

Colophon

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1. From the Secretary-general's desk

It was the highly active Dutch presidency which had the idea of launching this newsletter and which has been responsible for publishing it so far. I would like to extend special thanks to Mr Albert Heijmans and Mrs Joyce Leeuwerke at the Dutch Council of State, both of whom have done a brilliant job. They made it possible to forge a permanent link between the members of our association.

Now that the General Secretariat is up and running, we can take over these duties. We will endeavour to publish at least three issues every year and will do everything in our power to ensure that subsequent issues are worthy of their predecessors. For this, we will need the invaluable assistance of association members. If you have any news or reports which you would like to share with the other members of the association, then please do not hesitate to forward them to Frederik Riebbels (frederik.riebbels@raadsvst-consetat.be).

There has been a flurry of activity in recent months, but I would like to focus on two things in particular:

First, the JURIFAST rapid reporting system, which is accessible via the association's website, currently hosted on the site of the Belgian Council of State (www.raadvst-consetat.be), and secondly, the arrival of the supreme administrative courts of the 10 new EU Member States.

The JURIFAST rapid reporting system allows users to quickly learn about major national decisions applying Community law. A special edition of the newsletter will focus on JURIFAST, giving a detailed explanation on how to use it and how the member institutions can take part. JURIFAST is destined to become a cornerstone in the information network that we aim to set up. For additional information or if you have any suggestions, please contact Mr Robert Quintin (robert.quintin@raadsvst-consetat.be).

At the Colloquium in The Hague on 14-15 June 2004, it will be our great pleasure to welcome the newest members of our association: the institutions from the 10 countries which recently joined the EU. We are pleased that they are here and that all of the countries responded positively to our call. We will do our best to make them feel at home. To this end, the association organised a two-day seminar for them at the ERA. This newsletter reports at length on the seminar, which was even more successful than we had hoped. In these pages you will also find presentations of two of our new members: the Supreme Administrative Court of Poland and the Supreme Court of Hungary.

As you will see, our association is flourishing. This is the result of your cooperation and enthusiasm, for which I am most grateful.

Yves Kreins

Secretary-General

2. Communications of the Association

2.1 Jurifast

As indicated above, a detailed Newsletter will be devoted to Jurifast. However we would like to take this occasion to give a brief overview of the present state of affairs.

The ICT structure of Jurifast was first presented to the documentation services of the different member states, in December 2003. A participation plan was discussed and presented. By the end of February Jurifast was launched officially. From that moment on, the member states were able to input the data they considered to be interesting for the other member states.

The success and participation of the members is greater than first anticipated: the past 3 months, more than 30 decisions have found their way into our databank. A large number of member states participate regularly and actively. If for organizational reasons, your member state was not yet able to participate, please feel free to send any information you have. If you are having difficulties using the interface, you can always contact Robert Quintin. He will surely be able to help you on any questions you might have.

2.2 Minutes of the meeting of the members of the Association charged with acting in an advisory capacity in matters of legislation, held in The Hague on 16 February 2004

A special edition of the Newsletter will be dedicated to a detailed comparative study on the questions given by the invited member states posed by the presidency on this subject.

Those present:

Herman Tjeenk Willink , President of the Association, Vice President of the Council of State of the Netherlands;

Jean-Michel Belorgey, Section President of the Council of State of France;

Willy De Roover, First President of the Council of State of Belgium;

Marnix Van Damme, Chamber President at the Council of State of Belgium;

Pierre Mores, President of the Council of State of Luxembourg;

Marc Besch, Secretary General of the Council of State of Luxembourg;

Alberto de Roberto, President of the Council of State of Italy;

Giuseppe Barbagallo, Councillor of State at the Council of State of Italy;

Marcello Borioni, Secretary General of the Council of State of Italy;

Konstantinos Menoudakos, Vice President of the Council of State of Greece;

Willem Konijnenbelt, Chamber President at the Council of State of the Netherlands;

Aad Kosto, Chamber President at the Council of State of the Netherlands;

Hans Beekhuis, Chamber President at the Council of State of the Netherlands;

Marten Oosting, Chamber President at the Council of State of the Netherlands;

Yves Kreins, Secretary General of the Association of Councils of State;

Frederik Riebbels, Assistant to the Secretary General of the Association;

Albert Heijmans, Legal Counsel to the Council of State of the Netherlands.

2.2.1 Minutes of the morning session

Mr Herman Tjeenk Willink, President of the Association and Vice President of the Council of State of the Netherlands, opened the meeting and welcomed those present. He informed the meeting that the morning session would be given over to a discussion of the similarities and dissimilarities between the Councils of State in the exercise of their advisory function. The afternoon session would discuss how the Councils of State should structure their cooperation on the advisory function in the future.

The President observed that this would be the first meeting at which the language of the host country could be used.

The President stated that a questionnaire had been answered by all Councils of State in preparation for the discussion during the morning session. He suggested that the discussion should be conducted by reference to the questions formulated in the summary of replies (*Synthèse des réponses apportées au questionnaire*), which was among the documents that had been circulated for the meeting. This would make it possible to define more precisely some relevant topics. The discussion would focus on the similarities and dissimilarities. The President proposed that the meeting should start by considering point 1 (a) of the document and invited Mr Van Damme, Chamber President at the Belgian Council of State, to address the meeting.

Mr Van Damme stated that in the Belgian Council of State members of the Council may be assigned exclusively either to the advisory or to the judicial function. He explained that this differs from the practice of the other Councils of State, where the members (or some of them) may be assigned to both simultaneously. Mr Van Damme saw some advantages in combining the functions, but added that in the Belgian Council of State the simultaneous exercise of both functions is impossible for practical reasons, first because an opinion on legislation usually has to be published very quickly and, second, because in the judicial division too, applications for an injunction have to be dealt with as a matter of urgency. However, Councillors of State can switch from one function to the other as and when the workload of the Council of State makes this necessary. The assignment can then be altered by decision of the First President. Mr Van Damme explained that the provision of the Belgian Council of State Act (section 29 of the coordinating Acts) prohibiting a Councillor of State from hearing a case about the constitutionality of a bye-law or regulation on which he has previously given advice, predates the judgment of the Court of Human Rights in the Procola case and is not therefore a result of that judgment. Section 29 refers only to bye-laws and regulations and not to Acts of Parliament because the courts in Belgium (and hence the Council of State too) may never review the constitutionality of Acts of Parliament in their judicial capacity. To sum up, the reasons why Councillors of State in Belgium do not carry out the advisory and judicial functions simultaneously are of a practical nature rather than a matter of principle.

The President thanked Mr Van Damme for his explanation and invited Mr Mores, President of the Luxembourg Council of State, to address the meeting. He asked Mr Morres to explain in

particular how the decision to remove the judicial function from the Council had affected the exercise of its advisory function. **Mr Mores** said that the modification made to the Council under the 1996 reform did not fundamentally alter its advisory function. Indeed, the challenges involved in carrying out its advisory function have remained the same. He added that the members of the Council of State are obviously no longer in direct contact with developments in administrative law. It should also be acknowledged that the loss of the judicial function has been accompanied by the loss of some of the Council of State's prestige.

At the request of the President, Councillor of State **Barbagallo** explained the position of the Italian Council of State. This acts in a dual capacity, which is thought to benefit the exercise of the advisory function. In the view of the Italian Council of State, the two functions are not incompatible. In exercising its advisory function the Council acts as impartially and independently as it does in exercising its judicial function. In this respect, therefore, there is no real difference between a judge who has given a previous judgment on a similar matter and an adviser who has been involved in the preparation of an opinion. The incompatibility exists more in the realm of the 'institution' than in the realm of 'law'. In addition, he pointed out that in the exercise of the advisory function an opinion is always of an abstract nature, whereas in the judicial function it is a matter of applying the law in a specific case. In his view, it was therefore logically impossible for there to be an incompatibility between the two functions. He pointed out that in the recent judgment in the case of *Kleyn et al.* the European Court of Human Rights had defined the position more precisely.

The President observed that it was a matter of maximising the advantages of the dual function

and minimising its disadvantages. At the request of the President, the Vice President of the Greek Council of State, **Mr Menoudakos**, then described the position in Greece. For various reasons the problem is not regarded as pressing. First of all, the Greek Council of State is charged only with advising on decrees and not on Acts of Parliament and, second, the dual function is exercised simultaneously only by a small group of Councillors of State. Only one of the five divisions of the Council is charged with both functions. This division consists of seven Councillors of State and nine advisers. The advisory function is, in fact, their main activity. Mr Menoudakos said that although the combination has certain advantages, for example ensuring that the advisory function is carried out by people with the requisite experience and know-how, it also has disadvantages. For example, it is sometimes difficult to organise the work. No specific measures were taken by the Greek Council of State following the *Procola* judgment. As so few Councillors of State are involved in the advisory function, there is generally no difficulty in ensuring that a Councillor of State is never involved in hearing an appeal concerning the lawfulness of a decree on which he has previously advised.

