

**REPORT BY THE COUNCIL OF STATE ON THE
INTEGRATION OF EUROPEAN LAW INTO THE
SPANISH LEGAL SYSTEM**

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The Council of State Study Group, at its meeting held on 14 February 2008, attended by the Council Members listed in the margin, unanimously approved the following report.

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INTRODUCTION

1. The Government's Consultation Request

On 23 February 2007, the Government asked the Council of State to prepare a study on the foreseeable impact on the General State Administration of the integration of European law into the Spanish system. The document formalising this request, to be fulfilled within a year, was received by the Council on the following 24 February. It reads as follows:

“Spain’s accession to the European Communities in 1986 brought about profound changes in the structure of our administrative and legal systems. After the initial incorporation of the Community *acquis* then in force, the body of rules that make up Community law has expanded to the present day, not only through an ever-broader secondary law and with new developments regarding the European Union’s international action, and through new forms of regulatory action, such as the open method of coordination, but also through successive amendments to primary law, most particularly with the creation of the European Union, incorporating the original Communities.

Although the changes arising from our inclusion in the process of European integration are undoubtedly the most important, they are not the only ones. In addition, Spain’s membership of the Council of Europe has had a very significant impact on our legal system, especially with respect to the jurisprudence of the Strasbourg Court, whose interpretation of the European Convention on Human Rights (1950) is binding on Spanish judges, under Article 10.2 of the Constitution. Other international organizations and rules also raise issues that on occasion go beyond the traditional concept of international law.

The changes made to the national legal system during this process undoubtedly affect the regulatory function of the State, with the introduction of new law-makers and of new functions, especially for the Administration, in its participation in the procedure. Furthermore, the Administration's development and application of the rules and its supervision of compliance with them by national courts have been profoundly transformed, with the introduction of new responsibilities and concepts, such as that of dialogue between judges, which may sometimes become conflictive.

The problems and changes noted above have been widely discussed in the legal context, but we believe it necessary to obtain a diagnosis of the current situation, addressed from the standpoint and experience of the General State Administration, so that the latter can effectively develop its functions, as regards both itself and its relationship with the other levels of Spanish government and with the judiciary bodies.

The Government considers that the most appropriate institution to undertake this study is the Council of State, not only because of its institutional position but also by virtue of its long experience in relation to these questions. Under the provisions of Article 23.1 of the corresponding Organic Law, the Study Group would be responsible for this task, addressing the questions set out below, together with any others considered to require their attention, identifying dysfunctions that may be provoked by such changes and, where appropriate, formulating the proposals deemed necessary to correct them.

Regarding what has been termed the ascending phase of Spain's participation in the European decision-taking process, it is necessary to consider how to ensure that the content of Community rules adequately matches Spanish necessities such that the subsequent implementation of these rules will not be unreasonably complex or dysfunctional. Accordingly,

the Government believes the Study Group should consider the following questions:

- The area of Community decision-taking processes, in the different EU institutions, in which the General State Administration may participate, and the rules to which such participation is subject.
- The procedural and organizational forms of interministerial coordination for Spanish participation in such decisions, especially regarding the actions of the Interministerial Committee for European Union Affairs and the Permanent Representation of Spain to the European Union.
- The ways in which recently-developed procedures for regional participation may be integrated into the actions of the General State Administration.

Regarding the 'descending phase', the Government considers it necessary to explore means of ensuring full compliance with its obligations under European law together with respect for the constitutional principles of legality, hierarchy, transparency and legal certainty. Therefore, the study should consider the following:

- How to ensure compliance with the general obligations arising from Community law in the development and implementation of Spanish legislation, with special attention to the need for interministerial coordination in this context.
- The procedures required to ensure the inclusion of specific obligations arising from rules of Community law, within the time limits specified in this regard, and the consequences of any non-compliance.
- The consequences of the principles of primacy and direct effect on the validity and applicability of Spanish rules, considering the need to eliminate national rules that are partially or totally contrary to

European law, and to consider the effects of the introduction of new legal categories, arising from Community law, into our legal system.

- The consequences of the principle of State responsibility for breaches of Community law.
- The needs arising from the development and implementation of Community law with respect to relations between the General State Administration and the Autonomous Communities, as regards both ensuring compliance with Spain's obligations to the Union and the consequences of any breaches in this respect.

Finally, this study should also consider Spain's position as a member of the Council of Europe, both in terms of the rules it adopts and, very specially, concerning the jurisprudence of the European Court of Human Rights and how to ensure the effectiveness of its judgments".

2. Determining the goals of the study

As reiterated in the consultation request, the study commissioned by the Government requires the Council of State to focus on the issues that should be addressed by the General State Administration in response to the changes produced in the Spanish legal system by our accession to the European Communities and by membership of the Council of Europe.

The depth and significance of these changes are very evident. They would have been so even if the Communities of which Spain became a part in 1986 had remained unchanged, but obviously this is not the case. From that date until the present, the supranational organization has undergone major changes, in terms of both quantity (the marked increase in the number of Member States) and quality (the extension of its powers, the application of which has a decisive impact on the States' exercise of their own powers in all areas, not just in relation to economic or social issues).

These changes have transformed the original structure, through successive amendments to primary legislation, the latest of which was produced by the Treaty of Lisbon, signed on 13 December 2007 and still pending ratification. According to the provisions of this Treaty, which amends both the Treaty on European Union and the Treaty establishing the European Community, the latter ceases to exist as such, to be replaced by the Union itself¹.

In view of the evident impossibility of adapting the study to a constantly changing reality in Europe, the Council of State has focused this study on the basis of European law currently in force. As far as can be foreseen, any changes this may undergo in the immediate future will not alter the validity of the analysis made or the usefulness of the proposals formulated accordingly.

The need to cope with the transformations produced in the institutional structure and functioning of the Member States by the progressive advance of European integration has led many of these States to adapt their Constitutions to accord with the new reality. In our country, this task remains to be fulfilled, notwithstanding the particular amendment made in this respect to Article 13.2 of our Constitution.

Some aspects of the latter reform, effected to ensure the proper matching of Spain's legal system with Community law, were analysed in Section III of the report drafted by the Council of State at the request of the Government and approved in plenary on 16 February 2006. Nevertheless, in the present study, notwithstanding the ideas set out in the former report, the situation is analysed without contemplating any

¹ According to the provisions of the Lisbon Treaty (paragraph 3, Article 1 of the Treaty on European Union), the Union "shall replace and succeed the European Community" and its establishing Treaty shall be renamed the "Treaty on the Functioning of the European Union". The text of the Lisbon Treaty is published in the Official Journal of the European Union (OJEU) C 306 of 17 December 2007.

In this report, unless otherwise stated, the expressions "Community law", "European law" and "EU law" are equivalent.

constitutional change, and the responses proposed to the questions posed by the Government are formulated in terms that do not necessarily require the Constitution to be reformed.

In addition to this self-imposed constraint, and in accordance with the terms of the consultation, the Council also considered it necessary to examine the scope of executive power, including the issues raised by the relationship between the State and the Autonomous Communities, but not considering its impact on the organization, procedures and criteria for action of Parliament or of the judiciary.

Even with this limitation, the area covered by the study is extensive and important. Since 1978, Spain has undergone far-reaching political and administrative change. Many central government activities have been transferred to the regional governments, while, on the other hand, the State's responsibilities in an increasingly complex, globalized international arena, and in particular its participation in the European Union, have intensified, an evolution that has not always been accompanied by the necessary decisions on the organization, procedures and personnel and financial resources made available to the administrative machinery that must carry out these functions. Over twenty years have elapsed since our accession to the process of European integration; apart from this, during the same period the structure of the State has undergone a profound transformation. Thus, we have abundant cause for reflection on the basis of prospective and strategic criteria about what can be done but has not, about how to improve what has been done and about how evolving necessities should be addressed.

3. Methodological approach

In accordance with the provisions of Article 119 of the Implementing Regulations of the Council of State, a working group was asked to

formulate the present study, under the leadership of the Permanent Councillor Landelino Lavilla, as a member of the Study Group, headed by Senior Counsel Juan Antonio Ortega Díaz-Ambrona and including Alberto Gil, the Technical Coordinator for the Office of the President of the Council of State, together with the following legal advisers to the Council of State: María Presedo, Rafael Jover, Jose Joaquín Jerez and José Amérigo.

As stipulated by the Council of Ministers, "The problems and changes noted above have been widely discussed in the legal context, but we believe it necessary to obtain a diagnosis of the current situation, addressed from the standpoint and experience of the General State Administration, so that the latter can effectively develop its functions, as regards both itself and its relationship with the other levels of Spanish government and with the judiciary bodies".

In accordance with these indications, the study has been approached from a practical perspective, and focuses on analysing the structure and operating procedures of the General State Administration, including its relations with other Spanish administrations, especially those of the Autonomous Communities, and on the judiciary, with respect to the specific moment in history at which the consultation was formulated.

Prior to this analysis, we considered it necessary, however, to carry out a preliminary review of the academic contributions made in this respect. To this purpose, in addition to a selective study of the very extensive bibliography, the members of the working group took part in the seminar organized by the Centre for Political and Constitutional Studies and held on 26 June 2007. To complement the information derived from the presentations and discussions within the seminar (which took place in the framework of the cooperation required under the additional provision to Organic Law 3/2004), the Council of State also requested the collaboration of leading specialists in the field in order to obtain a detailed understanding

of the approach taken in other EU Member States to these questions², and regarding very specific aspects of the relationship between European law and national law.

At the same time, and to directly address the analysis of our own circumstances, during May and June 2007 numerous meetings were held with various authorities and ministerial delegations, including senior officials and other staff from the Secretariat of State for the European Union and the Permanent Representation of Spain, as well as persons with significant experience in European institutions³. From this extensive series of meetings, the Council of State was made aware of the views and the practical knowledge of those who are directly involved in the creation of European law or its integration and application in the field of Spanish law.

4. Structure of the Report

The Report is structured in two Parts, with a final chapter of Conclusions. The first Part, in five chapters, is devoted to the main theme of the consultation, the relationship between European law and national law. Part Two, comprising a single chapter, analyses the issues raised by Spain's membership of the Council of Europe, especially those resulting from the mandate set out in Article 10.2 of the Constitution. The ties between Spanish law and the jurisprudence of the European Court of Human Rights make it even more pressing here than in other States to resolve the complex issues raised in defining the content of the

² In this context it should be mentioned that the working group has also taken into consideration the study carried out by the French Council of State. *Rapport public 2007: «L'administration française et l'Union européenne. Quelles influences? Quelles stratégies?»*, Études & Documents, n° 58.

³ Specific meetings were held, as well as with officials from the Secretariat of State for the European Union and the REPER, with representatives of the following ministries: Presidency, Economy and Finance, Foreign Affairs, Agriculture, Fisheries & Food, Public Administration, Environment, and Industry, Commerce & Tourism, and also the State's Legal Counsel before the European Court of Justice.

fundamental rights enshrined in our Constitution. The final chapter summarises our responses to the questions posed by the Government and sets out the Council's suggestions as possible remedies for the organizational or procedural weaknesses identified in the analysis.

Further explanation is required of the internal organization of Part One, which is undoubtedly the prime focus of the report.

The first chapter here describes the basic features of the European legal system, with special attention to its relationship with domestic law, the complexity and singularity of its principles and rules, and the major procedures available to the European Union for taking decisions and ensuring their implementation. The second chapter considers how the Spanish administration is organized in order to develop the State's European function. In the context of comparative law, the General State Administration (within the country and abroad) and the agencies of the Autonomous Communities within this structure (also at home and abroad) are each examined.

Chapters three and four analyse the activities of the Spanish administrations in the formation of European law and in its implementation within our legal system. The scope of these chapters corresponds to the "ascending" and "descending" phases, in the terminology used in the consultation request. For the sake of clarity, the Council of State has employed the same terms in this study. Nevertheless, as made clear in the Report, this distinction, though useful for explanatory purposes, is artificial and even unsettling. Both phases are part of a single regulatory procedure and only by considering them together can the intricate problems presented by our regulatory structure be successfully addressed. The final chapter in Part One of the Report examines the application of European law in Spain, from the principles underlying the relationship between European and national law, as constructed by the European Court of Justice.

Although throughout the first two parts of the Report, our analysis gives rise to suggestions and proposed solutions to the organizational and procedural weaknesses identified, it is in the final chapter, the Conclusions, where these suggestions are summarized from a comprehensive standpoint, and where precise recommendations are made in reply to the Government's request, adhering as closely as possible to the order of the specific issues raised in the consultation.

PART ONE

I. THE SYSTEM OF EUROPEAN LAW

1. Regulatory structure

1.1. Rules and actions

It is not the purpose of this report to provide a comprehensive account of the European legal order, but it would be appropriate to highlight its complexity and singularity, in order to better understand the diagnoses and proposals made.

As is well known, Article 249 TEC defines regulations, directives and decisions as rules or binding Community acts. However, this configuration is not as clear as it seems. First, because such regulations, directives and decisions may be issued by the Council, by the Council and Parliament jointly (co-decision), by the Commission or even, with the exception of directives, by the European Central Bank (decisions will also be made by the European Council, following the adoption of the new Treaty of Lisbon); they may develop a Treaty provision or a rule set out in secondary legislation; and they may have a general or a specific purpose (as is the case of many CAP regulations). Second, because the terminology of Article 249 is sometimes employed for purposes other than those initially foreseen, as in the case of detailed directives or decisions of general application (for example, decisions regarding own resources, decisions on comitology and decisions arising from Article 308 TEC). In other words, under the current system, the configuration of an act does not necessarily determine its material content, nor does it clearly differentiate between legislative and non-legislative acts, nor, therefore, does it establish a model of regulatory hierarchy.

The new Treaty on the Functioning of the European Union, adopted in Lisbon (Articles 249-249 D), distinguishes between legislative acts, delegated acts (not to be confused with comitology) and executive acts, and provides that the "decision" may have a dual nature, depending on whether those addressed by it are designated or not. It cannot yet be determined whether these changes are sufficient to significantly improve the current situation. In any case, the proposed scheme remains somewhat removed from the common practice in most national legal systems, in which normative and non-normative legal acts are more clearly distinguished.

As non-binding rules or acts, Article 249 TEC cites recommendations and opinions. Furthermore, in the daily practice of the European institutions, there are numerous "atypical acts", such as communications, declarations, resolutions, and green and white papers, most of which are non-binding. Some of these acts, which are becoming increasingly common, are known in British terminology as soft law, and their non-binding nature does not mean they totally lack legal effect. Moreover, there exist a variety of legal instruments that could be considered "mere administrative acts" (instructions, letters of formal notice or of requirement, reasoned, detailed opinions and even some of the "decisions" described in Article 249, such as those approving domestic regulations). Therefore, in this respect we must differentiate between rules that have effects on third parties and acts that have merely internal effects, within the organization.

The fact that an act can be considered atypical, in the form of soft law or that of an administrative act, does not mean that its consequences, for this reason alone, are limited. In fact, the outcome of an "atypical act" is independent of the form it takes, because what is significant is its content; some acts have legal effects on third parties, while others establish a pattern for future interpretation and yet others are used to confirm a particular legal argument (ECJ, 31 March 1971, case 22/70,

AETR). The ECJ has acknowledged the present confusion between normative and administrative acts but, once again applying a material criterion, has ruled that this formal difference is not relevant in Community law, as it is always necessary to analyse the specific content of each legal instrument to determine its effects (ECJ, 10 December 1998, case C-221/1997).

To conclude this examination of the EU regulatory framework, let us consider the acts arising from the two intergovernmental pillars: Title V of the Treaty on European Union, concerning Common Foreign and Security Policy (CFSP), contains principles and general guidelines, common strategies, joint actions and common positions, while Title VI of the Treaty on European Union, concerning Justice and Home Affairs (JHA), includes common positions, framework decisions, other decisions and conventions.

Having illustrated the complexity of the present system of legal sources in European law, our starting point in this Report, as stipulated in the Government's consultation request, will be to consider the normal decision-taking process in the Community – including where appropriate the legal effects of acts that are not formally binding – together with references to the acts and regulations of the intergovernmental pillars, in full awareness that some of the comments and suggestions made are applicable, with appropriate adjustments, to these other acts and rules that are not strictly of a Community nature. Nevertheless, it should be borne in mind that with the new Treaty of Lisbon, we shall no longer speak of pillars and that the regulatory system will, to a large extent, be unified, except that "legislative acts" will no longer form part of the CFSP.

Decision-taking processes

According to the Government's consultation request, "the study should consider (...) the area of Community decision-taking processes, in

the different EU institutions, in which the General State Administration may participate...". It is therefore necessary to refer to the two institutions that play an active role in this respect, namely the Council and the Commission, without disregarding the importance of the European Parliament or that of the advisory bodies (the Economic and Social Committee and the Committee of Regions); in these latter cases, however, the intervention of the General State Administration, if any, is rather more indirect.

With respect to the competences of the Council, which is both a legislative body (as the Chamber of the States) and an administrative one (for example, in its role as General Affairs Council), national authorities can and must participate in this institution that brings governments together. Such participation normally takes place within the numerous working groups and certain special committees (the Article 133 TEC Committee, the Special Committee on Agriculture, the Economic and Financial Committee, the PSC and the Article 36 TEU Committee) set up by the Council. Special mention should be made of the essential role played by the Committees of Permanent Representatives (COREPER I and II), comprised of the Member States' permanent ambassadors to the EU.

The Commission warrants our attention because, in addition to its role as guardian of the Treaties, with sole right to exercise legislative initiative (which often involves the convening of a preparatory group or ad hoc committee of national experts) and the regulatory development it performs, it also exercises powers conferred by the Treaty and, uniquely, acts within the system known as comitology.

The European Community decision-taking process is developed through various channels according to the type of act that is to be adopted, the matter concerned, the legal basis for the action, etc., but it is not always clear why one or another approach is adopted. Moreover, as well as the formal procedures established by the Treaty, there exists a significant range of "methods of operation", extending from the harmonization of

national laws, through mutual recognition, to mere non-binding coordination. Furthermore, we note the growing importance of "new modes of governance", which are presented as an alternative to the Community method of legislation and a common feature of which is the encouragement of stakeholder participation and the use of voluntary instruments. Among such new modes are the "European social dialogue", through which social agents can effect the regulation of certain questions (Articles 138 and 139 TEC), and the "open method of coordination", which is particularly relevant in terms of the Lisbon strategy, and provides an atypical decision-taking process for approving non-binding recommendations.

Various attempts have been made to clarify this plurality of decision-taking procedures, and as far as it can be considered appropriate to apply categories of domestic law to European law (something that is always problematic, because the EU is not a State), distinctions have been suggested between procedures for taking "materially constitutional" decisions, "legislative" decisions and "regulatory" decisions. To a certain extent, this distinction is supported by the new Treaty of Lisbon, which distinguishes, albeit under purely formal criteria (Articles 249A-249D), between legislative procedures, whether ordinary (the present 'codecision') or special, which would result in legislative acts, and those which give rise to non-legislative or executive acts, the remainder; among these categories, the procedure would operate to approve the new category of delegated acts.

In any case, on the basis of current law, in this discussion we can distinguish two different levels of decision taking. The first would contain the preparation of acts addressed in the TEC and leading to the regulations and directives known as basic or framework acts, while the second would refer to acts resulting from the delegation of regulatory powers by the Council – i.e., comitology – and which result in development or executive acts. The latter are sometimes termed daughter regulations or directives, in

contrast to parent regulations or directives, which would be the basic or framework instruments referred to above.

The procedures for developing the basic or framework acts set out in the TEC are characterized in terms of two fundamental variables: the degree of participation of the European Parliament and the number of votes needed to pass the measure in the Council of Ministers (unanimously, qualified majority or simple majority). The main variants within the first group are procedures based on codecision, cooperation, consultation or assent.

The codecision procedure, the regulation of which is detailed in Article 251 TEC, reinforces the role of the European Parliament. It consists first of an initiative phase, implemented by the Commission, followed by a preparation phase, comprising a variable number of proposals and counterproposals exchanged between the Parliament and the Council under the aegis of the Commission (requiring varying degrees of agreement within the Council: simple majority, qualified majority or unanimity, depending on the case in question) and then a decision phase, in which the Council and the European Parliament have an equal voice.

The cooperation procedure is regulated by Article 252 TEC, with the same three phases as in the previous case. In practice, the European Parliament determines the degree of majority required for a measure to be approved by the Council (and also that required for internal agreement within the Council during the procedural process) but the final decision is taken by the Council, on the contrary to the codecision procedure.

Consultation (advisory ruling) and assent procedures are addressed in Article 192 TEC. In the first case, the Council must seek the opinion of Parliament before deciding on the Commission's proposal, but is not bound by this opinion; in the second, the Council must obtain approval from the European Parliament before taking certain decisions of special importance.

In addition, there are special procedures, or procedures with special aspects, in areas such as fiscal policy or employment policy, and for the conclusion of international agreements, etc. Furthermore, both the Council and the Commission may resolve procedures without the involvement of Parliament. This approach would locate the procedure outside the legislative context and within the regulatory one (more clearly so in the case of the Commission), as a direct development of the Treaty. Such a method evokes the concept of independent regulations, and includes decisions regarding common foreign and security policy, which are dealt with almost exclusively by the European Council and the Council of Ministers. In summary, it is the legal basis for each act, contained within and dispersed throughout the Treaty, which reveals the particular configuration of the procedure to be followed and which, on occasion, also involves mandatory consultation with the Committee of the Regions or the Economic and Social Committee.

In the second level of decision taking, corresponding to procedures for developing or implementing acts, the "regulatory" function of the Commission is made explicit. The latter institution is empowered to develop secondary legislation, in general terms, although the Council can decide to address certain matters itself. The term "regulatory" is used for the sake of clarity and systematization, since the complexity inherent to the Community system impedes the use in this context of national legal categories while maintaining their meaning.

The Commission is assisted – and supervised – in this function by some 250 committees⁴, composed of representatives of the Member States and chaired by a member of the Commission. Each such committee has its own rules of procedure, approved at the proposal of its President, based on the standard internal rules of procedure adopted on 31 January 2001 and

⁴ Divided into 22 sectors, among which the following are of special importance, due to the large number of committees involved: transport, energy and trans-European networks (38), environment (32), business (32) and agriculture (31).

published in the OJEU on 6 February of the same year. These committees, therefore, enable direct communication between the Commission and officials in national administrations, ensuring technocratic negotiation, notwithstanding that both the Council and the Parliament, depending on the procedure, may also exercise direct supervision.

In any case, in the comitology procedures, the regulatory initiative is taken by the Commission, whose representative makes proposals, sets the agenda, chairs the meetings and determines when voting shall take place.

At present, comitology is governed by Council Decision 1999/468/EC of 28 June 1999, which set out the procedures for the exercise of the implementing powers conferred on the Commission (as subsequently amended by Council Decision 2006/512/EC of 17 July 2006), specifying criteria on the choice of the procedure that can or must be followed, and a more detailed regulation of each of the following procedures:

- Consultation procedure: the Commission must consult the committee and "as far as possible" take into account its opinion. This procedure is used when it is deemed "the most suitable", a criterion that the ECJ has ruled to be purely indicative.

- Management procedure: the Commission presents its project to the committee, and may implement it even following the latter's rejection, unless the Council decides otherwise with a certain time limit. This procedure is used in connection with management measures (the implementation of agricultural and fisheries policies, or of programmes with significant financial implications, etc.). According to the ECJ, this criterion, too, is indicative.

- Regulatory procedure: the Commission may only adopt implementing measures on approval by the committee. If this support is not obtained, the proposal must be referred to the Council and Parliament informed. If the Council is opposed, the Commission must submit a new

proposal or a legislative proposal based on the Treaty. This procedure is used for the development of legislation of general application and in this case, too, the ECJ has ruled the criterion to be indicative.

- Regulatory procedure with scrutiny (added in 2006, a procedure which includes an option for emergency situations). The main difference here is that, even with the support of the committee, the Commission must submit the proposal to the Council and to Parliament, which may oppose it on certain grounds. If such opposition is presented, the Commission must present a new proposal to the committee or a legislative proposal based on the Treaty. This procedure is to be used for the development of legislation of general application that is adopted by codecision (the criterion is binding).

Together with the above procedures, there are those concerning purely administrative decisions by the European institutions, that is, acts of individual application, some examples of which are included within the Commission's supervisory activity, as discussed below.

2. Basic principles of the relationship between European law and domestic law

2.1. Nature of the relationship

Without entering into an in-depth analysis of doctrinal polemics, on which this Council of State has had occasion to comment elsewhere, in what may be a more appropriate setting, we nevertheless consider it useful

to address, albeit briefly, the issue of the nature of the relationship between European Community law and domestic law⁵.

In fact, it remains an open question whether Community law, with its particular legal instruments, is just a branch of international public law or, on the contrary, while accepting that this may have been so when the founding Treaties were approved, following its legislative and jurisprudential development, it now constitutes what should be viewed as an autonomous legal order resting upon its own foundational rules. Discussions have also taken place regarding the timeliness – and even the correctness – of conferring a possible constitutional nature on the Treaties.

Both of these positions have solid arguments in favour and respectable opponents. Supporters of the internationalist law concept point out that other subsystems rely on instruments enhanced to increase their effectiveness and applicability in the Member States (an obvious example of this being the European Convention on Human Rights), and that dynamic normative conflicts are not exclusive to Community law, with all international treaties requiring development in space and time. On the other hand, those in favour of the constitutional outlook argue that European primary law is structurally and materially constitutional, regardless of whether this nature is formally recognized in the Treaties.

Whichever position is accepted, and although Community law does indeed coincide with the trend toward the increasing integration of legal systems and recognition of the growing significance of the classical rules of international law (some commentators even speak of a global law), nevertheless the legal system of the European Union and, especially, that of the Community, of all those which are not strictly national, presents the highest level of sophistication in its legal instruments and their

⁵ Opinion 2544/2004, of 21 October 2004, issued on the occasion of the ratification process of the Treaty establishing a Constitution for Europe, and Paragraph III of the Report on possible Constitutional reform, of 16 February 2006.

implementation. In this regard, the European Court of Justice, in its judgment of 15 July 1964, re *Costa/Enel*, described Community law as a special law, one distinct from ordinary international treaties, that constitutes a distinct legal system, integrated within those of the Member States.

At its meeting last June, the European Council seemed to wish to intervene directly in the debate on the possible constitutional nature of the Treaties and the implications of this, when it distanced itself from the "Treaty establishing a Constitution for Europe" to declare, regarding the new Treaties, which were subsequently adopted in Lisbon, that "The constitutional concept (...) is abandoned" and that the new Treaties "will not have a constitutional character"⁶. Nevertheless, important aspects of the abandoned TCE survive, such as the recognition of the legal value of the Fundamental Rights of the European Union (albeit in the format of "Charter") and the accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms (cf. Article 6 of the new Treaty on European Union, approved in Lisbon), an issue which is considered in detail in the section on the Council of Europe.

In any case, regardless of the debate on doctrinal terminology, and fifty years after the Treaty of Rome, it seems today that the theoretical framework should be more comprehensive and ambitious than one restricted to the allocation of denominations, designed for realities that are not necessarily comparable with a system that, without seeking to become a new State, has extended beyond the boundaries usually applied to international organizations. In this respect, let us highlight certain innovative principles, such as primacy, the direct effect of directives or the financial liability of the Member States before the ordinary courts, and observe that national rules that transpose directives or complement the

⁶ See conclusions of the Brussels European Council meeting of 21-22 June 2007, especially points 1 and 3 of the IGC mandate.

application of other European rules comprise an important and integral element of the Community legal system. Furthermore, respect for the pluralism of national legal traditions underpins both Community jurisprudence and its legal system (e.g., in the field of human rights, see Article 6 TEU). Moreover, European law influences the configuration of domestic law institutions (Constitutional Court judgment 208/1999, of 16 December, legal argument No. 4, end) and has become quite ubiquitous, entering, affecting and shaping most elements of the domestic legal system.

Accordingly, European law and domestic legal systems are related by rules of primary law that, although originally approved by each sovereign Member State, upon entry into force acquire a strength that transcends the will of each State and are upheld by specific supranational institutions, especially the Commission and the Court of Justice. Spain, then, like all the States that comprise the European Union, is obliged to endorse two legal and political orders which, in practice, share the same territorial and personal area of application.

Nevertheless, it should be noted that although there is a greater degree of overlap between legal systems than between political structures, as yet we cannot, strictly speaking, refer to a single system, because the two concurrent systems address different issues and maintain different rules of recognition and validity, and disparate types of legitimacy and relationships. For example, it can be said that the ECJ has set out a two-tier structure or criterion with respect to the relationship between European law and other legal systems: a strict monistic criterion toward its relationship with national law and, to a certain extent, a dualistic one toward the rest of conventional international law.

One instrument that facilitates the integration of diverse legal systems is Article 234 TEC (and Article 150 of the Euratom Treaty), which entitles any national court of law to request a preliminary ruling from the

ECJ concerning the interpretation or validity of an aspect of Community law. This provision represents a change in the ordinary hierarchic relations between national courts and marks a starting point for a Community jurisprudence by which national judges will be viewed as ordinary European judges.

As a result, national judges, within what is termed a dialogue among judges, are compelled to implement a legal system that is complex, plural, ubiquitous and diverse, one that is not always easily accessible and which is not comprehensively understood. Moreover, the "ordinary" judicial system postulated by the Treaty and ECJ jurisprudence is not fully integrated because, on the one hand, the affected party cannot appeal to the ECJ (which is responsible for unifying European doctrine) against a national court decision held to be incorrect from the standpoint of European law, and, on the other, there is an absence of appropriate legal remedies in the Community context to respond to an evident violation or misinterpretation of Community law by national judges.

However, perhaps the clearest sign of the lack of real unity, both formal and material, is the survival of two separate judicial guarantee systems and the absence of a clear, unquestioned relationship between the two. This limitation is manifest when a rule of European law may have exceeded the sphere of competence agreed to in the Treaty (*ultra vires*), in other words, entering the area of competence reserved to the State. While the ECJ, in principle, is responsible for ensuring legality and respect for the law within the European institutions, some constitutional courts believe that these boundaries are stipulated not only in the Treaty (what is attributed to the European Union) but also in national constitutions (what each State considers is not attributed to it).

Although there exists an initial, and apparently well-defined, division of functions between the ECJ and the national Constitutional and Supreme Courts (the former interprets and applies Community law, while the latter

interpret and apply their own national law), in practice it is insufficient to interpret just one of the rules that forms part of a regulatory conflict. This is so despite the fact that the principle of primacy is focused on European jurisprudence, which outranks all national standards, including constitutional judgments⁷.

In fact, the constitutional courts are placed in the position of having to reconcile their role as supreme guarantors of the constitution (including the constitutional provisions enabling the entry of Community law) with the need to respect Community law that has its own system of judicial supervision. The constitutional courts hesitate to join this system and are unsure of their role in the respect (especially regarding requests to the ECJ for a preliminary ruling). National constitutional courts (at least the Italian, German and Spanish ones) seem to hold that the conflict should be resolved in the sense of an option between regulatory systems, with no reference to hierarchy, or otherwise decided in favour of the constitutional text, at least as regards its central argument (Declaration 1/2004 of the Spanish Constitutional Court, legal arguments 3 and 4). The German Constitutional Court even ruled that the fundamental principles of the national Constitution define the boundaries of the powers of the Community (Decision on the Treaty of Maastricht, BVerfGE 89, 155). According to the French Constitutional Council, rather than limits *a posteriori*, it is necessary to reform the Constitution beforehand, not only to address the possibility of conflict between its rules and those of the future Treaty but also insofar as the latter affect the "essential conditions of the exercise of sovereignty", diverse examples of which are given⁸. These considerations starkly illustrate the tension between the principle that the national constitutional text reflects, at least in some of its provisions, a redoubt of native

⁷ Case 11/70 *Internationale Handelsgesellschaft* (Supreme Court Judgment of 17 December 1970, consid. 3, p. 1135), doctrine later ratified in several more recent judgments (such as 6 May 1980, *Commission vs. Belgium*, case 102/80, p. 1487).

⁸ Judgment 92-308 of 9 April 1992 on the Treaty of Maastricht; Judgment 2004-505 of 19 November 2004, on the Treaty establishing a Constitution for Europe.

sovereignty that must be protected, and the need inherent to the process of European integration that it should not be slowed or hindered by divergent interpretations within the Member States.

2.2. Principles underlying the relationship

The principles governing the relationship between Community law and national laws have mostly been constructed by the ECJ, in jurisprudence characterized by its creativity, to the extent that it has evolved more in response to the goals of the organization than to the letter of the agreements conforming the original law, in the light of the absence from the latter of provisions addressing this relationship (other than the reference to the direct applicability of the regulations contained in the existing Article 249 TEC).

As well as certain principles common to European and national law, such as legal security and legitimate expectations, the following general principles are outstandingly significant: direct effectiveness (which would include the application of certain rules and the direct effect of others), primacy (and its corollary, uniform application), conforming interpretation and financial responsibility.

a) Direct effect

This expression describes the implementational virtuality that Community rules may deploy in their own right, i.e., regardless of provisions concerning national rights. This virtuality, present within Community rules but absent from the acts adopted under the second and third pillars of the European Union, is materialised in the creation of rights and obligations for all those included in the scope of application of the Community provision concerned, which may be invoked before national public authorities, who, correspondingly, are obliged to ensure these rights and obligations are respected.

