

## Colophon

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# Contents

<b>COLOPHON</b> .....	<b>1</b>
<b>CONTENTS</b> .....	<b>2</b>
<b>FROM THE SECRETARY-GENERAL’S DESK</b> .....	<b>3</b>
<b>FOREWORD</b> .....	<b>4</b>
<b>A. ORGANISATION OF THE ADVISORY FUNCTION OF COUNCILS OF STATE</b> .....	<b>6</b>
1. ORGANISATION OF THE ADVISORY FUNCTION AND HOW IT OPERATES WITHIN COUNCILS OF STATE.....	6
2. THE INDEPENDENT NATURE OF THE BODIES IN QUESTION, AND THE SELECTION, APPOINTMENT AND LEGAL POSITION OF THE COUNCILLORS RESPONSIBLE FOR PROVIDING ADVICE.....	10
3. THE DUAL FUNCTION – BENEFITS AND DRAWBACKS.....	12
<b>B. ASPECTS OF LEGISLATIVE ADVICE</b> .....	<b>17</b>
1. THE SCOPE OF COUNCILS OF STATE AS LEGISLATIVE ADVISORS.....	17
2. MONITORING OF TEXTS BY COUNCILS OF STATE.....	19
3. TIMEFRAME FOR ISSUING AN OPINION.....	23
4. THE CONSEQUENCES OF OPINIONS.....	24
5. PUBLICATION OF OPINIONS.....	25
<b>C. COUNCILS OF STATE AND EUROPEAN LEGISLATION</b> .....	<b>28</b>
<b>D. OTHER ADVISORY ACTIVITIES OF COUNCILS OF STATE</b> .....	<b>30</b>
1. OPINIONS ISSUED BY COUNCILS OF STATE ON THEIR OWN INITIATIVE.....	30
2. OPINIONS ISSUED BY COUNCILS OF STATE ON INDIVIDUAL MATTERS.....	31
3. OPINIONS ISSUED BY COUNCILS OF STATE ON OTHER MATTERS.....	32
<b>E. CONCLUSIONS</b> .....	<b>34</b>

## From the Secretary-general's desk

Article 3 of the statutes of our Association states:

The purpose of the Association is to promote, within its financial limits, exchanges of views and experience on matters concerning the jurisprudence, organisation, and functioning of its Members in the performance of their judicial and/or advisory functions, particularly with regard to Community law.

Article 4.1. of the same statutes states:

The following are members of the Association: the Court of Justice of the European Communities and the supreme jurisdictions and Councils of State of the Member States of the European Union, which are empowered to adjudicate in the final instance in disputes concerning the activities of public administrative bodies or which are acting in an all-round legal advisory capacity as far as the drawing up of normative texts is concerned.

The founder members of the Association deliberately targeted institutions exercising an advisory role and included this advisory function in the Association's stated purpose.

The advisory role is extremely important in that it involves the institutions in the drafting of normative texts: the clearer the texts, the fewer difficulties judges will have in applying them.

Nevertheless, it has to be said that so far this aspect has barely been taken into account in the Association's activities. The Dutch EU presidency has just plugged this gap by organising a seminar for the Councils of State belonging to our Association.

I would like to take this opportunity to congratulate President Tjeenk Willink on this highly successful initiative.

This newsletter focuses solely on the aforementioned meeting, and I would like to thank Mr Albert Heijmans of the Dutch Council of State for compiling it.

Yves Kreins

Secretary-General

## Foreword

The Association of Councils of State and Supreme Administrative Jurisdictions of the European Union is made up of members responsible either for administering justice in administrative matters in the final instance, or independent legislative advice or both. With the exception of those of Luxembourg and Spain, the Councils of State within the European Union combine the functions of supreme administrative judge and independent legislative advisor.

At the first colloquium of the group of institutions which gave rise to the Association, held in Rome from 4 to 6 March 1968, with the exception of Germany's Supreme Administrative Court (*Bundesverwaltungsgericht*) the Association comprised purely Councils of State performing the dual functions set out above. At the colloquium to be held in The Hague on 15 to 16 June 2004, legislative advisors will be in the minority. Of the Association's 26 members, there will be only six fulfilling that advisory function!

Many members of the Association are unaware that Councils of State provide independent legislative advice and are therefore ignorant of the significance that this advice can have for the quality of legislation.

The independent advisory function performed by the Councils of State in the field of legislation was the subject of an Association meeting held in The Hague on 16 February 2004, the aims being to highlight the similarities and differences between Councils of State when performing their advisory function and to explore the value of and openings for future cooperation within the Association.

This edition of the newsletter affords an overview of the written preparations for the meeting and the discussions that took place there.

The objective of this publication is make clear both to other members of the Association and to

the European and national authorities and interested members of the public what Councils of State actually are, how they fulfil their function as a source of legislative advice, and how this benefits and is of importance to legislators, administrators and judges at both national and European level.

The meeting in The Hague was confined to those members of the Association assigned to provide legislative advice. At the end of the meeting, discussions were held on staging follow-up meetings and it was decided that - where appropriate - such meetings should be open to interested members of the Association exclusively concerned with administering justice. This can only enrich the debate. After all, legislative advisors and judges essentially deal with the same issues, but it is rather the different angle from which they approach these issues that creates a certain synergy that is vital for performing both tasks.

Only those Councils of State that are members of the Association of Councils of State and Supreme Administrative Jurisdictions of the European Union attended the meeting in The Hague. But outside the Association there are a further two national institutions within the European Union that are responsible for providing independent legislative advice, namely the Council of State of Spain (*Consejo de Estado*) and Sweden (*Lagrådet*). Efforts will be made to establish whether and in due course how these institutions can become involved in cooperation between the various advisory boards in the area of legislation in the future, if they so desire.

Within the group of countries which, in principle, are candidates for accession to the European Union, Romania and Turkey also have independent bodies providing legislative advice. These bodies are therefore also potential candidate members of the Association and may in due course be included on this basis in

cooperation between the independent legislative advisors.

I hope that this publication will help provide a clearer understanding within the European Union of the work done by Councils of State as independent legislative advisors and of their significance with regard to the quality of legislation.

This publication briefly covers a number of topics pertaining to the organisation and work done by legislative advisors. Accordingly, specific attention has been focused on underlying similarities and differences. Further details on each individual body can be found on their own particular websites, to which links on the Association's own website [www.raadvst-consetat.be](http://www.raadvst-consetat.be) provide easy access.

H.D. Tjeenk Willink

President of the Association of Councils of State and Supreme Administrative Jurisdictions of the European Union

Vice-President of the Council of State of the Netherlands.

## A. Organisation of the advisory function of Councils of State

### 1. Organisation of the advisory function and how it operates within Councils of State

With the exception of the respective bodies in Luxembourg and Spain<sup>1</sup>, the EU's Councils of State perform a dual function, providing advice on legislation and administering justice in administrative matters in the final instance.

In organisational terms, both functions are separate from each other in all Councils of State, but in France, the Netherlands, Greece and Italy the councillors – or at least some of them – are nevertheless responsible for performing both functions concurrently. Only in Belgium are Councillors of State prohibited from fulfilling such a dual function.

It is clear that there are a number of similarities in the way in which the advisory function of Councils of State is organised and performed.

All Councils of State have specific divisions responsible for drawing up opinions, and each division appoints a *rapporteur* who is responsible for producing a draft opinion which will subsequently be adopted by the division.

In the Councils of State in the Netherlands and Luxembourg, definitive rulings on opinions are made by the General Assembly.

In the French Council of State, decisions on opinions concerning draft legislation are taken by the General Assembly, and on ordinances by the divisions themselves.

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<sup>1</sup> The Council of State of Spain is not a member of the Association and is therefore not taken into consideration in this connection.

In Belgium, opinions are issued by the divisions.

In Italy, opinions are also issued by divisions, but on the proviso that if an opinion is to be issued regarding draft bills of parliament (which is rarely the case) and in other major cases, it will be left to the judgement of either the division responsible for issuing the opinion, or the president of the Council of State to decide whether to take a decision on the opinion via the General Assembly.

In Greece, where there is only one division of the Council of State that is responsible for performing the advisory function, opinions are adopted by the division sitting as a body of three or four members. However, particularly where major issues are involved, this division may delegate the drafting of the advice in question to the plenary formation of the advisory function. This group comprises the President of the Council of State or their deputy, six councillors and two counsels.

One specific feature of the system in Belgium is the auditeurs' office (*auditorat/auditoraat*), which on its own initiative submits a preliminary opinion regarding draft legislation or regulation to the division responsible for enacting the opinion. This method is not used elsewhere. In other Councils of State, a councillor-rapporteur is always appointed to draft an opinion, and these individuals are usually but not always backed up by legal staff.