Section President **Belorgey** said that the French Council of State attaches the greatest importance to its dual function for historical and constitutional reasons. Unlike virtually all other Councils of State, the French Council of State has traditionally acted as co-author of legislation. The draft texts which it submits to the government are secret and are presented as a draft text. The proposition is only exceptionally accompanied by separated remarks when the representatives from the government are rather reserved concerning the matter, or when questions of confidentiality are at stake. Whenever a question is brought before the Constitutional court, its first

reflex is to consult the dossier of the Council of state. This is particularly important in respect of opinions on constitutional aspects. Such matters can be referred for decision to the Constitutional Council, which can then take into account the opinion of the Council of State. The Council of State never provides an opinion to the government on matters relating to cases pending before the Council or another administrative court in France. Any problems in connection with the Procola judgement are generally resolved in a pragmatic way, since members of the Council who have a dual role refrain from taking part in deliberations on an opinion with which they could later be confronted in their capacity as judge.

Chamber President **Konijnenbelt** explained the Dutch position. Unlike France, the Netherlands does not have a constitutional court. The constitutionality of Acts of Parliament may not be reviewed by the courts. However, the courts may decide whether an Act of Parliament is compatible with a binding decision of an international organisation (for example, a regulation of the European Union) or an international treaty binding on the Kingdom of the Netherlands. The opinion of the Council of State, which is always published, may play a role in such a decision and the link can be of considerable benefit to the Council's advisory work. As a result of their experience as judges, Councillors of State are able to scrutinise the texts submitted to them more rigorously than would otherwise be the case. For example, some time ago the Council of State issued a negative opinion on a bill to make radical changes to environmental legislation. Its arguments, which were based on administrative expediency, were drawn from its own experience as supreme administrative court. The Council also benefits greatly from its judicial experience when assessing the constitutionality of subordinate legislation. On the other hand, the judicial

function can also give rise to problems. For example, there is the question of whether or not the Council, when exercising its judicial function, is bound by an opinion given by it on the legislation at issue in the case concerned. As a large number of Councillors of State Extraordinary are attached to the Council and do not participate in the preparation of opinions, it is possible, where necessary, to arrange for administrative cases to be heard by benches consisting solely of judges who have not taken part in any way in the preparation of the opinion. In fact, such problems occur only very rarely. In a few instances the method adopted by the French Council of State is applied. For example, the Councillors of State responsible for hearing cases involving immigration and asylum do not take part in the preparation of opinions on legislation in this field.

Mr Mores began by pointing out that while it was pending before the European Court of Human Rights, the Procola case threatened the smooth exercising of the judiciary function - much like a sword of Damocles. After the Procola decision was handed down, the political will did not result in an approach or measures such as those mentioned by the representatives of other Councils of State. With regard to enhancing the advisory function mentioned by the other Councils of State, in Luxembourg it is possible in theory for members of the Council of State to be drawn from the judicial world and to recruit individuals with legal experience to work at the secretariat.

The **President** observed that the Councils of State which have a dual advisory and judicial role in respect of administrative law believe it is important to maintain this combination, since it is regarded as having a positive influence on the content of opinions and on the authority of the Council in its advisory capacity. However, the

decision of the European Court of Human Rights in the Procola case threatened to put this in jeopardy. With the exception of Luxembourg, the countries concerned have found practical ways of addressing the problem and maintaining the positive effect of the dual function. No problems occur in Belgium since Councillors of State are not charged with both functions simultaneously and because there is a statutory provision barring Councillors of State from acting as judges in cases involving the constitutionality of decrees and ordinances in which they themselves have acted as in an advisory capacity.

The **President** then invited the meeting to consider point 1 (b) of the summary of replies, which dealt with the selection of Councillors of State and the balanced composition of the Councils. In a number of cases the Councils of State could exercise great influence over their composition, but in some other cases parliament too had a say in the selection of Councillors of State.

Mr Konijnenbelt stated that the Dutch Council of State nominates candidates for office and that the nomination is always accepted by the government. As the Dutch Council of State advises on a very wide range of issues, the persons appointed as Councillors of State come from a variety of backgrounds. They include not only lawyers, who constitute the majority, but also former civil servants and politicians as well as economists and management experts. Their broad experience and the fact that they are appointed for life are conducive to the independence of the institution.

Mr Menoudakos said that the auditors and members of the Greek Council of State are graduates of the National School for the Judiciary and that the Council therefore consists entirely of

lawyers. The advice provided by the Council is also solely on legal matters.

Mr Belorgey informed the meeting that the French Council of State is divided into three parts because of the volume of work. Approximately 40 percent of the members are involved in the advisory function. Although it is possible to distinguish between the two functions, there is synergy between them. It is precisely because of the combination of functions that it is possible to have the work carried out by a relatively limited number of people. People are appointed to the Council directly from the *École Nationale d'Administration* (ENA) and can hold different jobs both on the Council and elsewhere, for example in public administration, politics and parliament. This too helps to create a body of members who have widely differing experience and can thus make a valuable contribution to discussion.

Chamber President **Kreins**, the Secretary General of the Association, pointed out that the existence of the dual functions in the Belgian Council of State also guarantees the position of its members as judges. This is because the members have the legal status of judges rather than that of civil servants. In addition, the type of selection procedure is of particular importance in safeguarding the independence of the institution.

The **President** then reminded the meeting that the European Court of Human Rights had expressly held in the Kleyen case that the independence of the Dutch Council of State was not at issue. This aspect of the judgment had often been wrongly overlooked in the commentaries that had been published.

Chamber President **Kosto** observed that the Dutch Council of State gives its opinion before a bill is presented to parliament. During the passage of the bill through Parliament both the

government and parliament can amend the bill. These amendments are submitted to the Council of State for its opinion only infrequently. He wondered how this was arranged in the other Councils of State.

Mr Mores pointed out that in Luxembourg, the Council of State generally issues its opinion on all amendments made to draft legislation during the procedural phase. It is rarely called upon to issue an opinion on amendments to draft regulations in Luxembourg.

The President of the Italian Council of State, **Mr De Roberto**, informed the meeting that the problem occurs in Italy only in respect of ordinances. This is because the Council of State does not advise on bills. Once the Council of State has submitted its opinion, the government must indicate what it intends to do with it. If the government amends the ordinance in a different way, it is obliged to submit the amended ordinance to the Council for its opinion. The Council then confines itself to the new ordinance rather than basing itself on the previous one. The government must indicate in the recitals at the start of the ordinance whether or not it has followed the opinion. If it has not done so it must also give reasons for this.

Mr Menoudakos said that in Greece too the government is obliged to consult the Council of State about all amendments made after the Council has published its opinion, unless, of course, the amendments are in keeping with the Council's recommendations.

Mr Belorgey stated that in France too this procedure must be followed for decrees. However, the situation is different as regards amendments and changes made by parliament. Nor does the Council of State advise on 'propositions de loi'. The government, who cannot ask for the opinion of the Council on a draft law,

nevertheless wanted such an opinion because the draft law on financing the social security system, was to be reforming the organic ordinance of 1959 on the finance laws. The government did this by subjecting 22 questions to the Council, and not by forwarding the proposal to him. This formula is not usually accepted, because as soon as a text is in preparation, it is the text which the Council wants to see, not questions. The importance of the subject could nevertheless justify an exception.

Mr Van Damme said that in Belgium the government is not obliged to request the Council for an opinion on changes and amendments made during the passage of a bill through parliament. Members of parliament do, however, have the power to request the Council of State for an opinion and sometimes exercise this power for political reasons.

Chamber President **Beekhuis** informed the meeting that every effort is made to ensure that the composition of the Dutch Council of State reflects as far as possible the social and political landscape of the Netherlands. The political background of the members is therefore taken into account, although this does not mean that they have to be members of a particular political party.

After a short break the President invited the meeting to consider points 5 (a) and 5 (b) of the summary. These were mainly to do with the criteria applied by the various Councils of State in their advisory capacity when assessing the texts submitted to them. Clarity on this issue helps to make the opinions predictable and less vulnerable to accusations of political bias, and also enhances their authority. What are these criteria and are they publicised?

Chamber President **Oosting** explained the practice of the Dutch Council of State. The

Council scrutinises much more than just the legal aspects of the bills submitted to it. Generally speaking, its scrutiny covers three elements:

1. compliance with technical guidelines for legislation
2. the legal aspects
3. the policy rationale

The first element involves assessing whether the 'Directions for legislation' adopted by the Prime Minister and binding on the government ministries have actually been observed. The second involves assessing whether the bill is in keeping with higher law, general principles of law, the principles of democracy and the rule of law, and whether it is suitably embedded in the legal system. And the third element involves analysing the policy underlying the bill, in other words such issues as:

1. what problem is the bill intended to tackle or solve?
2. does the bill have a reasonable chance of achieving the stated goal?
3. is the bill practicable, enforceable and efficient?

Mr Oosting inquired whether such an approach was taken elsewhere too.

Mr Belorgey replied that the French Council of State essentially adopts a similar approach. It too examines the necessity for new legislation (legislation introduced merely for reasons of 'propaganda' is regarded as quite unacceptable), the hierarchy of laws and the quality of underlying policy. He pointed out, however, that a good solution to a social problem can sometimes be based on a poor text! This too must be taken into account. In any event, it is too hard to draw up

unequivocal criteria and the extent of the scrutiny varies from case to case.