This possibility that citizens may invoke Community law before their national courts was first declared by the ECJ in the groundbreaking judgment of 5 February 1963, in *Van Gend en Loos*. However, this possibility is not asserted as being absolutely applicable to all provisions within a Community rule, but is conditional on the concurrence of the following conditions (formulated in *Van Gend en Loos* and defined in subsequent jurisprudence):

- Clarity and precision in the Community rule, although the Court has gradually ceased alluding to the question of clarity, focusing more on the requirement that the provision should be "sufficiently precise" in the sense of establishing a specific obligation in unambiguous terms.

- The unconditional nature of the provision, defined as being present "where it is not subject, in its implementation or effects, to the taking of any measure either by the institutions of the Community or by the Member States" (ECJ of 23 February 1994, re *Difesa della Cava*).

From these criteria, in the absence of which, as observed by the ECJ in its judgment of 24 October 1973, re *Schlüter*, it cannot be argued that the principle in question is applicable, there does indeed exist a direct effect of the provisions of the Treaties and regulations, to the extent that they can be invoked not only concerning the relations between individuals and the government (termed 'vertical relationships'), but also in horizontal relations or between individuals.

However, many details remain to be established regarding the direct effect of directives, an area in which the ECJ has endeavoured to clarify matters. This is not surprising, given that Article 249 TEC configured this *sui generis* source of Community law as a rule obliging Member States to conform within a stipulated period. Consequently, the recognition of the principle in the implementation of directives, regardless of their

implementation or transposition by the States, has its own characteristics in terms of its legal foundation, requirements and scope:

- Legal foundation: Since the first time it considered the direct effect of this regulatory source, in its judgment of 4 December 1974, re *Van Duyn*, the ECJ has attached the applicability of directives to the pathological existence of a situation in which the State fails to comply with its obligation to implement them in its domestic law within the due period. Thus, the direct effect of directives arose as a provisional remedy or a minimum guarantee against non-compliance by the State, in order to ensure their effectiveness; in other words, to prevent the functionality of these measures from being impeded by any non-transposition into national law.

- Requirements: In seeking useful effect, the possibility of directives being invoked is conditional, under ECJ jurisprudence, on the expiry of the period granted to the States for transposition of the measure, and any absence, insufficiency or deficiency in this respect.

Furthermore, the measure invoked must fulfil the general requirements of this principle, i.e., it must be sufficiently precise and unconditional. However, this latter requirement has been relaxed, and it is recognised that granting States a margin of discretion in their domestic implementation of such measures does not prevent them from becoming operational. Nevertheless, in such a case effectiveness, of a merely reactional nature, is manifest in the non-implementation of the domestic measure in excess of such a margin, that is, when it has been adopted *ultra vires*. Hence, in such cases we refer to an "exclusion" direct effect. The difference between this and the traditional mode (termed, in contrast, "substitution") is that in the latter the provisions of the directive are invoked to enforce a right pertaining to the question, and so the consequence of such an invocation, if upheld, would be the non-application of the domestic measure and the subsequent implementation of the Community provision.

- Scope: Unlike the direct effect of treaties and regulations, which is characterized by its completeness, in the case of directives it is restricted to the framework of vertical relations, in an ascendant direction.

Consequently, individuals may invoke the application of a directive against a State that has not adopted the corresponding implementing measures within the specified time limit. By requiring the concepts of "State" and "private individual" to appreciate the existence of a vertical relationship in which a directive may be invoked, the ECJ has operated flexibly, firstly by including in the notion of "State" not only all territorial and institutional public administrations but also companies in which there is public stakeholding or control (ECJ, 12 July 1990, re *Foster*) and secondly, by extending the notion of "private individual" to a territorial body that invoked the Community provision against the central authorities (ECJ, 17 October 1989, re *Comune di Carpaneto*).

By contrast, the ECJ has ruled that this principle does not apply in descendant vertical relations or in horizontal ones:

- With respect to the first of these areas, the Court is emphatic, holding that only individuals can invoke the direct effect of directives against public authorities, and not vice versa. This clarification of the scope of the direct effect of directives is explained as preventing "a State from taking advantage of its own failure to comply with Community law" (ECJ, 14 July 1994, re *Faccini Dori*), making it impossible for public authorities to require compliance with the obligations imposed by a directive on individuals, when they have failed to transpose it into domestic law.
- Similarly, the direct effect of directives is excluded from horizontal relations because such relations involve a private individual against whom the Community provision is invoked, and this individual is not responsible for the infringement, i.e., non-

transposition or inadequate transposition. The absence of any horizontal effect of directives was observed by the ECJ in its judgment of 26 February 1986, re *Marshall*, and later confirmed in the above cited case of *Faccini Dori*, when it rejected the argument that, in the absence of measures transposing the provisions of the directive within the prescribed time limit, consumers can claim from the same directive a specific right against traders with whom they have concluded a contract and enforce it before a national court of justice. Finally, despite the rejection of a direct effect in relations *inter privatos*, this rejection has been mitigated by two principles that are discussed below (those of conforming interpretation and of the responsibility of Member States toward individuals for breaches of Community law).

b) Primacy

The primacy of Community law over national law means that, in case of conflict, the former takes precedence over the latter, thus precluding domestic legislation that is incompatible with Community law.

This primacy of Community law was affirmed in general terms in the ECJ judgment of 15 July 1964, re *Flaminio Costa*, following which its primacy over national constitutional law was specifically recognized in the judgment of 17 December 1970, re *Internationale Handelsgesellschaft*.

Taking as its starting point the absolute primacy attributed in the above-cited cases – which is far from being accepted thus by all the Constitutional and Supreme Courts of the Member States, where it has conflicted with the highest levels of domestic legislation – the ECJ has turned its attention to the mechanisms through which this primacy should be enforced. For this purpose, it held, in the momentous judgment of 9 March 1978, re *Simmenthal*, that the national court is obliged to apply

Community law in its entirety and to protect the rights which the latter confers on individuals, and must not apply any provision of the national law which may conflict with Community law, whether prior or subsequent to the latter. In other words, European law has displaced national legislation but has not necessarily eliminated it, as it may continue to apply in other cases where no conflict arises.

In reviewing the administrative dimension of the principle of primacy, it would be useful to examine the ways by which the public authorities may put it into practice, either by not applying the domestic rule or by revising final judgments that are contrary to Community law.

- Regarding the first of these questions, in its judgment of 22 June 1989, re *Fratelli Costanzo*, the ECJ, after recalling that the obligations set out in Community directives "are binding on all the authorities of the Member States", continued that it would "be contradictory to rule that an individual may rely upon the provisions of a directive which fulfil the conditions defined above in proceedings before the national courts seeking an order against the administrative authorities, and yet to hold that those authorities are under no obligation to apply the provisions of the directive and refrain from applying provisions of national law which conflict with them". In conclusion, when the conditions of direct effect are met, "all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply [Community] provisions" and must not apply those of national law which are incompatible.

Although the extension to all organs of government, including the administrative authorities, of the duty not to apply the provisions of national law when they conflict with Community law has been reiterated by the ECJ in other pronouncements (ECJ, 4 October 2001, re *Jiménez Melgar*; ECJ, 9 September 2003, re *CIF*, although in the latter case setting limits to this obligation in order to safeguard legal certainty), this duty remains a matter of controversy, which has led some to question its continuing

validity, especially when inconsistency with national law is not obvious, given the absence of a mechanism similar to that of a preliminary ruling which is available to national administrations.

- The review of final administrative decisions on the grounds of a breach of Community law has been addressed by the ECJ primarily with respect to State aid.

The ECJ has developed a doctrine for such cases based on the principles of equivalence and effectiveness. Thus, according to the judgment of 7 September 2006, re *Laboratoires Boiron*, "it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effects of Community law, provided that such rules are not less favourable than those governing similar domestic actions (the principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness)". In this area, the forcefulness of the ECJ in demanding the effective recovery of State aid that is incompatible with the common market has gone so far as to regard as contrary to Community law "the application of a national provision which seeks to enshrine the principle of *res judicata*", taking into account that domestic courts are not competent to rule on the matter (ECJ, 18 July 2007, re *Lucchini*).

The above doctrine has been extended to the tax arena, and the ECJ has consistently held that private individuals are "entitled to obtain repayment of charges levied in a Member State in breach of Community provisions" (ECJ, 2 October 2003, re *Weber's Wine World*). And, in the absence of Community rules on the reimbursement of taxes, the domestic legal system of each State must regulate the conditions under which applications for repayment may be met, and must ensure that judgments uphold the principles of equivalence and effectiveness (ECJ, 6 October

2005, re *MyTravel*). Consequently, as held by the ECJ in its judgment of 15 March 2007, re *Reemtsma Cigarettenfabriken*, Member States must establish the legal measures and procedural rules necessary to enable the taxpayer to recover taxes improperly charged, in order to respect the principle of effectiveness.

In any case, it is pertinent to note that the ECJ has not always expressed itself as forcefully regarding the retroactive primacy of Community law. A good example of this is the judgment of 13 January 2004, re *Kühne & Heitz*, according to which:

"The principle of cooperation arising from Article 10 EC imposes on an administrative body an obligation to review a final administrative decision, where an application for such review is made to it, in order to take account of the interpretation of the relevant provision given in the meantime by the Court where:

- under national law, it has the power to reopen that decision;*
- the administrative decision in question has become final as a result of a judgment of a national court ruling at final instance;*
- that judgment is, in the light of a decision given by the Court subsequent to it, based on a misinterpretation of Community law which was adopted without a question being referred to the Court for a preliminary ruling under Article 234(3) EC; and*
- the person concerned complained to the administrative body immediately after becoming aware of that decision of the Court".*

With the doctrine set forth in the judgment of 19 September 2006, re *i-21*, having been invoked, the ECJ stated that the obligation to review established in *Kühne* – and subject to the concurrence of the four conditions mentioned – constitutes an exception to the principle of legal certainty, according to which "Community law does not require that

administrative bodies be placed under an obligation, in principle, to reopen an administrative decision which has become final [...] upon expiry of the reasonable time-limits for legal remedies or by exhaustion of those remedies”, thus preventing administrative acts from being challenged indefinitely. That said (and having discounted the applicability of the doctrine *re Kühne*), the Court refers to domestic law and, specifically, to its specific system of *ex officio* review, to determine the appropriateness of revoking a decision, while again underlining the importance of the principles of equivalence and effectiveness.

c) Conforming interpretation

This principle represents the obligation of national courts to interpret domestic law in the light of European law. Although formulated in very general terms, the principle of conforming interpretation has its own sphere of action in the field of European instruments that do not have a direct effect (on occasion, or possibly by definition), whether (in the case of directives) because they do not meet the required conditions, or (in the case of soft law) because such instruments are characterized by their non-binding nature, or (in the case of framework decisions adopted in the context of police and judicial cooperation in criminal matters) because these decisions are made devoid of direct effect by the original law.

Given the varying degrees of interpretive force of the three instruments mentioned above, we will analyse the jurisprudence relating to each case separately:

- In the case of directives, the ECJ ruled, in its judgment of 10 April 1984, *re Von Colson*, that the national court is obliged to interpret the domestic law adopted in this respect in accordance with the requirements of Community law. Since then, this obligation has been recalled in various ECJ rulings, including its judgment of 13 November 1990, *re Marleasing*,

according to which, when national law is applied, "whether the provisions in question were adopted before or after the directive", the national court is obliged to do all in its power, in the light of the wording and the purpose of the Community legislation, to interpret it so as to achieve the stated goal.

Since the ECJ did not rely on the legislative background considered to justify this principle, its entry into effect is not determined by the expiry of the time limit for the transposition of the directive, nor is its scope limited to relations between individuals and the public authorities. In consequence, the principle of conforming interpretation confers operativity on directives in fields where direct effect is inapplicable, i.e., when the necessary requirements are not met (for example, if the time allowed for implementation of the provision has not concluded) and in cases of relations between individuals. Thus, on the one hand, "from the date upon which a directive has entered into force, the courts of the Member States must refrain as far as possible from interpreting domestic law in a manner which might seriously compromise, after the period for transposition has expired, attainment of the objective pursued by that directive" (ECJ, 4 July 2006, re *Adeneler e.a.*). On the other hand, as the national court is obliged to make its interpretation regardless of the nature of the relationship in question, the reference principle alleviates the directives' lack of direct horizontal effect by allowing these measures to be invoked in relations *inter privatos*.

Finally, let us refer to the limits of this principle. The first is inherent in the existence of a margin for interpretation, since the interpretative effectiveness of a directive requires that there be a national law and that this law be open to interpretation, because, in fulfilling their duty of conforming interpretation, the judges in national courts can neither supplant nor contradict the legislator. Moreover, the interpretative effectiveness of directives is also limited by the general principles common to all Member States, in particular, that of legal certainty, to which the ECJ

has referred in the framework of criminal proceedings to prevent the State from invoking the Community provision in order to aggravate the liability in criminal law of persons who act in contravention of its provisions (ECJ, 12 December 1996, re *Procura della Repubblica*).

- In the case of soft law, it is essential to recall the judgment of 13 December 1989, re *Grimaldi*. The ECJ, while recognizing that recommendations are not intended to produce binding effects – not even as regards the persons to whom they are addressed – or create rights upon which individuals may rely before a national court, added that such acts "cannot be regarded as having no legal effect at all", because national courts are obliged to take them into account in resolving disputes submitted to them, especially when they shed light on the interpretation of national measures adopted in order to implement them or when they are designed to supplement binding Community provisions.

- Finally, in the case of framework decisions adopted in the field of police and judicial cooperation in criminal matters, again the interpretative approach has been included in order to overcome the lack of direct effect. In this case, it is in the text of the Treaty of European Union, where Article 34.2 provides for the use of these instruments in order to harmonise the laws and regulations of the Member States (obligatory only as regards the result to be achieved) but rejects the direct effect. In these circumstances, the ECJ, in its judgment of 16 June 2005, re *Pupino*, constructed the principle of conforming interpretation of framework decisions, with equal amplitude and in the same terms as are applicable to directives, including those concerning the limits of the interpretive criteria.

d) Financial liability of Member States

The principle of State liability for loss and damage caused to individuals as a result of a breach of Community law, like the above

principles, is based on jurisprudence. Its incorporation locates this aspect of State responsibility closer to the rights of individuals than to the structural principles of relations between jurisdictions, although the latter's importance in this area is undeniable.

This principle, under which a Member State may be liable to an individual for loss and damage arising from a breach of Community law, and that this liability must be acknowledged by the corresponding national administrative and judicial bodies, was first enunciated by the ECJ in its judgment of 19 November 1991, re *Francovich & Bonifaci*.

The minimum requirements established by Community law for the declaration of the liability of Member States for a breach of Community law can be ascertained from the joint analysis of various judgments (including ECJ, 5 March 1996, re *Brasserie du Pecheur and Factortame*; ECJ, 26 March 1996, re *British Telecommunications*; ECJ, 8 October 1996 re *Dillenkofer e.a.*; and ECJ, 2 April 1998, re *Laboratoires Norbrook*). This joint analysis shows that for Member States to be declared liable for loss and damage arising from a breach of Community law, the following conditions must be met:

1) That the legal provision infringed is intended to confer rights on individuals. In the *Francovich* case, the requirement was added that the content of these rights should be identifiable on the basis of the provisions of the directive.

2) That the breach is sufficiently serious. This second requirement, as acknowledged in the doctrine, is crucial to the application of the entire system of liability.

From a subjective standpoint, the ECJ again posits a unitary notion of the State as a subject to whom liability for a breach of Community law may be assigned, without making any distinction between vertical or horizontal relations. In the latter respect, thus, after accepting that breaches of

Community law committed by the legislature and the executive may generate liability, the ECJ expressly recognized in its judgment of 30 September 2003, re *Kobler*, that a State may be declared liable as a result of a decision by a national court ruling in final instance.

From an objective standpoint, the breach of any provision of Community law may give rise to a declaration of liability, whether such a provision is characterized as being directly applicable or whether it has no direct effect. Hence, regarding any breach of a Community directive due to its non-transposition or incorrect transposition, since the principle in question applies regardless of the relationship of the individual suffering the loss or damage, this principle contributes to alleviate the above-mentioned denial of the direct horizontal effect of such regulatory instruments.

Nevertheless, not all infringements of the rights of individuals arising from a breach of Community law generate State liability; this only occurs in the case of breaches that can be described as "sufficiently serious." The presence of this circumstance is determined taking into account the margin of discretion available to the public authority in question. Thus, "where the Member State which committed an infringement of a provision of Community law conferring rights on individuals was, at the time when it committed the infringement, not called upon to make any legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach" (ECJ, 23 May 1996, re *Hedley Lomas*, and ECJ, 25 January 2007, re *Carol Marilyn Robins*, among others). On the other hand, when a Member State acts in an area in which it enjoys considerable discretion, the decisive test for finding that a breach of Community law is sufficiently serious is the manifest and grave disregard of the limits to its discretion (ECJ, 17 April 2007, re *A.G.M.-COS.MET*).

In addition to the above, there exist further criteria to determine whether an infringement of Community law is sufficiently serious; these

include the intentional or unintentional nature of the infringement, the damage caused, the excusable or inexcusable nature of any error of law, or the circumstance that the position adopted by a Community institution may have contributed to the omission, adoption or maintenance of national measures or practices contrary to Community law.

3) That there is a direct causal link between the breach and the damage sustained by the individuals. To elucidate this requirement, the ECJ has provided evaluative criteria, such as a consideration of the actions of the injured party, who is required to act with reasonable diligence to limit the extent of any loss or damage sustained, in order to claim redress in the form of compensation.

Finally, mention should be made of the role of national law in determining the effectiveness of the principle in question. On the one hand, the ECJ has stated that the requirements set out do not prevent a State, under national law, from incurring liability under less strict requirements (ECJ, 13 June 2006, *re Traghetti del Mediterraneo*), such that the Community principle is of the nature of a minimum standard with regard to national legislation. On the other hand, any action for liability must be channelled through the means provided for in domestic law, such that the conditions of substance and form established under national laws with respect to compensation for loss and damage cannot be less favourable than those relating to similar claims within a national context and must not be so framed as to render compensation virtually impossible or excessively difficult to obtain, which represents another aspect of the rules of equivalence and effectiveness.

3. The incorporation and application of European law

3.1. Obligations of the national Administration and supervision and control by the Community

Member States are required to "loyally cooperate" (Article 10 TEC) in the application of European law, in two dimensions: active ("States shall take all appropriate measures, whether general or particular, to ensure fulfilment...") and passive ("Member States shall refrain from any action ..."). Community law, despite its direct effectiveness, requires extensive cooperation from Member States for full incorporation into the respective legal systems. This collaboration extends from the requirement of legislative development by Member States to their adoption of organizational or financial measures, and the elimination from domestic law of rules contrary to Community provisions.

According to the distinction made by the Commission in its annual report on the implementation of Community law, the main problems encountered are of three types: whether or not national transposition rules are adopted on time; whether, once adopted, the national rules adequately incorporate the directive; and finally, whether the national rule, together with the Community provisions that enjoy direct application, are complied with in practice.

The importance of ensuring compliance with European law is crucial in a system in which the main instruments to ensure the effective implementation of EU policies are, in fact, regulatory. The challenge is still greater in the present enlarged European Community, with 27 members, with a potential increase in the quantity of breaches of Community rules

and the consequent effects on the workload of the Community inspection, monitoring and control services. The Commission is aware of this challenge, and in 2001 with the White Paper on European Governance [COM(2001)428] it undertook a comprehensive reform process, which subsequently gave rise to a series of Communications addressing, among other aspects, the improvement of Community legislation and its effective application⁹.

Although an initial reading of the Treaty may suggest that administrative control of the implementation of Community law is exclusive to the Commission (Article 211 TEC), in fact the duty of loyal cooperation, set out in Article 10 TEC, reveals that this competence is to a great extent shared with the Member States, in both the administrative and the judicial fields, without prejudice to the possibility that disputes may be resolved directly (i.e., via the SOLVIT network).

In reality, the relationship between the Commission and national administrations varies according to the issue in question and the resources available to the Commission. Thus, we can distinguish between areas of direct Community administration (such as the law on fair competition and state aid) and those of indirect administration (the vast majority). However, even in areas of direct administration, the complexity and extent of the Community structure has led the Commission to decentralize part of its role to the Member States; in this respect, the scarcity of resources is also a significant factor¹⁰. Moreover, the same question of limited means

⁹ In 2002: Communication on improving the application of Community law, Communication on Better Regulation, Communication from the Commission to the European Parliament and the European Ombudsman on relations with the complainant in reference to breaches of Community law. More recently the Commission has published two interesting Communications: Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions; strategic review of "Better Regulation" in the European Union [COM (2006) 690 final], and Communication from the Commission, a Europe of Results, applying Community law [COM (2007) 0502 final].

¹⁰ Relevant in competition law is Regulation (EC) No 1/2003 on the application of the rules on competition set out in Articles 81 and 82 of the Treaty (OJEU, L1, of 4 January 2003).

has forced the Commission to establish a policy of priorities in its actions. This is known as selective enforcement, and according to a Commission Communication of 2007 [COM (2007) 0502 final], the following priority areas are identified: failure to notify transposition measures; the breach of other reporting obligations; breaches of Community regulations that have significant negative effects on citizens; and non-compliance with ECJ judgments (Article 228 TEC).

Accordingly, the responsible activity of Member States is crucial, both in developing (and implementing, where appropriate) Community rules, i.e. the "routine application", and in controlling and ensuring that Community law is complied with in its territory, i.e., "conflicting application" - as acknowledged by the Spanish Constitutional Court (Judgment 252/1998, of 20 December). In fact, the new Reform Treaty sought to emphasize the importance of this function by introducing a new title, "administrative cooperation" in the Treaty on the Functioning of the European Union, which contains a new Article 176D, whose first paragraph states that "the effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, is regarded as a matter of common interest".

As for the legal means available to the European institutions to carry out this function, we can distinguish between judicial and administrative measures. The first of these pose few problems, since both the Community judiciary and its powers and resources are considered and stipulated in the Treaty (Articles 220 to 245 TEC) and in the ECJ Statute. However, the questions of most interest for the purposes of the present report are those where national standards and actions are concerned, whether directly (action for non-compliance) or indirectly (request for preliminary ruling).

There exist a body of "special" administrative Community procedures, by which the Commission can resolve an alleged breach of Community law through a "binding decision", following which the Member

State (or company) concerned may appeal to the ECJ if it does not accept the ruling. Some of these exceptions to the common procedure are laid down in the Treaty (fair trade law, Articles 81-86 TEC, or the mechanism for controlling State aid, Articles 87-89 TEC), while others have been introduced by secondary legislation¹¹. Finally, there are diverse State infringements against which the Commission may apply other types of indirect sanctions, such as withholding funds or taking the question into account in future financing (i.e., the financial management of EU funds, CAP).

There are also an increasing number of administrative national procedures in which the participation of the Commission is mandatory, and in some cases decisive, to validate a national decision or regulation, as the mere failure to notify the Commission constitutes a breach of obligation by the State. These include the control of State aid, as well as the submission of draft technical standards and regulations within the information procedure laid down in Directive 98/34/EC of the European Parliament and of the Council of 22 June, as amended by Directive 98/48/EC extending its scope to the services of the information society.

However, for the purposes of this Report, perhaps the most important is the common horizontal procedure for controlling the application of Community law (governed by Articles 226-228 TEC), by which States are obliged to comply with their Community obligations before the very organization of which they are members. This procedure consists of three phases: pre-litigation, the litigation itself and a possible third phase of the judicial imposition of financial penalties for breach of the first judgment (Article 228 TEC). This power is enhanced in the new Treaty on

¹¹ To combat obstacles to the internal market, Council Regulation (EC) 2679/98 of 7 December, on the functioning of the internal market in relation to the free movement of goods between Member States; in relation to air transport, Regulation (EEC) 2408/92 on access for air carriers of the European Community to intra-Community air routes, and Regulation (EEC) 2409/92 on fares and rates for air services.

the Functioning of the European Union, with the simplification of the procedure and the capacity to directly request the imposition of sanctions in the first judgment in the case of non-transposition of directives (new paragraphs two and three of Article 228).

Let us note at this point that the construction of the concept of default is characterized by its breadth and objectivity, covering any infringement of Community law, either by commission or omission, without requiring the concurrence of intentionality. Similarly, it is irrelevant for this purpose, from the European perspective, which public authority is responsible for the infraction, because it is attributable to the State whatever the agency or authority involved. Indeed, as the ECJ held in its judgment of 13 June 2002, re *Commission/Spain*, the constitutional division of powers in different territorial levels has no bearing on the assessment of non-compliance; it is up to the Member States to ensure effective compliance with their obligations under Community law by both central and decentralized authorities. In other words, a Member State may not plead situations of its domestic legal system, "including those resulting from its federal organization" to justify non-compliance with obligations and time limits set out in a directive (ECJ, 6 July 2000, re *Commission/Belgium*).

3.2. Transposition of directives and the development of other binding decisions

The obligation to adopt national rules to enforce Community law is not limited to the necessary implementation of directives (Article 249, third paragraph, TEC). Regulations and decisions, despite their characteristic of direct applicability, in practice may require other, complementary, internal rules to make them fully effective. In this sense, rather than incorporation one could speak of the "development" or complementing of European law. This is so in the case of decisions of a regulatory nature that set a goal to

be achieved by the Member States, which in turn requires the adoption of national measures of a general scope. This complementary type of regulation also occurs when the Community regulation delegates responsibility so that the Member States themselves adopt the measures necessary for effective implementation (ECJ, 30 November 1978, re *Bussone/Italian Ministry of Agriculture*, Case 31/78; and ECJ, 27 September 1979, re *Eridiana*, Case 230/79). In addition, the ECJ has admitted the validity, although in restrictive terms, of implied powers for Member States (ECJ, 17 December 1970, re *Otto Scheer*, Case 30/70; and ECJ 30 October 1975, re *King Soda*, Case 23/75). In the case of decentralized States, this regulatory complement may be required by the need to ensure the implementation of certain Community policies (Opinion of the Council of State 4166/96, of 19 December 1996).

On the other hand, in complementing the Community regulations that so require it, this development must not endanger the purpose of the regulation, and States must apply the same diligence as in the framework of their domestic matters (ECJ, 6 May 1982, re *Fromme/BALM* and *BayWa/BALM*). Moreover, the Court strictly interprets the scope of discretionality available to States in materializing the necessary domestic regulatory complement (ECJ 14 March 1973, re *Westzucker*, Case 57/72). For the same reason, Member States may not develop in an incomplete or selective way the provisions of a Community regulation, in such a way as to frustrate the implementation of such provisions (ECJ, 7 February 1973, re *Commission/Italy*, Case 39/72).

In any case, directives remain the paradigmatic example of Community decisions which require regulatory activity by Member States; less rigorous are third pillar framework decisions, which bind Member States only as to the result to be achieved.

The directives establish a time limit for Member States to make the necessary adaptations to their domestic law. Accordingly, Member States

are obliged to transpose directives "on time", and this concept is defined very strictly by the ECJ; in all cases the *dies ad quem* stated in the directive must be complied with, and the State is not exonerated from liability if it begins to comply with its obligation after the control actions have been initiated and before a judgment has been passed.

Despite the principle of institutional autonomy, Member States do not enjoy absolute freedom in choosing how to incorporate a directive. The Court has ruled, for example, that "Member States should choose the most appropriate forms and methods to ensure the effectiveness of the directives" (ECJ, 8 April 1976, Case C-48/75), and "mere administrative practices, which by their nature may be altered at the whim of the authorities and lack the appropriate publicity, cannot be regarded as a valid fulfilment of the obligation imposed by Article 189 of the Treaty on Member States" (ECJ, 15 March 1983, Case C-145/82). It follows also that before the expiry of the transposition period, Member States should refrain from adopting and implementing measures which could jeopardize the attainment of the result prescribed by the directive (ECJ, 18 December 1997, re *Inter-Environnement Wallonie*, Case C-129/96).

Thus, although directives are only binding as to the purpose sought and their content is characteristically flexible (despite the growing practice of approving "detailed" directives), to be specified in detail by each Member State, the Commission devotes significant effort and resources to controlling their incorporation by the Member States.

3.3. Regulatory adjustments (the principle of legal certainty)

The principle of legal certainty, in its positive aspect, obliges Member States to incorporate Community law into their national legislation clearly and publicly so that both legal practitioners and the general public are fully informed in this respect. On the negative side, it imposes an obligation on

States to eliminate situations of uncertainty arising from the existence of areas of national law that are incompatible with Community rules. We shall now examine this second aspect, in relation to States' obligation to adjust and correct their regulatory systems.

The main characteristic of the obligation imposed on national judges by the *Simmenthal* doctrine (to set aside any provision of national law which may conflict with Community law) is that it is not subject to the prior elimination of the internal rule by legislative or other constitutional means. On the contrary, the ECJ holds that the domestic court must set aside, under its own authority and initiative, any provisions contrary to Community law, without waiting for their repeal or a declaration of unconstitutionality. Moreover, any provision of a national legal system having the effect of reducing the effectiveness of Community law, by denying the relevant judge's obligation to set aside such provisions, would be incompatible with the requirements inherent to the very nature of European law.

Nevertheless, and as clarified by the ECJ, from the above doctrine it does not follow that incompatibility with Community law of a subsequently adopted rule of national law does not have the effect of rendering that rule of national law non-existent. Therefore, in such a situation "a national court is obliged to disapply that rule, provided always that this obligation does not restrict the power of the competent national courts to apply, from among the various procedures available under national law, those which are appropriate for protecting the individual rights conferred by Community law" (ECJ 22 October 1998, re *IN.CO.GE.*).

Judicial action, therefore, will normally be limited to declaring a rule inapplicable to the case in question, but does not eliminate the order *per se*, unless it is of legislative rank and its legality is in question.

In this sense, the obligation of Member States to eliminate internal rules that are incompatible with Community law, as stated by the ECJ in its judgment of 4 April 1974, re *Commission/France*, is a complement to the principles of direct effect and primacy, and not a requirement. In other words, the amendment of national laws favours the applicative possibilities of Community law, but does not determine the validity of the above principles, in the same way as the direct effect and primacy of Community provisions do not exempt the authorities from eliminating incompatible provisions from the statute book.

The obligation of Member States to incorporate Community law does not conclude with the mere approval of a development rule; it must be put into practice, regardless of the authority involved, provided that, for reasons of legal certainty, domestic legislation found to be incompatible is eventually eliminated "by binding domestic provisions having the same legal value as the internal rules to be modified" (ECJ of 23 February 2006, re *Commission/Spain*, case C-205/04; ECJ, 15 October 1986, re *Commission/Italy*; and ECJ, 13 July 2000, re *Commission/France*).

The task of amending national legislation to achieve compatibility does not always consist of simply eliminating the internal rule that is incompatible, because sometimes that rule can be applied to situations beyond the scope of Community law, and so the competent authorities must clarify its area of application. This was recognized by the ECJ in its judgment of 16 July 1998, re *ICI*, according to which "where a particular provision must be disapplied in a situation covered by Community law, but that same provision could remain applicable to a situation not so covered, it is for the competent body of the State concerned to remove that legal uncertainty in so far as it might affect rights deriving from Community rules". However, if the European Commission initiates infringement proceedings against a State concerning a national rule that is contrary to European law, this procedure must establish the extent of the contradiction.

In fact, given the expansive nature of Community law, ever more questions are directly or indirectly affected by its regulation, making it increasingly likely that a national rule which is shown to contravene Community law in some way will finally be considered inapplicable in all circumstances (in what is known as contradiction 'on its face').

II. ORGANISATION OF THE SPANISH ADMINISTRATIVE SYSTEM TO DEVELOP THE "EUROPEAN FUNCTION" OF THE STATE

1. General considerations

To address the issues raised in the Government consultation request, a brief description should be given of the agencies within the Spanish administration that are responsible for the development of the "European function", this being understood as the body of work to be carried out in order to participate in the formation of European law, to incorporate this into national law and to facilitate its subsequent implementation. This is a general overview of the organizational landscape, intended as a reference for the considerations presented in the following chapters.

First, we outline the structure of the area of the General State Administration that is specifically responsible for the European function. It includes, on the one hand, the central authorities (ministerial organization and interministerial bodies) and on the other, the authorities responsible for foreign relations (in this case, the Permanent Representation to the European Union).

Second, we identify the bodies that, in applying the European function, seek to achieve full coordination and cooperation between regional administrations and the General State Administration, in order to

determine areas of competence and to ascertain diverse points of view regarding State actions, at all levels – central and regional. In this area, we distinguish between domestic participation (especially by means of sectoral conferences) and involvement abroad (through the REPER and directly within European institutions).

In both cases, the description presented is preceded by relevant details of the comparative European law in the framework of which the Spanish organization is located. However, this chapter does not include observations on dysfunctions or areas for improvement. These issues are addressed in later chapters, in accordance with the structure of the Government's consultation request.