The French Council of State also differs from all the others in that, traditionally, the Council of State is the co-author of legislation. Opinions issued by the Council are not so much commentaries, as is the case with other Councils of State, but consist almost entirely of draft texts drawn up by the rapporteur. As such, discussion before the division and the General Assembly is based mainly on the rapporteur's text rather than on the initial text submitted by the government.

The section below gives a brief description of each Council of State, its scope, how it issues opinions, and the organisational structure of the advisory function.

## **The Netherlands**

The Council of State of the Netherlands consists of a total of 23 members including a Vice-President<sup>2</sup> and five Presidents of the Chamber. The Council is divided into five advisory chambers which each handle proposals together with two or three ministries.

The chambers are responsible for preparing opinions which are then submitted for discussion and approval to the Council's general assembly, which includes all councillors. A rapporteur is appointed to prepare opinions within the chambers.

Decisions on opinions are taken at a plenary meeting by a majority of votes cast. Each member of the Council of State may propose a separate opinion which may be supported by one or more other members.

Councillors also perform an advisory and jurisdictional function, which occupy approximately 20% and 80% of their working time respectively.

The Council has a separate Administrative Jurisdiction Department of which all councillors and extraordinary councillors<sup>3</sup> are members. The latter do not perform an advisory function, being responsible exclusively for administrative jurisdiction.

The Dutch Constitution provides for the possibility of assigning an advisory function to a division of the Council. In this vein, a reform currently being drawn up stipulates that in future only some (as

opposed to all) Council members will be assigned an advisory function. The aim is to set up a separate legislative advice department alongside the existing Administrative Jurisdiction Department. However, the legislation required to enable such a move still has to be submitted to parliament.

## **Luxembourg**

The Luxembourg Council of State comprises 21 councillors performing an advisory function only. Following the ruling handed down by the European Court of Human Rights on 28 September 1995 in the case Procola versus Luxembourg, the function pertaining to administrative jurisdiction performed by the Council up until 1 January 1997 was transferred to a separate judicial body that is solely responsible for administrative actions (the Administrative Court and the Administrative Appeal Court). The Council is divided into 19 commissions responsible for drafting opinion proposals. These commissions are not founded on the basis of the existing governmental departments but on the basis of the different subjects of law. Each of these commissions appoints a rapporteur to draw up opinions.

Rulings on opinions are made at a plenary meeting of the Council of State by a majority of votes cast. Each member of the Council may propose a separate opinion which may be supported by one or more members.

## **France**

The Council of State consists of a total of 196 individuals<sup>4</sup> comprising a Vice-President, division Presidents, ordinary councillors, extraordinary councillors, maîtres des requêtes, and 1st class

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<sup>2</sup> The President of the Council is the head of state.

<sup>3</sup> 29 at the end of 2003.

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<sup>4</sup> Source: list of members of the Council of State active within the Council as at 15 May 2003.

and 2nd class officials known as "*auditeurs*" (hereafter referred to as 'auditors').

Within the Council of State, the legislative administrative function is delegated to four specialist administrative divisions, dealing with internal affairs, financial affairs, public works and social affairs.

Work within the administrative divisions is carried out by 41 members of the Council who are exclusively responsible for offering legislative advice, while 56 other members are responsible for both drawing up opinions (1/3) and for administrative jurisdiction (2/3).

In addition to the administrative divisions, there is also a judicial division responsible for administrative jurisdiction. This division comprises those members who perform a dual function, plus a further 88 members responsible for administrative jurisdiction alone.

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

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

For each text sent to a specific administrative division, the President of the division appoints a rapporteur, a member of the Council of State, to examine the text, analyse the ministerial dossier accompanying it and, where necessary, compile their report with representatives from the ministry or ministries involved.

Discussion before the deliberating board (the division and the General Assembly) focuses in fact on the rapporteur's text, rather than the initial text submitted by the government. When considering this specific method of operation, it should be borne in mind that the French Council of State has traditionally been a co-author of legislation. This is a unique feature of the French Council of State and is not found elsewhere.

## Belgium

The Belgian Council of State currently comprises<sup>5</sup> a First President and a President, together with 44 councillors of whom 12 are appointed exclusively to the legislation division. These councillors are assisted by 24 magistrates forming the auditeurs' office.

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

It is the task of the First President of the Council of State to assign recently appointed councillors to a specific division, in line with organisational requirements. In this respect, care is taken to ensure that the Council's jurisdictional and advisory functions remain strictly separated. Accordingly, no councillor may belong to both divisions at the same time.

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

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<sup>5</sup> Start of 2004.

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

Before an opinion is drafted, an investigation is conducted by a member of the auditeurs' office, whose findings are published in a written report that serves as the basis for discussion of the issue during an in camera meeting of the chamber. When an issue is under investigation, the appropriate auditor may contact the civil servant or member of the ministerial office named in the request for an opinion to obtain further information on the draft text submitted for opinion.

## **Italy**

The Italian Council of State comprises one President, 18 division Presidents and 82 councillors.

The advisory function is performed by Divisions 1, 2 and 3, the Legislation Advisory Division, and the Plenary Assembly. In general, each advisory division is made up of two division Presidents and eight councillors.

At the beginning of each year, the President of the Council of State determines the composition of the advisory and judicial divisions on the basis of criteria laid down by the Presidential Council.

Councillors performing an advisory function do not hold court posts at the same time, but may move between functions in the course of their careers. At present, members of the Legislation Division are also members of the Legislation Advisory Division.

Opinions are discussed and ruled upon at an assembly chaired by a President and comprising members of the division, and on the basis of a report compiled by a rapporteur who is a councillor and who has investigated the matter

previously. The opinion is drawn up in writing by the rapporteur and reviewed by the President.

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

## **Greece**

The Greek Council of State currently comprises 153 individuals and, along the lines of the French model, is made up of a President, Vice-Presidents, councillors, maîtres des requêtes and auditors. The Council of State is responsible for administration of justice in administrative matters in the final instance and issuing opinions on decrees. Draft laws are not submitted to the Council.

The Council of State performs its tasks via a plenary assembly and six divisions. The advisory function is the preserve of division 5, which is also responsible for jurisdictional matters and comprises a total of 7 councillors and 9 maîtres des requêtes.

Drafts of all regulatory decrees are discussed and opinions issued by division 5 sitting with either three (the President or his deputy, a councillor, and a maître des requêtes) or five members (the President or their deputy, three councillors and a maître des requêtes). Where major legal issues are concerned, this division may delegate the drafting of the decree to the plenary group performing the advisory function which comprises the President or Vice-President of the Council of State, 6 councillors and 2 maîtres des requêtes.

## ***2. The independent nature of the bodies in question, and the selection, appointment and legal position of the councillors responsible for providing advice***

The independent nature of Councils of State as bodies responsible for administrative jurisdiction and advice in the area of legislation is legally guaranteed by the Constitution. The independent nature of the Council of State of Luxembourg, which, as mentioned, performs an advisory function only, is also set out in the Constitution.

Among those Councils of State which perform a dual function, there is no difference in terms of selection, appointment and legal position between the members, which are either in whole or in part responsible for either opinions or administrative jurisdiction or both. Similar legal and constitutional guarantees exist with respect to the independent nature of those responsible for issuing advice as well as those acting as judges.

One important difference between Councils of State of both France and Greece and the other Councils of State lies in the process for selecting and appointing members of the boards.

In France and Greece, councillors mainly move up directly, respectively from the National School of Public Administration (ENA) or the National School for the Judiciary (*École Nationale de la Magistrature*). The individuals in question follow a long career within the Council and progress through the various ranks of auditor, maître des requêtes, councillor, and division President. Only a limited number of members of the institution are recruited at an older age mostly from the judiciary.

In other Councils of State, individuals are generally recruited to the body after having performed other functions elsewhere. The members of such bodies are usually either

lawyers who have carved out careers in general or administrative law or university law professors.

Although in the Netherlands the majority of members have a legal or often judicial background, there are also a few members who have come from other disciplines, such as economics or social administration. In addition, when selecting councillors in the Netherlands, efforts are made to ensure that the Council reflects the country's major social and political forces. This is not the case elsewhere.

In Luxembourg, by law 11 of the 21 councillors must be lawyers. The Council was in 2004 composed of 13 lawyers, the rest having their origin in a wide range of disciplines.

There are considerable differences between the various Councils of State in terms of actually selecting members of the board. Although it is usual for governments to formally appoint councillors, in Greece, France and the Netherlands members are selected independently by the Councils themselves.

In Belgium and Luxembourg on the other hand, not only the government and the Council of State, but also the two parliamentary chambers have a say in the selection of members of Councils of State.

In Italy, the Council of State seems to have only limited input in selecting its councillors.

The section below gives an overview of how each Council of State selects and appoints its members, and also its staff composition.