Mr De Roover, First President of the Belgian Council of State, stated that much attention is paid to the hierarchy of laws and to general principles of law, such as the principle of legal certainty in the case of retroactive effect and the principle of proportionality. Although the Council does not systematically review proposals by reference to the principles of sound legislation, it does consider such matters as their complexity and how this can affect government and administration. The scrutiny is therefore generally of a legal nature, but can extend further where necessary. The Council also considers such issues as whether there is a problem to be solved and whether the proposed solution is appropriate to the problem.

According to **Mr Mores**, bills presented to the Luxembourg Council of State are also subjected to thorough legal scrutiny, including of course reference to general principles of law. The Council also scrutinises the quality of the policy underlying the proposals submitted to it. He gave as an example a bill on water management where the question to be decided was which government ministry should be responsible for its implementation: the Interior Ministry or the Environment Ministry. For various reasons the Council chose the Environment Ministry and was promptly blamed for having meddled in politics.

Mr Barbaggio observed that although the scrutiny by the Italian Council of State mainly focuses on legal aspects, it also takes account of administrative expediency. In this way, it sometimes manages to find a more effective solution than a decree, for example a contract. Where appropriate, the Council also sometimes recommends a less convoluted solution than proposed by the government. The opinion may

also sometimes relate to expediency, in the sense that the Council asks the government first to arrange for a study of the consequences of the proposed provisions.

Mr Menoudakos indicated that although the Greek Council of State focuses on the legal aspects, it also takes account where necessary of the policy and administrative aspects. The **President** proposed that the meeting should consider in more detail how legislation is scrutinised in terms of general principles of law and the principles of sound legislation. He inquired whether outsiders knew that these principles were applied in scrutinising legislation.

Mr Van Damme stated that the Belgian Council of State carried out in-depth scrutiny of legislation by reference to general principles of law, but that the principles of sound legislation did not yet form part of its systematic study.

Mr Mores explained that the general principles of law are enshrined in Luxembourg's Constitution and in the international treaties binding on States. He referred in this connection to such principles as legal certainty, the limited scope for retroactive effect, the principle of the separation of powers, the rule of law and the rules of budgetary ethics. He drew attention to the report on this subject presented by the Luxembourg Council for the meeting of the Benelux Councils of State with the French Council of State in the context of the celebrations held in Brussels on 20 November 1998 to mark the 200th anniversary of the establishment of the French Council of State. **Mr Mores** said that the Council of State of Luxembourg always explicitly mentions in its opinions the legal principle on which its opinion is based, so that the public and politicians are duly informed.

Mr Barbagallo stated that the Italian view of the general principles of law is that they are derived from private law and not all aspects of these

principles are specifically defined. It is the courts that define the content of such principles. In doing so they apply views held in society. They make a connection, as it were, between law and society.

Mr Menoudakos explained that the concept of principles of sound legislation is unknown as such to the Greek Council of State. By contrast, the general principles of law are applied. Some of these principles are enshrined in the Constitution and others are principles of administrative law such as the principles of proportionality, non-retroactive effect and the public interest.

Mr Oosting added that the criteria applied by the Dutch Council of State in its advisory capacity are publicised in various ways. For example, opinions are published, the principles on which the Council bases its scrutiny are described on the Council's website, and its annual report provides a survey of the content of major opinions which is organised along the same lines as the criteria. In this way, the Council provides useful information for legal draftsmen in the government departments and for academics. The Council sets to work as systematically as possible. It scrutinises not only the text of the legislation but also the explanatory notes to the text (sometimes known as '*legisprudence*'). As regards the impact of its opinions, he noted that various studies have shown that recommendations of a legal and technical nature are generally adopted, unlike those relating to the policy aspects.

Mr Barbagallo observed that the opinions of the Italian Council of State are almost always adopted. All opinions are published on the website in the same way as judgments of the Council in its capacity as an administrative court, together with the names of the president of the chamber producing the opinion and the drafter of the opinion. Both the opinions and the judgments

constitute case law of which citizens too can take account.

Mr Mores discussed the effects which an opinion could have. What is of importance to the status of an opinion is that it is endorsed by all members of the Council. There are three possible situations:

(1) the opinion contains only commentary, in which case it is unlikely to be adopted;

(2) the opinion contains a counterproposal, in which case there is a much greater likelihood that it will be adopted;

(3) the opinion formally opposes the bill, in which case parliament must vote twice on it if it wishes to enact the legislation.

Mr Kosto then wondered how clear and accessible the law really is for citizens. Although everyone is deemed to know the law, he queried to what extent this is really possible. Is there not a role for the legislative advisor here?

Mr Belorgey said that although the opinions are not published in France, the Council does publish the main opinions, with the consent of the government, in its annual report. It also provides a catalogue of the principles which it applies in this connection. This is certainly instructive for the ministry draftsmen and the law faculties. Opinions on decrees are usually adopted by the government. This is not the case with opinions on Acts of Parliament, except in cases where the Council identifies constitutional problems. He agreed with Mr Kosto that Acts of Parliament should be clear and that there are at present too many Acts of Parliament and decrees. However, he doubted whether anything could be done about this. Efforts had been made in France to repeal certain legislation on a large scale. However, the remedy had proved worse than the disease.

The **President** rounded off the morning discussion. He pointed out that the meeting had for the most part discussed the issue of the quality of legislation. The question of whether or not an Act of Parliament is sound cannot generally be answered in advance, but will become apparent only during its implementation. The question that then arises is what should be done with dysfunctional legislation. The President wondered whether this was not in fact the question that the members should be asking themselves.

2.2.2 Minutes of the afternoon session

The President reopened the meeting. The subject of the morning session had been similarities and differences between the Councils of State. He stated that in the afternoon session he wished the meeting to consider the value of, and necessity and practical scope for cooperation and the exchange of information between the Councils of State and the legislative advisers. He referred in this connection to some subjects relevant to all institutions, such as comparative law, European legislation and managing their own organisation. In his view, the aims should not be overly ambitious: the essential thing is to investigate the practical possibilities and what subjects and themes should be the focus of further contacts. This was dealt with in parts 3 and 4 of the summary sent to the members. After some brief introductory comments the President invited Mr Konijnenbelt to address the meeting.

Mr Konijnenbelt proposed that the question of what points are emphasised by the different Councils of State in relation to the quality of legislation should be dealt with at a subsequent meeting.

Mr Oosting suggested a different approach to a possible agenda for a follow-up discussion. A selection could be made from one or more topical

issues concerning legislation in each of the countries. The priorities for a future agenda could then be chosen on this basis.

Mr Belorgey wished the efforts to be focused on achieving something concrete. He also considered that it would be worthwhile discussing themes relevant in the various countries, such as the transposition of Community law, decentralisation and democracy. An example of a concrete project would be the preparation of a document explaining to the public what the work of the Councils of State involves and what standards they apply to legislation. In this way the meeting could attempt to shape '*opinion intellectuelle*'. The document could set out legislative principles and, possibly, adopt a common position.

Mr Mores expressed a preference for two approaches. One option would be for the meeting to adopt the idea of recording the work and procedure of each of the Councils of State. The Dutch report was a first step in this direction. Such a document would also be useful for the outside world. Alternatively, the comparison of specific legislative texts, for example the provisions of the various Constitutions, could serve as a basis for discussion, since if the meeting were instead to talk about abstract matters there would be a danger of putting the cart before the horse. The separation of powers could be a possible topic of discussion, which could be based on comparison of the relevant constitutional provisions in order to determine how this is regulated in each country. He would be in favour of starting such a project on a step-by-step basis, for example within a small framework such as the Benelux.

Mr Barbagallo said that he would be in favour of tackling a modest subject at a subsequent meeting. The study could be based on the

relevant legal sources and could lead to the formulation of general principles. He mentioned the protection of minorities as a concrete example. The work should be based on normative texts and international conventions, but other matters such as the level of provision in relation to the media could also be taken into account later.

Mr Menoudakos considered that cooperation was possible in relation to two types of problem, namely procedural and substantive problems. He was convinced that cooperation in the latter area would not be simple or achievable in the near future since a thorough knowledge of the legislation of each country would be essential for this purpose. He stated that he would therefore prefer cooperation to focus on working methods and procedural issues, in any event in the short term. The Dutch report provided a good basis for this.

Mr Oosting said that in his view it would first be necessary to determine the aims of cooperation. This should be to learn from one another. The next question would be to decide in what areas they should cooperate: namely methods or content. If methods were to be chosen, the starting point could be what measures are taken by each of the Councils of State to ensure the quality of legislation. This point could be studied in depth. In addition, they could identify what themes regularly occur in their work. Examples in the Netherlands are the issue of the public and private sectors, the limits imposed on the growth of the welfare state, and fundamental rights. In his view, these were themes that could be profitably studied.

Mr Konijnenbelt supported Mr Belorgey's proposal that efforts be made to achieve something jointly.

Mr Kosto wondered whether the time had not come to focus on establishing a European Council of State, since it was clear that more and more sovereignty would pass to Brussels.