2. General State Administration

2.1. Overview of Comparative Law

In comparative law, the preparation and establishment of the national position in negotiations or the control and coordination of transposition activities is not always coordinated by a single ministry. Sometimes this is done by the President's office, the Federal Chancellery or the Prime Minister's office; and sometimes, by the Ministry of Foreign Affairs or a special department for European affairs. There are also cases in which the structure is contained within the context of a ministry that enjoys a special status because of its characteristics, such as the Ministry of Economy and Finance, and always with a greater or lesser degree of involvement by the most significant sectoral department in question (and sometimes by all those involved). Therefore, involvement in this role does not imply exclusivity, rather that the necessary functions are carried out in

collaboration among different departments. These are often *ad hoc* organizational structures for interministerial coordination, which becomes self-evidently necessary as soon as a national position in European negotiations must be determined.

In France, thus, preparations are made to establish the national position by an administrative body that reports directly to the Prime Minister: the General Secretariat of the Interministerial Committee for European Economic Cooperation. The French system also includes a provision for consulting the Council of State: on the one hand, and as a general approach, to ascertain the legislative or regulatory nature of a European project (to enable Parliament to intervene in establishing the national position in negotiations); on the other, and without this general nature, to obtain the Council's opinion regarding legal problems arising in the negotiation of a draft Directive or Framework Decision. Italy has an Interministerial Committee for European Community Affairs, introduced in 2005, which is intended to agree standpoints within the government in determining the Italian position in the preparation phase of Community acts. This committee forms part of the Presidency of the Council of Ministers; it is chaired by the President of the latter or by the Minister responsible for Community policies, and includes the Minister for Foreign Affairs, the Minister for Regional Affairs and other officials involved in the issues to be addressed.

Preparatory agencies are often established at administrative levels, the location of which varies from country to country. In Germany, the technical responsibility for coordination corresponds to the ministry with primary jurisdiction (*federführende Ministerium*), while at different administrative levels, various bodies are specifically responsible for helping resolve any areas of conflict. Thus, all ministries have a delegate for European affairs (and these meet as and when necessary) and there are also Directors General for European affairs in the different departments,

who meet more regularly under the joint presidency of the Ministry of Foreign Affairs and the Ministry of Economy and Finance. Finally, the Committee of Secretaries of State for European Affairs is the highest-ranked coordinating body, and its function is to deputise for the Federal Government, as far as possible, in questions of European affairs. It is comprised of the Secretaries of State for European Affairs of the different ministries and is chaired by either the Minister for Foreign Affairs or the Minister for Economy and Finance.

In Denmark, overall coordination is performed by the Minister for Foreign Affairs, in a process structured in three levels. At the base, special committees are chaired by the relevant Ministry and include various other departments (but always that of foreign affairs) and, on many occasions, the stakeholders in question. Above them is a European Union Committee, which deals with horizontal issues, those which are most sensitive or which the special committees failed to resolve. This Committee is chaired by the Minister for Foreign Affairs and its permanent members include the ministries most affected by European policies (other ministries may also participate according to the specific issues to be addressed). At the political level, the Government Foreign Policy Committee is headed by the Minister for Foreign Affairs, while European Council meetings are prepared by a group of secretaries of state, headed by the Prime Minister's Office. Notably, the Government is obliged to engage in prior consultations with Parliament (*Folketing*) in matters of special importance (thus allowing negotiators to express "subject to parliamentary consultation" during negotiations).

The British model is particularly interesting. Political and strategic coordination is implemented within the different departments comprising the Cabinet Office, which has a European Secretariat coordinating the activities of the Cabinet in matters of European policy and assisting the Prime Minister in this respect, by means of multiple meetings and advisory

sessions with the committees involved. Also significant is the action of the Treasury Solicitor, who provides legal advice to various departments and public agencies (including the European Secretariat of the Cabinet Office). It incorporates a European Division that provides and coordinates the legal services underpinning Government policies relating to the European Union. Its importance is highlighted by the fact that interdepartmental conflicts on Community law can arise from differing interpretations of this law in accordance with the policy preferences of each department (furthermore, particular attention is paid to all significant developments in Community law or ECJ jurisprudence and consideration is given to participation in pending cases that have a potential impact on British interests). Finally, when a position has been adopted, as an action coordinated among departments via the European Secretariat, decisions are transmitted as written instructions from the Foreign and Commonwealth Office to the UK Permanent Representation to the European Union.

External organization is expressed by Member States through their Permanent Representatives, which constitute the diplomatic channels for relations between the EU institutions and Member States. Their existence is provided for in Article 207 TEC, which provides for a committee consisting of the Permanent Representatives of the Member States (COREPER)¹², responsible for preparing the work of the Council and performing the tasks it requires¹³.

The number of people comprising each Permanent Representation varies not only from one country to another but also from one period to another, as is usually reinforced when a country holds the Presidency or

¹² The new Article 207.1 of the Treaty on the Functioning of the European Union, as amended by the Lisbon Treaty, refers to a committee "composed of the Permanent Representatives of the Governments of the Member States".

¹³ COREPER meets in two configurations: COREPER II, consisting of the Directors of the Permanent Representations, dealing, basically, with general affairs and those of greater political and economic content; and COREPER I, consisting of the Deputy Permanent Representatives, which in general considers issues of a sectoral, more technical nature.

during negotiations of special importance. In general, no more than half of these officials come from the diplomatic corps, the rest being senior officials from various ministries and departments, especially those most affected by Community policies (economy and finance, agriculture and fisheries, industry, trade, etc.). Each Permanent Representation is headed by an Ambassador (Permanent Representative to the European Union), assisted by a Deputy Permanent Representative and a number of Directors responsible for different areas of activity.

Permanent Representations serve as a channel of transmission of official communications, in both directions, between Community institutions and Member States, and perform the protocol functions equivalent to those of embassies. Their members may act as spokespersons for their country in the various committees and working groups in which States are represented, and issues are supervised and monitored by the Directors, in their respective areas of responsibility. In each Permanent Representation, a senior official (*Antici*) liaises between the national representatives of each group and the Head of Representation, analyses reports and is aware of the status of each proposal. The *Antici* members coordinate the work of the groups and prepare the COREPER II meetings (for Heads of Representation), which they also attend (and, where appropriate, those of the Council and of the European Council). An equivalent function to that of the *Antici* group (in relation to the COREPER II meetings) is carried out by the *Mertens* group with respect to the COREPER I meetings (for Deputy Permanent Representatives).

2.2. General State Administration: central structures

At the top of the domestic structure of the General State Administration – and therefore of its European function, too – is the Office of the President of the Government, whose title-holder exercises the

functions conferred by Article 2 of Government Act 50/1997, and is both the final arbiter in the coordination of European affairs and head of the external action office. Royal Decree 560/2004, of 19 April, which restructured this Office, established its functions and included a department of International and Security Policy. Within the Office, it would be useful for the purposes of this consultation to distinguish between ministerial organization and interministerial bodies, as these areas correspond to two perspectives, the sectoral and the general (or unitary), that need to be balanced and coordinated.

a) Ministerial organization

At the ministerial level, the centre of gravity of the European function is the Ministry of Foreign Affairs and Cooperation, and specifically the Secretariat of State for the European Union (SEUE). The relevant legislation in this respect is, basically, Royal Decree 1416/2004 of 11 June, amending and developing the basic organic structure of the Ministry of Foreign Affairs and Cooperation.

The SEUE assists the minister in the formulation and execution of Spain's foreign policy in the European Union and coordinates the actions of public authorities, including regional and local ones, in the framework of the European Union. It instructs the Permanent Representative of Spain to the European Union and forms part of the Interministerial Committee on European Union Affairs (CIAUE). The Secretariat of State is assisted by a cabinet office, as provided for in Article 17 of Royal Decree 562/2004 of 19 April, which approved the basic organizational structure of ministerial departments.

The General Secretariat for the European Union forms part of the SEUE and is responsible for coordinating the activities of the different elements of the General State Administration within the European Union. Its organizational structure includes two Directorates-General which

monitor and coordinate actions and establish Spain's positioning in the European Union by other ministries, this being expressed through various sub-directorates general in accordance with their sectoral responsibilities. Other bodies that are directly dependent on the General Secretariat are the Sub-Directorate General for Institutional Affairs of the European Union and the Sub-Directorate General for Justice and Internal Affairs. In addition, the State Legal Service acting before the ECJ is attached to this General Secretariat, despite its formal inclusion within the Justice Ministry¹⁴. Together with officials from other ministries and other senior areas of

¹⁴ This organizational structure is determined in Articles 12 and following of Royal Decree 1416/2004, of 11 June, which includes, as organs directly reporting to the Secretariat General for the European Union, in addition to the technical department, the following:

- a) The Directorate General for the Integration and Coordination of General and Economic Affairs of the European Union, which is responsible for coordinating the activities in the European Union of the ministries with competences in financial, economic, trade and related matters. This Directorate General is senior to the Sub-Directorate General for General Affairs, the Sub-Directorate General for Economic and Financial Affairs and the Sub-Directorate General for Customs and Trade Affairs.
- b) The Directorate General for Internal Market Coordination and other Community policies. Its duties include, among others, the monitoring and coordination of Spain's position in agriculture and fishing issues (Sub-Directorate General for Agriculture and Fisheries), in industrial affairs, energy, transport and communications and the environment (Sub-Directorate General for Industrial Affairs, Energy, Transport and Communications and the Environment) and in social, educational, cultural and health and consumer affairs (Sub-Directorate General for Social Affairs, Educational, Cultural and Health Affairs). It is also responsible for providing legal-Community advice to public authorities, for providing responses to infringement proceedings in pre-litigation stages, for supervising the transposition process (coordination, monitoring and notification of the transposition into national law of EU directives), for preparing, monitoring and coordinating proceedings before the ECJ and for coordinating the process to determine Spain's position in Council working groups (regarding the legal content), among others (functions assigned to the Sub-Directorate General for the Coordination of Community Legal Affairs).
- c) The Sub-Directorate General for Institutional Affairs of the European Union has the following functions, among others: relations with the European institutions and the participation of the Autonomous Communities in European affairs (without prejudice to the powers attributed to the Ministry for Agriculture and Fisheries).
- d) The Sub-Directorate General for Justice and Home Affairs.
- e) The State's Legal Counsel before the ECJ, attached to this Secretariat General, without prejudice to its subsidiary position to the Ministry of Justice.

government, assisted by staff from the diplomatic service, this Secretariat of State is managed by persons with sectoral skills, European Community experience and excellent channels of communication with other ministries and with Brussels.

While the centre of gravity of the European function is the SEUE, many other bodies, contained within diverse ministries, have powers that could be included in the generic description of "European function." This is not the place for a detailed reference to each of the ministries, offices and departments that are involved, to a greater or lesser extent, in the formation, incorporation or application of Community law. However, two major aspects should be considered in this area, taking into account that the internal structure of the ministries is basically regulated under Act 6/1997 of 14 April, on the organization and functioning of the General State Administration (LOFAGE), and recalling, moreover, that the corresponding Royal Decrees specify the practical organization of each of the ministries involved.

On the one hand, the joint services of the ministries include, among others, advisory services, planning and scheduling functions, international cooperation and action abroad, legislative production and legal assistance; all of these functions are very strongly oriented toward the Community, in view of its far reaching and intensive effects. These joint services are integrated within the Sub-Secretariat, reporting directly to the Minister, and are assigned to the General Technical Secretariat (and other bodies to be determined as appropriate for each ministry). It should be emphasized that among the functions of the Sub-Secretariat is that of providing "legal advice to the Minister in the development of his/her functions and, in particular, in the exercise of his/her regulatory powers and in the production of the administrative acts corresponding to the position, as well as to other departments of the Ministry", as well as that of "reporting on proposals or drafts for legislation and acts by other ministries, as

appropriate". It is specified in this respect that the Sub-Secretariat, moreover, "is responsible for coordinating actions within the Ministry and in relation to other ministries engaged in the process" (Article 15.1.g of LOFAGE). The General Technical Secretariat is assigned, in particular, responsibilities for the production of legislation and the provision of legal assistance.

On the other hand, the offices responsible for operational aspects in each department, addressing a particular sector of administrative activity, also participate in the European role, insofar as it affects their respective areas of operation. The degree of their participation in the formation, incorporation and application of European law depends, logically, on the extent to which the sector in question is affected by the degree of European involvement, although this is now generalized. In any case, there are some sectoral bodies, at all ministerial levels, whose functions are specifically related to European law, while others implement functions that remain more distant from the context of "European" issues.

Thus, according to the Spanish system of departmental organization (as provided for in the Royal Decrees regulating the corresponding organizational structures), most ministries have a sub-directorate general, as part of the sub-secretariat, exercising functions concerning the European issues that are of interest to the corresponding department. However, the allocation of these functions is on many occasions performed in a generic, imprecise or ill-defined way (such as "the exercise of powers in relation to the European Union" and "in matters concerning the department"), as a residual matter (those "not specifically assigned to other management bodies"), diluted among many others (included by reference to various sections) and, in some cases, distributed among different areas of the same sub-secretariat.

b) Interministerial bodies

The diversity of material contexts that are potentially affected by each action of the European Union, together with the wide range of administrative organizations contained within diverse ministries that are all involved in the formation, incorporation and implementation of these EU actions, requires the existence of bodies to facilitate information exchange, coordination and collaboration, and to resolve the discrepancies that inevitably arise; these bodies must ultimately work to achieve effective coordination between the sectoral and the overall (unitary) perspective.

With this goal in mind, the Interministerial Commission for European Union Affairs (CIAUE) was established by Royal Decree 1567/1985 of 2 September (subsequently amended by Royal Decree 2077/1995 and Royal Decree 2367/1996). This body, attached to the SEUE, carries out coordination and information functions, as well as the resolution or preparation of issues for submission to the Government Executive Committee for Economic Affairs (CDGAE)¹⁵. It is presided by the Secretary of State for the European Union, and the Vice Presidents are the Secretary of State for Economic Affairs and the Secretary General for the European Union. Other members include the Assistant Director of the Office of the President of the Government and the sub-secretaries of various ministries, together with other senior administration officials. However, Royal Decree 1567/1985 authorizes the Vice Presidents and the members to delegate powers to any other representatives of their departments holding at least the rank of Director General, and in practice, meetings of the CIAUE are

¹⁵ In particular, Article 1 of Royal Decree 1567/1985, as amended by Royal Decree 2077/1995, confers on it the following powers: a) To coordinate the activities of the General State Administration in matters relating to the European Union; b) To be informed of the decisions taken by the Ministries in areas of their exclusive competence related to the European Union; c) To review and resolve, where appropriate, matters relating to the European Union, affecting more than one department, that do not require referral to the Government Executive Committee for Economic Affairs or to the Council of Ministers; d) For its President to refer to the same Executive Committee those issues related to the European Union which due to their significance so require or when requested by any member of the Commission.

usually held among officials of a lower hierarchical level than that stipulated in the legislation.

At a higher level, the CDGAE is responsible for interministerial coordination functions with respect to European Union issues. These functions are stipulated not only in its general configuration (Article 6.4 of the Government Act), but, specifically, in the provisions of paragraph d) of Article 1 of Royal Decree 1567/1985, according to which the CIAUE refers to this Commission "issues that due to their importance require it or when so requested by any member of the Interministerial Commission". For its part, the CIAUE reviews and resolves matters that, affecting more than one department, "do not need to be referred to the Government Executive Committee for Economic Affairs or the Council of Ministers". Its composition is specified in Royal Decree 1194/2004, of 14 May, which prescribes the structure of all the Government Executive Committees. Although the Minister of Foreign Affairs and Cooperation and the Secretary of State for the European Union are not included, in principle, in the CDGAE, they do take part when "issues related to the European Union" are to be addressed (Article 3.3 of Royal Decree 1194/2004).

It does not seem necessary to dwell on the role played by the Council of Ministers, as a collegiate body within the Government, in the final determination of the European functions performed by the diverse ministerial departments. On the other hand, we should pause to consider the functions that, in relation to its decisions, are implemented by the following two bodies.

The first is the General Committee of Sub-Secretaries and Secretaries of State, set up under Article 8 of Government Act 50/1997, of 27 November, and headed by a Vice President of the Government. Its meetings are preparatory to those of the Council of Ministers. This body systematically oversees the process of incorporating Community law, and the first item on its agenda is always dedicated to consideration of this

issue, when ministries report the state of transposition of directives and the degree of compliance with Community decisions (regulatory or otherwise) in their area of competence.

The second is the Council of State, to which Act 3/1980 of April 22, attributed, among others, the power to issue an opinion, prescriptively, on draft laws and draft regulations to be issued in compliance with the execution, performance or development of treaties, conventions or international agreements and of European Community law, on the legal problems which may arise during interpretation and enforcement of the acts and resolutions issued by international or supranational organizations, and also on matters of State which the Government believes to be of particular importance or impact (Articles 21 and 22). Furthermore, Article 25 provides for consultation with the Council of State on "any matter which, although not of mandatory consultation, the President of the Government or any Minister deems appropriate". Another important function carried out by the Council of State is the preparation of studies, reports, memoranda or draft documents required by the Government (Article 2).

2.3. State Administration in the European Union: the REPER

Spain's Permanent Mission to the European Union (REPER) was created by Royal Decree 260/1986, of January 17 (amended by Royal Decree 2077/1995 of 22 December), and operates under the jurisdiction of the Ministry of Foreign Affairs and Cooperation (MAEC) through the SEUE. The REPER is the body accredited by Spain to the European Union and ensures Spain's presence in the institutions and dependent organizations of the European Union.

The REPER is headed by the Ambassador/Permanent Representative, who is responsible for the execution of the instructions issued by the Government, transmitted by MAEC, and who channels (obligatorily) all

official communications between the REPER and the Spanish Administration, always via the MAEC. The Ambassador is assisted and deputised, if necessary, by the Deputy Permanent Representative.

The REPER Ambassador and the Deputy Permanent Representative coordinate the activities of all the bodies and administrative units of the State Administration in the European Union, to ensure they comply with the general criteria set by the government, "in accordance with the principle of unity of State action abroad" (Article 37, LOFAGE). They are assisted by the Counsellors, Secretaries of Embassy and Attachés deemed necessary for the performance of their duties. Both diplomatic and non-diplomatic staff are appointed by the MAEC, at the proposal, when appropriate, of the ministries concerned. If there are several counsellors from the same department, one may be responsible for coordinating their functions.

The division of tasks within the REPER corresponds to the departmental division of responsibilities, and virtually all the ministries are represented, to varying degrees. It should be mentioned that the internal structure of the REPER does not follow the standard design of Community policies, but reflects the Spanish form of departmental organization, and thus the Counsellors assigned to the Mission report, in practice, both to the Ambassador and to their respective sectoral ministries.

In summary, the REPER is comprised of highly skilled personnel, mainly senior officials recruited from various ministries, and whose effectiveness is assessed by outside observers. Perhaps they enjoy excessive decision-taking power; although this outcome was not intended, it has arisen inevitably from the speed and the expeditious nature of negotiations within the European Union. The intervals between meetings sometimes allow queries (rapid and informal) to be passed to the ministry or ministries concerned, but the decision on the position to be adopted at the next meeting cannot always wait for the CIAUE to meet (and much less so for the CDGAE to decide the question).

3. Participation by regional administrations in State action

The means by which regional positions may be integrated into State action can be outlined by reference to two main areas: first, internal mechanisms of coordination and cooperation between national and regional administrations; and second, channels for direct participation by regional representatives in European institutions and bodies, in the external context (also in coordination and cooperation with representatives of the national administration). As an initial approach, let us examine the different models present in comparative law.

3.1. Overview of comparative law

There are two basic models in the European Union, according to the predominant channel of participation established for territorial bodies (regions, countries, federated states, etc.), in the area of composite States, as regards establishing a European priority or viewpoint.

In the first, the participation of these territorial bodies takes place primarily through a representative assembly extending beyond the administrative organization of the Member State. In the second model, the participatory body is constituted within the administrative sphere and is distinct from the parliamentary assembly. The separation between these models, however, is not absolute. The common ground lies in the decision-taking coordination between the State and other authorities; in the first model, the State Administration continues to play a significant role, while in the second, parliament is not completely devoid of jurisdiction in the matter.

a) The first model reflects, in essence, the system applied in the Federal Republic of Germany, where a chamber, the Federal Council or *Bundesrat* takes centre stage.

In this respect, there are two articles of great importance in the German Constitution, Numbers 23 and 52 (3a), together with the two laws

that particularly address these issues: the Law on cooperation between the State and the *Länder* governments concerning European Union matters, of 12 March 1993, amended by the Law of 5 September 2006, and the Law on cooperation between the Federal Government and the German *Bundestag* in European Union matters, of 12 March 1993, amended on 17 November 2005.

The German Constitution, Article 23.2, states that matters concerning the European Union are addressed by the Federal Parliament (*Bundestag*) and the states (*Länder*), the latter doing so through the Federal Council (*Bundesrat*). The Federal Government, it adds, must provide both the *Bundestag* and the *Bundesrat* with prompt and comprehensive information on European issues. In the following paragraphs of Article 23 it is clarified that the Federal Council participates in establishing the wishes of the Federation, while the Council or the *Länder* themselves adopt measures or are competent at the national level (paragraph 4).

Paragraph 5 states that the Federal Government is obliged to take into account the position taken by the Federal Council, even in the area of the Federation's exclusive competence, when the interests of the *Länder* are affected. However, the Federal Government is not bound by the position taken by the *Bundesrat*, although this must be "taken into consideration".

The same section of the Constitution establishes, indeed, a stronger degree of obligation with respect to the case where, for example, a European Union project lies fully within the area of competence – administrative or legislative – of the *Länder*. In this case, the Federal Government must take into account the opinion of the *Bundesrat*. But even here the ultimate decision-taking power remains with the Federal Government, as the body with responsibility for the Republic as a whole. For this reason, doctrinal decisions have stressed that, even though in this

case the Constitution calls for a decisive or determinant consideration, this greater intensity of consultation does not, strictly speaking, impose an obligation or duty on the Government to be subject to the opinion of the *Bundesrat*, come what may. Doctrine also warns that any action provoking a cost increase or a revenue decrease for the Federation must obtain the consent of the Government.

Moreover, paragraph 6 of Article 23 (as published in August 2006) provides for the special case, going beyond those considered above, in which a European project involves areas that are the exclusive competence of the *Länder*, such as education, culture or broadcasting. When this occurs, the task of safeguarding the rights of the Federal Republic, as a Member State of the European Union, is transferred from the Federation to a designated representative of the *Bundesrat*. However, this safeguard is exercised by the *Länder's* representative with the participation and consent of the Federal Government, as the body responsible for the Federation as a whole.

Finally, Article 52 (3a) of the Constitution provides that for European Union matters, the *Bundesrat* may establish a "European chamber" whose decisions are attributed to the *Bundesrat* itself.

In short, thus, coordination between local authorities and between these authorities and the Federation takes place within the Federal Council. This is the hallmark of the German model.

b) In Italy, on the other hand, a quite different system applies. In this country, there is no Federal Chamber or Council, following the rejection of the proposal to create a "representative chamber of the regions" as many had advocated during the reform of Title V of Part Two of the Constitution. What Italy does have is a "Conference of the Presidents of the Regions and of the autonomous provinces of Trento and Bolzano", together with a "Conference of the Presidents of assemblies, of regional councils and

of the autonomous provinces" which to a certain extent fills this gap. Of interest in this area are Law 131, of 2003 (*La Loggia*) and Law 11, of 2005, which govern the participation of the regions and the autonomous provinces (and even of local authorities) in the 'ascending' phase of Community law.

La Loggia (Article 5.1) enables the participation of the regions and autonomous provinces in governmental delegations participating in the work of the Council and the European Commission, as agreed upon within the State-Regions Conference, without prejudice to the unitary position adopted by Italy and presented by the delegation head appointed by the Government. Under this law, the delegation could also be led by the president of a region or autonomous province, when issues within the area of competence of the regional legislation are involved.

The 2005 Law requires the Government to provide the regions and provinces with appropriate information on European projects affecting their areas of competence. This information must be "qualified and timely" so that within twenty days the regions (via the above-mentioned Conferences) can transmit their "observations" to the President of the Council of Ministers or the Minister in question, and thus contribute to establishing Italy's definitive position before the European Union. Furthermore, in such cases, at the request of one or more regions or provinces, a meeting of the Permanent Conference for Relations between the State and the Regions and Autonomous Provinces may be convened.

Italy's regions and autonomous provinces in the ascending process can also be present within the Interministerial Committee for European Community Affairs, which is open to participation by regions, autonomous provinces and local authorities when the agenda include items relevant to their interests.

Another situation of interest is that of Austria, which, even before its integration into the European Union, had a Conference of *Länder* Presidents, as a high-level coordination platform (with the possible attendance not only of the Federal Chancellor but also of members of the government). In 1989, the Council for Issues of European Integration Policy was created, with the participation of two representatives of the Conference of *Länder* Presidents, two representatives of the *Länder* Parliaments, the Federal Chancellor, the Vice Chancellor and the Foreign Minister (as well as representatives of political parties and interest groups).

A 1992 agreement signed between the Federation and the *Länder*, and approved by the *Nationalrat*, established information and consultation mechanisms (once informed, the *Länder* have a certain time in which they can seek to influence Austria's position; when the *Länder* present a unified position, expressed in good time to the State, if the latter diverges from this position it must state its reasons for so doing), and rules on including *Länder* representatives in delegations at negotiations.

Let us also note the role played by the *Länder* Integration Conference¹⁶, set up in 1993, and constituted of their heads of government (and of the presidents of the parliaments, with the right to speak but not to vote), whose primary function is to defend the common interests of the *Länder* and to establish joint positions regarding European affairs.

In the UK, too, mechanisms exist to ensure participation by autonomous administrations in Europe (initially, in relation to Scotland and Wales, and subsequently applied to Northern Ireland). Although negotiations are carried out by the British government, there is a high level of coordination with the authorities of the autonomous governments, whose ministers may attend Council meetings and even speak on behalf of the UK.

¹⁶ A Standing Committee for the Integration of the *Länder*, in which each one has a representative, to advise the Conference, which could also empower the Commission to take its own decisions.

These coordination mechanisms include a Concordat on Coordination of EU Policy Issues, subscribed to by all four administrations (the UK and those of Scotland, Wales and Northern Ireland), bilateral concordats and an Interministerial Committee for European coordination. However, the utility of this model for Spain is limited because of the smaller number of authorities involved and the qualitative difference in the problems to be addressed.

3.2. Internal and indirect participation

In Spain, the primary channel for achieving regional participation in the European activities of the General State Administration is provided by the Conference for European Community Affairs (CARCE) and the mechanisms it adopts, mainly by means of sectoral conferences.

This Conference was created in 1988, under the provisions of Article 4 of Act 12/1983, of 14 October. At its meeting on 29 October 1992, the Agreement Institutionalizing the CARCE was adopted, and this was complemented on 14 June 1994 by a further agreement broadening its scope. It was definitively structured and regulated by Act 2/1997, of 13 March, according to which its rules of procedure were approved.

The CARCE is intended to facilitate cooperation, consultation and deliberation between the State and the Autonomous Communities, enabling the latter's effective participation in European Community affairs (both in the phase of establishing national priorities in this respect and in that of implementing Community law). It is supported by a Coordinating Committee for European Community Affairs.

It is chaired by the Minister for Government Administration, and includes the corresponding regional minister designated by each Autonomous Community, together with the Secretary of State for the European Union and the Secretary of State for Regional Cooperation. Its

functions are to promote, coordinate, enhance and ensure the provision of information, discussion and cooperation and the participation of the Autonomous Communities in matters concerning the European Union.

Under Act 2/1997, CARCE agreements must be adopted in accordance with Article 5 of Act 30/1992 and its Rules of Procedure. These agreements are particularly important in regard to collaboration and coordination between the Autonomous Communities and the State administration, in negotiations, in the incorporation and application of European law, and in everything concerning the direct involvement of the Autonomous Communities in European institutions.

Among other functions, the CARCE promotes and monitors procedures for the participation of the Autonomous Communities, through the respective sectoral conferences (or equivalent body), in Community policies or activities affecting regional competences; via its sectoral conferences, it ensures compliance with these procedures.

Sectoral conferences are multilateral cooperation organizations, with a sectoral focus, comprising members of the Government, on behalf of the General State Administration, and members of the Councils of Government, on behalf of the administrations of the Autonomous Communities. The conferences are regulated by Article 5 of Act 30/1992, by their respective Institutionalization Agreements and by their Rules of Procedure. The above-mentioned Article 5 provides for the conclusion of agreements, which can be formalized under the term Sectoral Conference Convention, whose effects are governed by the provisions of Article 8 of Act 30/1992. Sectoral conferences may establish their own committees and working groups to prepare, study and develop specific issues concerning the area of interest in each case.

The CARCE Agreement of 30 November 1994, on the internal participation of the Autonomous Communities in European Community

affairs via sectoral conferences¹⁷, was intended to determine the cooperation framework procedure that each sector conference should apply, in both the ascending and the descending phases. This framework procedure is developed by each sectoral conference taking into account the nature and the respective competences (national and regional) for the purposes of determining the degree of intensity and the specific content of the participation of the Autonomous Communities. Above all, they ensure the Kingdom of Spain's capacity to act and the flexible management of negotiations, and establish the duty of both parties to provide the information and documents necessary to effectively implement the participation procedure, in both the ascending and the descending phases.

The second part of the Agreement, in six points, sets out the content needed for participation by the Autonomous Communities in determining the priorities of the State. In this respect, the sectoral conference is expected to refer the Commission's proposals to the Autonomous Communities for their consideration at the conference (in committees, working groups or ad hoc meetings), together with the information to the Autonomous Communities on the development of the proposal, and on any amendments made, and the text to be included in the Council agenda, assessing in each case the possible need to hold a plenary meeting of the sectoral conference before the Council meeting.

In addition to the above, the first additional provision of Act 2/1997 provides for bilateral cooperation, in relation to participation in matters affecting a single Autonomous Community or which are of singular importance to the latter due to its regional specificity¹⁸.

¹⁷ Published in Resolution of 10 March 1995 (Official State Gazette, 22 March 1995)

¹⁸ Bilateral Cooperation Commissions between the State Administration and the Autonomous Community of the Basque Country (1995) and between the State Administration and the Autonomous Community of Catalonia (1998) were created to examine issues related with the European Union.

3.3. Participation abroad

Participation in actions abroad by the Autonomous Communities and their cooperation and coordination with the State Administration is structured into three different areas: one purely regional (their offices and delegations in Brussels), another State-wide (the REPER Department of Regional Affairs) and a third one focusing on the inclusion of regional offices and functions within State-level structures such as the delegations that represent Spain in various Community proceedings.

The regional offices and delegations in Brussels adopt different legal configurations, depending on the political decision taken freely by each Autonomous Community, in accordance with its degree of self-organization. This factor, therefore, remains outside the jurisdiction of the State.

The REPER Department of Regional Affairs¹⁹ was created by Royal Decree 2105/1996, of 20 September, which put into practice the proposal made by the CARCE Agreement of 22 July 1996²⁰. This initiative was in response to the interest expressed by the Autonomous Communities in having a "liaison" within the REPER, in the style of the German model of "observer" for the *Länder*. This Department was granted "sole competence" to liaise with the Offices of the Autonomous Communities in Brussels and to channel information to them, irrespective of the formal responsibility assigned to the sectoral conferences in this respect. This competence, it was noted, would not affect the ordinary relations between the regions and the other Offices within the Permanent Representation.

More recently, the CARCE Agreements of 9 December 2004 had a significant effect on the Department's configuration, appointment and

¹⁹ This Department reports to the Ministry for Public Administration, without prejudice to its reporting to the Ambassador/Permanent Representative and to the coordination functions attributed to the latter to ensure, in accordance with the principle of unity of action, compliance with the guidelines defined by the Government.

²⁰ The CARCE Agreement of 22 July 1996 contains some provisions on the Council that were not ultimately included in the Royal Decree.

duties. The first Agreement (point I) deals specifically with the REPER Department of Regional Affairs, and two items are outstanding: on the one hand, its Directors are appointed, in accordance with applicable regulations, at the proposal previously agreed by the Autonomous Communities, and formulated in the CARCE²¹; on the other, these Directors are required, periodically, to report to the CARCE and account for the performance of their duties. A clear distinction is made between the Directors' duties on behalf of the Autonomous Communities and those on behalf of the Ministry of Government Administration, without prejudice to any others that might be expressly attributed by the CARCE.

In any case, the main demands of the Autonomous Communities in this area have focused on their direct participation in Community organizations, of greater scope than that corresponding to their role in the Committee of the Regions. On this point, achievements have ranged from their involvement in implementation committees of the Commission to direct participation in the Council.

The Autonomous Communities' participation in the European Commission implementation committees began in 1998²². Periods of representation are usually biannual, although on several occasions, successive periods have corresponded to a single region, usually because it was the only one interested in the question (and, conversely, on more than one occasion, the period of representation has sometimes been limited to just a few months).

As well as the proposed distribution, the CARCE meeting of 10 March 2003 presented and approved its "Rules on participation by the

²¹ The appointment is for three years, renewable on an annual basis, subject to approval by the CARCE. The regions are expected to agree a system to ensure the succession of Directors proposed by different Autonomous Communities.