### **France**

Members generally enter the Council of State as soon as they leave the National School of Public Administration. Having joined the Council, they progress, in principle according to a specific timeframe, through the various ranks of auditor,

maître des requêtes, councillor and division President.

A limited number of individuals are recruited from posts in other administrative areas. Members of the Council may also be temporarily assigned to functions outside the Council, for example in administration. Accordingly, although all have a legal background, they may gain a wide range of practical experience. This helps to create a group of individuals with highly diverse backgrounds and expertise, which in turn enriches the opinions and administrative jurisdiction of the Council.

## **Greece**

Auditors are appointed by decree from among former students of the National School for the Judiciary. As in France, they progress through the various ranks during the course of their career with the Council. A small percentage of councillor vacancies (1/5) are reserved for councillors of the administrative appeal courts. Accordingly, the Council consists purely of lawyers.

Promotion to the posts of maîtres des requêtes and councillors is by decree following a decision by the High Council of Administrative Justice. Promotion to the posts of President and Vice-President are by decree upon proposal by the Council of Ministers.

## **Belgium**

Councillors are appointed for life by the King from two lists of three candidates, one submitted by the Council of State and the other alternately by either the Chamber of Representatives or the Senate. Only if the Council of State unanimously submits a first candidate may that candidate, in principle, be appointed immediately without either the Senate or the Chamber of Representatives having to draw up a second list of candidates. In more general terms, the candidates put forward by the Council of State are in most, but not all,

cases adopted by the Chamber of Representatives or the Senate.

Councillors are appointed to the Council of State itself and as such not to either of the Legislation of Administration Divisions. The First President of the Council of State is responsible for assigning a councillor who has been appointed to a specific division of the Council bearing in mind actual organisational requirements.

By law, the Council of State may only comprise lawyers.

## **Luxembourg**

Councillors are appointed by the Grand Duke. When replacing an outgoing councillor, the incoming member is chosen in one of the following ways in turn:

1. direct appointment by the Grand Duke;
2. appointment of one of the three candidates presented by the Chamber of Deputies;
3. appointment of one of the three candidates presented by the Council of State.

In derogation to these rules, members of the Royal family may also be appointed directly by the Grand Duke.

When replacing the entire Council of State, the Grand Duke directly appoints seven members to act as councillors. At least seven other members are chosen by the Grand Duke from a list of ten candidates presented by the Chamber of Deputies. At least seven members are selected by the Grand Duke from a list of ten candidates presented by the Council of State made up as per the aforementioned rules.

The function of councillor terminates either after continuous or interrupted period of 25 years, or when the member in question reaches the age of 72 years.

By law, 11 of the 21 members of the board must be lawyers. The Council was in 2004 composed of 13 Councillors of state with a degree in law, 6 councillors of state with a degree in mathematics en physics, in economics, modern literature, in social sciences, philosophy and literature, and also a councillor of state qualified as a nurse - social assistant holding a degree in social hygiene and an independent merchant.

## Italy

In the event of vacancies, councillor posts are filled, without any prior distinction being drawn between advisory and judicial functions, in accordance with the law:

1 One half by judges in Regional Administrative Courts (TAR) who so request, depending on their seniority, upon a favourable opinion from the Presidential Council for Administrative Justice (management body of administrative judges chaired by the President of the Council of State, composed of six magistrates from the Regional Administrative Courts and four councillors elected in their respective categories, and four elected lawyers, two by the Senate and two by the Chamber of Deputies).

2 One quarter by incumbent university law professors or directors-general or similar of ministries, or magistrates of a lower rank than that of councillor of the Court of Appeal.

Appointment is by decree by the President of the Republic upon deliberation by the Council of Ministers following an opinion by the Presidential Council.

3 One quarter via public competition of diplomas and written and oral examinations open to magistrates in any jurisdiction, government lawyers and civil servants with sufficient seniority.

By law, members of the body must be lawyers.

## The Netherlands

Councillors are appointed for life by the Queen (the government) upon the recommendation of the Council. The recommendation of the Council is always followed. In addition to lawyers, who make up the majority of the Council, its staff also includes some former high-level civil servants and politicians, economists and administrators. Every effort is made to ensure that the composition of the Council reflects as closely as possible the various political forces and different facets of Dutch society. Accordingly, members of the Council are also chosen on the basis of their political affiliation, though this does not necessarily mean that they must belong to a specific political party.

### ***3. The dual function – benefits and drawbacks***

With the exception of Council of State of the Grand Duchy of Luxembourg, all Councils of State exercise a dual function, namely a legislative advisory function and a jurisdictional function, which they perform in their capacity as supreme administrative jurisdiction.

In Belgium and Italy, councillors have a single function; they are appointed either to the jurisdictional function or the advisory function. But in both these countries, a councillor may switch between functions during their career.

In the Netherlands, councillors perform both an advisory and a jurisdictional function concurrently (the system of "dual function" or "shared function"), though this joint role still occupies different proportions of their working time (on average 20% legislation and 80% jurisdiction). France differs by virtue of the shared role played by a large proportion of its councillors, while in the French Council of State many councillors perform an almost exclusively jurisdictional role (judicial division) while others perform an almost exclusively advisory one (administrative divisions).

In Greece, this mixture of advisory and jurisdictional functions is found only in Division 5 of the Council of State. The five other sections perform a jurisdictional function only.

Councils of State that perform both an advisory and a jurisdictional function are keen to maintain this dual function due to the positive influence it has on the content of opinions issued by the Council and on the authority of the Council in advisory terms.

In the ruling of *Procola versus Luxembourg*, the European Court of Human Rights found that the introduction of a system of dual function for some councillors without any accompanying measures could lead to difficulties because it could potentially bring into question a judge's impartiality. The Court clarified its position in the *Kleyn* ruling.

With the exception of Luxembourg, the countries concerned have found practical solutions to this problem when the need arises, while at the same time managing to maintain the benefits of the dual function.

This section provides more details on the benefits afforded by combining the two functions, rulings by the European Court of Human Rights with respect to Councils of State of Luxembourg and the Netherlands respectively, and the consequences associated therewith.

### **Benefits of the dual system for the advisory function**

For the advisory function, there are a number of advantages to combining it with administration of justice in administrative matters in the final instance within a single body, or having it wholly or partly performed by the same individuals.

One significant advantage is that the legislative advisor is closely involved in social developments likely to arise in administration and jurisdictional matters. After all, from an advisor's point of view,

it is certainly important that they provide relevant advice.

In addition, creating a synergy between the two functions helps to ensure that the function is performed more efficiently. On the one hand, the daily evaluation of the legal and practical quality of legislation conveys a better understanding of laws and legislation which enhances the performance of his judicial function which deals with the correct interpretation of legislation. On the other hand, the judicial function, in which he is confronted with the application of the laws in practice and the repercussions they have in society, the advisor can benefit from the knowledge he obtained while exercising his advisory function. Also, this practical experience keeps advisors up to date with constitutional, legal and legislative problems and solutions.

All in all, jurisdictional experience enables councillors to inspect the texts submitted to them more closely.

Combining the function with administrative jurisdiction also enhances a councillor's authority and standing. After all, the authority of the supreme administrative judge is always – directly or indirectly – behind the advice they provide, particularly where legal and constitutional aspects are concerned. The government – and the parliament in the appropriate cases – knows that if they disregard opinions, they run significant legal risks when applying the law in practice and should therefore think very carefully before doing so.

Accordingly, this system can contribute substantially to the quality of legislation which is, with good reason, seen as the Archimedean point of a rule-of-law state.

For these reasons, those Councils of State that operate the dual-function system are keen to maintain it.

The success of combining the functions of legislative advice and judicial activities outside the group of countries with Councils of State is clear from the existence of the Lagrådet in Sweden, an advisory board on legislation comprising equally members of both the Swedish Supreme Court and the Administrative Supreme Court (*Regeringsrätten*), the supreme administrative judge.

### **Judgements by the European Court of Human Rights in the Procola and Kleyn cases**

In its ruling of 28 September 1995 in the case of Procola versus the government of Luxembourg, the Court raised the question of the impartiality of the Judicial Committee of the Council of State in the light of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

The Court found that four of the five members of the Committee "had to rule on the lawfulness of a regulation which they had previously scrutinised in their advisory capacity", and considered in this context that:

*"...four members of the Council of State carried out both advisory and judicial functions in the same case. In the context of an institution such as Luxembourg's Council of State the mere fact that certain persons successively performed these two types of function in respect of the same decisions is capable of casting doubt on the institution's structural impartiality. In the instant case, Procola had legitimate grounds for fearing that the members of the Judicial Committee had felt bound by the opinion previously given. That doubt in itself, however slight its justification, is sufficient to vitiate the impartiality of the tribunal in question...".*

In the ruling of 6 May 2003 in the case of Kleyn and others versus the Netherlands which raised the question of the position of the Dutch Council of State, the Court ruled on three specific points.

