Documents for the second meeting of the members of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union exercising a consultative function

The Hague

The 7th and 8th of December 2006

Table of contents

Contribution of the Legislative Council of Romania

1. Legislative Council of Romania
2. Commentary on the opinions of the legislative Council
3. Opinion regarding the legislative proposal amending and supplementing articles 9 and 11of Act no. 112 from the 25th of November1995
4. Opinion regarding the legislative proposal for the amendment of Act. No. 3 from the 22nd of February 2000 and the organisation of the referendum

Contribution of the Council of State of Belgium

1. The Council of State of Belgium

The Council has two divisions: Administration and Legislation. As a supreme administrative court, the Administration Division rules on administrative actions, while the Legislation Division issues opinions.

Opinions from the Legislation Division are issued by a chamber comprising three councillors. There are two French-speaking and two Dutch-speaking chambers. Requests for opinions which raise problems associated with the division of powers between the federal authorities and federated entities may be investigated by so-called 'joint chambers' i.e. one French-speaking chamber and one Dutch-speaking chamber working together.

Issues arising are assigned to the different chambers depending on the ministerial department which first submitted the request, thereby ensuring that any given issue will always be dealt with by the same chamber.

The Legislation Division issues opinions on all texts pertaining to preliminary draft bills, drafts of international conventions, draft subordinate legislation approved by the head of state, and legislative texts emanating from the authorities of the various federated entities (Communities and Regions).

The Belgian Council of State generally issues technical legal opinions. Specifically with regard to the advisory function of the Legislation Division, it is important to remember that the latter is careful not to make any observation on the appropriateness or political nature of the draft regulation. The legal investigation conducted by the Legislation Division focuses mainly on examining the underlying legality of the draft, and ensuring that the correct administrative procedure has been followed in drawing it up and in its legal aspects. Most of the checks conducted are therefore of a legal nature, but they may sometimes extend beyond that. The Council may also question the actual nature of the problem and whether the text submitted is appropriate for resolving it if invoked.

Although there is no official investigative model,opinions issued by the Legislation Division usually focus on the following points:

- competence,
- legal well-foundedness, and
- compliance with established formal requirements.

In the case of an opinion to be issued within a period of five working days, the Legislation Division must limit its investigation to legal well-foundedness, the competence of the authority in question, and compliance with formal requirements.

Depending on the time allowed by the party requesting the opinion, the Legislation Division examines the draft text submitted to it for opinion in more detail from the point of view of content and legal aspects.

In its opinions, the Council also places great emphasis on the hierarchy of regulations and respect for general legal principles, such as that of the certainty of the law in cases where a law is applied retroactively, and the principle of proportionality. While the principles of the quality of legislation are not systematically investigated, the Belgian Council of State takes account of the complexity of any legal texts submitted and the impact that this can have on the administration.

2. Opinion of the Council of State of 11 February 2003 on a proposed royal decree regarding the establishment of an ad hoc committee for negative assessments of proposed candidates for the Muslim Executive of Belgium (not published).

Legal context of the proposed regulation

1. The Islamic faith is one of the religions recognised by Belgium since the act of 19 July 1974. Despite the separation of church and state, it is necessary for civil and religious authorities to have certain contacts, for state financing of the religion for example. The royal decree of 3 July 1996 established the *Muslim Executive of Belgium* (EMB) as an advisory body to organise elections for a representational body for the Islamic faith. Elections took place in 1998 under the supervision of a steering committee made up of representatives of the government and of the EMB. The intention was for the elected body to also bear the name EMB and was, consequently, the successor to the former advisory body and received a representational mandate. This representational mandate only became formally recognized in the act of 10 March 1999 which was a sort of regularisation of the elections of 1998.

2. Those elections and the following government recognition of the EMB were not without difficulties. A number of the candidates for the elections were barred on the basis of a negative assessment by the National security police, in particular because of ties to radical Islamic societies, parties or movements some of which were violent in character. After the elections the EMB encountered more difficulties due to internal dissension, the dismissal of various members and the like. This finally led to the decision to organise new elections in 2004 under the supervision of a committee made up of two magistrates, two representatives of the Muslim community and one election specialist. The committee was established by an act of 20 July 2004, which was the initiative of a number of members of parliament and was approved by both Chambers of the Belgian Parliament within just eight days. The fact that the opinion of the Council of State is not required for proposed legislation probably had something to do with the choice not to make such a request, as well as the fact that the Council of State had made critical remarks about earlier initiatives, as there had been no initial legal regulation, and as there were conflicts with the constitution or the European Convention on Human Rights.

3. The earlier cited act of 20 July 2004 was contested in the Court of Arbitration (the constitutional court of Belgium). This court of justice ruled in its judgement no. 148/2005 of 28 September 2005 that there had been no violation of the constitution or the European Convention on Human Rights regarding freedom of religion and freedom to assemble. Decisive in this was the consideration that the legislature only established a commission to organise the election for a representational body as a discussion partner with the government for the financing of the religious leaders of the Islamic faith. The legislature cannot be reproached for having opted for a democratic election by members of the Muslim community for that body and for having provided a number of guarantees to assure the proper process of the election.

Scope of the draft of royal decree

4. The draft was drawn up after the elections for the EMB in 1998, but before there was a legal regulation established by the act of 20 July 2004. What did exist was the – very brief – legal regulation of 10 March 1999. It was the desire of the government apparently to use this draft decision to elaborate a legal basis for the practice of security investigations of candidates for the EMB.

The draft determined that candidates for a position in the EMB would be systematically

examined by the National security police. The Minister of Justice would receive that assessment and inform the relevant candidates of its contents.

A committee would be established consisting of a magistrate and two members of the Committee for the protection of privacy. That committee can be consulted by the relevant candidates and by the Minister of Justice. The committee can amass the necessary information, but can upon request of the National security police also decide to withhold certain information from the relevant candidates. The committee must hear the relevant candidates and give its opinion within two months. If the opinion confirms the negative security assessment, the Minister of Justice must follow the opinion; if the opinion does not confirm the negative security assessment, the Minister must first consult the Council of ministers.

The relevant candidate will be informed of the decision of the Minister of Justice.

The opinion of the Council of State

a) Background

5. The Council of State opinion was issued by the General Assembly of the legislation department of the Council of State.

The General Assembly is made up of four chambers of the legislation department (two Dutch-language and two French-language chambers). The government agency asking for an opinion can request that a draft be put before the General Assembly, although this does not occur as a rule. The Council of State can decide to put a matter before the General Assembly, which occurs several times a year. Nonetheless the opinions of the General Assembly remain the exception to the rule that opinions are pronounced by one chamber. The reason for putting a matter before the General Assembly is generally related to the significance of the particular draft; important institutional drafts or drafts whose constitutionality must be examined often come into consideration for this.

b) Study of the General Assembly

6. A draft decree must always have a legal basis in a higher legal regulation, generally in a statutory provision of a law. In the draft submitted to the Council of State for an opinion, two statutory provisions are named, one related to the security service that has the authority to carry out security investigations and the other related to the security authorization that is required to exercise certain positions or functions. The Council of State determined that neither of the two statutory provisions formed a legal basis for a system that came down to a systematic preliminary security investigation of candidates for a position in the EMB, the appeal procedure for the committee and the final decision of the minister related to it.

Nor are the legal regulations of 19 July 1974 and of 10 March 1999 related to the Islamic religion and the EMB sufficient legal basis for the draft regulation.

7. Under normal circumstances the Council of State would have stopped its study after determining that there was no legal basis for the decree. The Council of State did not do so, however, rather continued to examine the contents of the regulation, perhaps because it wanted to anticipate a modification of the text as decree to a law. The comments of the Council of State on the contents, in particular on their agreement with a number of articles of the constitution hold equally, after all, should the regulation be conceived as a draft law.

The General Assembly then examined whether the text was in conformance with the

freedom of thought, conscience and religion (no. 8), with the right to assemble (no. 9), with the right of respect of privacy (no. 10) and with the principle of equality (no. 11). Finally the opinion also considered the conformance with the constitutional provisions on the relationship between church and state (no. 12).

The reader will note that all of these remarks remain limited to a reservation and do not comprise a definitive decision on the conformance with the named constitutional rights and provisions. In general, the Council of State does make definitive statements about such matters, but the cautious approach in this case may perhaps be explained by the Council of State's wanting to bring attention to these problematic questions in case the draft decree were changed into a draft law (see in relation to this also no. 13). That draft law would still have to be submitted again for an opinion.

8. As far as *freedom of thought, conscience and religion* is concerned, the General Meeting remarked that, with reference to the jurisprudence of the European Court on Human Rights, the draft influences the configuration of the agency (the EMB) which itself plays a certain organisational role in the Islamic religion. That influence involves a limitation of the freedom of religion which must be justifiable within the limitation system of section 9.2 of the European Convention on Human Rights.

9. The draft also includes a limitation to the *right to assemble*. Religious communities traditionally have certain forms of organised structures, as we recognize. The draft regulation, consequently, must also be justifiable within the limitation system of section 11.2, a justification which is distinct from that of section 9.2, but equally necessary.

10. It is clear that a system of security investigations by the National security police implies limitations to the *right to respect of privacy*, both for the candidates themselves and for those around them. The regulation must certainly be justifiable in the light of section 8.2 of the European Convention on Human Rights because a systematic investigation is carried out before an election, in other words before assuming a representational position.

11. The Council of State also pointed out the problem of the principle of equality. No justification is given for the regulation with regards to the necessity of security investigations and their results for representatives of the Islamic religion and not for representatives of other religions. This different treatment may be justifiable, but that must first be demonstrated.
It may also be asked whether the institution of one agency to represent the Islamic religion can be reconciled with the principle of equality, perhaps combined with the freedom of religion and assembly. The Islamic religion is just as varied as the Christian religion after all. It is not all that clear that the institution of one single representational agency for the various streams within the Christian religion would be perceived as a measure that could bear the test of constitutionality (1) . Whatever the case, it is clear that the Council of State could not approach the question, because it is unusual to criticise existing legislative norms in an opinion on a draft decree. The choice to establish one representational agency stems from the act of 10 March 1999 and not from the draft decree.

12. There are a number of determinations in the Belgian constitution regarding the relationship of church and state which provide for such matters as state financing of the salaries and pensions of religious officials of the various recognized faiths. A discussion partner is required for each recognized faith for the purposes of making financing possible. The separation of church and state as well as the freedom of religion set forth in the

1 See on this point Adriaan Overbeeke, "Wetgeving voor moslims. Is driemaal scheepsrecht?" [Legislation for Muslims. Third time lucky?] , *NjW* 2005, 336-337

constitution imply that it is up to the faith in question to decide which agency will function as representational body. The government cannot, consequently, replace an agency that the particular faith sees as representational with another agency whose ultimate composition (read: after application of such things as security investigations) would no longer be representational.

The General Assembly did not dismiss the system of security investigations as such, but did curb it significantly by stating that the refusal of a candidate on the basis of the security investigations must not harm the representational character of the agency with regards to the Islamic religion.

13. The opinion closed with the reflection that neither the European Convention on Human Rights nor the relevant constitutional provisions entail a requirement to establish the envisioned regulation in a formal law (approved by the legislative authority). That does not alter the fact that there must be a legal basis in the law for a regulation by decree. Moreover, the General Meeting remarked that the legislature itself must establish the principles and basic elements of the rules regarding security investigations, taking into consideration that the constitutional provisions regarding the right to respect of privacy determines that limitations must be made by legislation.

14. After these rather fundamental reflections the Council of State stopped its investigation of the text. That is normal: after all, if the Council had gone further into the regulation (alternatively as it were), it would undermine its own fundamental criticism.

c) Consequence of the opinion

15. Even though an opinion of the Council of State is not binding, the comments in this case must have been taken seriously enough to abandon the regulation in the form of a royal decree. To this day there have been no other new legal regulations submitted for an opinion regarding the security investigation of the EMB.

3. Opinion of the Council of State of 24 January 2006 on a preliminary draft decree concerning modification of the decree of 15 July 1997 regarding the Flemish Housing code (Parl. St., Vl. Parl., 2005-2006, no. 824/1, p. 45-79).

Clarification of the preliminary draft decree

Initiated by the Flemish government, the preliminary draft decree modifies the social rental regulation that was elaborated for the Flemish region in the Flemish Housing code decree of 15 July 1997.

Various studies have demonstrated that in general there are few quality of life problems in the public rental sector: the moving patterns and moving intentions of the renters of public housing indicate a relative contentment with the housing situation, and the inclination of public housing renters to leave the public rental sector is rather limited. Nonetheless, a number of local problem situations continue to crop up in the public rental sector.

To remedy these situations the preliminary draft decree for which an opinion has been requested wishes to achieve better “local, tailor-made solutions” by involving the municipalities more closely in the policy regarding assignment of public housing. In addition, the preliminary draft decree contains a number of measures that make it possible for leasers to deal more efficiently with problem renters, ranging from steering measures, such as

administrative instruments and administrative fines, to ultimate termination of the rental agreement. *What is aimed at here is combating problem behaviour of public housing renters who disturb the quality of life of the neighbourhood or are guilty of "domicile fraud" (such as unauthorized co-occupancy) with all the consequences thereof and which increase the financial burden of other renters whose income is often modest.*
Although the preliminary draft decree appears at first sight to be quite technical, the regulation it comprises has found a certain resonance in the media and in public opinion. For it is the case that the Flemish government wishes to base its public housing policy on a greater integration of the inhabitants of the community and improved communication between renters and leasers; therefore, the preliminary draft decree stipulates that the candidate renter must indicate both upon registration for and acceptance of social housing that he is willing to learn Dutch and to take a citizenship course in pursuance to the decree of 28 February 2003 on Flemish citizenship policy, if that decree is applicable to the candidate renter in question.

The opinion of the Council of State concentrated primarily on the constitutionality of making admission to public housing dependent upon the willingness of the applicant to learn the language.

Opinion of the Council of State
a) Background

1. The opinion of the Council of State is made partially by the United Chambers and partially by the third (Dutch-language) legislation chamber.
In general, the Council of State issues its opinion in a mono-lingual group made up of three state councillors; this is the opinion of a "normal" chamber. If the request for an opinion brings up a problem related to the respective competence of the federal State and the sub-areas (communities and regions), the request for an opinion can be referred to the United Chambers which are made up of a Dutch-language and a French-language chamber, although only as concerns the competence aspect.
The government authority asking for the opinion can request that the case be handled by the United Chambers, or it may occur that the "normal" chamber which is to study the preliminary draft finds itself faced with a competence question and takes the initiative itself to refer the matter to the United Chambers. The latter occurred in conjunction with the preliminary draft decree at hand and resulted in the contribution of French-language State Councillors to the opinion of a (portion of a) preliminary draft of regulatory text that is restricted to the Flemish region. The reverse is equally possible and has contributed to an avoidance of divergences between the Dutch and French-speaking chambers regarding the division of competences between the federal State and the sub-areas.

2. As given under section 1 of the opinion, the Council of State has limited itself primarily to the study of three matters, namely the study of the competence of the entity submitting the regulation, the conformity of the draft proposal of decree with higher rules of law, and the question of whether it meets the mandatory formal requirements[2].
The reasons for this limited study is, as is often the case in opinions of the Council, the period in which the opinion must be given. In this case the opinion was asked to be given within a period of thirty days which, upon request of the Council and given the legal

[2] The Council of State only examines whether the required formal requirements are met without going into their contents. The Council will not, on principle, refer to certain content suggestions that are formulated by an advisory or consultation body which has taken part in the course of the administrative procedure to bring about a regulation, and assumes a strict distinction between more policy-like opinions that are made during the course of the procedure to create the regulation and the legal opinion offered by Council of State concerning it.

complexity of the topic of the decree, was extended by an equal period by the governmental authority requesting the opinion.
It is rather unusual for the Council of State to be asked for an opinion without the governmental body requesting the opinion exercising the possibility of asking for that opinion within one of the legally determined periods. The most common requests for opinion are those for a period of either five working days or thirty days. In the first case (opinion within five working days), the Council of State is required by legislation to limit its study to the three above-mentioned matters; in the second case (opinion within thirty days) the Council of State is not required, but has the option according to its discretion, to limit its study to the above-mentioned matters.
The strict time regulation, along with the large number of opinion requests that are submitted to the Council of State have resulted in the Council's being more and more constrained to limit itself and not go into detailed studies, which cannot include for example a correction of the legal formulation and the legislative quality of the regulatory texts that have been submitted for an opinion.

b) Study of the United Chambers

3. The study carried out by the United Chambers regarding the proposed draft decree is made up of two parts:

- first, an examination of whether the modifications included in the preliminary draft regarding the general objectives of the housing policy and related to the rental of public housing are in accordance with the rules defining assignment of competence;

- secondly, an examination of the constitutionality of the requirement to demonstrate willingness to learn Dutch.

4. As far as the competence study is concerned, the United Chambers came to the conclusion that the preliminary draft decree concerns only one regional concern, namely housing.
The fact that the willingness to learn Dutch and to take a citizenship course is made a condition for application for or acceptance of public housing does not mean that this is a policy concerning reception and integration of immigrants, nor that the education of the persons involved would be organised which would involve the exercise of a community competence, nor that language use for government matters would be determined, as that is equally a community concern.
Determinations of the preliminary draft that can be qualified as related to the concern of public housing come under the competence of the region and are consequently in conformance with that competence, even if they - expressly or implicitly – deviate from the legal regulation concerning housing rental in the Belgian Civil Code. There is only a problem of competence to the extent that the actual topic of the regulation regards the organization of the primary marriage system which comes under the competence of the federal government.

5. In the study of the United Chambers on the constitutionality of the requirement regarding willingness to learn the language it was first examined whether that requirement could contribute to the desired public interest objective of promoting good communication between the leaser and the renter or public housing.
Subsequently it was examined whether the requirement regarding willingness to learn the language in the preliminary draft decree is elaborated in such a manner as to achieve the afore-mentioned objective. For this an appeal is made to such things as the proportionality principle; moreover it is pointed out to the Flemish government that the description of the required willingness to learn the language needs to be formulated more precisely.

The opinion entails no more than a number of references to the intention of the government as set forth in the memorandum to the preliminary draft. The reason for this is not just that the United Chambers are of the opinion that the regulation included in the preliminary draft decree regarding willingness to learn the language is summary and leaves too much to the Flemish government to elaborate the more precise rules, but also because the United Chambers – in keeping with tradition – wish not to take part in the public debate about the requirement of willingness to learn the language, and restrict themselves to the strictly legal context.

6. Pursuant to section 23, first and second paragraphs of the Belgian Constitution everyone has the right to lead a life of human dignity, and the law, decree or ordinance guarantee the economic, social and cultural rights determining the conditions for this, taking into consideration the related duties. The right to appropriate housing is part of the afore-named rights in pursuance to section 23, paragraph 3 of the Constitution.
The required willingness to learn the language as set forth in the preliminary draft decree can, according to the United Chambers, contribute effectively to a better communication between leasers and renters of public housing and as such can – and in principle – be considered as a "related duty" in the sense of section 23, paragraph two of the Constitution.

According to the United Chambers, that point of departure does not imply, however, that the concrete regulation of the required willingness to learn the language in the preliminary draft decree is not, in certain of its components, in conflict with the right to appropriate housing. For that reason, the United Chambers decided to undertake a systematic study of the concrete regulation that is included in the preliminary draft decree regarding the requirement of willingness to learn the language, which led to the following observations;

- the required willingness to learn the language is in keeping with the right to appropriate housing to the extent that it is based on an obligation to make an effort and not an obligation to achieve a given result; to insist upon a different interpretation could mean that persons with a limited intellectual capacity for example, might not be able to achieve a specified language level and would then be excluded from public housing;

- the willingness to learn Dutch only implies that an attempt be made to reach a language level that is sufficient to allow for good communication between the leaser and the renter;

- the requirement of willingness to learn the language may not depend exclusively upon the taking of a determined course, but can also include other means to indicate willingness, provided that these are such as to achieve the envisioned objective (the furthering of communication), for example by participation in other educational or training activities;

- the decree maker should ascertain that there is sufficient supply of available educational and training possibilities which are either free of cost or at most available for a very modest sum with regard to the envisioned target group of those making use of social housing;

- the sanctions for failure to comply with the obligation to demonstrate willingness to learn Dutch must not be disproportionate to the envisioned objective of increased communication, and application of the sanctions must be decided on an individual basis, taking into account whether failure to comply has actually led to communication problems between the leaser and the renter of the public housing object or whether the living environment has been negatively influenced as a result.

7. After having examined whether the required willingness to learn the language is in keeping with the law for appropriate housing, the United Chambers gave their opinion on the

requirement in the light of the principle of equality, the regulation on free movement of employees and the Belgian economic union. No objections were expressed.

c) Study by the third chamber (N)

8. The third chamber of the Council of State examined the preliminary draft decree on other points than the United Chambers and formulated remarks regarding the principle of legality (too much delegation to the Flemish government), the principle of proportionality in criminal cases (too little differentiation of sentence and lack of premeditation), protection against double jeopardy, legal guarantees in the application of administrative sanctions with penal implications, and the principle of non-incrimination.
After these more general remarks, the third chamber undertook a limited study per section of the preliminary draft decree, in which it indicated a number of unclear passages in the text. It pointed out that literally, the repeatedly stated required willingness to learn the language is also applicable to persons who already can speak Dutch, which is, needless to say, pointless. The Council suggested that the text be modified on that issue.

d) Consequence of the opinion

9. One of the distinguishing features of the opinion of the Council of State is its non-binding character. The legal remarks of the Council are not always easy to fit into the whole of the policy imperatives of the government. Sometimes, delicate compromises are the basis for the formulated regulations that have risen from difficult negotiations between the government and the social partners for example. Frequently, regulations have to be made in a great hurry. For all of these reasons, it sometimes occurs that little attention is given to the remarks of the Council of State.
The opinion discussed here, however, has led to various modifications in the initial text of the preliminary draft decree as it was adopted by the authorized committee of the Flemish parliament (Parl. St., Vl. Parl., 2005-2006, no. 824/5, p. 20 ff.).

Contribution of the Council of State of France

1. The Council of State of France

Within the Council of State, the legislative administrative function is delegated to four specialist administrative divisions, dealing with internal affairs, financial affairs, public works and social affairs. Work within the administrative divisions is carried out by 41 members of the Council who are exclusively responsible for offering legislative advice, while 56 other members are responsible for both drawing up opinions (1/3) and for administrative jurisdiction (2/3).
In addition to the administrative divisions, there is also a judicial division responsible for administrative jurisdiction. This division comprises those members who perform a dual function, plus a further 88 members responsible for administrative jurisdiction alone.