²² In this year, the Autonomous Communities were present in 55 committees; in 2002, they were invited to participate in 95, although in some cases none accepted; thus, between 2003 and 2006, they were present in 74 committees.

Autonomous Communities in the implementation committees of the European Commission". These Rules set out the following means of inter-administrative coordination: a) between the State and the Autonomous Communities, within the sectoral conference or bodies providing specific support; and b) among the Autonomous Communities, through meetings and contacts with each regional representative, in every committee, as well with "regional sectoral officials" and with existing cooperation offices. The position of the Autonomous Communities is communicated to the General State Administration representative attending the committee meetings. This representative is responsible for chairing the meeting, acting as its spokesperson and casting its vote, when so required.

As regards the Council, participation by the regions was decisively promoted by the Agreements of 9 December 2004, in which two types of participation are distinguished: Council configurations and working groups.

Regarding the Council configurations, one of the Agreements facilitates the inclusion of a regional government minister in the Spanish delegation. In this respect, a number of general principles (such as unity of action, loyalty and mutual trust and joint representation) are mentioned; the configurations to which the system would "initially" apply are identified²³; and some provisions included on how the regional representative should be appointed, through the plenary session of the sectoral conferences concerned and with a minimum guaranteed period of stability (covering at least a six-month Presidency); apart from other aspects, the regional representative is assigned the responsibility of coordinating preliminary organization and consensus-reaching with the General State Administration.

The other Agreement provides for regional participation in the working groups of the Council of the European Union, for which two means

²³ Employment, Social Policy, Health and Consumer Affairs, Agriculture and Fisheries, Environment, and Education, Youth and Culture.

are indicated: via the Directors of the REPER Department of Regional Affairs, with their inclusion in the Spanish delegation in certain working groups; or via the incorporation in the Spanish delegation (within the appropriate working group) of the technical expert appointed by the person who is to exercise direct regional representation. The working groups where this participation is effected are those comprising the preliminary organization of the Council configurations listed (as referred to above), although the Ambassador/Permanent Representative and the Deputy Permanent Representative may designate other working groups in which such participation may be of interest. The participation will include, where appropriate, attendance at COREPER meetings.

In accordance with the provisions of the CARCE Agreements of 9 December 2004, the Directorate General for Regional Cooperation has issued various reports on the participation of the Autonomous Communities in the Council of the European Union (in December 2005 and December 2006), showing how it functions in practice.

III. THE FORMATION OF EUROPEAN LAW: SPAIN'S PARTICIPATION IN DECISION-TAKING PROCEDURES

1. The efficiency of Spanish participation

1.1. The dynamics of the Community decision-taking process

Given the diversity of existing decision-taking procedures, but also taking into account the fundamental steps that are repeated (under different conditions or with disparate effects in each case), let us now consider how Spanish participation in these procedures can be enhanced to make it more effective in achieving the objectives set out in the Government's consultation request.

We shall examine the possibilities for participating in the activities of the Commission, the Council and, to a lesser extent, given the nature and terms of the consultation, the European Parliament, with particular attention to the phases and opportunities available for the above-stated purpose.

a) The Commission's proposal

The work of the Commission merits particular attention, because it enjoys a virtual monopoly of initiative and subsequently retains ownership of the proposal, insofar as it may withdraw or modify it, with the considerable power of negotiation and conciliation that this implies²⁴.

²⁴ The general rule for initiatives of the Commission is to be found, since the Treaty of Lisbon, in paragraph 2 of the new Article 9 D of the Treaty on European Union. Article 250 TEC – not amended by the Lisbon Treaty – provides that, until the Council takes action, the Commission may alter its proposal at any time during the procedures leading to the adoption of a Community act. Paragraph 1 of the same article states: "Where, in pursuance of this Treaty, the Council acts on a proposal from the Commission, unanimity shall be required for an act constituting an amendment to that proposal (...)". In other words, the Council may accept the proposal from the Commission by a majority, but it needs unanimity to amend. The rule, with some adjustments and exceptions, remains in the new paragraph 1 of Article 250.

Initiatives are adopted within a framework of foreseeability because, in accordance with its Rules of Procedure of 8 December 2000, every year the Commission sets its priorities and determines its schedule, and knowledge of these data are essential for effective participation. Accordingly, we must consider how to facilitate the participation of Spanish authorities in preparing proposals, not only so that these may adequately reflect Spanish necessities, but also to prevent their subsequent regulatory implementation from becoming unreasonably complex or dysfunctional.

The starting point is the Commission's decision to undertake a specific initiative. Special attention should be paid to this decision, from the outset because, as it advances and develops, the initiative will become more resistant to influences and changes of orientation. Therefore, we must analyse the creation of the initiative and its development by the Commission.

The initial impulse, the "initiative of the initiative" can come from the European Parliament (Article 192 TEC) or the Council (Article 208 TEC²⁵) or, of course, from the Commission itself, which sometimes receives outline suggestions which, if substantiated, may stimulate it into action. These ideas are delivered through contact with national and European media, which make use of diverse means of transmission (such as think tanks, which are still poorly developed in Spain). Because an initiative is sometimes associated with existing standards, the reform or development of which is predictable, it would be helpful to instruct an area or department within the Spanish administration to remain alert in this respect, so that the competent ministries can be forewarned, and thus be equipped for possible participation in the initiative or to influence its evolution.

²⁵ According to the wording of Articles 192 and 208 of the Lisbon Treaty, if the Commission does not submit any proposal following the request of the European Parliament or the Council, it must communicate its reasons to one or the other.

The Commission sometimes launches a public debate before the actual preparation of a proposal, raising issues and suggesting alternative types of legislation. Of particular importance in this regard are the Green Papers, which provide the first description of a Commission initiative; their purpose is to stimulate debate on a topic, inviting interested parties to participate in a process of consultation and discussion. They constitute the basis for legislative developments, subsequently detailed in White Papers, which will then include proposals for Community action in specific fields. If the White Paper is favourably received by the Council, it may catalyse an EU Action Programme.

Both Green Papers and White Papers are preparatory documents for future initiatives, inviting participation by public and private bodies. The Commission itself, therefore, is calling for participation. The effectiveness of State participation in this respect depends largely on the responsiveness and influence of the Member States' authorities (and hence the importance of developing "European reflexes" to these documents). In short, it is important to pay careful attention to the development and publication of Green Papers and White Papers.

Within the Commission, the department responsible must consult associated services and interested parties in accordance with their jurisdiction, their powers and the nature of the matter²⁶. The Directorates-General affected prepare reports, compile statistics, draft comparative studies, etc. and the text developed is then communicated to the Legal Service and the Secretariat General. Depending on the degree of agreement between the DGs concerned, either a written or an oral procedure is followed, with meetings of chiefs of staff and, where

²⁶ For the preparation of each file, a lead Directorate-General is established, together with one or more associate DGs with competence in the area. Each DG appoints an official in charge of the case and all concerned meet in inter-service groups to prepare the Commission documents. The service responsible seeks agreement within the group and, if this cannot be achieved, its proposal is accompanied by the dissenting opinions.

appropriate, intervention by the College of Commissioners. Although the positions taken in the successive stages of discussion of the initiative are not necessarily determined by the nationality of its supporters or detractors, the obvious interest of States in its outcome leads them to promote mechanisms by which influence can be exerted.

Of particular interest, at this stage, are impact assessments, which must be performed during the initiative's passage through the successive stages of its development. In these assessments, the Commission must take due account in its legislative proposals of the "financial or administrative implications, particularly for the Union and the Member States", as stated in the Inter-institutional Agreement "Better Law-making" adopted in December 2003. In this Agreement, the Commission committed itself to continue developing an integrated process of prior impact analysis for major legislative projects. It is interesting to note that the results of these assessments "will be made fully and freely available to the European Parliament, the Council and the general public" and that "in the explanatory memorandum to its proposals, the Commission will indicate the manner in which the impact assessments have influenced them²⁷". These impact assessments, therefore, provide useful technical and legal instruments for developing negotiations until the act in question is finally adopted.

In parallel, or sequentially to the work of their services, the Commission encourages the participation of national experts, supported by a compact network of groups and committees ("preparatory committees"), composed of experts convened as such; thus, even if they are proposed by the State administration, strictly speaking they do not act as representatives of these authorities.

²⁷ Although it is beyond the scope of the Commission, it is noteworthy that the same Inter-institutional Agreement then notes: "Where the codecision procedure applies, the European Parliament and Council may, on the basis of jointly defined criteria and procedures, have impact assessments carried out prior to the adoption of any substantive amendment, either at first reading or at the conciliation stage".

It can be seen, therefore, that for assistance in its right of initiative the Commission consults with numerous preparatory committees established either by Community legislation or by the Commission itself (and, very occasionally, set up by the original Treaties). Depending on their purpose and composition, we may distinguish consultative committees, scientific committees and committees of experts (or "groups of experts", following the renaming by the Commission to avoid confusion with comitology committees)²⁸. The specific composition, powers and functioning of each of these committees or groups are clarified by the respective decisions for which they are created. Their members may be appointed under different systems, but it should be emphasized that they are not agents of their national authorities, but act as "experts", independent of their respective countries. In any case, a two-way relationship can be discerned: on the one hand, the participation of experts establishes the opportunity for a national influence on the Commission's proposal; on the other, it provides a preliminary call to attention for national administrations to start preparing their positions on the matter.

Finally, in procedures to prepare and implement its decisions, the Commission is assisted by the comitology committees (not to be confused with any of the above preparatory committees), which are composed of representatives of the Member States, acting as such, and governed by the aforementioned Decision 1999/468/EC of 28 June 1999. Their mode of action is determined by the type of administrative decision taken in creating each committee (and, where applicable, by any subsequent implementing powers conferred on the Commission in this respect). The rules for participation by the States in these committees are set out, moreover, in

²⁸ The consultative committees are composed of representatives of professional or economic spheres or, in general, of general interests, and their purpose is to determine these parties' views on EU policies that affect them or on draft regulations under preparation; expert committees are groups convened by the Commission to seek advice on specific issues on which the Commission wishes to form its own opinion; scientific committees are comprised of scientists, experts or persons with considerable experience and high reputation in their respective fields.

the rules adopted by each committee, on the basis of the standard rules of procedure decreed by the Commission on 31 January 2001. This standard procedure describes the normal rules of operation and those applicable to participation by the States, in areas such as notification to attend, the agenda to be addressed, communication to committee members, rules for decision taking, representation and quorum, the creation of working groups, the possible incorporation of experts and observers (who, however, will neither attend voting sessions nor participate in them), written procedures, and so on.

Regarding these committees, important features are the predictability of their deliberations (insofar as these are addressed in their foundational documents), the distinctly technical nature of negotiations and the possibility of including in the agenda, apart from proposals for action to be taken (and on which the committee's opinion has been requested), other issues presented for consideration, for the purposes of information and exchanges of views, at the written request of a committee member. Logically, no vote will take place if the documents relating to an agenda item have not been transmitted within the time periods determined (these transmissions are addressed to the Permanent Representations, although a request may be made for a copy to be forwarded directly to the person designated by the Member State).

b) Decision taking in the Council

The Council is the natural space in which negotiations take place between the Member States and in which each Administration sets out its position in relation to proposals made by the Commission. This is also where a State's action may be prepared or scheduled, since the Council's rules of procedure²⁹ require that every 18 months, "the three Presidencies due to hold office shall prepare, in close collaboration with the Commission,

²⁹ Approved by Decision 2006/683/EC, EURATOM, of the Council, of 15 September.

and after appropriate consultations, a draft programme of Council activities for that period".

In its decision-taking role, after receiving the proposal from the Commission, the Council's response (in its ministerial formation) is preceded by that of the COREPER which, in turn, assigns the Commission text to one of the more than 200 working groups (and committees)³⁰ constituted on a permanent or an ad hoc basis, in which the Commission is represented and which includes experts delegated by State governments (and, where appropriate, by the federated ones of Germany, Austria and Belgium, as well as the Spanish government). Sectoral fragmentation sometimes generates (sectoral) communities of interest, which may take precedence over the broader view of the State, thus giving rise to a system of functional loyalties that often overlap loyalty towards the State. This reveals the importance of firmly defining the national position.

The process is initiated when the Commission submits its proposal to the Council, in all official languages, for distribution by the Secretariat General³¹. On receipt by COREPER, it is assigned to one or more technical working groups, composed of members of the Permanent Representations and often reinforced with national experts appointed ad hoc, acting under the instructions of their respective Governments. Clearly, the possession of

³⁰ According to Article 19.3 of the Rules of Procedure of the Council, committees or working groups, may be constituted – created or endorsed by the COREPER – to carry out certain preparatory tasks or studies (previously defined) in the terms set out in these Rules of Procedure and the corresponding annexes. The General Secretariat updates and publishes the list of Council preparatory bodies, so that only the committees and working groups that appear on the list may meet as such. These groups and committees are distinct from those which assist the Commission in the exercise of its right of initiative ("preparatory groups") and from those involved in the comitology procedures.

³¹ In the process, a fundamental role is played by the Permanent Representations (REPER), on behalf of their respective national administrations. When the REPER receives a proposal, it is referred to the ministry or ministries concerned, which adopt a position in this respect in coordination with the Ministry of Foreign Affairs, or as applicable in each State, which then informs the REPER of the lines agreed so that the REPER members can act in the committees and working groups in accordance with the instructions received. The representation of each country is often strengthened with the presence in the committee meetings of specialist national officials, who have participated in the preparation of the national position.

adequate linguistic skills for use at this stage, not only in the formal negotiations, but in the informal contacts between officials from different administrations, is of crucial importance.

The working group presents its report, separating the points on which there is agreement from those which need to be discussed in the COREPER. Given the Council's workload, over 70% of its decisions are currently negotiated within working groups, which highlights the importance of this preparatory stage in the decision taking process.

Subsequently, the COREPER comes into play; here, the proposal is discussed, flexibly and with transaction possibilities, facilitated by the direct contact between the permanent representatives and their deputies and the governments concerned³². Deliberations conclude with the presentation to the Council, either of a final text approved by the lawyer-linguists, to be adopted without further discussion, or otherwise of a proposal that has not yet achieved the majority required for approval³³. Points may also be included for subsequent discussion by the Council. If this continues over several sessions, during their recesses the discussion can be continued in the working groups and in the COREPER.

From a pragmatic standpoint, it might be considered that there is limited practical significance in the change from the requirement of unanimity to qualified majority voting in certain cases, as Council practice is still to prolong negotiations in an attempt to achieve the conformity of all Member States. Nevertheless, we should not underestimate the potential of the strategic use of the right to call for a vote when there exists a sufficient

³² The proposal is assigned to COREPER II (Heads of Representation) or COREPER I (Deputies).

³³ The Council meetings are conducted in accordance with the agenda prepared by the COREPER, divided into two parts ("Part A" and "Part B"). Part A involves a final text intended to be approved without debate, while Part B mainly includes proposals that have not obtained the necessary majority in the working group or in the COREPER.

majority. Hence the importance of negotiating skills and strategic alliances, either to consolidate a sufficient majority or to achieve a blocking minority.

c) Intervention of the European Parliament

During the negotiation phase, and especially in the co-decision procedure, the Council interacts with the European Parliament, with its specialized committees and their respective speakers.

Parliament's role in the legislative process is usually formalized in resolutions, in diverse forms, including opinions or amendments to the common position of the Council. The issues under discussion are communicated to a parliamentary committee which, after examining the legal background (which is crucial in determining the weight of each institution in the process), prepares a report that includes a draft resolution to be submitted for approval to the General Assembly.

The European Parliament seeks to ensure that its amendments are accepted by the Commission, because of the impact of this decision on the requirement for a qualified majority or for unanimity to obtain acceptance by the Council: if the Commission endorses the amendments, the Council may adopt the proposal, as amended, by a majority vote, whereas if the Commission does not do so, the Council may only approve the proposal with the amendments accepted unanimously by Parliament, since this would represent a modification of the Commission's proposal.

The parliamentary committees and their speakers usually have contacts with representatives of the interests affected (public and private); these contacts may arise directly or be channelled through parliamentary assistants. We emphasise the important role played by both the committees and the speakers in furthering the activity of the European Parliament.

1.2. Shortcomings and weaknesses in Spain's participation

Having summarised the means of participation in the formation of European law, let us now highlight certain shortcomings, weaknesses and opportunities for improvement that the Council of State has perceived, among other channels, through its contacts with various ministries.

These deficiencies can be grouped into three blocks, concerning the moment at which participation is undertaken, the development of the negotiations and the very concept of the ascending phase.

a) Late participation

One of the factors hampering the effectiveness and influence of the Spanish administration in the formation of European law is the fact that its arrival on the decision-taking scene often takes place at a very late stage, when the Commission has already outlined proposals, the basic lines of which will be difficult to alter. This is an important limitation, since Community policy initiatives are inherently more flexible in the initial phases of the adoption process. An undeniable failing is that Spain currently takes little part in the early stages of evolution of Community initiatives.

On the one hand, there is a need for a stronger presence in the promotion of initiatives, an area in which Spain is either absent or does not achieve sufficient impact to attract the attention and support of other actors in the decision-taking process. In contrast, other States vigorously circulate proposals, studies, reports, etc. and make them known to the Commission in order to promote a particular action.

On the other hand, there is a certain passivity within the Spanish administration regarding the preparatory work carried out by the Commission, even when it expressly calls for external collaboration through consultative processes or Green Papers. In this respect, Spanish participation is, in many cases, clearly open to improvement.

In both cases, State action should be driven by the ministries, which are the bodies responsible for sectoral action in Spain and which are directly aware of the issues and needs in question.

b) Lack of firm support in negotiations

The positive assessment generally made of Spain's negotiating capabilities, and in particular those of the REPER, contrasts with the important element of improvisation that has also been identified, arising from the expeditious spirit in which negotiations are undertaken, but also from inadequate communication with the domestic system of government. To a large extent, this improvisation is made necessary by the absence of a clear programme or systematization of interests, needs and priorities with respect to the issue in question. Thus, there is an absence of firm support on the basis of which negotiations may be conducted, during the evolution of an initiative until its final approval.

Another factor of great importance to the optimum development of negotiations, and where Spain's shortcomings are highlighted by comparison with other countries (here, the British system is paradigmatic), is the possession of a solid technical and legal foundation on which to construct one's own position. This requires, on the one hand, a profound understanding of social reality, with reliable data and technical information about the sector affected by the negotiation, and on the other, a legal grounding that enables us to reject some solutions or favour others, not as support for a predetermined position, but as a basic requirement of the rule of law.

Finally, in view of the frequency with which specialized ministry officials must travel abroad to address a particular negotiation, Spanish officials (and politicians) must be forcefully and insistently reminded of the need to improve skills of specific utility for their participation in European affairs to develop its full potential. The emphasis, above all, is on language

proficiency (especially in English, but without neglecting other languages), the deficient command of which hampers Spain's achievement of its goals in Europe. We also draw attention to the importance of expertise in negotiation and of having a profound understanding of the functioning of the European Union and of European law.

c) Discontinuity between the ascending and descending phases

The perception of a certain discontinuity between the formation of a European norm and its incorporation into the domestic statute book leads to a given process of legal creation becoming split into differentiated (and sometimes non-communicating) segments, when they should be well connected phases of a single procedure. Thus, during the phase of incorporation, there may arise problems that can longer be resolved because the final Community decision has been taken. However, this situation could have been avoided with appropriate forethought.

In many cases what is lacking is a clear prior understanding of the domestic impact of European legislation, of the regulatory changes to be addressed, sometimes in several areas, of the legislative amendments that will be required or of the difficulties posed in Spain by certain categories or concepts.

1.3. Suggestions for improving Spanish participation

From the preceding overview, and having assessed Spain's experience in this respect, we can now propose certain guidelines for enhancing Spanish participation to ensure that Community rules incorporate Spanish priorities and that subsequent regulatory application is neither dysfunctional nor excessively complex.

a) Bring State action forward to participate in the initial phases of preparation of initiatives

Special attention should be paid to the initial development of initiatives. Accordingly, we must strengthen the capacity and effectiveness of Spanish responses, and especially those of the internal administration, to all types of Commission actions pertaining to this field (with particular regard to Green Papers). Going beyond this enhanced responsiveness, a proactive attitude should be encouraged, such that Spain promotes the adoption of initiatives or studies on actions likely to be addressed more effectively from a European standpoint.

To achieve these improvements, and given the extent to which Community rules, and in general the "European element", are actually or are expected to be present in the functions performed by the State administration, it is necessary to examine whether sufficient administrative support has been provided to this "European element" and whether such support has evolved in accordance with the expansion of this outlook in recent years. These questions should be posed, on the one hand, in relation to the centre of gravity and dynamism of European action represented by the State, but, above all, in relation to each of the ministries.

At present, the centre of gravity for European action within Spain is located in the Secretariat of State for the European Union (SEUE). This body needs to be aware of the initiatives that are developing in the European Union; it must promote and vigorously participate in the necessary planning for action in Europe; it must comprise the channel for transmitting proposals and reactions to them, between Europe and the diverse ministries; and it must have the means and resources to do so.

Each ministry must acquire organizational capacities appropriate to the European impact in its area of interest. It should establish or reinforce a department that is specifically mandated to monitor European actions, to achieve a coordinated response within the ministry and to be alert to foreseeable initiatives, taking into account existing rules and the agenda and priorities set periodically by the Commission and the Council. Thus, all

projects and draft directives, regulations and decisions issued or distributed by the European institutions should be examined in the corresponding ministerial departments to select those of greatest relevance or interest to Spain. This should be done using explicit powers conferred by legislation to identify the office or department that is most knowledgeable on European issues within each sector. In this respect, a useful example is the system applied in Germany, which has a delegate for European affairs in each ministry and directors-general for the European Union in each of the various departments. Thus, we require an office that specializes in European Union affairs, that has a generalist outlook within the department, that effects coordination both within the ministry and with other ministries (as well as with the Autonomous Communities) and that constitutes a smoothly operating channel of communication with the SEUE. Given the design of departmental organization in the Spanish government, the best location for such an office would be within the Sub-Secretariat; depending on the case in question, it could be configured either as a Directorate-General for European Affairs or as a revised General Technical Secretariat, one redesigned with greater attention to European issues, supported by a specialized Sub-Directorate General, dedicated to these concerns.

b) Impact studies and legal support

In close connection with the above, it is important to plan with a view to achieving predetermined goals. Multiyear planning would impose a periodic reflection about the objectives to be achieved in the medium term, with the intervention of the State and the Autonomous Communities. Short-term scheduling would also be needed, depending on the programmes arising from the Commission and the Council, as well as on Spanish needs, for each sector and as proposed by the ministries in their respective fields.

In this context, it would be possible to select the initiatives considered of greatest interest for Spain and in this respect to set up impact studies (legal, economic, social, environmental or any other area of interest, depending on the initiative in question)³⁴, identifying and ranking Spanish interests, compiling useful information and data for subsequent negotiations and even sketching out a road map with controllable milestones. To do so, this information must be obtained in advance from the sectors in question. By these means, the administration would enjoy solid support for its actions to influence the configuration of Community initiatives.

A factor of particular importance is the legal perspective (as shown by the effectiveness of the British model), which in Spain would benefit from a substantial increase in the human and material resources, within the State Legal Service, that deal specifically with European law (and in particular, those available to the SEUE). Let us recall that in the British model, the legal advisers to the European Secretariat (within the Cabinet Office) promote collective discussions among lawyers from different departments after any significant development of Community law or after ECJ case law, and that the department of the Treasury Solicitor reviews all cases pending before the ECJ to decide on intervention when national interests may be affected. It is therefore advisable to apply ways and means to enable the Spanish administration to be better advised of European law and its development, and to consider Spain's possible participation in issues where, at first sight, national interests might not appear to be involved.

Legal studies and analyses are of enormous potential value; in negotiations and also in facilitating the subsequent incorporation of European law into Spanish legislation, outlining the necessary rules for its

³⁴ The goal would be for these impact studies to be extended to all initiatives, adapting their content or intensity to Spain's interest in each case.

implementation or internal application, preparing the legislative amendments required and detecting problems that may be resolved straightforwardly at this stage... these actions may all become intractable when the Community decision has already been taken. Together with the above-mentioned aspect of the impact on the Spanish legal system, it may be important to analyse matters from the perspective of the established legal basis and its place within the Community legal order, making a constructive yet critical examination of the study made by the Commission and taking account, where appropriate, of the jurisprudence of the European Court of Human Rights. Such an examination could be particularly beneficial during the negotiation process.

The optional referral to the Council of State of specific issues or studies, or the commissioning of reports or studies on initiatives of singular importance or complexity, might be useful and convenient instruments, for determining and also for defending the Spanish position in the decision-taking procedure, and also for the subsequent incorporation and implementation of European rules. Moreover, they could help strengthen the vital connection between the creation of Community legislation and its incorporation into national law.

Consequently, the Council of State might function as an organic substrate enabling this continuity between the two phases of the process, during the first of which it would foresee problems and probable outcomes for incorporation, while in the second, possible solutions could be proposed in view of the Community consensus achieved. This proposed role contrasts with the present state of affairs, in which the Council of State only intervenes at the end of the process, when the Community decision is taken and is final; moreover, the schedule for incorporation is presented in such a way that fundamental options cannot be altered without excessively delaying their ultimate approval, with all the consequences of this responsibility.

c) Greater openness and Europeanization of the domestic administration

There is a need for greater openness and more generalised Europeanization in the context of Spanish governance, in particular as regards the internal administration. Stress should be laid on the fruitfulness of contacts and of bilateral and multilateral meetings, in different areas of Community activity, both within the institutions of the Union and also with interest groups and with other States. We do not seek to sway political action in one direction or another, but rather to highlight the desirability of strengthening the organizational or procedural basis for this increased openness.

Regarding the institutions of the Union, we wish to enhance cooperation with the Commission and to seek a closer, more strategic relationship with its services and staff (in particular, with those who are most familiar with the situation in Spain or with the issues to be addressed in each case). Support should be given to promoting Spanish officials to positions of service and responsibility in the Commission and in other institutions and bodies of the European Union. Conversely, the Spanish government could benefit significantly from the European experience of Community officials who, with incentives not necessarily or exclusively financial, might decide to join (or rejoin) the Spanish administration. Furthermore, we emphasize the growing importance of intervention by the European Parliament in decision-taking. Hence, its committees, subcommittees and speakers are becoming increasingly influential, and this draws our attention to the potential importance of actions regarding the MEPs (and not only the Spanish ones), paying attention to their profile and, where appropriate, encouraging the greater recruitment of back-room staff.

With respect to stakeholders, our aim must be to identify common priorities (and thus to be in a position to coordinate strategies) and to acquire a reliable database in support of negotiations. And this must be

done, not just in relation to the European groups, but also with Spanish ones – whether or not they are integrated within European associations – thus forging an initial contact that will doubtless be reinforced in the future, as we shall discuss below.

In short, there is an evident need for strategic action in relation to other States, given the importance of qualified majorities and blocking minorities in the give-and-take of negotiations and so that certain decisions may be taken, and such a function would best be applied in the framework of the SEUE. It could be done, for example, in the way that Germany organizes its bilateral relations from the Ministry of Foreign Affairs, or via the numerous Attachés for EU Affairs posted to the German embassies in all Member states, as well as in those in candidate countries. In Denmark, there has been much recent insistence on the importance of having prompt access to information on the attitudes of other Member States regarding the proposals to be negotiated³⁵.

These concerns should be considered with respect to the 'Community' suitability and training essential of civil servants involved in these areas, in each ministry. In the Spanish public sector, there must be stronger language skills (especially, but not exclusively, English), better negotiation techniques and a more profound knowledge of European Union functioning and law (and, indeed, of public sector administration in other Member States). While acknowledging the efforts made in recent years, we must emphasize the importance of these instrumental factors, even if their effects are not self evident in the short term.

To achieve these changes, one possibility would be to increase the stringency of requirements in the selection of personnel, but above all, what is needed is to allocate greater resources to the promotion and retraining of the present staff, to provide incentives to skills acquisition and

³⁵ Thus, a report on the reform of the approach to European affairs by the Danish *Folketing*, dated 10 December 2004, reiterates the importance of having this information.

to developing staff exchanges or redeployments abroad, thus contributing to forging networking possibilities in Europe.

In relation to this point, the Treaty of Lisbon introduced in what is now called the Treaty on the Functioning of the European Union a new Title XXIII ("Administrative cooperation"), in which Article 176D, paragraph two, stated that the Union may support the efforts of Member States to improve their administrative capacity in order to implement Union law. And it added, "Such action may include facilitating the exchange of information and of civil servants as well as supporting training schemes", for which purpose regulations would be adopted under the ordinary legislative procedure. Accordingly, Spain must take an active part in the development of these norms and implement suitable measures for their effective implementation.

d) Introduce practices for the control of translations

The Spanish version of EU rules has full legal force, but it is often a translation of an original text in English or French, which served as the basis for negotiations. The translation sometimes involves expressing in Spanish certain categories or terms that do not have a precise equivalence in our law. Given the rigour and nuances of some legal terms and the effects that may be caused by any alteration, however slight, of the intended meaning, all possible care should be taken in the translation process³⁶. In consequence, the expertise of the lawyer-linguists of the European institutions may need to be complemented with specific technical knowledge of the Spanish sectoral standards to be applied in incorporating Community rules into the domestic system.

To ensure fidelity to the intended meaning of the European rules, it would be advisable for the person who has overseen the development of negotiations to supervise the translation process; furthermore, the

³⁶ A recent example, among others, of various dysfunctions resulting from these differences is evident in Opinion 32/2007 of the Council of State.

incorporation of the final text into the Spanish legal system is facilitated if this supervision is carried out by those who have to implement these standards together with the domestic ones. Therefore, in an environment in which extended language skills are required of officials in sectoral bodies, it would be most effective for the people involved in the negotiations to also control the resulting translations, from the Commission's first proposals (informing the Commission's translators of the Spanish delegation's position concerning the best translation into Spanish of any particular term) until the rule is finally adopted and published and it is clear that no errors remain to be corrected. To this end, it would be very useful for negotiating teams to combine both legal and technical expertise. This would facilitate greater accuracy in the Spanish version of Community rules and a better expression in the latter of the categories and concepts commonly (or least uncommonly) employed in Spanish law.

2. Coordination within the General State Administration

This is a point of the utmost importance, which includes aspects of interministerial coordination at both organic and procedural levels. Let us clarify, at the outset, that in this respect, and also with regard to the participation of the Autonomous Communities, as we discuss below, all that is said is directly relevant to the descending phase. Nevertheless, we must avoid situations in which a misunderstanding of systemic requirements may produce dissociations fragmenting the coherence of the point being made, and giving rise to repetition or impeding clear understanding of the real need for coordination.

2.1. Sectoral action and the need for coordination

a) Tension between sectoral action and the unity of action

The administrative structure of participation in the European Union (discussed in the previous chapter) concerns two types of action: sectoral action, which is favoured by departmental specialization, and unity of action, which is the goal of the coordinating bodies and their resources. These two types of action are potentially divergent, embodying contrasting principles that inevitably produce tension, which must be resolved. This tension is reflected at the two levels referred to above (internal and external).

In Spain – the internal level – some sectoral ministries are jealous of their skills and of their technical and practical knowledge of the subjects under discussion and negotiation in Europe, with all that this entails in determining Spain's position and in the course of negotiations. However, to ensure unity of action and the coherence of the Spanish position, there are bodies that must arbitrate the inevitable conflicts that arise between the positions taken in each case by such departments (SEUE, CIAUE, the Government Executive Committee for Economic Affairs, etc.).

In Brussels, at the external level, there are the same two lines of action, although in this case the centrifugal forces are weaker and those of cohesion more intense, revolving around the figure of the Ambassador/Permanent Representative. This greater cohesion is facilitated by the smaller size of the REPER (which has sometimes been described as an Administration in miniature) and by the daily meetings of its members. Moreover, certain persons and groups, such as coordinating counsellors, *Mertens*, *Antici*, the Deputy Ambassador and the Ambassador, have specific responsibilities for ensuring or facilitating coordination and unity of action. Nevertheless, and as stated above, the REPER Councils largely adhere to the lines of distribution of powers established for the internal Administration (and not those for European policies), with Counsellors and advisors reporting directly to their ministries of origin. In addition, from a functional

standpoint, let us note that negotiations are conducted on a sectoral basis, both in working groups and in Council configurations.

Between these two levels of operation (in each of which sectoral action and the goal of unity of action coexist) vertical lines of connection can be discerned, by means of which information and instructions are channelled and Spain's position is determined.

The SEUE-REPER combination is the keystone to coordination, providing an overview and modulating the positions held by sectoral negotiators in the working groups. This function is complemented by developments within other channels, connecting diverse sectoral lines of action and whose effectiveness is derived from the high-level contacts between the REPER Counsellors and their ministries of origin. Another contributing factor in this respect is the habitual – and necessary – practice of Spanish negotiators in the working groups being posted from Spain, thus directly transferring the sectoral vision to the European stage.