Firstly, it found that the impartiality of the Dutch Council of State and its members was beyond doubt:

*"Having regard to the manner and conditions of appointment of the Netherlands Council of State's members and their terms of office, and in the absence of any indication of a lack of sufficient and adequate safeguards against possible extraneous pressure, the Court has found nothing in the applicant's submissions that could substantiate their concerns as to the independence of the Council of State and its members....".*

Secondly, it ruled that the claim of impartiality against the chamber handling the case, where one of the three councillors had been involved in an advisory capacity, was unfounded, but criticised the measures taken by the Council of State in reference to the ruling on the Procola case:

*"The respondent Government has brought to the Court's attention the internal measures taken by the Council of State with a view to giving effect to the Procola judgment in the Netherlands. According to the description of these measures which is to be found in the Annual Report of 2000 of the Council of State, the composition of the bench will only be scrutinised if doubts are expressed by a party; the criterion then applied is that if the appeal goes to a matter explicitly addressed in a previous advisory opinion, the composition will be changed so as to exclude any judges who participated in that opinion.*

*The Court is not as confident as the Government was in their statement during the parliamentary budgetary discussions in 2000 that these arrangements are such as to ensure that in all appeals coming before it the Administrative Jurisdiction Division constitutes an "impartial tribunal" for the purposes of Article 6 (1) of the Convention. It is not, however, the task of the Court to rule in the abstract on the compatibility of*

*the Netherlands' system in this respect with the Convention. "*

Thirdly, the Court specified the quoted passage below on this point in the Procola case regarding "the same decisions":

*"In the present case the Plenary Council of State advised on the Transport Infrastructure Planning Bill, which laid down draft procedural rules for the decision-making process for the supra-regional planning of new major transport infrastructure. The applicants' appeals, however, were directed against the Routing Decision, which is a decision taken on the basis of the procedure provided for in the Transport Infrastructure Planning Act. Earlier appeals against the Outline Planning Decision are not at issue as they were based on a different legal framework.*

*The Court is of the opinion that, unlike the situation examined by it in the above-cited cases of Procola v. Luxembourg and McGonnell v. the United Kingdom, the advisory opinions given on the Transport Infrastructure Planning Bill and the subsequent proceedings on the appeals brought against the Routing Decision cannot be regarded as involving "the same case" or "the same decision".*

This section deals with the specific arrangements within each Council of State regarding the dual function, together with any arrangements established as a consequence of the aforementioned rulings of the European Court of Human Rights.

## **Luxembourg**

The ruling in the Procola case led to the introduction of a separate administrative Court. The Council of State performs an advisory function only, as a consequence of the reform of 1996. This modification has not fundamentally changed the way in which the advisory function is executed. In fact, the challenges in the execution of this task remain the same. As a consequence

of this reform the councillors of state or no longer in direct contact with the evolution of administrative law. However, to keep up with these evolutions, the Council has the theoretical possibility to accept persons as councillors of state who have their origins in the judicial system and to integrate in the secretariat persons with a judicial experience.

## **Belgium**

Since the Council of State was introduced in Belgium in 1947, councillors may not be members of both the Legislation and Administration Divisions concurrently. At that time, this stipulation was not inspired so much by doctrine as by practical considerations. Performing the two functions concurrently within the Council of State was a practical impossibility: on the one hand, because opinions generally have to be issued very swiftly, and on the other, because within the Administration Division suspension procedures must also be dealt with as quickly as possible.

The First President of the Council of State can assign an advisor who has been appointed to a specific division of the Council bearing in mind actual organisational requirements. Councillors may move between divisions depending on the Council's needs and workload. In such cases, their remit is amended by a decision taken by the First President.

In addition, a specific legal provision prohibits a councillor belonging to the Council's Administration Division to handle applications regarding the lawfulness of decisions and regulations<sup>6</sup> on drafts in respect of which they

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<sup>6</sup> The provisions in this article only form part of decisions and regulations rather than legislation: this is because in Belgium judges, and therefore the Council of State, may not rule in their judicial capacity on the legality of legislation.

have issued an opinion in their capacity as a member of the Legislation Division.

This provision dates from the original 1946 Act on the Council of State and therefore predates the Procola ruling.

## **Italy**

At the beginning of each year, the President of the Council of State determines the composition of the advisory and judicial divisions on the basis of criteria specified by the Presidential Council.

Councillors performing an advisory function do not perform jurisdictional functions at the same time, but may move between functions during their careers.

## **Greece**

Relatively few councillors perform a dual function. Only one of the five divisions of the Council is responsible for the dual function; it comprises seven councillors and nine legal advisors. The advisory function is this division's main focus.

The Procola ruling has not prompted any specific measures within the Greek Council of State. Since the number of councillors who perform an advisory function is so small, it is generally easy to avoid a councillor being involved in investigating an appeal pertaining to the lawfulness of a decree in which he issued an opinion in an advisory capacity.

## **France**

The French Council of State is very keen on the dual function, both for historic reasons and due to the structure of the French state. Unlike almost all other Councils of State, that of France has always been a co-author in the legislative process. The draft texts it submits to the government are confidential. This is especially important in the context of opinions of a constitutional nature. In fact, such cases may be submitted to the Constitutional Council for a

recommendation, and the Constitutional Council may then link them to the opinion of the Council of State. But the Council does not submit opinions to the government on issues pertaining to cases being handled by the Council or any other French administrative court.

Any difficulties arising from the Procola ruling are usually dealt with pragmatically: members of the Council with a dual function do not deliberate on an opinion in respect of which they may subsequently be called upon to act in their jurisdictional capacity.

## **The Netherlands**

As a result of the Court's ruling in the Kleyn case, the Council of State decided to take active measures to establish more fully whether an opinion from the Council and an appeal brought before it pertain to 'the same case' or 'the same decision'.

In such cases, these circumstances will be taken into account when putting together the chamber of the Administrative Jurisdiction Department to handle the case. Since the Dutch Council of State includes many extraordinary councillors who do not perform an advisory function within the Council, it is possible, where necessary, to put together administrative chambers comprising solely judges who have not performed an advisory function in the case. However, such cases are relatively rare.

## **B. Aspects of legislative advice**

### ***1. The scope of Councils of State as legislative advisors***

A key difference between the Councils of State is that only the Councils of State of France and the countries of the Benelux have to be consulted with regard to draft bills of parliament. In Italy, requests for an opinion from the Council of State on draft bills are optional and are very rarely made.

In Greece, the advisory function is limited to decrees and does not apply to bills.

Only in the Benelux countries is the Council of State consulted on draft legislation submitted by parliament.

In Belgium, advice is given not only to the central government, as in other countries, but also to the governments of the Communities and Regions into which the country has been divided since the state reforms of 1970, 1980, 1988, 1993 and 2001.

Legislative advice from the Belgian Council of State therefore covers a very wide area.

There are considerable differences between the various Councils of State with regard to advice pertaining to amendments made to texts after an opinion has been issued and not made as a result of advice given. In the case of amendments made to decrees, with the exception of the Councils of State of the Benelux countries, Councils of State must always be consulted. In terms of bills, such consultation is not compulsory if amendments are made during the course of a matter being handled by parliament.

This section provides an overview of the area and scope of legislative advice provided by each Council of State.

## **Belgium**

The Legislation Division issues opinions on all texts pertaining to preliminary draft bills, drafts of international conventions, draft subordinate legislation approved by the head of state, and legislative texts emanating from the authorities of the various federated entities (Communities and Regions). International conventions regarding matters in respect of which the federal government and the federated entities are each partially competent, must be approved by the different legislative organs (Federal, Community and Regional).

Once the government has submitted the draft legislation amendments may be made by either the government or the parliament. In Belgium, the government is not obliged to request an opinion from the Council on changes and amendments made during parliamentary debate. But MPs may and sometimes do request an opinion.

During the judicial year 2002-2003, 197 opinions were issued on draft legislation, 23 on legislative proposals, and 690 on draft royal decrees. Moreover, a further 503 opinions were issued on draft decrees by the government, a Community or a Region.

## **France**

The Council of State must be consulted on all draft legislation – texts submitted by the government – without exception and without any distinction as to the type of legislation (constitutional, organic, ordinary, financial, pertaining to social-security funding) procedure (referendums), or any distinction for drafts highlighted as urgent by the government other than that they be submitted, where appropriate, to the Standing Committee (Commission permanente). In the latter cases, the Standing Committee – comprising the Vice-President and 10 councillors named by the latter – is appointed to examine the text.

By virtue of the organic law of 19 March 1999, draft national legislation which the government of New Caledonia is planning to submit to the Congress is subject to an opinion by the Council of State (issued, in principle, by the Internal Affairs Department, or Section de l'intérieur).