The **President** replied that this idea had been put forward previously in the Association, but it had proved to be unrealistic. With reference to the issue of the quality of legislation that could be monitored by a European Council of State, he noted that the meaning of the term differs according to whether national or European legislation is under consideration. The two types of legislation have different functions: for the most part national legislation lays down what must be done whereas European legislation is much more about what may no longer be done. He himself would like European Union law to be among the possible fields of cooperation. Each Council of State is, after all, increasingly becoming a European institution and must also make a contribution to Europe. This could also determine the subjects for cooperation. As Mr Morres had already stated, the basis for cooperation should be the texts. In addition, consideration could also be given to the question of deregulation and the clarity of legislation, as suggested by Messrs Belorgey and Kosto.

The **President** then invited the meeting to discuss specific possibilities for establishing cooperation. Part 4 of the memorandum listed some options. He invited Mr Oosting to address the meeting.

Mr Oosting wondered whether the electronic exchange of data would benefit the Councils of State in their advisory capacity. In his view, this would not be the case (unlike the judicial capacity). He would prefer regular meetings, for example in the premises of the Academy of European Law (ERA) in Trier.

Mr Van Damme would like such meetings to deal with questions relating to major trends in legislation. He explained that in Belgium, for example, there was nowadays a tendency for matters that had been previously resolved under public law to be dealt with by private law arrangements and procedures. He wondered whether similar trends were occurring elsewhere.

The **President** replied that an example in the Netherlands was the use of administrative penalties in cases in which the criminal law would formerly have been the means of enforcement. He added he shared the view that an electronic information system of the kind established for the judicial function would be of less use for the advisory function. On the other hand, a system of confidential communication enabling members to put questions to one another could yield some useful comparative information about relevant points.

Mr Konijnenbelt emphasised the importance of submitting the opinions for publication in the Bulletin. He also pointed out that Europe's oldest Council of State, namely that of Spain, was still not a member of the Association. The Spanish Council of State also acts as an adviser on legislation. It would be desirable if this Council too could be involved in the activities.

The **President** then rounded off the meeting. He concluded from the reactions that the suggestion of holding further meetings in the future enjoyed wide support. He would arrange for the minutes of the meeting to be circulated, together with a request for notice to be given of any desired amendments to them and, if possible, submission of suggestions for themes and topics for future meetings and forms and subjects of cooperation. He considered it important for the advisers to participate in the Newsletter and he also intended to propose to the board of the Association that a

legislative adviser should also always be present at meetings of the board. In this way account could be taken of the possible contribution of the advisers in the choice of subjects for colloquiums and other activities.

The Secretary General of Association, **Mr Kreins**, then addressed the meeting. He stated that procedural work involved in organising a follow-up meeting could be performed by the general secretariat and possibly by the ERA if the meeting were to be held in Trier. However, the substantive preparation of the meeting would always have to be done by one of the six Councils of State themselves. It would be best if they were to take turns at this. The President agreed with the Secretary General. He proposed that the nature of the follow-up to this meeting could be decided on the basis of the minutes. He would return to this subject later in a letter to the presidents of the Councils of State. The participation of the Spanish Council of State in the Association had hitherto encountered objections from the Spanish Supreme Court. He would discuss the matter with the president of the Court informally during the colloquium in an effort to resolve the problem. The identity of the President of the Association as from 2008 would become clear in June 2004. Who should be asked to organise the follow-up meeting could be examined at that stage.

The **President** then wished everyone a good journey home and closed the meeting.

2.3 Report of the reunion held in Trier the 22nd and 23^d of March 2004

In cooperation with the ERA and TAIEX (Technical Assistance Information Exchange Office) the Association organized a seminar about the Preliminary Reference Procedure based on practical experiences of the highest

national courts in administrative matters. Presided by Chairman Heikki Kanninen (Judge at the Supreme Administrative court in Helsinki) the reunion outclassed the initial expectations.

2.3.1 The following 62 judges were present:

Country		Surname	First name	Court
AT	Mr.	Kohler	Martin	Administrative Court
BE	Mr.	Kreins	Yves	Council of State
BG	Mr.	Kalinov	Angel	Supreme Administrative Court
BG	Ms.	Kotzeva	Bisserka	Supreme Administrative Court
BG	Ms.	Kovatcheva	Violeta	Supreme Administrative Court
BG	Ms.	Papazova	Rumiana	Supreme Administrative Court
BG	Ms.	Yordanova	Dima	Supreme Administrative Court
CY	Mr.	Eliades	Christakis	Supreme Court
CY	Mr.	Nicolaides	Frixos	Supreme Court
CZ	Mr.	Kamlach	Milan	Supreme Administrative Court
CZ	Mr.	Melzer	Filip	Supreme Administrative Court
CZ	Mr.	Molek	Pavel	Supreme Administrative Court
CZ	Mr.	Novotny	Vaclav	Supreme Administrative Court
CZ	Mr.	Sebek	Petr	Supreme Administrative Court
DE	Mr.	Groepper	Michael	Federal Administrative Court
EE	Mr.	Koolmeister	Indrek	Supreme Court
EE	Ms.	Laffranque	Julia	Supreme Court
EE	Mr.	Pilving	Ivo	Supreme Court
EE	Mr.	Tampuu	Tambet	Supreme Court
FI	Mr.	Kanninen	Heikki	Supreme Administrative Court
HU	Mr.	Buzinkay	Zoltan	Supreme Court
HU	Mr.	Darak	Peter	Supreme Court
HU	Mr.	Karpati	Magdolna	Supreme Court
HU	Mr.	Madarasz	Gabriella	Supreme Court
HU	Mr.	Nagy	Gabor	Supreme Court
HU	Mr.	Polonyi	Eniko	Supreme Court
LT	Mr.	Baranovas	Tomas	Supreme Administrative Court

LT	Mr.	Drigotas	Arturas	Supreme Administrative Court
LT	Mr.	Klisauskas	Romanas	Supreme Administrative Court
LT	Mr.	Piskinaite	Nijole	Supreme Administrative Court
LT	Mr.	Valancius	Virgilijus	Supreme Administrative Court
LV	Mr.	Gulans	Andris	Supreme Court
LV	Mr.	Jonikans	Valerijans	Supreme Court
LV	Mr.	Logins	Maris	Supreme Court
LV	Mr.	Vernusa	Edite	Supreme Court
LV	Mr.	Visnakova	Gunta	Supreme Court
MT	Mr.	Caruana-Demajo	Giannino	Courts of Justice
MT	Mr.	De Gaetano	Vincent	Courts of Justice
MT	Mr.	Galea Debono	Joseph	Courts of Justice
MT	Mr.	Micallef	Joseph	Superior court
MT	Mr.	Sciicluna	David	Courts of Justice
NL	Mr.	Lauwaars	Richard H.	Council of State
NL	Mr.	Van Dijk	Pieter	Council of State
PL	Mr.	Biernat	Stanislaw	Supreme Administrative Court
PL	Mr.	Chlebny	Jacek	Supreme Administrative Court
PL	Mr.	Kisielewicz	Andrzej	Supreme Administrative Court
PL	Ms.	Wiszniewska	Irena	Supreme Administrative Court
PP	Mr.	Tridimas	Panagiotis Takis	University of Southampton University of Southampton - Highfield Faculty of Law
RO	Mr.	Albu	Emmanuel	High Court of Cassation and Justice
RO	Ms.	Cantar	Elena	Court of Appeal of Craiova
RO	Mr.	Graur	Ion	Timisoara Court of Appeal
RO	Ms.	Hutopila	Violeta	Court of Appeal of Bucharest
RO	Mr.	Luzescu	Cristina	Hugh Court of Cassation and Justice
SE	Mr.	Schäder	Göran	Supreme Administrative Court
SI	Mr.	Kmecl	Andrej	Supreme Court
SI	Ms.	Lippai	Martina	Supreme Court
SI	Mr.	Ozbolt	Kristina	Supreme Court
SI	Ms.	Pogacar	Jasna	Supreme Court
SK	Ms.	Elexova	Anna	Supreme Court
SK	Ms.	Hencekova	Jana	Supreme Court
SK	Ms.	Kovacova	Elena	Supreme Court
SK	Ms.	Rothova	Viera	Supreme Court

TR	Mr.	Alpak	Osman	Council of State
TR	Mr.	Demirtas	Erkan	Council of State
TR	Mr.	Ogus	Alaittin	Council of State
TR	Mr.	Simsek	Tacettin	Council of State
TR	Mr.	Yet	Orhun	Council of State

2.3.2 Topics discussed:

The welcome words were spoken by Mr. *Wolfgang Heusel, Director of the Academy of European Law, Trier and Jan-Kees Wiebenga, Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union*

- *Introduction: Current Trends in the Preliminary Reference Procedure*

Speaker: Takis Tridimas, University of Southampton and College of Europe, Bruges

- *The Procedure before the National Court*

Speakers:

Panel I: Pieter van Dijk, Council of State (Netherlands);

Martin Köhler, Verwaltungsgerichtshof (Austria);

Michael Gröpper, Bundesverwaltungsgericht (Germany);

Göran Schäder, Supreme Administrative Court (Sweden)

The subjects discussed were:

- National supplementary provisions concerning the preliminary reference procedure
- Which national jurisdictions are courts or tribunals in the sense of Article 243(3)?
- Which national courts or tribunals are most active in making references? Why?