Despite the achievements of Spanish participation in the European Union, the Government's consultation request reflects the need, now that over 20 years have passed since our accession, to consider improving the current degree of inter-ministerial coordination. Deficiencies in this respect, which have been denounced by various parties, can lead to actions becoming fragmented, to an absence of coherence, and to these effects being transferred to the phase in which Community law is incorporated or implemented.

On the other hand, overcoming problems of (a lack of) coordination does not mean eliminating the sectoral action that is useful and necessary (which might occur if the vertical lines of sectoral connection were severed, and a single, two-way channel between SEUE and REPER reinforced). The sectoral nature of negotiations in Europe, both at the lower levels (working groups, committees) and at the higher ones (the Council configurations),

the call for specialised technical expertise and for policy decisions to be taken at departmental level, and the necessary continuity between the negotiation phase and the transposition of Community law... these are all examples of the need to properly reconcile unity of action (coordination) with sectoral (departmental) action.

Accordingly, what must be avoided is any fragmentation of the action taken; in positive terms, the sectoral position presented in Europe should be previously coordinated in Spain. The situation in practice, however, varies depending on the area in question and the level at which the national position is presented in Europe.

b) Sectoral action and unity of action in the decision-taking process

In the initial stages of an initiative and while it is being debated in the Commission, there is no national coordination as such, but it is not appropriate to speak of a lack of coordination, because the national experts assisting the Commission do not do so as representatives of their countries but as experts on whom the Commission relies in order to develop its regulatory proposal. Nevertheless, as this first contact between the Commission and the national experts gives notice that countries need to begin preparing their positions in the Council, from these early stages of the process, it would be advisable for internal channels to be implemented in order to coordinate the national position to be adopted in the Council. From another standpoint, proactive rather than reactive, it should be noted that these means of coordination would have to come into play, or at least be advised, before sectoral areas promote initiatives that could be favourably received by the Commission. In any case, it is apparent that the need for internal coordination while an issue is being addressed within the Commission is proportional to a country's effective participation in the discussion, and that this question must be evaluated if Spain's participation

in these early stages of consideration of Community policy proposals is to be enhanced.

Coordination problems arise, above all, in relation to the Council's work, in its different areas, reflecting the importance of the State's participation in this work.

With respect to the working groups, sectoral action takes precedence over coordinated action. The hundreds of working groups, subgroups and committees are distributed periodically among the various ministries, so that negotiations are led by the administrative unit of the department that is responsible in each case. In Spain, unlike in other Member States, there are hardly any groups that are jointly responsible to various ministries, and problems of interdepartmental coordination are more acute in areas in which the working group's activities affect more than one department.

In such cases, the ministry concerned may present the dispute to the CIAUE for adjudication, but this body, in practice, has little or no decision-taking power, and is often unable to resolve the question. Therefore, coordination is more commonly achieved informally, through the good offices of the two Directorates-General of the SEUE, which have the power to set up technical working groups or to propose the constitution of a joint delegation, with the participation of the REPER, to negotiate within the working group in Brussels.

Since 70-80% of issues are settled in this preparatory phase, it is vital for the national position to be properly coordinated at this stage. Otherwise, problems in this respect might reoccur and, among other consequences, Community legislation might be inadequately incorporated or implemented.

Within the COREPER, a generalist outlook tends to prevail. Instructions are prepared by the SEUE, assisted by the CIAUE but also, and more importantly, by means of bilateral meetings with the ministries

involved (with the participation of REPER negotiators recalled to Madrid). If a common position or coordinated instructions cannot be achieved, it may be decided to refer the decision to the Government Executive Committee for Economic Affairs or to the Council of Ministers (although this is rarely done) or by issuing flexible, broad-ranging instructions for the REPER to act with a certain margin of discretion. This is by no means a negative outcome; on the contrary, it equips the REPER with negotiating instruments that may prove very useful. What is not so positive is the fact that the margin for negotiation is derived from defects in coordination rather than from a jointly-agreed decision adopted in accordance with strategic priorities and alliances.

Issues that cannot be resolved by the COREPER are passed on to the ministerial configuration of the Council, whose sectoral nature again tends to favour a departmental outlook, and so there is a risk that the position finally adopted by the State may fail to take adequate account of the positions of each of the ministries involved or Spain's strategic interest. It is therefore necessary for the Spanish position, with all interests involved being closely coordinated, to be clearly specified, whenever possible, at lower levels and with enough support to maintain its main features during its examination by the sectoral configuration of the Council. Accordingly, and over and above the use of flexible instructions issued by the SEUE to the REPER, the instruments for technical and political coordination must be made more effective.

2.2. How can coordination be improved?

The current situation regarding interdepartmental coordination revolves around the CIAUE and the SEUE. There is a widespread perception that the effectiveness of the CIAUE could be improved and that its ordinary functioning is somewhat lethargic, with meetings being held only every two

or three weeks. It is also commonly observed that there is a need to enhance the political authority under whose presidency it operates.

To discover the reasons for this limited usefulness and to establish how it could be increased, it must be borne in mind that, in practice, CIAUE meetings usually involve officials of a lower hierarchical level than that stipulated in the legislation. Consequently, its decision-taking powers are reduced, which in turn consolidates the trend for lower-ranking officials to attend these meetings. Therefore, the decision-taking function is largely shifted to the Government Executive Committee for Economic Affairs, that is when the CIAEU is not simply ignored or under-deployed.

The Council of State has been informed that another question often raised within the Administration is the need to strengthen political and administrative leadership in the offices responsible for coordination. To do so, we do not consider it necessary to create a Ministry for European Affairs; this would present the advantage of having a department dedicated exclusively to such issues, but to be truly effective, it would apparently have to be associated with a government vice presidency³⁷.

The deficiencies observed suggest that three lines of action should be addressed, in order to improve coordination: first, concerning technical levels; second, in an explicitly political outlook; and finally, emphasizing, once again, the overall view of the matter achieved by forward planning, and ensuring that both the ascending and descending phases are characterised by continuity.

By these means, we would seek to improve the narrow conclusions of sectoral outlooks and to better express the flexibility of instructions transmitted from Madrid to Brussels; this flexibility would not be based on deficiencies in coordination, but driven by the effectiveness of such

³⁷ In any case, the involvement of two departments is not without serious disadvantages, as became apparent in previous experience, in addition to the increased public spending and greater distance from foreign affairs that this situation would produce.

coordination, thus cultivating an understanding of diverse viewpoints and facilitating their negotiation and adaptation to the demands of strategic alliances, the search for blocking minorities, etc.

a) Technical coordination

Technical issues must be coordinated both within each department and among all departments. For both purposes, and in the framework of a generalised "Europeanisation" of sectoral action, it is strongly recommended that a specific body be created or strengthened, and assigned responsibility for the European dimension of issues within the area of competence of the department. Such a body should monitor the activity of the Commission and of the Council working groups, and also review all projects and drafts of European rules relevant to its area of interest (as mentioned above with respect to the German system). This body, reporting to the Sub-Secretariat, should have the appropriate powers and the means necessary to carry out its functions effectively – we would suggest it be assigned the rank of Directorate-General. These powers should be attributed clearly, precisely and specifically (compared to the current situation, as described in the previous chapter), and include two tasks that are very significant to the present matter: first, that of facilitating coordination, at the administrative level, with other ministries; and second, that of ensuring intradepartmental coordination between the different sectoral DGs. For the latter purpose, it would be useful to have a mechanism (organic or functional) involving all areas of the ministry with sectoral European interests, under the direction of the Sub-Secretary or the General Technical Secretary.

At the interdepartmental level, consideration should be given to assigning responsibility for coordination to the sectoral ministry with relevant or primary jurisdiction (the *Federführende Ministerium* in Germany). This ministry would lead negotiations, but would immediately refer the initiative to the others (namely, to the above-mentioned specialist

agency for European affairs in each department), which need to know as soon as possible the criteria to be adopted regarding Spain's negotiating position. Thus, a distribution that is usually performed (by the SEUE) in the incorporation phase is brought forward to this ascending phase, so that any interdepartmental discrepancies may be identified as soon as possible and, in any case, once a Commission proposal has been adopted, to ensure the Spanish position is already coordinated when the proposal is submitted to the Council.

To this end, the Ministry responsible for coordination should inform the other departments concerned about the negotiating position, obtain their reports in this respect and, if necessary, organize meetings to resolve any outstanding issues³⁸. The British approach to this question reflects the value of paying special attention to legal-Community aspects in addressing interdepartmental differences, an aspect in which an important role could be played by the office specialized in European affairs within each Ministry³⁹.

Persistent discrepancies and general issues could be addressed in a technical coordination body, of variable composition (to be determined *ad hoc*), constituted of officials from the ministries involved (General Technical Secretaries or offices specialized in European affairs) and in particular, from the Ministry of the Economy, and with the decision-taking capacity of a politically reinforced SEUE. The political reinforcement of the SEUE could benefit from its reporting both to the Ministry of Foreign Affairs and to the Ministry of the Presidency and Vice Presidency of the Government⁴⁰. Formal

³⁸ The good offices of the SEUE in making information available on the status or position of other Member States could be useful, although it need not be responsible for coordination at this first technical level.

³⁹ Consideration might also be given, at this early stage of determining the Spanish position, to participation by representatives of the social sectors, as discussed below.

⁴⁰ Assigning this coordination function, with decision-taking powers, to the Ministry of the Presidency and to the Deputy Presidency of the Government could enable this office to resolve discrepancies, after the Ministry responsible for the issue has attempted coordination. By this

communication to the REPER of the decision taken by this technical coordination body, by means of appropriate instructions, would enable the issue to be settled from these first stages of the process (it would also be useful to inform the REPER of any divergent positions among ministries, at least until such differences are resolved).

b) Higher-level coordination

The scant effectiveness presented by the CIAUE also requires the coordinating function to be strengthened at higher levels, addressing two main aspects: its composition and its location (i.e., deciding which presidency the body should be responsible to).

In order to re-establish the basic function assigned to the CIAUE, it will be necessary to recover its rank (which depends on that of its constituent parts) and the effectiveness of its decision-taking capacity, two aspects that are directly related. A structure incorporating the Under-Secretaries of the different ministries would be consistent with the functions attributed to the latter and, above all, with their reinforcement, as proposed in relation to the European function. Nevertheless, within the Spanish organization there already exists an organ that brings together the Under-Secretaries of various ministries and which is headed by a Vice-President of the Government, with the political weight that this represents: this organization is the General Committee of Under-Secretaries and Secretaries of State. Therefore, a suitable mechanism, consistent with the above-stated requirements of rank and responsibility, would be to explicitly enhance the Europe-oriented functions of this General Committee and to specify these functions in well-focused specific provisions (indeed, this could be done by reference to Article 8 of Act 50/1997, of 27 November, on

means, in any dispute all the ministries involved would be obliged to endorse the political and strategic decision taken.

the organization, competences and functioning of the Government)⁴¹. Locating European affairs as the first item on the agenda (including not only the state of transposition, but also discrepancies between ministries regarding Commission proposals) would benefit coordination at this higher level. However, the meetings of this Committee are preparatory to those of the Council of Ministers, and it cannot take decisions or conclude agreements on behalf of the government (Article 8.3 of Act 50/1997, of 27 November).

It would be preferable, therefore, to create a Government Executive Committee for European Affairs, with real decision-taking authority, headed by a Vice-President of the Government and composed of the Secretary of State for the European Union and Ministers (or Secretaries of State) whose departments play a prominent role in the European Community context (although the specific composition would be flexible, depending on the specific issues to be addressed in each case), together with the Minister for Public Administration and, in all cases, the Ministry for Economy and Finance. Apart from the support this would provide to the coordinating bodies referred to above, it is necessary to assess the impact of coordination priorities at the higher levels of the current CIAUE (without limiting this to financial questions)⁴², the extent to which it would be

⁴¹ The alternative, of trying to restore the position of the CIAUE as a specialized coordinating body with the rank of Sub-Secretariat, would require avoiding or eliminating the possibility of delegation to lower ranking positions, and strengthening its presidency. In any case, this option would have to be accompanied by the creation of working groups to address technical issues or preparatory work, along the lines sketched out above in the text, and by a more concrete specification of the functions attributed to such groups. However, the organizational overlap with the General Committee of Sub-Secretaries and Secretaries of State makes this option doubtful; it would be better to exploit the existing structure, strengthening the functions of interest.

⁴² To date, the CIAUE has been responsible for resolving issues, affecting more than one department, that do not need to be referred to the Government Executive Committee for Economic Affairs; or, where appropriate, for referring to the latter Committee matters whose significance makes this necessary or when so requested by a member of the Interministerial Commission. But these powers – and this referral to the said Committee – were established in the initial text of Royal Decree 1567/1985, when the functions of the CIAUE did not extend to

desirable to counter the sectoral vision currently prevailing in Europe at the highest political level (the sectoral configurations of the Council) and the increased weight of European affairs in Spanish government as a whole (which does not seem to be adequately reflected in the organizational environment).

In short, such a coordination body could report directly to the President of the Government, playing a supporting role in the President's management and coordination functions, with respect to European Union affairs. This model, in fact, does already exist, in the form of the Foreign Policy Council, which was established by Royal Decree 1412/2000, of July 21. This Council has not met the goals established at its outset, but a recent attempt was made to enhance its value, by Royal Decree 1389/2007, of October 29, which established a minimum frequency for Council meetings, created an executive council to ensure the continuity of its operations, and gave the Minister of Foreign Affairs and Cooperation the task of executing the strategies and guidelines set by the Council. Any assessment of the possible development of this model would need to examine its effectiveness in its new configuration and its necessary adaptation to the specific circumstances of European Union affairs⁴³.

c) Ensuring coordination and continuity in the negotiation-incorporation process

In the framework of planning and scheduling European policy, certain working groups within the Council could be assigned the shared

"matters relating to the European Union" (the wording currently in force), but to "economic issues relating to the European Communities" (original wording).

⁴³ If, after resolving the reservations expressed and in full awareness of the dysfunctions that may be provoked, it were decided to adopt this option, appropriate adjustments would have to be made regarding the composition and functions of the body described. These might include the establishment and development of guidelines and strategies to achieve the goals set, fulfil the interests of Spain in the European Union and contribute to coordination between departments and with the different bodies involved in the creation, implementation and application of EU law and, in general, enhance the analysis of all issues related to our EU membership that the President of the Government submits for its consideration.

responsibility of various ministries, when the subject matter in question affects the jurisdiction of more than one department; in this respect, there should be specific mechanisms for conflict resolution and a stronger role for the SEUE in the exercise of its arbitration functions, in order to enhance interdepartmental coordination. Such a structure, perhaps in the form of joint committees, would facilitate the appearance of informal, flexible and fluid lines of coordination between the ministries involved, generalising a joint consideration of questions (which is sometimes conspicuously absent).

Apart from this planning of a general nature, the regulatory impact studies carried out in relation to certain Commission proposals could include, depending on the different areas affected by each such proposal, a forecast of the specific coordination measures required of the ministries involved. This forecast could include questions such as deciding which ministry should be responsible, and which consultations, communications or joint committees could be needed with respect to the proposed new rules (even if initial or general planning procedures do not consider including a joint committee in the working group).

In conducting these studies, and for these specific issues, the institutional support of the Council of State would be useful for resolving problems and overcoming discrepancies, performing or complementing a legal analysis of interdepartmental conflicts, and affecting areas ranging from the negotiation phase to the adoption of internal rules. In this respect, too, the application of such an advisory function is to be recommended.

We also stress, from this standpoint of coordination the need for continuity in the phases of negotiation and incorporation of Community rules, specifically to prevent divergence (and even incoherence) between the position prevailing when the (common) Spanish position is established and that resulting from the eventual transposition. If there were no mechanism to prevent it, sectoral ambitions set aside in the ascending phase might resurface during transposition, and could even block it.

To prevent such an occurrence, the department responsible for negotiation should normally effect the subsequent transposition, and the coordinating action taken to smooth out sectoral differences during the process of establishing the overall Spanish position and during negotiation must be mirrored in the integration phase. In fact, assigning responsibility for coordination in the ascending phase to the ministry with jurisdiction in the matter is just the prelude to assigning responsibility for the transposition of the European rules: thus, a single body would be responsible for directing negotiations, coordinating divergent positions, incorporating the European rules into national legislation, as appropriate, and proceeding with their implementation. To ensure that jurisdictional debates resolved during the negotiation phase are not reopened in that of incorporation, it would be useful to establish mechanisms to settle such interdepartmental conflicts, on the basis of the criteria adopted in the ascending phase. To this end, there must be a detailed record of the position taken by Spain and the reasons for doing so, rejecting or postponing consideration of sectoral criteria in this respect. Moreover, the coordination mechanisms should be extended, increased and made more expeditious, where appropriate, before the discussion and debate phase.

3. Participation by the Autonomous Communities

Another important question posed in the consultation request is that of how newly developed procedures for regional participation can be incorporated into the action of the General State Administration. As concerns regional participation in government actions with respect to the European Union, both our identification of dysfunctional areas and any presentation of proposals for improvement must be based on the overall perspective of the channels currently available for this participation, as described in the previous chapter.

3.1. Some general features of the system

As is apparent in the above introduction, rather than a system it would be more appropriate to speak of a network of organizations, agencies, departments and responsibilities, more or less formally connected, which have been created, shaped and modified. These entities operate within a framework of mutual demands and concessions, sometimes involving tense relations between the State and the Autonomous Communities, that have culminated in the regions' achieving their ambition of greatest symbolic impact, that of direct participation in the Council configurations.

A relevant consideration to the above is the fact that the present institutional landscape has evolved, to a large extent, through agreements of various types and degrees of formalization. Nevertheless, the main factor, in principle, is the outcome of the resolutions adopted within the CARCE⁴⁴.

However, the reasons underlying the fact that progress has taken place through agreements such as those stated, as well as the legal status of these instruments, and indeed, even their content (sometimes lacking clear-cut sanction mechanisms) mean that the scope of the provisions

⁴⁴ Agreements referred to in Article 4 of Act 2/1997, which states that these should be adopted as provided for in Article 5 of Act 30/1992 and the Rules of Procedure of the CARCE. The same Article 5 provides for the adoption of agreements by the sectoral conferences, if any, that are formalized under the description Sectoral Conference Convention; Article 8 of the same Act contains a brief regulation of the effects of Sectoral Conference Conventions, stating that in no case do they represent the renunciation of the powers corresponding to the authorities involved, and that any contentious issues that arise in their interpretation and implementation should be resolved by a contentious-administrative court (and, where appropriate, by the Constitutional Court). It should be noted, at this point, that Article 10 of the Rules of Procedure of the CARCE, approved on 5 June 1997, states that agreements "shall take effect upon their adoption by the Conference, for those members who have voted in favour", adding that the Autonomous Communities that have not voted in favour "may adhere to the agreement subsequently".

contained is often limited (and so, therefore, is that of the connections within the above-mentioned network), thus giving rise to certain dysfunctions that are perfectly apparent to those concerned. Sometimes the provisions set out in an agreement differ from those established by legislation; indeed, there have been cases in which such provisions appear to exceed the powers of the body approving them. Yet, paradoxically, the lack of an express provision regarding the effects of non-compliance can prevent the escalation of conflicts or other types of dysfunction.

On the other hand, it is understandable, if not indeed, inherent to the system, that there should be a diversity of situations, given the plurality of the Autonomous Communities, whose interests and priorities do not always coincide. This feature, together with the facts set out in the previous paragraph, accounts for the existence of different configurations of governmental bodies within the network and the connections between them, with varying degrees of development and with equally varying practices. In short, there is indeed no homogeneous configuration or operation of regional offices and representations; but neither is there any such homogeneity in the sectoral conferences, nor in the expression of regional participation in European Community institutions. Each Autonomous Community has its own form of participation and of coordination with the others and with the State.

In this sense, it can be perceived that having achieved their goal of participation in Council configurations, among certain Autonomous Communities there is little interest in further involvement at other levels or in institutions of less symbolic impact. In other cases, rather than disinterest it may be that their resources or technical capacities are insufficient to undertake such participation on multiple fronts, or they may lack the coordination necessary for each region, periodically and sector-by-sector, to play its rightful part.

To avoid the dysfunctions that may arise from these circumstances, documents of undoubted value (agreements, standards of conduct, best practice guidelines, rules for participation, etc.) have been issued by the Ministry of Public Administration and by the CARCE. In general, these have helped made the system viable, by skirting or overcoming the major obstacles arising in practice. Some of these documents, especially those issued very recently, highlight the infra-utilization of certain mechanisms, together with efforts by both national and regional authorities to overcome problems, on the basis of mutual trust and of respect for certain principles (which are also set out in particular agreements). Nevertheless, these measures have not prevented the occurrence of all the problems identified, and further rationalization and regulatory clarification is needed to make the system stable and secure.

3.2. Rationalization and regulatory formulation

In the opinion of the Council of State, the circumstances described above call for certain measures to be adopted to consolidate the situation and to establish the necessary security and stability, within a regulatory framework taking into account the need to achieve coordination on many fronts and to rationalize the current situation, regarding both internal participation and, above all, direct participation.

a) Establishing a regulatory framework of coordination

Now that the participatory ambitions of the Autonomous Communities are being achieved, through channels such as those described above, it is necessary to equip these channels with an appropriate regulatory support, to systematize the resources currently available, to reinforce the elements that have proved to be most useful and to eliminate conflictive overlaps. This can be done by creating additional tools and by optimizing human and material resources.

The latest reforms to the Statutes of Autonomy incorporate provisions addressing regional participation in matters relating to the European Union, in establishing the positions of the State, and in European institutions and bodies. They also call for a regulatory framework to be established and on occasion make direct, explicit references to the requirements set out in national legislation⁴⁵. Quite clearly, the statutory provisions, which to a large extent reflect current practice, must be taken into account in developing the overall regulatory framework.

The approach adopted to regional participation in determining the national position should take into consideration the different possibilities for the constitutional distribution of powers, in order to determine the priority to be assigned in each case to the position expressed by the Autonomous Communities (a priority that can be as high as "decisive", notwithstanding that, as in Germany and Austria, the State can play a separate role when issues of overriding constitutional importance are involved). Another relevant factor is the extent to which matters affect some or other regions; indeed, bilateral mechanisms may come into play if such matters affect one Autonomous Community "exclusively".

The State's power to define regional participation is limited by the self-organizing powers of the Autonomous Communities; but in any case, the State can create bodies to make this participation effective and to incorporate regional interests into the position adopted nationally. It can also develop resources and instruments to ensure inter-regional coordination for subsequent application within State-wide action. The

⁴⁵ For example, in some provisions of the Statute of Autonomy of Catalonia, after the reform produced by Basic Law 6/2006, of July 19. Thus, Article 184 provides that the Generalitat shall participate "in the terms established by this Statute and the laws of the State" in matters relating to the European Union that affect the powers or the interests of Catalonia. Article 186 refers to participation in the formation of State positions and its paragraph 1 also refers to "the manner specified in this Statute and legislation on this matter." In similar terms, see Articles 230 and 231 of the Statute of Andalusia, amended by Basic Law 2/2007. Different provisions are set out in various other statutes, such as that of Valencia (Article 61), after its reform under Basic Law 1/2006, of 10 April.

possible content of this regulatory framework will require preparation pursuant to the Government Act and to Parliamentary Regulations, among other standards, but certain areas should be pointed out where evident shortcomings or inadequacies must be corrected.

b) At the internal level: the demands of manifold coordination

Here we observe a new dimension to coordination: as well as that which is necessary among the various sectors of public action, there must also be coordination among the regions, so that a joint position may be taken into account in State-wide action, through appropriate mechanisms.

At the level of inter-sectoral coordination, the problems encountered in national terms, among ministries, also exist with respect to participation by the Autonomous Communities. Paralleling the former, sectoral standpoints here can be discerned at two different levels (the regional governments and the State, rather than the State and the European Community), but in this case they are also determined by departmentalization in both administrations: the regional ministries in the Autonomous Communities (whose internal coordination, logically, is their own concern) and State-level sectoral conferences. At the State level, the existence of issues that affect various sectoral conferences makes it difficult to achieve intersectoral coordination. The keystone of this coordination might be located within the CARCE, but solutions must be found at the technical level. This might be achieved by strengthening the functions of the CARCE Secretariat, the Committee of Coordinators and the working groups, in particular as regards their coordination with the support bodies that, under different names (councils, committees, groups, etc.), are to be found in the various sectoral conferences.

With respect to coordination among the Autonomous Communities, experience has shown that basic channels should be established to ensure this coordination; while there does exist a wide margin of discretion to

establish inter-regional cooperation and coordination mechanisms, the fact remains that, when the State must be informed of an agreed position or criterion, there must be due record of this, i.e., the State must be able to verify the effective participation of all concerned in the decision being communicated. In any case, the State, as the body expressing the popular will in European bodies and institutions, must assume the role of providing the means and instruments necessary for the formation of that will. Accordingly, it must provide supporting resources, such as computer facilities to enable the online publication of the necessary documents and information, as well as enabling access and exchanges of views among the relevant agencies in each Autonomous Community. This could also serve to rationalize the procedure for transmitting information and documentation, making it more agile and avoiding the overlaps and duplication of effort that are apparent today.

Sectoral conferences have proved to be a useful tool for inter-region coordination and for reaching agreements with the State, and these conferences have been significantly promoted by the actions of the CARCE. However, their degree of functionality in relation to European issues may vary considerably, and this is affected by the diversity of regional powers in each field, as well as by the different levels of intensity of Community action in each sector. In any case, strengthening the conference working groups would make them more responsive, and help overcome the technical issues that arise (this consideration recalls the high percentage of issues that are resolved in the Council working groups in the European Union). Therefore, they need to have sufficient decision-taking capacity. It might also be useful for a member representing the CARCE to be present in each such working group.

Finally, incorporating the regional position into State actions would be better assured if the determination of this position, agreed within the sectoral conference (or its working groups) were formalized, with more or

less flexibility, and transmitted to the relevant ministry (via the sectoral conference), or to the SEUE for referral to the REPER (via the CARCE). This second solution would be more appropriate for cases in which exclusively regional competences were involved.

Another mechanism to enhance mutual trust in the State-Autonomous Communities relationship should also be considered, given the need for complete dependability for the system to function properly. After a position or criterion has been agreed in the sectoral conference, it should be communicated to Europe, in principle, via the formal SEUE-REPER channel. The REPER has a Council for Autonomous Community Affairs, with the status and functions described above (including that of "liaising" with the Autonomous Communities). The SEUE, too, could be endowed with such a "liaison agency" to facilitate collaboration between the State and the Autonomous Communities and to contribute to mutual trust in transmitting joint positions to Europe, under the principle of unity of action.

Ultimately, one of the CARCE working groups would forward initiatives and proposals to the technical bodies of the sectoral conferences; in the event of any discrepancies, intersectoral coordination decisions would be taken by the CARCE, and those regarding coordination between Autonomous Communities, by the sectoral conference. Furthermore, it would be necessary to ensure the communication of the position or criterion to the State negotiator, to be taken into consideration as appropriate in each case, depending on the distribution of competences in the matter.

Finally, at the apex of the system, it might be constructive, as part of the institutionalization of the Conference of Presidents, to confer a specific duty on the foremost political figure in each region to seek agreement and to address long-term differences among them and between the regions and

the State⁴⁶. At the highest political level, this initiative could help unify the three levels of coordination discussed and make a valuable contribution to strategic decision-taking regarding the European Union.

c) Rationalization of direct participation

Special consideration should be given to the necessary rationalization of direct participation; at present, more than the fulfilment of regional aspirations, this is a necessity arising from the fact that administrative action in certain areas corresponds more to the regions than to the State. The usefulness of direct participation stems from the fact that the technical and practical resources and skills possessed are, in certain areas, more specialized in some regional governments than in the General State Administration.

However, there is still relatively little experience of direct participation by the Autonomous Communities in European institutions and bodies; certain difficulties are apparent and require considerable rationalization and, perhaps, imagination to be overcome. In this respect, it is significant that the factors determining the participation of certain regions and not others in preparatory phases and in Council configurations respond to different criteria in different sectoral conferences (such as the date of approval of the Statutes of regional self government, the population criteria applied, political dynamics – the most complex aspect of the impact of the issue in each region – and priority may even be decided by drawing lots or by alphabetical order). Moreover, there is no guarantee that a given criterion (or combination of criteria) will persist in each area, and so there is an absence of the necessary stability or security for the Autonomous Communities left behind at the outset.

⁴⁶ Note the valuable role played by a similar figure in the Austrian system, as discussed in the previous chapter.

In certain cases, too, an Autonomous Community may have insufficient technical capacity or "European" preparation; this may be another consequence of the still-short lifespan of the system, but it should be noted that the acquisition of experience, for each region, will inevitably be an intermittent process due to the successive nature of their participation. The problem is exacerbated when a single Autonomous Community must participate directly in several areas simultaneously (with all this entails in terms of dedicating resources, skills and coordination), due to the chance outcome of the criteria used in each case.

In this respect, another complicating factor is the brevity of the periods during which each Autonomous Community assumes direct participation in a particular area. Although attempts have been made to endow the system with some continuity (through a system of regional troikas), only limited success has been achieved and there continues to be a significant squandering of resources and experience. Furthermore, short-term periods of attention become even more dysfunctional if, with every change, the channels of coordination, specifically created for that brief period and during which the Autonomous Communities must adapt to them, are reshaped and transformed.

In addition, the interests of the regions may differ or even be directly opposed, which suggests that solutions should be sought through formulas such as the Open Method of Coordination.

The complexity of the above-described problems requires us to seek solutions that would fit within the regulatory framework referred to and provide the Autonomous Communities with a certain degree of stability and security. The optimization of resources, especially human ones, and the effective use of synergies are criteria that must give fundamental shape to the solutions ultimately adopted.

It would be beneficial to have a legislative definition of homogeneous systems of coordination, although the corresponding regional competences cannot be overridden. However, as observed above, the State is the means by which the popular will is made manifest in European institutions and bodies, and must provide the means and instruments for the expression of that will. In particular, it is essential that resources and instruments be provided for networking and for profiting from the work carried out by the technical offices of the sectoral conferences, which can continue to perform their inter-regional coordination role in support of the Community that, in each case, is responsible for such coordination.

It is also necessary to achieve greater specialization for direct participation in Europe, including the management and coordination of a jointly-agreed regional position. Therefore, we recommend that the periods during which each Autonomous Community is responsible for a particular area should not be excessively short. But more could be done; perhaps through (voluntary) specialization among the Autonomous Communities according to their specific skills and interests, technical expertise and degree of involvement. In technical terms, it is preferable for all concerned that negotiations be led by the Autonomous Communities with most experience and technical ability, and not by means of a rigid rota system based on relatively inflexible factors.

Thought should also be given to the possible merits of delegating specialization not to a single Autonomous Community but to several (or all of them), which would form compact working groups to take responsibility for the management and coordination of the regions' position, incorporating regional specialists in each area of interest, not in terms of their origin from one region or another, but according to their ability and experience. This solution could be developed by technical bodies, reporting to the CARCE or linked to it. In close collaboration with the working groups of the various

sectoral conferences⁴⁷, they would nominate the team, composed of personnel from the regional administrations, to be responsible, over extensive periods, for establishing inter-regional positions (and, where appropriate, to agree the negotiating position with State officials and to participate, on behalf of all the Autonomous Communities, in negotiations within European Union institutions)⁴⁸. The above-mentioned relationship with the CARCE or the sectoral conferences could also contribute to achieving greater continuity between the ascending and descending phases of the European legislative process.

In summary, while some Autonomous Communities may consider the rotation system, albeit less flexible, to be inalienable, for political reasons, at the technical level all could benefit from a different approach, based on voluntary participation, technical expertise and the degree of involvement (fundamentally dependent on the experience of the personnel in question). On this point, the use of a more imaginative strategy appears to be necessary.

4. Participation by groups representing social interests

An issue that is not made explicit in the Government's consultation request, but which inevitably arises in addressing the questions posed, concerns the intervention of groups representing social interests and of social dialogue in the regulatory process and in Community decision-taking.

⁴⁷ These bodies could be dissociated from the Sectoral Conferences or simply sideline the State presence. In the opinion of this Council of State, their presence need not be disturbing (notwithstanding that, in certain cases, they may be attributed the right to speak but not vote). They could provide an overall view, taking into account other competences that may be involved, preparing the integration with the State position and contributing to the necessary continuity between the ascending and descending phases.

⁴⁸ Such a solution could improve participation by the Autonomous Communities in the Commission's implementation committees, and in relation to cases of direct participation in Council organs, would not pose any obstacle to the appointment to the team of a technical manager by the body responsible for exercising this direct participation by the regions.

Specific attention to this intervention would contribute to achieving the goals set out in the consultation request.

4.1. The current situation

The headquarters of the European institutions in Brussels attract the presence of many interest groups (stakeholders). At present, several thousand are registered, of differing types and origins (from the representations of Member States' territorial entities to non-European foreign foundations). In Spain, when we speak of social participation in policy creation, the listener's first thought is of the organizations representing the interests concerned. On the basis of Article 105 of the Constitution, at the national level these organizations are regulated by Article 24 of the Government Act, as well as by other relevant provisions in this area, such as Article 7 of the Constitution. Our approach in this consultation must take into account other variables, not only because it concerns the European decision-taking process, but due to the larger dimensions of the subjects, agencies and organizations whose participation is involved.