The government is obliged to consult the Council of State on all amendments to decrees – not legislation – it makes once the Council has issued its opinion, unless, of course, the amendments are stipulated by the Council's opinion.

During 2002, the Council of State handled 92 draft laws, of which 89 were examined by the General Assembly and of which 53 were required to ratify agreements, treaties or international conventions.

In 2002, 12 draft ordinances were investigated by the General Assembly.

## **Greece**

The Council of State performs an advisory function and only issues opinions on draft regulatory decrees.

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

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

## **Italy**

It is compulsory to request the opinion of the Council of State in order to approve government and ministerial regulations.

If the government amends the draft in a different way to that set out in the opinion, it must request a further opinion from the Council of State on those amendments. In the fresh opinion, the

Council of State may only examine the new draft and must not take into account the former one.

Between 1 January 2003 and 31 October 2003, the Council of State issued 334 opinions on draft decrees.

## **Luxembourg**

The Council of State is called upon to issue an opinion on any draft legislation submitted by the government, and all legislative proposals submitted by one or more MPs. This includes draft legislation pertaining to the approval of treaties or international conventions.

In terms of subordinate legislation approved by the government, draft regulations adopted to enact laws and treaties may only be submitted to the Grand Duke once the Council of State has given its opinion.

In urgent cases to be assessed by the Grand Duke, the government may dispense with the Council's opinion, though this does not apply if the law formally requires that the Council of State be consulted. This applies in particular to legislation authorising the Grand Duke to rule on certain cases, or to the law of 9 August 1971 regarding execution and approval of decisions and directives, and approval of EU Regulations on economic, technical, agricultural, forestry, social and transport matters.

Finally, by virtue of its organic law, the Council of State is only called upon to intervene in the context of legislation and regulations emanating from government bodies themselves.

The Council of State generally gives its opinion on all changes and all amendments made to draft bills during parliamentary debate except in the case of urgent legislation. It rarely issues opinions on amendments to draft ordinances "grand ducaux".

Between 1 August 2002 and 31 July 2003, the Council of State issued 305 legislative and regulatory opinions, including 105 on draft legislation, 16 on legislative proposals, and 120 on draft Grand-Ducal regulations.

The Council of State has exempted 124 pieces of draft legislation and legislative proposals from the second constitutional vote<sup>7</sup> and refused to exempt one piece of draft legislation from the second constitutional vote.

## **The Netherlands**

The government is obliged to request the opinion of the Council of State regarding draft legislation, draft royal decrees, and international treaties submitted to parliament for approval.

Parliament must consult the Council on legislative proposals before they are handled. The Council does not issue opinions to other government institutions.

The Council is only consulted on changes to pending draft legislation and on amendments proposed by parliament if the government believes them to be 'of an interfering nature' and if there are no 'compelling reasons' not to request an opinion. Opinions on such texts are requested sporadically.

In 2002, the Council issued opinions on 176 pieces of draft legislation, 13 legislative proposals, 50 treaties not requiring legislative approval, and 339 draft texts submitted to the government.

## **2. Monitoring of texts by Councils of State**

All Councils of State examine texts submitted to them to ensure that they conform to the provisions of the Constitution, international treaties, Community law and higher-level regulations. They also check that they are in line with the legal system already in place and monitor legal and technical aspects of the texts submitted to them for their opinion.

They also verify that the texts have been drawn up in the correct manner.

All Councils of State also ensure that draft legislation complies with general legal principles even if they are not expressed in positive law. This applies mainly to legal principles such as the certainty of the law, which requires that legislation should be clear and precise, with required transitional provisions (those governing the fate of acquired rights and other similar matters), the principle of proportionality (in the case of penalties for criminal acts), and so forth.

Almost all Councils of State also ensure that principles of 'good legislation' are respected. These principles entail prohibiting any unnecessary legislation<sup>8</sup>, highlighting the need for new legislation and eliminating any legislation that is pointless and has purely symbolic value, underscoring the efficiency and pertinence of specific legislation, and enhancing the feasibility and likelihood of being able to ensure that legislation is respected.

Councils of State in France, the Netherlands and Luxembourg also examine the appropriateness in terms of "policy" of the draft legislation submitted to them.

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<sup>7</sup> Since the Grand Duchy of Luxembourg does not operate a two-chamber system, all laws are in principle subject to a second vote by the Chamber of Deputies. Sometimes though, with the agreement of the Council of State, the chamber may be exempted from holding this second constitutional vote.

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<sup>8</sup> Montesquieu: "*Useless laws weaken the necessary laws*".

In all countries except the Netherlands, opinions usually include proposals to replace the text submitted by the government.

On the other hand, since the French Council of State is a co-author of French legislation, its opinions mainly contain concrete amendments to the proposed text. Accordingly, more than other Councils of State, the French Council of State is directly and actively involved in drawing up legislation and ordinances.

The section below sets out how each Council of State monitors the proposals submitted to it.

## **Belgium**

The Belgian Council of State generally issues technical legal opinions. Specifically with regard to the advisory function of the Legislation Division, it is important to remember that the latter is careful not to make any observation on the appropriateness or political nature of the draft regulation. The legal investigation conducted by the Legislation Division focuses mainly on examining the underlying legality of the draft, and ensuring that the correct administrative procedure has been followed in drawing it up and in its legal aspects.

Most of the checks conducted are therefore of a legal nature, but they may sometimes extend beyond that. The Council may also question the actual nature of the problem and whether the text submitted is appropriate for resolving it if invoked.

Although there is no official investigative model, opinions issued by the Legislation Division usually focus on the following points: competence, legal well-foundedness and compliance with established formal requirements.

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

question, and compliance with formal requirements.

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

In its opinions, the Council also places great emphasis on the hierarchy of regulations and respect for general legal principles, such as that of the certainty of the law in cases where a law is applied retroactively, and the principle of proportionality.

While the principles of the quality of legislation are not systematically investigated, the Belgian Council of State takes account of the complexity of any legal texts submitted and the impact that this can have on administration.

## **Greece**

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

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

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

### **a. Legal quality**

- Does the draft decrees violate a higher legal regulation such as the Constitution, international conventions or Community law?
- Does the draft decree conform to the principles of democracy, the rule of law and fundamental legal principles in general?

- Does the draft decree conform to principles such as equality under the law, the certainty of the law, the non-retroactive nature of the law, proportionality and general interest?

#### **b. Technical quality**

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

### **France**

In performing its advisory functions, the Council of State is essentially an assembly of 'jurists'. In this capacity, it will monitor the quality of the wording of draft legislation (legal), will assume its legal monitoring role and will rule on the administrative - but never the political - appropriateness of the text, which will be defined as being the coherence of the action of the government and the ability of the public authorities to implement the planned reform.

When the Council of State is consulted on draft legislation it is mainly in the context of the legal quality of the text. In this respect, the administrative groups handling the matter ascertain that rules regarding competence (respective areas of law and regulations), procedure (specifically the efficacy of preliminary consultations) and form (wording and structure of the text in order to avoid any discrepancies in interpretation).

It is primarily the Council of State which assesses the normative – i.e. prescriptive – content of the draft legislation under consideration. Finally, it will ensure that the hierarchy of standards is adhered to: constitutional standards and international conventions.

But the French Council of State also monitors the need to adopt new legislation (for example, it rejects any legislation which serves only as

'propaganda'), the hierarchy of standards and the quality in terms of the underlying policy of the submitted text.

### **Italy**

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

On the other hand, the opinion may also take into account the appropriateness of the decree by the Council asking the government to start off by considering the effects of the proposed provisions.

When examining legislation, the Council monitors the compatibility of the provisions submitted to it with higher-level legislation and also their coherence with the system as a whole.

The model to be used as a basis for legislative acts is set out in directives issued by the Presidency of the Council of Ministers.

Where matters of legal substance are concerned, the Council has on occasion asked the administration for a detailed examination of the legal and economic impact of the normative provisions submitted to it.

### **Luxembourg**

In the course of its examination, the Council of State specifically monitors the conformity of the proposed provisions with the Constitution, international conventions and treaties, and general legal principles stipulated in the

Constitution and in the international conventions to which the states are party (principles such as legal certainty, limits regarding the retroactive nature of legislation, the separation of powers, the rule-of-law state and budgetary ethics). As a result, the examination in question focuses mainly on the legal quality of the draft submitted to it.

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

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

The Council of State also monitors the technical quality of the texts submitted to it.

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

Since there is no model as such for monitoring the texts submitted to it, the issues raised by the Council of State when drawing up its opinions largely overlap with those taken up by the Council of State of the Netherlands.

## **The Netherlands**

The Council monitors three aspects of legislative proposals: political quality (political in terms of “policy”), legal quality and technical quality.