- Appeal to a court of higher instance against a decision of a court of lower instance concerning the application of Article 234.

- What is the procedure when you decide on a preliminary reference?: the role of the parties (reference ex officio or at the request of concerned parties, hearing of the parties); at which stage of the procedure the reference is made; are there special internal arrangements in your jurisdiction for cases where a preliminary reference is considered?; how do you get information on Community law and the case-law of the Court of Justice?

- How extensively do you motivate a decision to decline the request of a party that a reference for a preliminary ruling be submitted.

- Structure and content of the decision to submit a reference for a preliminary ruling.

- *When to Make a Reference for a Preliminary Ruling*

Speakers:

Panel II: R.H. Lauwaars, Council of State (Netherlands);

Martin Köhler, Verwaltungsgerichtshof (Austria);

Göran Schäder, Supreme Administrative Court (Sweden);

The subjects discussed were:

- What can be asked and when from the Court of Justice?

- The obligation of the national supreme court to make a reference.

- Practical application of the criteria referred to in the *CILFIT* judgment.

- The impact of the delay due to the procedure before the Court of Justice. Other special aspects

affecting the use of the preliminary reference procedure.

- Procedure in cases where there are several similar cases pending before the national courts or where a similar case is already pending before the Court of Justice.

- *The Experiences of a Member of the Court of Justice*

Speaker: Advocate General Francis G. Jacobs, European Court of Justice

- *The Role of the National Court after having submitted a Reference for a Preliminary Ruling and the Procedure following the Preliminary Ruling*

Panel III: Pieter van Dijk or R.H. Lauwaars, Council of State (Netherlands); Martin Köhler, Verwaltungsgerichtshof (Austria); Michael Groepper, Bundesverwaltungsgericht (Germany);

- Has your court ever withdrawn or corrected its preliminary reference?

- Has the Court of Justice ever asked for further information from your court?

- In general, what has been the role of your court during the preliminary reference procedure before the Court of Justice?

- Have any problems arisen concerning the admissibility of references sent from your jurisdiction?

- Do you have any experience on cases where the Court of Justice has answered to your preliminary question by using the simplified procedure referred to in Article 104(3) of the Rules of Procedure of the Court of Justice?

- What is the procedure after your court has received the preliminary ruling?

- Has your court had difficulties in utilising the preliminary ruling?

- *Case Study: Presentation of the Case Study*
- *Case Study: Workshops and discussion of Results*

2.3.3 Reactions and appreciation

The new members to our Association were extremely eager to learn the different views on the subject, and their interventions in the different discussions proved the usefulness of this reunion. In most new EU member states no effort had been spared to give their judges a sufficient theoretical insight, but as a member of the Maltese Court stated: "we never had the opportunity to discuss the practical implementation of EU Law with all actors. We are limited to paper knowledge and we only have gotten information from experienced lawyers. Here we have the change to get the information from colleague judges and even from the ECJ itself".

Especially appreciated was the open atmosphere, which permitted anyone to intervene whenever a question rose, and on more than one occasion the panel itself disagreed on delicate points of interpretation. Hence, we can only draw one conclusion: the meeting treated the subjects profoundly and did not spare the sometimes very technical aspects of preliminary ruling.

In fact these technical aspects were made a lot easier by Mr. R. Lauwaars, as he presented a systematic overview of all possibilities with ECJ jurisprudence, available in all languages of the EU.

2.3.4 Guide to preliminary ruling

This guide is available on our website, in greater detail and with jurisprudence available in all languages of the EU. Printed below you will find an overview of the information available on our website.

This guide to preliminary ruling proceedings before the Court of Justice EC (ECJ) appears under the auspices of the Dutch 'Euro Group' [the Euro Group is an informal working group of the Netherlands Association for the Judiciary (the association for judges and public prosecutors); the aim of the working group is to study the developments in European Community Law and the decisions of Dutch judiciary bodies in the field of European Community Law]. The final editing was done by:

M.J. Kuiper (member of the College van Beroep voor het bedrijfsleven (Dutch Appeals Tribunal for Trade and Industry), court co-ordinator for European law) and Dr R.H. Lauwaars (member of the Raad van State (Dutch Council of State), court coordinator for European Law).

General

The development of the legal order of the European Community depends on the cooperation between the Court of Justice EC and the national courts by means of the preliminary ruling proceedings of article 234 of the EC Treaty.

- Characteristics and functions of preliminary ruling proceedings

The Court of Justice and the national courts are deemed equivalent judicial bodies. Consequently, the preliminary ruling proceedings are not characterised by hierarchy but by cooperation which requires the national court and the Court of Justice - both within their own jurisdiction – each to make direct contributions to achieve a decision

The most important function of the preliminary ruling proceedings is to ensure a uniform interpretation of Community law.

Secondly, the proceedings facilitate the application of Community law by offering national courts a helping hand in resolving the problems, which sometimes accompany the application of Community law.

Thirdly, the preliminary ruling proceedings may serve as a means to protect the rights, which citizens derive from Community law.

- Preliminary ruling proceedings in short

The rules for the proceedings before the Court of Justice have been laid down in the Protocol on the Statute of the Court of Justice and the Rules of Procedure of the Court of Justice.

- Request

The proceedings start with a request from a national court (the order for reference). This judgment is translated into all other official Community languages, after which it is transmitted to the parties in the main action, the member states and the Commission. The Court of Justice may ask the referring court to provide further clarification in the course of the proceedings.

- Hearing of the case

The parties, the member states, the Commission and, where appropriate, the European Parliament and the Council have only one opportunity to submit written observations.

After the judge-rapporteur has delivered his so-called report for the hearing, the parties and the authorities and institutions mentioned above may orally elucidate their position at the hearing.

Some months after the hearing, the Advocate-General will deliver his opinion. There is no opportunity for the parties to give their reaction to this opinion.

- Judgment

Some months after the Advocate-General has delivered his opinion, the Court of Justice will issue judgment in open court. The judgment is binding from the date it is rendered.

- Division of competences between the Court of Justice and the national courts

The Court of Justice shall ensure that in interpreting and applying the Treaty the law is observed. For this purpose the Court of Justice, *inter alia*, has jurisdiction to give preliminary rulings concerning the interpretation of the Treaty and the validity and interpretation of the acts of the institutions of the Community. The national court is authorised to request the Court of Justice to give such a preliminary ruling (article 234 of the EC Treaty).

- Interpretation

There is a clear separation of functions between national courts on the one hand and the Court of Justice on the other. The Court of Justice does not evaluate the reasons of a national court for deeming that the interpretation of a provision of Community law is necessary for giving judgment in a pending case. It is for the Court of Justice to issue the interpretation of the provision and for the national court to apply it subsequently.

- Validity

The Court of Justice decides on the validity of acts of the institutions of the Community, *i.e.* regulations, directives and decisions. In preliminary ruling

proceedings concerning the validity, all the grounds for declaring such acts void (articles 230 and 231 of the EC Treaty) may be put forward, i.e.

- lack of competence;
- infringement of an essential procedural requirement;
- infringement of the treaty or any rule of law relating to its application; and
- misuse of powers.

In addition, the Court of Justice may review the validity of acts in the light of provisions of international law which are binding on the Community and which have direct effect.

A national court may reject the grounds of invalidity, but it has no power to declare Community decisions to be void.

However, if a national court has serious doubts as to the validity of an act of a Community institution on which a national law or decision is based, the court may, in special cases, suspend the application of such act or may order any other interim relief with regard to such act. The national court should subsequently refer the question of validity to the Court of Justice, setting out why it believes that the Community act must be considered invalid.

- Other preliminary ruling proceedings (than article 234 EC Treaty)

- Article 68 EC Treaty

The proceedings of article 68 EC Treaty are meant for questions on asylum, immigration and civil law and differ from the ordinary proceedings in that:

- lower national courts do not have the competence to request for a preliminary ruling;
- the Court of Justice does not have the competence to review decisions of the Council to abolish border controls or decisions relating to the maintenance of law and order or the safeguarding of internal security.

- Article 35 EU Treaty

The preliminary ruling proceedings provided for police and judicial cooperation in criminal matters (EU Treaty, Title VI) are also different from the proceedings of article 234 EC Treaty.

Firstly, the proceedings are optional, i.e. a member-state should explicitly accept them by making a declaration to that effect. In doing so, a member-state has two options to choose from: it may specify that either all courts and tribunals or only the highest ones are authorised to request a preliminary ruling (article 35(3) EU Treaty). In the latter case, a member-state may also impose an obligation to refer on the highest courts (see Declaration no. 10 to the Treaty of Amsterdam).

Secondly, the Court of Justice has no jurisdiction to review the validity or proportionality of operations carried out by the police or other services of a member-state in charge of maintaining law and order and safeguarding internal security (article 35(5) EU Treaty).

