in favour of this draft decree based on provisions contained in the Construction and Housing Code (Article L. 111-7 originating in the Equality of rights and opportunities law of 11 February 2005) and the Employment Code (Article L. 4111-6).

Established in 1978, the Commission Nationale de l'Informatique et des Libertés is in charge of ensuring that progress in information technology does not jeopardize personal identity, human rights, privacy or freedom.

Privacy

The handling of personal data

Exploiting advances in the information and communication technologies (ICT) at the same time as protecting privacy: that is the balance the Conseil d'État is committed to maintaining in terms of the way personal data is handled and processed. Its position is well illustrated by its ruling on the creation by legal entities of conviction and sentencing databases.

In considering the issues surrounding the way in which personal data is handled, the Conseil d'État strives to reconcile two goals: reaching the efficiency that the information technologies can bring to the functioning of government, public services and society in general; and protecting individual privacy and liberties. It is with this balance in mind that during 2011, the law relating to certain types of data processing raised a number of sensitive questions regarding data protection legislation.

The law governing databases is broader than simply the Data Protection Act of 6 January 1978, as a result of the legislator's increasing will to allow specific types of processing and to adopt corresponding special provisions, whether in combination with the 1978 legislation or as exemptions from it. As a result, the Conseil d'État was required to consider the creation by a legal entity of a database containing details of criminal convictions.

The parliamentary bill reviewed by the Conseil d'État provided for the creation by the National Council of Commercial Courts Registrars *(Conseil National des Greffiers des Tribunaux de Commerce* or *CNGTC)* of a single database of disqualified directors. The purpose of the proposed database was the centralisation and national distribution of details of all disqualified directors (whether retailers or otherwise) in order to avoid the registration of companies that would be subsequently struck off after checking and identification of disqualified director involvement. The goal of the bill was twofold: to limit fraud and simplify the company registration checking procedure. In fact, such a database could be created only by statute for two reasons. The first arises from the provisions contained in the Code of Criminal Procedure, which prohibit the holding of conviction-related data by any person whatsoever and by Government departments not related to the Ministry of Justice. The second relates to the 6 January 1978 Data Protection Act, which does not permit the processing of such data by the CNGTC.

Declaration to the CNIL

The Conseil d'État ruling found that once the statute had been adopted, the database of disqualified directors could be created lawfully by the CNGTC, subject to declaring that database to the French Data Protection Agency *(Commission Nationale de l'Informatique et des Libertés* or *CNIL)*. It would not be possible to obtain prior authorisation from the CNIL. In practical terms, the provisions contained in the private member's bill authorising the CNGTC to process this data in this way constituted an implicit, but necessary, exemption from the 1978 legislation, which normally requires CNIL authorisation for *"the processing of data relating to offences, convictions or security measures, except where such processing is carried out by law officers for the purpose of their duties in defending the persons concerned"*.

Environment

Implementation of the Grenelle 2 legislation

In 2011, the Conseil d'État examined more than 50 Executive regulations aimed at implementing the 12 July 2010 law on the national commitment to the environment, otherwise known as the Grenelle 2 Act. As a result, many provisions of the Environmental Code have been modified. These changes relate essentially to climate, air quality and energy issues, technology and natural risk prevention, the listing of classified installations, the marine environment action plan, waste management, reforms to the approval of social organisations, impact studies and public enquiries. Changes were also made to certain provisions of the Planning Code in relation to campsites and residential leisure parks to take account of thermal and acoustic insulation regulations when granting building permits and/or determining floor areas.

Employment law

Appointment of volunteer firefighters

Volunteer firefighters have a special status requiring the application of specific rules. In 2011, the Conseil d'État was requested to rule on a parliamentary bill relating to the legal context of their appointment.
The proposed legislation made specific provision to recognise that the role of the volunteer firefighter 'is not an occupation', in order to avoid application of all the rules that normally apply in such cases, and especially those relating to employee relations. The Conseil d'État ruled that it was not possible to exclude firefighters from application of the rights granted under the Constitution, and specifically the freedom to join a trade union and to be assured of health protection.
Subject to any interpretation by the Court of Justice of the European Union of the qualification applied by the national legislator, the Conseil d'État nevertheless stressed that the role of volunteer firefighter should not be subject to all those rules applying to an occupation.
This ruling takes particular account of the principles of voluntary service and voluntary work on which this role is based, as well as the rights and freedoms attaching to the exercise of that role.
On this basis, the Conseil d'État proposed the following definition:
"The role of volunteer firefighter, the basis of which is voluntary service and voluntary work, is not exercised as an occupation, but is subject to its own specific conditions".

Constitution

The ombudsman

A number of decrees relating to the organisation and operation of the services provided by the National Ombudsman *(Défenseur des Droits)* were examined by the Conseil d'État. The first holder of this office – Dominique Baudis – was appointed on 23 June 2011. As part of its work, the Conseil d'État advised the government to withdraw the decree relating to the procedural rules and provisions setting the period within which those individuals questioned by the Ombudsman would have to reply to official communications - formal demands, for example. Given the diversity of practical situations likely to be examined by this independent constitutional authority, and the fact that this authority must exercise its powers in compliance with constitutional guarantees regarding rights and public liberties, the Conseil d'État felt that it would be inappropriate to fix standard procedural deadlines by law, and that such inflexibility would act against the intention of the powers invested in the Ombudsman by Parliament.

As an independent constitutional authority, the Ombudsman has a specific mission to ensure that the rights of children are respected.

Tighter pharmacovigilance of medicines following marketing authorisation.

Health

Healthcare product marketing authorisation

In the wake of the Mediator case, the law on improving the safety of medicines and healthcare products was reviewed in detail during 2011 with the aim of introducing greater independence and transparency.

The 'Mediator' case triggered a detailed revision of the law governing the medicines marketing authorisation procedure. The purpose of this revision was to provide a higher level of independence of scientific appraisal by introducing public declarations of interest and by requiring publication of all benefits granted to healthcare professionals. It also imposed further obligations on the holders of marketing authorisations. The rules applying to pharmacovigilance following authorisation were tightened, and stricter guidelines were applied to recommendations other that the indications provided under the strict terms of the authorisation. Measures to promote the quality of medical prescription were also proposed.

Ethical behaviour by medical representatives

Amongst the measures examined by the Conseil d'État, the prescribing of a medicine outside the circumstances covered by its authorisation is more strictly restricted to those uses covered by temporary recommendations for use in the treatment of uncommon diseases or in paediatrics. Furthermore, concerns over the current practice of using meetings between doctors and pharmaceutical laboratory medical representatives essentially for publicity reasons prompted the authors of this proposed legislation to seek new ways forward: experimenting with the obligation to hold group meetings in hospitals attended by several healthcare professionals, requiring an industry commitment on correct use of medicines by prescribers and limiting publicity. In all these respects, the Conseil d'État focused on ensuring that the legislative provisions proposed were legally relevant and practically compatible with the goals set.

COMPENSATION FOR MEDIATOR VICTIMS

In terms of related issues, the Conseil d'État also reviewed the plans to compensate damages suffered by Mediator victims. The Conseil d'État found that the decree proposed by the Government took account of the special features specific to such damages without departing any further than necessary from the overall mechanism for compensating victims of medical accidents.

Psychiatry

Hospitalisation without consent

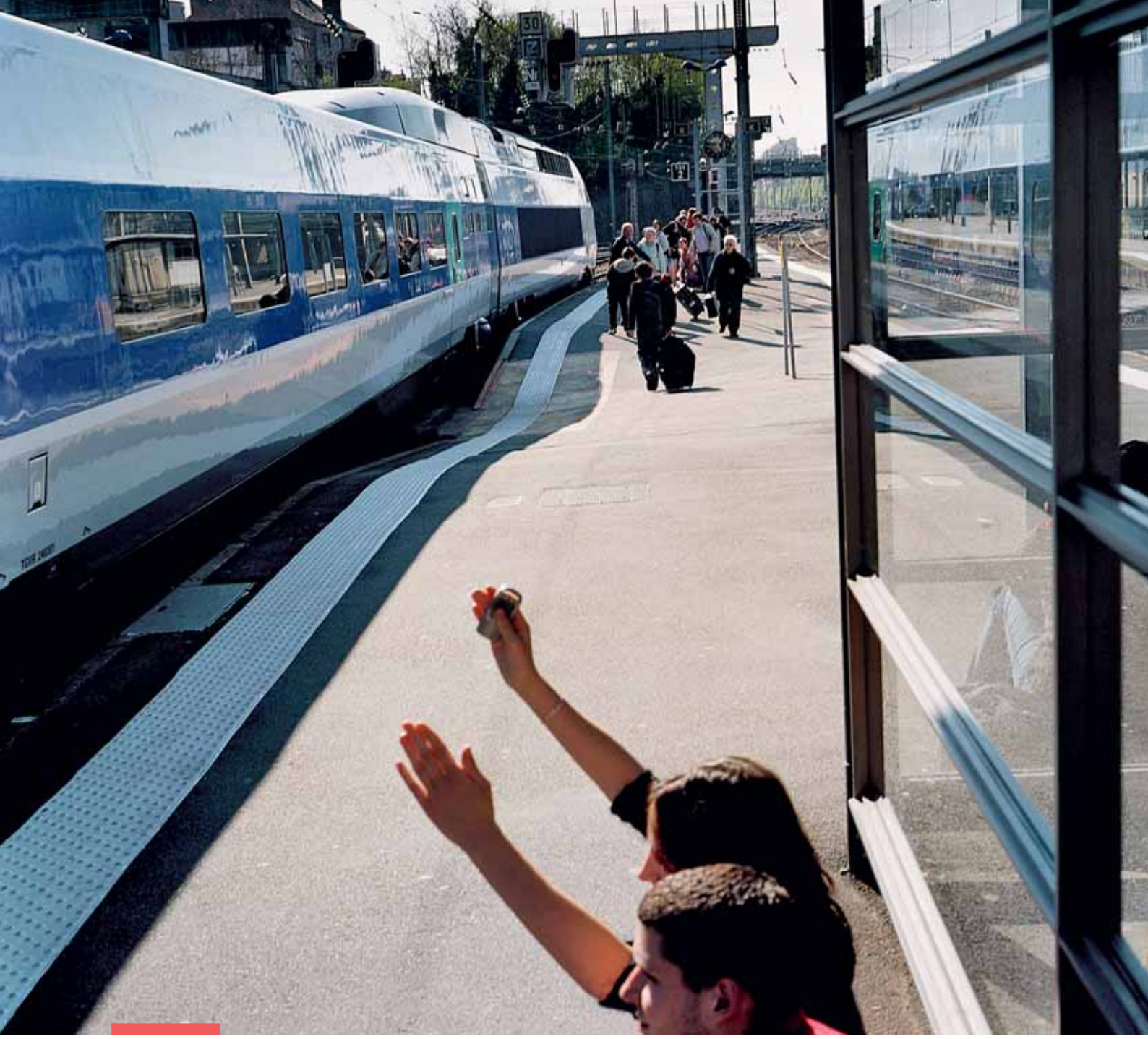
Enforced admission to a psychiatric hospital for individuals causing a threat to themselves or other people requires either a prefectoral ruling or a request by a third party (often the family of the person concerned), and operates within strict guidelines. In response to a Preliminary Request for Constitutional Ruling on the current procedure for hospitalisation without consent at the request of a third party, the Constitutional Council held in its ruling of 25 November 2010 that the then current procedure, which permitted hospitalisation without consent to continue beyond 15 days without the need for the involvement of a judicial authority *'within the shortest possible time'*, misinterpreted the requirements of the Constitution. Requested to provide a ruling on a piece of draft legislation concerning the rights and protection of individuals in psychiatric care and the methods surrounding their treatment, the Conseil d'État wished to draw a balance between the relevant constitutional requirements and the need to maintain public order. In its recommendation to the government, it pointed out that taking into account the individual's psychiatric history over an unlimited period could be regarded as an infringement of personal liberty and privacy. However, it also made clear that as long as the review by a judicial authority occurred systematically on the fifteenth day, and that the person hospitalised without consent could apply to that judge at any time with a request to release him or her from hospitalisation, the absence of any repeat review within six months was acceptable.

