COSAC Presidency
Mr. Vilén
Chairman of the Grand Committee
Eduskunta-Parliament of Finland
Arkadiankatu 3
FI-00102 Helsinki
Finland

The Hague, 5 September 2006

Dear Colleague,
Dear Mr Vilén,

Thank you for your invitation to the meeting of the COSAC chairpersons on the 11th of September in Helsinki. On behalf of the committee for European Cooperation Organisations of the Dutch Senate, I would like to take the opportunity to bring two matters to your attention that have our special interest at this moment. We would appreciate it if these matters could also be touched upon during the COSAC meetings under the Finnish EU-presidency.

First, on the 27th of June 2006 the Dutch delegation to the Parliamentary Assembly of the Council of Europe (PACE) tabled a motion for a resolution on the accession of the EC/EU to the European Convention on Human Rights (ECHR). This motion was co-signed by the leaders of all the political groups in the PACE. We believe the EC/EU accession to the European Convention on Human Rights is of the utmost importance for the European citizens. And since it is a non controversial matter, we would urge the governments of the EU member states to open the accession negotiations as soon as possible. We would appreciate if the COSAC under the Finnish Presidency will support our initiative and adopt conclusions in favour of opening accession talks between the EU and Council of Europe. Therefore, both the Senate and the House of representatives of the Netherlands, request to place this on the agenda. We have enclosed the motion tabled for your information.

Second, the Dutch Senate has asked the Dutch Council of State, the highest advisory body of the Dutch government and parliament, to publish a report on European regulatory agencies. We have specifically asked for the Council of State's opinion on the topic of the (parliamentary) democratic control regarding the creation and functioning of these agencies, on the possibility of a subsidiarity check on a proposal to establish an agency and in general on the embedding of agencies in the European institutional structure. The Dutch Senate has received the report of the Council of State last June and the committee on European Cooperation Organisations decided - considering the importance of this matter from a

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democratic and citizen's point of view - to translate the main findings and recommendations so that these can be discussed on European level.

The creation and activities of European regulatory agencies are both supranational and intergovernmental matters. On the European level an interinstitutional agreement on the operating framework for the European regulatory agencies is being negotiated. As parliaments of the EU member states we can of course discuss the topic of agencies with our national governments. Together however, we should develop ideas and proposals to improve the European playing field of regulatory agencies. The Dutch COSAC delegation is of the opinion that the topic of European regulatory agencies deserves more and specific attention of all the national parliaments, especially in our relations with the civil society and our citizens.

On behalf of the committee on European Cooperation Organisations of the Dutch Senate, I would like to ask our colleagues in COSAC their opinion on European regulatory agencies and especially on the findings of the Dutch Council of State. We would appreciate it, if this topic could be dealt with in COSAC,

Please accept our best wishes for a successful presidency,

With kind regards,

J.H. Eigeman
Vice-Chairman of the committee on European Cooperation Organisations,
Senate of the States-General, the Netherlands

Motion for a resolution on the accession of the EU/EC to the European Convention on Human Rights

27 June 2006

presented by Mr Van Thijn/Mr Kox and others

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1. One of Europe's common goals is the protection of human rights. Our shared values and principles for the protection of fundamental and human rights are –on the European continent- expressed in the European Convention on Human Rights.

2. The European Convention on Human Rights applies to all Council of Europe member states. Thus all member states of the European Union (EU)/European Community (EC) are at the same time signatories of the European Convention on Human Rights. Those who deem that their rights have been violated can bring their case to the Court in Strasbourg after exhaustion of domestic remedies. The EU/EC has a separate legal order created by the treaties governing the EU/EC with, as highest court, the European Court of Justice in Luxembourg. The European Convention on Human Rights and its judicial mechanism do not apply to this legal order. This can only be corrected by the EU/EC as such by becoming a Party to the European Convention on Human Rights.

3. To achieve the necessary coherence between the European Convention on Human Rights and European Community law, to grant European citizens the same protection on the European level as they have on a national level and to increase the credibility of human rights in Europe, the EU/EC should therefore accede to the European Convention on Human Rights.

