

## Colophon

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## 1. From the Secretary-general's desk

The biennial colloquium is always a key event for our Association, providing delegations from all the Member Institutions with an opportunity to become better acquainted and reflect on matters of common interest. The 19<sup>th</sup> colloquium, held in The Hague between 14 and 15 June 2004, was no exception. No one who had the privilege of attending it will forget the high quality of the work done there under the brilliant leadership of Mr Ernst Hirsch-Ballin, the general rapporteur, or the excellent organisation and very warm hospitality displayed by the Council of State of the Netherlands.

The colloquium in The Hague will always have a special resonance, being the first to be attended by the institutions of the EU's 10 new Member States as full members of our Association. At the General Assembly that took place on the sidelines of the colloquium, the following institutions were declared full members of the Association:

- The Supreme Court of Cyprus
- The Supreme Administrative Court of the Czech Republic
- The Supreme Court of Estonia
- The Supreme Court of Hungary
- The Supreme Court of Latvia
- The Supreme Administrative Court of Lithuania
- The Court of Appeal of Malta
- The Supreme Administrative Court of Poland
- The Supreme Court of Slovakia
- The Supreme Court of Slovenia.

We wish all these institutions a very warm welcome to our Association.

The colloquium in The Hague marked the end of the Dutch presidency of the Association. President Tjeenk Willink's dynamism and the human and financial resources he agreed to place at the Association's disposal suffused it with a spirit of thoroughness and professionalism in record time, as borne out by the excellent review published in this newsletter. So many thanks to President Tjeenk Willink and his team, especially Mr Albert Heijmans and Ms Joyce Leeuwen. Their extraordinary dedication and exemplary commitment has made the Association what it is today.

The general report on the Colloquium and the respective national reports are available on the Association's website. The general report will also be published as a book accompanied by a CD-ROM with the national reports. This newsletter on the Colloquium will allow us to complete the picture by featuring previously unpublished documents, such as the speeches by the Dutch justice minister and the President, the remarks made by the general rapporteur, Mr Hirsch-Ballin, and a summary of the work written by Mr Van Haersolte of the Council of State of the Netherlands.

Yves Kreins

Secretary-General

## 2. The Dutch Presidency: Review and Perspectives

In my address to the general assembly in Helsinki on 22 May 2002 I referred to four challenges facing our Association:

1. further developing the channels for sharing information
2. intensifying relations with the European institutions
3. coping with the expected large increase in the number of members
4. encouraging greater participation by the members in the activities of the Association.

In the last two years the Board has focused heavily on these four points.

With the Newsletter, the DEC.NAT databank, the JURIFAST system and the private network for exchanging information we have created a structure which the members can use to keep themselves informed about European law in particular, but also to keep in touch and if necessary to consult one another on any specific problems they may be struggling with.

The seminars held in Trier in the last few years, the various meetings of the sections for studies and information, the meeting of the national rapporteurs to prepare the colloquium, and - last but not least – the recent seminar with the new members to discuss the practical aspects of the preliminary ruling procedure, provided a useful framework for the exchange of ideas and information and brought many representatives of the Association's member institutions in contact with each other.

The closer relations with the European institutions, such as the Court of Justice, the Parliament and the Commission have done the Association no harm.

The Court of Justice has provided us with the valuable data from its own databank and, in response to the appeal made at the colloquium in Helsinki, has decided to place information about requests for preliminary rulings pending before the Court on its website. The appointment of Jean Pierre PUISSOCHET to the Board has firmly established the ties between the Court and our Association, a link that we will carefully foster.

Thanks to the European Parliament – and with the generous cooperation of the Commission - we receive a subsidy that – together with the contributions of the members - not only enables us to organise the major colloquia every two years, pay for the costs of the information and communication infrastructure and organise the regular seminars in Trier, but also allows us to have a small but highly professional secretariat general.

Together with the Board – and particularly Yves KREINS – I have given the highest priority in the last two years to developing a properly staffed and effective secretariat general. An efficient back office is after all essential for the further development of our Association, especially in view of the large number of members we now have.

An Association like ours that is just starting out, must build solid foundations and become firmly established before it can consolidate its position. A secretariat general that works according to an annual plan, drawn up by the Board, is absolutely essential in this respect. This approach is also called for, since it is public money that is being used.

The stability provided by a secretariat general working according to a plan is even more important because the person appointed every two years as President of the Association, generally has neither the time nor the resources, human or financial, to devote a lot of time to the matters dealt with by the secretariat general. After all, it is the secretariat general which has to help the Board to take initiatives for new activities, has to develop and maintain the infrastructure for the information and communication technology, maintain relations between the Association and the members and between the Association and the European institutions and monitor and supervise the progress of all these activities.

It was a privilege to have been serving as President of the Association at the time when the ten new members joined. I hope that they will participate fully in the activities of the Association, and in particular that they will use the information and communication resources that have been developed and will enrich them with their own contribution.

In the past two years we have tried to make the leap from a loosely structured forum where the presidents of the member institutions met once every two years in a festive way, to a true association characterised by the existence of working relationships, regular common activities, an animated exchange of ideas and brisk cooperation on various levels.

We have achieved a lot, but there is still a lot more to be done.

I am pleased to see that practically all the institutions attend the association's meetings. However, it is often the same faces I see there. I would welcome the participation of more members of your institutions in the work of the Association.