The 4 March 2002 legislation was framed by the legislator to confirm the rights of patients and guarantee their equality before the law.

Symposium

Health and justice: where do the responsibilities lie?

In an unprecedented initiative, the Conseil d'État and Court of Cassation hosted a joint symposium on 20 and 21 October 2011 entitled *'Santé et justice : quelles responsabilités ? Dix ans après la loi du 4 mars 2002'* (Health and justice: where do the responsibilities lie? Ten years on from the law of 4 March 2002). Attracting more than 200 delegates, this event provided the occasion not only for in-depth discussion between judges, academics and healthcare professionals, but also an opportunity to hear the viewpoints of patient representative organisations, lawyers and insurers on this highly sensitive subject. The seven round-table sessions held successively at the Court of Cassation and the Conseil d'État gave delegates the opportunity to raise issues encountered by the civil and administrative judicial systems in apportioning medical responsibility. The symposium also helped to identify the many points of convergence in jurisprudence between the two judicial systems.



Transport

The Brittany - Pays de la Loire high-speed rail link

Having examined the decree setting out the public utility of the Brittany - Pays de la Loire high-speed rail link (LGV BPL) in 2007, the Conseil d'État was requested in 2011 to provide a ruling on the draft partnership contract between Réseau Ferré de France (RFF) and Eiffage Rail Express to provide this link. This partnership covers the design, construction, operation, maintenance, repair, renewal and funding of the LGV BPL between Connerré (Sarthe) and Cesson-Sévigné (Ille-et-Vilaine), and its connection to the existing rail network. This contract is the most valuable partnership agreement signed to date, and the first to entrust infrastructure maintenance to an operator other than SNCF.
The Conseil d'État was able to verify compliance with the rules governing the award of partnership agreements and the content of the draft contract.

Survey

Consulting differently, participating effectively

Following on from two in-depth surveys conducted in 2009 and 2010 into public policy in housing and water, the topic adopted in 2011 for the Conseil d'État public report marks a return to the cross-disciplinary issue of updating the procedures used to consult all those involved in public policy making. The report shows that the expectations of citizens and users in terms of their right to information go beyond the traditional round of consultations prior to public decision-making, and involve the discussion of ideas, plans and legislation. The introduction of such mechanisms therefore requires the establishment of a genuinely deliberative process as the basis for the competent authority reaching a fully informed decision.
The Conseil d'État survey provides an insight into France's supposed shortcomings in terms of administrative democracy and, in its proposals, outlines a new administrative model that seeks to develop procedures characterised by transparency in public debate without threatening judicial security.

Find out more at www.conseil-etat.fr

Five parliamentary draft bills were submitted to the Conseil d'État in 2011, compared with two in 2010 and one in 2009. 2011 was the first year in which a legal opinion was asked by the Senate.

Advising Parliament

Five parliamentary draft bills submitted for opinion to the Conseil d'État

The five parliamentary draft bills submitted in 2011 reflect the increasing use now being made by Parliament of the new procedure introduced in 2009 aimed at asking the Conseil d'État to deliver its legal opinion.

The constitutional reform of 23 July 2008 introduced the opportunity for the Senate and National Assembly presidents to consult the Conseil d'État on their draft legislation. Before that, the Conseil d'État could only deliver opinions to the Executive. It is now in a position to provide its expertise to both houses of Parliament.
Consideration of the five Parliamentary draft bills submitted to the Conseil d'État in 2011 was based on a shared commitment to improve the quality of law in areas involving a certain degree of technicality, at the same time as impacting directly and practically on individuals and institutions.

From firefighters to simplifying the law

The first parliamentary draft bill came from Pierre Morel-À-L'Huissier, a deputy from Lozère, and addressed the appointment of volunteer firefighters. Whilst clearly identifying the role of volunteer firefighters as distinct from that of a regular occupation covered by general employment legislation and that of a public-sector employee, it provides for an increase in the statutory and social provisions for these individuals *(see p. 10)*. Proposed by Bernard Deflesselles, a deputy from Bouches-du-Rhône, the second draft bill proposes that local fire and emergency services should be able to obtain reimbursement of emergency response operating costs from persons causing a fire *(see p. 17)*. The third parliamentary draft bill to be considered by the Conseil d'État was introduced by Jean-Luc Warsmann, President of the National Assembly Statutory Law Committee, and seeks to simplify the law and streamline administrative procedures. Containing around 100 provisions relating to many different areas of law, this bill focuses mainly on small and medium-sized enterprises, but also has implications for the effective administration of justice, the principle of equality in company and employment law, the handling and processing of personal data *(see p. 8)*, the funding of social security benefits, environmental protection, housing, public contracts, press rights and freedom of association. The fourth parliamentary draft bill was submitted by Victorin Lurel, a deputy from Guadeloupe, and was aimed at amending the 16 December 2010 Regional Authorities Reform Act in order to increase the number of regional councillors for Guadeloupe from 45 to 65, and to adapt the corresponding voting methods. Introduced by Éric Doligé, the senator for Loiret, the fifth parliamentary draft bill seeked to simplify the standards applicable to local authorities. This is the first draft bill to be received from the Senate.

WHAT FORM DOES A CONSEIL D'ÉTAT OPINION ON A PARLIAMENTARY DRAFT BILL TAKE?

The parliamentary draft bill is registered with the parliamentary assembly office and published, which prevents the Conseil d'Etat from adopting a draft other than the one submitted to it. The Conseil d'État ruling takes the form of a memo detailing the legal issues that could be raised by the bill as drafted and, where required, explains the reasons behind its approval or the ways in which these issues could be overcome. This ruling is then forwarded to the president of the submitting assembly.

Tax

An ecotax on HGVs

A tax on heavy goods vehicles intended to discourage the rerouting of traffic from the taxable network was originally introduced for an experimental period in Alsace. The 2009 State Budget Act extended that tax regime to all of mainland France. In 2011, a number of pieces of draft legislation required for the effective implementation of this tax were submitted to the Conseil d'État.
In addition to identifying the categories of vehicles covered by the tax, the Conseil d'État examined the draft decree in terms of the local road network subject to this national tax. According to the statute, the tax would apply to non-toll motorways and route nationale trunk roads, as well as to local road networks likely to attract significant levels of traffic rerouting to avoid toll routes. The Conseil d'État therefore focused on identifying these local road networks and on the relevance of the method adopted to quantify the significant rerouting of traffic and its application in France. The Conseil d'État also ruled on the draft decree covering approval of tax inspection systems, and two more general pieces of legislation, one of which relates to the registration of European electronic toll fee collection service providers, whilst the other addresses the rules governing the marketing of interoperable electronic toll fee collection systems (the equipment used with the European electronic toll fee collection system).

Law enforcement

Regulating the use of firearms

The Conseil d'État has examined a draft decree on the use of force to maintain or restore public order, with specific emphasis on the use of firearms intended for riot control and crowd dispersal. The Conseil d'État found that the wording of this draft should make a distinction between two separate sets of circumstances. In the first of these, where the police are acting on express orders or special command, the only types of weapon that may be used are *'blast-effect grenades and their launchers'*, where such use is ordered by the Prime Minister. Use of these weapons should meet two conditions, the need to maintain or restore public order on the one hand and the principles of necessity and proportionality on the other hand.
The Conseil d'État found that it was not necessary to make specific mention of launcher-propelled teargas-only grenades: since they are not classed as firearms, their use does not fall under the procedure governing the *'use of firearms'* within the meaning of the Defence Code and Criminal Code, but rather under that governing the *'use of weapons'*. In the second set of circumstances, where violence or assaults are inflicted on law enforcement officers, or where these officers cannot defend their ground in any other way, the draft authorises the use of first- or fourth-category firearms without prejudice to legitimate self-defence or necessity. These clarifications guarantee that, following review by the Conseil d'État, the only firearms permitted for use are those suited to maintaining public order or designed for this purpose.

The Conseil d'État has ensured that the drafting of the proposed decree governingthe use of force to maintain or restore public order makes a distinction between two different sets of circumstances: those where the forces concerned are acting under special orders or command, and those where enforcement officers must defend themselves against violence and assault.

Emergency response operations

Reimbursement of fire fighting costs

Since the Constitutional Reform Act of 23 July 2008, the Conseil d'État has also been an adviser to Parliament. In this role, one of the parliamentary draft bills submitted to the Conseil d'État under Article 39 (paragraph 5) of the Constitution was aimed at enabling local fire and emergency services to oblige people causing fires to pay back emergency operating costs. Without challenging the principle that fire and emergency services are normally provided free of charge, the proposed legislation introduced the principle that the costs incurred by a public service utility in fighting fires should be met by the persons responsible for having caused those fires *"whether by neglecting an obligation of safety or prudence imposed by law or regulations"*.

Consumer affairs

Boosting consumer protection

Launderette safety, energy labelling, financial products and rented homes… In 2011, the Conseil d'État examined an enormous range of draft consumer protection legislation.

At a time of economic crisis, consumer protection is more important than ever. The Conseil d'État therefore examined many provisions in a parliamentary draft bill, a government draft bill and a number of decrees dealing with consumer issues. Parliament and the Executive were also involved as a result of the increasing number of European Union standards to be incorporated into national legislation.

An enormous diversity of standards

The draft legislation examined by the Conseil d'État covered an extremely broad range of issues, from increasing safety levels in public launderettes – which sometimes result in injury – to protecting consumers from financial products, and the transposition of an EU directive on the labelling of products impacting on energy consumption (such as air-conditioning units, refrigerators, microwave ovens, televisions, dishwashers and domestic bulbs).
The Consumer Code has been substantially strengthened, with most of the new provisions being focused on accident prevention or ensuring that product end-users receive proper information.

Protection for borrowers, tenants and Internet users

This arsenal of new standards introduces additional obligations and prohibitions, as well as tightening criminal, civil and administrative penalties.
For example, revolving credit agreements were felt to be in need of particular attention, given the risks they pose to consumers. The requirements for pre-contractual information and borrower solvency were tightened, and the option for borrowers to make early repayment without incurring additional interest and charges was introduced. In respect of the rule limiting the repayment period for revolving credit agreements, and therefore the total cost of borrowing, the Conseil d'État suggested an appropriate mechanism for spreading the increase in monthly payments resulting from the minimum capital repayments rule in order to avoid penalising consumers already heavily indebted.
In the residential lettings market, penalties were introduced to dissuade landlords from the undesirable practices of overstating actual floor areas in leases and exceeding the period allowed for repayment of deposit balances to outgoing tenants.
Lastly, electronic communication service providers may now offer those consumers on the most modest incomes a social tariff for broadband access. A number of measures designed to combat misleading online sales practices and protect the health of consumers were also submitted for examination to the Conseil d'État. The Conseil d'État verified the constitutionality, compliance with European Union law, relevance, consistency and drafting of all these proposed measures.

Conseil d'État | Track record

The Conseil d'État is the legal adviser to the government. It examines bills and draft orders prior to their submission to the Council of Ministers, as well as the most important draft decrees. It delivers opinions on the lawfulness of statutory draft bills in terms of their drafting and the relevance of the provisions contemplated with respect to the goals originally set out. The Conseil d'État may be consulted by government on any point of law, and examines the full range of administrative and public policy issues. Since the constitutional reform act of 23 July 2008, the Conseil d'État may also be consulted by the presidents of the National Assembly and the Senate for its opinion on parliamentary draft bills before such bills are considered by the relevant parliamentary committee.

Type of legislation

133 Executive draft bills.

48 draft ordinances.

5 parliamentary draft bills.

1,012 draft decrees, including 199 individual decrees.

Average period of consideration

Laws

60% examined within one month.