4. In his report "A sole Ambition for Europe" Prime Minister Juncker of Luxembourg stated that the accession of the EU to the European Convention of Human Rights is absolutely necessary to ensure maximum consistency of human rights protection in Europe. Prime Minister Juncker recommends that the governments of the EU member states immediately open the door for accession.

5. During the Third Summit of the Council of Europe, Warsaw, May 2005, the Heads of State and Government also expressed their intention for the EU to accede, without delay, to the European Convention of Human Rights.

6. The European Council of 15-16 June 2006, concluded that a fruitful co-operation between the European Union and the Council of Europe is of great importance, and that the report of Prime Minister Juncker deserves further consideration.

7. The existing momentum in favour of EU/EC accession to the European Convention of Human Rights should –for the benefit of all European citizens- not be neglected. The Council of Europe's Steering Committee for Human Rights already addressed the technical adjustment needed for EU accession in 2002, which shows that the idea has an older history. Indeed, the period of reflection in the EU does not necessarily have to be observed, as this concrete step to improve human rights protection of European citizens is not controversial at all.

8. The Assembly should recommend that for the establishment of a coherent human rights protection system in Europe, the accession of the EU/EC to the European Convention on Human Rights is of the utmost importance.

9. The Assembly should therefore stimulate the opening of accession talks between the Council of Europe and the European Union, so that accession can quickly enter into force as soon as a sufficient legal basis for accession can be identified on the EU/EC side.

This motion has been initiated by members of the Dutch delegation to the Parliamentary Assembly of the Council of Europe, representing all the different political groups and is (co) signed by:

Van Thijn – the Netherlands (SOC) – Eerste Kamer

Kox – the Netherlands (UEL) – Eerste Kamer

Bemelmans-Videc – the Netherlands (EPP/CD) – Eerste Kamer

Dees – the Netherlands (ALDE) – Eerste Kamer

Platvoet – the Netherlands (UEL) – Eerste Kamer

Jurgens – the Netherlands (SOC) – Eerste Kamer

Van Winsen – the Netherlands (EPP/CD) – Tweede Kamer

Ateş – Turkey (SOC) - Chairperson of the Political Affairs Committee

De Puig – Spain (SOC) – Political leader of the SOC group

Eorsi – Hungary (ALDE) – Political leader of the ALDE group

Einnarsson – Sweden (UEL) – Political leader of the UEL group

Frunda- Romania (EPP/CD) - Chairperson of the Monitoring Committee

Gross – Switzerland (SOC) - Chairperson of Committee on Rules of Procedure and Immunities

Marty – Switzerland (ALDE) - Chairperson of the Committee on Legal Affairs and Human Rights

Van den Brande – Belgium (EPP/CD) – Political leader of EPP/CD group

PART C. Summary and recommendations

9. Summary of the general framework

This information concerns European regulatory agencies. These are legal entities that are separate from the Commission, have legal personality and have been established by a decision based on the EC or EU Treaty. They have a specific executive function as described in the decision establishing the agency. They include regulatory agencies under the EC Treaty (3.1.2) and under the EU Treaty (3.2). The regulatory agencies under the EC Treaty can be divided into two categories. First of all, there are the regulatory agencies that do not have any decision-making power and whose purpose is purely to provide assistance. Second, there are the regulatory agencies with decision-making powers; this category also has the power to make individual decisions.

The Council of State points out that various legal questions concerning regulatory agencies have yet to be answered by the EC Court of Justice; see at 4.2, 4.4 and 4.5. In the case of regulatory agencies there are differences with regard to the legal basis, legal protection and structure. The aim is to achieve a more coherent arrangement. This arrangement can consist of the proposed interinstitutional agreement, a framework regulation or an amending regulation in each policy field to harmonise all existing regulations establishing regulatory agencies.

The implementation of European policy by regulatory agencies represents a departure from the normal manner of implementation in two ways: first, implementation takes place not at national level (possibly together with the Commission) but at European level and, second, implementation at European level is not by the Commission but by entities separate from the Commission. This is why there must be both a conscious assessment when a regulatory agency is established and scrutiny of its functioning. The relevant recommendations will be considered below.