Opinions regarding draft bills of parliament that are drawn up by the divisions are approved by the Council of State's General Assembly. If regulations pertain to a level lower than that of legislation, the divisions approve the opinions themselves. Furthermore, only a limited number of the 196 members of the body are allowed to take part in the General Assembly.

In dealing with matters which the government requires to be dealt with as swiftly as possible, examination of the texts in question is the job of the Standing Committee (*Commission permanente*) comprising the Vice-President and 10 councillors appointed by him.

For each text sent to a specific administrative division, the President of the division appoints a rapporteur, a member of the Council of State, to examine the text, analyse the ministerial dossier accompanying it and, where necessary, compile their report with representatives from the ministry or ministries involved.
Discussion before the deliberating board (the division and the General Assembly) focuses in fact on the rapporteur's text, rather than the initial text submitted by the government.

When considering this specific method of operation, it should be borne in mind that the French Council of State has traditionally been a co-author of legislation. This is a unique feature of the French Council of State and is not found elsewhere.

2. COUNCIL OF STATE
Internal Affairs Section

No. 373.359

Mr. SANSON,
Rapporteur

EXTRACT OF THE REGISTER OF DELIBERATIONS OF THE GENERAL ASSEMBLY

Session of Thursday 13 July 2006

OPINION

The Council of State, seized of a request for an opinion on the question as to what authority is competent and what procedure is applicable in the case where a member of the judiciary ("*magistrat*") who is the subject of disciplinary proceedings in connection with acts committed while sitting as a judge, rejoined the office of the public prosecutor when the disciplinary case began, or, in the contrary case, where a magistrate sitting as a judge is subject to proceedings arising out of the performance of his previous functions as a public prosecutor.

Having regard to the Constitution, in particular Articles 64 and 65 thereof;

Having regard to Ordinance No. 58-1270 of 22 December 1958, enacting the institutional Act governing the status of the Judiciary, in particular Articles 1, 43, 48 and 66 thereof;

IS OF THE OPINION THAT THE QUESTION SHOULD BE ANSWERED IN THE FOLLOWING MANNER:

Under Article 64 of the Constitution, "The President of the Republic shall be the guarantor of the independence of the judicial authority. He shall be assisted by the High Council of the Judiciary. An institutional Act shall determine the regulations governing the members of the judiciary. Judges shall be irremovable." Under Article 65, "…The High Council of the Judiciary shall consist of two sections, one with jurisdiction for judges, the other for public prosecutors. … The section of the High Council of the Judiciary with jurisdiction for judges …shall act as the disciplinary council for judges. When acting in that capacity, it shall be presided over by the first president of the Court of Cassation. The section of the High Council of the Judiciary with jurisdiction for public prosecutors … shall give its opinion on disciplinary penalties with regard to public prosecutors. When acting in that capacity, it shall be presided over by the chief public prosecutor at the Court of Cassation."3

Under Article 1 of the above-mentioned Ordinance of 22 December 1958: "…II Each member of the judiciary ("*magistrat*") may in the course of his career be appointed to serve both as a judge and as a prosecutor"; under Article 43 of the same Ordinance, "Any breach by a member of the judiciary of the duties of his office, or of honour, discretion or dignity, shall be a disciplinary offence. Such offence shall be judged, in the case of a public prosecutor or a member of the judiciary serving in the central administration of the Ministry of Justice, in the

3 Translator's note: English translation of Articles 64 and 65 of the 1958 Constitution taken from the official website of the French *Assemblée Nationale*, www.assemblee-nationale.fr.

light of the obligations incumbent on his position in the hierarchy"; under Article 48 of the same Ordinance, "Disciplinary power shall be exercised, in the case of members of the judiciary sitting as judges, by the High Council of the Judiciary, and in the case of members of the judiciary serving as public prosecutors or in the central administration of the Ministry of Justice, by the Minister of Justice. In the case of members of the judiciary on secondment or on leave of absence, or those who have definitively left the service, such power shall be exercised either by the section of the High Council with jurisdiction for judges or by the Minister of Justice, depending on whether the members of the judiciary in question last served as sitting judges or as public prosecutors or in the central administration of the Ministry of Justice"; under Article 66 of the same Ordinance, applicable to members of the judiciary serving as prosecutors: "…The section of the High Council of the Judiciary with jurisdiction shall give a reasoned opinion on the sanction that the facts complained of should in their view attract; the said opinion shall be transmitted to the Minister of Justice."

The provisions cited above implement the constitutional guarantee of the independence of serving judges, in particular with regard to the executive. In order to be effective, this guarantee implies that only the section of the High Council of the Judiciary with jurisdiction for judges has the power to issue a disciplinary sanction, both in the case of a member of the judiciary who was exercising the functions of a judge at the date of the facts giving rise to the disciplinary proceedings, and also in the case of a member of the judiciary who is exercising the said functions at the date on which the disciplinary proceedings were commenced.

Consequently, the Minister of Justice has jurisdiction to issue a disciplinary sanction against a member of the judiciary who was serving as a prosecutor at the time of the acts, and who is also serving as such at the date of commencement of disciplinary proceedings.

This opinion was deliberated and adopted by the Council of State at its session on Thursday 13 July 2006.

The Vice-President of the Council of State
signed: R. DENOIX DE SAINT MARC

The Councillor of State,
Rapporteur,
signed: M. SANSON

3. COUNCIL OF STATE
FINANCE SECTION

EXTRACT OF THE REGISTER OF DELIBERATIONS OF THE GENERAL ASSEMBLY

No. 372.147 **Sessions of 25 and 29 August 2005**

M. MOLINA
Rapporteur

OPINION

The Council of State , seized of the following questions by the Minister of the Economy, Finances and Industry:

1. Is there an obstacle under the Constitution to the privatisation of semi-public companies holding motorway concessions (ASF, APRR, Sanef), in particular in the light of paragraph nine of the Preamble to the 1946 Constitution, which provides that "All property and all enterprises that have or that may acquire the character of a public service or de facto monopoly shall become the property of society"?

2. In the light of the composition of the body of shareholders of the motorway companies, is the procedure envisaged by the government, which relies on application of the provisions of Title III of Law No. 86-912 of 6 August 1986, in compliance with the rules of procedure laid down in the legal instruments governing privatisations?

Having regard to the Constitution;
Having regard to Law No. 55-435 of 18 April 1955;
Having regard to Law no. 86-793 of 2 July 1986, as amended by the Laws of 4 January 1988 and 12 April 1996;
Having regard to Law No. 86-912 of 6 August 1986, as amended;
Having regard to Law No. 2004-1484 of 30 December 2004 on the finances for 2005, in particular Articles 60 and 127 thereof;
Having regard to Decree No. 2004-1317 of 26 November 2004 on the Financing Agency for French Transport Infrastructure;

Is of the opinion
that the question should be answered in the following manner:

1. The ninth paragraph of the Preamble to the Constitution of 27 October 1946, to which the Constitution of 4 October 1958 refers, provides that: "All property and all enterprises that have or that may acquire the character of a public service or de facto monopoly shall become the property of society".4

4 Translator's note: English translation of the extract from the Preamble to the Constitution of 27 October 1946 taken from the official website of the President of the French Republic, www.presidence-de-la-republique.fr.

The application of that provision calls for the following observations.

As the Constitutional Council pointed out in its Decision No. 86-207 DC of 25 and 26 June 1986, this provision refers to national public services the need for which "arises out of principles or rules of constitutional significance". On the one hand, the motorways constitute assets that are part of the public domain of the State, even when concessions are granted for their operation. On the other hand, provided the freedom to come and go is not affected, there is no principle or rule of constitutional significance that would require the national public service of operating the motorways, which is mainly covered by the public service concessions regime, to be granted to companies the majority owners of which were public bodies.

The Constitutional Council also made it clear, in the same decision, that the notion of a de facto monopoly to which the ninth paragraph of the Preamble to the Constitution of 27 October 1946 refers "must be understood as encompassing the whole of the internal market in which the enterprises conduct their business, as well as all the competition they encounter in that market from other enterprises; and no account should be taken of the privileged positions such and such an enterprise may have at any given moment, or in connection with production of something that represents only a small portion of its business". In the light of this, companies holding motorway concessions are not de facto monopolies, because, for each journey by motorway, there is another itinerary available between the starting and finishing points. Besides that, the mere fact that operation of motorways takes the form of an exclusive concession does not mean that the concession-holding companies are de facto monopolies within the meaning of the paragraph cited above.

The ninth paragraph of the Preamble to the Constitution of 27 October 1946 thus presents no obstacle to the privatisation of the companies holding motorway concessions.

Lastly, there is no constitutional obstacle to such privatisation, provided it is carried out in conformity with the procedures laid down in the Laws of 2 July and 6 August 1986.

2. Article 7 of the above-cited Law of 2 July 1986 provides:

"I. The following transfers of ownership to the private sector are approved by law:

- of enterprises of which the State directly owns more than half the capital stock, and which have more than one thousand employees, including those of subsidiaries of which they own, directly or indirectly, more than half the capital stock, at 31 December of the year preceding the transfer, or whose turnover, consolidated with that of their subsidiaries, as defined above, is over 150 million euros at the closing date of the financial year preceding the transfer;
- of enterprises that have become part of the public sector by operation of legislation.

II. Transactions the effect of which is to transfer from the public to the private sector ownership of enterprises other than those mentioned in paragraph I above, are subject to governmental approval…"

The application of these provisions calls for the following observations.
In the first place, the State holds less than 50% of the capital stock of each of ASF, APRR and Sanef. The mere fact that the State on the one hand and *Autoroutes de France* on the other, a public law entity created in 1982 which is distinct from the State, between

them hold the majority of the shares in these companies is not a reason to regard them as being in the “direct” majority ownership of the State within the meaning of paragraph I of Article 7 of the Law of 2 July 1986, cited above.

Second, while Article 4 of the above-cited Law of 18 April 1955 gave the State the option of granting concessions “either for the construction and operation of a motorway, or the operation of a motorway, together with the construction and operation of its ancillary installations”, the mere fact that ASF, APRR and Sanef, which were originally set up by the local authorities and the *Caisse des Dépôts et Consignations*, were awarded such concessions pursuant to these provisions, does not mean that they should be treated as having become part of the public sector by operation of legislation.

ASF, APRR and Sanef are thus not among the companies referred to in the provisions cited above, the privatisation of which must be approved by law.

This opinion was deliberated and adopted by the Council of State at its sessions on 25 and 29 August 2005.

The Master of Appeals
State
RAPPORTEUR
Signed: P.-A. MOLINA

The Vice-President of the Council of

Signed: R. DENOIX de SAINT-MARC

Contribution of the Council of State of Greece

1. The Council of State of Greece
The Council of State performs judicial and advisory functions. It performs these functions via a plenary assembly and six divisions. The advisory function is the preserve of division 5, which is also responsible for jurisdictional matters and comprises a total of 7 councillors and 9 *maîtres de requête*.
The Council of State performs its advisory function only with regard to draft regulatory decrees.

In Greece, the government is also required to consult the Council of State on all amendments it makes once the Council of State has issued its opinion, unless, of course, such amendments are stipulated by the Council's opinion.

In 2003, the Council of State issued opinions on 507 draft decrees.

The Council monitors two aspects of draft regulatory decrees: legal quality and technical quality.

Even though monitoring legal quality is the main focus of the Council of State, the appropriateness in terms of sound administration and the underlying policy may also be taken into account where necessary.

The Council has developed a framework for monitoring drafts focused mainly on the following points:

a. Legal quality
- Does the draft decrees violate a higher legal regulation such as the Constitution, international conventions or Community law?
- Does the draft decree conform to the principles of democracy, the rule of law and fundamental legal principles in general?
- Does the draft decree conform to principles such as equality under the law, the certainty of the law, the non-retroactive nature of the law, proportionality and general interest?

b. Technical quality
- Has the proposed regulation been worded in a logical and systematic manner?
- Is the draft decree appropriately worded in terms of its legal formulation?

2. The Council of State was seized of a request to examine a draft decree the object of which was to govern the status (background, skills, recruitment etc.) of members of the Greek Police force assigned to special missions.
In this connection, it handed down an Opinion (614/2002), the main thrust of which is as follows:

Paragraphs 1 and 4 of Article 13 of the Constitution, which establish the freedom of religion, provide that «1. Freedom of religious conscience shall be inviolable. The enjoyment of public freedoms and civic rights of each person shall not depend on their religious convictions 2. … 4. No-one may, by reason of their religious convictions, be excused from carrying out his or her duties to the State or refuse to comply with the law». The following ruling was given with reference to these provisions:

The first of these provisions guarantees the fundamental right to freedom of religion, including freedom of religious conscience, which is one aspect of this right. The same provision lays down the possibility for each person to adhere to the religion of their choice or, indeed, not to adhere to any religion. This fundamental right finds its expression in the possibility each citizen has to enjoy his or her full civic rights irrespective of their religious convictions. The right of each Greek citizen to be eligible for public service is one of the rights enshrined in Article 4 para. 4 of the Constitution, which provides that « …Greek citizens shall be admitted to all the public services, except where specific laws provide otherwise ». Consequently, the legislature or the government, in the exercise of its delegated legislative powers, may not take the view that either belonging to a certain religion or not believing in any religion is a precondition for admission to public employment, just as they may not take the view that these are incompatible with such admission. It follows from this that the exclusion of a candidate from eligibility for public employment by reason of his religious convictions would be contrary to Article 13 of the Constitution. However, by virtue of paragraph 4 of the said Article, cited above, which provides *inter alia* that no-one may, by reason of their religious convictions, be excused from carrying out his or her duties to the State, the exclusion of a candidate from access to public employment because of his or her religious convictions is not contrary to the Constitution, where the said candidate expressly agrees that such convictions would prevent him or her, in whole or in part, from complying with the rules governing the public service in question, and the tasks arising therefrom. Consequently, Article 3 para. 1 subpara. d3 of the draft, the effect of which would be to exclude from admission to the Police force persons whose religious beliefs would prevent them from carrying out their mission, is in conformity with the law; however, it would be advisable for reasons of clarity for the said provision to be reformulated as follows: « They must obey the Constitution, devote themselves to the Country and refrain from practising any religion that would interfere with the performance of their functions ».

3. Draft decree implementing U.N. Security Council Resolution 1483 (2003)
Introduction
The Council of State was seized of a request to examine a draft decree the object of which was to put in place the measures necessary to implement U.N. Security Council Resolution 1483 (2003).

The said Resolution prescribed, inter alia, the return of items of cultural importance illegally removed from Iraq and established a prohibition on trade in or transfer of such items, lifted the economic sanctions imposed on Iraq under previous Security Council Resolutions, and provided for the management of the proceeds of sale of petroleum products, the freezing of the capital and financial resources of the former government of Iraq, the officials of the former regime and their immediate family members, and the transfer of the said resources into the Development Fund for Iraq. On the other hand, by its Common Position 2003/495 the Council of the European Union, relying on Article 15 of the European Union Treaty, adopted measures identical to those of the Security Council; in the light of that Position, and pursuant to Articles 60 and 301 of the European Community Treaty, the Council issued its Regulation 1210/2003 of 7 July 2003, whereby specific measures were taken in order to implement the abovementioned Security Council Resolution. More particularly, it required the Member States to pass laws imposing sanctions in the event of breach of the Regulation, and to take all necessary measures to ensure these were applied. The Regulation was accompanied by Appendices including Appendix I, which gave a catalogue of petroleum products the proceeds of sale of which were to be paid into the Development Fund for Iraq, Appendix II, which catalogued the items of cultural importance that must be returned to Iraq and the transfer of which was prohibited, and Appendix IV, which listed the individuals and legal persons designated by the U.N Sanctions Committee whose capital was to be frozen and paid into the said Fund.
The Preamble to the draft decree invokes the provisions of Article 25 of the United Nations Charter, sanctioned by Law 585/1945, and by Article 1 para. 1 and Article 4 of Law 92/1967, according to which Resolutions of the Security Council providing for the breaking off of economic relations with a country, issued pursuant to Article 41 of the Charter and binding on Member States by virtue of Article 25 of the Charter, shall be implemented by decrees issued on the proposal of the Minister for Foreign Affairs, which may, if necessary, specify the prohibitions provided for in such Resolutions and lay down the commercial, financial or economic measures necessary to implement them (para. 1), while similar decrees may be issued to suspend or lift measures put in place in application, *inter alia*, of paragraph 1 of that Article (para. 4).

The legal issues that arise out of this draft relate to:
a) whether it is possible to insert the provisions of a Community Regulation into the national legal system;
b) whether or not certain provisions in the Security Council Resolution are in conformity with the Greek Constitution.

The Council of State made the following observations on these questions (Opinion 183/2005 of the 5th Section).
1 . As the CJEC, and also the Greek Council of State, have ruled on a number of occasions, under Articles 249 and 254 of the European Community Treaty, a Regulation is directly applicable in the national legal systems from the time of its publication in the OJEC, or, as the case may be, at the end of a period of twenty days from its publication. It follows that its provisions cannot be imported into a piece of national legislation or an administrative law with regulatory effect. What is more, national measures adopted in order to implement the Regulation, or complementary to it, must not impede the direct applicability of the Regulation

or disguise its nature as Community legislation, nor must they exceed the limits of its provisions.
Furthermore, according to the ***majority opinion***, Greece, as a member of the U.N., is bound to implement the Resolutions of the Security Council, in accordance with Article 25 of the U.N. Charter. Such obligation is independent of the obligation to apply a European Regulation having the same content. The former derives both from Article 103 of the U.N. Charter, which provides that the obligations of members of the U.N. arising under the Charter shall have precedence, where there is a conflict, over those deriving from any other international Treaty, and also from Article 307 of the European Community Treaty, which provides that the said Treaty may not affect the rights and obligations of the Member States under other international conventions entered into prior to 1 January 1958 or prior to their adhesion. However, given that Greece, while under an obligation to comply with the Security Council Resolution, is nonetheless still bound to adopt measures to implement Regulation 1210/2003, in accordance with Article 15, para. 1 thereof, the correct view must be that the draft Decree is also intended to conform to that Regulation, the more so because there is nothing in Greek, European or international law that prohibits the adoption of measures implementing a Security Council Resolution and a Community Regulation in one and the same instrument. True, the provisions of the draft Decree to some extent repeat the language of those of the Regulation; nonetheless, given that the Government is also, in the same draft Decree, seeking to fulfil the terms of the Security Council Resolution, the fact that the draft repeats the provisions of the Regulation is dictated by the need for all the provisions in question to be uniform, and must therefore be excused. Moreover, according to the same majority opinion, the issuing of a decree deriving its authority from the said Article 1 of Law 92/1967 is indispensable, in order for it to be possible to apply Article 2 of the said Law, which on the one hand imposes criminal and administrative sanctions on those who breach the decrees issued pursuant to Article 1 of that Law, and on the other, provides for the seizure of products being traded in violation of those same decrees. ….

However, according to the ***dissenting opinion***, by virtue of Article 61 para. 2 subpara. 1 of the European Community Treaty, it is only when the Community has not intervened in a case involving the common external policy and falling within the scope of Article 301, that the Member States may take emergency measures. It follows that, once the Common Position, referred to above, had been adopted, and once action had been taken by the Community that consisted, in this case, of issuing the said Regulation, in accordance with the above-mentioned provisions of the Treaties, the taking of measures relating to the said action fell outside the competence of the Member States and within that of the Community itself. Consequently, this draft decree, based on the legal authority of Law 92/1967, cited above, is illegal because a Regulation had previously been issued that contained detailed stipulations about economic sanctions against Iraq and the individuals and legal persons to which the Security Council Resolution refers, the more so because the Government appears not to have taken the said Regulation into account before drafting the Decree…. Furthermore, according to the same dissenting Opinion, the draft Decree is not in conformity with the Law for the further reason that its text as a whole repeats the terms of the Regulation, while not containing any measures that execute or complement the Regulation (for example, addressing the question whether the freezing and transfer of assets are to be carried out directly by the lending institutions or by the government authorities, or even whether they require a decision of a civil, criminal or administrative court), and this amounts to a breach of the above-mentioned provisions of the Treaty. Moreover, criminal and administrative sanctions can also be imposed by applying the decrees issued in implementation of Articles 4 para. 1, and 5 of Law 1388/1983 *(whereby the Government is authorised to import Directives into the internal legal system, and also to take measures to execute Regulations)*, and it was therefore superfluous to rely on the provisions of the said Law 92/1967 to do so.