Accordingly, in order to achieve the goals stipulated in the Government's consultation request, we must take into account not only the existence of stakeholders, pressure groups or lobbies, as an abstract phenomenon, but also their different types and multiple configurations⁴⁹. At the same time, we should not overlook other types of organizations that may not readily fit into these concepts, such as think tanks and caucuses, entities that originated in the U.S., but which have come to play an

⁴⁹ They may include companies, groups of companies, multinationals, professional or sectoral associations, business organizations, trade unions, NGOs, etc. There may also be inter-governmental groups (which defend the interests of certain public entities with respect to others (for example, those of municipalities versus the State) or inter-State ones (which extra-officially promote the interests of one country within the frontiers of another).

increasingly important role in Europe. Thus, in the European Parliament, the variety of national and political figures has led to the appearance and activity of inter-parliamentary groups, with members of different nationalities and ideologies, formed to defend and promote diverse interests. The term "civil society organization" is used by the Commission in this regard, while recognizing that it lacks a precise definition, let alone a legal one.

In the White Paper on European Governance, the Commission undertook to strengthen the culture of consultation and dialogue in the European Union, observing that civil society plays an important role and that the quality of EU policies is achieved via the widespread participation of citizens in all phases of the process, from policy conception to implementation. Therefore, an opportunity must be provided for citizens to participate more actively in working toward the Union's goals, offering "a structured channel for feedback, criticism and protest". The document also expresses the idea that participatory democracy is a functional complement to representative democracy⁵⁰. Similarly, the Commission Communication "Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission" (2002) states that consultation mechanisms "are part of the activities of all European institutions throughout the legislative process, from the design phase of the policy prior to the proposal from the Commission, to the final adoption of a measure by the legislature and its application".

The permeability to social participation in the decision-taking process has varying degrees of acceptance in each of the institutions, but is recognized in the inter-institutional agreement on better law-making of

⁵⁰ In this respect, we read: "Consultation of interested parties [...] can only ever supplement and never replace the procedures and decisions of legislative bodies which possess democratic legitimacy; only the Council and Parliament, as colegislators, can take responsible decisions on the context of legislative procedures".

2003, which states: "During the period prior to the submission of legislative proposals, the Commission, informing the European Parliament and the Council, shall consult as widely as possible, and make the results public. In some cases, if the Commission considers it appropriate, it may submit a pre-legislative consultation document, on which the European Parliament and the Council may issue an opinion".

More recently, the Lisbon Treaty introduced a new Article 8b of the Treaty on European Union, which provides that institutions shall give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action (paragraph 1); it adds that the institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society (paragraph 2). The Treaty on the Functioning of the European Union also reflects this concern and its new Article 16 A states, in paragraph 1, that in order to promote good governance and ensure the participation of civil society, the institutions, bodies and agencies of the Union shall "act with the utmost respect to the principle of openness." Finally, in the specific area of social policy, the new Article 136a states that the Union "recognizes and promotes the role of the social partners in its scope" and that it should facilitate dialogue among them, within the due respect for their autonomy.

Consequently, it would be useful to identify the channels of participation that enable the entry of society into the activities of the EU institutions. In particular, we shall consider the Commission, the European Parliament and the Economic and Social Committee, taking into account that when a proposal is before the Council, European stakeholders generally operate in an indirect fashion, through their members, and especially if they are very influential at a national level and are in contact with senior government officials (without prejudice to the direct, continuous

contact between European associations and the Permanent Representations and the General Secretariat of the Council)⁵¹.

a) The Commission

The Commission provides interested parties with a means of entry to the decision-taking process. In addition to acquiring social support for the proposal, this mechanism enables the Community to benefit from the experience and knowledge of specialists in different fields. In consequence, in carrying out its functions regarding legislative initiatives or the preparation of proposals, these measures enable the Commission to obtain a sufficient knowledge of the social reality addressed and the positions and concerns of stakeholders in the sector in question⁵². The need for this provision is reflected in the Lisbon Treaty, which provides that, to ensure the consistency and transparency of the actions of the Union, the European Commission "shall carry out broad consultations with stakeholders" (paragraph 3 of the new Article 8b of the Treaty on European Union).

In preparing its proposals, the Commission carries out wide-ranging consultations with advisory groups or committees, scientists and experts, which include representatives of the professions involved, those of economic and other interests, experts, scientists, technicians and persons with great experience and well-established reputation in their respective fields. In addition, there are other mechanisms for interested parties to engage in social participation and to contact the Commission, such as by

⁵¹ It should be noted, moreover, that the Council's Rules of Procedure, approved by Decision 2006/683/EC, Euratom of the Council of 15 September, in stating the reasons for the new regulations, begin by referring to the importance of achieving greater openness and transparency and to the need to improve the technical means used to disseminate, in all official languages, the discussions and public debates in the Council, in particular using the internet. Annexe II sets out the specific provisions on public access to Council documents.

⁵² Data on formal, structured consultative bodies are collected in a database, accessible through the internet, called CONNECS (Consultation, the European Commission and Civil Society), which provides information on the committees and other forums of the Commission by means of which inquiries can be addressed to civil society organizations, in a formal or structured way.

drafting Green Papers, sponsoring seminars in academic and socioprofessional circles or announcing calls for technical studies on specific issues.

Stakeholders, for their part, seek to maintain close relationships and permanent channels of contact with the Commission, being well aware of its role in terms of legislative initiative and in the conviction that the best time to influence it is in the first phase of the decision-taking process. It is claimed that, at this stage, there is a certain ease of access to the mid-ranks of Commission officials, and so representatives of the sectors concerned attempt to get in touch with the departments responsible for drafting the proposal, in order to provide the necessary information, the data available or the arguments and reasons on which they base their preferences. This activity culminates in the form of position papers, which are designed to transmit to the Commission the views of those potentially addressed by a particular Community action. The groups also seek to monitor the proposal and its evolution, compiling the information made available both formally and through informal contacts among the Commissioners, their cabinets and the various Directorates-General and Commission services.

Sometimes the European Community officials themselves make informal contact with stakeholders or with specialists in the sector concerned, in order to obtain information or data useful for the preparation of texts whose degree of specialization and detail requires technical knowledge and skills that the Commission services do not always possess 'in-house'. All such activities take place in accordance with the rules applicable in each case and, in particular, the Code of Good Administrative Behaviour for European Commission staff in their relations with the public (published as an annexe to the Commission's Rules of Procedure).

Finally, the Commission has emphasized the importance it attaches to receiving input from representative European organizations, although it

also considers that representativeness at a European level should not be used as the sole criterion when assessing the relevance or quality of the observations made: sometimes national and regional points of view may be equally important, highlighting the diversity of situations in the Member States, and minority criteria can reveal aspects that should also be taken into account. But in any case, the Commission attaches considerable importance to the degree of representativeness of the views expressed, when political decisions must be taken following consultations⁵³.

b) The European Parliament

Although the activities of stakeholders initially focused and evolved with respect to the Commission, they were later extended to the European Parliament, in line with its enhanced decision-taking power, and in particular with the increasing use of the codecision procedure. On the other hand, the European Parliament has no structured system for consultation with civil society as is available to the Commission, and so the activity of stakeholders largely takes place through more informal channels⁵⁴.

Nevertheless, this does not preclude the action of stakeholders: there are currently estimated to be over 3,000 lobbyists working in the European Parliament. The diversity of political groups, the plurality of nationalities in each of them, the sessions of the parliamentary committees, which are normally open to the public and based on criteria of equal representation by countries and ideologies, and the existence of a team of assistants for each

⁵³ Communication in 2002 "Towards a reinforced culture of consultation and dialogue ..." cited above.

⁵⁴ Beyond doubt, the search for avenues of dialogue, information and communication between civil society and the European Parliament is reflected in the right to petition that is recognized to any natural or legal person residing or having its registered office in a Member State (Article 194 TEC and 191 et seq. Regulation of the European Parliament). Over 6,000 petitions have been received by the Petitions Committee in the course of a single legislature. It should also be mentioned, at this point, that hearings are organized by the parliamentary committees each year, to be informed by experts, personalities from different fields (economic, cultural, etc.) or representatives of NGOs.

MEP... these are all contributing factors to the development of stakeholder action.

Thus, stakeholders seek to follow the progress of proposals in their area of interest within the European Parliament and within the committees and subcommittees dealing with these questions. They also contact the MEPs involved, especially the rapporteur, and their teams of assistants. This is all done in the framework of a regulation aimed at preventing abusive practices by lobbyists, as set out in the Regulations of the European Parliament (in particular, Article 9 and its Annexes), which provides for the issuance of access cards to those who require frequent entry to Parliament premises; these cards facilitate their holders' attendance at public meetings of the committees and parliamentary bodies, enable them to obtain information, provide knowledge of Parliamentary papers, etc. In return, holders are required to enrol in a register of card-holders and to respect the Code of Conduct set out in Annexe IX of the Regulations.

c) European Economic and Social Committee

The Economic and Social Committee and the Committee of the Regions also play an important role as long-established institutionalized advisory bodies. They have concluded cooperation protocols with the Commission to strengthen their role as intermediaries between the institutions of the European Union and organized civil society, as well as regional and local entities.

The aim of the Economic and Social Committee is to provide a forum for dialogue; this institutional platform enables representatives of economic, social and civil organizations in Member States to participate in Community decision-taking. It is considered an exceptional venue for representation, for information and for the expression of organized civil

society⁵⁵ and brings together representatives of the various social and economic components of organized civil society. In practice, appointments to the Committee reflect the higher priority assigned to the representation of professional activities than to that of interest groups (which, for some, weakens its relevance within European society). Apart from the above, its Rules of Procedure provide for the establishment of observatories, the organization of hearings or the appointment of experts, as additional channels of communication⁵⁶.

The reports issued by the Economic and Social Committee do not express a juxtaposition of the views, whether consistent or contradictory, expressed by stakeholders, but a common denominator of these views. In any case, the Committee's influence in the course of legislative formation is very limited, due to the stage at which its intervention occurs, i.e., when an initiative has already taken concrete shape as a proposal. Therefore, it is not surprising that stakeholders aim their activity more toward the Commission than toward the members of the Economic and Social Committee⁵⁷.

4.2. Participation by Spanish society in European rule making

a) Participation by society in rule making in Spain

The special importance granted to social participation in the Spanish system is reflected in the Constitution, where the Preliminary Title

⁵⁵ Opinion of the Economic and Social Committee on "Organised civil society and European governance - Contribution to the drafting of the White Paper" (2001).

⁵⁶ Regulation 2004/788/EC, EURATOM, of 24 October.

⁵⁷ However, as well as prescriptive Opinions (in which this deficiency is revealed more clearly), there are "exploratory Opinions" (at the request of the Commission – they may also be requested by other bodies, before the proposal has been finalised) and "own-initiative Opinions" that allow the Committee, without consultation, to give its views on issues it considers relevant.

expressly calls on government to "facilitate the participation of all citizens in political, economic, cultural and social life"⁵⁸.

Restricting the issue to the area of participation in rule making, we must distinguish the legislative procedures carried out by Parliament from the regulatory ones, created and implemented by the Administration. In the first respect, the Constitution does not consider the presence of stakeholders or any intervention by them before the legislature, although the framers of the Constitution were aware of this question and it has subsequently been taken into consideration by Parliament.

Indeed, debates in the Constituent Assembly revealed a concern that the Constitution itself should provide a legal framework for stakeholders and for their intervention at the parliamentary level⁵⁹, although the proposals to this effect were ultimately rejected and were not included in the definitive text of the Constitution. Years later, further attempts were made, aimed at regulating interest groups and their lobbying activities in Parliament, although the proposals submitted failed to crystallize in the normative texts intended for this purpose⁶⁰.

⁵⁸ Although Article 23 of the Constitution recognizes the fundamental right to participate in public affairs, the Constitutional Court has ruled that not every right to participate is a fundamental right. In this sense, its Judgment 119/1995 states that the participation referred to in Article 23.1 does not exhaust the manifestations of the participatory phenomenon, and after recalling the mandate contained in Article 9.2, states: "In other cases, the constituent has provided for forms of participation in specific areas, some of which become true individual rights, either *ex Constitutione* or as a result of subsequent development by the legislature; such is the case (...) of Article 105 (...). As can be appreciated, these forms of participation differ not only in their justification or origin, but also with respect to their legal effectiveness, which moreover depends in most cases on the provisions established by the legislature (...). It cannot be accepted, however, that these are manifestations of the right of participation guaranteed in Article 23.1 of the Constitution".

⁵⁹ Specifically, Article 77, which governs the right to petition Parliament, incorporated, besides the two sections that currently make up the Article, another two, with the following content: "3. Commissions may receive delegations from legitimate stakeholders in sessions that shall always be public. 4. A Basic Law shall be adopted to establish a permanent system for monitoring and recording stakeholders".

⁶⁰ Thus, the non-legislative proposal on the establishment by Congress of Deputies of a Public Registry of Stakeholders and a Code of Ethics for such Stakeholders, filed on 9 December 1992, or the Bill with the same name filed on 25 January 1993.

This was not the case, however, in regard to social participation in the development of administrative rules. Here, the Constitution does contain an express provision, Article 105, according to which, "The law shall regulate: a) the hearing of citizens, directly or through organizations and associations recognized by law, in the process of making administrative arrangements affecting them (...)"⁶¹. Thus, when the focus moves from Parliament to the Administration, the Constitution expressly requires the participation of those affected⁶².

At the legislative level there is also a significant difference that stems from this different constitutional treatment. In the process of determining general provisions issued by the Administration, Government Act 50/1997 requires that a hearing be given to the citizens affected, directly or through the corresponding organizations and associations. In contrast, in the case of governmental legislative initiatives, Article 22 of the same law leaves it up to the Council of Ministers to decide regarding the consultations, opinions and reports it deems necessary, and regarding the terms in which these should be obtained (apart from those which are obligatory), since the final approval of such legislative texts must be given by Parliament.

These ideas provide a basis for reflecting on the course to be adopted in relation to social participation in rule making when the initial position is shifted from the domestic context to that of the European Community.

b) Shifting rule making to the European context

In this new situation, in which rules affecting Spanish citizens are increasingly produced by European Community institutions, an analogy with

⁶¹ In the constitutional draft and in the wording of the paper, the precept specifically referred to "participation", a term later replaced by that of "hearing".

⁶² The reason for the different treatment is not to be found in the type or rank of rule, an administrative provision rather than a regulation having the force of law (which perhaps would further justify strengthening participation by means of a rule of higher rank) but rather in the subjective or organic aspect, due to the different nature of the Spanish Parliament (the genuine expression of representative democracy and of political participation) and of the Administration (in which participation is regulated by means other than direct representation).

the essence of Article 105.a) of the Constitution can lead us in two directions.

On the one hand, it can give rise to a demand for stakeholder participation in the Community decision-taking process and within the European institutions. In this context, affected Spanish parties would be involved as members of European organizations or in conjunction with persons or entities from other Member States that are also affected by the draft legislation. This participation would be regulated under Community law, which promotes it as described above.

On the other hand, involvement could take the form of the Spanish stakeholders participating or being given a hearing in the phase during which the goals of the Spanish Administration, or its position to be defended in Europe, are being determined. This form of participation is currently regulated under domestic law, and is addressed in Article 105.a) of the Constitution.

To the extent that Community law provides for the involvement of stakeholders in the rule-making process, Article 105 should not lead us to consider it a constitutional imperative that the law should govern the hearings given to those affected in such a process, or the determination of Spain's position to be expressed in Brussels⁶³. However, a legal provision in this direction, as well as being supported by the same reasoning that underlies Article 105.a) of the Constitution, would be an appropriate

⁶³ Indeed, by analogy with Article 105, such participation would be regulated under Community law; in our opinion, it would be going too far, based on an analogous application of Article 105, to claim that a hearing should be provided for those affected, in cases in which Community law excludes such a possibility or does not provide for it (and marginalizing, for the reasons given above, cases in which the rule is adopted by the European Parliament and thus via the mechanism of direct representation, for which the Constitution imposes no such hearing). What is required by Article 105 of the Constitution is that the law should govern it – which has led some to speak of a right to a legal context – and indeed Article 24 of the Governance Act allows the procedure to be omitted in certain cases. Therefore, in formal terms it could be sufficient for the law to state, simply, that the inquiry (or hearing) should take place under the terms of Community law, which is unnecessary (and so, therefore, is any resort to the above-mentioned Article 105 in order to establish the requirement of legal regulation of such participation).

response by the legislator, not imposed by the latter Article, but in accordance with the mandate of its Article 9.2, insofar as it refers to the need to facilitate the participation of citizens in political, economic, cultural and social life, taking due account of the extent to which Spanish political life today is grounded in the field of Community law. Neither should we overlook the social utility of such social participation for the Spanish government, both to assess the elements and data necessary to determine its position and also to develop negotiations, seek alliances and facilitate the subsequent incorporation of Community rules into domestic legislation⁶⁴.

In addition to the above, let us recall that the specific effect of Article 105.a) of the Constitution or, at least, and especially, its legislative development (Article 24 of the Government Act), could be seriously affected by administrative provisions that constitute a transposition or development of Community rules. Indeed, the granting of a hearing to parties affected by prospective legislation may be rendered ineffectual if the key regulatory decisions in each case concerned have already been taken, under Community rules, and are unalterable in the administrative provisions in relation to which the Constitution guarantees a hearing for those affected. The scant room for manoeuvre which may remain, either in the incorporation phase or in that of internal development, corroborates the view that any such hearing should be brought forward to take place in the ascending phase⁶⁵.

⁶⁴ The difficulties of transposition arising from a lack of agreement between the representatives of the sectors in question is evident in some cases, and can produce significant delays in the transposition or application of Community rules: according to the Opinion of the Council of State No. 936/2007, it is "difficult to justify the delay in carrying out full transposition, even if such delay may have been caused by the commendable effort prior to approval to obtain agreement among the social partners on the issue".

⁶⁵ Although, conversely, as is logical, its influence on the (European) rule during the ascending phase will be more limited, given the greater number of actors and stakeholders involved in the decision-taking process.

In summary, the progressive shift in the performance of rule making, from Spanish administrative bodies to European offices and institutions, together with the mandate set out in Article 9.2 of the Constitution, and in view of the basis and purpose of its Article 105.a), all favour a legal regulation that promotes the participation of those affected in the preparation of Community rules and allows them a hearing in the process during which the Spanish government's position is being determined, to be subsequently communicated to the Community institutions in the corresponding negotiations. There are many and varied possibilities for such regulation, but it seems necessary, given the path already taken by Community law, for the Spanish legislature to consider this participation.

4.3. Suggestions

In accordance with the above ideas, and to bring social participation into line with the Europe-oriented shift of rule-making processes, two types of suggestions can be made.

a) Promoting social participation in the framework of Community institutions

To achieve a stronger presence of Spanish interests in Europe, various types of action should be taken, starting with heightened outreach toward the sectors affected regarding Community initiatives, in the early stages of their preparation, informing of possible channels of participation in the deliberations of Community institutions. The aim of this would be to remove obstacles – which to a large extent consist of a lack of information – and thus facilitate greater direct participation by Spanish citizens and stakeholders in political life, one of whose centres of gravity is obviously in Europe.

Taking account of the Community interest inspiring the actions of the Commission, originating and shaping its initiatives, actions by Spanish

stakeholders must take place largely within European groups. To facilitate this, public sector action should be aimed at promoting this integration, so that Spanish interests may have sufficient specific weight within the European organizations representing particular interests.

A variety of such policies could be developed for the purposes referred to, as reflected in the panorama presented of the current situation, and this is not the proper place to detail them; sectoral administrative bodies are aware of the organizations that represent the interests involved in each case, of who needs to be given a hearing when administrative provisions are being drafted in Spain, and of the most effective actions to be taken in each case. Ultimately, it is they who can best decide how to promote and favour the action of Spanish stakeholders in Europe.

b) Regulating participation in Spanish government procedures during the Community decision-taking phase

Another type of suggestion is based on the provisions of Article 9.2 of the Constitution, in conjunction with its Article 105.a), as implemented under Article 24 of the Government Act, and consists of helping reinforce the continuity between what the consultation request terms the ascending and descending phases.

Just as the law requires that citizens affected be given a hearing during the development of a regulatory provision, it seems reasonable that the same connection between the Administration and the interests affected should be facilitated when the former is participating in the creation of Community rules that will determine the boundaries and margins within which internal regulatory provisions must subsequently be incorporated, developed or executed.

This leads us to suggest that the law should govern such participation. Here, too, the possibilities are varied and it cannot be ignored that a general requirement for a hearing to be given to stakeholders in

determining the position that the Spanish Administration will subsequently defend in Europe might provoke excessive rigidity and lead to serious dysfunctions⁶⁶. Nevertheless, in the framework of preparing Spanish action in Europe, it could be possible to select initiatives concerning which the Spanish government should address the associations or groups representing the interests concerned, seeking their views, data, information, etc. In the other cases, such consultation could be optional for the Administration, but always allowing the organizations representing interests affected to address it in order to make representations or to provide information considered relevant. Such information or representations could be very useful, not only in determining the Spanish position, but also in the course of negotiations. Moreover, these considerations would continue to be available when the Community rules come to be incorporated into internal legislation, thus reinforcing the appearance and awareness of continuity throughout the procedure.

In conclusion, and in a parallel way to the approach taken by the Commission, steps taken to improve consultation should be based on a flexible model, providing appropriate training and resources to the officials responsible for promoting such procedures.

⁶⁶ The European Commission, in its own field, has reservations about an overly restrictive approach to the question of hearings, which led it to adopt an instrument of soft law to address the issue: see the above-cited Communication from the Commission "Towards a reinforced culture of consultation and dialogue ..." (2002).

IV. THE INTEGRATION OF EUROPEAN LAW INTO THE SPANISH LEGAL SYSTEM

1. General considerations

Let us now examine how Spanish domestic law incorporates the Community measures (fundamentally, the directives) that require regulatory activity by the Member States. For this purpose, and as control by the competent European authorities must be reconciled with the principle of the institutional autonomy of the Member States, the necessary adjustments and changes are presented so that, as worded in the Government's consultation request, we may "ensure compliance with the general obligations arising from Community law in the development and implementation of Spanish legislation, with special attention to the need for interministerial coordination in this context" and obtain the "procedures required to ensure the inclusion of specific obligations arising from rules of Community law, within the time limits specified in this regard". In particular, these adjustments and modifications should reduce the time needed to develop and approve the corresponding transposition rules and reinforce the techniques applied to ensure the correct incorporation of Community legislation.

At the outset, there are three basic ideas:

- The Spanish system is highly decentralized, at both the political and the legal level, which introduces an important factor of complexity that must be reflected in any approach or proposal. This aspect is discussed here in detail because it concerns the impact of the Community element in the constitutional distribution of powers and in the necessary coordination between the State and the Autonomous Communities, but its influence extends further, to cover the other contents of the Report.

- The notion of international relations has undergone a gradual evolution, in two respects: first, toward the differentiation of certain relationships of an international nature that are not totally removed from the context of regional decision taking; and on the other hand, toward the differentiation of the Community's relations from all other international relations, by the very nature of the European Community and the implications this presents for the Member States. This is reflected not only in the distribution of powers between the State and the Autonomous Communities, but also concerning possible proposals for the organizational model.
- Within the State sphere/Regional sphere duality, in each level there coexist different authorities with rule-making powers, namely the legislature (Parliament and the regional Legislative Assemblies) and the executive (the national Government and the regional Governments). The suggestions advanced in this respect in our Report will focus, due to its nature and origin, on the question as it concerns the State. However, taking into account the foreseeable – in the light of recent statutory reforms – evolution of regional powers in this area and whilst maintaining all respect for the Autonomous Communities' power of self-organization, we must draw attention at the outset to the necessity for the Autonomous Communities to create the mechanisms necessary to ensure, in their respective fields, the proper exercise of those powers.

Among the aims of this discussion is to point out the main features of the Spanish model, to target the dysfunctions identified and to reflect on the solutions considered appropriate, in full awareness that it is not always possible to put the optimum outcome into practice. Our considerations are structured as follows: first, we address the subjective element of the transposition, i.e. the State and the Autonomous Communities, with special

reference to questions of their powers, organization and coordination; second, we examine the transposition from an objective perspective (the technical and regulatory object, and the place, time and manner of incorporation); after this, the transposition process as such is considered, in relation to which we emphasise the need to introduce certain specific provisions. Finally, reference is made to the effects arising from the transposition.

2. Subjective perspective: the position of the State and the Autonomous Communities regarding the incorporation of European rules

One of the questions posed in the Government's consultation request concerns "the needs arising from the development and implementation of Community law with respect to relations between the General State Administration and the Autonomous Communities, as regards [...] ensuring compliance with Spain's obligations to the Union [...]".

It is therefore necessary to consider how the Government and the General State Administration organize themselves to carry out the effective transposition of European legislation, how responsibilities are distributed between the State and the Autonomous Communities, and how, for this purpose, the areas of State and of regional action are coordinated. Furthermore, we must specify which aspects need to be improved and what options are available to do so, with the primary objective of ensuring proper transposition and, ultimately, the necessary compliance with Spain's obligations in this respect as a member of the European Union.

2.1. The Government and the General State Administration

The Government has a major role to play in the process of incorporating Community rules into national law. The Government carries out most of this operation, either indirectly, through the draft bills presented to Parliament, or directly, through the exercise of its regulatory power or, when so authorized by Parliament, the relevant legislative delegation.

Although this Report has already provided an overview of the question, it seems appropriate now to make a brief reference to the organization of the ministerial departments responsible for carrying out the transposition procedure, and to examine how the performance of these tasks is supervised.

a) Ministerial organization

As concerns the General State Administration, the task of transposition is assigned primarily to the sectoral ministries, depending on the subject in question and the ministry's area of competence.

Although twenty years have passed since Spain's accession to the European Communities, the adaptation of the General State Administration to the requirements arising from this new status has been only partial and remains open to improvement. As mentioned above, a generalized 'Europeanisation' of sectoral action and of departmental organization is required.

The political weight of each Ministry and its degree of "Communitarization" are factors that are reflected in its specific organizational structure, and which are apparent in the degree of attention paid to the regulatory implementation of Community obligations. In this respect, there is an excessive heterogeneity in the location and structure

within the various ministries of the administrative units dealing with Community affairs. Furthermore, the organization, in each case, depends largely on the characteristics of the ministry in question and on the greater or lesser impact of Community law on matters within its competence⁶⁷.

The general rule is that each ministry has a Sub-Directorate General for International Relations or for Community Affairs, as part of the General Technical Secretariat or reporting directly to the Sub-Secretariat, which is technically responsible for coordinating European affairs in the department; it is usually this office that represents the ministry in the CIAUE and acts as interlocutor with the Secretary of State. Nevertheless, it does not enjoy exclusive rights in this respect, as very often the Directorates-General involved have their own team of officials specialized in Community issues. Accordingly, the provisions relating to the structure of the various ministries do not clearly reflect which offices are actually responsible for carrying out transposition tasks.

b) Supervising transposition

Increasing importance is being granted to the preventive or control function corresponding to the Member States, which includes ensuring the implementation, quality and effectiveness of applicable procedural requirements.

At the organizational level, and under the principle of institutional autonomy⁶⁸, the task of supervising the incorporation of Community directives, after publication of their approval in the OJEU or notification by

⁶⁷ In general, the largest number of directives correspond to the Ministries of Agriculture, Fisheries and Food, Health and Consumer Affairs, and Industry, Tourism and Trade.

⁶⁸ Sometimes, however, the application of this principle must take into account certain limits. This applies, for example, in the case of agricultural policy and structural funds, in relation to which it is mandatory for Member States to establish specific monitoring bodies with certain characteristics, such as independence from other ministries (Article 11 of Council Regulation (EEC) 4045/89), administrative autonomy with full powers and responsibilities to carry out the tasks assigned (Article 20.3 of Council Regulation (EEC) 2075/92) and the existence of detailed rules on the internal organization and procedures of the national paying agencies (Commission Regulation (EC) 1663/95).

the Commission, falls first to the Council of Ministers, subject to prior support and preparation by the Commission of Sub-Secretaries and Secretaries of State. The latter body systematically monitors the process, and its daily agenda always includes an item on this question, when the ministries involved report the state of transposition with respect to their areas of competence.

The second body involved is the Directorate-General for Internal Market Coordination and other Community policies (under the authority of the General Secretariat of the European Union and part of the Secretariat of State for the European Union of the Ministry of Foreign Affairs and Cooperation). This DG controls the transposition of directives into Spanish legislation and, in particular, the coordination, monitoring and reporting of the incorporation of Community directives into domestic law, of infringement proceedings under Article 226 EC Treaty and of State aid, as well as the preparation, monitoring and coordination of the proceedings before the Court of Justice of the European Union (these latter functions being carried out by the Sub-Directorate General for Coordinating Community Legal Affairs).

In the case of incorporation tasks, too, interministerial coordination is performed by the CIAUE (under the authority of the Government Executive Committee for Economic Affairs), which monitors the status of work being carried out to incorporate Community Directives when they affect several ministries. With respect to this function, we perceived a generalized impression that the effectiveness of the CIAUE could be improved: it is a body with scant capacity for decision taking, its meetings are sometimes occasions of mere formalism and there appears to be a certain lethargy (in parallel with the wide variations, observed above, in the hierarchic level of the Committee members).

c) The non-existence of a protocol or manual for action on transposition

We emphasise the non-existence of any manual or protocol, at least in regular use, although documents of this type are drafted when Spain holds the EU Presidency, to reinforce and speed up transposition and decision-taking, by specifying the various actions to be taken, the measures to be adopted and the tools to be acquired in order to ensure adequate coordination among the various ministerial departments.

2.2. The Autonomous Communities

The model of devolved power set out in the Spanish Constitution requires the Autonomous Communities to be involved in the administrative and legislative implementation of the rules of Community law. This became apparent at the beginning of the European Community experience, even though the statutes of regional autonomy did not include any provision in this regard.

The Court of Justice of the European Communities and various sentences handed down by the Constitutional Court have shaped the legal framework that has so far applied to the intervention of the Autonomous Communities, in which a crucial issue is the distribution of powers between them and the State.

Before considering the Spanish model, it is necessary to make a brief reference to comparative law, which provides several examples of how powers are distributed in federal or decentralized States.

In Germany, Article 23 of the Basic Law expressly addresses the participation of the *Länder* in the Community legislative process (through the Federal Council or *Bundesrat*). When particular tasks of transposition must be carried out, supposing that the Community legislation in question affects matters within their competence, the *Länder* approve the corresponding measures, typically through a legislative procedure that is fairly uniform in all cases. If the Community provision affects all the *Länder*,

they attempt to reach a voluntary agreement to develop a common draft bill. In practice, each *Land* has come to specialize in a particular subject, in order to facilitate the transposition of the more technical content. When Community rules impinge on Federal powers and also on those of the *Länder*, or when the approval is required of municipalities or other local authorities, the transposition process is divided among those concerned, which motivates a significant degree of conflict over which part corresponds to each authority.

In Austria, if the Community legislation affects the Federation and the *Länder*, both parties must approve the corresponding measures in the areas that affect them.

In Belgium, given the plurality of entities involved (State, regions and communities), the Belgian Council of State has emphasised the need for all parties involved to reach an agreement so that a coordinated and convergent transposition may be designed. The Federal Government can only replace the regions and take the necessary measures following a ruling to this effect by an international or supranational jurisdiction, and not on a mere decision by the European Commission or even that of a national court.

In Italy, the Constitutional Court has recognized the power of the State to dictate the general principles for the implementation of directives, and has also confirmed the regions' powers to act in matters within their competence. Conflicts of attributions between the State and the regions are resolved by the Constitutional Court, to which the State may also resort in order to request the cancellation of a regional law that contravenes a Community directive. If the regions do not exercise jurisdiction within the time allowed for this, the State can take their place, approving the appropriate measures for transposition.

a) Current situation

The constitutional division of powers is applicable to both the implementation and the transposition phases of Community legislation, and this raises the question of how to coordinate and match two elements that pose serious problems in this respect: first, because Community law does not take into consideration, for this specific purpose of transposing its rules to domestic legal systems, the complex territorial structure that may be present in its Member States (thus, the Spanish State is viewed as the only subject responsible to the European Union regarding the necessary transposition or complementation of Community rules, the implementation of Community law in Spain and the task of ensuring subsequent compliance); second, because in Spain's constitutional distribution of powers there are no specific provisions to incorporate and implement Community rules, nor any provisions on how discrepancies should be resolved.

In short: on the one hand, Community law *per se* does not intervene in the territorial distribution of powers; and on the other, neither the Constitution nor the statutes of autonomy provide for any specific competence regarding the implementation of Community law. Therefore, the question as to which public body should be responsible for implementing Community law, either in the adoption of legislation or in its application, must be resolved case by case and in accordance with constitutional and statutory criteria on the allocation of powers between the State and the Autonomous Communities in the areas concerned⁶⁹.