10. Recommendations concerning regulatory agencies

The Council of State makes recommendations that are based on the analysis in part B and on the answers to the questions raised by the Minister of Foreign Affairs. The questions are about how the regulatory agencies relate to and fit in with the European institutional framework, about the democratic legitimacy and scrutiny of regulatory agencies and about the application of the subsidiarity and proportionality tests to the setting up and functioning of regulatory agencies.

The recommendations focus on the various questions connected with decisions on the setting up of regulatory agencies and their functioning. Three questions arise in this connection: (i) should a subject be regulated at national or EU level (the first ‘or’ question, to be decided by means of the subsidiarity test)? (ii) should a regulatory agency be established for the implementation of European policy if such policy is desirable (the second ‘or’ question, to be decided by means of the proportionality test)? (iii) finally, how should a regulatory agency be structured, in particular how should the scrutiny take place (the ‘how’ question)? For this purpose the subsidiarity test, the proportionality test and the various forms of scrutiny are considered. In view of the submitted questions, the issue of democratic legitimacy is also dealt with. In accordance with the ‘integral approach’ advocated by the Council of State, attention is finally paid to the relationship between the regulatory agencies and their national

and international counterparts. The recommendations relate to regulatory agencies with or without decision-making powers, with the exception of the recommendation on judicial scrutiny which relates only to agencies with decision-making powers (recommendation 14).

10.1. Application of the subsidiarity and proportionality tests when a regulatory agency is set up

Recommendations

1. The Member States themselves are primarily responsible for implementing European policy. It follows, in the opinion of the Council of State, that restraint should be exercised in setting up regulatory agencies. The principle should be 'no, unless' various conditions are fulfilled. The responsibility of the Member States means that in the setting up of a regulatory agency the subsidiarity and proportionality tests must be applied both by the government and by the national parliament (see at 5.1 and 5.3).[1] The necessity for a regulatory agency must therefore be demonstrated in the proposal for its setting up.

2. In assessing whether a particular subject should be regulated at EU level and, if so, whether it should be implemented by a regulatory agency, attention should be paid at both European and national level by government and parliament to the national entities (see at 5.1) and to the 'supra-EU' entities which can be regarded as the counterparts of the proposed agency (see at 5.2). This is in order to avoid duplication in implementation and to achieve good cooperation between implementing entities at various levels.

3. The proportionality test need be applied at the time of the proposal for setting up the agency only if the subsidiarity test has shown that implementation should take place wholly or partly at the European level. The proportionality test should indicate which authority is appropriate at EU level (i.e. the Commission or a regulatory agency) for the performance of the relevant public duties (see at 5.3).

4. The Protocol on the application of the principles of subsidiarity and proportionality can be applied in assessing a proposal for the setting up of a regulatory agency (see at 5.1 and 5.3).

5. The national parliament should be able to apply the subsidiarity and proportionality tests independently and more systematically, and above all at the earliest possible stage. This means that it must monitor the developments that can lead to the setting up of a new regulatory agency (or to a proposal to this effect). If it appears that there is opposition in the national parliament to the setting up of a proposed new regulatory agency, contact can be sought with other parliaments in connection with the 'yellow card' procedure (see at 7.1.2).

6. To allow effective monitoring the government ministries should gather the relevant information at an early stage and introduce it into the policy preparation process, in particular with a view to the initiation of a substantive debate and political decision-making[2] (see at 7.1.2).

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1 This is in keeping with the advisory report of the Council of State on the consequences of the European arrangements for the position and functioning of the national state institutions and their interrelationship, Parliamentary Papers II 2005/06, 29 993, no.22.

2 See recommendation 7 of the advisory report on the consequences of the European arrangements for the position and functioning of the national state institutions and their interrelationship, Parliamentary Papers II 2005/06, 29 993, no. 22.

10.2. Democratic legitimacy

Recommendations

7. The national parliament can, by proactively seeking information, exercise influence in good time over the decision-making process in Brussels, for example by applying the subsidiarity and proportionality tests referred to above[3] (see at 7.1.2).

8. The democratic legitimacy of a regulatory agency can be strengthened if the elements of the normal legislative process (such as consultation between parliamentary committees and government ministers and provisional reporting) are used wherever possible in the national parliament when a proposal for the setting up of the agency is considered.[4] Questions can be asked in this connection about such matters as the composition of the administrative board and scrutiny of the board. The national parliament can coordinate both substantive and procedural consideration of a proposal for the setting up of a regulatory agency and scrutiny of the functioning of the agency with the European Parliament (see at 7.1.2).