Our Association is after all not only an association of court presidents and specialists in European law, but an association in which many people (members of the bench but also staff members) from within the institutions should be involved. I hope that participation will expand further in this direction.

Regrettably, I am also forced to observe that it is often always the same member institutions that submit judgments and recommendations for inclusion in the information systems, although I cannot imagine that the institutions we never hear from, do not issue interesting judgments or recommendations on European law. I want to impress on you that the information systems are not a one-way street, and that they can only fulfill their purpose with input from you all.

In this context I would like to make a special appeal to the new members we have welcomed. Please send us information about the rulings you will soon have to make on European law! If translation is a problem, get in touch with Yves KREINS, who will certainly find a solution for you.

I would like to thank everyone, and especially Yves KREINS, for all their help in the last few years. It is now my pleasure to hand over the presidency of the Association to Eckardt HIEN and to wish him every success in his new capacity.

H. D. Tjeenk Willink

Vice-President of the Dutch Council of State

### 3. Opening speech of the colloquium given by the Dutch Minister of Justice

Ladies and Gentleman,

Quality of European legislation; it's a subject of endless debate. It has been a focus of attention and complaint in the Netherlands for many a year. It is a constant worry for legislators and courts in the member states and it got particular attention in the Treaty of Amsterdam. Yet to a certain extent the problem is inherent to the process of legislating in the Union. Language or concepts that would be considered imprecise or inappropriate in any national act, often have to provide a solution for hotly debated controversies in the Council of Ministers. Negotiators that feel proud of their achievement in reaching agreement in Brussels are often met upon return with blithering criticism with regard to the applicability of those agreements by those charged with transforming them in national law.

It is therefore extremely appropriate that your association of the institutions in the member states that are concerned with European legislation, both in an advisory and a judicial capacity, has put this subject on its agenda. The General Report provides ample food for thought and discussion in the coming days. Thus it is a pleasure and a great honour for me that you have invited me to open your meeting today.

Law has an important function in ordering society and in establishing the state. It grows out of custom and mutual human relations. Originally it had to be found by persons specially trained to look for it; men of jurisprudence. In medieval times the notion of judges as 'mouth of the law' didn't imply that judges were merely repeating what had been enacted by the legislature, but perceived judgements as an original source in formulating the law. It was a process that served societies in which social order was considered to be perennial and in which there was ample time to adapt the law to emerging and changing social needs. In the past five centuries the emerging modern state has been in search of methods and procedures adapted to a more dynamic and open sort of society. Since the French revolution most states have opted for the model of democratic legislation as the means to establish or change the law. Added to the concept of the rule of law, parliamentary legislation has proven to be extremely successful in serving the explosive growth of the need in modern societies for dependable order, security, and government services. But above all legislation has proven to be an extremely successful instrument for changing social order, for adapting the law and for amending social evils.

That role of legislation in the modern state has provided the founders of the European Community with the idea of indirect legislation. The concept of directives and obligations addressed to the member states that have to be implemented in national law but that leave them the choice as to the means by which it is done. In the past forty years this osmotic method of legislation has proven to be an effective instrument for the development of a system of European law that inserts itself in national law without displacing it. At the same time it is precisely that method of indirect legislation that lies at the root of most complaints about the quality of European legislation. There are of course problems with the interpretation of regulations due to the process of decision by negotiation, through which they are adopted. But because of their direct applicability problems of interpretation or of consistency do not

interfere to quite the same extent with the functioning of national law as similar problems in directives do.

Now it is undeniably true that the formulation of directives is often not completely limpid as to its meaning or purpose. Similar complaints can be made with regard to the consistency, coherence and compatibility of different directives. It is of course not an exclusive feature of European law. National legislation is not immune for similar problems. And lawyers or judges shouldn't complain; they earn their livelihood because of these problems.

Yet, these problems occur more often in community legislation than in national legislation; which is understandable. National legislation is produced within a national legislative tradition and by procedures that include different safeguards against legislative mistakes, of which the consultation of the Council of State is not the least. Similar safeguards are lacking in the legislative procedures of the Union. European rules are not the product of a legislative tradition; they borrow concepts and ideas from different national and international legislative systems that do not necessarily fit into one legal system and are often not transplantable into other national systems.

Considering the way in which proposals are discussed and developed it is more surprising that the result is so often remarkably comprehensible. But precisely because of this often somewhat erratic process of reaching a result, the comprehensibility of texts wouldn't be improved by the publicity of the preparatory papers and of these negotiations, as some lawyers suggest. It might even add to the confusion.

This is not an excuse. European legislation is an integral part of our legal order and should meet with requirements of comprehensibility, coherence and consistency. However the complaints about the quality of European law are all too often based on the application of quality criteria that are proper to national law; criteria like uniformity, applicability, comprehensibility for individual users. The underlying assumption of such criticism is that European legislation is not essentially different from national legislation and should therefore meet with similar quality requirements. And it is precisely that assumption which is debatable.