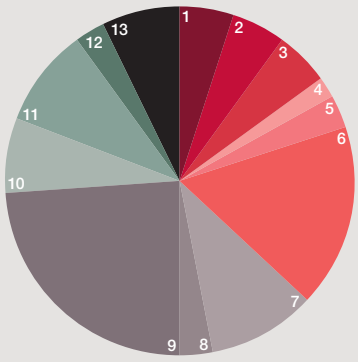
95% examined within two months.

Decrees

35% examined within one month.

80% examined within two months.

Breakdown of draft legislation by ministry



1. **5%** Foreign Affairs
2. **5%** Agriculture
3. **5%** Budget – Public sector employment
4. **2%** Culture and Communication
5. **3%** Defence
6. **17%** Ecology - Transport - Housing
7. **10%** Economy
8. **3%** National Education – Further Education
9. **24%** Home Affairs – Overseas Territories
10. **7%** Justice
11. **9%** Employment
12. **3%** Health - Youth and Sports
13. **7%** Other ministries

Judging

Evolving legislation

Our litigation work is an accurate reflection of the challenges facing our society today, and in 2011 that work focused particularly on issues central to the concerns of our fellow citizens and the State: health and the environment, information technology and individual freedoms… It also re-examined old problems that have returned to today's agenda, including a re-examination of the 9 December 1905 law on the separation of Church and State, where the Conseil d'État was called upon to define the scope and implications of this legislation today.

Headline news on our litigation work / p. 21

Track record / p. 30 to 33

Regulation

Mobile phone relay masts

The Conseil d'État recognised the relevant State-run authorities as having exclusive competence in regulating the location of relay masts. Only those State-run authorities appointed to do so by law (the Minister, Arcep[1] and ANFR[2]) are competent to set the general rules applying to the location of mobile phone relay masts. Mayors may not therefore exercise their authority by issuing orders regulating the location of relay masts within their communities. The Conseil d'État also ruled that the principle of precaution cannot be used as justification for a public authority exceeding its scope of competence.

CE General Assembly, 26 October 2011, Commune de Saint-Denis (no. 326492), Commune des Pennes-Mirabeau (no. 329904) and SFR (nos. 341767 and 341768).

1. Autorité de Régulation des Communications Électroniques et des Postes (the French Telecommunications and Posts Regulator).
2. Agence Nationale des Fréquences (the authority responsible for managing and planning the radio frequency spectrum).

Working time

Days off for children's holiday camp supervisors

Until the Conseil d'État became involved in 2011, supervisors working in children's holiday camps were not covered by the Employment Code's general provisions on working hours and weekly and daily rest periods. Instead, they were covered by special provisions introduced by the decree of 28 July 2006. In 2011, the Conseil d'État received a request to nullify this decree on the basis that it did not provide for daily rest periods and was consequently in conflict with the aims of the EU working time directive (2003/88/EC) in respect of certain aspects of working time arrangements. Article 3 of the directive provides that every worker is entitled to a minimum daily rest period of 11 consecutive hours per 24 hour period. The Conseil d'État referred the issue of establishing compatibility between national law and this directive to the Court of Justice of the European Union. In October 2010, the Court found that French law did not include the appropriate compensation or protection measures required by the directive for such a departure from its provisions to be acceptable. The Conseil d'État interpretation of this ruling was that although the system of rest periods for children's holiday camp supervisors could qualify for exemption under the circumstances provided for by Directive 2003/88/EC, the decree of 28 July 2006 provided neither for equivalent rest periods in compensation nor for appropriate protection, and that the annual maximum of 80 days worked could not be regarded as such protection. It therefore nullified this decree. Until such time as new exemption provisions compatible with community law are adopted, supervisors working in children's holiday camps are entitled to a daily rest period of 11 consecutive hours.

CE, 10 October 2011, Union syndicale Solidaires Isère, no. 301014.

Taxation

State found liable in case of negligence

The State may now be liable on the basis of negligence in applying the procedures for calculating and collecting tax. The Conseil d'État has ruled that negligence by the tax authority when applying the procedures for calculating and collecting tax is sufficient to establish the liability of the State towards the taxpayer or any other person when he or she has suffered damage. The principle of negligence *(faute simple)* applies to claims for compensation not only by private individuals and companies, but also by regional authorities. The damage, which does not necessarily relates to the payment of tax, may take the form of practical consequences of decisions taken by the tax authorities and, in some cases, of problems encountered by taxpayers in terms of their standard of life. The prejudice referred to cannot however be attributed directly and certainly to negligence by an income tax agency when such agency can show that it would have reached the same decision had it complied correctly with the relevant procedures or where its assessment had been based on considerations that it had omitted to take into account or on a legal basis other than that originally adopted to justify the tax levied. The tax authority may totally or partially discharge its liability by successfully arguing the liability of the taxpayer or compensation claimant.

CE, 21 March 2011, M.X.

The State is liable for damage resulting from negligence when income tax agencies do not properly apply the procedures for calculating and collecting taxes.

Procedural errors

Establishment of the ENS Lyon nullified

Administrative acts must be taken in accordance with the forms and procedures provided for by the relevant laws and regulations.

Ruling on a request to nullify the decree setting out the regulations of the new École Normale Supérieure (ENS) in Lyon subsequent to its merger with the ENS in Fontenay - Saint-Cloud, the Conseil d'État restated that administrative acts must comply with the forms and procedures provided for by the relevant statutes and by-laws. It ruled that, in principle, an error affecting the course of a preliminary administrative procedure (whether mandatory or optional) may legally invalidate the decision taken, where the error concerned was capable in itself of influencing the nature of the decision taken or has deprived interested parties of a guarantee. In this case, it found that two procedural errors were of such a nature as to legally invalidate the decree challenged. The joint technical committees had not been consulted prior to the deliberations undertaken by the governing boards of the two ENS institutions, thereby depriving staff representatives of a guarantee. Furthermore, when deciding in favour of the principle of merging the two institutions, the two governing boards had issued their recommendations at a joint meeting chaired solely by the principal of one of the two institutions - including during the discussion and voting stages - and had used deliberation methods likely to influence the outcome of those deliberations. The Conseil d'État therefore nullified the decree challenged, such ruling being effective on 30 June 2012.

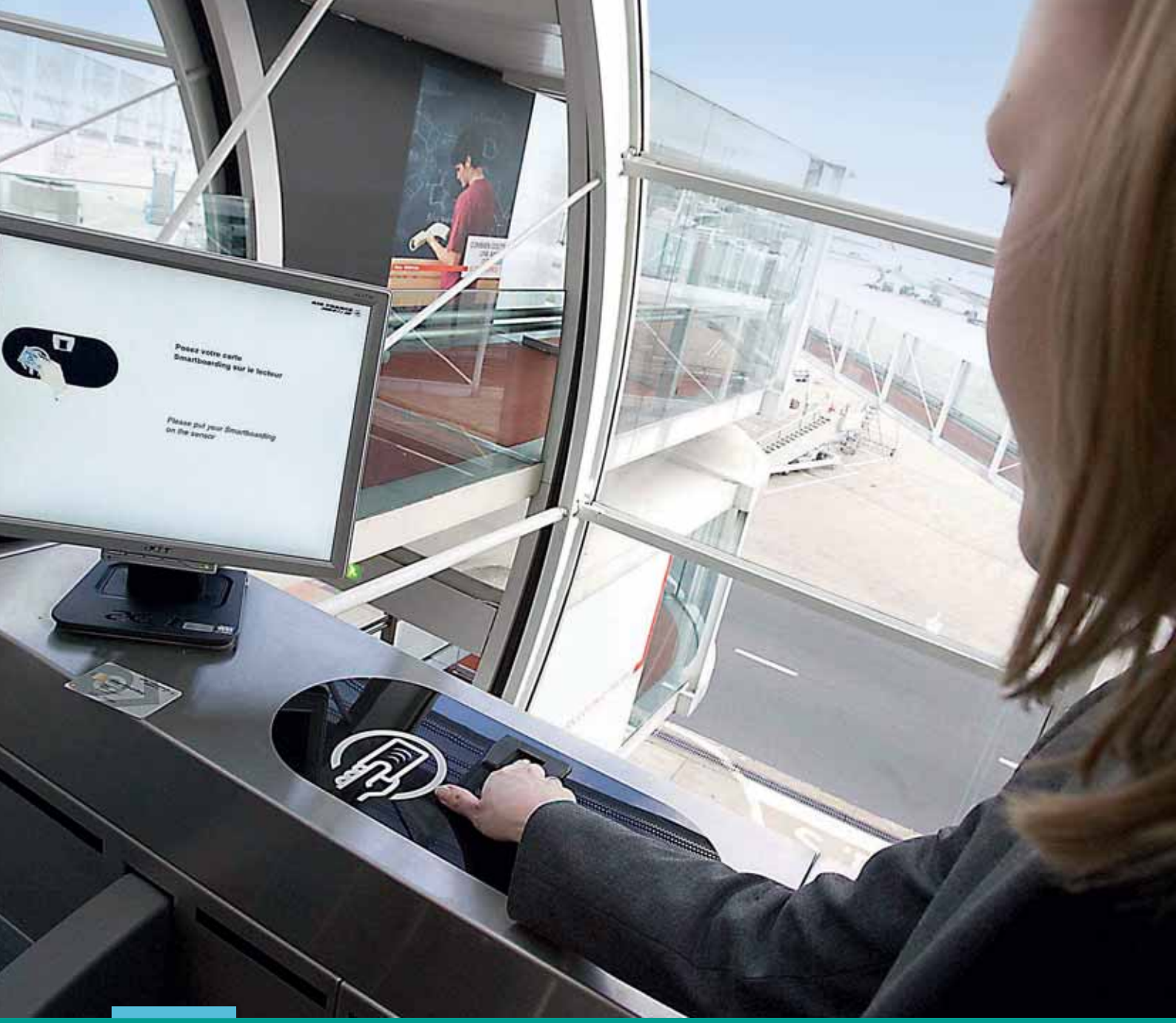
CE, General Assembly, 23 December 2011, M. D. and others, no. 335033.

Competition

The ecotax on HGVs: a contract challenged in court

The company Autostrade per l'Italia was awarded a 13-year contractual partnership valued in excess of €2 billion for the funding, design, construction, maintenance, operation and repair of the system to be used for the collection, payment and recovery of the ecotax on heavy goods vehicles. The Conseil d'État received applications from the Minister for Ecology and Autostrade per l'Italia for a cassation hearing following nullification of the contractual partnership award procedure at the request of several companies whose tenders had been unsuccessful. The Conseil d'Etat set aside the grounds raised by the unsuccessful companies, which challenged the impartiality of the procedure on the basis that the Minister had been advised by consultants from companies that were wholly-owned subsidiaries of a company having commercial links with the Autostrade per l'Italia group. The Conseil d'État found that these facts were not going as far as to affect the impartiality of the procedure, since the collaboration between the contracting company and the abovementioned group was only occasional and that sufficient precautions had been taken in the contract award procedure.

CE, 24 June 2011, Minister of Ecology, Sustainable Development, Transport and Housing, and Autostrade per l'Italia SpA, nos. 347720 and 347779.



Databases

Digital fingerprints used in biometric passports

Having received a number of claims against the decree introducing biometric passports, the Conseil d'État criticised the retention in a central database of digital fingerprints for all eight fingers, given that only two were required to appear in the passport. However, following detailed examination of the operational guarantees in place (limited access and retention time, and the inability to search on the basis of biometric data, etc.), it granted permission for the creation of a central database of passports. Furthermore, the Conseil d'État restated that the State can still meet its requirements from its own resources, and rejected criticisms of photographic professionals regarding the taking of passport photographs directly by the border agency.

CE, 26 October 2011, Association pour la Promotion de l'Image and others, nos. 317827 and others.

Beekeepers contested the decision of the Minister of Agriculture to authorise the use for one year of Cruiser, an insecticide which, according to their claim, raised a potential danger to bee populations.