9. In addition to coordination with the European Parliament, members of national parliaments can contact their counterparts in representative assemblies of other international organisations such as the Council of Europe if they are already dealing with the same issue (see at 7.1.2). If possible, personal unions should be established.

10. In the discussion of a proposal for the setting up of a regulatory agency, it is important for the government and national parliament to take account of the interests of special interest/pressure groups. Examples of ways in which they could take part in a regulatory agency are through an advisory role or a seat on the administrative board. This is of particular importance when a regulatory agency is set up in order to provide a platform for such groups and technical and specific knowledge is necessary in order to be able to develop policy in a particular field. Special interest/pressure groups could also be consulted when a regulatory agency is set up and during discussion of an evaluation of the functioning of such an agency. In this way civil society could be directly involved in the policy-making and decision-making (see at 7.2).

10.3. Scrutiny mechanisms

Recommendations

11. To supplement the existing scrutiny mechanisms the political and administrative scrutiny at European level can be increased by including in each regulation setting up an agency an evaluation provision enabling the European Parliament to hold the director and EU Commissioner concerned accountable on the basis of the evaluation and enabling the Commission to obtain sufficient information about the functioning of the agency (see at 6.3 and 8.1.1).

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[3] In general, the strengthening of democratic legitimacy is promoted by incorporating EU subjects as a national subjects in the normal national procedures; see also recommendation 3.a. of the advisory report on the consequences of the European arrangements for the position and functioning of the national state institutions and their interrelationship, Parliamentary Papers II 2005/06, 29 993, no.22.

[4] See also recommendation 6 of the advisory report on the consequences of the European arrangements for the position and functioning of the national state institutions and their interrelationship, Parliamentary Papers II 2005/06, 29 993, no. 22.

12. The political (parliamentary) scrutiny at national level can be clarified by providing for fixed moments of scrutiny (see at 8.1.2). Possible forms of scrutiny are:

- prior to an evaluation of a regulatory agency discussion of the agency in the national parliament, possibly in the presence of members of the European Parliament. These evaluations can take place not only in the European Affairs Committee but also in the standing committees that deal with policy fields of the regulatory agencies concerned;
- the parliamentary consideration of annual reports and evaluations of national counterparts; and
- discussion of regulatory agencies during the debate on the government's annual 'State of the European Union' report.

13. The public scrutiny can be strengthened by more transparency and open government, for example by the provision of ample access to documents (see at 8.2). In connection with political scrutiny there should be clarity about the question of when special interest/pressure groups can be involved in the functioning of a regulatory agency by means of committees and what special interest/pressure groups are represented on those committees and why (see at 7.2).

14. Judicial scrutiny must always be guaranteed in the case of a regulatory agency with decision-making powers. The procedure to be followed is preferably that an objection can first be lodged with the agency concerned, namely with the board of appeal. Application for review may then be made to the court of first instance, followed by appeal to the EC Court of Justice. No legal protection need be separately provided in respect of decisions of a regulatory agency that does not have decision-making powers since the decisions by the Commission cannot affect individuals directly and individually and the normal legal protection procedures are thus applicable (see at 8.3).

10.4. Relationship between a regulatory agency and its national and international counterparts

Recommendations

15. It is recommended that both the EC institutions and the government and national parliament should consider at periodic intervals, on the basis of annual reports and evaluations, the relationship between the different entities that are involved with the same subject at national, EU or supra-EU level. It is also recommended that consideration be given, in connection with the scrutiny and evaluation of the work of a regulatory agency, to the different levels of implementation and the extent to which they supplement, duplicate or even disrupt one another, not only during the setting up of the regulatory agency (see recommendation 2) but also during its operation, and that, where necessary, the establishment of an advisory forum in which national counterparts are represented should be advocated (see at 6.2 and 8.1.1).

16. The principle of Community good faith means that Member States must take account of the implementation of European policy in other Member States even in cases where there is no counterpart of a national entity at European level. This may mean that the national entities should set up an information and cooperation procedure among themselves (see at 6.2).

The Council of State has no objection to the disclosure of this information.