Quality is not an absolute norm, but a relative notion. Quality reflects on the level of suitability for a particular function. In other words, quality requirements have to do with the question for what purpose we want to use something. Thus the quality of an automobile is primarily determined by its driving capacity and not by its upholstery or exterior. Similarly the quality of legislation lies in its suitability in bringing about its intended results. In as much as the purpose and intended effect of directives is different from national legislation it is highly questionable whether the same criteria can be applied to evaluate the quality of national and European legislation. Quality may be subject to a different interpretation at a European Level. If we consider the quality of European legislation, we should start by asking ourselves about its function and purpose. This function will be different for the different areas of European legislation. Thus directives relative to market regulation have a different legislative purpose than directives intended to bring about a measure of equivalence in the protection of the environment. In national legislation uniformity of application and interpretation is a normal requirement, but the same is not automatically true for a union that aims for unity in diversity. In certain areas the extent to which a directive leaves room for diversity could be a measure of its quality, even if the

implementing national legislation would have to meet strict requirements of uniformity and applicability. Thus for example the European legislative action in the area of police and judicial co-operation.

In certain fields of action it can even be argued that the directive as such is no longer a suitable instrument to achieve the intended results. Thus in the long term the union will have to reconsider the suitability of indirect legislation as a means to achieve a uniform immigration policy. In view of the experience in the member states, the price of uniformity in this field could very well prove to be an increasingly detailed maze of rules and regulations that would produce an explosion of prejudicial questions, which would in short time swamp the whole European judicial system.

Ladies and Gentleman, I hope to have made clear with these few remarks that there are different levels to the question of quality of European legislation. It is not only a question of the formulation of individual directives. It is also a question of the criteria that are applied. It is even questionable if the separate legislative products – the European and the national legislation– should be considered separately for the purpose of assessing quality, or whether they should be considered as one integrated process of legislation. In certain areas of policy the problem of quality even raises fundamental questions with regard to the suitability of the method of indirect legislation as such.

The findings concerning quality requirements in the General Report, and of this symposium, will therefore be extremely important both for the national and the community legislator. Notions like 'normative flexibility' to which the General Report refers could constitute an important contribution to the quality debate. But in the end it is not only a question of legislation. Both the choice of instruments and the quality requirements we apply, have an explicit bearing on the result we want to achieve. Thus it is also a question of the way in which we think the Union should function and develop as a legal order.

I wish you a fertile and satisfying meeting, in that great tradition of our common legal heritage and common political future.

Thank you

J.P.H. Donner,

Dutch Minister of Justice.

## **4. Opening speech of the colloquium given by the president of the Association, Mr. Herman Tjeenk Willink.**

Allow me to thank you, Mr Minister, for opening this colloquium, and for your extremely interesting observations on the subject we shall be discussing here.

A few months ago, the cultural philosopher George Steiner singled out five key characteristics to define Europe. Five features that distinguish Europe from other countries and regions of the world. The first was its cafés with their groups of “regulars”, meeting places for poets and thinkers, artists and drifters. The second was a landscape on a manageable human scale. Europe has been shaped by human beings and can be crossed on foot; Europe’s history is one of long marches. Then there are the countless streets and squares around which Europeans make their way – streets and squares named after statesmen, generals, poets, artists, composers, scholars and philosophers. That is the third characteristic. The fourth is the twofold heritage of Athens and Jerusalem. For Steiner, to be a European means seeking to reconcile the incompatible ideals, claims and practices of the city of Socrates with those of Isaiah. And finally, the fifth characteristic is the richness of history and the shadow it casts, the feeling that things could go wrong, that things come to an end, the sense that the very concept of “Europe” might lose its meaning.

By joining the EU, the cooperative organisation which, for the first time in European history, was not imposed by conquerors but entered into voluntarily, ten countries have converted to the concept of “Europe”. Ten countries, each with its own cafés, manageable landscape, streets and squares named after statesmen, generals, poets, artists and scholars, its own often complex relationship with both Athens and Jerusalem, and above all, its own history. Who could have predicted this in 1956, when the Hungarian Revolt was crushed? Who would have dared to hope for it at the end of the Prague Spring in 1968? In all its diversity in the five characteristics identified by Steiner, Europe is nevertheless a single entity.

The Netherlands, too, has traditionally been characterised by unity in diversity. In 1968 Arend Lijphart, an American political scientist of Dutch origin published his book *The Politics of Accommodation: Pluralism and Democracy in the Netherlands*. In it he explored how a society as pluralistic and divided as that of the Netherlands could nonetheless exhibit such great political stability – impossible according to the theory of pluralism. The answer is a combination of great independence accorded to the different sections of the population, allowing scope to arrange one’s own affairs, and the existence of shared institutions, procedures, and rules. The principle of subsidiarity is central to this solution. Because freedom to regulate one’s own affairs does not exclude government intervention. Subsidiarity is not merely about the question of *whether* the state must act, but also about *who* must act, and how.

For 150 years, Dutch history has shown that allowing scope for diversity makes it possible to preserve stability and achieve unity. This applies all the more to Europe. Citizens will be able to feel at home in Europe only if they can recognise something of themselves in it: their own cafés, and streets and squares. Their own landscape and cultural backgrounds. Their own historical awareness. The citizens of Europe’s nations can become European citizens only if they continue to feel at home in their

country, can be themselves there. “Only if we are self-confident in the knowledge of our own identity can we become good Europeans; this is indeed a prerequisite for constructive cooperation. We can only build the Europe of today and tomorrow on our own foundations”. Feeling that one’s own identity is not under threat is a precondition for openness to others.