2 . Article 7 para. 1 of the draft provided that, with effect from 22.5.2003, the date of adoption of Resolution 1483/2003 by the Security Council, the capital and financial resources of the former government of Iraq, of legal entities belonging to the Iraqi State, as well as of officials of the former regime and their immediate family members, were to be frozen and transferred to the Fund set up pursuant to paragraph 12 of the said Resolution. That article also provided that claims by individuals or non –governmental entities on the capital sums transferred could be made to the government of Iraq, which is currently recognised internationally, « unless otherwise addressed». Article 7 of the draft thus reflects the contents both of paragraph 23 of the Resolution and of Article 4 of the Regulation, since, as is clear from the explanation of the reasons underlying these two texts, those provisions were designed to promote the rebuilding of Iraq and the restitution to the Iraqi people of the wealth that the officials of the authoritarian former regime and those in their immediate entourage were presumed to have taken out of the country.
According to the ***majority opinion*** *(supported by those judges who had supported the majority opinion referred to in the preceding recital),* Article 7 of the draft, having such content, is in conformity with the law, because it was adopted in conformity with the said Security Council Resolution, this being an obligation of the Member States of the U.N. under Article 25 of the Charter. Furthermore, given that the provision in question is in line with the Resolution, it is not subject to any further review to verify its legality, since it has to do with the exercise of political power and the country's relationship with international organisations, and nor is the Resolution itself subject to any such control, because nothing of the kind is provided for in the laws in force. The same goes for the provisions of the draft, the object of which is to bring the country into compliance with the Regulation, since the Regulation, being directly applicable, is subject only to a direct recourse pursuant to Article 230 of the Treaty or to review on an exceptional basis during an ongoing legal proceeding, where the court if it had doubts about the validity of the Regulation could put a preliminary question to the CJEC. On the other hand, the Regulation is not subject to review as part of the process of drafting a decree, because of the non-jurisdictional nature of this process, and because, that being the case, there is no possibility of making a preliminary referral. In any event, the rule contained in Article 7 of the draft is in conformity with the law, according to the prevailing opinion. It is true that the said rule does imply restrictions on the rights of ownership and legal protection of the persons to which it refers, namely those appearing in the list attached to Appendix IV to Regulation 1210/2003, to which Article 7 of the draft is taken to refer; nonetheless, neither internal, European or international law treat human rights as being unlimited, but as subject to restrictions imposed in the public interest. In the present case, the restriction in question is justified by the international public interest that forms the background to the disputed provision *(of Article 7 of the draft)*, namely the rebuilding of Iraq, the weakening of that country's former leaders, and the restoration to the Iraqi people of the wealth illegitimately removed from the country by the officials of the former regime and their family members. It follows that the provisions of Article 7 of the draft do not contravene either the Constitution or other higher norms of European or international law. More specifically, the provision in question is not contrary to Article 7 para. 3 of the Constitution, which prohibits general confiscation5, since this latter presupposes that the property was lawfully acquired, and not obtained illegally, as, in the judgment of the international community, was the case here.
However, according to the ***dissenting opinion***, because the effect of Article 7 of the draft would be to transfer the whole of the property of certain individually designated persons, with no prior judicial process and with no possibility for the persons affected to defend themselves, such provision does involve a general confiscation of the kind prohibited by Article 7 para. 3 of the Constitution. True, such persons do have the right to address their

5 According to Article 7 para. 3 of the Greek Constitution « Total confiscation is prohibited ….».

claims at a later stage to the « legitimate government of Iraq» ; but the fact remains that this possibility is not such as to offer these persons fair and expeditious legal protection equivalent to that which they could expect from the Greek courts. Such a breach of a fundamental provision of the Constitution, forming part of the protection of human rights, albeit rendered necessary in order for Greece to comply with a Resolution of the Security Council, can still not be accepted, because duly ratified international conventions take precedence over ordinary laws, by virtue of Article 28 para. 1 of the Constitution, but not over the Constitution itself. Consequently, Greece is not bound to comply with instruments emanating from the organs of international organisations of which it is a member, the Security Council in the present case, to the extent that the content of such instruments is contrary to the Constitution, since the powers that the Member States of the U.N. have entrusted to the Security Council to exercise «on their behalf» (Article 24 para. 1 of the Charter), cannot be taken to include that of adopting measures that contravene fundamental provisions of the Constitution concerning the protection of human rights. It follows from this that such instruments cannot become part of the internal legal order or be applied in Greek territory to the extent that they involve the adoption of rules that would contravene the Constitution. Furthermore, according to the same dissenting opinion, the question whether or not the draft is illegal may be subject to review by the Council of State as part of its administrative competences, and, likewise, it is subject to review as part of the process of drafting a decree because, under Article 95 para. 1 subpara. d of the Constitution, all draft decrees having regulatory content are subject to such a process. Moreover, as part of that procedure, the Council of State must give its opinion on all the legal issues arising out of the provisions of the draft and, above all, on whether the rules proposed by the Government are in conformity with the laws in force, which latter include, especially, those rules that take precedence; lastly, it is for the Government, which has the competence and responsibility to issue the decree, to decide what shall be its final content6.

More particularly, the **Judge *Rapporteur*** gave the following opinion:

The Security Council, as a constituted organ, must act in concordance with the objectives and principles of the U.N., among which is the protection of the fundamental rights safeguarded by the Universal Declaration on Human Rights … and the International Covenant of the U.N. on Civil and Political Rights of 16.12.1966, ratified by Law 2462/1997. Member States are subject to the same obligation. The inventory of these rights includes, first and foremost, that of legal protection and a fair hearing (Articles 8, 10 and 11 of the Declaration and 14 of the Agreement) …, the kernel of which must be respected even in case of emergency. The right in question is part of the binding rules of general international law (*ius cogens*), which must be respected when concluding and interpreting international conventions, and treaty clauses that violate the *ius cogens* are thereby null and void by virtue of Article 53 of the Vienna Convention of 23.5.1969 on the Law of Treaties, ratified by Legislative Decree 402/1974 ….. It follows that a Resolution of the Security Council that is contrary to the *ius cogens* is illegal, and consequently not binding on the Member States, which have the right or even the obligation not to comply with it, as expressly provided in Article 25 of the Charter. Furthermore, in the absence of any system for review of Security Council Resolutions, it is for the national courts to make such a finding of nullity and decide on the consequences that flow from it. As a result, Resolution 1483/2003, when interpreted in harmony with international law, cannot be taken to prevent the exercise of the right to legal protection by those persons referred to in paragraph 23 thereof, but it must be accepted that such persons, who may indeed exercise the said right, also have the further option of submitting their claims to the legitimate government of Iraq. Moreover, fundamental rights such as those enshrined in the European Convention on

6 The Opinions of the Council of State on draft regulatory decrees are not binding on the President of the Republic (opinions of non-conformity).

Human Rights constitute general principles of Community law, which would prohibit the adoption in Community territory of measures that are incompatible with respect for human rights as recognised and protected by the Convention; at the present time, the said rights are expressly enshrined in Article 6 para. 2 of the European Union Treaty, review of the implementation of which is a matter for the jurisdiction of the CJEC, under Article 46 paragraph b of the European Union Treaty. The right to legal protection, in all its aspects …., constitutes one of those rights. Consequently, the correct view must be that Regulation 1210/2003, interpreted in the light of the provisions cited above, does not prohibit the person concerned from having recourse to the competent courts in the Member States, as well as having recourse to the Iraqi authorities. Indeed, Article 14 of the Regulation stipulates that rights and obligations flowing from treaties entered into before it came into force shall not prevent its application; but that provision manifestly does not apply to the European Convention referred to above, which is applicable by virtue of a rule of a higher order, namely Article 6 para. 2 of the European Union Treaty. It follows, according to this opinion, that Article 7 of the draft contravenes Article 20 para. 1 of the Constitution, Article 6 of the European Convention and Article 14 of the International Covenant, cited above, and it is therefore illegal to the extent that it does not allow for an appeal to the Greek courts by the person concerned.

Contribution of the Council of State of Italy

1. The Council of State of Italy

The Italian Council of State comprises one President, 18 division Presidents and 82 councillors. The advisory function is performed by Divisions 1, 2 and 3, the Legislation Advisory Division, and the Plenary Assembly.
In general, each advisory division is made up of two division Presidents and eight councillors. Opinions are discussed and ruled upon at an assembly chaired by a President and comprising members of the division, and on the basis of a report compiled by a rapporteur who is a councillor and who has investigated the matter previously.
The opinion is drawn up in writing by the rapporteur and reviewed by the President.

The Legislation Advisory Division is responsible for examining draft regulations in respect of which an opinion from the Council of State is required by law, and when so requested by the administrative authorities. The division also looks into draft EU regulations if asked to do so by the President of the Council of Ministers. Given their special importance, opinions regarding draft laws or regulations submitted by the division or by the President of the Council are issued by the General Assembly.

The Italian Council of State is primarily responsible for legal monitoring, but also takes into account in its deliberations the administrative appropriateness of the texts submitted to it. Accordingly, it sometimes draws the government's attention to the possibility of resolving a problem in a more efficient manner than via a decree, for example by concluding an agreement. Where appropriate, the Council of State also sometimes recommends a less complicated solution than that proposed by the government.
On the other hand, the opinion may also take into account the appropriateness of the decree by the Council asking the government to start off by considering the effects of the proposed provisions.

When examining legislation, the Council monitors the compatibility of the provisions submitted to it with higher-level legislation and also their coherence with the system as a whole. The model to be used as a basis for legislative acts is set out in directives issued by the Presidency of the Council of Ministers.
Where matters of legal substance are concerned, the Council has on occasion asked the administration for a detailed examination of the legal and economic impact of the normative provisions submitted to it.

2. Introduction

The Italian Council of State gave its opinion on a normative act designed to introduce a new structure into the Italian legal system for government contracts (for public services, public supplies and public works) in compliance with European Directives nos. 2004/17/EC and 2004/18/EC, both dated 31 March 2004, which deal respectively with the coordination of "*the procurement procedures of entities operating in the water, energy, transport and postal services sectors*" (the so-called "reserved sectors") and the "*coordination of procedures for*

the award of public works contracts, public supply contracts and public services contracts".
The same normative instrument (which will be known as the government contracts code) also restructures public procurement contracts for public works, supplies and services that fall below the threshold, in an effort to bring the rules of domestic law applicable to contracts that do not fall within the scope of the Community Directives into line with the same principles as are laid down in them.
The rules of both Community and national law (as to contracts that fall below the threshold) also express the same principles that the regions (which have some room to manœuvre where the setting of norms in this area is concerned) must observe when establishing their own rules.

COUNCIL OF STATE
Advisory Section for Normative Instruments
Assembly of 6 February 2006

Section No. 355/06

SUBJECT:

PRESIDENCY OF THE COUNCIL OF MINISTERS
- Draft of a legislative decree enacting a "*Code on public works, public supply and public services contracts*" pursuant to Article 25 of Law No. 62 of 18 April 2005.

The Section
Having regard to the draft legislative decree enacting a "*Code on public works, public supply and public services contracts*" pursuant to Article 25 of Law No. 62 of 18 April 2005, transmitted under cover of Note no. 355/06 dated 17 January 2006 from the Presidency of the Council of Ministers, received on 27 January 2006, on which the opinion of the Council of State is sought;

Having examined the documents and heard the *rapporteurs*, Presidents Coraggio, Giovannini, Trotta, Cossu and Barberio Corsetti, and Councillors Piacentini, Torsello, Millemaggi Cogliani, Carbone, De Cesare, Fera, D'Agostino, Marchitiello, Pozzi, Anastasi, Marra, Salemi, Leoni, Meschino, Saltelli, Chieppa, Montedoro, De Ioanna, Roxas, Corradino, Nocilla and De Felice;

RECALLS AND DECIDES AS FOLLOWS:

Part One – General considerations

1. The draft legislative decree before us submits for the opinion of the Council of State the "*Code on public works, public supply and public services contracts*" in the framework of the implementation of the delegation of powers contained in Article 25 of Law no. 62 of 18 April 2005 (Community law for 2004).

In its first paragraph, that instrument delegates to the government the power to transpose into our legal system Directives Nos. 2004/17/EC and 2004/18/EC, both dated 31 March 2004, which deal respectively with the coordination of "*the procurement procedures of entities operating in the water, energy, transport and postal services sectors*" (the so-called "reserved sectors") and the "*coordination of procedures for the award of public works contracts, public supply contracts and public services contracts"*.

1.1 The methods for adopting the legislative decree (or decrees) provided for in Article 25 are the general methods set forth in Article 1 of the above-mentioned Community law for all transposing decrees, by analogy with the Community laws for the previous years.

The said Article 1 prescribes, in particular:

- a time-limit of eighteen months starting from the date of entry into force of Law no 62 of 2005 for legislative decrees to be adopted (Article 1, para. 1)
- implementation of Article 14 of Law no. 400 of 23 August 1988 on the proposal of the President of the Council of Ministers or the Minister for Community Policy and the Minister with the main institutional competence in the field, in cooperation with the Ministers for Foreign Affairs, Justice, the Economy and Finance, and the other Ministers having an interest in the subject matter of the Directive (paragraph 2);
- that the opinions of the Chamber of Deputies and the Senate are to be given within a forty day time period, which may be extended by ninety days in specific cases (paragraph 3);
- an obligation to attach to the drafts of legislative decrees enacting certain Community Directives (among them Directives nos. 2004/17/EC and 2004/18/EC, which the present draft transposes) the technical report referred to in Article 11 *ter*, paragraph 2, of Law no. 468 of 5 August 1978, on which the Parliamentary committees with competence in the relevant financial fields also express their views. The government may choose not to comply with the conditions drawn up, by relying on its obligation to guarantee compliance with Article 81, paragraph 4, of the Constitution, and may transmit the instruments to the Chambers afresh, annexing to them the information necessary to enable the committees with competence in the financial fields to give a final opinion (paragraph 4);
- the possibility for the government to propose, within a period of eighteen months starting from the date each of the legislative decrees enters into force, complementary provisions and amendments, in accordance with the same guiding criteria and principles laid down in the delegating law, and following the same procedure (paragraph 5);
- that Article 117, paragraph 5, of the Constitution be applied, whereby "*legislative decrees shall explicitly state if the provisions they contain are substitutive in nature*" (paragraph 6);

1.2. Turning now to the specific delegation contained in Article 25, it appears that the very definition of its subject matter presents some notable and distinctive features.

Paragraph 1 in fact provides that the government may issue one or more legislative decrees " *for the purpose of defining the legal framework for transposition*" of the above-cited Directives.

That formulation is much broader than the one generally given in the Community law itself, which speaks of the adoption of "*legislative decrees enacting the provisions necessary for the implementation of the Directives listed in Appendices A and B*", and the formulation used in Article 1, paragraph 1, is reproduced in all the specific delegating provisions in the law we are considering, the only textual variation being that in some places the expression "*for the transposition*" is used instead of "*for the implementation*".

It should be added that the broad scope of what is delegated by Article 25 is further underlined by the reference (under subpara. a) of paragraph 1) to a "single instrument", a term which, though not having any technical meaning – a point we will come back to later – does indicate that the legislator did not intend to limit himself to a mere compilation of

existing instruments, even if they were consistent with the Directives: it is the whole of the public procurement sector – but that alone – which must here be the subject of a single consistent set of rules.

This distinctive feature, in the light of the usual method for transposing Community Directives, had the effect of making it necessary to formulate four separate guiding criteria and principles, for the transposition of the public procurement Directives alone, in the same first paragraph of Article 25, criteria that on the one hand govern the intervention of the delegated legislator, but also on the other define the scope it has to innovate.

The specific nature of the delegation in Article 25 seems all the more striking then it is looked at in parallel with the others. Article 5 of the same Law, no. 62 of 2005, which provides for "*reorganisation of the norms applicable to the subject matter covered by the Community Directives*", delegates to the government the power to adopt, in the same way as prescribed in Article 1, paragraphs 2 and 3, and in the same eighteen month time-frame, "*single instruments providing for the implementation of the matters delegated for the purposes of transposition of Community Directives, in order to coordinate these with the laws in force in these fields, making only those amendments as are necessary to ensure that the rules are simplified and that they are consistent in terms of their logic, layout and language*".

This comparison brings out the broad scope of the delegation contained in Article 25 beside the merely formal coordination of the other aspects.

1.3 Since the capacity for innovation under this delegation is clearly defined, the guiding principles for what may be done, and consequently also the limits, must obviously be looked for in the criteria laid down in that instrument.

The first criterion derives directly from the need to bring the Italian legal system into line with a fundamental reform that has taken place in the legal system of the Community (in subpara. a)). In particular, Directive no. 2004/18 takes the place of three previous Directives, which made a distinction between the sectors of works, services and supplies, and puts in place one single procedure for the award of public procurement contracts to replace the three procedures that existed before.

This criterion must be read in the light of the object of the delegation itself ("the legal framework for transposition of Directives"), and this brings out its central nature. In fact, if the previous legislator made certain choices, availing himself of the discretionary margins allowed by the Community instruments (such for instance as the solutions contained in Law no 109 of 1994 on integrated public procurement and the criterion of the most economically favourable bid) and inspired by values and issues other than those of competition, the delegating legislator concentrates solely on the transposition of new Directives.

Only later will it be possible to understand the extent to which the implementation of the reform has been influenced by this, by looking at the obligations that are inherent in the Directives; in any event, there is no doubt that this would justify the possibility of making substantial amendments to the current body of law in force.

Furthermore, the discretionary margins for innovation where current laws are concerned appears to be limited to what is needed to adapt the national legal system, including on points that are not directly governed by Directives nos. 17 and 18, to reflect the general

trend in Community law on the subject, as "incorporated" in the often praetorian case law of the Court of Justice. As to this, the Section takes the view that the principle contained in subpara. d) of Article 25, paragraph 1, on the need to conform to Decision C-247/02, is not limited but, on the contrary, broadened, in scope, when it states that it is necessary to take account of the whole body of Community law of which the said Directives form part; and, in the first place, the fields in which the entities awarding the contracts can apply discretionary powers must be respected (particularly, but not only, where criteria for choice are concerned) as these guarantee that competition will be selective and based on the quality of the bids (see paragraph 2 below).

The obligation to "*respect the principles of the founding Treaty of the European Union*" contained in subparagraph a) of the delegation of power serves to further confirm the interpretation of the above aspects. Such respect involves not only an exhaustive list of acts that must be avoided as they would contravene the principles of the Treaty, but also includes actions the legislator is bound to take for the purpose of "*defining the legal framework for the transposition of the Directives*", which actions must be consistent with those same principles, as construed (and sometimes even "constructed") by the case-law of the Court in Luxembourg.

1.4. The criterion in subparagraph b) reflects one of the traditional requirements of the national legal system, and has to do with the need to "simplify" the processes of national government.

This requires an in-depth analysis to determine, first, what is meant by this simplification, and thence what is its scope. In this respect, it should be noted that, even though the delegating instrument does not appear in any of the recent "annual simplifying laws" (Law no. 229 of 2003 – the simplifying law of 2001 – and Law no. 246 of 2005 – the simplifying law for 2005), it does form part of the process of which these laws are the most recent development. In particular, Law no. 229 of 2003 marked the start of a new phase in the simplification and reorganisation (now known as "*reordering*") of legal instruments, following on from that of the "single mixed instruments" referred to in the now abrogated Article 8 of Law no. 50 of 8 March 1999 (repealed by Article 23, paragraph 3, of Law no. 229 of 2003).

In its Opinion no. 2/04 of 25 October 2004 (on the "Industrial Property Code"), which may be referred to for a fuller discussion of the issue, the Plenary Assembly of the Council of State examined the meaning currently given to the concept of "simplification", which is the cornerstone of the entire series of measures taken over the past ten years or more (those relating to reorganisation, codification and reordering, and also the recently-promulgated "annual laws", as well as the one that is the subject of the present analysis). On that occasion, the observation was made that this concept had undergone a significant change over the years, following a process that could be seen as involving international practice, current legislative practice, and the requirements put forward, even recently, by associations representing the interests of producers and consumers.

International experience shows that the approach to the question of the quality of these rules is determined, initially, by the needs of a growing market, in which there are contradictory tendencies towards deregulation on the one hand, to make it easier for economic players to enter the market, and "hyper-regulation" on the other, with a view to regulating competition and protecting a variety of interests such as the environment, health and safety. These have had to be reconciled in order to arrive at the right "measure" of regulation and the right quality of rules.

These developments are in line with the similar process that has been going on at Community level, which has gathered momentum recently as a result of initiatives by the European institutions (where the issue is described as one of “better regulation”: as to this, see, especially, the major communiqué COM (2005) 97 of 16 March 2005 from the European Commission to the European Parliament and Council, entitled “Better Regulation for Growth and Jobs in the European Union” and the conclusions of the European Council in December 2005, which, despite the predominantly political nature of that document, devotes much space to the issue).

The Italian experience has also progressively fallen into line with this approach, having started from an older concept of “simplification” as merely limited to introducing greater flexibility into the organisation of government departments and their administrative processes.

However, as regards the specific goal of simplification now before us, it is important to delineate the extent to which it permits innovation within the current legal order, bearing in mind that this is not a vague general direction in legislative policy, but a criterion of delegation which, in the absence of any more detailed indications, must be analysed not in such a way as to reduce its scope, but at the very least, following a more traditional interpretation (the effects of such limit will also be dealt with below).

As to the objective scope of application of the criterion, it is necessary to decide on the meaning of the expression – not, in truth, very clear – “ *procedures for awarding contracts that are not a direct application of Community instruments*”. That expression is capable of two alternative meanings, depending on whether:

- the expression “*procedures for awarding contracts*” is to be understood in a restrictive sense, namely by reference only to the procedures taken as a whole; this means that subparagraph b) of the delegation (and the power to simplify that goes with it) applies only to those procedures said to be below the threshold, since these alone are not subject to the Community rules. Here there is an interpretation followed by the ministerial report (which, even so, does not expressly raise the question and thus offers no help in terms of reasoning);
- the above expression is to be understood in a broad general sense, as referring to “parts of procedures”, and not just the procedures taken as a whole, and thus, in a general sense, those “provisions concerning the award of contracts” that are not directly derived from Community law. This understanding would, for instance, make it possible also to apply subpara. b) to the national legislation passed over and above the Community laws for the award of contracts above the threshold, which from this perspective are most certainly “provisions concerning the award of contracts” that are not “a direct application” of Community law.

  The Section considers that this second interpretation is:

- more plausible in terms of the legislative decree, which would otherwise have made an express reference to procedures below the threshold;
- more consistent with the spirit of the delegation, which would otherwise appear contradictory if limited in its criteria by the “definition of the legal framework” referred to in its subject, since this “framework” must obviously, and necessarily, refer to the regime applicable above the threshold;
- more consistent with the essential reasoning underlying the Community reform and the evolution of the principles of the Treaty, all of which are directed at simplifying the award of contracts above the threshold;

- more in keeping with the continuing efforts of the European institutions to limit, as much as possible, the extra requirements added by Member States when transposing Directives (the phenomenon known as “goldplating”) which delay and obstruct the process of harmonisation of legislation required by the Treaty and which threaten to introduce de facto obstacles to the effectiveness of the single market.

1.5 The policy of reducing and reorganising legal instruments from the legal and formal standpoint is an integral part of the more general policy of assuring the quality of laws. This is leading to the “codification” of public procurement, a term that was recently revived after a number of years (and for the first time in the title itself) in Law no. 229 of 2003, and later expanded upon in Law no. 246 of 2005.

The draft before us, even though it falls outside the ambit of the process of codification (or reordering) set in motion by the laws mentioned above, is in fact called the “*Code on public… contracts*”, and, as such, it must be subjected to a systematic analysis.

The above-cited Opinion no. 2/04 of the Plenary Assembly held that, while the model of codification dating back to the Enlightenment is long dead, the need to group laws together in an organic way according to their subject matter is more pressing than ever: in recent years, this overriding necessity has resulted in the revival of the concept of codification, even if it obviously now takes a variety of forms. In practice, as the Council of State has already had occasion to reflect in some depth, codification is an idea that is changing: it goes hand in hand with the striking of temporary balances in an attempt to bring together the numerous special laws in the sector (often originating from the Community, as is the case here) in such a way as to confer on the body of law a systematic scope, by steering it towards regulatory notions that ensure that the corpus of rules as a whole is unified and consistent.

The Code on public procurement that is before us belongs to this “new generation” of codification, and to characterise it as such seems to be consistent with the overall objectives of the delegation of powers, even though there is no express provision to that effect.

The legal instrument used for all parts of this process – including the one we are concerned with – is the legislative decree, but this is most of all used to allow substantive reforms to the existing rules. In practice, while the common goal of both the previous single mixed “reordering” instruments and of the current “codifying” legislative decrees is clearly that of “reorganisation” of the sources of law and the drastic reduction of their numbers, the difference between single instruments and codes resides not only in the abandonment of a lawmaking tool but above all in the innovative legislative scope of the codes. As a result, this is not a case of codes that codify existing law but do not change it, as found in the French legal system (where, using that approach, which is faster because it avoids difficult problems of substantive reform, more than 50% of the subject areas covered by the legal system have already been codified) but of true codes that lay down fresh laws in a given field.