- When to refer

- Non obligatory reference

- "Court or tribunal"

When assessing whether the referring body is a court or tribunal as understood by article 234 of the EC Treaty, the Court of Justice takes into account a number of factors.

- "Necessary"

According to the Court of Justice it is up to the national courts (both the lower courts and the highest court(s)) before which actions are brought and are responsible for the subsequent judicial decision to assess, in the light of the special features of each case, whether a preliminary ruling is required.

However, a request from a national court may be dismissed by the Court of Justice if:

- the question is not relevant in the sense that the answer to that question, regardless of what the answer may be, in no way can affect the outcome of the case;
- the requested interpretation of Community law bears no relationship to the actual facts;
- the problem is hypothetical; or
- the Court has not been provided with the factual or legal material necessary to give a useful answer on the questions submitted.

- Obligatory reference

According to article 234(3) EC Treaty, a court is under the obligation to refer where a question relating to the interpretation or validity of Community law is raised in a case pending before a court or tribunal of a member-state against whose decisions there is no judicial remedy.

- Exceptions to obligatory reference

The obligation for the highest court to refer may lose its absolute character in a number of cases.

- Acte éclairé

The highest court is not under an obligation to refer if the question that has arisen has already been answered in an earlier judgment of the Court of Justice.

- Acte clair

The highest court is not obliged to refer either if the question has not yet been answered in the case law of the Court of Justice, but the answer to that question is beyond all doubt. Before it comes to the conclusion that such is the case, the

national court or tribunal must be convinced that the matter is equally obvious both to the courts of the other member states and to the Court of Justice. In this respect the national court should bear in mind that:

- the interpretation of a provision of Community law involves a comparison of the different language versions of the provision concerned;
 - terms and concepts in Community law do not necessarily have the same meaning as the laws of the various member states;
 - every provision of Community law should be interpreted in the light of Community law as a whole, taking into consideration its objectives and its state of development at the moment of application of the provision in question.
- National interlocutory proceedings (interim cases) and preliminary ruling proceedings

There is no obligation for the highest court to refer either when giving judgment in interlocutory proceedings, provided that each of the parties is entitled to institute normal proceedings on the substance of the case or to require that.

- Ex officio reference

Reference is not limited to cases where one of the parties to the main action has taken the initiative of raising a point concerning the interpretation or the validity of Community law, but is also possible in cases in which a question of this kind is raised by the national court or tribunal of its own accord.

- How to refer

- Structure of the order for reference

The judgment or order in which the court submits a question for a preliminary ruling should contain a brief statement of the reasons as well as all the information necessary for the Court of Justice and for those on whom the judgment must be served (the member-states, the Commission and, when appropriate, the Council and the European Parliament) for a proper understanding of the factual and legal framework of the main action.

- Elements of the order for reference

It is helpful to include the following elements, or an exposition of such elements, in the judgment or order:

- the facts which are essential to understand the legal scope of the main action;
- the applicable national law;
- the parties' positions;
- the reasons why the court is submitting the question to the Court of Justice;
- where appropriate, the court's own opinion on the issue of Community law raised;
- the specific question(s) in the operative part.

In addition, the file of the case must be sent on to the Court of Justice together with the order for reference. See the Information Note on references by national courts for preliminary rulings, published by the Court of Justice EC.

- Phrasing of questions

- Hearing the parties first

In the interests of the proper administration of justice, it may be useful for a national court to hear the parties about the contents of the questions before giving the order for reference.

- Questions on interpretation

The Court of Justice is the sole body, which has the competence to interpret Community law.

The Court of Justice may not decide on questions relating to the interpretation or validity of provisions of national law, nor is it up to the Court of Justice to apply Community law to the facts in the main action before a national court.

However, the Court of Justice is prepared, within certain limits, to reformulate questions, which are too far-reaching.

- Questions on validity

Only the Court of Justice has the competence to declare acts of the institutions void. The Court of Justice cannot answer questions, which are aimed at having the provisions of the Treaty declared void.

3. Communications of the members

1. The European Court of Justice has a new President: we wish Mr. Skouris Vassilios success as head of the ECJ.

2. The Administrative Court of Luxembourg welcomes Mrs Marion Lanners as the new President. We welcome her in our Association.

3. The Council of State welcomes Mr. Pierre Mores as its new President. We welcome him in our Association.

4. The European Court of Justice welcomes two new judges, well known by our Association: Sir Konrad Schiemann (UK) and Mr. Uno Lohmus (EST).

4. Meet the new members

4.1 Presentation of the Supreme Administrative Court of Poland¹

The Supreme Administrative Court in Warsaw was created by the 31 January 1980 Law and started activities on 31 August 1980. Presently it operates under the 11 May 1995 Law on the Supreme Administrative Court (Dz. U. Nr 74, 368). The Supreme Administrative Court examines decisions in cases involving the following challenges: administrative decisions; certain intermediary acts issued during administrative proceedings; other public administration acts or activities and resolutions concerning activities of commune authorities. On the basis of Art 21 of the 1995 Law, the Supreme Administrative Court reviews the actions of administrative bodies for their conformity with the law. The term "conformity with the law" includes the review of the interpretation of vague legal concepts on the part of administrative organs or the manner in which administrative discretion is exercised.

The administrative judiciary operates at present as a one instance - the Supreme Administrative Court. Such a structure does not match the present stipulation in the Constitution in Art. 176 point 1: Court proceedings shall consist of least two instances. Thus the Constitution includes also Art. 236 point 2: Laws bringing Article 176 point 1 into effect, to the extent relevant to proceedings before administrative courts, shall be adopted before the end of 5 years from the day on which the Constitution comes into force. The provisions relating to extraordinary revision against the Supreme

Administrative Court decisions shall remain in effect until the entry into force of such laws.

On 1 January 2004 come into force regulations reorganizing the administrative judiciary: the 25 July 2002 Law on administrative courts (Dz. U. Nr 153, 1269) and the 30 August 2002 Law on proceeding before administrative courts (Dz. U. Nr 153, 1270). Those regulations bring into effect the rule of two instances court proceedings concerning challenges against acts and activities of administrative bodies. The case will be examined in the first instance by the provincial administrative courts. Decisions of those courts can be appealed to the Supreme Administrative Courts. Adding one instance shall not make longer the period of proceedings, taking for granted that only 12 - 15 % of the decisions will be appealed.

The new regulations do not alter the method of exercising control and the scope of the court's review. Presently the Supreme Administrative Court (in the future the administrative courts) hands down decisions in cases involving the following challenges: (1) administrative decisions; (2) certain intermediary acts issued during administrative proceedings; (3) decisions issued in executory proceedings subject to appeal; (4) public administration acts or activities other than those specified in items 1-3 regarding the rights or obligations directly resulting from legal norms; (5) such resolutions of commune authorities as constitute commune ordinances and such acts of local government administration bodies as have the force of regulations in local law; and (6) supervisory acts over the activities of local government organs. In addition, the court hears complaints against the inactivity of administrative bodies in the cases specified in items 1-4.

¹ This text has been drafted by the end of 2003, before the accession of Poland to the EU.

Presently the Supreme Administrative Court (and in the future all the administrative courts) reviews the actions of administrative bodies for their conformity with the law. The term "conformity with the law" here is broadly understood in juridical practice; it includes, among other things, the review of the interpretation of vague legal concepts on the part of administrative organs or the manner in which administrative discretion is exercised. Decisions of the Supreme Administrative Court acknowledging the appropriateness of a challenge have an invalidating effect, i. e., they overturn or pronounce invalid the challenged acts of administrative organs. Only in very exceptional cases does the court hand down a decision resolving a case on its merits.

Presently the Supreme Administrative Court functions in Warsaw and 11 local centers. There are 284 judges employed in the Court. The preparing reorganization will change the present 11 local centers into 16 courts of the first instance and will also change the number of judges. It will not change immediately, but according to the current plans there will be in the provincial administrative courts 400 judges, and in the Supreme Administrative Court - 50 judges. In future the number of judges will double, what shall cause reducing the period of proceeding (presently the average period of proceeding before the Supreme Administrative Court lasts 14).

The new regulation changed the method of challenging the final administrative decisions. The challenge will be filled before the administrative body (not directly before the Court). It shall shorten the preparations for the first activity concerning the case. Correspondence with parties, collecting and completing the files - it will be all eliminated. The Law on proceeding before administrative courts changed also the method of making up the grounds for the decisions - the decision

dismissing the challenge will be grounded only when demanded -- not *ex officio*.

Two new institution set in the Law on proceeding before administrative courts shall make the proceeding before administrative court faster and more efficient: the mediatory proceeding and the simplified proceeding. According to Art 115 the mediatory proceeding can be started on application of each party to the provincial court, field before appointment the date of hearing. The purpose of this proceeding is to explain and consider all facts and legal circumstances of the case and to settle by the parties the way of solving this case. According to those settlements the administrative body annuls or alters the contested decision or undertakes another activity taking into consideration the circumstances of the case, in the filed of its own competence. If the parties do not settle the way of solving the case, the challenge will be examined by the court (art. 117).