⁶⁹ It should be emphasized that to justify the legislative competence of the State, the powers granted under Article 149.1.3^a (international relations) of the Constitution are rarely invoked explicitly. More commonly, general or cross-cutting competences are referred to, thus shaping a broad concept of what is meant by basic legislation (for example, in relation to the following questions: 1) basic conditions guaranteeing the equality of all Spanish citizens; 11) the regulations for credit, banking and insurance; 13) the general planning of economic activity; 18)

The Constitutional Court has ruled on this issue on several occasions (in judgments 252/1988 of 20 December, 79/1992 of 28 May, 80/1993 of 8 March, 102/1995 of 26 June, 146/1996 of 19 September, 98/2001 of 5 April, 38/2002 of 14 February, 96/2002 of 25 April and, more recently, 33/2005 of 17 February) and has observed that when powers are shared or concurrent between the State and the Autonomous Communities, only the constitutional and statutory rules on the division of powers should be taken into consideration, notwithstanding that the State may establish appropriate systems for coordination and cooperation to prevent irregularities or deficiencies in compliance with Community law. Furthermore, the Government must have the instruments required "to adopt the necessary measures to ensure compliance with the resolutions of international organizations in whose favour powers have been ceded (European Union primary and secondary law, for the present purposes), and only an inadequate interpretation of constitutional and statutory provisions could obstruct this function" (Constitutional Court judgment 252/1988). Such measures could include the establishment of additional formulas, not for control but for coordination between the State's power and that of the Autonomous Communities, such as introducing information-reporting obligations, establishing supervisory methods and (exceptionally) State action in response to breaches of duty by the Autonomous Communities.

Thus, the Constitutional Court clearly recognizes the participation of the Autonomous Communities in the implementation of Community law⁷⁰.

In practice, the task of transposition is generally undertaken by the State⁷¹ and does not usually arouse opposition from the Autonomous

administrations and public contracts; and 23) the environment – all addressed in Article 149.1 of the Constitution). Thus, Community law tends to be perceived as basic, as a common regulatory denominator (Council of State Opinion 53.962, of 11 January 1990).

⁷⁰ In the same vein, see Council of State Opinions 53.611, of 14 November 1989, and 53.962, of 11 January 1990, among many others.

Communities. There are various reasons for this, but fundamentally they all concern the conviction that the legislation eventually introduced, regardless of the agency effecting the transposition, and in view of the predetermined formula of many directives, will be the same.

Statutory reforms and the greater intensity of Community action, however, make it essential to further reflect on the interrelation between the new European Community context and the scheme of distribution of powers foreseen in the Spanish Constitution. This necessity was noted in Constitutional Court Judgment 102/1995, of 26 June, and more recently in its Judgment 33/2005, of 17 February, according to which "it cannot be ignored that the interpretation of the system of distribution of powers between the State and the Autonomous Communities does not take place in a vacuum [...] but should take account of how an institution is configured under Community rules". It continued that this "might not only be useful, but indeed essential, in order to correctly express [the Community legislation] in terms of the internal distribution of powers".

b) The new Statutes of Autonomy

In view of recent statutory reforms⁷², there appears to be a clear intention to claim an increasingly prominent role for the Autonomous Communities on the European stage. With regard to the incorporation of Community rules, this is apparent in two particular aspects: bilateral

⁷¹ In general, the regulatory activity directly conducted by the Autonomous Communities to incorporate Community law (especially as regards direct incorporation) is not very extensive. Most of these regional legislatures have adopted rules that directly or indirectly are intended to comply with certain obligations under Community law; however, on occasion these are mere formal statements (for example, in the preamble) of Spain's membership of the European Union, or of a series of Community provisions, while the work of transposition itself is deferred to the State. On other occasions, the political importance of the measure adopted prevails over its impact from a legislative or technical perspective (see, for example, the approval by the Basque and Catalan parliaments, respectively, of Acts 2/1986 and 4/1986, delegating authority to their respective executive bodies).

⁷² The new statutory reforms have been enacted by the following laws: in the case of Valencia, Act 1/2006, of 10 April; in Catalonia, by Act 6/2006, of 19 July; in the Balearic Islands, by Act 1/2007, of 28 February; in Andalusia, by Act 2/2007, of 19 March; in Aragon, by Basic law 5/2007, of 20 April; and in Castilla y León by Act 14/2007, of 30 November.

relations and transposition by the Autonomous Communities with no need for prior basic legislation by the State.

Regarding the first of these questions, let us recall the emphasis – inferred from the vocabulary used – that some Statutes (Article 186.2 of the new Catalan Statute and Article 231.2 of the amended Andalusian Statute, although other such provisions are more nuanced, for example Article 110.1 of the Balearic Isles Statute) place on the necessary bilateral nature of relations between the State and the respective Autonomous Community for the purposes of participation in European affairs. Although these provisions mainly refer to the ascending phase, they could also represent a starting point in transposing Community legislation into national law.

Under the above-mentioned Statute provisions, bilateralism comes into play in the case of Community issues that affect only the region in question, and provide that, in other cases, regional participation will take place through the corresponding multilateral procedures. Without judging the extent to which this solution is compatible with the constitutional framework, the fact is that the inclusive, harmonising nature of European law makes it difficult to conceive of Community issues that would affect only one Autonomous Community. In this context, and as a general rule, it would not be acceptable to exclude other Autonomous Communities from a particular action in this respect. Accordingly, it seems reasonable that initial attempts at bilateralism will ultimately converge such that a *de facto* multilateralism is installed, in a generalization of the achievements of European integration throughout Spain's Autonomous Communities.

With respect to the impact of recent amendments to the Statutes of Autonomy on the incorporation of Community law, diverse models have been put forward. One option is to include a broad, purposely-vague clause, according to which the Autonomous Community in question would have exclusive competence to develop and implement European provisions and

rules, within the scope of its powers. Such is the case of Article 61.3 of the Statute of the Autonomous Community of Valencia. In other cases, the question is specified in more detail, with provisions of greater or lesser extent:

- The Autonomous Community is empowered to implement and apply European Union law within the scope of its competence. The Statute goes on to state that the existence of a European rule does not modify the internal distribution of powers established by the Constitution and by the Statute (Article 189 of the Statute of Autonomy of Catalonia; Article 93.2 of the Statute of Autonomy of Aragon; Article 235.1 of the Statute of Autonomy of Andalusia, taking into account the final caveat; Article 62.3 of the Statute of Autonomy of Castile and Leon).
- According to the Statute of Catalonia, when implementation of European Union law requires the adoption of internal measures that extend beyond the territory of the Autonomous Community and when the Autonomous Communities cannot do so by means of collaboration or coordination, the State must consult with the Catalan Government about these circumstances before adopting the measures. The Catalan Government must participate in the authorities that adopt such measures or, if such participation is not possible, the measures must be subjected to prior examination by the Catalan Government (Article 189.2 of the Statute of Autonomy of Catalonia).
- Other Statutes declare the competence of the Autonomous Community to develop and implement Community law in accordance with its powers. When transposition affecting matters within its exclusive competence must, unavoidably, be effected via State-determined rules, due to the fact that the European rule extends beyond the boundaries of the Autonomous Community, the latter

must be consulted in advance in accordance with the internal mechanisms of coordination established under a national law (Article 109 of the Statute of Autonomy of the Balearic Isles).

- Finally, should an item of European Union legislation replace a corresponding item in basic State legislation, the Autonomous Community may adopt implementing legislation based on European rules (Article 189.3 of the Statute of Autonomy of Catalonia; Article 235.2 of the Statute of Autonomy of Andalusia).

2.3. The necessary interrelation between the State and the Autonomous Communities: problems concerning the distribution of powers, organization and conflict resolution

The coexistence of regulatory powers with a varying extent of applicability– national and regional – regarding the effective incorporation of European rules lies at the origin of the different practical problems encountered in relation to the distribution of powers, and to organizational questions, coordination and conflicts that may arise in this regard.

a) Problems concerning the distribution of powers

In the regulatory framework shaped by the new statutory provisions, the interaction between European directives, basic State rules and the regulatory powers of the Autonomous Communities is not so clear-cut that its boundaries and effects may be established without very careful previous consideration.

The fundamental question is whether, as stated in some Statutes of Autonomy (Article 189.3 of the Statute of Catalonia and Article 235.2 of the Statute of Andalusia), the entry into force of a directive, which, by its very nature, leaves some leeway for national authorities regarding its

transposition, would in certain circumstances grant the regional authorities the power to proceed directly with its implementation, without having to wait for its incorporation by means of State legislation (indeed, it has even been stipulated that the basic State legislation could be replaced by means of a concerted action by the Autonomous Communities, Article 189.2 of the Catalan Statute). At least, this conclusion is to be inferred from the statutory provisions.

In this situation, problems could arise because, as mentioned above, the Spanish State continues to be responsible to the European Union for any breach of transposition obligations.

Certainly, together with the principles resulting from the very distribution of powers determined in the Constitution (among which are those defining the scope of application of regional powers: by territory, by the need to ensure equality throughout the nation, for the purposes of regulations that apply to more than one Autonomous Community, etc.), we could envisage the possibility – as made apparent in some of the above-mentioned Statute provisions, such as Article 189.2 of the Catalan Statute and Article 109 of the Balearic Isles Statute – that, as the scope of applicability of regional powers is affected by the mere existence of a European law of generalized application, it is essential for a basic or harmonizing rule to be adopted by the State (even one referring to powers that are exclusive to the Autonomous Communities, as is expressly recognized in some Statutes) as a common denominator to be respected by all regional standards and authorities.

Nevertheless, at present there is no regulatory provision that expressly and directly contemplates this possibility.

b) Organizational questions. The Conference for European Community Affairs

The sectoral conference system was established in order to ensure the necessary participation of the Autonomous Communities in European Community affairs and the essential coordination between the Autonomous Communities and the State. As part of this system, the Conference for European Community Affairs (CARCE) plays a role in the task of incorporating Community law. Among its functions are those concerning technical aspects of regulation; these aspects concern both the incorporation of directives into domestic law and the implementation, development and enforcement of regulations and decisions. In addition, the CARCE is responsible for producing formulas for the participation of Autonomous Communities in internal procedures to ensure compliance with obligations to European Community institutions.

In the exercise of these functions, and among other achievements, the CARCE orchestrated the Agreement (reached on 30 November 1994) on internal participation by the Autonomous Communities in European Community affairs through their respective sectoral conferences. In particular, in the event that the application in question involves the adoption of certain rules, the Agreement makes the following stipulations:

- Administrations that are considering legislation, either to develop or complete a European Community regulation or decision or to effect the transposition of a directive, must provide the sectoral conference with the text of the draft regulations.
- When, in the course of the sectoral conference, the General State Administration and the Autonomous Communities agree on the need to achieve an internal policy instrument with a similar or equivalent content to that derived from the application of Community law, the

question must be included in the agenda of the corresponding specialized office within the sectoral conference in order to develop a proposal for agreement, for subsequent presentation to the Conference in plenary session.

A critical view of this system raises some questions, not only in terms of the limited range of the legal instruments underpinning the system, as pointed out above, but also in terms of its utility in ensuring the necessary coordination regarding horizontal issues, which concern various ministries and regional governments and are encountered increasingly frequently. In addition, the Secretariat of the Conferences is weakly institutionalized, lacks a homogeneous configuration and operation and is overly reliant on (or associated with) ministerial cabinets or their regional equivalents, which hampers its practical function of supervising and controlling ordinary administrative action.

c) The absence of a specific prior means of addressing conflicts of competences

At present, there is no standard procedure for resolving disputes concerning the location – the State or the Autonomous Community – of the competence called into question. Such disputes are more likely when the competences affected are, in principle, exclusive to the Autonomous Communities but when, under the Community procedure, they require the adoption of uniform, generally-applicable rules that are determined, with crucial effects for the transposition of specific rules, by the distribution of competences.

While it is true that, among other functions, the Ministry for Public Administration is obliged to uphold respect for regional competences in State legislation (and thus also in the State's transposition of Community rules), its involvement is not always mandatory. Furthermore, in its current form it is unlikely to be capable of effectively resolving problems of the

distribution of powers. In addition, the formal channel provided by the CARCE and the sectoral conferences appears to be configured, in general, more as an area for participation and the exchange of information than as a mechanism to decide on the distribution of powers.

Practical experience, therefore, raises serious doubts about the effectiveness, at least in their present terms, of the provisions established to address the question of the distribution of powers. *De facto*, the State generally undertakes transposition without debate, and regional participation is determined during the establishment of the rules to be implemented, either in the context of the public hearing or through the inclusion of regional representatives in the agency responsible for coordination.

Let us note, however, that relatively few cases have arisen in which the Autonomous Communities have raised formal objections⁷³ to transposition by the State. In this respect, it should be recalled that the prior regulatory framework is defined by Community legislation and that the issues subject to regulation often clearly extend beyond regional boundaries.

In this framework, it does not seem necessary to hypothesize an approach for the resolution of conflicts that may arise in the distribution of

⁷³ Such objections are usually posed as the filing of the corresponding positive conflict of jurisdiction in relation to matters of an administrative or executive nature. Significant in this respect are the following Constitutional Court judgments: 252/1988, of 20 December (trade in fresh meat); 115/1991, of 23 May (seeds and nursery plants); 236/1991, of 12 December (metrological control); 79/1992 of 28 May 28 (EAGGF subsidies on agriculture and livestock); 117/1992, of 16 September (purchase of butter); 80/1993, of 8 March (internal trade); 141/1993, of 22 April (contracts); 165/1994, of 16 May (ministerial organization); 102/1995, of 26 June (environment); 67/1996, of 18 April (livestock); 146/1996, of 19 September (advertising); 147/1996, of 19 September (labelling, presentation and advertising of packed foodstuffs); 13/1998, of 22 January (environmental impact assessment); 128/1999, of 1 July (agricultural structures); 45/2001, of 15 February (reorganization of milk and dairy products); 98/2001, of 5 April (the award of subsidies); 38/2002, of 14 February (management of natural resources and parks); and 33/2005, of 17 February (industrial safety and quality). An appeal of unconstitutionality is adopted less often, but examples include judgments 208/1999, of 11 November (antitrust), and 96/2002, of 25 April (tax regime).

powers, firstly because any action taken in the respect could delay the adoption of the necessary internal rules, thus aggravating situations of non-compliance, and secondly because the State bears the primary responsibility to the European Union in these cases.

Nevertheless, this situation could change under the new statutory provisions. But the existence of a more active role for the regions in carrying out transposition does not, in itself, justify the need to introduce such a mechanism: in addition to the above-mentioned risk of further delay, it is conceivable that other instruments, discussed below, might both ensure compliance with the constitutional distribution of powers and at the same time enable the Spanish State to fulfil its obligation to achieve the timely transposition of European legislation.

In conclusion, at present there is no perceptible need, and certainly no urgent need, to create a specific means of determining the distribution of powers between the State and the Autonomous Communities – at least not on a generalized basis. It is not cause for concern, but on the contrary, reasonable and useful, that the State should maintain the practices and customs by which it plays a primary role in the work of transposition (moreover, this is consistent with its status as the sole body responsible to the European Community in this respect).

For this reason, it is not unreasonable that in any disagreement between the State and the Autonomous Communities as to which administration has powers of transposition, the question or conflict should be submitted, *a posteriori*, to the Constitutional Court. In this way, the necessary incorporation will be fulfilled, for the purposes of the Community, while settlement of the issue in the national context remains pending the decision of the Constitutional Court.

2.4. Proposals to rationalize the distribution of competences, to enhance coordination and to better ensure proper performance of transposition obligations

a) Ministerial organization

The different ministries could review their current organizational structures, to determine exactly where and how Community issues are addressed.

To ensure coordination and internal control within each department, various possibilities may be considered; for example, an office may be specifically requested to monitor European issues, providing a generalist perspective to the corresponding department and with powers that are upheld and politically supported. Such a body would, in all cases, take into account the characteristics of each ministry concerned. In this respect, of course, the transposition phase would also be subject to the considerations and to the organizational structure proposed for the coordination of issues relating to participation in Community decision-taking and, in particular, to the suggestions that a specific body (with the rank of Directorate-General) be created or the powers of the General Technical Secretariat strengthened⁷⁴. This measure could be complemented with the creation of a contact group, which would hold regular meetings and include the participation of specialist officials from each unit of the respective ministries with competence in Community affairs.

This configuration would ensure that each ministry adopted a more rigorous and precise position on every issue, and would improve coordination among ministries. Nevertheless, we reiterate that the effective functioning of the model requires, first, that the specialist administrative

⁷⁴ The aforementioned decision of the Council of Ministers of 27 July 1990 attributed diverse transposition-related tasks to such Secretariats: 1) to initiate the transposition work, as a matter of priority, once the Community rules are notified by the Commission; 2) to expedite the processing of transposition projects in progress and to develop and update a permanent transposition programme in order to meet the deadlines set by the directives.

agencies have a specific weight within their respective ministries and, second, that the body responsible for monitoring European issues enjoys the support and the resources necessary to exercise control.

In short, and as observed in the Government's consultation request, it is essential to enhance or, where necessary, to create mechanisms for coordinating the different departments in terms that enable transposition to be carried out properly and effectively, without undue delay (it is from this perspective that we should consider the proposals that have been presented to create a Government Executive Committee for European Affairs, or a two-fold affiliation of the Secretary of State for the European Union, with the Ministry for the Presidency and the Ministry for Foreign Affairs and Cooperation). Finally, and as observed elsewhere in this Report, coordination, in the sense of unity of action, must be accompanied by corresponding coordination within the departments, taking into account the marked sectoral nature of negotiations in Europe, the demand for technical expertise and the necessary continuity between the negotiation phase and that of the incorporation of Community law.

b) The specialization of government officials

In line with the suggestions made regarding participation in Community decision-taking - reiterating the validity of the fundamental principle and the need to avoid duplication of activities - it would be desirable to achieve greater (or a degree of) specialization within ministerial departments whose area of responsibility requires the existence of an administrative unit whose primary task is to supervise and ensure the correct transposition of Community rules and the development of legislative complements in this respect.

This specialization, in coherence with the progressive sectoralization of the European Union, should be accompanied by measures aimed at

increasing motivation such that Community issues are considered more significant and assigned special priority within each ministry.

From this same perspective, there should be mechanisms (motivation, incentives, recognition, etc.) to enable the departments involved to benefit from the knowledge acquired by staff with particular expertise in issues concerning the European Union.

c) Supervising transposition

Accordingly, inter-ministerial coordination, an aspect specifically referred to in the Government's consultation request, must be improved.

Although, formally, the transposition process is supervised by the Ministry of Foreign Affairs and Cooperation, in practice effective action to set in motion the machinery of the corresponding ministerial department is frequently exercised by the General Committee of Sub-Secretaries and Secretaries of State (in accordance with the present structure and functions of the ministries). In the event of any conflict concerning which ministry is responsible, the Executive Committee for Economic Affairs has the final word.

These facts give the impression that, while the Ministry for Foreign Affairs and Cooperation (and, specifically, its Secretariat of State for the European Union) technically plays the main role in supervising Community issues, sometimes it is other government departments that ultimately manage to accelerate transposition or resolve conflicts that arise. Whether due to the absence of an appropriate, accepted position for the Foreign Ministry, or due to the lack of sufficient means, the fact is that when a serious conflict occurs or when strategies must be designed, this Ministry does not usually exercise leadership or take decisions. This does not preclude our recognizing the substantial coordination work carried out, especially through the bilateral meetings and informal contacts of the

Secretary of State for the European Union, as well as the prominent role of the REPER in Brussels.

Therefore, it seems essential to strengthen the political and executive dimension of transposition, whilst recalling (as noted above) that the incorporation of Community law is not an independent process, isolated from negotiation and decision-taking. A very important contribution to this goal, in terms of interdepartmental coordination, is that of the proposed two-fold ministerial association of the Secretary of State for the European Union.

As for the possible need to maintain the existing collegiate structure, or to create a new one, which would help achieve joint positions and strategies and enhance interdepartmental coordination, an initial possibility would be to rethink or restructure the present collegiate structure, i.e., the Interministerial Committee on European Union Affairs (CIAUE), to make it more dynamic and executive and, ultimately, a body that is operational and effective, thanks to the skills and endeavours of its members and participants, in performing the complex task of ensuring coordination among ministerial departments.

To this effect, the functions of this Committee need to be more clearly identified and, as mentioned above, its composition reconsidered, taking into account that it must address the question of Spanish participation in Community decisions. Moreover, adjustments will be needed in its form of operation in order to avoid any discord between the members of the CIAUE and those who actually participate in its meetings. Alternatively, as the most straightforward option from the point of view of its practical implementation, the current structure and composition of the Committee could be maintained, but redefining it as subsidiary to the current General Committee of Sub-Secretaries and Secretaries of State, as a kind of working group.

However, it may be preferable to opt for a different model altogether, in which interdepartmental coordination is carried out by working groups or by a body of diverse, flexible make up (which might, in fact, introduce an element of greater stability) reporting directly to the Secretary of State. The ministerial departments concerned in each particular case would participate in the actions of such a body.

In this latter case, it would be totally justifiable to create an Executive Committee for European Affairs. This Committee, reporting to the Minister for the Presidency and with the continuous, conspicuous presence of the Ministry for Foreign Affairs and Cooperation (and in particular, that of the Secretary of State) in the debate, together with the Ministries of Economy and Finance and of Public Administration, would take the final decision regarding the functions of coordination and of furthering the tasks of transposition. This option would make it possible to emphasize the political dimension of European issues and, foreseeably, would ensure more effective control of the incorporation of European law, precisely because the Presidency is a horizontally structured Ministry.

d) Creating a manual for transposition

It would be very useful to produce a manual or protocol to ensure due attention is paid and the necessary diligence applied in the task of transposition.

A possible model in this respect is that applied in the UK, which publishes the periodic "Transposition guide: how to implement European Directives effectively". This guide consists of three parts: the first is devoted to government policy on transposition and to the key points to ensuring proper transposition (including a checklist with specific points, such as making a comparative study of the positions of the other Member States, appropriate communication with the Commission, the drafting of Transposition Notes, and conducting studies on the costs, benefits and risks

of a particular policy option). The second part describes the actions to be taken prior to adoption of the Community rules in question (i.e., during the decision-taking stage), and the third addresses developments after the Directive has been approved.

A detailed description is given of the steps required to implement the transposition of a directive and, in particular, to assess the risks involved in the various options. The importance of good planning is emphasised: there must be a practicable schedule and appropriate resources, and preferably working groups composed of people from different backgrounds (technical specialists, lawyers, politicians, etc.). Many other aspects, too, are considered, such as defining the types of legislation applicable to transposition or the convenience of adjusting the scope of the transposition to the bare minimum, in order to avoid 'gold-plating' (whereby implementation goes beyond the minimum set by the directive, for example by adding unnecessary requirements, anticipating the entry into force of the directive or maintaining current legal requirements that are not provided for in the Community rules).

e) Coordinating State and regional powers and ensuring Spain complies with its transposition obligations

In view of the need to improve coordination between the State and the Autonomous Communities in the exercise of their regulatory powers and the need to ensure Spain's compliance with its transposition obligations, we propose some suggestions in this respect. As a preliminary question, let us first consider the source from which the necessary legislation should be derived (although some of the measures proposed are already addressed within the existing regulatory framework, in practice they are under-used or in need of reinforcement).

In its 2006 Report on constitutional reform, the Council of State suggested a provision should be included in the Constitution for revoking

the competence of an Autonomous Community for non-compliance with ECJ rulings; this withdrawal of powers would be reversed when the Autonomous Community carried out the European ruling. It also proposed expressly drafting a law to establish the cases in which the State would be liable for a breach of Community law attributable to an Autonomous Community, and the procedure for transferring such liability to the Autonomous Community in question.

As the Constitution is unlikely to be amended to this effect in the short or medium term, some of the proposals set out below could be implemented in a law⁷⁵ applicable to all the Autonomous Communities, setting out areas in which action should be taken and outlining solutions to foreseeable problems. In our opinion, it is essential to adopt such a law, in which the preparatory work of the CARCE could play an important role in terms of coordination and the advancement of proposals, in view of the fact that recent statutory reforms have not achieved results sufficiently mature and balanced on which to achieve a generalized acceptance of the mechanisms needed to consolidate and even expand participation by the Autonomous Communities in European affairs. Another possibility to consider is that of calling on the Council of State to exercise its advisory function in this respect.

- Enhancing existing mechanisms to anticipate and resolve any conflicts arising in the distribution of powers

As stated above, although at present we do not consider it a matter of priority to introduce a specific procedure for resolving conflicts of powers, it does seem appropriate to reinforce the role of the sectoral conferences, and in particular that of the CARCE, as forums for resolving such disagreements.

⁷⁵ A Basic Law cannot be considered, since Article 81 of the Constitution establishes that issues required to be regulated by a Basic Law can only be regulated by such laws and, conversely, that Basic Laws cannot regulate issues other than those assigned to them under the Constitution (see, among others, Constitutional Court judgment 5/1981, of 13 February).

The involvement of the Ministry of Public Administration could also be reinforced, either through legislation or simply by enhancing the significance attached to its prior report during the drafting of internal legislation, and by including in this report a general review of questions concerning the distribution of powers to transpose Community legislation, as well as other conflict prevention mechanisms that might be considered.

Finally, a more political body, with a lower degree of formalism, possibly the Conference of Presidents of the Autonomous Communities, might seek to achieve a consensus solution to this type of question.

- The use of harmonisation laws

We do not rule out the use – ordinary and operative – of the harmonisation laws referred to in Article 150.3 of the Constitution, particularly in cases in which the competences affected are, in principle, exclusive to the Autonomous Communities, but where the scope of the Community rule means that uniform rules of general applicability may need to be adopted⁷⁶.

This legislative instrument would allow the State to establish the principles needed to harmonise the provisions laid down by the Autonomous Communities in their transposition of Community rules. The harmonisation could be effected as a precautionary measure, because the Constitution does not expressly forbid it (although the opposite is

⁷⁶ Note that according to Constitutional Court judgment 76/1983, the legislature cannot enact harmonisation laws when other specific instruments are provided for under the Constitution to issue the legal regulation in question. Article 150.3 is a system closure rule, applicable only to cases in which the State legislator has no other constitutional means to exercise its legislative power or in which they are not sufficient to ensure the harmony required by the public interest. Harmonisation laws are intended to complement, not supplant, other constitutional provisions. It cannot be inferred, however, that harmonisation under Article 150.3 of the Constitution refers only to the exercise of powers exclusive to the Autonomous Communities. While harmonisation usually affects these exclusive powers, it is not contrary to the Constitution for harmonisation laws to be used when, in the case of shared powers, it appears that the system for the distribution of powers is insufficient to prevent a diversity of regulatory provisions among the Autonomous Communities from producing a situation of disharmony that is contrary to the interests of the Nation.

suggested in Constitutional Court Judgment 76/1983) and it would avoid future discrepancies in the content of different bodies of regional legislation, and thus contribute decisively to achieving the proper incorporation of Community legislation. Moreover, the public interest invoked in Article 150.3 resides in the need to comply with the obligation to transpose Community rules that require internal legislative change and thus prevent the State from becoming liable for non-compliance.

In any case, it would be necessary to achieve judicial corroboration for certain procedural steps that would have to precede this type of law, especially with regard to the necessary coordination of the Autonomous Communities and granting them a prior hearing.

- Mechanism to temporarily revoke an Autonomous Community's legislative competence when it is not exercised within the period allowed for in the Community rules.

With full respect for the distribution of powers established by the Constitution and to ensure the State complies with its obligations to transpose EU rules, without needing to invoke the supplementary condition set out in Article 149.3 of the Constitution, and in accordance with Article 93 of the Constitution, it is to be expected, should an Autonomous Community fail to comply with its transposition obligations⁷⁷, that a substitutive power would be conferred on the State (in line with that provided for with respect to local government⁷⁸). This substitution would be achieved via a mechanism comparable to the Italian *cedevolezza* clause, under which, on the appropriate date (which could be when the time limit for the transposition of the Community provision in question expires or when formal notice is received), the State legislation adopted enters into force in

⁷⁷ It is true that, on occasion, the obligation to transpose does not conclude with the approval of the corresponding basic State rule (although this outcome is usually accepted by the Commission), but requires additional regulatory development by the Autonomous Communities to achieve the complete incorporation of the directive and its effective implementation.

⁷⁸ Article 60 of Act 7/1985, of 2 April, on Local Governance.

the Autonomous Community or Communities that have not yet adopted their own rules in this respect, and continues to be applicable and effective until the rules in question are transposed by the Autonomous Community or Communities.

In Italy, there is a clear linkage between the system and the Constitutional order. In this respect, what is of particular interest is the precept set out Article 117.5 of the Italian Constitution, according to which the regions and the autonomous provinces, on matters within their respective powers, may adopt appropriate measures to implement European Union acts, subject to the rules of procedure established by the "State law that controls the exercise of substitutive power in the event of non-compliance". Italian judicial authorities have stated that this Constitutional provision of Article 117.5 refers to a substitutive, innominate State power applicable should a region be in breach of its obligations, unlike other cases provided for in the Constitution, which are comparable but have a different scope (for example, as addressed in Article 120). It has also been observed that Article 117.5 considers a situation of legislative or regulatory inertia (or indifference) presented by the regions and interprets this as justifying "preventive State intervention with respect to any breach of obligation by the region".

First introduced into Italian law under Act 39 adopted in 2002, this mechanism of preventive, substitutive intervention is regulated under Act 11 of 2005, which reflects the main features of the Italian Council of State's consultation response issued at its plenary meeting of 22 February 2002. The Council based its judgment, essentially, on the following principles:

- The power to transpose Community directives in matters attributed under Italian law exclusively or concurrently to the autonomous provinces or regions corresponds to those provinces or regions.

- If the provinces or regions fail to adopt the necessary measures, the State is obliged to transpose the directives by means of its own system of legislative resources in order to respect Community commitments.
- The rules approved by the State by means of this substitutive route are only applicable in the territory of the regions (or autonomous provinces) that have not adopted the transposition measures, and yield to regional standards: in other words, they cease to be applicable as soon as the region or province exercises its own power to transpose the Directive within its territorial limits. This characteristic of the State rules of "yielding" to the enactment of the regional legislation is the essence of the *cedevolezza* clause.
- The express inclusion of the clause in the State rules on substitution was necessary, according to the Italian Council of State, because State intervention in matters of regional competence is considered to be collaborative in nature and therefore the substitutive State rules, even if adopted beforehand, only take effect from the moment at which the region's non-compliance with its transposition obligations takes place.

The above-mentioned Act 11 of 2005 basically reflects the reasoning of the Italian Council of State, distinguishing the cases in which the State rule on substitution is a law, a governmental regulation or a ministerial decree. For all three cases, according to the Act, the State rules "apply, for the autonomous provinces and the regions in which their own regulations in the respect are not yet in force, from the moment following the expiry of the time limit for compliance with the transposition required under Community legislation, and shall in all cases cease to be effective from the date of entry into force of the transposing legislation adopted by each region or autonomous province". The State rules must also explicitly recognize the substitutive nature of the State power exercised, together

with the time limit for the validity of their provisions, which will yield to the regional legislation following its adoption.

In view of this Italian system, the main features of which are described above, it is highly advisable to introduce into Spanish law a similar preventive, substitutive mechanism. Certainly, the ideal location for including such a provision, in general, would be in the Constitution, but it could also be incorporated into a legal regulation. What is important is that, in practice, the State can make use of this instrument, especially in cases in which the replacement of an Autonomous Community's legislative competence by that of the State is the only way by which Spain can fulfil its obligations to the European Union. We emphasise the exceptional nature of this replacement, which would only occur if the Autonomous Community failed to effect the necessary transposition within the allotted time period, and would only remain in force until the Autonomous Community adopted its own transposition rules.

The assumption by the State of this guarantor function – a question on which no clear Constitutional jurisprudence has yet been handed down – is supported by various Constitutional texts referring to legislative competence (to name just a few of the most general ones, those contained in rules 1a and 3a of Article 149.1 of the Constitution⁷⁹) and by its impact on "the very foundations of the regulatory system" (to use the terminology of Constitutional Court Judgment 32/1983), by its clearly extending beyond mere implementation. In any case, the decisive factor is that, as noted above, the absence of such a mechanism could lead to Spain failing to comply with its obligations to transpose Community rules. In this regard, and as noted by the Constitutional Court in one of the judgments mentioned above (number 252/1988), only an incorrect interpretation of Constitutional and statutory provisions could impede the guarantor function

⁷⁹ Despite the fact that the Constitutional Court has sometimes rejected the invocation of Article 149.1.3 of the Constitution (for example, in its judgment 54/1990, of 28 March), this does not mean that the use of this power is always forbidden.

and deprive the State of the instruments needed to ensure compliance with its obligations to the Community.

In any case, it would be useful for the instrumentation of this solution to be preceded, in each specific case, by prior agreement or by informal negotiations with the Autonomous Communities. Beyond a doubt, this would contribute to reducing the conflictivity that could otherwise be generated by a measure of this kind.

f) Sectoral conferences and the CARCE

As well as establishing an appropriate regulatory framework to make the system more secure and consistent, it seems highly necessary to streamline the performance of transposition, introducing appropriate measures to make the organizational structure and the functioning of all the conferences more flexible; this could be achieved by means such as varying their composition depending on the issues under discussion and the level of knowledge required, having a clearcut schedule for meetings, strengthening the position of the Secretariats to encourage a more dynamic approach to the tasks at hand, and preparing for such tasks in advance (when for reasons of timetabling, decision taking cannot be delayed until the next conference meeting).