Europe as a concept does not imply surrendering one’s identity but preserving it in a world without borders that would otherwise be decided by the law of the jungle. The survival of the fittest – not only economically but also culturally and in terms of different “legal cultures”. Allow me to remind you, in passing, that in the natural world, any “monoculture” can be imposed.

Where diversity abounds and cultural pluralism must be respected, the law becomes the only objective factor. The principle of the rule of law is essential to the smooth functioning of the European Union, which is not an arbitrary forum for cooperation but a legal order to which all its actors – EU institutions, member states and citizens – are subject. The success of the European Union as a whole is determined largely by how well the Community’s legal order functions. The European legal order was devised to serve diversity and pluralism and the EU’s legislators must take this into account. Were some law introduced in the name of the free market which made it mandatory for all cafés in Europe to meet the same requirements, it might denote a success for that free market but it would spell failure for the concept of Europe. Of Europe as a cultural and social reality. “European legislation is not intended to take away the diversity of legal traditions, methods and systems in the member states, but rather to shape their compatibility”.

This means that the EU’s legislators do not necessarily play the same role as national ones. While national legislators focus primarily on how to find uniform solutions to what are experienced as common problems, European legislators must define the scope for diverse solutions. National legislators will often indicate what must be done while EU legislators will indicate what must be stopped. This is why the differences between the EU’s legislative instruments are so important. European legislation never exists independently but must always be viewed and applied in relation to appropriate national legislation. Even though there is always considerable pressure to regulate more than is strictly necessary at European level. Fears arise about the possible disruption of the freedom of movement; specialists who draft legislation are wary of legal uncertainty; member states and lobbies are suspected of seeking to abuse the scope they are given. Drafters therefore seek to establish uniform rules which must however be implemented in different legal cultures. Given the function of European legislation, any excess undermines the quality and credibility of European legislation more than it does national legislation.

The quality requirements of EU rules are not necessarily those which apply to national legislation. European legislation has its own function and internal logic. It will always be impossible – and should be – to dovetail European legislation with every national legal system. It is up to national legislators to fuse European and national legislation into a cohesive whole. Just as European legislators must serve diversity and pluralism, national legislators must increasingly be conscious that they belong to a single European legislative process. Achieving and maintaining the delicate balance between unity and diversity is becoming more and more a responsibility to be shared by EU and national legislators, just as the subsequent uniform application of EU law is the shared responsibility of EU and national courts.

National legislators and national courts are not merely consumers subject to the binding force of European law but also co-actors in the development of the manifold interlaced legal systems of the member states and the European Union. It is against this backdrop that we should consider the subject of the colloquium, “The Quality of European Legislation and its Implementation and Application in the National Legal Order”. This is what has brought us together for two days and is the unifying factor in the Association of Councils of State and Supreme Administrative Jurisdictions.

This subject gives judges and advisors in our Association the opportunity to present their different insights and so benefit from the synergy of the two roles that are united in our Association.

The colloquium was prepared under the supervision of the general rapporteur Ernst Hirsch Ballin. By completing the questionnaire, all of you contributed to it in an essential way – both in Trier and afterwards. You are “co-actors”, not consumers. I should like to thank you warmly for your contributions and efforts.

We chose the Peace Palace as our venue for the working meetings. Here in The Hague, the Peace Palace is the most potent symbol of the efforts to build an international legal order and to achieve peace and prosperity in the face of the horrors of conflict and war. Sadly, we are forced to acknowledge today that, in the world at large, the ideal is still a distant goal.

In this respect precisely, the European Union and its predecessors have been highly successful over the past 50 years. They have turned Europe into a single legal order, in which the aspirations of the European peoples for peace, justice and prosperity can be fully realised. The recent enlargement of the EU has added a topical and very gratifying dimension to this.

And this explains the choice of the Peace Palace. I should like to thank the board of directors of the Carnegie Foundation for making the palace available for our colloquium, which I sincerely hope will also help to advance the European legal order further still.

Finally, a word of thanks to the European Union, without whose support the activities of our Association, and this colloquium in particular, would not be possible.

I would also express our appreciation to the Dutch government, which has borne a considerable share of the costs of this event.

I wish you all a fruitful colloquium and a pleasant stay here in The Hague.

H. D. Tjeenk Willink

Vice-President of the Dutch Council of State

## 5. Report of the various sessions of the Colloquium<sup>1</sup>

### **The Quality of European Legislation and its Implementation and Application in the National Legal Order**

#### ***Introduction***

On Monday 14 and Tuesday 15 June 2004 the 19<sup>th</sup> Colloquium European Association of Councils of State and Supreme Administrative Jurisdictions was held. It took place in The Hague under the chairmanship of Herman Tjeenk Willink, Vice-President of the Dutch Council of State. With the exception of the opening session that took place in the Council of State the various sessions were held in the Peace Palace, seat of the International Court of Justice.