If the conditions for examining the case in the simplified proceeding are fulfilled, the case may be examined during not-public hearing before one judge (Art. 120). The case is examined in the simplified proceeding, when the challenged administrative decision is invalid or when there is ground for renewal the administrative proceeding or when the administrative body has not sent the challenge to the court and the party demands the exercising the case. The case may be also examined in the simplified proceeding, when one of the parties demands it and other parties will not oppose. We may expect a frequent using the simplified proceeding in the practice, because form our previous experience appears, that there are many cases in which the administrative decisions are invalid.

Poland is not one of the member states of the European Union and thus the Polish courts cannot make preliminary references to the

European Court of Justice (ECJ) under Art. 234 EC (no presently in Poland valid regulation does not stipulate such a possibility). Taking for granted that after Poland's accession to the EU Polish courts will use this opportunity, we would like to get acquainted with the procedure concerning the preliminary references

Problems concerning this procedure have been presented in the report prepared by the judges of the Supreme Administrative Court: Prof. Irena Wiszniewska and Prof. Stanislaw Biernat for the 18th Colloquium "Preliminary reference to the Court of Justice of the European Communities", in Helsinki, May 2002.

The Polish legal system envisages the possibility to present legal questions to the Constitutional Tribunal. In pursuance of the Constitution any court may refer to the Constitutional Tribunal a legal question concerning the compatibility of a legal act with the Constitution, ratified international agreements or laws, when the decision in case pending before that court could be affected by the answer to this question. According to Art. 66 of the Law on the Constitutional Tribunal it is bound by the limits of the legal question. Thus, the extent of the examined contents of a legal act is determined by the complainant in his formulation of the plea. Nevertheless, legal commentators highlight the issue that the Tribunal should examine whether the contents of the act do not prejudice the rights and freedoms of an individual.

The institution of referring legal questions also exists within the Supreme Administrative Court itself. According to Art. 49 of the Law on the Supreme Administrative Court an adjudicating panel may apply to the President of the Court to examine the case in a panel of seven judges, in view of essential legal doubts raised in the case. This provision also indicates that the adjudicating panel may ask the President to

clarify legal doubts by a panel of seven judges, a chamber or combined chambers.

The new regulations regarding the administrative judiciary do not alter the principle that all courts have right to refer the legal questions to the Constitutional Tribunal. This competence will rest both with the administrative courts of the first instance and the Supreme Administrative Court.

The Law on the proceedings before administrative courts stipulates that the Supreme Administrative Court will pass the resolutions aimed at clarifying the legal provisions whose application resulted in diverging decisions in the administrative courts. The initiative to take such resolutions will rest with the President of the Supreme Administrative Court. The Supreme Administrative Court will pass resolution providing solution to the legal questions raising serious doubts in a specific case. The initiative to formulate such a resolution could come from any adjudicating panel of the Supreme Administrative Court considering the appeal. The Supreme Administrative Court may refuse taking up a resolution when it considers that there is no need to resolve doubts. When any of the adjudicating panel of the Supreme Administrative Court does not share the views expressed in the resolution, it will have the right to request reconsideration of the resolution.

In the Law on the proceeding before the administrative courts there is a general provision that a court (both the administrative courts of first instance and the Supreme Administrative Court) can *ex officio* suspend the proceedings when the decision in the case depends on the outcome of other pending administrative proceedings, proceedings before an administrative court, before other court or the Constitutional Tribunal. It seems that nothing can prevent the assumption that such "that court proceeding" covers also the proceedings before the ECJ. This

provision could be just interpreted as language enabling the Polish administrative courts of first instance and the Supreme Administrative Court to refer the questions to the ECJ under Art. 234 EC after the accession of Poland to the European Union.

4.2 Presentation of the Hungarian Supreme Court.

1. The Hungarian judicial system

Based on paragraph 45(1) of Act XX of 1949 on the Constitution of the Republic of Hungary and on paragraph 16 of Act LXVI of 1997 on the Organisation and Administration of the Courts (hereinafter: OAC), in Hungary justice is administered by the Supreme Court, the court of appeals, the county courts (including the Municipal Court of Budapest) and the local courts. First instance jurisdiction in most matters rests with the local courts. The county courts, including the Municipal Court hears most of the appeals submitted against the decisions of the local courts, but in cases specified by the laws of procedure they act as courts of first instance. The territorial competence of county courts and the Municipal Court is determined by and identical with public administration. The Municipal Court of Appeals shall hear the appeals in cases defined by law, submitted against the decisions of the local or county courts and will act in other matters referred to its authority by law. The Supreme Court is the highest judicial body.

In Hungary the Constitutional Court is not part of the ordinary court system. The court's decisions reviewing the constitutionality of norms have erga omnes effect and cannot be appealed. Its jurisdiction includes ex ante review of bills of Parliament, and ex post review of constitutionality of laws. Ordinary judges may also initiate ex post review if they think that the law to be applied in a specific case is unconstitutional. The constitutional court may also review whether a law complies with international treaties that the Government has ratified. (see paragraph 1 and 44-45 of Act XXXII of 1989)

2. The Supreme Court

Based on paragraph 47 of the Constitution and paragraphs 24-25 of OAC, the functions of the Supreme Court are manifold:

as a court of second instance it adjudicates appeals lodged against the decision of the county courts (including the Municipal Court) and the appeals courts;

it reviews final decisions if these are challenged through an extraordinary remedy;

it adopts uniformity decisions and thereby provides judicial guidance to lower courts;

it adjudicates in other matters referred to its authority by law.

The Supreme Court exercises its judicial activities in panels administering justice or passing binding decisions with regard to unify the jurisdiction of lower courts. The panels work within the framework of the Administrative, Criminal and Civil Divisions, the latter comprising special branches of civil, economic and labour law. The Administrative Division has four panels, altogether 15 judges, including the President of the Supreme Court, who chairs one of the panels. Decisions concerning the uniform application of law are taken in all three divisions and the adjudicating panel in such cases generally consists of five members chaired by the leader of the division concerned, however, in cases requiring the collaboration of more divisions the size of the panel increases to seven members chaired by the President or Vice-President of the Supreme Court.

Uniformity decisions are issued if required for the development of or to ensure the uniformity of judicial practice, or if a panel of the Supreme Court intends to deviate from the case-law established by another panel of the Supreme Court (see paragraph 29 of OAC). All uniformity decisions are published in the Hungarian Official

Journal (*Magyar Közlöny*). Furthermore, the Supreme Court has the right to issue decisions on principle. These are judgements passed by the panels of the Supreme Court in various cases and are selected for publication with a view to unify the interpretation of law as the solution of the relevant legal dispute is considered theoretically significant. The publication of such decisions – issued twice yearly – in the Official Corpus of Supreme Court Decisions (*A Legfelsőbb Bíróság Határozatainak Hivatalos Gyűjteménye*) is thus also helpful in creating uniform jurisdiction in all courts (paragraph 27(2) of OAC). In addition, the Supreme Court publishes every month the Court Decisions (*Bírósági Határozatok*), which includes all the judgements of the court and a selection of the decisions of the European Court of Justice and the European Court of Human Rights. Besides, the administrative case-law is published in a special compilation (*Közigazgatási Döntvénytár*).

3. The history and development of the administrative judicial system

The history of Hungarian administrative jurisdiction goes back to over a hundred years. It was first introduced by Act XXVI of 1896 and functioned as a separate supreme administrative court. It adjudged financial and general cases through out-of-court proceedings. After its dissolution in 1949, Act IV of 1957 on the General Rules of State Administration Procedures (hereinafter: SAP) provided for the possibility of judicial revision as regards certain types of state administrative cases (e.g. decision declaring tax or duty liability, refusal to register birth, marriage or death, decision ordering the requisition of residence, decision refusing the release of assets seized in the course of an administrative proceeding etc.) From 1982 on the scope of disputable decisions was further restricted by Decree No. 63/1981 of the Ministerial Council which was, however, annulled on 31 December 1991 by a decision of the Constitutional Court. Act XXVI of 1991, which modified the SAP and

which entered into force on 27 July 1991 ensures the possibility of judicial revision in almost every case.

4. Judicial review

As a general rule every decision issued on the merits of a case by an administrative organ may be subject to review by the court. However, the SAP specifies cases where judicial revision is not permitted as an exception. Pursuant to paragraph 72(4) of SAP, no judicial review of administrative decisions lies:

- *if it is excluded by law;*
- *if the administrative decision serves the execution of a final decision of the court;*
- *if the decision is temporary and a final decision has to be taken within a time specified by law;*
- *if the decision affects administrative legal relations concerning foreign trade, fire-arms, explosives, radiating matters and drugs, ordering the appearance of those of military age before a recruiting committee, civil military service or civil defence service matters, the protection of order at the national borders.*

The SAP does not define what qualifies as a decision on the merits of a case. In the course of judicial practice, however, a state administrative action is regarded as a decision on the merits of a case if the organ entitled to proceed in the case passes a final decision on the dispute constituting the subject matter of the case. As regards the produced legal effect a decision on the merits of a case may originate, modify or alienate rights, it may establish rights or obligations, in addition it may apply a legal consequence.