The Council has developed a monitoring framework focusing mainly on the following points:

## **Quality in terms of policy**

With regard to political quality in terms of policy, the Council takes an analytical approach to the policy underlying the text submitted to it. This specifically involves knowing which problem the legislator wishes to resolve or reduce, whether it can be reasonably assumed that the text submitted will enable the attainment of the desired objective, whether it will be possible to apply it, whether its application can be monitored and whether it will be effective.

In this context, the Council asks the following questions, among others: Must and can the problem in question be resolved by way of legislation and regulation? Does this make the proposal necessary, and is its necessity adequately motivated? Is the proposal appropriate, effective and balanced in terms of the advantages and disadvantages associated with it? Can the proposal be applied, can its application be monitored and do the required instruments for its application exist?

## **Legal quality**

With regard to legal quality, the Council mainly examines the text to ensure that it complies with higher-level legislation, general legal principles, the principles of democracy and the rule of law, and also to establish whether it fits into the respective legal system.

In this context, the Council asks itself the following questions, among others:

Does the proposal violate any piece of higher-level legislation such as the Constitution, international conventions (the Convention on Human Rights, for example) or Community law?

Does the proposal comply with the principles of democracy and the rule of law?

Is the proposal in line with the principles of good legislation such as equality under the law, legal

certainty, appropriate legal protection and proportionality?

Can the proposal be integrated into the present legal system?

### **Technical quality**

In terms of technical quality, the Council mainly verifies whether the legislator has followed the guidelines (Instructions pour la législation/Aanwijzingen voor de Wetgeving) established by the prime minister, which are binding for all ministries.

In this context, the Council asks itself the following questions, amongst others:

Is the proposal well conceived from a technical point of view?

Has the proposed regulation been drawn up in a logical and systematic manner?

### **3. *Timeframe for issuing an opinion***

The timeframe for issuing an opinion differs significantly between the various Councils of State.

The Councils of State of Greece, Luxembourg and the Netherlands may, in principle, stipulate their own timeframes.

Although specific national legal frameworks apply, the Councils of State of Belgium, France and Italy depend in principle on the timeframe set by the government when requesting an opinion. In the case of Belgium and France, this means that sometimes opinions need to be issued within very short timeframes, and the Council sometimes does not have time to reach a truly balanced decision.

## **Belgium**

In most cases, the Legislation Division must issue its opinions within strict timeframes set out by the legislator, namely five working days or 30 days. Coordinated law on the Council of State was recently amended on this point to stipulate that if an opinion has not been issued within a pre-determined period, the authority requesting it is not obliged to wait for it if it pertains to a non-legislative regulatory text. For opinions that have to be issued within a period of five working days, the Legislation Division must limit its investigation to the legal grounds, the competence of the authority concerned, and compliance with formal requirements. In the case of an opinion to be issued within a period of 30 days, the Legislation Division may limit its investigation to these points.

## **France**

Depending on the texts, the Council of State should be given a period of four weeks from the date of submission of a draft to examine it in satisfactory depth. However, the public report by the Council of State in 1991 felt constrained to point out that the respective administrative formations were not given sufficient time. Indeed, the Senate has frequently complained about the short time allowed for examinations because these short deadlines deprive the government of the necessary legal guarantees.

In urgent cases, texts are submitted to the Standing Committee (Commission permanente). However, this would appear to undermine the quality of the consultation due to its members' lesser sense of forming a coherent body. This means that the Council of State is loath to refer matters to the committee.

Finally, it should be emphasised that in terms of the procedure of consulting the Council of State, within the context of implementing Article 88(4) of the Constitution of 4 October 1958, the timeframes allocated by the government are extremely short (the average duration being five

to six days) as a result of intra-Community negotiations underway<sup>9</sup>.

## **Greece**

There is no fixed timeframe. The Council usually stipulates a period of one to two months for the issuing of an opinion. The competent minister may specify a reasonable period depending on the importance and degree of urgency of a decree.

## **Italy**

Subject to shorter time periods set out by law, the Council of State issues an opinion within 45 days of the date on which the request is received. When that period has elapsed, the administration may proceed without obtaining the opinion. If, due to urgent reasons pertaining to examination of the request, the aforementioned period does not necessarily have to be respected, it may be interrupted once only and the final opinion must be issued within 20 days of receipt of the additional information sent out by the administrations concerned.

This deadline applies to all matters except special appeals. It has been deemed sufficient and has been observed.

## **Luxembourg**

In principle, the Council of State is not subject to any specific timeframe within which it must issue an opinion, but wherever possible it endeavours to adhere to the priority list drawn up periodically by the government.

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<sup>9</sup> The government advises the Council of State during the preparation of draft European directives to help it establish whether a particular directive should be transposed via legislation or another legal act (Article 88-4 of the Constitution of 4 October 1958).

Nevertheless, it is important to note that if the Chamber of Deputies has voted on a piece of draft legislation or a legislative proposal article by article, without voting on it in its entirety since not all the articles have been submitted to the Council of State, the latter must issue its opinion on the provisions voted on by the Chamber within a period of no more than three months from the date on which it was notified of the provisions in question. If no opinion is issued within this time period, the Chamber may vote on the draft or proposal in its entirety. To date, this procedure, which was introduced in 1996, has never been applied.

## **The Netherlands**

In principle, the Council of State is not bound to adhere to any specific timeframe within which it must issue its opinion. However, it has set itself a maximum of three months in which to issue an opinion. In a small number of cases (issues covering a very wide area or of extreme complexity) the Council needs more than three months in which to issue its opinion. In a very few urgent cases, the opinion is issued more quickly following a specific request by the government.

## **4. The consequences of opinions**

As a general rule, the government (or parliament if the latter requested the opinion), is not obliged to follow the opinion issued by the Council of State. However, in general it must state the reasons underlying its reaction in a response to the opinion.

In Luxembourg, failure to follow the opinion of the Council of State can, in some cases, cause formal difficulties.

Generally speaking, legal and technical observations made in an opinion are followed.

## **The Netherlands**

The government is not under any obligation to follow the opinion issued, but it must respond to the Council's opinion stating its reasoning in an official report to the Queen. Neither are the initiators in parliament obliged to follow the opinion. They must however submit an official reaction to the opinion in a report to parliament.

Several studies have shown that legal and technical opinions are generally followed by the government, but that this is not the case in relation to opinions pertaining to the quality in terms of underlying policy of a draft.

## **France**

The government is under no obligation to follow the opinion issued. Nevertheless, the position adopted by the Council of State in relation to a piece of draft legislation will certainly carry much more weight with the government if the latter is aware that if it fails to take account of the opinion it runs the risk of censure, in legal terms, by the Constitutional Council, to which the law voted on may be referred.

## **Greece**

The government is not obliged to comply with the opinion of the Council of State, but it is highly unlikely not to do so. Given that the drafting of a decree is inextricably linked to the way in which it is enacted, failure to submit a draft decree to the Council of State to be drawn up amounts to a procedural error.

## **Italy**

Ministers are not under any obligation to follow opinions. However, if a minister decides not to follow the Council's opinion with regard to regulations or individual texts, the Council of Ministers must be consulted. The general rule is that the administration must follow the opinion of the Council of State. Exceptions are rare.

## **Luxembourg**

In principle, the government is not obliged to follow the remarks made by the Council of State, but in practice, it is rare for the government not to take account of any formal opposition expressed by the Council regarding legal provisions that violate the Constitution, higher-level legislation or general legal principles.

In Luxembourg, three possible scenarios may arise: An opinion is limited strictly to comments, in which case it is unlikely that it will be followed; the opinion contains an alternative proposal, in which case it is much more likely that it will be followed; the Council of State formally opposes the text submitted to it, in which case parliament must vote twice on the text for it to be adopted.

## **Belgium**

Opinions issued by the Legislation Division are not binding. However, it is possible that if the opinion is not followed in respect of certain legal points, the authority in question will provide some justification in the form of an explanation of the reasons underlying a law, decree or ordinance, or in the report to the King or the government of the Community or Region concerned. Such justification is not required by law.

## **5. Publication of opinions**

There are considerable differences between the various Councils of State with respect to the way in which their opinions are published. In Italy, Greece, Luxembourg and the Netherlands opinions are made public if not immediately, then within a very short space of time. In Belgium, although opinions are indeed published, the publication procedure leaves much to be desired. In France, in principle opinions do not enter the public domain.

## **Greece**

The Council of State publishes its opinions.

## **Italy**

Article 15 of law no. 205 of 21 July 2000 stipulates that opinions issued by the Council of State must be published and must name the president of the formation and the author. Opinions are published as soon as they are sent to the authority that requested them. Opinions are published on the Council of State's website. This arrangement regarding the publication of opinions highlights their similarity to judgements, since both are issued in a neutral manner in the interests of general legal order.