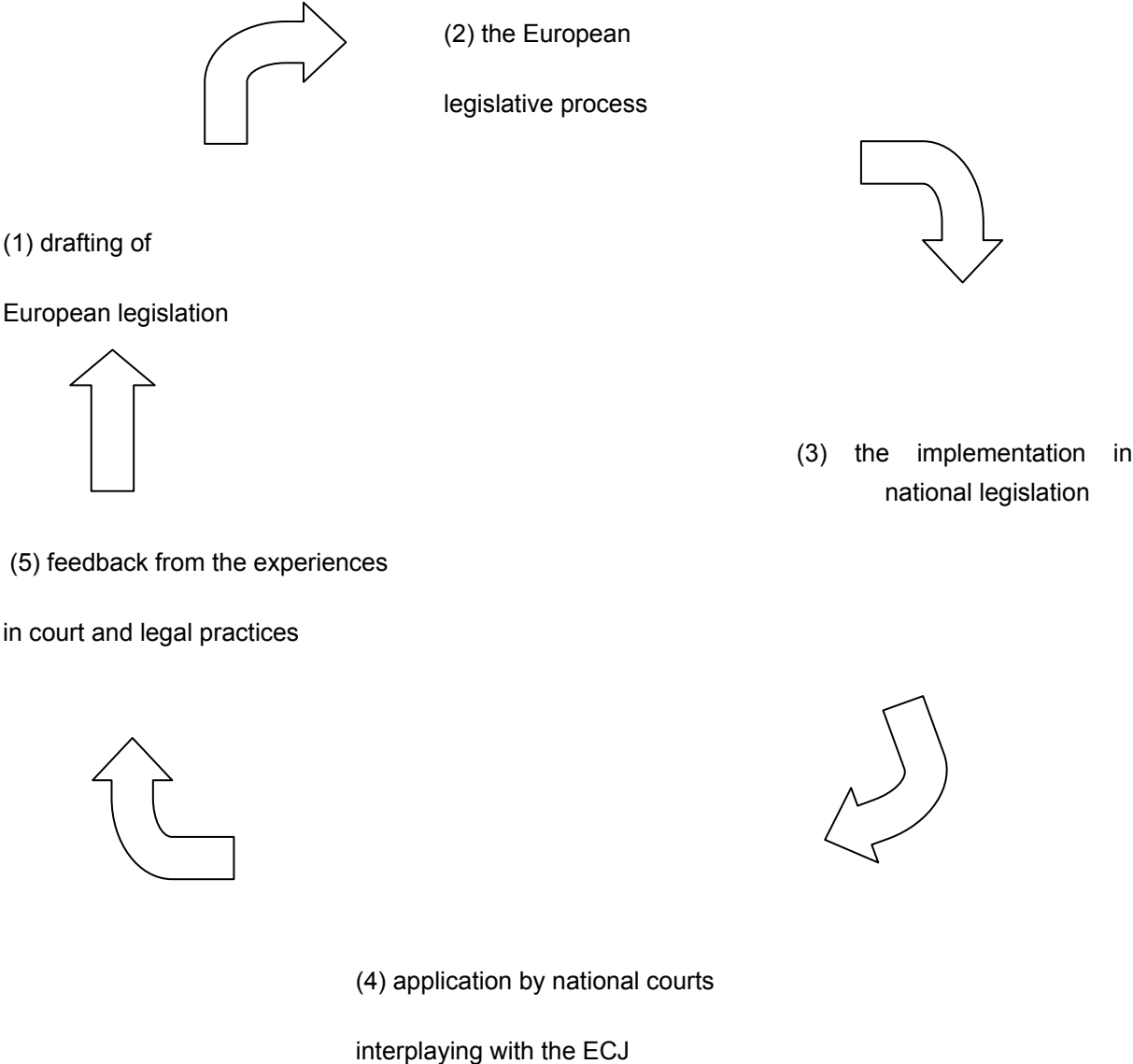
#### ***Plenary session Monday morning***

The first plenary session took as a starting point the interconnectedness and interdependence of European legislation and national legislation. European legislation is not intended to take away the diversity of legal traditions, methods and systems in the member states, but rather to shape their compatibility. Central regulation leads in practice to arbitrariness in the application and enforcement of rules. The question is how much uniformity is required for European law to function properly. And, how do judges deal with the CILFIT doctrine? To discuss these questions one should realise that there are many players involved in the development of European law who are closely interdependent: the Commission, the member states directly as well as when acting as the Council of Ministers, the European Parliament (EP), the European Court of Justice (ECJ) and the national parliaments. The question is therefore whether we should consider ourselves to be merely 'consumers' of EU law or rather 'co-actors' in the development of the interlaced legal states of the member states and the European Union (EU).

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<sup>1</sup> Report drawn up by Johan C. van Haersolte, staff member of the Netherlands Council of State and specialized in EU law. He thanks his colleague Molle Eisma and Linda Senden, professor of EU law at Tilburg University, for their input.

The cycle of interconnected European and national lawmaking may be pictured as follows:



A fundamental question is: what constitutes quality when discussing European law? National and EU law have different purposes. Using wordings in national implementing legislation that differ from the ones in the EC Directive should not be seen as a problem but as a solution. An instrument to improve the quality which was valued positively by different speakers was the regulatory impact analysis. Such analysis would be carried out by the Commission with regard to economic, social and environmental effects. With regard to the usefulness of providing more access to the *travaux préparatoires* the opinions were less positive. One should rather focus on the final phase of the adoption of ER legislation which mainly lies in the hands of the Council of Ministers. The *juristes linguistes* of all three institutions should work closely together and keep a sharp eye on the final text.

There was general agreement that the number of preliminary references had to be diminished. But how, especially in the light of the CILFIT judgment? The recent judgment in the Köbler case was not

seen as very helpful in order to view the national judge as an co-actor. The judgment rather highlighted the ambiguity of their attitude towards EU law. The JURIFAST database through which national judgments applying EU law are published may become helpful when more and more judgments are disseminated and the existence of the project becomes better known by the judiciaries that can benefit from it.