Environment

The marketing authorisation procedure for Cruiser

In response to applications made by environmental protection organisations and farmers' unions, the Conseil d'État provided a ruling on the decision by the Minister of Agriculture to authorise the marketing of Cruiser, an insecticide whose effects were - according to the organisations concerned - toxic to bees.

In 2011, the Conseil d'État provided two rulings on the procedure used to authorise marketing of the insecticide Cruiser to treat maize seeds. The first ruling clarified the methods to be used by the French food safety agency *(Agence française de sécurité sanitaire des aliments - AFSSA)* when evaluating the risk presented by this product to the health of bee populations. A number of environmental protection organisations, farmers' unions and bodies representing beekeepers challenged the decisions taken by the Minister of Agriculture on advice from the AFSSA to permit the marketing of Cruiser in 2008 and 2009. The decree of 5 May 1994 regulating phytopharmaceutical products requires the AFSSA to apply the so-called 'hazard quotient' method when measuring the risk of bee mortality following exposure to the product. If the mortality threshold provided for under the relevant legislation is exceeded during testing, then authorisation may not be granted. However, the AFSSA had not applied this method and had proceeded directly to evaluate the risks presented by the product on the basis of the conditions of use proposed. The Conseil d'État set aside the decisions reached by the Minister of Agriculture on the basis that the risk evaluation method used by the AFSSA when preparing its recommendation did not comply with the relevant regulation.
The Conseil d'État also found that, contrary to regulatory requirements, the AFSSA conclusions that Cruiser had no unacceptable impact related only to its short-term effects, since no data was available regarding its long-term effects. In a second ruling, the Conseil d'État set out the conditions governing the issue by the Minister of Agriculture of marketing authorisation for phytopharmaceutical products such as Cruiser.
The framework for such authorisation is provided by a European directive and the Rural Code at national level, which requires that authorisations are granted for a period of ten years, except when special assumptions apply. The French Union of Apiculturists (UNAF) requested nullification of the Minister of Agriculture's decision authorising the marketing of Cruiser for one year. The Conseil d'État came to the conclusion that the decision was illegal and nullified it. By authorising Cruiser for use in 2010 only and announcing a full reassessment of the case at the end of the year to examine the possibility of renewal, the Minister had effectively applied rules that were contrary to the procedure for authorising phytopharmaceutical products. In granting or refusing this authorisation, there were only two possibilities open to the Minister: he could either have considered that the short- and long-term harmlessness of the product or its effectiveness were not sufficiently proven – in which case authorisation would have to be refused, or he could have considered that the evidence was sufficient and therefore have granted authorisation for ten years.

CE, 16 February 2011, Confédération Paysanne and others, nos. 314016, 314044, 314144, 325193, 325318 and 325328 and CE, 3 October 2011, Union Nationale de l'Apiculture Française, no. 336647.

Since the 9 December 1905 law was introduced, the French State may not fund or subsidise any religion.

Secularism

Law on the separation of Church and State

In five rulings delivered on 19 July 2011, the Conseil d'État provided significant interpretation regarding the 9 December 1905 law on the separation of Church and State.

Five rulings published in July 2011 referred to five cases in which the Conseil d'État provided interpretation of the 9 December 1905 law on the separation of Church and State. Four of these cases had one thing in common: they involved challenges to decisions by regional authorities which, in the local public interest, had supported a project involving a particular religion. The fifth case raised the question of how legislative provisions permitting local communities to enter into official emphyteutic leases for the purpose of constructing a religious building should be applied: did this legislation constitute an exemption from the provisions of the 1905 law? All these cases therefore rested on reconciling local public interests with the principles enshrined in the 9 December 1905 law.

The principal clauses of the 1905 law

In arriving at its rulings, the Conseil d'État based its considerations on the main provisions of the 1905 law. Article 1 provides that *"The Republic ensures freedom of conscience. It guarantees the free exercise of religions subject only to those restrictions decreed hereafter in the interest of public order"*. Article 2 states that: *'The Republic neither recognises, funds nor subsidises any religion. Consequently […] any expenditure relating to the exercise of religions will be withdrawn from the budgets of the State, departments and communes"*. Lastly Articles 13 and 19 provide that buildings used for public religious worship, together with their furnishings, are free of charge to religious associations formed to meet the costs, upkeep and exercise of a religion. Such associations may not receive any form of subsidy from the State, departments and communes, which nevertheless may grant loans to these associations for the purpose of repairing buildings used for public religious worship. The law also permits public bodies owning religious buildings to incur expenditure in order to maintain and keep them up.

Public interest and equality between religions

On examining these cases, the Conseil d'État restated that by virtue of these provisions, local authorities may fund the upkeep and conservation of religious buildings they have inherited or taken ownership of when the Church and the State were separated, and provide financial support to religious associations to fund repair works. On the other hand, they are prohibited from providing support for religious observance. Two ideas therefore arise from the rulings given by the Conseil d'État. Although the 1905 law prohibits any support for religious observance, it provides for exemptions to be made or, where no exemption exists, must be applied in conjunction with other legislation providing exemptions or mitigating measures. Although local authorities may make decisions or fund projects relating to religious buildings or practices, they may do so only on condition that these decisions are in the local public interest, comply with the principle of religious neutrality and equality, and exclude any financial support for a particular religion.

Five cases raising issues related to the 1905 law

A multipurpose hall used as a place of worship, the provision of a slaughterhouse for the celebration of Aïd el-Kébir, the signature of an emphyteutic lease, the purchase of a lift to improve the access to a basilica and the acquisition of a church organ: the five cases brought before the Conseil d'État reflect the diversity of the issues raised.

In 2011, five cases concerning different religions were submitted to the Conseil d'État, which, as a result, clarified the provisions of the 1905 law on the separation of Church and State.

Trélazé: purchase of an organ for the community church

The city council of Trélazé decided to acquire and restore an organ for subsequent installation in the community church. In its ruling, the Conseil d'État found that the 9 December 1905 law did not prevent a local authority from contributing to the funding of an item intended for use in a place of religious observance (a church organ, for example) as long as there was an element of local public interest (music lessons, concerts, etc.) and that the operation was subject to contractual agreement.

CE, 19 July 2011, Commune de Trélazé, no. 308544.

Lyon: a lift for the Basilica of Notre-Dame de Fourvière

The 1905 law does not impede local authority initiatives intended to promote the cultural or tourist attraction of a religious building. Therefore, the granting of a subsidy by the city of Lyon for the purpose of installing a lift to facilitate access to the Basilica of Notre-Dame de Fourvière is not contrary to the prohibition on providing financial aid to a religion, even though it may incidentally benefit people belonging to such religion. In practical terms, the lift fulfils the test of local public interest, given the importance of the building for the cultural reputation, tourist industry and economic development of the city, which justifies the involvement of the relevant authority.

CE, 19 July 2011, Fédération de la Libre Pensée et de l'Action Sociale du Rhône et M. P., no. 308817.

Le Mans: a temporary slaughterhouse for the celebration of Aïd el-Kébir

The urban authority of Le Mans decided to equip abandoned premises for the purpose of obtaining health approval for a local temporary sheep slaughterhouse intended to operate essentially during the celebration of Aïd el-Kébir. The Conseil d'État ruling found that a municipal authority is not in breach of the provisions contained in the 1905 law by equipping premises for ritual slaughter where the local public interest justifies such a use. The need to exercise ritual practices under conditions complying with the safeguard of public order (cleanliness, public health, etc.) therefore justifies the involvement of the authority where no nearby slaughterhouse exists. The conditions under which this facility is used must comply with the principle of religious equality and neutrality, and exclude any financial element that would constitute support for a religion.

CE, 19 July 2011, Communauté Urbaine du Mans - Le Mans Métropole, no. 309161.

Montpellier: a multipurpose hall used as a place of religious worship

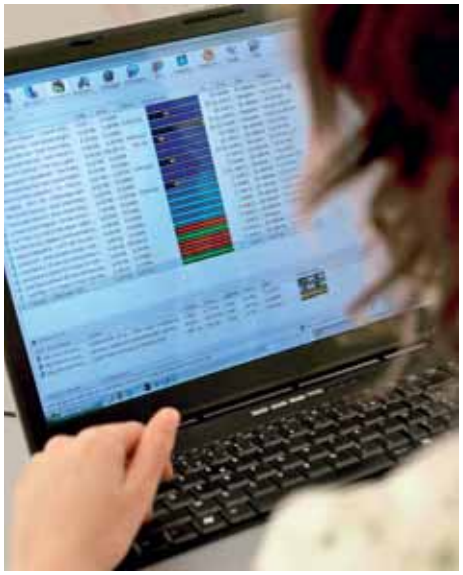
The city of Montpellier has built a 'multipurpose community hall', which is made available to the Franco-Moroccan Association for use as a place of worship under a renewable annual agreement. The Conseil d'État ruling stressed that a local authority may, as long as the principles of neutrality and equality are respected, permit the use of a place it owns for the purpose of religious worship only where the financial conditions exclude any financial element that would constitute support for a religion. On the other hand, the permanent and exclusive provision of a hall for the purpose of its use by an association for religious worship was found to confer a religious character on the building concerned and was contrary to the provisions of the 9 December 1905 law.

CE, 19 July 2011, Commune de Montpellier, no.313518.

Montreuil: emphyteutic lease for building a mosque

The Montreuil-sous-Bois city council had approved the signature of a 99-year emphyteutic lease with the Montreuil Religious Federation of Muslim Associations in return for the annual symbolic rent of one euro for the purposes of building a mosque. In its ruling, the Conseil d'État indicated that by authorising the signature of such a lease between a local authority and a religious association for the purpose of building a place of religious worship, the legislator had permitted local authorities to provide land in their ownership, against a limited contribution and the return of the building to the authority's own estate upon expiry of the lease. In doing so, the legislator had provided exemption from the prohibition imposed by the 9 December 1905 statute on granting any financial contribution to the construction of new religious buildings in order to enable local authorities to facilitate the erection of such buildings.

CE, 19 July 2011, Mme V., no. 320796.



Internet

Hadopi: a judicial matter

The Conseil d'État rejected the application of the company French Data Network challenging the decree of 26 July 2010 relating to the procedure applied by the rights protection committee of the *Haute Autorité pour la Diffusion des Oeuvres et la Protection des droits sur Internet* (HADOPI), the body set up to promote the distribution and protection of creative works on the Internet. Firstly, the Conseil d'État upheld the procedure applied by HADOPI in relation to the European Convention for the Protection of Human Rights and Fundamental Freedoms. It restated that the recommendations made by the HADOPI rights protection committee involve no element of penalty or accusation. Secondly, the Conseil d'État confirmed that since the recommendations made by the rights protection committee were not penalties, they could not be the subject of proceedings before the administrative justice system. In practical terms, the HADOPI system is designed to warn Internet users against any breach of law. Any penalty can be decided only by a judge according to Constitutional Council case law. If illegal downloading practices recur and HADOPI reports the matter to the criminal justice system, the person concerned may use this judicial route to discuss the facts alleged in the relevant warning letters.

CE, 19 October 2011, French Data Network, nos. 339279 and 342405.

International law

State no-fault liability recognised

Under customary rule of public international law, States enjoy immunity from execution in respect of actions undertaken in other States. Nevertheless, the no-fault liability of the State may be invoked in respect of a damage suffered as a result of this rule being applied. This was the Conseil d'État ruling that confirmed the status of international customs in national law previously enacted in the Aquarone judgement of 6 June 1997. Under the terms of this judgement, a customary rule of international law may be applicable in national law insofar as it is compatible with national statutory law. The Conseil d'État therefore ruled that State no-fault liability as a result of applying a customary rule of public international law may be proven on the basis of infringement of the principle of equality inherent in public duty where the damage suffered by the victim is of a serious and special nature. This criterion is measured according to the known or estimated number of victims of similar damage. The judgement is therefore consistent with existing jurisprudence on State no-fault liability as a result of international agreements first referred to in the Compagnie Générale d'Énergie Radio-Électrique ruling issued by the Conseil d'Etat on 30 March 1966.