To conclude, the Section takes the view that, in the present case – notwithstanding the possible literal uncertainties, as well as those surrounding the expression “single instrument”, which is devoid of any technical meaning, used in Article 25, paragraph 1, subparagraph a) of the delegating law -- what it has before it is not a “single instrument”, even an innovative one, but rather a legislative decree that codifies the subject matter by introducing reforms made necessary by the substantive criteria of delegation set forth in Article 25, the first of which is the transposition of Community Directives.

2. The question of the relationship with existing laws must be approached on the basis of these considerations.

As drafted, the original text of Framework Law no. 109 of 1994 on public works laid down rules that were different, in part, from Community law, since they provided for a strict separation between the activities of design and execution of the works, limited resort to the criterion of the most economically advantageous bid, the use of private negotiation and the introduction of modifications, abolished the price review mechanism and also contained other provisions that were among the most reformist.

It is certain, too, that the question arises whether these provisions complied with the Directive in force at the time (no. 89/440/EEC, reproduced in Directive no. 37/1993/EEC). But, in its Decision no. 482 of 7 November 1995, the Constitutional Court declared that the questions raised by the Regions concerning the constitutionality of the procedures for selection of contracting partners and the criteria for awarding contracts laid down in Law no. 109 of 1994 were unfounded, holding that the provisions of that law, which contained methods for selecting contracting partners that were more stringent than those in the Community Directives, were in conformity with the Constitution, even in the light of the division of law-making competence as between the State and the Regions, because they were designed to provide even stronger guarantees for competition.

Since that time, there have been some adjustments to the principles in question, but their general outline has remained basically the same.

There can be no doubt that the “Code” marks a clear evolution in relation to what went before. However, the obligation deriving from the transposition of European Directives, taken together with the judgments of the Court of Justice, markedly reduces the possibilities open to the delegated legislator to follow the route marked out in its time by Law no. 109 of 1994, especially in relation to the most significant respects in which it departed from the rules in force: those of the integrated public procurement contract and the most economically favourable bid.

As to the first case, the ninth “whereas” of the Directive in question should be recalled, which makes clear the interest in having the governments provide both for the separate and joint award of contracts for the design and execution of the works, and requires the legislatures only to set the economic and qualitative criteria on the basis of which the said decisions must be taken.

The Court of Justice, in its turn, in its judgment of 7 October 2004 in the case of *Sintesi s.p.a.* -- which is relevant for the present interpretation because it was expressly cited among the delegation criteria in Article 25, paragraph 1, subparagraph d) of Law no. 62 of 2005 – drew the contours, albeit in a summary manner, of an administrative model capable of providing reasons for the choice of rules of competitive bidding, by taking into consideration the particular distinguishing facts of each situation and having the technical expertise necessary to implement an appropriate public procurement “policy”. As has already been explained in paragraph 1.3, that principle is one which is capable of considerable extension.

Added to this is the fact that the very criterion of “simplification”, having the content and scope defined above, is a further reason for reducing the constraints on the authorities awarding contracts, by allowing them – totally consistently with the logical reasoning of the Community – to make the best use of the possibilities the market has to offer.

Furthermore, it should not be overlooked that the new normative framework might once more give rise to some of the very problems the limitations in Law no. 109 of 1994 had sought to remedy. Although the Court of Justice did not deem it necessary to take them into account (in the *Sintesi s.p.a*. case, the subject of Judgment C-247/02 referred to above, Italy had relied on such necessity as a defence), such problems should not be underestimated, bearing in mind the current administrative and social context. It thus seems more necessary than ever to adopt the appropriate legal guarantees, and, in particular, when viewed in this perspective, the delegation criterion in subparagraph c), which seeks to ensure that the control conferred on the Authority for public works is strengthened and extended to cover all the sectors covered by the Directives, should be regarded as positive, and given support. There is no doubt that the role of that institution, far from being at odds with the system of autonomies, must be viewed as the point of reference and the necessary lynchpin of the system itself.

3. Among the issues of a general nature is also that of the division of law-making competences between the State and the Regions.

Contracts entered into by the government such as those for public works, services and supplies are not listed in Article 117 of the Constitution, but this does not mean that they fall under the residual legislative powers of the Regions because, as the Constitutional Court has held on the subject of public works, " these are legislative fields that do not have their own content as such but are classified according to the subject matter to which they relate, so that they can be treated each time either as falling within the exclusive legislative power of the State or under concurrent legislative powers" (Constitutional Court, no. 303/2003).

Placing them in the new constitutional order is thus not easy, for two reasons: for one thing, these rules are transversal in nature, having many aspects, and fall within other domains listed in the new Article 117 that are part of the exclusive competence of the State or of the concurrent competence of the State and the Regions; and, for another, a distinction has to be drawn between contracts entered into by the national government or national bodies and contracts that are of regional interest.

While it cannot be disputed that the national legislator is the holder of exclusive legislative power in the field of "national" public works, services and supplies, the field of competence of the State with regard to some of the subject areas listed in Article 117, paragraph 2 of the Constitution -- "*protection of competition", "civil legal order*", and "*jurisdictional competence and rules of procedure; administrative justice*" -- remains to be defined.

The first, "transversal", area, that of protection of competition, is the one that gives rise to the most sensitive problems.

The Constitutional Court has made it clear that the protection of competition is a transversal competence that involves several areas of subject matter and is characterised by its functional nature (it sets goals that determine how national legislative power must be exercised, rather than defining the subject matter of legislation), and serves to justify the intervention of the national legislator including in areas that in other respects fall under the competence of the regions (Constitutional Court, nos. 14 and 272 of 2004 and no. 29 of 2006). The Court also made it clear that this area encompasses competitive market relations as a whole, and its inclusion in Article 117, paragraph 2, subparagraph e) of the Constitution serves to emphasise that it was the intention of the drafter of the Constitution to bring together, for the benefit of the State, those instruments of economic policy that have to do with the development of the country as a whole and are capable of compromising the general

economic balance, as is the case with aspects of government contracts for works, services and supplies, defined therefore as the central core of the Code.

There can therefore be no doubt that the protection of competition also has a bearing on the sector that concerns us here, but its very transversal nature means that it crosses into other subject areas without, by definition, occupying the whole field, so that, in general, areas remain that are unaffected by this problem and where the normal division of competences can operate unchanged.

This can be seen in the present case, where, alongside the issues of competition, there are substantial questions of organisation, procedure, economics and others, among them the drawing up of the works, services and supplies, the management of the works, services and supplies, their auditing, and what functions and qualities are required of the person responsible for the process.

Because of these aspects, too – *a fortiori* – the Constitutional Court had good grounds for declaring that what counts is not the subject matter: depending on the purpose, this might fall not only within the exclusive competence of the State, but also within the concurrent or exclusive competence of the Regions. In the former case, regional legislative activity remains subject to the fundamental principles derived from the Code. In the latter, on the other hand, subject to a number of potentially major obligations (for instance, that of transparency and, in a general sense, the principles of law governing administrative procedure), regional legislation can have free rein.

As to the aspects relating to the qualification and selection of the bidders, the competitive process, the criteria for awarding the contract, the subcontracting of public procurement contracts and the powers of control conferred on an independent public procurement Authority, here we are concerned with the core content of the Code, and there is no doubt that, here, competition plays a predominant role, but it remains to be seen whether any possible scope remains for normative intervention at regional level.

Where contracts are concerned that are above the threshold, the choice made by the national legislator not to use up the discretionary margins left to it by the Directives opens up a residual margin to the Regions in which to act. But this is subject to the clarification that this margin may not be used to bring in measures that restrict competition – as would result, for example, from increasing the scope for private negotiation – but only allows interventions designed to bring about a wider application of the principle tending in the direction indicated in the above-cited judgment no. 482/95 of the Constitutional Court, which recognised that Law no. 109 of 1994 was in conformity with the Constitution precisely because it was designed to guarantee broader competition.

Added to this is the fact that protection of competition interferes with the unifying tendency of Community laws, which also seeks to guarantee to economic players similar, transparent and non-discriminatory conditions in public procurement, as the Constitutional Court acknowledged, in another area, in its Decision no. 336 of 2005, in the part in which it emphasised that the objectives fixed by Community Directives, although not having an impact on the distribution of competences as between the State and the Regions, can de facto require a special shift in the relationship between “rules of principle” and “rules of detail” in favour of a more incisive intervention by the national legislator.

In concrete terms, these considerations invite the conclusion that the decentralised exercise of legislative power is not possible in the following areas, which belong to what has been defined as the core content of the Code: the qualification and selection of bidders, the criteria

for awarding the contract, the subcontracting of government contracts and the control of award of government contracts by an independent authority.

By contrast, for the other aspects that still belong to this core, and especially for the competitive bidding procedures, it must be recognised that the Regions have law-making competence within the terms and limits set forth above; this follows from the holding by the Constitutional Court that a national instrument laying down rules that are so detailed as to be out of proportion to the goal of protecting competition amounted to an illegitimate restriction on regional autonomy (Constitutional Court no. 272/2004 on competitive bidding for local public services).

As to contracts with a value below the Community threshold, it falls to the State to lay down principles to ensure transparency, equal treatment and non-discrimination, without there being any need (from the Community standpoint) to ensure that the said rules are uniform down to the finest detail.

The substance of the area covered by these principles that are binding on the Regions has been defined by the constitutional case law, which, in relation to the acquisition of goods and service falling below the threshold, has upheld the constitutionality of applying to the Regions the principles derived from national legislation transposing Community laws, only where those principles impose a competitive bidding process, determine the subjective and objective domain to which the obligation applies, limit the resort to private negotiation, and impose civil sanctions and some forms of liability for breach of the obligation (Constitutional Court no. 345 of 2004, which makes a distinction between rules of principle in a transversal area such as protection of competition, and fundamental principles in cases where there is concurrent legislation).

Other areas remain that are reserved to national competence: the legal system and the jurisdiction of the courts.

Aspects relating to the conclusion and performance of contracts fall under the civil law of contract and the freedom to contract, hence within the domain of the "civil legal system", which remains within the exclusive competence of the State; however, it should be made clear that even within the framework of contractual performance questions of governmental organisation and accounting can arise, over which the State has exclusive competence only where central, and not regional, government is concerned.

On the contrary, the resolution of disputes falls within the "*jurisdiction and rules of procedure…administrative justice*" referred to in Article 117, paragraph 2, subparagraph l) of the Constitution (subject to verifying that this is compatible with the delegation of power).

3.2 By contrast, there are other matters governed by the Code that doubtless fall under the concurrent competence of the State and the Regions, such, especially, as matters inherent in the siting of public development works, the programming of public works, the approval of projects for purposes of town planning and compulsory purchase, which come within the domain of "*regional development*", or those relating to "*protection and security of employment*", and the "*promotion of cultural and environment resources*".

Furthermore, it is expressly provided that certain types of works fall within the concurrent competence of the State and the Regions, such for example as "*civil ports and airports; major transport and navigation networks; ….the national production, transport and distribution of energy*" (and so on, since it is clear that the State has exclusive competence over works, services and supplies which, irrespective of which government entity performs

them, relate for example to "*defence…; State security", "public order and security", "customs, protection of national frontiers*").

As to that competence, it has been explained that the formulation of fundamental principles is a matter for the State, and it should be mentioned on this point that the revision of the laws contemplated by the delegation also responds to the need to simplify the law, and such simplification must help to ensure respect for the principle of legal certainty, especially during the current phase of implementing constitutional reform, already fraught with uncertainties and difficulties that can only be partly resolved, after the event, when they are referred to the Constitutional Court.

As the Section has already pointed out, it therefore does not appear that asking the court in its interpretative capacity to determine all the fundamental principles in a field that falls within concurrent competences, satisfies the requirements of the above-mentioned principle of legal certainty (Council of State, Section on Normative Instruments, no. 11996/04 of 31 January 2005 and 4 April 2005).

3.3. That same requirement for clarity must be taken into account in implementing the criterion referred to in Article 1, paragraph 6, of the delegating law.

That criterion embodies the principle, which the Council of State in its advisory capacity has already upheld where lawmaking power is concerned, whereby the State can act to implement Community Directives covering subject matter within the exclusive or concurrent attribution of the Regions or the autonomous Provinces, where the Regions have failed to act, by adopting rules of a flexible nature that take effect at the last date for carrying out the Community obligation to transpose the Directive, and only with respect to those Regions that are in default (Council of State , Plenary Assembly no. 2/2202, 25 February 2002).

This criterion does not appear to have been followed in drawing up the Code, most probably because it was assumed – an assumption not shared by the Section, for the reasons set forth above – that all the Directives to be transposed concerned only matters reserved to the exclusive competence of the State.

As a result, the need arises to introduce a flexibility clause, and to indicate which parts of the Code are "flexible", as well as those that, by contrast, require action to be taken by the regional lawmaking authorities, either because they touch on domains that fall within the exclusive competence of the State or because they constitute fundamental principles subject to concurrent competence.

3.4 As to the autonomous Provinces of Trento and Bolzano, there cannot be a flexibility clause, since, as the Constitutional Court has confirmed on a number of occasions, it is not Article 10 of Law no. 62 of 1953 that applies to them, but Article 2 of Legislative Decree no. 266 of 16 March 1992 (the rule giving effect to their special status), under which the entry into force of new national laws requiring provincial legislation to be adapted does not mean that existing provincial laws that turn out to be contrary to the new obligations are repealed, but imposes only an obligation to adapt them, with the government having a special means of recourse available to challenge provincial laws that are not brought into conformity (Constitutional Court, no. 3/2003).

The delegation criterion referred to in Article 1, paragraph 6, of Law no. 62 of 2005, while it also refers to the autonomous Provinces, must, according to the Constitution, be interpreted in the light of the specific mechanism provided in the rules giving effect to their special status when adapting the laws in force in the autonomous Provinces of Trento and Bolzano.

In any event, the provisions of the Code relating to subject matter falling within the exclusive competence of the State still apply to the two autonomous Provinces, since even the attribution to the State of exclusive competence in transversal matters such as the protection of competition, does not amount to a new limitation on the broader forms of autonomy granted to the two Provinces, and is thus not applicable to them under the terms of Article 10 of Constitutional Law No. 3 of 2001; on the contrary, before the reform of Title V even entered into force, competition was an area reserved to the competence of the State, as was clear, too, from Decision no. 482/95 of the Constitutional Court.

Based on these considerations, the Section considers it necessary to reformulate Article 4 of the draft following the suggestions contained in the second part of this Opinion concerning the different Articles.

3.5. Whether each of these provisions belongs to one domain or another is a matter of importance, including with regard to the exercise of lawmaking power that the State, as has been shown, has retained only in respect of those areas in which it has exclusive competence.

The State may exercise this lawmaking power to execute and implement the Code in its entirety where “national” public works, services and supplies are concerned, while, as regards those of regional interest, this lawmaking power may only be exercised in a manner that is limited to those aspects set forth above, that fall within the domain in which the State has exclusive competence. In fact, both before as well as after the reform of Title V came into force, the Constitutional Court has on a number of occasions limited the exercise of the lawmaking power of the State in this very field of public works (Decisions no. 482/95, 302/03 and 303/03).

On the other hand, the enumeration of those points to be governed by the making of laws, contained in Article 5, paragraph 4 of the Code, could give the impression that the delegated legislator wished to submit to the lawmaking power of the State those questions already determined, as to which it does not, by contrast, seem possible to use the lawmaking function as a way of influencing the regional competences.

In order to avoid new uncertainties arising, it seems appropriate to make it clear in the text (see below, observations on Article 5 of the draft) that the rules must expressly provide that they apply to national public works, and also state which provisions are applicable to the Regions, to the extent that they intend to execute or implement the provisions of the Code with regard to subject matter over which the State has exclusive competence.

It follows that the transitional provisions in Article 253, paragraph 3, must be interpreted in the light of the principles that emerge from the decisions referred to above. In them, the Constitutional Court moreover upheld the constitutionality of the provision in Article 1, paragraph 3, of Presidential Decree no. 544 of 1999, according to which, under Article 10 of Law no 62 of 1953, the Regions, including those with special status, must apply the laws (in force prior to the reform of Title V) until such time as they had adapted their own legislation to the principles derived from the new law (Constitutional Court no. 302/2003, which however excluded the autonomous Provinces of Trento and Bolzano from the application of this conclusion, as has already been explained).

Therefore, the application of the rules must be limited, where the Regions are concerned, to those cases where there is no pre-existing regional norm, either because no such norm has ever been approved, or because it has been repealed because it contradicted the

fundamental principles derived from Law no. 109 of 1994, without the regional legislation subsequently having been adapted.

3.6. In conclusion, it must be noted that, in a situation such as this, conflicts can arise between the national and regional legislative competences on which the Constitution provides no express guidance; more specifically, in cases where there is a conflict between provisions on subjects some of which fall within the exclusive competence of the State, and others of which fall within the exclusive competence of the Regions, the Constitutional Court has recalled the principle of faithful cooperation, which is sufficiently elastic to allow each specific situation to be examined, and also the principle of predominance, in cases where the core content of a set of instruments clearly appears to belong to one subject rather than another (Constitutional Court no. 370/2003 and 50/2005).

From that perspective, in this area which presents so many problems of division of competences between the State and the Regions, the attention of the government should be drawn once more to the particular importance of the Opinion of the Unified Conference referred to in Article 8 of Legislative Decree no. 281 of 1997, which was handed down on 9 February 2006 at a time when the present Opinion was being drafted. While it is obvious that a favourable opinion of the Unified Conference cannot be viewed as decisive in overcoming potential problems of lack of constitutionality, just as a negative opinion does not obstruct the progress of the present decree, the need has, however, become apparent for the Regions to become more closely involved in the process of formulating national legislation, especially in cases where there has been no such shared involvement during the drafting phase of the text of the law.

The Section has taken this need into account, and has given close attention to the observations made by the Regions, some of which, indeed, it considers to be well founded.

4. The prior reconstitution of the capabilities for normative innovation given expression in the solution chosen by the delegating legislator, and the inclusion of these capabilities as part of the new organisational system of legislative and regulatory powers defined in Title V of the Constitution, make it possible – as will be seen from the analysis that follows of each of the main provisions – to clarify those rules that seem inconsistent and/or excessive by reference to the criteria for reconstitution.

As a preliminary matter, on the sensitive and complex issue of the division of competences as between the State, the Regions and the autonomous Provinces, reference should be made to the new formulation the Section proposes for Article 4, while the amendments proposed for Article 5 concerning the clarity of the headings of the rules should also be read.

Having disposed of the question of the division of competences, it seems helpful at this point to indicate solutions that, in the view of the Section, fall outside the scope of the delegation:

a) on the grounds that they enter into fields of normative innovation that are completely outside that perimeter: this covers innovations that deal with questions of institutional organisation and relationships of interpretation requiring explicit legislative scrutiny with regard to the order to be given to the interests at stake. In this respect, the following should be pointed out especially:

- as to the rules relating to the Authority supervising administrative contracts, Article 6, paragraph 7, subparagraph m) on dispute resolution;
- as to the award of contracts for works and services to “in house” providers, Article 1, paragraph 2, and Article 32, paragraph 3;

- as to the jurisdiction of the courts, Article 244 and the first two paragraphs of Article 245;

b) on the grounds that they are not susceptible of the reasonably broad interpretation that can, under the legal system, be given in the field of simplification, to the extent that this *topos* in the present phase of reordering of our legal system comes into play; in fact, these are substantive solutions that cannot be reduced to parameters that reflect the goals of procedural simplification, including on the specific issue of reduction o-in the time periods:

- Article 111 (the guarantee the bidders must give) which contains new obligations incumbent on professionals that affect the very conditions of exercise of their professional activity;
- Article 118bis (Activities that do not amount to the subcontracting of government contracts), in the part where it extends the rules for preventing organised crime, which are in any case to be strictly interpreted, to hitherto unforeseen situations;
- Articles 122 (Rules applying specifically to public works contracts falling below the threshold), 123 (restricted simplified procedure for public works contracts) , 124 (Public services and supply contracts that fall below the threshold), 125 (Works, services and supplies in the economy), 144 (Procedure for awarding contracts and publishing of notices of concessions for public works): these articles enact a number of provisions outside the scope of the delegation, such provisions having to do, especially, with the technique for increasing the amounts involved, and they do not seem to be justified by the goal of simplification, even when that term is taken in its broadest sense.

Contribution of the Council of State of Luxemburg

1. The Council of State of Luxemburg

The Council of State is called upon to issue an opinion on any draft legislation submitted by the government, and all legislative proposals submitted by one or more MPs. This includes draft legislation pertaining to the approval of treaties or international conventions. In terms of subordinate legislation approved by the government, draft regulations adopted to enact laws and treaties may only be submitted to the Grand Duke once the Council of State has given its opinion.

In the course of its examination, the Council of State specifically monitors the conformity of the proposed provisions with the Constitution, international conventions and treaties, and general legal principles stipulated in the Constitution and in the international conventions to which the states are party (principles such as legal certainty, limits regarding the retroactive nature of legislation, the separation of powers, the rule-of-law state and budgetary ethics). As a result, the examination in question focuses mainly on the legal quality of the draft submitted to it.

If the Council of State believes that a legislative proposal violates the Constitution or any international conventions or treaties, including European directives, or contravenes any general legal principles, it is required under the organic law of 12 July 1996 to state this in its opinion.

The Council of State in Luxembourg always mentions specifically in its opinions the legal principle upon which the opinion is based, so that the public and politicians are aware of this.

The Council of State also monitors the technical quality of the texts submitted to it. In terms of the political quality (policy) of draft legislation or a legislative proposal, the Council of State rules on this aspect, where appropriate, essentially within the framework of general considerations of its opinions. The Council also verifies the quality of the texts submitted to it in the light of the policy underlying them. In Luxembourg, three possible scenarios may arise:

-the opinion is limited strictly to comments, in which case it is unlikely that it will be followed;

- the opinion contains an alternative proposal, in which case it is much more likely that it will be followed;

- the Council of State formally opposes the text submitted to it, *in which case parliament must vote twice on the text for it to be adopted.*

2. Draft Bill transposing Directive 2004/25/EC of the European Parliament and the Council of 21 April 2004 on takeover bids.

I. The context

1. *The transposition process*

Subject : A Directive that seeks to define the minimum guidelines for the conduct of takeover bids and to guarantee a sufficient level of protection for shareholders

Instrument: a draft Bill

2. *The constitutional framework*

Article 83*bis* of the Constitution:

"The Council of State is called upon to give its Opinion on draft Bills and proposed legislation as well as any amendments that might be suggested to them, together with all other issues that shall be referred to it either by the Government or by law. It shall give its Opinion within the time-limit fixed by law on Articles voted by the Chamber pursuant to Article 65.