## ***Group session Tuesday afternoon***

### **Group 1: Interaction between European and national legislation**

During this session some questions raised in the morning were further developed and new ones were explored. They were grouped around three of the connecting links: (1) drafting, (2) decisionmaking and (3) implementation.

Before starting to draft new EU legislation it would be a significant improvement if the actual necessity of the regulation would first be assessed. Closely connected to this is the concept of an *ex ante* impact assessment of the proposed EU legislation on the national legal systems. This should not only be done at the European level (f.ex. by the legal service of the Commission) but also in the member states (f.ex. by the national parliaments). At the national level the assessment should not only focus on the political desirability but also on how the proposed legislation will fit in the legal system. It should be noted that the proposed Constitution for Europe offers the possibility for national parliaments to check the application of the subsidiarity principle. *Ex ante* review, however, will be confronted with the general problem of the huge amounts of proposals from Brussels. Furthermore, *ex ante* review is no solution for the problems which originate in last minute changes done to EU legislation. To prevent these problems, the legal services of the various institutions should cooperate closely together with the *juristes linguistes*.

During the phase of decisionmaking the focus should be whether or not certain core issues have been dealt with, in particular the aforementioned question whether or not European legislation is necessary at all, and whether or not the objective of the proposed legislation is formulated as clearly and simple as possible. The *travaux préparatoires* can be helpful for the transposition into national legislation.

Literal transposition may be considered to be helpful to be able to comply with the time limits but has disadvantages because of the ensuing inconsistencies with the national legal system and the practical application of transposing legislation. The amount of European legislation that has to be transposed and the pressure it exerts on the national legislator is also something that should be kept in mind when carrying out *ex ante* reviews.

One concept was discussed that transcended the various connecting links. It concerns the effects of the terminology which is used. It was said that the use of one and the same term may not have the same effect in the different legal systems of the Member States. The use of terminology in European legislation is further complicated by the fact that that legislation almost never falls on virgin national grounds. Furthermore the development of national fields of policy into European fields is a gradual process. During this process the concerned systems and terminologies may differ at the national and European level. It is only after some time that such differences may lead to incompatibilities. Deciding

on when the national systems and terminologies eventually have to be replaced by the European ones, can then be problematic.

## **Group 2: Interaction between national courts and the European Court of Justice**

Also during this session some questions raised in the morning were further developed and new ones were explored: European law not being a separate area of specialisation but an integrated element of day-to-day work of national judges, consumership or co-actorship, uniformity or diversity in EU law, access to *travaux préparatoires* not only in a technical sense but also in practical terms, the method of transposition (literal, accelerated etc.) and its consequences for application of EU legislation by judges, safeguarding the effectiveness of the preliminary ruling proceedings in the light of an expanding EU not only in geographical terms but also in terms of competences for the ECJ.

In order to find solutions for the delays at the ECJ, one has to look at different aspects. At the level of the national judges it is the way in which they apply the CILFIT judgment that influences the workload in Luxemburg. Should the CILFIT criteria be changed by the ECJ itself? Or should the national judge not be too strict in their application? It was said that a more reasonable application of CILFIT should be welcomed. The formulation of the preliminary questions also plays a role. Precise references lead to precise answers and offers thus less leeway for the national judges to apply the ECJ's ruling. This raises the question of the degree of divergence permitted when transposing and applying EU law at the national level. The general feeling was that diversity, whether when transposing or when applying, is unavoidable and does not imperil the functioning of EU law. One could also choose to give the highest national court a role in selecting preliminary questions proposed by lower courts, or even restricting the competence of referring questions to the highest national court. This last option had not met with much approval in the national reports. Another option which had been viewed more positively in the reports but not during the present session was to have the national judge to submit draft answers together with the preliminary questions, possibly in combination with a 'green light' system whereby the ECJ decides whether it will answer the questions. In the new practice instructions of the ECJ it is written that the national judges may indicate in which direction, according to them, the solution of the case should be looked for.

Besides the CILFIT judgment, it was the Köbler judgment which received attention from the participants. To counterbalance the somewhat horrifying impression made by the judgment, it was said that it should be clarified that Köbler concerned a breach of substantive law and that it does not imply that not referring questions to the ECJ can cause state liability. It was also said that the Köbler judgment concerned a very specific situation which may not occur easily again.

At the level of the ECJ itself a part of the solution can be found in the simplified procedure of art. 104(3) of the Rules of Procedure. Making more use of that procedure, something which is already happening, should shorten the duration of the procedures before the ECJ. Another option could be the development of specialised courts but this deserves more research. The possibility of a transfer of competences by the ECJ to the Court of First Instance (CFI) has been introduced by the Treaty of Nice. Doubts were expressed on whether further transfer would overall diminish the time involved in cases before the European courts.

Another aspect concerns the know how of EU law, the access to and use of databases and the ability of national judges to make use of the existing sources of information in their daily routine. The need for more seminars and practical information sources for judges to be organised with the help of the European Association was expressed by several speakers, especially from the new member states. A suggestion was made to have the secretariat of the European Association to become an 'interface' between EU law and the national judges. Also the JURIFAST database, still in its freshman year, containing national judgments in which EU law is applied, could develop to become a tool to give the national judges more confidence when being confronted with questions of European law.