CE, Section, Mme S. and other, 14 October 2011, nos. 329788, 329789, 329790 and 329791.

A customary rule of public international law offers States immunity from execution in respect of actions undertaken abroad.

Public works

The Les Halles site

Following a site accident, a company had obtained an interim ruling from a judge in chambers at the Paris administrative tribunal to suspend construction work above its shop in the Forum des Halles shopping centre. Ruling on the subsequent appeal, the Conseil d'État confirmed its jurisprudence that, in the event of danger, an application may be made to a judge in chambers either for a suspension interim ruling suspending the administrative ruling underlying the danger concerned, or for a 'practical measures' interim ruling in order to demand that the administrative authority take all necessary protection measures. Furthermore, the Conseil d'État ruled for the first time that an application may be made to a judge in chambers on the basis of a "freedom emergency procedure" (Article L. 521-2 of the Administrative Justice Code, which requires a judgement to be given with 48 hours). Such procedure is applicable when some misfeasance of a public authority creates a clear and imminent threat to life, since the right to life is a fundamental freedom that this procedure is intended to safeguard. In this case, having examined the nature of the incident and the measures taken to ensure that work could continue safely, the Conseil d'État found that there was no clear and imminent threat to life.

CE, 16 November 2011, Ville de Paris and Société d'Économie Mixte PariSeine, nos. 353172 and 353173.

Administrative tribunals | Track record

Despite a 4.7% increase in litigation, the administrative tribunals continue to shorten the period for judgement. The average period for judgement is now approaching one year. The number of cases registered for more than two years account for less than 14% of pending cases, compared with more than one-third at the beginning of the 2000s. Whether in emergency (interim rulings) or proceedings on the main dispute, the administrative justice system is committed to responding effectively to citizens with all required speed, without setting aside its quality standards.

Key figures

182,916
cases registered in 2011, reflecting an increase of 48% in 10 years.

186,493
cases judged in 2011, reflecting an increase of 54% in 10 years.

10m 27d
was the average predicted period for judgement* in 2011.

796
judges, 1,071 clerks' officers and 160 judicial assistants.

Amongst our judgements...

Employment law

Election of employee representatives or works council members, redundancy of protected employees and the signature of individual employment support contracts: in addition to ruling on the legality of decisions reached by the government employment service (Administration du Travail et de l'Emploi), the administrative tribunals are also responsible for providing interpretations of employment law. They may also be required to rule on what is a group of companies in order to assess the conditions under which a protected employee has been assigned[1], the concept of business sector to assess the relevance of the financial reason given by an employer to justify the dismissal of this employee[2] or even the conditions applying to the signature of an agreement between an employer and trade unions regarding the organisational methods used in ballots to elect employee representatives[3]. The Caen administrative tribunal ruled that the provisions of the Employment Code in relation to the employment support contract do not exclude trade associations from the list of employers eligible for the scheme[4].

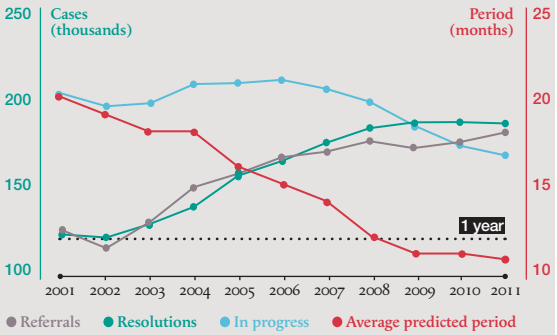
Competition law

Fuel price setting in French Guiana[5], where government control of prices still applies, the selection of newspapers authorised to receive and publish judicial and legal announcements[6] and the establishment of a public database of medicines for medical pratictioners[7]... in all these cases, the administrative rulings concerned have direct and immediate implications for the businesses of economic actors, requiring the administrative justice system to assess their legality in light of competition law or the principle of freedom for commerce and industry.

1. Marseille AT, 8 March 2011, no. 0808500
2. Marseille AT, 29 November 2011, nos. 1003338 and subsequent
3. Judge in chambers at the Cergy-Pontoise AT, 3 November 2011, no. 1108330
4. Caen AT, 15 December 2011, no. 1100567
5. French Guiana AT, 21 April 2011, no. 0900769
6. Lille AT, 13 October 2011, no. 1102652
7. Paris AT, 2 November 2011, no. 0907742

Lead times

Average predicted period



The average predicted period for a judgement is the ratio between those pending cases at the end of the year and those in which a judgement has been delivered during the same year.

Average actual period

The average actual period is the average period of time actually needed to obtain a judgement in those cases where a judgement has been given during the year.

Average actual period (for ordinary cases)

The average actual period for ordinary cases excludes emergency proceedings or those constrained by law to be heard within a specific time period on the one hand, and cases subject to rulings on the other hand. This is undoubtedly the most representative 'time to justice' in the eyes of most applicants.

Administrative courts of appeal | Track record

In 2011, the administrative courts of appeal confirmed their return to full health.
The growth in cases settled was greater than that in cases registered, thereby reducing the number of cases and the time needed to obtain a judgement. The average predicted period for judgement is now less than one year for the first time in the record of the courts. The courts are therefore delivering extremely effective appeal proceedings for citizens.

Key figures

28,279
cases registered, reflecting an increase of 84% in 10 years.

29,314
cases judged, reflecting an increase of 127% in 10 years.

11m 16d
cases registered, reflecting an increase of 84% in 10 years.

269
cases judged, reflecting an increase of 127% in 10 years.

Amongst our judgments...

Jehovah's Witnesses
The claim by Jehovah's Witnesses that the Prisons service may not legally use the small number of prisoners belonging to the Jehovah's Witnesses in order to justify its refusal to approve volunteer chaplains of this denomination, thereby denying prisoners the opportunity to benefit from the spiritual support of a minister of this religion[1].

European Convention on Human Rights
The limitations of money claims are not the same, depending on who holds the legal title (The State v/s a citizen or a citizen v/s the State). In some cases the discrepancy between such limitations can be regarded as violating Article 1 of the First Additional Protocol to the European Convention on Human Rights, which protects the right of any person on his/her property. In this particular case, the limitation that the State enjoyed to pursue its money claims were 6 to 7.5 times longer than the limitation applying to money claims held by citizens against the State[2].

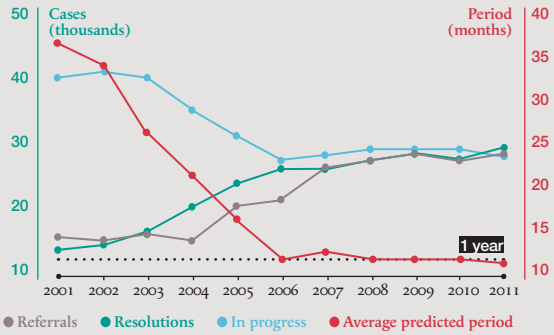
Public utilities and competition
In the absence of any lack of private initiative and therefore any real need for public utilities, the contract introducing three additional maritime services between Marseille and Corsica is regarded as an unjustified restriction on the principle of free enterprise[3].

Regional land use
The guidelines contained in the regional development scheme for Martinique are precise enough to justify a decision to dismiss a request for a permit aimed at operating a new quarry on the basis that this open-cast site – covering more than 10 hectares with annual production forecast at 180,000 tonnes of andesite – would be incompatible with the guidelines set out in the scheme for the South Caribbean region[4].

1. Paris ACA, 30 May 2011, nos. 10PA03567 and 10PA03619 / 2. Lyon ACA, 12 July 2011, no. 09LY02807 / 3. Marseille ACA, 7 November 2011, no. 08MA01604 / 4. Bordeaux ACA, 29 November 2011, nos. 11BX00456 and 11BX00457.

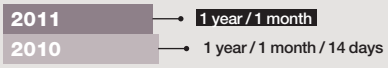
Lead times

Average predicted period



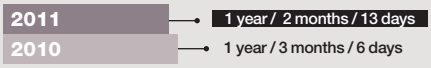
The average predicted period for a judgement is the ratio between those pending cases at the end of the year and those in which a judgement has been delivered during the same year.

Average actual period



The average actual period is the average period of time actually needed to obtain a judgement in those cases where a judgement has been given during the year.

Average actual period (for ordinary cases)



The average actual period for ordinary cases excludes emergency proceedings or those constrained by law to be heard within a specific time period on the one hand, and cases subject to rulings on the other hand. This is undoubtedly the most representative 'time for justice' in the eyes of most applicants.

Conseil d'État | Track record

In 2011, the Conseil d'État once again judged more cases than it registered.
The volume of pending cases fell to the historically low level of 6,880. As a result, the average predicted period for judgement was reduced from 9 months to 8 months and 12 days.On the other hand, the average actual period for judgement rose slightly, reflecting the efforts made to reduce the amount of older cases.

Key figures

9,346
cases registered in 2011.

9,801
cases judged in 2011.

8m 12d
was the average predicted period for judgement* in 2011.

215
members of the Conseil d'État, 412 clerks' officers and 23 judicial assistants.

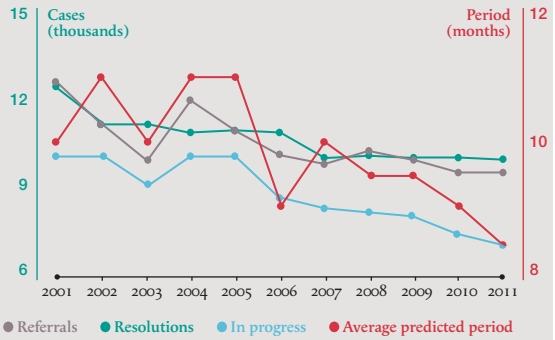
The viewpoint of… Bernard Stirn, president of the litigation section

Protecting fundamental freedoms, interactions between French and international law, financial regulation and the rights of civil servants… In 2011, the Conseil d'État continued to fulfil its role as the supreme court of the administrative justice system with a series of important and innovative rulings. Year two of the Preliminary Request for Constitutional Ruling also confirmed the importance of the filtering role performed by the Conseil d'État. Required on many occasions to rule for the first time on issues regarding compliance with rights and freedoms guaranteed by the Constitution, it addressed the consequences of unconstitutionality judgements delivered by the Constitutional Council[1]. The Conseil d'État also clarified the conditions for implementing the 1905 statutory law on the separation of Church and State[2], combining the principle of secularism with local public interest[3]. It was also called upon to rule on the balance between the need to let public authorities perform their duties efficiently and the need to protect personal data, resulting in quashing part of the decree on biometric passports[4]. It also continued to affirm the basis of French law in European and international law by ruling that State no-fault liability could result from applying customary rules of public international law[5]. It further confirmed its role in economic and financial life by clarifying the rules applicable to disputes over public contracts[6]: in the event of government contract termination, the judge may rule in favour of compensation for the government's co-contractor, but may also order the resumption of contractual relations. Lastly, it restated the importance of the rules for preventing conflicts of interest[7], and clarified the legal framework governing the marketing authorisation procedure for pesticides[8]. The statute on civil service employees also saw some important rulings: the Conseil d'État ruled that the period granted to a public authority to accept or reject the resignation of a civil service employee was mandatory, and when such period expires the relevant authority may not decide anything anymore[9]. The Conseil d'Etat also ruled that the damage caused by mental harassment must be redressed in full, regardless of the behaviour of the victim[10]; and that the protection of civil servants suited by virtue of their jobs is a general principle of law[11].

1. General Assembly, 13 May 2011, Mme D. and M. V., no. 317808 and General Assembly, 13 May 2011, Mme M., no. 316734 / 2 and 3. See p. 26-27 / 4. See p. 24 / 5. See p. 28 / 6. See p. 23 / 7. 27 April 2011, Association Formindep, no. 334396 / 8. See p. 25 / 9. Section, 27 April 2011, Jenkins, no. 335370 / 10. Section, 11 July 2011, Mme M., no. 321225 / 11. Section, 8 June 2011, Farré, no. 312700.