The organisation of the Council of State and the way in which it exercises the functions attributed to it are governed by law."

Article 59 of the Constitution:

"All laws shall be subject to a second vote, unless the Chamber, by agreement with the Council of State, decides otherwise in public sitting. – There shall be an interval of at least three months between the two votes."

3. *The procedural history*

Directive 2004/25/EC of 21.4.2004
O.J.E.U. of 30.4.2004
time-limit for transposition: 26.5.2006 (Art. 21)

Draft Bill
submitted: 7.2.2006
put before the Council of State: 7.2.2006
amendments: 23.3.2006
revised version: 28.3.2006

Council of State
Opinion: 7.3.2006
Supplementary Opinion: 4.4.2006

Report of the Finance and Budget Committee
27.4.2006

Dispensation from the second vote under the Constitution (Constitution, Art. 59)
Chamber of Deputies: 4.5.2006
Council of State: 16.5.2006

Law of 19.5.2006

publication and entry into force: 22.5.2006

II. The issues at stake

1.° Transposition, within the time-limit laid down, of Directive 2004/25/EC

2.° The takeover bid Mittal Steel was planning for Arcelor, which was taking place in a legal vacuum.

The commentary to Article 20 of draft Bill N° 5540 made the "discreet" observation that "there may well be one or more takeover bids under way at the time this law comes into force. It is absolutely necessary, therefore, to make it clear that the new law will apply to any such takeover bid from that date onward, but without the need to repeat steps that have already been validly taken… ".

3.° Political and media reactions and repercussions, at national, European and global level.

III. The approach of the Council of State

See the extract of the report of the Finance and Budget Committee of the Chamber of Deputies:

"The Council of State, in both its Opinion and its Supplementary Opinion, followed its own process of reasoning. That reasoning relies on strict legislative analysis, and the Finance and Budget Committee approves of the initiative of the *Haute Corporation*, which has, undoubtedly, helped to considerably improve the original text, while at the same time preserving its substance and the main thrust of its argument.

The Council of State in its Opinion put forward six formal objections to the draft Bill. Far from amounting to a rejection of the substantive approach of the authors of the Government draft, this Opinion clarified, among other things, those items on which the Council of State considered that the powers of the Supervisory Committee for the Financial Sector (*Commission de surveillance du secteur financier*, or CSSF) were excessive, this being the authority set up under the draft Bill to regulate takeover bids. The Committee took its lead from the Council of State and revised the essential points to bring them into line with our normative hierarchy.

Since all the formal objections contained in the Opinion of the Council of State related to the discretionary powers of the CSSF, as well as its power to make decisions and to act, the Committee followed all the drafting proposals in the Opinion, so as to ensure that the powers of the supervisory authority are in conformity with its position as an institution.

The Council of State gave a Supplementary Opinion on the proposed amendments put forward by the Committee, once all the opinions on the Government's draft Bill had been received. In that Supplementary Opinion, it raised a formal objection to one amendment, which in its view contravened Articles 43 and 44 of the EC Treaty on freedom of establishment. A further formal objection concerned an amendment which, according to the Council of State, could have had the effect of including in the draft Bill provisions that relate to situations other than takeover bids, or that arise out of such situations. Lastly, the Council of State based its final formal objection on the consistent case-law of the European Court of Human Rights whereby the legislator is prohibited from interfering in ongoing legal proceedings, as the Council of State considers that one of the amendments proposed by the Committee might have such an effect.

While the Committee would have wished to maintain those amendments, it nonetheless understands the legislative concerns of the Council of State, which for many years has set its face against "catch-

all" laws and legislative confusion. The Committee can also accept the refusal on the part of the Council of State to agree to provisions which, in its view, either breach or contradict the higher norms of Community law, or go against the established principles of the case-law of the ECHR.

As to form, it should be noted that the Committee has followed the Council of State with respect to all the formal objections to its proposals that appeared in the Supplementary Opinion."
(Doc. parl. N° 5540[5], p. 10-11)

The formal objections, all of which were based on legal grounds, gave a clear message that, if the legislature did not comply, the Council of State would refuse to consent to dispense with the second vote required by the Constitution (Constitution, Art. 59)

IV. Reactions

In the Chamber of Deputies, the Council of State was criticised for "forcing the hand of the legislature", given the urgency of the draft, and for having exceeded its powers. It was also recalled that the Council of State was not an elected body, and the statement was made that it thus lacked legitimacy …. (37th public sitting, 4 May 2006, p. 397 to 403 / www.chd.lu).

V. Summary

Policy and law do not always sit well together.
The Council of State has not departed from its guiding principle: to preserve the rule of law, in the broadest sense of the term.
The law passed meets this concern. (Law of 19 May 2006, published in *Mémorial A*, N°86, p. 1510 et seq.)

3. Amendment of Article 11 of the Constitution

1. Framework for amendment of the Constitution

Amendments to the Constitution take the same form prescribed for the adoption of laws, while at the same time they must also comply with the special requirements laid down in Article 114 of the Constitution. 7

" ***Art. 114***.- *Every amendment to the Constitution must be adopted in the same terms by the*

7 This text was introduced into the Constitution by the amendment of 19 December 2003, which simplified the procedure for adoption of amendments to the Constitution by comparison with the previous text. Formerly, a declaration of amendment of one or more of the provisions of the Constitution automatically triggered the dissolution of the Chamber; a quorum of three quarters of the deputies was required to be present, moreover, in order for an amendment to be adopted by the Constituent Assembly resulting from the elections organised following the dissolution of the Chamber.

Chamber of Deputies in two successive votes, separated by an interval of at least 3 months.

No amendment shall be adopted unless it obtains the votes of at least two thirds of the members of the Chamber, not counting proxy votes.

The text adopted by the Chamber of Deputies on first reading shall be submitted to a referendum, which shall take the place of a second vote of the Chamber, if during the two months following the first vote this is requested either by more than one quarter of the members of the Chamber, or by twenty-five thousand voters registered on the electoral roll for Parliamentary elections. The amendment shall be adopted only if it gains a majority of the votes validly cast. The referendum shall be organised in accordance with law."

By analogy with proposals for legislation, the initiative for a Constitutional amendment may come either from the Government, or from the Chamber8. The Council of State shall in its turn be called upon to give its Opinion on draft amendments to the Constitution and any amendments made to them (Constitution, Art. 83*bis*).

In practice, the initiative for constitutional amendments normally comes from the Chamber of Deputies, and at present it is the Chairman, or more rarely another member of the Parliamentary Committee on Institutions and Constitutional Amendment, that puts forward the draft amendments to be examined by that Committee.9

2. Article 11, the subject of amendment

Under the procedure for amendment of Article 11 of the Constitution, discussed here, the first proposal for amendment was submitted on **19 April 1994** by the Chairman at that time of the Committee on Institutions and Constitutional Amendment (*doc. parl.* n° 3923). The procedure, which has still not been concluded for part of the amendments envisaged at the time, provides an illustration of the way in which the procedure for constitutional amendment is set up, and also of the way in which dialogue takes place between the institutions involved in that procedure. In the case under review, there has unfortunately been no direct formal intervention either by the Government, nor the professional bodies that might have been directly affected by it.

Article 11 is one of the provisions in the Constitution relating to fundamental rights and freedoms that make up Chapter II of our basic charter entitled "Public freedoms and fundamental rights ". Article 11 is somewhat complex, because of the multiple subjects it covers. This heterogeneity is, to a great extent at least, responsible for the slow unfolding of the process now under way for the updating of several aspects of the form and substance of the provisions referred to.

The original text of Article 11 dates back to the Constitution of 1848. It survived in the successive Constitutions of 1856 and 186810. Only with the effects of the amendments of 21 May 1948 did the content of this Article fundamentally change. The Constituent Assembly at the time decided to supplement it by inserting 1) a guarantee of the natural rights of the

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8 "***Art. 49***.- *The Grand Duke shall present to the Chamber legislative proposals or draft bills he wishes to submit to it for adoption.*
The Chamber shall have the right to propose draft bills to the Grand Duke."

9 While, normally, legislative drafts coming from the Government are called draft bills, and those coming from a Deputy are called legislative proposals, (cf. Art. 49, cited above), the procedural practice with regard to Constitutional amendments breaks with this terminology, describing parliamentary initiatives for Constitutional amendments either as bills or proposed legislative amendments, without distinction.

10 Constitution of 1868: "**Art. 11**.- *There shall be no distinction between orders in the State.*
Citizens of Luxembourg shall be equal before the law; they alone shall be eligible for civil and military service, save as may be otherwise provided by law in particular cases."

individual and the family, 2) a guarantee of the right to work and the right of every citizen to exercise the said right, 3) organised social security, healthcare, and guaranteed rest time for workers and freedom for the trade unions, 4) freedom of trade and industry (including the exercise of the professions and agricultural work), except where restricted by law.11

The 1994 draft amendments pursued a number of goals:

- deletion of the provision dating back to the 1848 Constitution that there was to be no distinction between orders in the State;
- eligibility of foreigners to civil and military service under conditions to be decided by law;
- clarification of the guarantee of natural rights by prohibiting all discrimination based on sex, descent, nationality, origin or philosophical or religious persuasion;
- introduction of the guarantee by the State of protection of the human and natural environment.

In its **Opinion of 6 May 1994** (*doc. parl*. n^{os} 3895^{1} - 3913^{1}, 3685^{1}, 3686^{1}, 3914^{1}, 3922^{1} - 3925^{1}), which moreover was not limited to the draft amendment to Article 11, cited above, but expressed a position on no less than 21 other amendments to the Constitution, the Council of State declared itself in agreement with the main thrust of the changes proposed, but, after a careful analysis of the drafting proposals put to it, suggested changes to the wording.

3. Equality of citizens of Luxembourg before the law and access to public sector employment

In the context of its amendments of 10 July 1998, the Committee on Institutions and Constitutional Amendment (*doc. parl*. n° 3923^{2}) suggested that the draft amendments of 1994 be split, so as to focus in the first instance on amending only paragraph 2 of Article 11 to allow foreigners to have access to public sector employment. That option had been dictated by the **Judgment of 2 July 1996 of the Court of Justice of the E.C**. holding the Grand Duchy of Luxembourg liable for having failed to open up its public services to nationals of other Member States of the European Communities, and by the subsequent legislative proposal by the Government that required a prior amendment to the provision of the Constitution in question. In its **Supplementary Opinion of 20 October 1998** (*doc. parl.* n° 3923^{2}), the Council of State endorsed this approach, while at the same time suggesting drafting changes to the text proposed by the Parliamentary Committee which was intended to become a new Article 10*bis* of the Constitution.

The Parliamentary Committee responded on 2 December 1998 with an alternative suggested text (*doc. parl.* n° 3923A) which gave rise to a **second Supplementary Opinion of 12 January 1999** (*doc. parl*. n° 3923A^{1}) in which the Council of State insisted that the text proposed in its 1998 Opinion, cited above, was still relevant, and, in particular, wished to

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11 1948 Amendment: **Art. 11.-** (1)
(1) There shall be no distinction between orders in the State.
(2) Citizens of Luxembourg shall be equal before the law; they alone shall be eligible for civil and military service, save as may be otherwise provided by law in particular cases.
(3) The State shall guarantee the natural rights of the individual and of the family.
(4) The law shall guarantee the right to work and shall ensure that each citizen may exercise the said right.
(5) The law shall organize social security, healthcare and rest time for workers and shall guarantee freedom for the trade unions.
(6) The law shall guarantee the freedom of trade and industry, the exercise of the professions and of agricultural work, subject to any restrictions that the legislature may impose."

maintain the principle of the equality of Luxembourg citizens in the body of Article 11, with the question of access to employment in the public sector being made the subject of a new Article. The Parliamentary Committee largely took this into account, but still put the two ideas together in one new Article of the Constitution (cf. amendment of 21 January 1999 – *doc parl*. n° 3923A[2]). In its third Supplementary Opinion of **9 February 1999** (*doc parl*. 3923A[3]) the Council of State accepted this, while at the same time suggesting a reformulation of that paragraph of the new Article 10*bis*.

The amendment of 29 April 1999 introduced Article 10*bis* into the Constitution:

"***Art. 10*bis.-** *(1) Citizens of Luxembourg shall be equal before the law.*

(2) They shall be eligible for all public service, both civil and military; the law shall determine the eligibility for such service of persons who are not citizens of Luxembourg."

4. Equality of men and women

According to a letter dated 28 January 1999 from the President of the Chamber of Deputies to the Council of State12 (*doc parl*. n° 3923B), the Committee on Institutions and Constitutional Amendment resumed its examination of the draft amendment of the other paragraphs of Article 11 begun in 1994, and added new proposed amendments. The draft contained the following:

- deletion of the provision whereby there was no distinction between orders in the State;
- introduction of the principle of equality of men and women, making it possible for the law to lay down appropriate measures to bring about such equality;
- a guarantee of protection of the family and private life;
- formal recognition of the right to strike and provision in the law for combatting poverty and for the integration into society of persons with a handicap;
- a guarantee of protection of the human and natural environment.

It should be noted that the insertion of the amendment concerning the equality of men and women as one of the proposed changes was the result of an opinion given on 18 November 1998 by the Parliamentary Committee on Equality of Opportunity between Men and Women and Female Advancement (*doc. parl*. n° 3923[3]).

In its **Supplementary Opinion of 27 April 1999**, the Council of State gave its detailed position on the revised version of the amendments to be made to Article 11 of the Constitution. While it accepted the deletion of paragraph 1, it proposed changes to the wording of the other amendments. The reply of the Committee on Institutions and Constitutional Amendment on 21 February 2000 (*doc. parl*. n° 3923B[2]) focused on the question whether, on the one hand, the term "fundamental rights of the individual and the family" would not be preferable to the notion of "natural rights" and, on the other hand, what must be the prerogatives and obligations of the State to ensure "equality in the rights and duties of men and women". Moreover, the Higher Council for Handicapped Persons submitted its opinion to the institutions on 15 September 2000 (*doc. parl*. n° 3923B[3]). The Council of State took a position on the new version in its **second Supplementary Opinion of 25 February 2003** (*doc. parl*. n° 3923B[4]) confirming its reservations about replacing the

12 Art. 19, §2 of the law of 12 July 1996 reforming the Council of State: "(2) Proposed amendments to draft bills and legislative proposals by the Chamber of Deputies as well as Opinions of the Council of State thereon shall be transmitted via the Presidents of the two institutions."

adjective "natural" by "fundamental" where the rights of the individual and the family were concerned, and proposing a compromise formula to set limits to the intervention of the State to guarantee equality between men and women. On that point, the Parliamentary Committee on Equality of Opportunity between Men and Women and Female Advancement, took a position on the second part of the wording over which there was a difference of views as referred to above (cf. report for opinion of 2 June 2003 – *doc. parl*. n° 3923B[5]). On 7 October 2003, the Committee on Institutions and Constitutional Amendment (*doc. parl*. n° 3923B[6]) tried, by putting forward a version amended to take account both of the Opinion of the Council of State of 25 February 2003 and the report of the Parliamentary Committee on Equality of Opportunity of 2 June 2003, to find a compromise particularly as to the language on "equality between men and women". The Council of State once again took a position in its **third Supplementary Opinion of 16 March 2004** (*doc. parl*. n° 3923B[7]). In order to avoid imposing on the State *an obligation of result* with regard to the implementation of equality between men and women, which the Council of State viewed as *fraught with risks* especially in legal terms, the Parliamentary Committee eventually proposed that the Chamber of Deputies should replace the wording that said "the State shall adopt measures to eliminate obstacles that might exist to equality between men and women and to promote de facto equality in the exercise of rights and duties" with a softer formulation: "The State shall ensure the active promotion of the elimination [of obstacles13] that might exist to equality between men and women" (*doc. parl*. n° 3923B[8]).

It was this version that was finally used in the amendment to paragraph 2 of Article 11 of the Constitution on 13 July 2006 (*Mém*. A 124 of 19 July 2006):

> "*(2) Men and women shall have equal rights and duties.*
>
> *The State shall ensure the active promotion of the elimination of obstacles that might exist to equality between men and women.*"

5. Protection of the environment and protection of animals

Within the framework of the amendments proposed to the Council of State in a letter from the President of the Chamber of Deputies dated 3 November 2004 (*doc. parl*. n° 3923B[8]), the Committee on Institutions and Constitutional Amendment resumed its work of examining the proposed amendments to Article 11 and supplemented its earlier statement by making two further changes. It wished it to be made clear, on the one hand, that protection of private life was to be guaranteed by the State "except only in those cases laid down by law" and, on the other hand, it proposed that protection of animals be added to the language on protection of the environment.

In its **fourth Supplementary Opinion** (*doc. parl*. n° 3923B[9]) **of 14 February 2006**, the Council of State recommended, on the first new point, that the usual formulation should be retained as it appeared elsewhere in the Constitution, by providing that the principle of the State's guarantee was subject to no exceptions other than those " laid down by law".

The work of analysing how to retain protection of the environment as a constitutional principle also provided the Council of State with the opportunity to emphasise, from a more general perspective, the difference in treatment in constitutional doctrine between fundamental rights and goals with constitutional importance , which, unlike the former, are not directly "*justiciable*"; while they create a duty to act on the part of the State government,

13 Translator's note : words omitted in the French.

they do not by themselves, however, create rights as between citizens or rights on the part of citizens vis à vis the government, and as such they are not directly applicable nor can they be invoked before a court.

As to the express mention of protection of animals, the Council of State was reluctant to accept this, taking the view that it was, in many respects, only one particular aspect of the protection of the natural environment.

On the basis of the Opinion of the Council of State of 14 February 2006, the Parliamentary Committee decided, on the one hand, to follow the Council of State in its proposed wording as to the "protection of private life, except in those cases laid down by law" and to rework the text concerning the protection of the human and natural environment and the protection of animals, with both of these two principles to be put into one new Article 11*bis* (cf. letter from the President of the Chamber of Deputies of 27 March 2006 – *doc. parl*. n° 3923C).

In its **fifth Supplementary Opinion of 4 July 2006** (*doc. parl*. n° 3923C[1]), the Council of State agreed that protection of the natural and human environment and protection of animals should be put in a new Article 11*bis* of the principles of the Constitution, and drew attention to a number of inadequacies in the drafting of the text adopted by the Parliamentary Committee.

At the time of finalising this commentary, the new Article 11*bis* of the Constitution14 has not yet been submitted to the Chamber of Deputies for approval pursuant to the requirements of Article 114 of the Constitution.

6. Grant of regulatory powers to professional bodies

Under the Constitution, regulatory powers have traditionally been reserved to the Grand Duke in his capacity as Head of State exercising executive powers at the same time.

As part of the amendments of 19 November 2004, the relevant provisions of Articles 32 and 36 of the Constitution were brought up to date with the following goals in view:

- to maintain the prerogatives of the Grand Duke in regulatory matters;
- to clarify regulatory powers in those areas the Constitution has reserved to the law;
- to insert in the Constitution provisions to allow the Grand Duke to take the necessary measures in an international crisis;
- to provide a constitutional basis for the regulatory powers of members of the Government, public institutions set up by law, and professional bodies concerned with the exercise of the professions.

In the context of the review cited above, (*Mém.* A-N°186 of 25 November 2004), the Constituent Assembly decided to insert into paragraph 6 of Article 11 provisions concerning

14 Allowing for future changes to take account of the observations put forward by the Council of State in its Opinion of 4 July 2006 (*doc. parl*. n° 3923C[1]), the draft text of new Article 11*bis* put forward by the Committee on Institutions and Constitutional Amendment will read as follows:
"**Art. 11*bis*.-** *The State shall guarantee the protection of the human and natural environment, by working to establish a sustainable balance between the conservation of nature, in particular its capacity to regenerate itself, and satisfying the needs of present and future generations.*
It shall promote the protection of animals."

the regulatory powers that may be granted by law "in relation to the exercise of the professions to professional bodies having legal personality".

Since the 19 November 2004 revision, paragraph 6 of Article 11 ("*The law shall guarantee the freedom of trade and industry, the exercise of the professions and of agricultural work, subject to any restrictions that the legislature may impose*") has been supplemented by the following text:

> *"In relation to the exercise of the professions it may grant the power to regulate to professional bodies having legal personality.*
>
> *Such regulation may be subject to approval, cancellation or suspension by law, without prejudice to the powers of the courts or administrative tribunals.*"

7. The outcome of the other proposed amendments to Article 11

In the course of the dialogue between the Parliamentary Committee on Institutions and Constitutional Amendment and the Council of State concerning amendments to Article 11 of the Constitution, the two institutions reached agreement on other planned changes to Article 11 in respect of which "the Parliamentary Committee has endorsed a number of proposed drafts put forward by the Council of State" (cf. *doc. parl*. n° 3923C cited above).

If the Chamber of Deputies should decide to go along with the Parliamentary Committee with regard to the new wording of Article 11, it will read as follows, bearing in mind that the provision whereby "*There shall be no distinction between orders in the State*" will be deleted:

> " ***Art. 11*.- (proposed)** *(1) The State shall guarantee the natural rights of the individual and the family.*
>
> *(2) 15* (amendment of 13 July 2006) *) Men and women shall have equal rights and duties.*
>
> *The State shall ensure the active promotion of the elimination of obstacles that might exist to equality between men and women.*
>
> *(3)* **The State shall guarantee the protection of private life, except only in those cases laid down by law.**
>
> *(4) The* **law** *shall guarantee the right to work and* **the State shall ensure that** *each citizen may exercise the said right. The law shall guarantee the freedom of trade unions* **and shall recognise the right to strike.**
>
> *(5)* **The law shall govern the principles of** *social security, the protection of health,* **the rights** *of workers,* **the fight against poverty and the social integration of citizens with a handicap***.*
>
> *(6) The law shall guarantee the freedom of trade and industry, the exercise of the professions and of agricultural work, subject to any restrictions that* **the law** *may impose.*

15 cf.paragraph 3 above: amendment of 29 April 1999 introducing Article 10*bis*.

*(*amendment of 19 November 2004*) In relation to the exercise of the professions it may grant the power to regulate to professional bodies having legal personality.*

Such regulation may be subject to approval, cancellation or suspension by law, without prejudice to the powers of the courts or administrative tribunals."

Contribution of the Council of State of The Netherlands

1. The Council of State of The Netherlands

The government is obliged to request the opinion of the Council of State regarding draft legislation, draft royal decrees, and international treaties submitted to parliament for approval. Parliament must consult the Council on legislative proposals before they are handled. The Council does not issue opinions to other government institutions.