### ***Plenary session Tuesday morning***

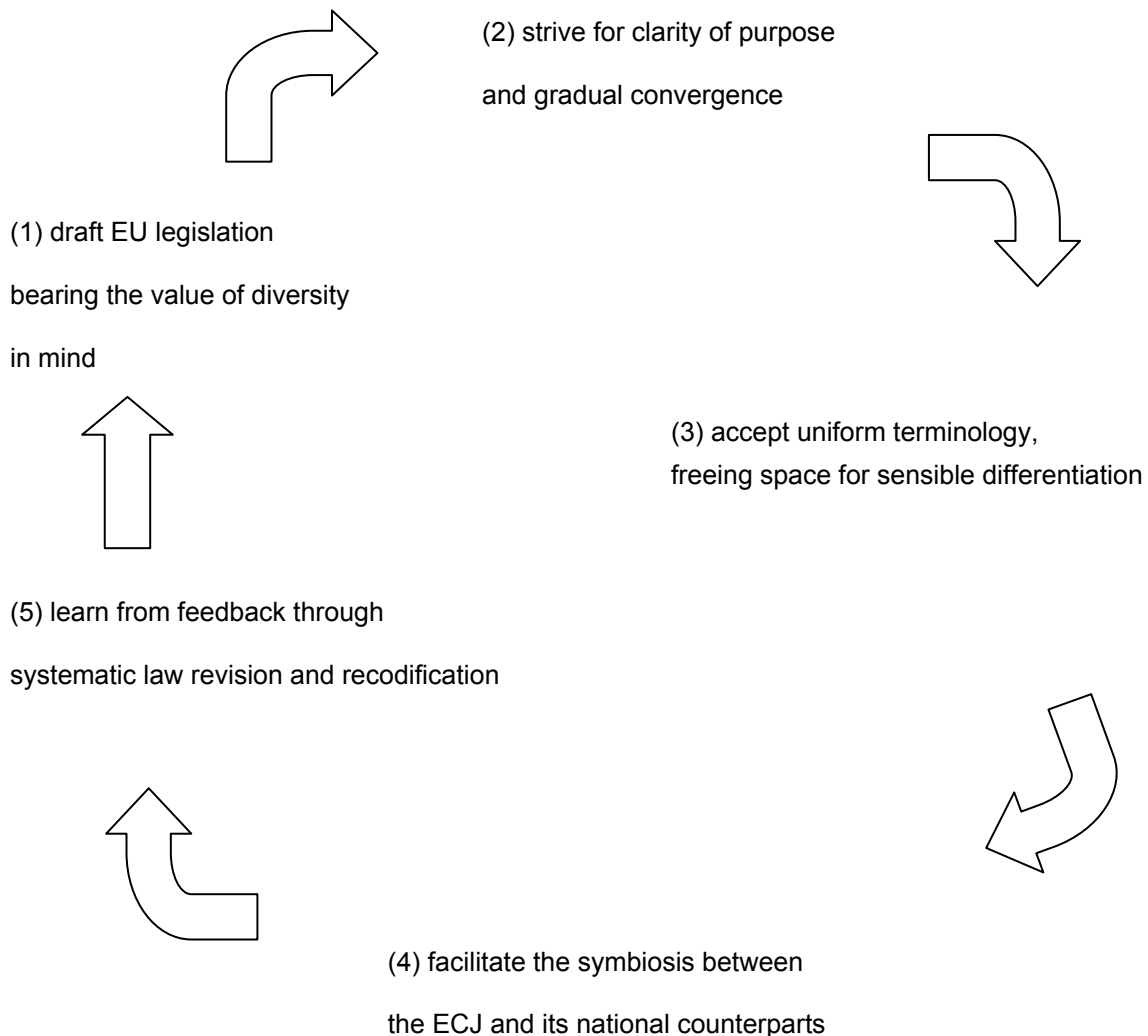
The last session saw various threads reappearing from the previous sessions and was closed with the drawing of conclusions by the morning chairman, professor Ernst Hirsch Ballin, president of the Administrative Jurisdiction Division of the Dutch Council of State.

There exists a general consensus on the value of the work done by the European Association. One should, however, look at the future and see what can be done about the needs of the members of the association. Activities in the field of education (courses, seminars etc.) and information management would be welcome.

The Köbler judgement continued to provoke interventions. Problems were expected when a lower national court would have to deal with the liability of the highest court that had breached Community law. By who, and how exactly should such liability be determined? Can the principle of *res judicata* be abandoned? The answer to the last question is no. The consequences of Köbler should be settled by national procedural law.

Art. 104(3) of the Rules of Procedure of the ECJ (the simplified procedure) was considered to offer possibilities to decrease the workload of the Court. This procedure may be combined with a 'green light' system although in that case the ECJ still would have to take some kind of decision each and every time. Or it may be combined with the submitting of draft answers by the referring national judge.

Before drawing the conclusions a new scheme containing **recommendations** was distributed:



EU law encourages and warrants diversity. The first scheme, issued on Monday, may have been a simplification but it clarifies the links and the fact that European law is a reiterative process. In that respect that scheme had no starting point.

The value of variety: EU legislation is different from national legislation. Impact assessment is necessary on European and national level. Differences between European and national legislation should be accepted because they serve different purposes.