Lead times

Average predicted period



The average predicted period for a judgement is the ratio between those pending cases at the end of the year and those in which a judgement has been delivered during the same year.

Average actual period

The average actual period is the average period of time actually needed to obtain a judgement in those cases where a judgement has been given during the year.

Average actual period (for ordinary cases)

The average actual period for ordinary cases excludes emergency proceedings or those constrained by law to be heard within a specific time period on the one hand, and cases subject to rulings on the other hand. This is undoubtedly the most representative 'time for justice' in the eyes of most applicants.

National Court of Asylum | Track record

In 2011, the number of asylum cases once again grew very quickly (16.5%). Nevertheless, far from weakening, the performance of the National Court of Asylum improved very significantly: the number of cases judged rose by 44.5%, the average predictable period for judgement fell from 15 months to 9 months and 5 days over the year, and initiatives to modernise and improve procedures were extended.

Taking a closer look…

Cutting judgement lead times

In 2011, the action plan introduced to reduce judgement lead times in the National Court of Asylum led to a significant level of new staff recruitment. The number of posts for *rapporteurs* responsible for reviewing appeals case documentation rose from 95 at the end of 2010 to 132 at the end of 2011. The average predictable period to get a case though this court, which was nearly 15 months in 2010, had fallen to barely 9 months by the end of 2011. The very sharp increase of 16.5% seen in the number of cases registered was more than matched by a 44.5% increase in rulings.

Modernisation

The Court continues to press ahead with its policy of increased digitisation of proceedings: completely refurbished in 2011, its courtrooms are now equipped with workstations enabling judging panels and *rapporteurs* to view case documentation and helping secretaries to manage hearings more effectively. In December 2011, digitised technology was used in 36% of all appeals heard. At the same time, the Court continues to implement its internal restructuring programme to improve its hearing capacity and the quality of its case listing. A single repository of case documentation and a central case listing service responsible for managing this repository and preparing lists have also been introduced. It is expected that this new development will improve list consistency and the process of calling lawyers before the court (nearly 85% of appeals are presented by a lawyer).

Developments in procedural law

Modernising the jurisdiction also involves revising its incomplete procedural law. A working group chaired by Christian Vigouroux, deputy president of the litigation section of the Conseil d'État, has been tasked with preparing draft legislation aimed at reconciling the quality of case review with the need for speed and the judicial security of proceedings. This working group heard submissions from all those involved and delivered its conclusions on 18 November 2011. When adopted, such proposals will be incorporated into the regulatory section of the French code on immigration, residency and asylum (the Code de l'Entrée et du Séjour des Étrangers et du Droit d'Asile - CESEDA). Lastly, the decree of 23 December 2011 enacting a provision contained in the 16 June 2011 law modifying the CESEDA provides for the possibility of holding hearings by means of video conferencing, the main aim of which is to enable appeals by overseas applicants to be heard more promptly.

Key figures

31,983
cases registered, reflecting an increase of 16.5% in one year (2010 to 2011).

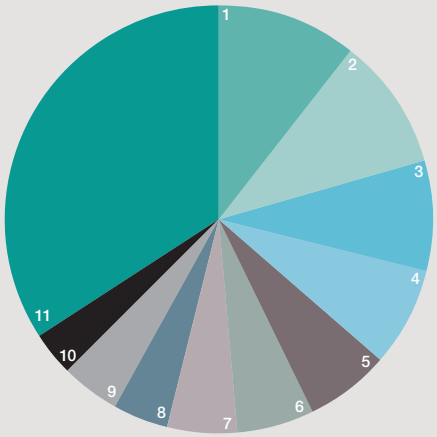
34,595
cases judged, reflecting an increase of 44.5% in one year (2010 to 2011).

343
permanent staff involved in Court proceedings, including 132 *rapporteurs* and 56 hearing secretaries.

12
permanent presidents, 78 part-time presidents and 65 assessors heard appeals in 2011.

Country of origin

In 2011, appeals were lodged with the National Court of Asylum by applicants from 107 different countries. Of these, the most significantly represented were as follows:



1. **10.8%** Bangladesh
2. **9.9%** Kosovo
3. **8.4%** Sri Lanka
4. **7.5%** Russia
5. **6.4%** China
6. **5.7%** DRC
7. **5.2%** Armenia
8. **4.4%** Turkey
9. **4.2%** Haiti
10. **3.6%** Guinea
11. **33.9%** Other countries

Viewpoints

on the Conseil d'État and administrative justice system

Having embarked several years ago on an ambitious policy to become a more open institution, the Conseil d'État is more involved than ever in discussion and listening through the increased use of the spoken word in its litigation proceedings, symposia and international meetings. Here, the Conseil d'État has invited some of its key partners to give their personal views.

Contributors:

Michel Mercier

Minister of Justice and Liberties

Jean-Luc Warsmann

Deputy from the Ardennes and Chairman of the National Assembly Statutory Law Committee

Didier Le Prado

Former Chairman of the Conseil d'État and Court of Cassation Bar Council

Emmanuelle Wargon

Secretary General of the Ministries of Social Affairs

Vassilios Skouris

President of the Court of Justice of the European Union

Herwig Hofmann

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Yves Gaudemet

Professor at Panthéon-Assas University, Paris

Yves Repiquet

Barrister, former President of the Paris Bar Council, Chairman of the National Consultative Committee on Human Rights

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Jacqueline Morand-Deviller

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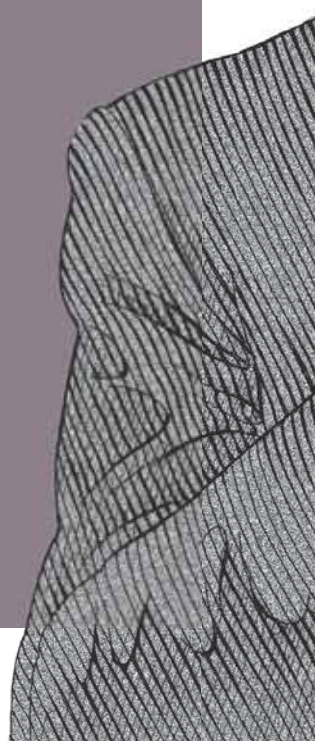


THE ADMINISTRATIVE JUDGE: GUARANTOR OF THE RULE OF LAW

Michel Mercier, Minister of Justice and Liberties

One of the distinguishing characteristics of the French judicial model, and one that is more widespread than is sometimes acknowledged, is the coexistence of two distinct judicial systems.
Naturally, this dual jurisdictional system may raise occasional difficulties. However, experience has shown that the existence of an autonomous administrative judge provides the perfect response to the specific needs of public activities. By virtue of their background, training and career, administrative judges understand the scale of events and factors that may result from public action, as well as its constraints and its dangers. This intimate knowledge of government, combined with real independence - both of which must prevail – give the administrative judge a legitimacy that no one would today think of challenging. The control decisively exercised by the administrative judge contributes to identifying a fair balance between the general interest and personal interests, and between the necessities of public service and respect for individual rights.
Its case law and various reforms have continually enhanced the office of the administrative judge and strengthened its position as guarantor of the rule of law. The efficiency of appeals proceedings, the extension of powers that allow judges to go beyond nullification of a contested act *(plein contentieux)*, the evolution of gross negligence *(faute lourde)* and the possibility for judges to adapt the effects of nullification rulings are just a few illustrations of the constantly updated ability of the administrative judge to regulate administrative action to reflect changes in social demand.
But the extent of instruments available to the administrative justice system would have little effect without the remarkable personal commitment of administrative judges and the clerks' officers who support them in their duties. The continual increase in the number of applications submitted to the administrative justice system every year - which has not prevented a simultaneous and significant reduction in judgement lead times – shows that citizens have strong confidence in that system.

Michel Mercier

This intimate knowledge of government, combined with real independence – both of which must prevail – give the administrative judge a legitimacy that no one would today think of challenging.

ADVISING PARLIAMENT: A SUCCESS

Jean-Luc Warsmann, Deputy from the Ardennes and Chairman of the National Assembly Statutory Law Committee

Back in 2008 when they considered the possibility of an Assembly President submitting a parliamentary draft bill to the Conseil d'État, members of parliament could hardly have imagined just how useful and innovative this option would prove to be. The National Assembly Statutory Law Committee was the first to learn about this new procedure, having initiated the amendments required for its introduction as a parliamentary draft bill. In August 2009, the Conseil d'État was therefore consulted on the draft bill that led to the 17 May 2011 law on simplifying and improving the quality of law. At short notice, it was able to bring together a number of its sections and a large number of *rapporteurs* to examine this draft legislation. The outcome was very satisfactory for me as the deputy who drafted the bill and for the Statutory Law Committee *rapporteur* Étienne Blanc. Almost all of the recommendations made by the Conseil d'État were included in the committee's report, thereby making them available to members and the public. In conjunction with its internal expertise of Parliament, the work done by the Conseil d'État brought a valuable contribution to improving legislative provisions in respect of their constitutionality and compliance with treaty law. The recommendations provided by the Conseil d'État in 2011 following its examination of the parliamentary draft bill on the €15,000 threshold for public procurements below which it is not mandatory to follow a competitive process is an excellent example of that contribution. Introduction of this procedure has also provided the opportunity for those members not already familiar with the Conseil d'État to gain a clearer understanding of its role and methods. Since October 2009, the Statutory Law Committee has examined 6 of the 7 parliamentary draft bills examined by the Conseil d'État upon request of the Assembly. The experience has been so positive that others will follow.

SHORTER LEAD TIMES WITHOUT COMPROMISING THE QUALITY OF RULINGS

Didier Le Prado, former Chairman of the Conseil d'État and Court of Cassation Bar Council

The Conseil d'État and Court of Cassation Bar Council is naturally delighted to see the reforms to which it was associated and which it helped to implement enable the Conseil d'État to handle its case flows to balance referrals with resolutions, having previously lowered the number of its pending cases, whilst at all times maintaining a high level of quality in its rulings. It is a pleasure for lawyers who are themselves busy trying to manage proceedings to be able to rely on very reasonable average lead times for case reviews. Performance can only be measured on the basis of how well the interests of public justice service users are considered, and the procedural facilities offered by legislation today require the sensitive exercise of proportionality to avoid impacting negatively on the balance of power, the rights of the defence, impartiality, quality of justice and humanity: the Conseil d'État has been able to move this step forward even though it was risky. I am delighted that in the great majority of cases, citizens can benefit from the clarifications provided by the public *rapporteur*. In this regard, last year will have demonstrated the benefits of the possibility for lawyers to speak after the public *rapporteur* in order to provide further clarification to the judging panel. Although it is not up to me to offer an assessment of the case law aspects of the Conseil d'État, I nevertheless observe that it is continually moving forward with its introduction of new standards for judicial, economic and social relations, which are helping to bring society and public authorities closer together. Lastly, the Conseil d'État has fully exercised its function as a filter for Preliminary Requests for Constitutional Ruling, thereby playing its role as 'negative' constitutional judge with expert balance and sagacity, thus contributing to model a procedure that was worth introducing permanently in the French institutional landscape. For the Conseil d'État and Court of Cassation Bar Council, there remains only one question: the future of e-proceedings. My colleagues are ready to give their full commitment to the widespread transmission of proceedings towards the Conseil d'Etat.