The Council monitors three aspects of legislative proposals: quality in terms of policy, legal quality and technical quality. The Council has developed a monitoring framework focusing mainly on the following points:

Quality in terms of policy

With regard to quality in terms of policy, the Council takes an analytical approach to the policy underlying the text submitted to it.
This specifically involves knowing which problem the legislator wishes to resolve or reduce, whether it can be reasonably assumed that the text submitted will enable the attainment of the desired objective, whether it will be possible to apply it, whether its application can be monitored and whether it will be effective.
In this context, the Council asks the following questions, among others: Must and can the problem in question be resolved by way of legislation and regulation? Does this make the proposal necessary, and is its necessity adequately motivated? Is the proposal appropriate, effective and balanced in terms of the advantages and disadvantages associated with it? Can the proposal be applied, can its application be monitored and do the required instruments for its application exist?

Legal quality

With regard to legal quality, the Council mainly examines the text to ensure that it complies with higher-level legislation, general legal principles, the principles of democracy and the rule of law, and also to establish whether it fits into the
respective legal system. In this context, the Council asks itself the following questions, among others:
Does the proposal violate any piece of legislation of a higher level such as the Constitution, international conventions (the Convention on Human Rights, for example) or Community law? Does the proposal comply with the principles of democracy and the rule of law?
Is the proposal in line with the principles of good legislation such as equality under the law, legal certainty, appropriate legal protection and proportionality?
Can the proposal be integrated into the present legal system?

2. Advisory opinion of the Council of State of 12 October 2004 concerning the bill to amend the Municipalities Act in connection with the introduction of directly elected mayors (Directly Elected Mayors (Introduction) Act)

Background information on the bill

Unlike the position in most European countries, mayors in the Netherlands are not elected by local residents but are appointed by the government. Nor is the mayor the head of the municipality. Under the Constitution a municipality is headed by the municipal council, which is directly elected by local residents. However, the mayor does preside over council meetings. He is a public servant and is expected to adopt an independent position both in relation to higher-tier government authorities and within his municipality.

Although the mayor is chosen by the government, the influence of the municipal council over such appointments has greatly increased in the last 20 years as a confidential committee established by the municipal council now advises on applications for the post. The committee's recommendation is adopted by the government in over 90% of cases.

The government's arguments for introducing elected mayors were that the position of the mayor should be strengthened and that the system of government appointment had outlived its usefulness. As regards the former argument the government pointed out that the position of the mayor had weakened over the years, thereby creating a gap between what the public expected of the mayor and the mayor's actual power (i.e. status incongruence), and that disasters such as the firework explosion in Enschede and the café fire in Volendam (16) had shown that mayors had too few powers to guarantee the safety of the public and enforce the relevant rules.

As regards the latter argument the government maintained that it was undesirable for mayors to derive their legitimacy from nomination or appointment by a municipal council. Because the government considered a return to the old situation in which the government appointed the mayor without consultation with representatives of the municipality to be unthinkable and undesirable, it argued that there was only one remaining option, namely direct election by the local electorate. In this way the electorate would be able to influence not only oversight over the municipal executive but also the work of the executive itself. At the same time, the system would allow elected mayors to render account to the local population for their policies.

The Council of State's advisory opinion

The advisory opinion focused on policy analysis. The Council's remarks related to the arguments put forward in the explanatory memorandum for introducing the direct election of mayors and, above all, to the possible consequences of the bill. The Council took the view that the bill required further consideration by the government.

PART I: THE ARGUMENTS FOR A DIRECTLY ELECTED MAYOR

In view of the analysis of the problem in the explanatory memorandum, the Council of State first of all considered the position of the mayor in a broader context and identified various aspects of the historical development of the office that it considered relevant. It then

16 Two recent major accidents that resulted in many fatalities and injuries and caused great public consternation in the Netherlands.

reviewed the grounds given in the explanatory memorandum for introducing the directly elected mayor and, finally, discussed the question of whether these 'grounds and considerations' constituted urgent reasons for so doing.

Mayors and political change
The Council of State examined the bill first of all in the light of the changes that had occurred in municipal executives. The central issue for the Council was whether there were indications that the relationship between the mayor and the public formed a major problem.

The remainder of parts I and II is taken verbatim from the advisory opinion.

'As regards the development of the office of mayor and the mayor's relationship with the public and with other government bodies, the Council feels it important to draw attention to the following.

(a) Whereas mayors were originally recruited from the upper echelons of society, increasing efforts were made from the 1930s onwards to recruit more broadly. One result was a corresponding narrowing of the social gap separating mayors from the citizens and their fellow administrators.

(b) The number of small municipalities has declined drastically as a result of the continuing process of redrawing local government boundaries. (17) In consequence, the average mayor is no longer the sole full-time local administrator in the municipality, but has alongside him aldermen who are fully-fledged administrators and for whom the position of alderman is just as much a full-time position as that of the mayor. Indeed, over the years many of those appointed as aldermen have been of greater significance to their municipalities than many a mayor. It follows that despite all the differences there is now a greater measure of equivalence in this respect between the offices of alderman and mayor in terms of governance.

(c) The mayor's relationship with the municipal council and the councillors has been placed on a more equal footing by various statutory developments. It is important to note in this connection that the mayor has had an obligation to inform and account to the municipal council since 1969 and an obligation to provide information at the request of only one councillor since 1994. Municipal councils have acquired increasing influence over the appointment, reappointment and dismissal of mayors. In keeping with the codes of practive for ministers at central government level and aldermen at local government level, the custom has also evolved that the mayor does not make decisions of any importance without first consulting a committee of the municipal council or, sometimes, the leaders of the political groups represented on the council.

(d) Whereas the mayor originally held the most important portfolio in the municipal executive (except in the largest municipalities), the advent of full-time aldermen has meant that, apart from chairing the municipal executive, the mayor now has a portfolio more or less on the same level as those of the aldermen. As the municipal executive (formed by the mayor and aldermen) became politicised in many municipalities in the 1970s and therefore took office on the basis of a clear political programme, important 'political' portfolios were often no longer assigned to the mayor. This was viewed by many of the mayors concerned as weakening their position within the executive. In recent years, however, the pendulum has started to swing back.

17 Scale enlargement as a result of mergers of municipalities.

(e) However, the development described at (d) did mean that more emphasis came to be placed on the mayor's traditional role of ensuring observance of democratic and political principles and proper treatment of the public by municipal departments. This role was originally reflected only in the mayor's power of submitting decisions to the provincial executive for review if in his view they qualified for immediate annulment by the Crown as being contrary to the law or the public interest. The task of monitoring observance of the rules of democracy and statutory rules and ensuring the proper treatment of the public was something that could be entrusted to mayors on account of their relative independence of the municipal council and the aldermen, which results to a large extent from the manner of their appointment and is strengthened by the fact that they are appointed for a term of six years, whereas councillors and aldermen are elected for a term of four years. This mayoral function, which is also sometimes described as ensuring 'good governance', was expressly strengthened and widened in the Municipal Authorities (Separation of Powers) Act by amendments to such provisions as section 53a, subsection 1, of the Municipalities Act (promoting unity in the municipal executive's policy) and section 170, subsections 1 (quality of civic participation procedures and fair and correct processing of objections and complaints) and 2 (annual report for the public).

Various conclusions can be drawn from the above. First, the main developments affecting the office of mayor have taken place as a result of changes in society, in the setting in which mayors operate and in the manner in which municipal executives function, rather than as a result of statutory provisions specifically intended to make changes. Second, the ability of the mayor to function autocratically has ended: the all-powerful patrician figure of former times has evolved, particularly since the 1960s, into just another member of the municipal executive, albeit one with a special function. And, finally, it should be noted that the mayor's position has ceased to 'weaken' (something which did not happen in all municipalities by any means) and is now, if anything, starting to strengthen again. The Council will return to these findings later.

Weakened position of the mayor – status incongruence

Some of the points made above at (e) have a bearing on what the explanatory memorandum calls 'the weakened position of the mayor'. First of all, it must be pointed out that in so far as such a weakening has occurred it has been a result of changing attitudes, such as politicisation and the adoption by municipal executives of clear political programmes. These developments are not irreversible, as we have seen. While the mayor's position may have 'weakened' in this way, it has also been strengthened in various respects, for example through the mayor's role as coordinator and as guardian of good, democratic and careful governance.

Anyone who is at all conversant with public administration generally has a fairly realistic idea of what a mayor can and cannot do. Nonetheless, it is true that in practice people sometimes expect more of mayors than they can deliver and that some mayors are troubled by this. In fact, other holders of public office are troubled by the same problem. But even if it is accepted that this incorrect image is a major problem, it would make more sense to take measures to ensure that the image is in keeping with reality.

Need to strengthen the mayor's powers in the area of public safety and security

The Council of State would make the following points about the argument in the explanatory memorandum that the powers of the mayor need to be strengthened. It is generally known (and was indeed emphatically pointed out in the report of the Polak/Versteden Committee on the café fire in Volendam, to which the explanatory memorandum refers) that the authority –

and hence the responsibility – for dealing with unsafe situations is divided among many administrative authorities. These may be municipal bodies, water board executives, provincial authorities or central government agencies. At municipal level, authority in these cases is often vested in the mayor, but sometimes also in the municipal executive (i.e. the mayor and aldermen together) or the municipal council. It follows that strengthening the position of the mayor (who in any event takes charge as soon as there is a pressing danger and the situation must be tackled locally) can be of only limited significance. This is also evident from the modest proposal made in the bill, namely the insertion of a section 171a in the Municipalities Act. In so far as statutory measures creating additional powers for mayors are necessary, they may be introduced without changing the nature of the office to such a degree that a mayor appointed in accordance with the current procedure would be unsuitable.

The Council would refer to the findings of the study of the position of mayors abroad by Erasmus University in Rotterdam,18 particularly the finding that there is no clear link between the powers a mayor can exercise and the manner of his appointment. It should in any event be noted that the proposed inclusion of a section 171a in the Municipalities Act cannot in itself be a reason for deciding on a different method of appointing mayors.

System of appointment by the Crown has outlived its usefulness

The Council of State would make the following observations about the last argument made in the explanatory memorandum, namely that the system of appointment by the Crown has outlived its usefulness. Broadly speaking, the system of Crown appointments, which was strongly influenced by lobbying by the parliamentary parties in the House of Representatives for much of the twentieth century, has been increasingly constrained by the influence of the municipal council. The most recent development is that the municipal council puts forward a public shortlist (possibly containing only one name), from which the Crown can deviate only on serious grounds that it must make public. A special feature is that the municipal council may decide to hold a consultative referendum on the appointment of a mayor. This power has now been exercised on a number of occasions.

With the possible exception of the mayoral referendum so heavily criticised by the Royal Commission on Dualism and Local Democracy, the existing procedure would seem to be a fairly natural outcome of developments over several decades. The procedure ensures, in principle, that the municipal council has a decisive say in the appointment, but also provides extra safeguards such as the role played by the Queen's Commissioner and, above all, the ultimate appointment by royal decree. It produces a type of official who enjoys the confidence of the council while at the same time keeping a sufficient distance from the other members of the municipal executive to monitor the performance of the executive. The existing procedure is still fairly new: the last relevant legislative amendment dates from mid-2001. As far as the Council knows, there are no indications that the procedure produces unsatisfactory results. It has had little chance to prove its worth.

On the basis of the above the Council concludes that neither the wish to strengthen the position of the mayor nor the view that Crown appointments have outlived their usefulness warrants the conclusion that a far-reaching change to the system, specifically the election of mayors, is urgently necessary. In its view, it is therefore extremely doubtful whether the reasoning in the explanatory memorandum adequately explains why the bill is desirable. Indeed, this line of reasoning would actually seem on balance merely to detract from the persuasiveness of the arguments.

18 *Buitenlandse burgemeesters bekeken*.

In fact, the aim of the bill is to further a particular vision of a democratic system of local government. The true basis for the submission of the bill is not the 'grounds and considerations' referred to in the explanatory memorandum but the coalition agreement that led to the formation of the present government. It would therefore be advisable to discuss that underlying vision of democracy and its consequences. This is therefore what the Council recommends.

In view of this, the Council will deal with a number of possible consequences in the following section.

PART II: POSSIBLE CONSEQUENCES OF THE ELECTED MAYOR

Introduction

A radical change to the system of appointing mayors would have a variety of consequences, as is apparent from the explanatory memorandum. In this part of its advisory report the Council lists the possible impact of direct election on a mayor's dealings with the public, the municipal council, the aldermen, other government bodies and the police.

The mayor and the public

The public will assume that a mayor who is elected on the strength of his own programme (and is touted as having much more political power than the current holder of the office) is able to deliver the programme. The intention is that it should also be possible to hold the mayor to account for this if he stands for re-election, either for a new term or if a by-election is held after the council dismisses the mayor on account of an unworkable relationship between them.

A distinction should be made between a mayor's plans for public order and safety and his policy on other topics. As the mayor himself is the competent authority in respect of public order and safety, he can formulate his own policy on them. For the implementation of all other plans, however, the mayor is dependent on the council (in particular, the budget fixed by the council) and on the municipal executive. There is therefore a risk that a mayor will be elected on the strength of one or more programme elements that do not command the support of a majority of the council, which has been elected on a different programme, or of the aldermen, as a result of which the programme cannot be implemented. The mayor would then run the risk of being 'held to account' after four years for failing to carry out parts of his programme despite his best endeavours. This could be a source of frustration not only to him but also to the electorate. Problems of this kind are less pronounced in the present system of council elections, because a single political party hardly ever obtains an absolute majority and it is clear from the outset that any programme is simply a wish list whose realisation largely depends on the outcome of the coalition negotiations.

As far as the mayor's election programme is concerned, it should also be realised that it will not be easy for a candidate from outside, who does not enjoy the support of a local political group, to present a programme that takes account of the special needs and wishes of the municipality. This problem does not arise at present , because a new mayor is selected above all for his or her personality, experience and skills, not for a particular programme.

As regards the second element, accountability to local residents for past performance, it should be realised that the greater the clarity about the body to which account must be

rendered and about the rules that apply, the more effective will be the accountability. In this respect, there is much to be said for accountability to the municipal council. It is equipped for this. The mayor has a duty to provide information to the council. The council has the power of enquiry. Account is rendered in public meetings, and the debate ends with a conclusion. Moreover, the council can call the mayor to account whenever there is cause. Accountability to the public is essential in a democracy, and it already occurs in a variety of ways. However, it is entirely different from accountability to the council. Since directly elected mayors could remain in office even without the confidence of the council, there is a risk that the accountability of the mayor to the council would become less important.

One of the tasks of the mayor in the present system is to monitor the 'quality of civic participation procedures', the adequacy of the complaints procedures and the quality of the municipal services delivered to the public (section 170, subsections 1 and 2, of the Municipalities Act). It was explained above that whoever becomes a mayor under the present procedure is in a position to perform this task well. The bill does not amend section 170. However, a new-style mayor would seem less suited to this function: he has his own political agenda and is the personification of the executive power. In the new situation, section 170 would therefore require him to monitor and supervise himself. It should, however, be noted in this connection that this objection might be covered by the political 'accountability' to the electorate in any election for a second term of office.

The mayor and the municipal council

The Council of State would raise three subjects with regard to the relationship between a directly elected mayor and the municipal council:

(a) the mayor and the council as competitors;
(b) the likelihood of relatively frequent by-elections;
(c) the question of whether the bill is in keeping with what the Constitution provides about the position of the municipal council and about the chairing of the council.

(a) The mayor and the council as competitors

In the new system the municipal council and the mayor are in direct competition with each other, both having a direct mandate from the electorate. They have to work together. Two types of situation may occur: either the elected mayor's programme essentially enjoys the support of a majority in the council, or it does not (forced cohabitation). As both will occur, they must both be treated as normal under the new legislation.

The need to work together is reflected first of all in the choice of the aldermen. Both parties have, as it were, a right of veto. The mayor may refuse to nominate someone and the council may refuse to appoint a candidate nominated by the mayor. The two parties are therefore dependent on each other and will ultimately have to find a modus vivendi. Second, cooperation is necessary when approving the budget: the priorities resulting from the mayor's election programme and the wishes of the council majority must be reconciled with each other in the budget. Third, the mayor will need the council to introduce byelaws and make other decisions that are within its sole competence and necessary in order to implement the mayor's programme.

Both the council and the mayor can claim to have direct authority from the electorate. This may mean that neither is much inclined to yield to the wishes of the other. Ordinarily this need not immediately cause major problems. But in a situation of forced cohabitation, where a mayor has been elected on the basis of an explicit programme and a majority of the council is unable to agree with one or more major elements of the programme, this may lead to

political clashes and vetoes. This seems to be an inevitable consequence of the new system.

(b) By-elections

One consequence of the bill is that the municipal council can dismiss the mayor if they have an unworkable relationship. In such a case the mayor must give way, although he may stand for re-election in the election that must then follow. However, this increases the chance of by-elections, for example in situations as referred to at the end of the previous section. Other circumstances that could result in by-elections are the resignation of the mayor, dismissal by the Queen's Commissioner if the mayor is ill, no longer fulfils the requirements for the office or holds a prohibited position (section 62, subsections 1 and 2), dismissal by the minister for 'acts or omissions on the part of the mayor that are incompatible with the conscientious performance of the office of mayor' (section 63c, subsection 1), and death.
Today's appointed mayors too can resign, be dismissed or die; however, the appointment of a successor (in principle for a full new term of office) is much less problematic than a by-election, which furthermore would only apply for the remainder of the original four-year term in cases where the dispute arises in the first half of the term of office.

The Council of State also notes in this connection that the bill contains no provision regulating the position of the aldermen in this situation. At the start of a normal term of office the new mayor will seek candidates for the post of alderman whom he trusts and who are prepared to help him implement his election programme and are acceptable to the council. However, if no other provision is made a mayor elected in a by-election would have no choice in the matter: he would have to make do with the aldermen 'bequeathed' to him by his predecessor, although he would have the option of proposing their dismissal under section 48. Has this been thought of and has consideration been given, for example, to allowing a mayor elected in a by-election to propose the replacement of one or more aldermen?

(c) Constitutional issues

Under article 125, paragraph 1 of the Constitution a municipality is headed by the municipal council. The government not only considers that this will remain the case in the proposed new system, but even refers to the council's headship as a 'guiding principle'. It does not propose to amend the relevant provision of the Constitution.

The precise significance of the constitutional rule that the municipality is headed by the council is not entirely clear. It is important to realise that in the 19th century this was of relevance only in the area of municipal autonomy: in the areas where executive powers are now delegated,19 the municipal executive was treated as a central government body. As time passed, more and more important executive powers were delegated to the municipal executive or, to a lesser extent, to the mayor. This tendency was not, however, seen as bearing on the council's position as head of the municipality. In the course of the 20th century the exercise of delegated powers gradually came to be regarded as an essential part of the municipal domain. The duty of accountability to the municipal council came to relate to these powers too, and liability for harm caused by the exercise of responsibilities delegated to the municipality was attributed to the municipality and no longer to central government. Little if any consideration was given to the question of what this meant for the constitutional rule that the municipality is headed by the council. Nor did the 1983 revision of the Constitution, which retained the council's headship, consider the real significance of this rule in a situation in which most of the work of the municipality involves exercising delegated powers.

19 The term is used here to mean the obligation of municipalities to cooperate in the implementation of higher regulatory schemes where this is required by statute, orders in council or provincial byelaws.

In the opinion of the Council of State, the powers to pass byelaws, adopt the budget and appoint and dismiss aldermen are in keeping with the council's position as head of the municipality and are therefore also in keeping with the constitutional principle that the council can dismiss the mayor if an unworkable relationship exists, but that the mayor does not have the power to disband the council early or, for example, to request the Crown to disband the council.

All in all, the Council of State sees no reason to hold that the bill would be unconstitutional in this respect.

The chairing of the council is also regulated in the Constitution: article 125, paragraph 3 provides that the mayor presides over meetings of the council. The bill leaves this unchanged and is to this extent therefore not unconstitutional. In the opinion of the Council of State, however, the mayor's right to preside over meetings of the council is hard to reconcile with his new position.

The elected mayor and the aldermen

A number of factors in the new system are relevant to the relationship of the new-style mayor with the aldermen. The aldermen can be appointed only on the nomination of the mayor and the mayor may nominate an alderman for dismissal. Moreover, it is the mayor who decides (and can also change) the allocation of the portfolios, and the municipal executive may adopt its internal rules of procedure only at the proposal of the mayor. Finally, the mayor decides when the municipal executive will meet and what the agenda will be. All of this signifies a radical change in the mayor's relationship with the aldermen. Although the municipal executive will retain its powers and the mayor will to this extent be dependent on the aldermen, the mayor will in future clearly be in a position of strength within the executive.

The question arises of why the bill does not take this to its logical conclusion and provide that the mayor becomes the executive body of the municipality (rather than, as at present, the municipal executive, i.e. the mayor and aldermen), assisted by a number of deputies appointed by the council on the nomination of the mayor (in other words a modified 'presidential' system).

In the proposed system the mayor would not be free to designate the aldermen. He would first have to reach agreement about this with the council. But as a result, above all, of the powers of the mayor to allocate portfolios, nominate aldermen for dismissal and determine the agenda for meetings, the municipal executive would in future be dominated by the mayor, with the aldermen doing his or her bidding. This creates the risk that municipalities may shortly find that their aldermen differ from the present incumbents in that they are more subservient, less enterprising and possibly more like civil servants. It should be realised that one of the distinguishing features of local government in the Netherlands at present is the figure of the strong alderman.

The new relationships may result in more homogenous municipal executives, as the explanatory memorandum seems to suggest. But it is also conceivable that a new, less independent type of alderman may appear and that the municipal executive will thus become in fact little more than a one-man show. How this would affect the quality of local government remains to be seen.

The elected mayor and other government bodies

The mayor will continue to play an important role as a representative of the municipality and

the municipal executive in contacts with other government bodies. As regards the contacts with water boards, provincial executives and national authorities, the mayor may be expected to operate as ambassador of the municipality to a greater extent than at present. After all, it will often be the mayor's policy that is at issue.

This could cause complications in contacts with neighbouring municipalities. The new-style mayor would have his own policy programme on the basis of which he was elected. This could mean that he would be less inclined to try to strike an acceptable balance between purely municipal interests and the more wide-ranging regional interest; this risk would be the greatest in the relationship between a central municipality and its peripheral municipalities. This point would arise first of all in collaborative bodies, which are staffed to a large extent by mayors. However, the new relationship between mayor and aldermen could easily mean that the problem would also occur, albeit in a rather more diluted form, in the case of intermunicipal collaboration between aldermen. The bill therefore creates a risk that the introduction of elected mayors may adversely affect cooperation between municipalities, cooperation which remains of undiminished importance.