*Ex ante* review should take into account the purpose of the legislation. One should not try to regulate all relevant aspects as one also should try to avoid EC-legislation becoming a source of confusion. In this respect it should be said that preambles and *travaux préparatoires* can be helpful but also confusing. Furthermore clarity is not always realised by uniformity.

Directives give shape to the aspirations of EC law. The function of national implementation legislation is not to make the directive superfluous by copying it, but to make national law compatible with it. The question whether the terminology used in the national implementation legislation should be identical with the terminology of the directive, is a question which can not be answered in general.

The reasons and backgrounds for the references to the ECJ should be investigated further. Where lies the problem: with EU legislation, national implementation or national administration? It is clear that national courts should view themselves as decentralised EU courts. According to the same view the ECJ is a national court. JURIFAST could develop in a very helpful tool to reduce the workload of the ECJ in preliminary rulings proceedings. National judges can be better informed on national practices in other Member States when dealing with EU law. The art of referring and the application of judgments could be further developed. Room for diversity should be made possible when referring to the ECJ.

Efficient approaches to make use of feedback should be chosen when drafting new EU legislation. Safeguards, such as the new role for national parliaments with regard to subsidiarity, are important but should not function as roadblocks. All this expresses the need for all actors in the European lawmaking process to be co-actors.

## 6. Reflections given by the general rapporteur

In June of this year, judges from the ten new Member States of the European Union took part in the biennial colloquium of the European Association of Councils of State and Supreme Administrative Jurisdictions, held in The Hague. Delegations from the Court of Justice of the European Communities and the Court of First Instance were also present.

The preparatory reports for the colloquium show the extent to which the Union's and Member States' legal systems are closely interwoven. National judges do not stand in opposition to European judges; they are all European judges through their combined action. Nor should duality among the European and national legislative processes be assumed any longer, as these processes also intertwine continuously.

The quality requirements of European legislation are no longer comparable with those of national legislation. This is due to the nature of European legislation. The national legislature's natural ambition to regulate legal relations between the authorities and individuals equally is not a central feature of European legislation.

Directives (or 'European framework laws' in the new terminology of the European Constitution) have the sole objective of 'unifying national legislatures in their diversity', to use the terms of the European Union's new motto. In the case of regulations (which will soon be called 'European laws'), the situation appears different initially, but they too almost never act apart from the various national laws. This leads to a very specific quality criterion for European framework laws, i.e. that they must contain adequate normative flexibility. They must therefore be clear and open.

European legislation is still all too frequently considered from the viewpoint of national legal order. As a result, emphasis is often placed on limiting expressions of views rather than on Community order. For deputies from Member States, the determining viewpoint is often to ensure that European legislation provides them with the least possible burden and maximum satisfaction. Their reference framework is their own legislation, with its familiar systems and concepts. According to their estimation of the sphere of influence and their own need for European harmonisation, they either aim to have the normative content reflect their own legislation to the greatest extent possible or to keep the normative content limited to the utmost degree possible.

A different and -- when viewed from the perspective of the founding treaties and later the European Constitution -- better position may be developed if a European reference point is accepted. For European legislation, a divergent viewpoint must be decisive, i.e. how to ensure the coexistence of a multiplicity of national legislatures within a single market and a 'space of freedom, security and justice'. This entails the considerable task of converging the legislative activities of at least 25 legislative authorities and government organisations, and frequently even more, if account is taken of the fact that in federal decentralised states, Community law usually has to be implemented at sub-national level.

Explaining European legislation for the purpose its application is one of the main tasks of the supreme administrative judges from Member States who are members of the Association. The position of the

national (administrative) judge is special because, although he comes from the national constitutional order, he is simultaneously a 'Community' judge, i.e. a European judge. The preliminary reference procedure links national case law on the application of Community law with the case law of the Court of Justice.

This procedure is extremely important. The legal orders of the EC/EU and those of the Member States are becoming increasingly interwoven and this trend will inevitably continue. However, constitutional orders can still be differentiated. The constitutional order of each Member State and that of the European Union have their own structure, institutions and operating method. The intertwining of legal orders makes connecting links necessary. The preliminary reference procedure is one of these essential connecting links, which has been present from the establishment of the European Communities; the other connecting links include the representation of Member States per se as actors with a voting right in the legislative process, namely via the EU Council of Ministers, and the subsidiarity test that will be carried out by the national parliaments in compliance with the European Constitution. These connecting links make interaction between explanation, implementation, application and improvement of the law possible, a law that is often simultaneously 'European' and 'national'. The Councils of State and supreme administrative judges therefore no longer need to consider themselves simply as 'consumers' of European law, subject to the binding force of European law, but rather as 'co-players' in the development of EU Member States' legal systems, which are interlinked in many ways.

European legislation and the national legislation of these Member States (or their constituent states) have not merged into a single legal system. However, they do form a network that unites the legal systems in their diversity. The drafting of legislation within this network depends on decisions which either belong to the European Union's legal order or to that of the Member States. All of the bodies and institutions involved are co-players, whether they wish to be or not. This is why the connecting links between the Union and the Member States are of vital importance. In their mutual alliance they produce what is, from many viewpoints, a fascinating cycle of legal development. This intertwining in no way detracts from the difference in nature between European and national legislation, but rather is based on it.

Ernst Hirsch Ballin,

General rapporteur of the Colloquium.