Jean-Luc Warsmann

THE CRITICAL REFLECTION REQUIRED FOR HIGH-QUALITY LEGISLATION

Emmanuelle Wargon, Secretary General of the Ministries of Social Affairs

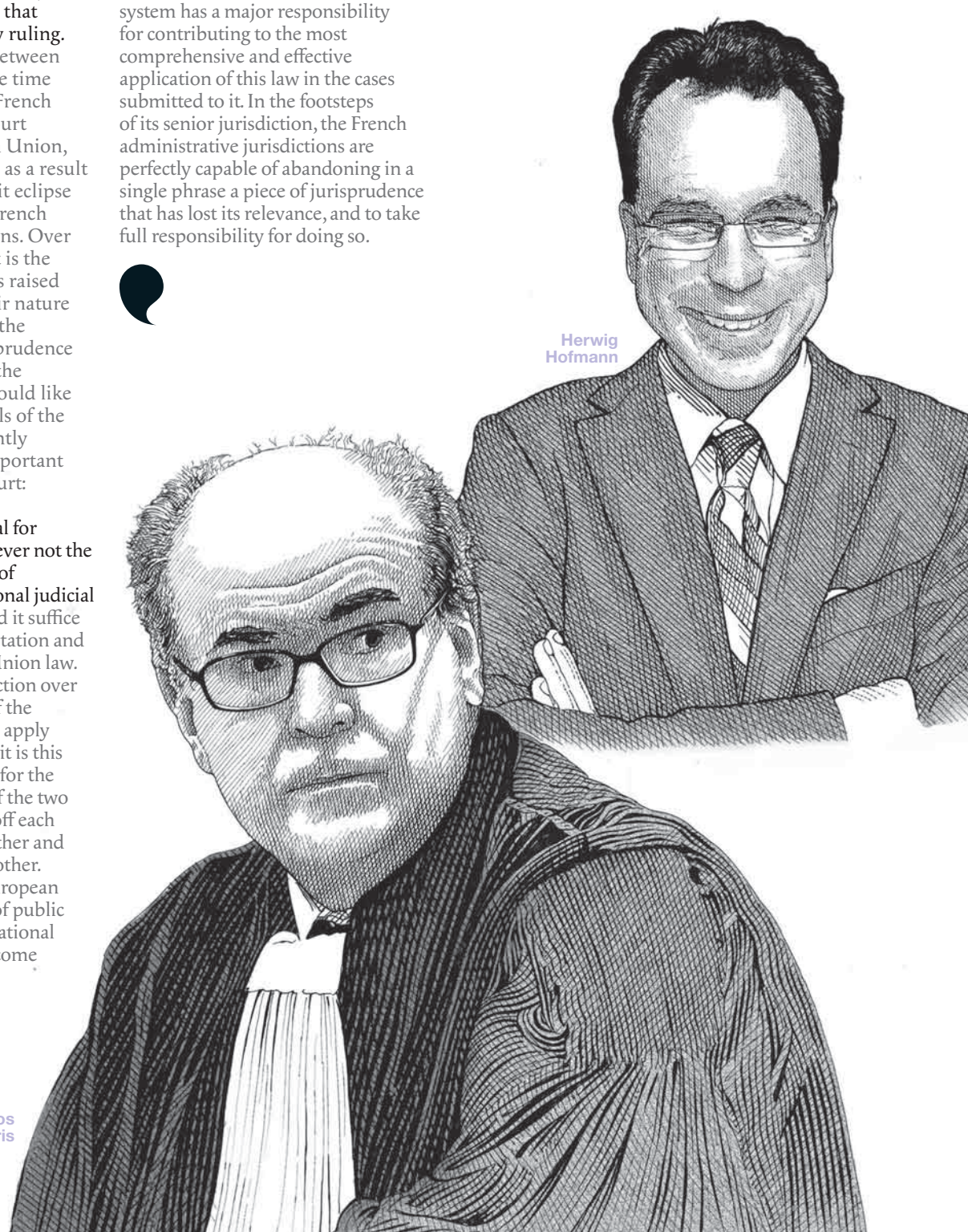
Historically the adviser of the Executive on the preparation of draft legislation, orders and certain decrees, the Conseil d'État contributes to ensuring the judicial security of these legal texts, at the same time as improving their quality and legibility. The importance of this function has grown apace with the increasing volume of legislation brought forward by governments, and the increasing number of provisions contained in that legislation. The success of the procedure governing preliminary requests for constitutional rulings further strengthens the demanding nature of this method of systematically inspecting legislation to ensure that it complies with constitutional principles prior to promulgation. The same demanding level of critical reflection is applied to international agreements and the legal texts derived from them, which are increasingly invoked in the courts to criticise national legal standards. The Ministries of Social Affairs generate more than one-third of all standards, and submit many draft texts to the Conseil d'État every year. The 21 July 2009 law on hospital reform, patients, healthcare and the regions contained no fewer than 135 articles and required the adoption of more than 200 implementing instruments. Over and above the judicial expertise of the Conseil d'État, the ministries appreciate the attention paid by the administrative sections to the goals and constraints of government initiatives, the constructive way in which they help us to achieve those goals by introducing more secure draft amendments, and their ability to work to often-tight deadlines on issues that demand real technical expertise. The work done by the *rapporteurs* and the depth of discussion both in individual sections and in the general assembly provides government with the assurance that the issues raised by a particular draft have been resolved, and in most cases persuades it to adopt the recommendations made. Lastly, in addition to these formal procedures, there is regular contact between section presidents, ministries and the secretary general of the cabinet in order to improve the scheduling of draft legislation examination and making maximum use of the judicial skill demonstrated by the Conseil d'État.

A DECISIVE CONTRIBUTION TO EUROPEAN UNION LAW

Vassilios Skouris, President of the Court of Justice of the European Union

The most visible form taken by the cooperation between national jurisdictions and the Court of Justice of the European Union is that of referral for preliminary ruling. Although this 'dialogue between justice systems' took some time to establish between the French Conseil d'État and the Court of Justice of the European Union, it is all the stronger today as a result of that fact. Neither does it eclipse applications from other French administrative jurisdictions. Over and above the statistics, it is the relevance of the questions raised by the Conseil d'État, their nature and their importance for the development of the jurisprudence of the Court of Justice of the European Union that I would like to emphasise. The referrals of the Conseil d'État are frequently examined by the most important plenary session of the Court: its Grand Chamber.

Essential as it is, the referral for preliminary ruling is however not the only measure of the spirit of cooperation between national judicial systems, and neither would it suffice to ensure unity of interpretation and application of European Union law. As the system with jurisdiction over general law, it is the role of the national judicial system to apply European Union law, and it is this role that makes it decisive for the harmonious coexistence of the two legal systems, which feed off each other, complement each other and sometimes confront each other. Although the impact of European legislation on the actions of public authorities is increasing, national administrative law has become a prominent instrument for implementation of European Union law, and the administrative justice system has a major responsibility for contributing to the most comprehensive and effective application of this law in the cases submitted to it. In the footsteps of its senior jurisdiction, the French administrative jurisdictions are perfectly capable of abandoning in a single phrase a piece of jurisprudence that has lost its relevance, and to take full responsibility for doing so.



Herwig Hofmann

Vassilios Skouris

ONE OF THE EUROPEAN COUNCILS OF STATE

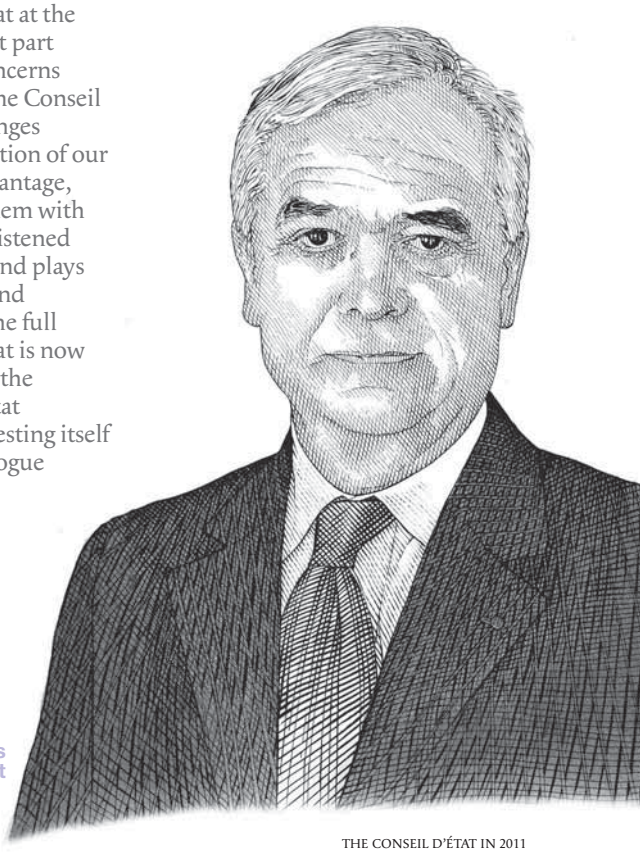
Herwig Hofmann, Professor of European and Transnational Public Law at the University of Luxembourg

In accordance with the principle of territoriality, the jurisdictional control of the Conseil d'État is exercised within national borders and is limited to French government acts. But, as it is the case with its European counterparts, it is required to deal with cases that exceed the traditional territorial vision of administrative justice system competence. In this context, the French Conseil d'État has shown itself to be one of the most open in Europe, since it does not limit itself to deliver comments on French law only. By virtue of the separation of powers between national and European jurisdictions, it is clearly conscious of being a European Union law judge as well. It is part of a network of national administrative jurisdictions that share the same mission of implementing European law as part of a transnational process. It is an active member of a European community of supreme administrative jurisdictions in charge of implementing this *jus communis*. The litigation generated by the Schengen Information System (SIS) now being brought before the Conseil d'État is a good illustration of its status as a member of this network. By using a transnational preliminary ruling procedure to obtain information from other jurisdictions, it has demonstrated that the situation in which a foreign national administrative ruling outside the limitations of national law needs to be examined is not without remedy. But transnational cooperation remains loose. Since it solves the resulting problems only partially, it leaves judicial vacuums that can be addressed only by informal solutions. It is up to the creativity of the Conseil d'État to indicate legal solutions for the Schengen area, as well as those questions raised by an administration integrated to the European Union.

OPEN TO COMPARING IDEAS AND SUGGESTIONS

Yves Gaudemet, Professor at Panthéon-Assas University

There was a time – not so long ago – when the Conseil d'État drew part of its authority from a form of discretion, restricted communication, guarded its secrecy jealously on occasion and never involved itself in social debate. In those days, consulting someone from outside – a law professor, for example – was more likely to be based on personal friendship than institutional participation. But those days are gone, and I refer to them only to illustrate how far we have come. The Conseil d'État has become an open institution: its publications, symposia and working groups bring it into contact with external competences, and major rulings are accompanied by press releases and conferences. There is also another form of openness, which is an extension of the traditional presence of Conseil d'État members in government to include their participation in regulatory authorities, international organisations, major companies and law firms. All of these things put the Conseil d'État at the heart of society, and make it part of the great debates and concerns that run through society. The Conseil d'État found that these changes imposed by the transformation of our body politic were to its advantage, and willed and managed them with real talent. As a result, it is listened to and better understood, and plays a larger role in discussion and decision-making. But it is the full spectrum of civil society that is now addressed and involved by the decision of the Conseil d'État to become more open. Divesting itself of majesty in favour of dialogue - controversy even – it wants to listen, offers dialogue and accepts change as it seeks to enrich itself by drawing on external skills, thoughts, proposals and criticisms. It has come to the recognition that it has a duty sometimes to change and seek out new ways forward in conjunction with others. The academic world and, more particularly, the law faculties are naturally the first to benefit, because the law is everywhere and because, whether as judge or adviser, the prime vocation of the Conseil d'État is to express, according to law, what should change and what should be retained. Equally, the academic world can only be delighted with this willingness to be more open and accessible, which takes many different forms; especially when - and this is always the case – it takes the form of a kind of 'partnership of thinking'.