## **Luxembourg**

According to article 36 of the statutes of the Council of State, opinions and - where they exist - separate opinions issued on draft legislation or regulations or legislative or regulatory proposals in respect of which the Chamber of Deputies has already received a committal or a communication, are made public as soon as they are approved in plenary session.

As soon as opinions are issued in accordance with the deliberations of the plenary assembly, the Secretariat may send them to any private authority or individual they wish.

The Secretariat posts opinions that have been made public on the Council of State website by the day following the plenary session which adopted them.

Draft legislation and regulations in respect of which the Chamber of Deputies has not received any committal or communication remain confidential and may only be sent to the government or the administration concerned.

## **The Netherlands**

The government publishes opinions issued by the Council of State as soon as it has sent its reasoned response to the Queen. In the case of a draft bill in the formal sense, the Council's opinion

and the reasoned response from the government are published as parliamentary documents.

The Council's opinion is published on its website as soon as it announced by the government. Every year, the Council publishes an annual report in which it analyses the opinions published during the previous year.

## **Belgium**

In principle, the law of 11 April 1994 on disclosure of information by the administration applies to opinions issued by the Legislation Division. In practice, however, opinions are not systematically published, but may be requested individually, which is quite rare (for example, in the event of a dispute before the Administration Division of the Council of State regarding application of a regulation that has been subject to an opinion issued by the Legislation Division).

Opinions are not systematically published on the Council of State's website but are sent to the party that requested the opinion, who then decides whether they should be made public.

Nonetheless, some opinions are published, either in parliamentary documents if the opinion pertains to preliminary draft legislation, or in a legislative proposal, draft decree or ordinance, or in the Belgian Official Gazette if the opinion relates to a draft royal decree or an order enacted by the government of a Community or Region and provided that a report has been drawn up for the King or for the government of the Community or Region in question.

In its annual activity report, the Council of State publishes extracts of key opinions issued during the year.

## **France**

In principle, opinions are not published. Opinions issued by administrative groups within the Council of State are not administrative

documents within the meaning of law no. 78-753 of 17 July 1978 regulating the freedom of access to administrative documents. Only the government may and must decide the principle underlying and the timing of publication of opinions issued by the administrative groups within the Council of State, since the latter is the legal advisor of the government alone.

With the government's authorisation, major opinions issued by the Council of State are published in annual reports. Accordingly, since issue number 28 in 1976, the review *Etudes et Documents* (Studies and Documents) has - with the government's approval - published the text of a number of such opinions. In addition, academics analyse key opinions in a well-argued and highly detailed fashion in the publication *Les Grands avis du Conseil d'Etat* (Key Opinions of the Council of State), 2nd edition, Dalloz, 2002.

## **C. Councils of State and European legislation**

All Councils of State are consulted when transposing European rules and regulations into national legislation in all cases where such transposition requires a legislative instrument (law, ordinance, etc.) falling within the general field of competence.

In France, the Council of State advises the government from the preparation phase onwards of draft European directives, where the process involves establishing whether a particular directive needs to be transposed via legislation or another legislative act (see Article 88-4 of the Constitution of 4 October 1958).

The Council of State in Italy may, at the request of the prime minister, investigate draft EU legislation. This provision is only applied in rare cases. The Dutch Council of State may be requested for advice from the appropriate minister responsible on draft European legislation in preparation.

This section provides further details on how each country's Council of State is involved with European rules and regulations.

### **Belgium**

The Legislation Division issues opinions on internal draft laws aimed at transposing European legislation.

The Belgian Council of State is not involved in preparing European rules and therefore issues no opinion in this context.

### **France**

In its advisory capacity, the French Council of State rules on measures (laws or regulations) aimed at implementing European legislation.

The Council of State is invited to issue an opinion on European legislation being prepared in Brussels under the procedure set out in Article 88-4 of the Constitution of 4 October 1958, which states that: "The Government shall lay before the National Assembly and the Senate any drafts of or proposals for acts of the European Communities or the European Union containing provisions which are matters for statute as soon as they have been transmitted to the Council of the European Union. It may also lay before them other drafts of or proposals for acts or any document issuing from a European Union institution" (Article 88-4, paragraph 1, wording adopted in the wake of the Constitutional law of 25 January 1999).

Bearing in mind the vague nature of the phrases 'draft acts or proposals for acts' and 'containing provisions which are matters for statute', from the outset the government has made provision via circulars for the Council of State to be consulted for its opinion in a bid to help it ascertain what should be put to parliament.

During 2002, the Council of State ruled on 342 drafts of and proposals for Community acts; it concluded that 228 of them contained legislative provisions, thereby justifying their submission to the French parliament.

In addition to this purely operational role, (deciding on and channelling cases) the Council of State would like to be consulted within the framework of Article 88-4 of the Constitution regarding the basis of drafts acts and proposals for acts of the European Community and the European Union which may have significant legal ramifications.

### **Greece**

The Council of State performs its advisory function in respect of decrees (approximately 50 drafts each year) needed to transpose European legislation.

The Council is not involved in drafting European rules and regulations.

## **Italy**

When European legislation is transposed via regulatory acts, an opinion must be sought from the Council of State; if transposition is to take place via legislation, the Council's opinion is optional and is generally not requested.

Article 17 paragraph 28 of law no. 127 of 15 May 1997 stipulates that at the request of the president of the Council of Ministers the Council of State shall examine draft EU legislation.

This provision, which stipulates that the Council of State's opinion is optional, has only been applied on a very few occasions.

## **Luxembourg**

Given that the Council of State is called upon to rule on any draft legislation, it may perform its advisory function within the framework of transposition of European directives via legislation. The same applies to directives which are transposed into national law via a Grand-Ducal regulation.

At present, the Council of State does not issue any opinions on draft European legislation under preparation. Nevertheless, the government itself may submit such drafts for an opinion under its right to submit to the Council of State matters pertaining to high-level administration.

## **The Netherlands**

In 2003, the Dutch Council of State performed its advisory function in respect of 54 legislative proposals and secondary legislation required to transpose European legislation.

If the appropriate minister deems it appropriate, he may ask the Council to issue opinions on draft European legislation being prepared in Brussels. To date, this has occurred on five occasions.

## **D. Other advisory activities of Councils of State**

### **1. Opinions issued by Councils of State on their own initiative**

Councils of State in the Netherlands and Luxembourg have the right to issue opinions to their governments on their own initiative, but they rarely – if ever – exercise this right. It should be noted, though, that in its annual report 2003, the Dutch Council of State made remarks on legislation which it felt had shortcomings.

The Italian Council of State does not have the right to issue opinions on its own initiative. However, the law does stipulate that if a Council of State investigation reveals that any aspect of the legislation in force is unclear, flawed or incomplete, then a report to this effect should be submitted to the head of government.

Councils of State in Belgium and Greece have no authority to alert the government to a particular case on their own initiative.

The French Council of State may, on its own initiative, draw the attention of the public authorities to legislative, regulatory or administrative reforms which it feels are of general interest.

It exercises this right by publishing reports and in-depth studies which often have a legislative, regulatory or administrative outcome.

#### **Belgium**

The Belgian Council of State may not issue opinions on its own initiative.

#### **France**

The Council of State may, on its own initiative, alert the public authorities to legislative, regulatory or administrative reforms which it believes to be in the general interest (Article 24 of

the ordinance of 31 July 1945, codified into Article L.112-3 of the Code of Administrative Justice).

The present remit of the Council of State can be seen more as to play the role of an examining or expert body and possibly an advisory one. Devolved to the Council's Documentation and Research Division (*Section du rapport et des études*), it is involved primarily in investigating in depth the information surrounding matters or issues which, previously seemed uncertain, and, secondly, in formulating recommendations and proposals to be integrated into positive law.

According to a former head of the Documentation and Research Division, approximately two-thirds of proposals formulated produce legislative, regulatory or administrative results.

Among its main recent studies, some of which have immediately been applied in positive law, mention should be made of the 1992 report advocating greater efficiency of planning law which seems to have inspired members of parliament in debates prior to the law of 9 February 1994 reforming the Planning Code (*Code de l'urbanisme*). In the same vein, the doctrinal content of the study entitled *The laws on bioethics: five years on* (1999), the conclusions of which appear to have influenced the drawing up of a draft law on the matter, deposited before the National Assembly 20 June 2001, is also worth pointing out.

#### **Greece**

The Council may issue opinions on its own initiative, but rarely does so (most such instances pertain to issues concerning its own operation).

#### **Italy**

The Council of State may not issue an opinion on its own initiative, but Article 58 of decree no. 444 of 21 April 1942 stipulates that if it emerges from an investigation into a matter by the Council of

State that legislation in force is in any way unclear, flawed or incomplete, then the Council must submit a report on the matter to the head of government.