As opposed to the SAP, Act XCI of 1991 on the Rules of Taxation (hereinafter: RT) explicitly states which financial decisions of tax authorities may be subject to judicial revision and what are

the criteria of a decision on the merits of the case. According to paragraph 86(1) of RT every decision concerning tax liability, or establishing the rights and obligations of the taxpayer or of the person obliged to pay the tax – except for a decision concerning the allowance of deferred payment and payment by instalments – shall qualify as a decision on the merits of the case. It should be emphasised that application for review may be filed against a decision reached in a procedure of equity as well. Such a decision, however, cannot be arbitrary. Paragraph 4(5) of SAP lays down a special provision according to which upon the request of a client the administrative court may – in non-contentious procedure – oblige an administrative organ to resume the proceedings in a case falling within the scope of its authority and competence. This means that the client has an opportunity to gain remedy for an infringement originating in the negligence of the administrative organ, and the decision of the administrative court that establishes such an obligation qualifies as a decision on the merits of the case. What's more a decision of the administrative organ that establishes the absence of authority based on the lack of administrative relations also counts as a decision on the merits of the case and thus may be subject to judicial revision. (Administrative uniformity decision no. 3/1998)

5. Judicial proceeding at first instance

According to the specific rules of Chapter XX of the Code of Civil Procedure, Act III of 1952 (hereinafter: CPP), paragraph 72 of SAP and paragraph 86(1) of RT, the courts (county courts and the Municipal Court) will revise the following decisions in administrative actions:

a decision of the administrative organ, or other organs entitled to act in official administrative actions, that is a decision in which the mentioned organ identifies a right or a duty in respect of a client, certifies data, keeps records or conducts on official review;

the order, internal regulation or other decision of a local authority defined by law; a decision of another organ, the revision of which may take place in an administrative action under a separate law.

A client or a person whose lawful interest has been injured may file a complaint with the court within 30 days of the announcement of the decision passed in the merits of the case by an administrative authority, referring in the complaint to the infringement upon the law. Administrative lawsuit may be instituted by the person whose right or legal interest is affected by the case that constitutes the basis of the proceedings. The request for judicial review has to be submitted to the competent court or to the administrative organ that passed the decision at first instance, in which case the administrative organ is obliged to forward the application, together with all the documents of the case, to the court within eight days. No judicial review is possible when the party failed to avail themselves of the right to appeal, consequently the judgement became final at the first instance. There are exceptional cases when the right to appeal is excluded by law, e.g. cases of competition, cases of public procurement.

All administrative cases fall within the jurisdiction of the county courts or the Municipal Court, and the court by the seat of the administrative organ will be competent in the procedure. If a client files a complaint with the court against an administrative decision, it postpones the enforcement of the ruling. However, the administrative organ may declare the decision immediately enforceable if so required by public interest or a principal interest of the client concerned. In such a case and in financial cases, where the fact of submitting an application for review has no delaying force on the execution, the court may suspend execution of the decision ex officio or upon the request of the client. Suspension of execution of an administrative decision may be ordered by the court especially if

establishing the decision as immediately enforceable constitutes an infringement upon the law, if suspension may be reasoned by circumstances deserving special equity or by other significant circumstances, or if execution of the decision entails consequences that produce serious disadvantages for the client.

As a general rule cases are adjudicated in trial presided by a single judge. If, however, the value of subject-matter of litigation exceeds 30 million Forints, the case shall be judged by a panel consisting of three professional judges (paragraph 324(4) of CCP). The lawsuit is instituted against the administrative organ that issued the final decision at second instance, it will thus participate as defendant in the procedure of review. The plaintiff is not obliged to be represented by a counsel. If parties of adverse interest participate in the administrative case and the request for judicial revision was filed only by one of the parties, the court is obliged to enable the adverse party to intervene in the lawsuit.

As regards the court, it may review the decision of the administrative organ only within the limits set by the application for review, which means that the decision shall not go beyond the relief sought. As a result, if the court establishes no infringement of law referred to in the petition, it cannot abrogate or modify the administrative decision based on another infringement of law, which is essentially different from the one included in the petition.

The court in administrative cases examines mainly whether the administrative decision complies with substantive legal regulations. Based on infringement of the rules of procedure abrogation may be applied only if such infringement is significant and affects the decision on the merits without being remediable in judicial proceeding. As a general rule, the court shall always proceed based on legal regulations that were in force and facts that existed while passing the administrative decision. It has to take into

account when the client's claim to establish its right, or the enforceable demand of the administrative organ vis-a-vis the client came into being. It often happens that in administrative cases the proceeding authority applies a legal rule that has, at the time of judicial review, been annulled yet is governing for the legal relation concerned (e.g. cases of taxation) In such cases the legal rules that were in force at the time of establishing the claim or demand shall be applied. If, however, the amended regulation stipulates that its provisions shall be applied to pending cases as well, the court reviews the given case not according to the regulation that was in force when the administrative organ passed its decision but according to the legal rule that is governing for the pending cases. The reason for this is that if the administrative proceeding is followed by judicial revision, the case is ended not with the administrative but with the judicial proceeding, or in case of abrogation and instruction for a new proceeding, with a new administrative procedure based on judicial revision. Another important rule is that if a legal rule modifies earlier provisions with retroactive effect, in doubtful cases the court has to look for the regulation which is more favourable for the client.

If the challenged decision complies with the legal rules, or if only a minor infringement of the procedural rules occurred with no significant effect on the judgement on the merits of the case, the court shall refuse the motion and shall maintain the decision of the administrative organ in force. If, however, the decision proves to be illegal according to the court, the latter may nullify it and may simultaneously instruct the administrative organ (of first or second instance) to initiate a new proceeding with giving compulsory instructions as to how to conduct it. In certain cases mentioned by the law, the judge may also modify the administrative decision. These cases are related among others to adoption, education of minors in state owned institutions, guardianship, register record,

registration of vital statistics, real property register, payment of taxes and duties, placement of documents in the archives, expropriation, recognition as a refugee, request for civil military service, certificate of the time in internment, family allowance, social insurance, and besides these modification may be prescribed by law (paragraph 339(1-2) of CCP).

In administrative cases – as a main rule – appeal is not permitted by law. There lies an appeal against the court judgement as an exception provided that the action was initiated for the judicial review of a decision that was issued in a single instance procedure by an administrative organ whose competence covers the whole country and this decision may be modified by the court (see paragraph 340(2) of CCP). Appeals are heard by the independent administrative division of the Municipal Court of Appeal.

6. The re-opening of a case

The provisions of Chapter XX of CCP enable the client to file an application for the re-opening of a case or for the review of a final judgement from the Supreme Court.

According to paragraph 260(1) of CCP, a new trial may take place if:

- *a party refers to a fact or a proof or a final judicial or official decision which was not adjudged in the proceedings, provided that – in the case of adjudication – it could have resulted in a decision more favourable for him;*
- *a party has lost a suit in contradiction with the law because of criminal offence of the judge passing the judgement, of the opposing party or of another person;*
- *a final judgement was passed on the same right prior to the judgement passed in the proceedings.*

A motion for the re-opening of a case may be filed within six months from the coming into force of the contested decision, and it has to be submitted to the court of first instance which proceeded in the suit. In the case of permission of a new trial, the case shall be heard within the limits of the motion. Depending on the result of the new trial, the court may keep the challenged decision in force, or it may pass a new judgement in conformity with the law, while simultaneously annulling the contested decision in whole or in part. (Chapter XIII of CCP)

7. The review of a final judgement by the Supreme Court

Referring to an infringement of law the review of a final judgement may be sought from the Supreme Court by the party, the intervening party or anyone else who is affected by the provisions included in the court decision, against the part of the provision affecting them. As included in Chapter XIV of CCP, a petition for review may be lodged if the contested decision on the merits of the case infringes a legal rule and it does not comply with the uniformity decision of the Supreme Court; its review is indispensable to ensure the uniformity and development of judicial practice, since either in connection with the decision a question of principle arises concerning which the Supreme Court has not passed a decision or it issues a decision on principle

concerning which in the Official Corpus the Supreme Court has issued a decision of differing content.

The application for review shall be filed with the court having passed the decision of first instance within sixty days from the communication of the decision.

In the course of the review procedure, the party filing the petition is obliged to act with counsel, accordingly, the power of attorney must be attached to the application. No lawyer-candidate may proceed in the Supreme Court. The motion soliciting the review is examined by a single judge of the Supreme Court and s/he shall act (accept or refuse it) within sixty days. No appeal is permitted against the decision of the proceeding judge. Unless a party demands a trial, the case is adjudged out of sessions. In the course of the judgement of the application, the Supreme Court shall make its decision on the basis of the available records and the submitted documents. Besides that, no other evidence shall be proceeded with. If the challenged decision complies with the legal rules, or if only a minor infringement of the procedural rules occurred with no significant effect to the judgement to the merits of the case, the Supreme Court shall maintain the challenged decision in force. If, on the contrary, the decision infringes a legal rule, the Supreme Court shall replace the judgement infringing the law by a new decision in accordance with the legal rules, or if it is not possible, it shall quash the judgement infringing the law as a whole or in part and shall instruct the court of first instance or appeal to initiate a new proceeding and to make a new decision.

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