Yves Gaudemet

JUDGING: A MISSION

Yves Repiquet, barrister, former President of the Paris Bar Council, Chairman of the National Consultative Committee on Human Rights and Member of the High Council of Administrative Tribunals from 2009 to 2011

It falls to the judges of the administrative justice system to fulfil this mission conscientiously, that is to say independent-mindedly, putting personal political leanings to one side, with impartiality, by ensuring that fundamental principles are respected and seeking to do all of this as promptly as possible. How better to define this mission than to quote Portalis: *"Justice is the foremost debt of sovereignty. It is to pay this sacrosanct debt that courts are established"*? Justice must be accepted, and therefore understood. Is it to improve the understanding of what contributes to this that, spurred on by the vice-president of the Conseil d'État, the public *rapporteur* has replaced the Government commissioner all too often wrongly seen as the counterpart of the prosecution in the jurisdictions of the judicial system. Driven by the same impetus, an ethics charter has been drafted by all members of the administrative justice system, reflecting the shared willingness to structure and give form to that which, taken for granted in terms of judges' ethics, is required of it and to show citizens the consideration due to them under the rule of law. The recent development of oral proceedings, the right to reply to the conclusions of the public *rapporteur* and the instructional effect of responding - in the ruling - to each argument raised by the parties are all undeniable advances. Putting them into practice will require further improvements. Aware of the value of their mission, the members of the administrative justice system are too closely in touch with the reality of change not to involve themselves in the unending pursuit of progress.

Yves Repiquet

JURISPRUDENCE THAT CONTRIBUTES TO THE CONSTITUTIONAL ORDER

Pierre Delvolvé, Member of the Institut de France and Professor Emeritus at University Paris-II

The relationship between the Conseil d'État and the constitutional order is both organic and functional. Recent events have strengthened that relationship.

Although the existence of the Conseil d'État was determined directly by certain Constitutions, it is less explicit in that of 1958, although some of its provisions do refer to the appointment of its members and the preparation of draft legislation, orders and decrees. It was developed by the Constitutional reform of 2008, which introduced the possibility of the Conseil d'État being consulted on parliamentary draft bills and requiring its involvement in preliminary requests for constitutional ruling. Indirectly and by virtue of a constitutional principle, reserving the competence of the administrative justice system to address appeals for notification or reform of administrative acts requires the existence of a jurisdiction such as the Conseil d'État. Its jurisprudence contributes to determining the constitutional order in a number of different ways. Government bodies have long recognised the value of administrative bodies whose acts are subject to judicial control, at the same time as recognising their power to enforce law and order throughout the country and ensure continuity of public utilities through regulation. Under the Fifth Republic, such jurisprudence pays great attention to defining the boundaries between the respective areas of statutes and regulations through the application of the general principles of law. It identifies the respective roles of the French President (and his staff) and Prime Minister. It ensures the internal pre-eminence of the Constitution over international conventions, whilst clarifying how French constitutional law interacts with European law. It interprets the law on the basis of the Constitution, enabling the latter to take precedence over the former in the event of ambiguity. Where there is a contradiction, it can now have the statute abrogated by the Constitutional Council using the preliminary request for constitutional ruling mechanism. It ensures the balanced application of the constitutional principle of secularism. Its status and action therefore assure the important position of the Conseil d'État within the constitutional framework.

AN INDEPENDENT AND IMPARTIAL INSTITUTION

Jacqueline Morand-Deviller, Professor Emeritus at University Paris-I

Pierre Delvolvé

Jacqueline Morand-Deviller

The Conseil d'État is a venerable and powerful institution advising the government and providing the supreme jurisdiction in administrative litigation. These twin areas of competence, combined with the fact that its members are recruited from outside the traditional corpus of judges, are what makes it different. The importance of its role within the rule of law is not without risk, and its long history is dotted with crises that it has always serenely overcome. This intangibility is explained by a tradition of independence and impartiality, by the quality of service it provides in the assessment and drafting of legislation both as administrator and adviser, and by the 'major rulings' of its jurisprudence, which combine moderation with creativity. It is also explained by its ability to accept and support reforms it sees as compelling, which has been the case for some years as a direct result of European law.

In responding to the demanding requirements of ensuring 'fair trial' and the effectiveness of judicial rulings, it has developed emergency, amendment and injunction proceedings and has succeeded in concealing its irritation with the attacks led by the ECHR against its most cherished traditions by reforming itself without compromising its essential identity: as a result, the government commissioner becomes the public *rapporteur*. Equally subtly, it has joined in the 'choir of many voices' imposed upon it by competition from other supreme jurisdictions. Already familiar with confronting the Court of Cassation, it must now confront the equally-sovereign interpretations of the Constitutional Council, the EUCJ and the ECHR: courteous squabbles with spiked guns that are mollified by time.

This willingness to respond positively to changes in society must be protected against the excesses of systematic communication. As a model of balance, neutrality and prudence, the supreme jurisdiction, whilst opening itself to dialogue, must not lose either its independence or its rather majestic and secret presence, since both of these qualities are inextricably linked. It achieves this through the concision of its rulings, remarkable for their succinctness, detail and precise use of language, which are less cumbersome in form and less paralysing in content than the verbose and often obscure explanations that have swept through the courts.

5 levers

to improve our organisational structure

In order to offer citizens high-quality justice that is fast, accessible, understandable and reliable, the Conseil d'État has been pursuing a programme of major reforms for some years. The reduction in the time taken to obtain a judgement and the decline in the volume of pending cases are the results of those efforts. But reform is also a matter of firm commitments, and paying greater attention to these levers for change enables the Conseil d'État to fulfil its missions more effectively.

1 Listening

The administrative jurisdiction is committed to giving citizens and lawyers their rightful place in every hearing. Already prevalent in emergency proceedings, the spoken word is being increasingly introduced into the arbitration hearings and 'court examinations' that are now being used more often in cases involving financial dispute. Many jurisdictions (including the Conseil d'État) have experimented with the procedural changes set out in the 7 January 2009 decree. Without reversing the principle of written proceedings, this decree opens up the opportunity to applicants and their legal representatives to address the hearing following presentation of conclusions by the public *rapporteur*. New for the parties, the ability to communicate the content of these conclusions prior to the hearing also contributes to a more meaningful dialogue between the parties and the judging panel. These reforms contribute to making hearings much more productive and to improving the quality of justice delivered. Since 1 January 2012, lawyers in all administrative tribunals and administrative courts of appeal speak only after the report submitted by the *rapporteur* and the conclusions of the public *rapporteur*.

Philippe Portail,
President of the first chamber of the Marseille administrative tribunal

"Applicants not represented by a lawyer and not accustomed to speaking in public appreciate the opportunity to speak after the public *rapporteur*. It is a way of opening the debate, leaving applicants feeling more comfortable about putting their own arguments. With prior knowledge of the general thrust of the conclusions, lawyers no longer fear the much-criticised 'element of surprise'. The fears I once had of outbursts by parties able to have the last word have proved unfounded, and - quite to the contrary - hearings are showing a deep respect for the administrative justice system".

2 Discussing

In its role as watchtower at the heart of society and government, the Conseil d'État wishes to report to society on its mission and the way it accomplishes that mission. It has therefore identified the process of expanding opportunities for discussion and debate as a priority. For this purpose, it has for several years been engaged in a series of meetings, symposia and conferences, which are often structured into cycles focusing on issues such as European human rights legislation, employment legislation and public finance law. In 2011, around 20 events of this type were held, some of them in partnership with other French and international institutions. Several thousand people, judges, lecturers, researchers, government practitioners and private practitioners attended these events to discuss and debate a series of important issues.

Fabien Chevalier,
external relations executive

"In 2011, the Conseil d'État introduced a policy of partnership for its symposia. We work alongside public-sector and private-sector experts, as well as with the justice systems of European and other jurisdictions, and in partnership with institutions such as the Economic, Social and Environmental Council, the Court of Cassation and the Paris Chamber of Commerce and Industry".

3 Evaluating

The permanent mission of inspecting administrative jurisdictions *(Mission permanente d'Inspection des Juridictions Administratives or MIJA)* is responsible for evaluating the smooth-running of the various jurisdictions. It conducts 'quality audits' of institutions, measures the results obtained and recommends solutions to improve the service provided to citizens. In 2011, these inspection missions were delivered on the basis of a new methodology built around an evaluation benchmark based on four subsets: 'management of the jurisdiction', 'jurisdictional activity', 'administration of the jurisdiction' and 'the jurisdiction and citizens'. Each of these subsets was accompanied by its own key objectives (for example, for 'jurisdictional activity', these included 'improving the overall quality of service provided', 'dealing with pending cases' and 'improving notification lead times'). More than 80 items were analysed in this way. To assist in total adoption of the recommendations made to jurisdictions, the inspection report is made available to all judges and clerks' officers, and feedback sessions are usually held in the year following inspection.

Florence Orsetti, executive officer and former registrar of an administrative court of appeal

"During inspections, I've noticed a real expectation amongst jurisdictions, whether from judges or clerks' officers. Their welcoming attitude shows the extent to which inspections are seen as an opportunity for each jurisdiction to improve its operating methods. The indicators set in the benchmarking procedures mean that inspections are now based on a consistent series of checks and precise analyses, making it possible to offer solutions tailored to each jurisdiction".

Pierre-Yves Martinie, head of the jurisprudence dissemination department

"Even more than legislative and regulatory texts, jurisprudence must shed light on the issue concerned if it is to be intelligible to the public. By making a clear distinction between what is a new ruling by the justice system and what is essentially a reminder of existing case law by ranking rulings on the basis of how much they contribute to jurisprudence, by adding an analysis of this contribution to all the most notable rulings, and even by issuing a press release, we hope to make the public more familiar with this source of law and make the principle that 'ignorance of the law is no defence' a little less unrealistic".

4 Disseminating

In 2011, the Conseil d'État launched ArianeWeb, the online database of administrative jurisdiction rulings. Available at www.conseil-etat.fr, this database is designed to help web users view the most significant rulings of the administrative jurisdiction. ArianeWeb is free of charge, and offers permanent access to more than 130,000 of the most far-reaching rulings delivered by the Conseil d'État and administrative courts of appeal. Every year, 3,500 more Conseil d'État rulings are added to this resource. Where their jurisprudential interest merits, these rulings are accompanied by an analysis setting out their contribution to jurisprudence. The rulings available on ArianeWeb date back as far as 1875 and the founding rulings that underpin administrative jurisprudence (also referred to as the *grands arrêts* or major rulings). ArianeWeb also offers online access to

5,000 judgments of major jurisprudential relevance delivered by the administrative courts of appeal. The most important judgements of the administrative tribunals will also be added at a later stage. The database has recently been extended to include orders issued by the Jurisdictional Court, complete with analyses and the conclusions arrived at by public *rapporteurs* in those cases judged by the most formal hearings of the Conseil d'État.

5 Training

The Administrative Jurisdiction Training Centre (CFJA) develops and delivers initial and in-service training for Conseil d'État members and staff, administrative judges, the clerks' officers working in the administrative tribunals and administrative courts of appeal, and the staff of the National Court of Asylum… a total of around 3,600 people. The 2010-2012 three-year training plan is structured to address the foreseeable trend in job profiles, qualifications and the development of new skills. 2011 was the first year to see a single intake of administrative judges. This new format enables trainees to gain experience from each other across a broad spectrum of different skills and expertise. Other areas of particular focus include the initial training of new *rapporteurs* to the National Court of Asylum and the decentralisation of courses for clerks' officers.

Marlène Commes,
training adviser

"Our training plan sets out to provide everyone with career-long learning support. The CFJA therefore provides initial training and in-service training for administrative judges. They come to us for the six months from January to June when they first join the profession. We then structure those training modules that will be useful to them throughout their careers: when they relocate, for example, take on responsibility for new types of cases, are appointed as a Presiding Judge or Head of Jurisdiction or opt for career mobility opportunities".

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This report is intended to provide the general public with information on the Conseil d'Etat activities and the administrative jurisdiction. The Conseil d'Etat Annual Report can be consulted at the following address **www.conseil-etat.fr** or ordered at the Documentation française.