## **Luxembourg**

The organic Act on the Council of State stipulates that the Council may draw the attention of the government to the appropriateness of new laws or new regulations, or to amendments to be made to existing laws and regulations. Accordingly, it has sui generis power in terms of legislation and regulations.

But it rarely exercises this right and, in the past, has limited itself to exercising it in cases where it believed there to be a danger in the status quo, especially in institutional or jurisdictional terms or in cases that pertained to areas to do with its own internal organisation. The Council of State proposes the draft legislation or Grand-Ducal regulation in question.

## **The Netherlands**

The Council may issue opinions on its own initiative but has never done so yet. In the 2003 annual report for the first time it also systematically highlighted shortcomings in legislation which it had observed while performing its legal function. The Council plans to continue this method in future years.

## ***2. Opinions issued by Councils of State on individual matters***

In addition to the legislative opinions, governments are sometimes required by law to consult Councils of State in individual cases. In Belgium and Greece this never happens; in the Netherlands it is rare, while in Luxembourg it is more commonplace. In France, the practice is becoming less frequent, and in Italy the Council is consulted within the framework of a special appeal before the head of state.

This section details the specific advisory role played by the respective Councils of State.

## **Belgium**

The Legislation Division does not issue opinions on individual cases. Administration Division's competence in the area of opinions may at the very most focus on administrative measures of an individual nature.

## **Greece**

The Council only issues opinions on decrees of a regulatory nature.

## **The Netherlands**

In a very few cases, the law stipulates that the government should rule in an individual case on the basis of an opinion from the Council of State. In 2002, there were five such cases.

## **Luxembourg**

The Council of State must be consulted for an opinion with respect to all applications for a change of first name or last name. Between 1 August 2002 and 31 July 2003, it issued 63 such opinions.

During the same period, it also ruled on six applications for declarations of public interest by non-profit associations.

The Council of State is also called upon to rule by virtue of Article 6, paragraph 11 of the law of 29 June 1989 on nightclub regulations, applications for unlimited licences to sell alcoholic beverages. Between 1 August 2002 and 31 July 2003, the Council of State issued seven opinions in respect of the applications in question.

It should be noted that, in accordance with the aforementioned law, opinions on such applications are issued by a committee comprising three members, each appointed for

one year by the president of the Council of State. Opinions are not submitted to the plenary session for deliberation.

## **France**

With regard to individual measures, the Council of State used to be competent in the area of applications for name changes; this authority, set out in a law of the 11th Germinal year XI remained in force until 1 February 1994, on which date the law of 8 January 1993 came into force stipulating simple decrees from that point on.

In terms of individual decisions, the trend has been to reduce the competence of the Council of State, in particular that of the Internal Affairs Division (179 in 2002 as compared with 241 in 2001)

## **Italy**

All opinions issued regarding special appeals as opposed to jurisdictional appeals pertain to individual cases. Between 1 January and 31 October 2003, the Council of State issued 2,299 opinions on special appeals.

Usually, matters which the government may submit to the Council of State concern general difficulties of interpretation, but they may also have to do with individual matters, as was the case for example regarding the interpretation of the XIIIth provision annexed to the Constitution on the entry and residence of former kings, their wives and male descendants of the House of Savoy.

### ***3. Opinions issued by Councils of State on other matters***

There are also considerable differences between different Councils of State in terms of governments obtaining opinions on matters not of a legislative or individual nature.

In Greece and Belgium this is not possible, although in Belgium, since the government

reform, the Council has performed an advisory role in resolving issues of competence between public authorities.

In the other countries, the government may ask the Council for an opinion if it so wishes, but this only happens in a small number of cases. In Italy, either House of parliament may request an opinion from the Council.

## **Greece**

In Greece, applications for opinions on issues other than legislation may not be submitted to the Council of State.

## **Belgium**

A (compulsory) opinion may be requested from the Legislation Division to determine whether a specific political dispute (a 'conflict of interest'), which has arisen between the federal government and the governments of the federated entities, also poses a problem of legal competence. If the opinion deems this to be the case, the matter is referred to the Conciliation Committee, a political body composed of representatives of the federal government and the Regional and Community governments, which may handle conflicts of interest with a view to resolving them.

## **France**

Since its origins back in year VIII, the Council of State has always been consulted by either prime ministers or ministers on 'administrative difficulties' (Article 52 of the Consular Constitution of the 22nd Frimaire year VIII, appearing in Article 23 of the ordinance of 31 July 1945 on the Council of State, now codified into Article L.112-1 of the Code of Administrative Justice).

Certainly, this advisory role of the Council of State is less important than its involvement in preparing laws, ordinances and decrees, but it

nevertheless enables it to reiterate or clarify the scope of the rules and regulations in force.

Traditionally, the Council of State does not draft opinions on problems that are the subject of a submission for a legal settlement.

The 2003 public report by the Council of State mentions 18 opinions (of which four were from the General Assembly) issued by virtue of Article L. 112-1 of the Code of Administrative Justice.

## **Italy**

The government, the Regions, or either of the parliamentary chambers may ask the Council for an opinion on any issue.

Accordingly, for example, the Italian Senate asked the Council of State whether a senator, who had become President of the Republic, was entitled to retirement emoluments from the Senate for the period during which he had been President of the Republic. The Council replied no.

The government may also seek an opinion from the Council regarding problems in interpretation of laws. Between 1 January and 31 October 2003, the Council issued 70 opinions on such problems.

## **Luxembourg**

The Council of State deliberates in plenary session on all issues pertaining to high-level administration submitted to it by the government. Moreover, the prime minister has the right to instigate meetings between the government and the Council of State on issues regarding legislation and high-level administration.

It is important to note, though, that only seldom are such issues submitted to the Council of State, and it is even rarer for the prime minister to instigate interinstitutional meetings.

## **The Netherlands**

The government may request the opinion of the Council of State on any issue it deems appropriate. Accordingly, every year it requests the Council's opinion on the Memorandum on the state of the public finances, the government report that accompanies budgetary items submitted to parliament.

The Council is also asked for its opinion on the political quality (policy) of legislation, for example, on official investigations regarding legislation.

## E. Conclusions

From the previous comparative survey of the advisory function by the Counsels of State of the European Union appears that on a number of issues there sometimes exist large differences between the Counsels of State. We may think about the organisation, the way of working and the composition of the boards, their terms of and the role they're playing in connection to European legislation. However there is a striking similarity in the way in which the Counsels of State judge the texts which are placed before them.

As far as their believes about the quality of legislation are concerned, the Counsels of State, acting as independent and impartial advisors of the government – and sometimes also of parliament – seem to a large degree to be in agreement with each other.

Their job as independent and impartial advisors is after all focused on judging the propositions which are laid before them. This of course happens from a point of view which is primarily provided by the higher law, that is to say the international treaties which their state is bound to, the European law, the constitution, the general principles of law and, if it concerns law of a lower rank, bills, and other national law on that level.

Besides this the Counsels of State are also aware of other aspects, such as consistency, transparency, accessibility and readability, which determine the quality of (the system of) legislation and the allied legal security in their country.

The quality of legislation in the constitutional states of the European Union is extremely important.

After all, legislation that comes about following approval by parliament, can be viewed as the Archimedean point of a state based on the rule of law. For it forms the basis of the state and of the national legal system; it is a pivotal force

imposing order on society; it is the basis upon which administrative powers are determined; and it provides a frame of reference for judges as well as a system by which to protect the individual.

Poor legislation limits legal security, jeopardises administration and makes it difficult for judges to perform their job satisfactorily.

Certainly, in a rule-of-law state there is always a degree of tension between democratically weighing up interests on the one hand, and legal principles on the other. These elements are not always compatible with each other.

As a result, legislation can be influenced by all manner of requirements, elements and interests. High-quality legislation will only be achieved if a balance can be struck between all the relevant requirements, aspects and interests, and if a number of technical demands are met.

As independent and impartial legislative advisors, Councils of State of the European Union – even when their authority is limited to decrees and ordinances and excludes bills - make a significant contribution primarily to the quality of legislation in their respective countries. As a consequence of this profound experience and expertise of a broad range of legislation they are able to rule authoritatively on the quality of the texts submitted to them and suggest ways in which they could be improved.

Generally speaking, the Councils should perform their tasks on the basis of the practical knowledge and experience gained by their members, not only through their wider professional experience, but also, in most cases, through their own activities as the Supreme Administrative Court.

The opinions given by the Councils of State are, except for a few exceptions, public and as a consequence controllable.

It is this dual task of acting as Supreme Administrative Court and legislative advisor that characterises all Councils of State with the exception of the Council of State of Luxemburg; which makes the advice provided by them particularly important and enables them to play an extremely valuable role not only vis-à-vis the party at whom the opinion is directly or indirectly aimed – the government, legislators and administrators – but also vis-à-vis judges and citizens.