The elected mayor and the police

As the bill does not, according to the explanatory memorandum, directly affect the relationship between the mayor and the police no changes are proposed to the Police Act 1993. Nonetheless, the relationship with the police deserves consideration.

(a) The Council of State considers that the bill to amend the Police Act 1993, which was presented to the House of Representatives of the States General on 22 July last, cannot be disregarded. One of the purposes of the bill is to amend section 23 of the Police Act such that the mayor of the provincial capital or largest municipality in the region is no longer automatically designated by law as the regional police force manager and that instead one of the mayors is designated as such by the government. This amendment can hardly be seen in isolation from the present bill and should therefore be taken into account in the deliberations.

(b) Allowance must also be made for the possibility that the new system will result in the appointment of a more local type of mayor; such a development would, if anything, reinforce the trend towards further centralisation of authority over the police. As nothing can yet be said with certainty about this, the Council of State considers it sufficient simply to point out this possibility.

(c) The bill referred to at (a) empowers the Minister of the Interior and Kingdom Relations to issue general and special instructions to mayors relating to the maintenance of public order and safety. This means that the mayor would no longer be in charge even in what has come to be regarded as his own policy field, namely that of public order and safety, and that here too it would not be certain that he could implement the programme for which he was elected.

PART III: CONCLUSION

The Council of State added the following more general observation to its advisory opinion.

'In the course of the twentieth century the calls for a 'more democratic' way of appointing mayors were, above all, a reaction to the still rather patrician traits of many mayors. These traits have now disappeared as a consequence of numerous developments, as outlined above. The mayor has thus evolved into an important guardian of democratic decision-making, the quality of civic participation and service delivery, and the fair and correct processing of complaints and notices of objection.

Changing to direct election could be seen as the final measure to end the autocratic position of the mayor. Paradoxically, the other side of the coin is that the present proposals would reintroduce the figure of the strong governor who in many ways operates alone, and this new-style mayor would in fact seem less suited to the role of arbitrator. In that sense, the bill would turn the clock back.'

3. Advisory opinion of the Council of State, 19 May 2003, on the bill proposed by MPs Dittrich and Halsema concerning rules on retail price maintenance for books (*Retail Price Maintenance (Books) Bill)*

Background information on the proposed bill

The Netherlands has had a system of retail price maintenance for books since 1904. Publishers set minimum prices at which books are sold to bookshops and by bookshops to consumers (a practice known as ***resale price maintenance (RPM)***). This fixed price is binding in principle for two years for general books, schoolbooks, and scholarly and scientific books. Since 1923 the agreements on retail price maintenance for books have been codified in regulations governed by private law. Today the Rules and Regulations (*Reglement Handelsverkeer*) of the Royal Dutch Book Trade Association (KVB) are in force. The KVB has been granted an exemption from the ban on other forms of resale price maintenance. The last exemption, granted in 1997 on the basis of the Economic Competition Act then in force, remains in effect until 31 December 2004.

Now that this exemption is about to expire, the question arises what should happen after this date. The following options are available: 1) maintain the status quo with a new exemption on the basis of the Competition Act; 2) introduce a separate statutory provision; or 3) abolish retail price maintenance for books.

Two mutually contradictory recommendations were issued with regard to these options: one by the Council for Culture, the other jointly by the Netherlands Bureau for Economic Policy Analysis (CPB) and the Social and Cultural Planning Office (SCP). In the Council for Culture's view, the market is functioning well at present without any investment of public resources. On the basis of considerations of cultural policy, the Council for Culture recommends continuing with retail price maintenance for books. In its view, the consequences of interfering with the existing system are unclear, and an upset in the current equilibrium of the industry cannot be ruled out. The Council for Culture does however prefer statutory regulation instead of the arrangement under private law now in force. The Council for Culture is thus in favour of the bill.

The report by the Netherlands Bureau for Economic Policy Analysis and the Social and Cultural Planning Office (the CPB-SCP report), by contrast, concludes that resale price maintenance has certain disadvantages from the point of view of culture policy, and is also less efficient than any of the three following options:
1. maintaining the status quo;
2. subsidising the book trade; or
3. establishing a more limited form of retail price maintenance, meaning that the fixed price would only be binding for a period of, for example, six months and would not apply to scholarly and scientific books or schoolbooks.

The two MPs who introduced the bill sought to prevent the abolition of retail price maintenance for books. Their bill was designed to maintain the current system under public law in a modified form.

TEXT OF THE COUNCIL'S ADVISORY OPINION

The Council's advisory opinion consists of two sections, one devoted to policy analysis and one to legal issues.20

20 Parts of the advisory opinion have been omitted for reasons of space.

In the section of its advisory opinion devoted to policy analysis, the Council of State went step by step through the unclear and uncertain aspects of the sponsors' arguments. In the legal section it examined the aspects of the bill related to constitutional and European law.

The section on policy analysis noted the lack of clarity about the proposal's goal; raised questions about the bill's practical implications for the diversity of the book supply and broad availability of books at a large number of sales outlets; and pointed out the divergent interests of the different parties concerned: buyers and readers, booksellers, publishers and authors.

The Council also questioned the fairness of applying the system of retail price maintenance to schoolbooks and scholarly and scientific books.

I. Policy analysis

Lack of clarity about the goal

According to the bill's sponsors, it serves a cultural goal: *'creating conditions in which a broad, diverse supply of books will be available in Dutch and Frisian in an extensive network of bookshops with a large and varied stock over the long term'*. The same goal underlies the existing system of retail price maintenance for books.

The CPB-SCP report points out that at the time the system was set up, the government did not specify how many titles must be available or in what genres, or how many sales outlets there should be with how wide a selection, to attain this goal. Nor do the sponsors of the present bill make their cultural goal any more specific. The Council realises that this cultural goal is difficult to set, measure or specify. But it thinks more could be said about whether the book market as it currently functions meets the goal, whether a higher level of achievement is desirable and whether a lower level of achievement would be acceptable.

Diversity of titles offered

The intended cultural goal has two facets: *promoting diversity of titles offered and ensuring the wide availability of books to the public.*

According to the bill's sponsors, retail price maintenance allows publishers and importers to provide booksellers with an adequate profit margin for titles whose sales are slower and less assured. This prevents booksellers from focusing exclusively on titles that sell quickly and in large quantities, due to price competition from other retailers, like supermarkets. It also encourages the book trade to offer books that sell more slowly. With a view to this goal, Section 12 of the bill provides that in setting the mark-up, publishers should take account of costs to booksellers related to maintaining a varied stock.

The Council notes that the loose wording of Section 12 makes oversight difficult. *In principle the bookseller is free to use the mark-up for purposes other than diversifying the stock: boosting profits, for example, or offering other products for sale that are not culturally important.* Since it is not possible to compel publishers and booksellers to use their extra revenues in a particular way for cultural purposes, it cannot be ascertained to what extent resale price maintenance serves the intended cultural ends. That holds true for both the current system and the system proposed by the bill. The Council recommends devoting more attention to this uncertainty in the explanatory memorandum.

Broad availability

The second facet of the proposal's cultural goal is book distribution through a sufficient number of sales outlets. The number and geographical dispersal of bookshops as well as their supply of books all play a role in this regard.

Experience in surrounding countries shows that abolishing retail price maintenance can threaten the existence of small bookshops, particularly in small towns. In France, for example, a system existed for decades in which booksellers voluntarily sold books at the prices recommended by publishers. When the FNAC chain opened its doors in 1974 and gave 20% discounts on its books, many other bookshops were forced to close. The CPB-SCP report confirms this effect and concludes that resale price maintenance can be an effective way of fostering the availability of books at a large number of sales outlets. But the report also cites a number of developments counteracting this effect: technological developments such as online booksellers, e-books and print on demand, and bookshops' tendencies towards specialisation on the one hand and expansion on the other.

The bill makes no exception for the internet book trade; internet bookshops based in the Netherlands are required to charge the price set by the publisher. In the view of the bill's authors, experience shows that retail price maintenance offers good prospects for the kind of internet bookshop that 'seeks to attain the same level as traditional bookshops in terms of service and breadth and depth of stock'. E-books fall outside the bill's scope, supposedly because their revenues and production figures are too marginal.

The Council notes that these technological developments can increase the availability of books. Abandoning retail price maintenance could be beneficial for internet products, e-books and print on demand, because these products would then go down in price.

The Council recommends devoting more attention in the explanatory memorandum to the question of whether retail price maintenance will contribute to the goal of broad availability in the long run.

Interests of the groups concerned
Broadly speaking, four interest groups can be distinguished: buyers and readers, booksellers, publishers and authors. A balanced arrangement requires taking the interests of each of these groups into account.

Readers have various interests: the production of a great variety of books, high quality bookshops and the lowest possible prices. Booksellers are in general best off with a system that allows them to provide a wide supply of books at an attractive profit. First-time and less popular authors, benefit, in particular, from an opportunity to get their books onto the market. For publishers, a reasonable rate of profit and rapid sales (particularly in the first six months) are important.

The Council recommends paying more attention in the explanatory memorandum to both the divergent interests of these distinct groups and the interests of the general public (potential buyers and readers).

Limiting the bill's area of application: schoolbooks and scholarly and scientific books
The bill's sponsors have opted for fixed book prices that apply to schoolbooks and scholarly and scientific books and remain binding for two years. The CPB-SCP report suggests a more limited system of retail price maintenance, which would exclude these categories of books and remain in place for only six months, as an alternative to the current system.

The CPB-SCP report states that booksellers sell most of the copies of a large proportion of their titles within six months. Under the current system, booksellers cannot increase sales when a title is selling poorly by lowering the price. This increases booksellers' inventory risk. For this reason, the report proposes making the fixed price binding for only six months.

With regard to schoolbooks, the Council refers to a report by SEO/Amsterdam Economics, which concludes that retail price maintenance contributes little if anything to policy targets for schoolbooks in secondary education. According to the report, a broad array of titles and high-quality schoolbooks should be attainable without retail price maintenance. It also concludes that the system makes it harder to control the cost of schoolbooks to parents and students. On the basis of these findings, the Minister of Economic Affairs and the State Secretary for Education, Culture and Science reached the conclusion that it would be better not to continue with the system of retail price maintenance for schoolbooks after 2004. The Council observes that the explanatory memorandum does not discuss these points, and recommends that it do so.

More generally, the Council poses the question whether making schoolbook buyers contribute to reaching the bill's cultural objectives is justified if buyers of general books will be the beneficiaries.

With regard to scholarly and scientific books, a distinction can be made between manuals and textbooks, which can have large print runs, and research publications. Publication of research results in particular entails relatively high production costs and limited, specialised demand, which means that publishing them in printed form is often no longer feasible. The question is whether retail price maintenance is the right way to foster availability, in the case of this genre. The Council also wonders whether electronic publication, which is an increasingly popular option, may not be a more appropriate way of promoting diversity and availability. For scholarly and scientific literature, reading a text on-screen is less objectionable than for general books. In so far as retail price maintenance for scholarly and scientific books serves to subsidise other books, in particular by promoting sales of non-scholarly books, priority is apparently being given to one particular cultural goal over an equally desirable goal: spreading scholarly and scientific knowledge. The proposal gives no motivation for this preference.

The Council recommends reconsidering this aspect of the proposal, and presenting adequate arguments in the explanatory memorandum for rejecting the more limited system of retail price maintenance proposed in the CPB-SCP report.

Legal assessment
In its legal assessment, the Council focused on the aspects of the bill related to constitutional and European law.

Constitutional aspects of entering dwellings
Section 21, subsection 2 of the bill provides that the members of the Book Retail Price Maintenance Board, which is to be established and charged with supervising this market, are authorised to enter a dwelling without the occupant's permission.

In view of Article 12 of the Dutch Constitution (21) and Article 8 of the European Convention

21 Text of the Constitution: *1. Entry into a home against the will of the occupant shall be permitted only in the cases laid down by or pursuant to Act of Parliament, by those designated for the purpose by or pursuant to Act of Parliament.*
2. Prior identification and notice of purpose shall be required in order to enter a home under the preceding paragraph, subject to the exceptions prescribed by Act of Parliament.
3. A written report of the entry shall be issued to the occupant as soon as possible. If the entry was made in the interests of state security or criminal proceedings, the issue of the report may be postponed under rules to be laid down by Act of Parliament. A report need not be issued in cases, to be determined by Act of Parliament, where such issue would never be in the interests of state security.

for the Protection of Human Rights and Fundamental Freedoms, authorisation to enter a dwelling without the owner's permission should be granted in a context of official oversight only in exceptional circumstances (see the legislative history of the General Act on Entry into Dwellings). In the Council's opinion, there are no exceptional circumstances in this case that justify entering a dwelling. We would recommend deleting this authorisation.

Aspects related to European law
Case law of the Court of Justice of the European Communities provides that cross-border regulations for the purpose of retail price maintenance in a given industry are contrary to Article 81 of the EC Treaty, but that purely national regulations for an industry are permitted in the absence of any European legislation (22). The same applies to national statutory regulations on retail price maintenance for books, but the rules for free movement of goods under Article 28 of the EC Treaty must be respected (Leclerc and Échirolles cases)(23). For purely domestic situations, therefore, there are no problems under European law. Community law permits introduction or maintenance of such systems where they affect purely internal situations.

However, the effectiveness and feasibility of retail price maintenance are very much influenced by the degree to which a fixed price can also be enforced for Dutch-language books imported from other EU member states. This has become more important as a result of both the removal of obstacles to cross-border economic activity in the EU and increased technical possibilities.

Importers
The bill provides for retail price maintenance not only for books published in the Netherlands, but also for imported books. There are substantial book imports from Belgium, other EU states and the rest of the world, through both bookshops and internet orders. The bill provides that the importer set the fixed book price. For books published by foreign publishers, the bill makes a link with the price set or recommended by the publishers. Those publishers are offered an opportunity to set separate prices for the Netherlands. If they do not take this opportunity, the prices set or recommended in the member state concerned also apply in the Netherlands. If those prices cannot be ascertained, then importers do not set a fixed price for the books. The term 'importer' also includes parallel importers, each of which is supposed to set the fixed book price independently. Under Section 3 of the bill, importers who have been able to secure discounts can lower their fixed book prices accordingly.

The regulation described above is essentially the same as the one that the Court of Justice of the European Communities (ECJ) struck down in the Leclerc and Échirolles cases as contrary to the principle of free movement of goods.24 This case law forbids any regulations requiring an importer to set a fixed price for books published in another member state, because this establishes a separate legal regime for imports. The Council also notes that consumers can order books themselves from around the world through internet companies, and that an arrangement for imports from EU members cannot be failsafe. The Council recommends that this aspect of the proposed arrangement be reconsidered.

Re-importation

22 Joined Cases 43/82 and 63/82, VBVB and VBBB v. Commission, Judgment of the Court of Justice of 17 January 1984 [1984] ECR 19.
23 Case 229/83, Leclerc v. Au blé vert (1985) ECR 1; reconfirmed in Case C-9/99 Échirolles Distribution [2000] ECR I-8207.
24 Case 229/83, Leclerc v. Au blé vert (1985) ECR 1; Case C-9/99 Échirolles Distribution 2000] ECR I-8207.

With regard to re-importation, case law of the ECJ provides that retail price maintenance can only be enforced when re-importation is used as a method of circumventing the rules. The explanatory memorandum for the bill treats every form of re-importation as abuse (evasion of the rules on retail price maintenance).25 The Council would observe in this connection that the mere fact that Dutch-language books are re-imported does not automatically prove abuse. Re-importation can include situations where there is abuse and situations where there is no abuse. The case law of the Court of Justice mandates that measures to combat abuse must be specifically tailored to fit possible occurrences of abuse, not generally applicable to all cross-border situations.(26) The Council recommends amending this aspect of the proposal.

25 Parliamentary Papers, House of Representatives, 2002/03, 28 652, no. 3, p. 8.
26 See e.g. Judgment of 12 December 2002 in Case C-324/00 Lankhorst-Hohorst [2002] ECR I-11779; Case C-264/96 ICI [1998] I-4695.

Contribution of the Lagrådet of Sweden

1. Lagrådet

The Lagrådet is a body of the state that assesses bills. It is composed of members of the Supreme Court (Högste Domstolen) and the Council of State (Regeringsrätten), who are attached to the Lagrådet for two years, after which they resume their original posts. Retired members of these two bodies can also sit in the Lagrådet.
It usually takes the form of two chambers, each composed of three members.

The Lagrådet's advice is requested before Parliament (Riksdag) takes a decision on legislation:

- relating to the freedom of the press, or freedom of expression in radio, television, film and other media, or to other fundamental rights and freedoms;
- relating to access to public documents;
- relating to the personal status of private individuals or their personal or financial relations;
- imposing obligations on citizens, or in some other way interfering with their personal and financial affairs;
- relating to the administration of justice and the fundamental principles of public administration.

In assessing the legislation submitted to it, the Lagrådet looks at the following points:

1. how the bill relates to existing legislation;
2. how the various provisions of the bill relate to each other;
3. if the bill complies with the principle of legal certainty;
4. whether it is fit for its purpose;
5. if implementation may lead to problems.

2. Hereby the Swedish delegation presents a short explanatory note to show how the Swedish "Council of Legislation" fulfils its consultative function in the Swedish law-making process and in doing so we think it is necessary to start with a very brief introduction of the organisation of the Swedish judiciary.

The courts of Sweden can be divided into general courts and special courts. There are two general court organisations, the general courts and the general administra¬tive courts. These organisations are, in all material respects, parallel and are structured as a triple instance system. The general courts consist of district courts, courts of appeal and the Supreme Court, while the general administrative courts consist of county administrative courts, administrative courts of appeal and the Supreme Administrative Court. A number of courts of special jurisdiction exist beside these courts. One example of a court of special jurisdiction is the Labour Court.
Sweden has, however, no constitutional court but in chapter 11 art.14 in the Instrument of Government ( ) it is stated that if a court or an other public body finds that a provision conflicts with a rule of fundamental law or another superior statute, or finds that a procedure laid down in law has been disregarded in any important respect when the provision was made, the provision may not be applied. If the provision has been approved by the Parliament or by the Government, however, it shall be waived only if the error is manifest. That means that in each particular case the courts have to ascertain whether a statute meets the standards set out by the super-ordinate provisions, so-called statutory examination.
In this context, it might also be mentioned that the Justices of the Supreme Court and the Justices of the Supreme Administrative Court occasionally, in periods of two years, serve on the Council on Legislation (Sw: Lagrådet; hereafter referred to as the Council), a body with the task of commenting on draft legislation at the request of the Government or a parliamentary committee.

The opinion of the Council is obtained by the Government or, under more detailed rules laid down in the Riksdag Act, by a committee of the Parliament.

The government is obliged in principle to refer major items of draft legislation to the Council whose members are drawn from the Supreme Court and the Supreme Administrative Court. The Council sits in divisions. Each division is made up of three members, at least one of whom shall be drawn from each court.
Briefly, the Council's remit is to ensure conformity with the legal system and consistency between laws, and to safeguard the principles of the rule of law in law-making. The various committees of the Parliament are also free to solicit the Council's opinion. This may arise when a committee is considering proposing an amendment to a Government bill or when a committee raises a question of law not previously raised by the government, either in response to a private member's motion or on its own initiative. Examination by the Council constitutes an important check on the legislative process, not least with respect to the compatibility of proposed legislation with fundamental law in content and origin (approved by the competent body and in the proper forms). The Council is however a consultative and not a decision-making body. The government and, in the last resort, the Parliament may choose to ignore its advice (27).

However, the foregoing does not apply, if obtaining the opinion of the Council would be without significance having regard to the nature of the matter, or would delay the handling of legislation in such a way that serious detriment would result. If the Government submits a proposal to the Parliament for the making of an act of law in any matter referred and there

27 "THE CONSTITUTION OF SWEDEN"; The fundamental laws and the Parliament act of Sweden, 2003, page 34-35

has been no prior consultation of the Council, the Government is obliged to, at the same time, inform the Parliament of the reason for the omission. Failure to obtain the opinion of the Council on a draft law never constitutes an obstacle to application of the law.

The Council's scrutiny relates to:
1. the manner in which the draft law relates to the fundamental laws and the legal system in general;
2. the manner in which the different provisions of the draft law relate to one another;
3. the manner in which the draft law relates to the requirements of the rule of law;
4. whether the draft law is so framed that the resulting act of law may be expected to satisfy the stated purposes of the proposed law;
5. what problems are likely to arise in applying the act of law.
More detailed rules concerning the composition and working procedures of the Council are laid down in law.

As you can see *the main objective of the Council is to scrutinize a proposed legislation from a legal viewpoint*. In that aspect the accession of Sweden to the European Union of course has brought new dimensions and difficulties to the work of the Council that now has to take into consideration not only Swedish law but also EC-law. Especially when it comes to the implementation of directives in a way that is in accordance with Swedish legal tradition and our fundamental law it has caused the Council a lot of extra work and difficulties. That is so because, for the exception of EC-regulation, Sweden has in principle a dual system which means that international agreements must be transformed in all aspects into Swedish law and they are not binding until so has been done. That also goes for conventions like i.e. the Human Rights Convention and the interpretation of that convention as it has been laid down by the European Court in Strasbourg.

To exemplify what has been said above we would like to present two examples where the Council newly has given advisory opinions. One is related to the implementation of EC-law and the other one has mainly constitutional and human rights implications.

3. Implement of directive 2006/48/EC of the European Parliament and of the Council relating to the taking up and pursuit of business of credit institutions and directive 2006/49/EC of the European Parliament and of the Council on the capital adequacy of investment firms and credit institutions.

The first directive dealt with measures to coordinate credit institutions in order to protect savings and to create equal conditions of competition between these institutions. The objective of the other directive was the establishment of capital adequacy requirements applying to investment firms and credit institutions. Both directives were highly complex and technical and very detailed and certainly not suitable to transform into an ordinary Swedish law. It was therefore proposed that the implementation should be done in two steps, firstly a framework law which introduced the general principles and basic terms of the directive, thus founding the base for giving the competent authorities authorisation to issue more precise provisions or regulations in order to fully implement the directives as a second phase.

It was now up to the Council to scrutinize the proposed framework law and the first thing to do was to check if the Swedish language version of the directives was in accordance with other language versions. The differences that were discovered was reported back to the Government which then had to take appropriate actions in order to correct the Swedish version.

After that the Council mainly looked upon if there were some contradictions between the law proposals and Swedish fundamental laws.

In this case the directives in same cases called for the possibility to transfer to a foreign authority the public authority to exercise supervision on a consolidated basis of a Swedish credit institution. According to chapter 10 art. 5 of the Instrument of Government judicial or administrative functions may be transferred to another state, international organisation, or foreign or international institution or community by means of a decision of the Parliament. The Parliament may also in law authorise the Government or other public authority to approve such transfer of functions in particular cases. Where the function concerned involves the exercise of public authority, the approval of the Parliament approval shall take the form of a decision in which at least three fourths of those voting concur. The Parliament´s decision in the matter of such transfer may also be taken in accordance with the procedure prescribed for the enactment of fundamental law.

The procedure for amending a fundamental law is more complicated than for other laws. It is designed to protect our democracy by providing time for reflection and ensuring that the consequenses have been thoroughly considered before changes are made.

For an admendent to be made, the Praliament must take two identical decisions with a general election in between. This long drawn-out procedure is designed to ensure that the Parliament does not take any hasty decisions that can limit people´s freedoms and rights.

In this particulary case the Council had no objection cocerning the transformation provisions in the law proposal, but anyhow it was pointed out for the Government that the proposed law in some cases called for decisions in the lawmaking process that was in accordance with chapter 10 art. 5 of the Instrument of Government.

The Council also checked if all basic principles in the directive were to be found in the framework law so that the authorisation to different authorities to issue their own provisions and regulations was limited to certain areas, set out by our Constitution. According to the Instrument of Government provisions concerning the relations between private subjects and

the public institutions which relate to obligations incumbent upon private subjects, or which otherwise encroach on the personal or economic circumstances of private subjects, should be laid down in law enacted by the Parliament. These provisions include provisions relating to criminal acts and the legal effects of such acts, provisions relating to taxes due the State, and provisions relating to requisition and other such disposition.

Nevertheless, with authority in law, the Government may, without hindrance of the fore mentioned provisions by means of a statutory instrument, adopt provisions relating to matters other than taxes, provided such provisions relate to matters such as the protection of life, health, or personal safety and the import or export of goods, money or other assets, manufactures, transport and communications, granting of credits, business activities, rationing, re-use and recycling of materials, design of buildings, installations and human settlements, or the obligation to obtain a permit in respect of measures affecting buildings and installations.
Where, under the present Chapter, the Parliament authorizes the Government to adopt provisions in a particular matter, the Parliament may also authorize the Government in such context to delegate the power to adopt regulations in the matter to an administrative authority or a local authority.

It was up to the Council to control that the different authorisations given by law did not exceed the limits set up by the Instrument of Government. Just to give you one example. In directive 2006/48/EC it is prescribed in article 70 that if certain conditions are fulfilled the competent authorities may allow, on a case by case basis, parent credit institutions to incorporate subsidiaries in the calculation of the capital requirements. In the proposed Swedish framework law the Parliament authorised the Government to adopt provisions clarifying under which condition such a permission could be given and the Government was also authorised to delegate its power to adopt regulations in that matter to an administrative authority. According to the opinion of the Council in this case the authorisations and also other authorisations were in compliance with the instrument Government. However, in cases where the Parliament authorises the Government to adopt provisions in a particular matter it is sometimes hard to scrutinize the proposed legislation from all aspects since the Council very seldom has access to provisions enacted by the Government or a local authority which are presupposed in the law, but very seldom are drafted at that stage of the Legislative process. Thus it is not possible for the Council to get a complete survey of all the consequences of the law.

However, what the Council always can do is, where appropriate, to simplify the text and correct the language grammatically and improve the structure of the law or different law-provisions from a logical point of view.

Finally, as a whole, after having scrutinized the law-proposals in this case from all aspects that the Council had to take into consideration the Council found that the proposal, with some minor alterations, could be presented before the Parliament.
4. **Advise on a proposal of law prohibiting the wearing of masks specifically during demonstrations in public places.**
The legislation was primarily caused by the experiences of disturbances in connection with demonstrations that we had when Sweden arranged a meeting for the European Council in Gothenburg in 2001.
The most essential part of the regulation prescribed that a person who takes part in a demonstration in a public place or is present in connection with such a demonstration must not, totally or partly, conceal his face with the intention to obstruct identification.

The proposal included a couple of exemption clauses. First – the prohibition should not be

valid when, subject to the nature of the demonstration and other circumstances, it could be considered as justified to conceal ones face. Second – the prohibition should not be valid for a person who had got a permission from the relevant authority to conceal his face when taking part in the demonstration.

The principal question for the Council was if the proposed masking-prohibition was compatible with the regulation in the Swedish Constitution which guarantees all citizens – in their relations with the public administration – freedom to demonstrate; i.e. the freedom to organise or take part in any demonstration in a public place. This fundamental freedom may be restricted, as of interest in this context, only for the purpose of preserving public safety and order at the demonstration. The restraints may be imposed only to achieve a purpose acceptable in a democratic society and must never exceed what is necessary having regard to the purpose which occasioned it nor may it be carried out so far as to constitute a threat to the free formation of opinion as one of the fundaments of democracy. Moreover, no restraints may be imposed solely on grounds of political, religious, cultural or other such opinions.

Corresponding regulation is to be found in the European Convention on protection of human rights and fundamental freedoms, art. 11 p. 1 and 2.

The first conclusion of the Council was that the proposal implied a restriction of the freedom to demonstrate, as defined in the Constitution and in the European Convention.

The next question was if it was a permitted restriction of the freedoms. According to the opinion of the Council it could not be said that masking in connection with a demonstration generally is jeopardizing public safety and order. In this context it should also be taken into account that it can be of great importance for a person to take part in a demonstration and in that way express his opinion, without being obliged to reveal his identity. Accordingly the Council found that it was not compatible with the Constitution with a general masking – prohibition in connection with demonstrations.

Furthermore the Council had to consider if the possibilities to exemptions made the masking – prohibition acceptable from the constitutional point of view. The Council found the exemptions written in such a general and insignificant way that they did not give expression to the limitations of possible restrictions, given in the Constitution.

Accordingly the Council found the proposed legislation not compatible with the Constitution.

The Council also raised the question if the proposed masking – prohibition could be presumed to fulfil the given purpose of the legislation to such an extent that the restrictions were justified. After having presented arguments pro et contra the Council concluded that this was not the case. Accordingly, also from this point of view, the Council found that the restrictions on the freedom to demonstrate were more far-going than the Constitution permitted. Finally it should be said that the Council also found the proposed legislation incompatible with the relevant statutes in the European Convention.

The government took account of the advice of the Council in the sense that they redrafted the regulation in significant parts and thereby

- limited the applicability to those taking part in a demonstration (excluding those who are present in connection with a demonstration),

- limited the prohibition so that it is applicable only if there is disturbances of the public order or immediate risks for such disturbances,

- limited the exemptions and made them more precise (the prohibition is not valid for those who conceal their faces out of religious motives nor – as before – for those who have got a special permission to mask themselves).

The government sent the bill to the Parliament and this time the Parliament solicited for the Council's opinion regarding the legislation on masking-prohibition, in its new wording.

This time the Council (other members) concluded that, owing to the modifications having been made, the legislation was compatible both with the Constitution and the European Convention. Having said that, the Council declared that there still remained some hesitation about the effects of masking-prohibition in situations with disturbances of public order or risks for such disturbances in connection with demonstrations.

The Parliament later on adopted the bill as proposed.

Contribution of the Legislative Council of Romania

1. The Legislative Council of Romania

Extract of the Law on the creation, organization and functioning of the Legislative Council

Art. 2 – (1) The Legislative Council shall have the following competences:

a) It shall analyse and give opinions on Government drafts of laws, proposals for laws, draft legislative decrees and draft orders having the effect of law, so that these may be submitted to the legislative process or the procedure for adoption, as the case may be;
b) It shall analyse and give opinions, at the request of the Chairman of the Parliamentary Committee with responsibility for the subject, on amendments that are before the Committee for discussion, and on draft laws and proposals for laws received by the Committee that have been adopted by one of the Parliamentary Chambers;
c) It shall, pursuant to a decision of the Chamber of Deputies or the Senate, itself draft or coordinate the drafting of, codes or other particularly complex laws;
d) It shall, pursuant to a decision of the Chamber of Deputies or the Senate or on its own initiative, draw up studies aimed at simplifying, unifying and coordinating the law, and on the basis thereof, it shall make proposals to the Parliament and the Government, as the case may be;
e) It shall examine the laws to ascertain whether they conform to the terms and principles of the Constitution, and shall submit any cases of unconstitutionality it finds to the permanent bureaux of the Parliamentary Chambers and the Government, as the case may be; not later than twelve months following its creation, it shall put forward proposals designed to bring pre-existing laws into conformity with the terms and principles of the Constitution;
f) It shall officially keep the law up to date and shall set up a computerized system for making an official record of the law…..

Art. 3 – (1) Draft laws and proposals for laws shall be submitted for debate in Parliament with the opinion of the Legislative Council.

(2) ….

(3) The opinion shall be advisory, and its purpose shall be:

a) to ensure that the legal instruments proposed are in conformity with the Constitution, as well as the nature of the law;
b) to eliminate contradictions and conflicts between the terms of the draft law or the proposed law and the achievement of their overall objectives, while respecting the rules of legislative technique;
c) to present the implications of the new legislation for the laws in force, by identifying those provisions of law which, since they regulate the same subject-matter, will be repealed, amended or unified, and by avoiding legislating for the same matters in different normative instruments….

2. The Legislative Council of Romania

According to its organic law, the Legislative Council has the power to issue three types of opinions on the draft legislation: a) favourable opinions, b) favourable opinions including remarks and recommendations, c) negative opinions. *The favourable opinions issued without any remarks or recommendations* are not justified by the Council, so they are not covered by this commentary. On the other hand, *the negative opinions* as well as *the favourable opinions including remarks and recommendations* are explained by the Council, in order to allow a well-grounded point of view.

The examination of the draft pieces of legislation sent to the Legislative Council showed that part of them were not correlated with the constitutional provisions and principles, for which reason they were given **negative opinions**, due to the fact that those pieces of legislation were inadequate as a whole, and part of them were given **favourable opinions**, but with **remarks and recommendations** envisaging to guarantee their compliance with the fundamental law. Some of the legislative proposals sent to the Legislative Council **had provisions not correlated one to another, sometimes even contradictory ones**, provisions which took into account neither the coherence of the proposal as a whole nor the other legal provisions to whom they made reference to.

The examination of the conformity of draft legislation with the provisions and principles of the Constitution is in fact the main objective of the Legislative Council's activity. In this respect, most of the opinions were favourable ones, meaning that the remarks concerning the non-constitutionality are far less numerous than the other remarks regarding the substance or the form of the proposed legislation.

After the entry into force, on the 31st of March 2000, of the *Act of Parliament no. 24/2000 on the legislative drafting rules*, although certain improvements took place, we also witnessed many violations of the rules imposed by this law, especially as regards the systematization of certain areas of legislation, the way the modifying or supplementing provisions were drafted and, in general, the accuracy of the proposed texts.

Hereinafter we give examples of two types of opinions issued by the Legislative Council: the favourable opinion with remarks and recommendations as well as the negative opinion.

The favourable opinions including remarks and recommendations on the substance of the proposed legislation and on the legislative drafting, which were issued by the Legislative Council, aimed at contributing to the improvement of the draft legislation and, in most cases, those remarks and recommendations were taken into account by the initiators when drafting the final texts.

The first opinion concerns a legislative proposal modifying and supplementing articles 9 and 11 of Act no. 112 from 25th of November 1995. Note that Act no. 112/1995 regulating the legal status of certain houses which passed into the property of the State set up compensatory measures for the former owners (natural persons) of the houses having been passed into the property of the State or of another legal persons after the 6th of March 1945 and which were held by the State or by the other legal persons on 22nd of December 1989. Articles 9 to 11 stipulate that the apartments which are not returned in kind to their former owners may be purchased by their contractual tenants, provided that they would not alienate the apartments during a 10 year-period after their acquisition. The Opinion on the legislative proposal modifying and supplementing articles 9 and 11 pointed out that the justification to this proposal (i.e. the provision concerning the house alienation prohibition would not comply with the constitutional provisions on the guarantee and equal protection of the property, irrespective of its owner) could not be accepted. The Opinion argued that the proposed justification was inconsistent with the decisions of the Constitutional Court, institution which had been notified to give its opinion on the alleged non-constitutional nature of art. 9 last paragraph from the Act no. 112/1995.

Thus, by way of *Decision no. 169 from 2nd of November 1999* on the aforesaid text, the

Constitutional Court decided that this provision does not violate the provisions of art. 41 para. 1 first sentence of the Constitution stipulating that “The right of property and the claims against the State are guaranteed”. According to that decision, “Indeed, the provisions of the first sentence of the aforesaid constitutional text cannot be separated from the following provisions of the second sentence, according to which the content and the limits of the right to property are stipulated by law. Therefore, the Parliament is the only authority entitled to set up such a temporary alienation prohibition, prohibition which was known by the author of the notification when he chose to acquire the right of property on the house where he lived by then as a tenant”.
As a consequence, the alleged non-constitutional nature of the aforesaid provision was rejected by the Constitutional Court, who decided that it was not well-grounded.
The same solution was given through the *Decision no. 238 from 21st of November 2000*, published in the Official Gazette of Romania no. 46 from 22nd of January 2001. Because the provisions of art. 41 para. 1 from the Constitution in force at that time are identical with the provisions of art. 44 para. 1 of the republished Constitution, it is obvious that those decisions are still valid nowadays.
Anyway, the Parliament may reassess the current solution, by reconsidering it and by eliminating the prohibition.
Please also note that because the law modifying the Act no. 112/1995 was adopted without taking into account the remarks of the Legislative Council, the President of Romania refused its promulgation and sent that law back to the Parliament, where it is now pending on its agenda for re-examination.

The negative opinions are generally justified by such serious deficiencies in the substance and structure of the proposed legislation which make it inadequate for adoption, because there are no actual possibilities of improvement of the texts submitted. The deficiencies concern especially the non-compliance with the constitutional provisions and with other higher level legal provisions and even such instances when the provisions proposed to be modified or amended were in fact abrogated. As an example, the legislative proposal for the amendment of Act no. 3/2000 on the organisation of the referendum was given a **negative** opinion by the Legislative Council. According to the Councils’ opinion, there is no contradiction between those texts of art. 12 and art. 13 of Act no. 3/2000, which were proposed to be modified. Indeed, that’s why the law maker has organised the act in several chapters, in order to avoid contradictions between those two texts, concentrating the general provisions and the common provisions on the national referendum and on the local referendum in separate chapters. In addition, it was notified the fact that the current drafting of those two texts takes over as such certain expressions from the Constitution, in order to avoid any doubt or any confusion. As a matter of fact, the legislative proposal aimed practically at modifying, in an implicit manner, the text taken over from the Constitution, as regards the organisation of the local public administration and the territory, as well as the general legal framework on the local autonomy.
In addition, the legislative proposal introduced elements of legal uncertainty because of the vague and general language, extending the applicability of the local referendum from issues of particular interest of the territorial-administrative units to political issues which concern those territorial-administrative units. But the latter can be decided, by way of an organic law, only by the Parliament.
As a whole, the Legislative Council is a laboratory of analysis attached to the legislative power which recommends, in a correct and impartial manner, improvements to the proposed legislation. Its influence depends on the value of its opinions, on the well-grounded answer to the legislative drafting problems and to the legal ones, but also on the appreciation of its remarks and recommendations by the initiators of the legislation, if we bear in mind the fact that the opinions of the Legislative Council have only a consultative nature.

3. OPINION
regarding the legislative proposal amending and supplementing articles 9 and 11 of Act no. 112 from 25th of November 1995 regulating the legal status of certain houses which passed into the property of the State

Examining **the legislative proposal amending and supplementing articles 9 and 11 of Act no. 112 from 25th of November 1995 regulating the legal status of certain houses which passed into the property of the State**, sent by the Secretary General of the Senate with the Standing Bureau's letter no. 92 from 24th of March 2005,

THE LEGISLATIVE COUNCIL

Based on art. 2 para. 1 letter a) from the Act no. 73/1993 (republished) and art. 48(2) from the Regulation on the organisation and functioning of the Legislative Council,
Has given a favourable opinion to the legislative proposal, including the following remarks and recommendations:

(…)

2. We mention that the suggested motivation, namely that the current provision would not comply with the constitutional provisions on the guarantee and protection of property, irrespective of its owner, cannot be accepted because violate the decisions of the Constitutional Court, which was notified to give its opinion on the alleged non-constitutional nature of art. 9 last paragraph from the Act no. 112/1995.
Thus, by way of Decision no. 169 from 2nd of November 1999 on the aforesaid article, the Constitutional Court decided that this provision **does not violate** the provisions of art. 41 para. 1 first sentence of the Constitution stipulating that "The right of property and the claims against the state are guaranteed". According to the decision, "Indeed, the provisions of the first sentence of the aforesaid constitutional text cannot be separated from the following provisions of the second sentence, according to which the content and the limits of the right to property are stipulated by law. Therefore, the Parliament is the only authority entitled to set up such a temporary alienation prohibition, prohibition which was known by the author of the notification when he chose to acquire the right of property on the house where he lived by then as a tenant".
As a consequence, the alleged non-constitutional nature of the aforesaid provision was rejected by the Constitutional Court, who decided that it was not well-grounded.
The same solution was given through the Decision no. 238 from 21st of November 2000, published in the Official Gazette of Romania no. 46 from 22nd of January 2001, stipulating that those considerations and that solution are still valid.
Because the provisions of art. 41 para. 1 from the Constitution in force at that time are identical with the provisions of art. 44 para. 1 from the republished Constitution**,** it is obvious that those decisions are still valid nowadays.
Anyway, the Parliament may reassess the current solution, by reconsidering it and by eliminating the prohibition.

(…)

4. OPINION
regarding the legislative proposal for the amendment of Act no. 3 from 22nd of February 2000 on the organisation of the referendum

Examining **the legislative proposal for the amendment of Act no. 3 from 22nd of February 2000 on the organisation of the referendum**, sent by the Secretary General of the Senate with the Standing Bureau's letter no. 492 from 6th of October 2004,

THE LEGISLATIVE COUNCIL

Based on art. 2 para. 1 letter a) from the Act no. 73/1993 and art. 48(3) from the Regulation on the organisation and functioning of the Legislative Council,
Has given a negative opinion to the legislative proposal, for the following considerations:
(…)
2**.** Although the Statement of Reasons stipulates that "there is an apparent contradiction between the text of art. 12 and the one of art.13", we mention that there is no such contradiction between those texts of Act no. 3/2000 which this legislative proposal would like to amend.
Indeed, that's why the law maker has organised the act in several chapters, in order to avoid contradictions between those two texts, concentrating the general provisions and the common provisions on the national referendum and on the local referendum in *Chapter I* and, respectively, in *Chapter IV*.
While the provisions on the national referendum were gather together in *Chapter II*, which also includes the provision from art. 12 para. 1 letter B letter b), the provisions on the local referendum are in a separate chapter of the act, *Chapter III*, which also includes the provision from art. 13 para. 1
As a result, art. 12 regulating *issues of national interest* is located in the chapter relating to *the national referendum*, and art. 13 regarding *issues of particular interest from the territorial-administrative units and the territorial-administrative subdivisions of the municipalities* is located in the chapter relating to the *local referendum*.
3. In addition, note that the current drafting of those two texts takes over as such certain expressions from the Constitution, in order to avoid any doubt or any confusion.
Thus, art. 12 para. 1 letter B letter b) makes use of the expression from art. 73 para. 3 letter o) from the Constitution (republished), regulating "the organisation of the local public administration, of the territory, as well as the general legal framework of the local autonomy", expression which cannot be implicitly modified by rules of a lower legal power, as it has been suggested.
On the other hand, due to their importance, those issues are included and regulated by Act no. 3/2000, in that part of the act relating to **issues of national interest**, which are enumerated in art. 12 para. 1, this way guaranteeing the concordance with the constitutional provision.
In fact the legislative proposal aims practically at modifying, in an implicit manner, the text taken over from the Constitution, as regards the organisation of the local public administration and of the territory, as well as the general legal framework on the local autonomy.
4. As regards art. 13 para. 1 from the same act, the text is also clear and a contradiction with the text from art. 12 is not possible, as the initiators of the legislative proposal considered, because those texts regulate different issues.
According to the current drafting of the text, "The issues of particular interest from the territorial-administrative units and the territorial-administrative subdivisions of the municipalities may be submitted, under the terms of this act, to the approval of the residents, by a local referendum".
The legislative proposal envisages, on the one hand, the extension of the list of issues that

may be subject of approval by a local referendum and, on the other hand, the removal from the text of the conditions for the organisation of a local referendum, namely the expression “under the terms of this act”.
We mention that the proposal concerning this text does not bring any contribution to the clear and coherent text of art. 13 para. 1, but also introduces elements of legal uncertainty because of the vague and general language (“issues that envisage”), extending the applicability of the local referendum from issues of particular interest of the territorial-administrative units and the territorial-administrative subdivisions of the municipalities to political issues which concern those territorial-administrative units and the territorial-administrative subdivisions of those municipalities. But the latter can be decided, by way of an organic law, only by the Parliament.
We also have major objections as regards the removal of the expression regarding the terms stipulated by the law for the organisation of the local referendum, because this process cannot take place under the terms and for the purposes decided by the local authorities, but only in compliance with the conditions provided for by the relevant law, namely the Act no. 3/2000.
(…)

List of participants in the meeting of the members of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union exercising a consultative function, 8th of December 2006.

01	Marnix VAN DAMME	Belgium	President of Chamber
02	Jeroen VAN NIEUWENHOVE	Belgium	Auditor
03	Alberto DE ROBERTO	Italy	President
04	Mario Egidio SCHINAIA	Italy	Vice-President
05	Jean-Marc SAUVÉ	France	Vice-President
06	Jean-Michel BELORGEY	France	President of a section
07	Konstantinos MENOUDAKOS	Greece	Vice-President
08	Pierre MORES	Luxemburg	President
09	Paul SCHMIT	Luxemburg	Councillor
10	Herman TJEENK WILLINK	The Netherlands	Vice-President
11	Jan Maarten BOLL	The Netherlands	Councillor
12	Willem KONIJNENBELT	The Netherlands	Councillor
13	Jan Kees WIEBENGA	The Netherlands	Councillor
14	Sylvia WORTMANN	The Netherlands	Councillor
15	Kamiel MORTELMANS	The Netherlands	Councillor
16	Rintse VAN DER BRUG	The Netherlands	Secretary-general
17	Albert HEIJMANS	The Netherlands	Legal advisor at the Council of State
18	Lars WENNERSTRÖM	Sweden	Judge
19	Bengt Ake NILSSON	Sweden	Judge
20	Dragos ILIESCU	Romania	President
21	Sorin POPESCU	Romania	President of a Section
22	Yves KREINS	Association	Secretary-general
23	Hanneke LUIJENDIJK	The Netherlands	Legist