As regards the CARCE in particular, these suggestions are all the more significant for issues that affect more than one sectoral conference. In this respect, as noted elsewhere in this Report, the CARCE must play a more active, expeditious role.

Furthermore, we believe a process should be introduced to facilitate and ensure coordination when the matter in question affects different ministerial areas. This aspect is all the more significant, as emphasized in the Government's consultation request, when the Autonomous Communities are responsible for developing the Community law, because although the CARCE Agreement governs internal participation by the

regions in Community issues, by means of the sectoral conferences, in certain cases the urgency of the procedure currently prevents adequate coordination between the sectoral conferences affected.

To ensure the participation of the Autonomous Communities, it might also be necessary to ensure that if the urgency (properly accredited) is such that the respective sectoral conference is unable to meet, this procedure could be replaced by that of a hearing with these Autonomous Communities.

3. Objective perspective: from the directive to the internal rule

3.1. Transposition: goals and methods

On examining transposition from an objective perspective, including aspects of regulatory technique, various questions arise, such as the convenience of opting for a new rule or amending an existing one, the partial or total nature of the transposition, and linguistic and categorial aspects of the issue.

All these questions are affected by the very nature of the Community Directive: although Article 249 TEC defines it as a rule set with general contents and with a clear objective to be achieved, thus leaving the Member States substantial room for manoeuvre, in practice the content of these directives has become increasingly complex (thus reflecting the Anglo-Saxon approach in this respect) and they have come to constitute detailed regulations of the area addressed⁸⁰. This feature of some

⁸⁰ The initial characterization of the Community directive and, ultimately, the role to be played by the Member States in its development, has been significantly affected by the practice of the Commission and by ECJ case law; hence, the clear-cut differences between regulation and directive have become less obvious. In the 1970s, the Luxembourg Court recognized the 'useful' effect of the non-transposed directive, provided it was "unconditional and sufficiently

directives⁸¹ encourages the practice of making a verbatim transcript of their contents; some have even inquired whether the limited scope for action open to the Member States in such cases might justify directly incorporating the directive into domestic law as a regulatory instrument, thus bypassing the intermediate step of State decision.

However, it is likely, or at least desirable, that this trend will moderate, for various reasons, such as the application of the principles of subsidiarity and proportionality, which require States to respect the open-ended wording of Community Directives⁸².

Another important factor to consider is that the development of Community provisions is overlain by respect for the multilingual nature of the European Union, a respect that has given rise to a harmonizing, integrating attitude to all the official translations of the same provision, so that, in the event of any apparent difference between a version in one official language and those in the others, no greater value may be attached to one interpretation over the others – although sometimes the correct interpretation can be reached by a critical comparison and matching of multiple versions. On the contrary, the appropriate interpretation must be

precise" (see, among others, ECJ judgments of 6 October, *Grad*, Case 9/70, and of 4 December, *Van Duyn*, Case 41/74) which – although the Court found some justification for the delay, sometimes considerable, in the transposition of directives into the domestic legal system – represented an advance replacement by the domestic law on the same subject and the mandatory application of the directive by national judges when so invoked by citizens.

⁸¹ Referred to by the Council of State in numerous Opinions (among others, 535/92, of 2 July, 1992, and 1605/93, of 13 January 1994).

⁸² Thus, in the Communication from the Commission to the Council and to the European Parliament on the principle of subsidiarity, on 27 October 1992 (which was expressed in similar terms shortly afterwards by the Council in its Edinburgh Conclusions), it was suggested there should be a more systematic use of directives as a general framework of rules, and that the Member States should be solely responsible for their implementation. In short, this Communication foresaw a gradual abandoning of the practice of generating detailed directives, as was also advocated in Amsterdam with Protocol No. 30 on the application of the principles of subsidiarity and proportionality.

The guidelines on legislative techniques of EU institutions also support this view, such that Community acts should be drafted taking into account the type of act in question (second general principle of the Institutional Agreement of 22 December 1998): therefore, if a final text is expected to be drafted, in general, the legal form of regulation should be adopted.

inferred from the context and from the stated aim of the Community provision in question (see, among others, ECJ 6 October 1982, *CILFIT vs. Ministry of Health*, Case 283/81; and 3 March 1977, *North Kerry Milk Products Ltd vs. Minister for Agriculture and Fisheries*). By virtue of the same principle, Community acts are drafted in terms and sentence structures which respect the multilingual nature of Community legislation.

Nevertheless, Community legislation is often criticised for its proliferate use of loan words, calques and jargon, as well as the long lists of definitions usually included. Although these definitions are sometimes limited to technical concepts of the matter in question, in other documents they constitute categories in themselves that in the natural development of the Community rules need to be incorporated within the corresponding domestic legislation.

In all these considerations, it should be recalled that the Community body of law features both linguistic pluralism and a high degree of conceptual originality, partly as a result of the significant influence of the Member States' legal traditions.

a) Complete transposition: whether to adopt a new rule or amend an already-existing one

The rules adopted should regulate the question that is the object of transposition completely, without gaps or omissions. Two main options are available: either to adopt an independent body of rules covering the entire field covered, or to adopt rules in order to amend already-existing internal legislation, making the changes necessary to include the content of the Community provision.

Both approaches offer advantages and disadvantages: in the first case, the adaptation to the Community rules is more visible, while the second approach avoids a situation of greater regulatory fragmentation and

facilitates the implementation and localization of the rules (especially if it is followed by the development of a consolidated text).

The right choice depends on the nature of each case, and this question, in any case, must be reconciled with the requirement to conclude incorporation within the time limit established by the Community provisions. Therefore, a balance must be sought between the benefits of full regulation and the risks that may arise from possible resistance to new regulations (Council of State Opinion 2429/2004, of 28 October 2004).

b) Total or partial transposition

A Community Directive must be incorporated in its entirety into national law (ECJ of 28 May 1998, *Commission vs. Spain*, Case C 298/97), which would require, as a rule, a single item of transposition legislation for each directive, unless the nature of the issue regulated requires laws of different ranks.

However, in real life there are many examples of the partial incorporation of Community rules. In some cases, because such rules apply to matters that are already regulated in different bodies of legislation, in other cases, for reasons of procedural economy, and in yet others, because the transposition must be confirmed by rules of different levels or because the area in question lies within the jurisdiction of several ministries.

In general, there is no objection to partial transposition when this option is adopted for objective reasons such as those set out above, and provided it does not omit the transposition of any part of the directive. In any case, when the transposition needs to be addressed by rules of different ranks, it is convenient, as reiterated by the Council of State in numerous Opinions – including 304/96 of 22 February 1996, 1786/2000 of 18 May 2000, 1344/2001 of 19 July 2001, 740/2007 of 3 May 2007, and 1504/2007 of 19 July 2007 – that a coordinated and if possible

simultaneous development should be conducted of all these regulatory texts.

When the subject covered by the Community provisions involves several ministries, such that the partial nature of the transposition arises from the area of competence corresponding to each department, and can be addressed through a regulatory approach, it would be appropriate to establish the rule that in such cases the transposition should be addressed so that either the initiative is taken by one of the ministries involved, or otherwise they all participate, with one being responsible for overall direction. The aim, in both cases, is to achieve a single transposition instrument and thus a lower degree of fragmentation of the provisions set out in the directive.

c) Transposition by transcription

When a Community Directive must be incorporated into national law, sometimes it is transcribed literally, while on other occasions the legislator seeks a closer match to the domestic system and its associated categories and concepts. The literal transcription facilitates the incorporation and perhaps reduces the occurrence of inexactitudes of interpretation, but might not fit well with current legislation and difficulties can arise in its practical application. Therefore, caution is required in using this approach to legislation. Indeed, it has not always been accepted by the European Court of Justice, because directives, in principle, are characterized by the diversity of regulatory policy options available and by their flexibility regarding the resources that can be used.

The most reasonable approach is to seek to give a clear and technically correct wording to the transposition instrument (see, among others, Council of State Opinions 426/91 of 11 April 1991, 1684-1691 of 26 December 1991, 380/92 of 26 March 1992, 271/92 of 9 April 1992, and 1429/2005 of 20 October 2005). This is of particular significance with

respect to legal categories that have no equivalent in the national legal system (an issue expressly referred to in the Government's consultation request) as a simple literal transcription could provoke severe mismatches and misunderstandings, either by the use of inadequate expressions or by creating situations of uncertainty as to the intended effects of the new legislation.

Sometimes, however, due to the technical nature of the subject or when the wording of the Directive is very detailed, legislators may opt for literal transcription because the use of any other terminology could provoke conflict and could even be considered grounds for an allegation of infringement of Community law. It must be remembered that the Commission closely monitors developments to ensure that transpositions reflect as closely as possible the Community provisions incorporated and, although such monitoring does not mean that a literal copy is imposed, in practice this tends to be the case.

As for the transcription of a directly applicable Community provision, this is a course of action that should only be adopted in exceptional circumstances, so that no doubts are raised concerning the Community origin of the regulation. However, if it is considered appropriate and even necessary to reproduce, albeit partially, any provision or provisions contained in Community regulations, the internal rules should state the direct applicability of the Community regulation, irrespective of its partial transcription into the internal standard (for example, in the preamble: see Council of State Opinions 48.969, of 13 March 1986, and 49.001 of 20 March 1986).

d) Transposition by reference

The very use of the literal transcription of directives in internal law raises the possibility that the internal law adopted to this effect, rather than

incorporating a literal reproduction of the full content of the directive, might simply refer to it, wholly or in part.

This issue may be related to the requirement that publicity be given to legislation. To resolve it, the legal nature of the directive itself must be taken into account, insofar as it is results oriented and addressed to the Member States, not their citizens.

From this perspective, it is not advisable to incorporate the content of the directive by reference, as this would prevent any adaptation of its concepts and could reduce the clarity of the regulations and thus affect legal certainty, especially in the case of directives that are not published in the Official Journal of the European Union (our emphasis in the latter supposition, obviously, should not be understood as seeking any weakening of the requirement that publicity be given in domestic law when the directive has been published in the OJEU).

Transposition by reference, if and when called for, should be constrained to clearly-defined points and lead to better understanding of and compliance with the regulation (see, in the same sense, Council of State Opinion 535/92, of 25 June 1992). Thus, for urgent circumstances and to avoid a breach of duty to the Community institutions, it might be reasonable to apply transposition by reference⁸³.

In the case of directly applicable rules (such as regulations), the use of reference is considered preferable to the literal transcription of the content; moreover, this is consistent with ECJ jurisprudence. It operates by reference to specific precepts of Community rules and it limits the content of the internal law to its development within the margin of operation allowed by the regulations for internal regulatory options.

⁸³ Consider the example of the transposition, by Royal Decree-Law 1/1997, of Directive 95/47/EC. Another case in which transposition by reference took place was that of certain essentially technical annexes of the directives, which had to be reflected literally in the correlative annexes of the internal rule (Council of State Opinions 1517/1591, of 28 November 1991, and 535/92 of 25 June 1992).

e) Linguistic and conceptual questions

Despite recent efforts made to improve the drafting of Community texts, it is unarguable that these originate from a multitude of transactions between subjects using different languages, and these transactions often have to be transcribed in a language other than the original.

Accordingly, there are cases in which the wording can be ambiguous, cumbersome and hard to understand, a circumstance that may be aggravated with subsequent translation into the other official languages, and this has sometimes resulted in the existence of conflicting versions. However, in the case of secondary legislation, the most serious problems can be overcome, especially if the incongruence is perceived in time, with the publication of an errata list in the OJEU.

When Community law is transposed into national law, the terms employed must be those most appropriate for the Spanish legal system. The language employed in the Spanish version of a directive, which has full authenticity, is a question of vital importance. The Spanish versions are very often translations of the "original" texts, normally written in English or French, and this fact may be detrimental to the quality of the official translation. In consequence, we emphasise, once again, the importance of applying mechanisms to prevent the appearance of clumsiness, poverty of style and even coarseness in such translations.

As well as from poor translation, a conceptual incongruence may arise from the diverse categories employed in Community and national legislation. In this case, and in accordance with the principle of giving preference to the internal quality of transpositional rules, preference should also be given to the use of concepts pertaining to Spanish law. Nevertheless, this principle may have to be tempered in order to uphold the principle of Community solidarity, such that the term finally chosen enables

the transposition rule to be interpreted in accordance with the goals set out in the directive.

The above-mentioned diversity may arise from the fact that the Community provision employs a generic term. In this case, the problem is normally resolved straightforwardly; all that is required is a normal level of familiarity with the regulations currently in force to identify the closest and most appropriate term in Spanish.

Another situation is that in which the directive employs a category or concept referring to an idiosyncratic view of a particular national law, with no clear equivalent in Spanish law. The national legislator has broad, but not unlimited interpretive freedom, and the directive must not be invalidated by an adaptation text that violates its spirit and purpose. Proof that such national freedom of drafting is not absolute was given in the ECJ judgment of 13 January 2005, *Commission vs. Spain*, C-84/03, condemning Spain for the inadequate incorporation of the term "contracting authority" in legislation on public works contracts (having considered that the private law system in itself constituted a criterion by which the classification of an entity as a contracting authority could be rejected).

Finally, a directive may also include a category that is alien to all concepts in national law, thus constituting a complete innovation within the legal framework of the Community. In this case, special care must be taken to clearly define the meaning of the category in question; this usually requires a prior reflection process, which should obviously be addressed with the utmost rigour.

3.2. Transposition in practice

Let us now examine transposition from the standpoint of the various parameters – place, time and manner – that affect its development.

a) Place: establishing connecting points to determine the location of competence for transposition

A point to consider is the possibility of identifying points of connection for the proper exercise of State and regional competences in the transposition process.

This would be particularly useful in view of certain statutory provisions, such as Article 189.3 of the Statute of Catalonia and Article 235.2 of the Statute of Andalusia, which recognize the region's competence, in general, to adopt implementing legislation from European regulations, in contrast to the broad interpretation of the concept of basic legislation that governs the transposition of European rules.

Without seeking to judge the conformity of such provisions with the Constitution (although it is obvious that any exercise of such jurisdiction would need to be conducted in accordance with the distribution of powers stipulated in Articles 148 and 149 of the Constitution), we do observe a foreseeable strengthening of regional powers, in line with demands in this respect by the Autonomous Communities, and so there should be mechanisms that allow the State to address situations in which the Autonomous Communities fail to comply with their obligations regarding the transposition process.

In this context, it is reasonable and appropriate to define the criteria that should be taken into consideration so that, when the issue permits, and especially when competences of diverse types are involved, it may be decided how the exercise of each authority's regulatory powers should be effected.

b) Time limit for transposition

The European regulations that require a domestic legislative complement usually set a deadline for the Member States to adopt the necessary provisions. Regardless of whether this time limit is reasonable –

despite the increasing complexity of many of the regulations contained in the directives, transposition periods are tending to become shorter – Member States are obliged to perform the transposition within this period, or otherwise be liable for the breach.

For this reason, transposition work is given high priority⁸⁴ and the few specific provisions on procedures for drafting internal transposition rules are also intended to reduce the risk of non-compliance due to non-fulfilment or the late transposition of directives.

Nevertheless, there is scope to improve the transposition activity from the point of view of its conclusion within the specified time. Accordingly, many of the proposals contained in this report are intended, directly or indirectly, to accelerate the inception of transposition work and to expedite the procedure so that the transposition of European rules may be concluded in the allotted period; however, perhaps all of these proposals can be restated as or associated with the idea of the essential continuity between the decision-taking phase and the transposition phase, since this continuity, together with more and better coordination, will undoubtedly give rise to a higher level of anticipation and, ultimately, to more time for preparation, thus raising the quality of the internal regulation itself.

c) Manner: publicising the internal regulation

Due publicity for domestic legislation is expressly required under current Spanish law, and therefore all transposition texts must be published, in full, in the Official State Gazette.

Furthermore, Member States are obliged to give official publicity to transposition rules, in accordance with the principle of ensuring legal certainty. Therefore, a State is not relieved of liability for infringement, even if it implements the Community rules by means of circulars or internal

⁸⁴ This is required under the Council of Ministers Agreement of 27 July 1990, which called for instructions to be issued to certain areas of the public administration to accelerate the process of developing rules for transposing Community directives.

instructions, and not even when these are binding on its authorities and officials, until the transposition is published in an official journal (ECJ, 2 December 1986, *Commission vs. Belgium*, Case 239/85; 15 October 1986, *Commission vs. Italy*, Case 168/85; and 12 January 2006, *Commission vs. Spain*, Case C-132/04).

The Autonomous Communities, too, must publish their provisions in the corresponding official gazette, and in the case of laws, the publication is twofold as it must be done in both the State and the Autonomous Community gazettes (although it is the latter case that determines the starting time for any time limits that may be imposed).

Although this would depend on its being permitted under Community law, a merely informative publication in the Official State Gazette of the European Community's general acts would be highly useful and of great interest in the case of Community regulations.

Finally, in its "Communication on the Internal Market Strategy – Priorities 2003-2006", the Commission set out the desirability of transposition-related information (time period, content, rights) being included in a publication for the general public and for business. A suitable channel for this might be via a website dedicated to this issue or through an appropriate link on each ministerial website.

4. Dynamic perspective: the transposition process

In examining the transposition process, let us first emphasise the priority nature of this task and the need for preventive, well-planned action. Hence, the aim of this study is not merely to reduce the possibility of non-compliance due to failure to effect the transposition of directives or to delays in this respect.

We must focus, therefore, on the process itself, culminating with the approval of the corresponding provision (at the same time, let us note that Spanish law does not stipulate any particular procedure in this respect).

The corresponding report sometimes details the main aspects of the transposition carried out, including a double-entry table listing the articles of the Community legislation and the corresponding ones in the draft legislative project. However, there is no legal obligation in this respect, and so its inclusion or otherwise depends on the criteria of the Ministry concerned.

Perhaps the most characteristic element of the process is the mandatory Opinion of the Council of State in the case of draft laws to be adopted in the implementation, performance or development of international treaties, conventions or agreements and of European Community law (Article 21.2 of the corresponding Organic Law), since in the case of draft statutory rules, in addition to the specific provision contained in Article 22.2 of the above Law, the Council of State must rule on all draft regulations or general provisions issued in the implementation of laws, as well as any amendments made to them (Article 22.3).

Therefore, we now set out certain specific proposals for adjustments to the procedure laid down in general terms in title V of Government Act 50/1997, of 27 November. At the same time, we emphasise the importance and value of the Council of State's intervention; it complies with the legal requirement to obtain said opinion and is also available to respond to consultation requests the Government may make, taking into account the circumstances and reasons set out in this Report.

4.1. Identifying the ministry with competence in the subject. The essential continuity between the decision-taking phase and the transposition phase

Once the directive has been published in the OJEU, it is necessary to determine the authority initially considered competent for its transposition. The Secretariat of State for the European Union, specifically the Directorate-General for Internal Market Coordination and other Community Policies, then performs and reports its "provisional assignment", by which responsibility for the transposition is assigned to one or more ministries.

This procedure does not usually take long (about a month) and the designated Ministry is usually responsible for implementation. But it is possible (albeit rare) for this not to occur, in which case the procedure is prolonged:

- The dissenting ministry states the reasons for its rejecting the designation. The decision-taking authority, after appropriate consideration of its reasons, then makes a new designation (not excluding the possibility of the original one being ratified).
- If again there is disagreement, a coordination meeting is convened between the dissenting ministries to attempt to reach a solution.
- If no solution can be achieved, the issue is transferred to the Government Executive Committee for Economic Affairs, whose decision is final.

Surprisingly, the ministry that undertakes the lead role in the negotiations leading to the Community decision is not always the same one that subsequently implements the transposition procedure. In other words, the attribution of competence (and responsibility) for the transposition is

not considered correlative with the degree of participation (and responsibility) of each ministry in discussions/negotiations at the Community level. This fact underlines the need to follow a specific procedure (although this is not stipulated in any instruction) to assign the transposition of Community rules, as and when required, to the appropriate body.

In consequence, it is advisable to seek, indeed to ensure, the oft-invoked continuity between participation in the Community decision-taking procedure and the eventual incorporation of its outcome into Spanish law. It is not reasonable for the department made responsible for the transposition to be other than the department that was involved in (and to a greater or lesser degree "headed") the negotiations. Continuity, besides avoiding possible differences of criteria, enables the work of transposition itself to begin at the earliest possible moment (even if the draft text remains subject to change, especially in the framework of codecision procedures).

Moreover, and without losing sight of the idea of continuity, it might be beneficial to institutionalize the procedure followed in practice in determining which ministry shall be considered competent, bearing in mind that a degree of flexibility in this respect is recommended. This regulatory procedure should facilitate the expeditious resolution of any jurisdictional conflicts that may arise.

4.2. Anticipation and planning: developing a transposition schedule and obtaining additional reports. The role of the Council of State

It would be helpful – via a sectoral outlook together with appropriate coordination – to take a broadly-agreed decision on major issues, including the question as to which authority or authorities shall be responsible for

negotiating and for transposition; if the attribution of responsibilities is carried out quite transparently, and a mechanism introduced to avoid the re-examination (or to enable the speedy resolution) of organizational issues that have already been decided, then subsequent conflicts between departments could be headed off. Moreover, this approach would undoubtedly help streamline the entire process and avoid hasty, last-minute decision taking. In essence, a preventive, pre-planned stance must be taken.

In the English model, a transposition programme is developed at the outset, identifying the competent authorities, the regulatory reforms that will be needed and the dates by which they should be implemented. In France, the Circular of 25 January 1990 requires the competent ministry, in the three months following the publication of the corresponding directive, to develop an implementation schedule for the transposition texts, together with a provisional draft in each case.

The preparation of similar documents – for example, a more general transposition programme in the initial phase, and a more detailed version when the Community regulations have been officially published by the ministry concerned, would certainly help facilitate the incorporation of Community rules. Such documents could include crucial elements such as the distribution of powers between the State and the Autonomous Communities, the ministries involved (both in negotiations and in incorporating the Community legislation) and the regulatory body or bodies to implement the transposition (taking into account the subject addressed and the rank).

With respect to this question, in some Member States additional reports may be requested about how the transposition of a given directive should be addressed. For example, in France the Council of State can be consulted as to the best procedure to adopt regarding transposition.

In Spain, when the Government refers a transposition bill (or draft text) for its attention, the Council of State is obliged to give an opinion as to the accordance of the text with the directive. However, intervention at an earlier stage – for different ends and possibly to more valuable effect – might be considered. For example, its opinion might be requested concerning the meshing of a particular draft version of Community provisions within domestic law or concerning the terms in which transposition should be addressed; this is especially to be recommended in the case of highly complex Community rules that affect various areas. Furthermore, during the subsequent mandatory intervention by the Council of State, this kind of prior consideration would provide it with information and introductory criteria with which to judge how the transposition has been addressed, as well as to evaluate (as it does at present) the final content of the draft legislation.

Furthermore, implementation of such a measure would not require any amendment to the Basic Law establishing the Council of State, as the question of discretionary consultations is provided for in the first paragraph of Article 25 of this Act. On the other hand, it would be appropriate to include in the protocol for action, referred to above, the reasons for requesting this prior report, especially in cases of Community rules that are highly complex or of a heterogeneous nature, together with the terms in which the consultation should be formulated, to ensure its meaningfulness and independence, and so as not to interfere with the conclusive nature of the Council of State's opinion.

4.3. The transposition measure to be applied

The transposition rules applied must respect the current system of domestic law sources, meaning that certain requirements must be taken into consideration and complied with in deciding upon the type – obligatory

or recommended – of such a standard. In this respect, one of the crucial areas to be addressed in examining the transposition procedure is that of the distribution of issues between laws and regulations. This distribution must be decided taking into account, on the one hand, the principle that the only legally-binding provisions are those contained formally and substantially in a law, and on the other, that contents of less importance or stability should be addressed by means of regulations. Given these principles, a balanced approach should be sought on a case by case basis, without forgetting that a directive cannot be considered properly incorporated into national law until all the rules and measures necessary for its practical application (be they laws and regulations, or State-wide and Autonomous Community regulations) have been adopted. Hence the above-mentioned desirability of developing – within the time limits established (in France, for example, within three months of the directive's publication in the OJEU) – a transposition schedule specifying the competent authorities (taking into account that in the ascending phase negotiation and transposition responsibilities have already been assigned to one or more ministries), the regulatory changes required and a timetable for their implementation. In consequence, work in this respect should begin immediately after the publication of the Community provision.

In view of the necessary respect for the system of domestic law sources and for Constitutional presuppositions in this area, special consideration should be given to certain practices whose correctness may be open to question.

a) *Associated laws and similar legislative acts*

The first such case arises when transposition takes place by means of what are termed 'associated laws', accompanying the General Budget Act; until very recently these were used to carry out the transposition of certain elements of Community provisions. At the national level, this practice has been discarded, because the extremely heterogeneous content of the

associated laws was considered to seriously endanger the principle of legal certainty. Nevertheless, they have been replaced by other instruments that have an equally heterogeneous content, but which are focused, at least in principle or intention, on the incorporation of Community directives.

Our underlining of the drawbacks to such practices is compatible with the design of mechanisms and instruments to modify and improve them, thus enabling a flexible approach to transposition. Thus, the example of Italy is often cited. There, the Law of 9 March 1989, commonly known as *La Pergola*, now replaced by Law No. 11 of 2005, makes the minister in question responsible for monitoring the stage of incorporation of Community rules, and also states that before 31 January each year the Government must submit a draft "Community law" setting out the measures that Italy must take in order to comply with its obligations under Community legislation or ECJ resolutions. This not only contains the provisions necessary to transpose certain directives, but also states the degree of conformity between domestic law and Community law, and acknowledges any infringement procedures that have been initiated against Italy, the judgments handed down by the ECJ and the degree of compliance with these. In addition, issues that have previously been regulated by law, unless there exists an express legal reserve in the Constitution, can be incorporated by means of a regulation, provided the necessary de-legalization is performed, either in the "Community law" or in another law. Finally, the provisions referred to are accompanied by numerous annexes listing the types of rules to be incorporated.

Nevertheless, this legislative and regulatory practice does not appear wholly satisfactory, either. Taking into account Italy's relative position in the statistics of compliance with transposition deadlines, its record does not entirely credit utility and effectiveness and an absence of serious drawbacks. What does seem an example to follow is the annual referral to Parliament of a report setting out all transposition activities pending and

effected, so that compliance with obligations in this respect can be monitored continuously.

In any case, if associated laws are to be retained in practice, they should be limited to unavoidable cases. Moreover, at the very least, it is essential to seek and confirm the existence of a substantive relation between the Community rules that are to be incorporated into a single regulatory text.

b) Legislative Decree and Decree-Law

It is sometimes necessary to resort to mechanisms that reduce the role played by Parliament, such as Legislative Decrees and Decree-Laws.

- Legislative Decrees

Although secondary Community law must be incorporated in accordance with the internal distribution of competences, in the Member States there is an evident tendency for such competences to be delegated to the Government when the regulations to be adopted have the force of law. This appears to be so for two main reasons: first, there is an obvious relationship of subordination between the Community instruction and the national implementation of its provisions; furthermore, it should be noted that directives are often detailed and casuistic, thus reducing the scope of decision-taking deferred to the State.

Under the provisions of Article 82 of the Constitution, approval of the corresponding basic law and of its subsequent development would in principle appear to be the ideal channel with which to address the incorporation of Community rules. From this perspective, two types of delegation are possible⁸⁵:

⁸⁵ This was done on the first and only occasion that the mechanism of the basic law was used to incorporate different Community rules following Spain's accession to the then European Economic Community. At the end of 1985, Basic Law 47/1985, of 27 December, was adopted, and it was implemented under Royal Legislative Decrees 1296-1304/1986 of 28 June.

- Delegation to adapt certain legal texts to the Community rules. The use of this formula does not pose major problems and it is particularly suitable for highly technical regulations, which in many cases are subject to a very strict deadline.
- Delegation to legislate on matters contained in Community provisions but not currently regulated in the domestic sphere. This option raises greater difficulties and doubts due to the breadth of the delegation and because, ultimately, the impression is given that Parliament is to some extent neglecting its decision-taking power, unnecessarily, regarding issues hitherto lacking domestic regulation.

In both cases, a question arises concerning the scope to be given to the term "basic law". If the principle of delegation requires the basic law to define the goals and scope and to establish the criteria and principles to be followed in its implementation (Article 82.2 and 82.4 of the Constitution), the basic law must be that resulting from the directives to be developed⁸⁶. Therefore, the corresponding basic law can be useful and relevant in terms of the act of delegation itself, but it operates in a limited way and by referral as regards the issue being addressed.

The other type of delegation provided for in Article 82 of the Constitution – the drafting of a consolidated text – can also be useful, although with a more limited effect, for the purposes of incorporating Community rules into national law. In the framework of the Government's power to regularise, clarify and harmonise the legal texts to be consolidated, this procedure could readily be applied to the Community

⁸⁶ It has even been pointed out that, due to the "duplicative" nature – under the referral – of basic laws, there could be some conflict with ECJ jurisprudence, to the extent that such a delegation could give the impression that the binding force of the legal basis actually derives from the internal rule and not the Community directive. From another perspective, this approach might lead to the Spanish courts, under the provisions of Article 82.6 of the Constitution, ruling on the compliance of the Government's legislative decree with the corresponding legal basis, which corresponds, in fact, to the Community rules.

provisions currently applicable. The main limitation to this approach is that it does not allow the introduction of any innovative legal regulation.

Moreover, as is the case in other respects, the Constitution does not take into account the fact of Spain's EU membership, and therefore does not consider a generalised delegation law, formulated in broad terms and authorizing the Government to develop the provisions that impact on any of the areas in which the European Community has powers of decision (such a delegation of power would be most meaningful in matters on which the legislature has had the opportunity to rule during the proposal phase, under the "early warning" system). The terminology used in the Constitution, such as "for a specific subject" and "cannot be taken as granted implicitly", etc., suggests rather that a case-by-case authorization was contemplated.

Accordingly, on this point too it would be desirable to amend Article 82 of the Constitution so that the instrument enabling legislative delegation could be fully empowered with regard to the incorporation of Community law.

In the absence of such an amendment and under an interpretation of the previously-cited Constitutional provision to enable maximum flexibility, it would be appropriate at this point to note the desirability of introducing a specific, legally-regulated procedure to deploy the constitutional system of delegated legislation in response to the needs of the European framework and with full respect for the principles enshrined in Article 82 of the Constitution. The content of this future law, if adopted, would not constitute a delegation of Article 82, but would focus on regulating the corresponding procedures and on assigning competences. Clearly, in no case would this represent a total cession of powers to the Government, although it would remain directly responsible for developing, via regulations, the matters subject to Community legislation that are of less legal and political significance. And, of course, this would be under the control of the legislature in accordance with stipulations to be set out in the same law. It

is apparent, therefore, from the latter observation, that the techniques of legislative delegation and of delegalization converge and impinge upon each other; they operate in opposite directions and are disparate in their degree of rigour.

Moreover, in regulating this procedure, special emphasis should be placed on the need to minimise the time allotted to each phase, because otherwise the legislative decree option would not necessarily achieve any greater flexibility and speed in incorporating Community rules than the ordinary legislative procedure.

- Decree-Law

The use of the decree-law as a means of incorporating Community rules warrants particular attention. It is true that this approach may be justified in certain cases— according to Article 86 of the Constitution, the situation must be one of extraordinary and urgent necessity – in response, for example, to an imminent deadline imposed by the Community rules, to a pressing need to react to specific circumstances, or following a declaration of non-compliance by the ECJ. But it is equally true that it should not become a standard mechanism for the incorporation of directives, fundamentally due to the very nature of this class of legislation.

In any case, if resort is made to this mechanism, special care must be taken to ensure it is duly justified and its content sufficiently homogeneous. In this respect, it would be desirable, indeed highly advisable, for it to be passed into law by the emergency procedure, not so much because of the sudden disappearance of the enabling supposition, but rather because the material limits to the operation of the decree-law could prevent complete regulation to incorporate the Community rules.

c) *Laws and regulations. The case for "pari passu" regulation.*

When the issue in question is not subject to the requirement of law, and there is no need to amend an existing law, the Government may

exercise its regulatory power, the initial expression of which is a decree issued by the Council of Ministers.

In this regard, it should be borne in mind that the Constitution, and in particular Article 97, states that the Government may exercise such regulatory power even in the absence of express legal authorization to do so, and therefore this form of regulation plays an important role in the transposition of Community law; however, in practice most of the content of directives tends to be included in primary legislation, even for questions that are not subject to the requirement of law, which complicates any subsequent modification of this content. Therefore, the general rule should be that the law only regulates matters that, due to their importance or subjection to the requirement of law, constitute the essential regulatory framework of the issue in question (Council of State Opinion 1504/2007 of 19 July 2007).

Secondly, in case of doubt and as an overall principle, transposition should be carried out by means of a decree rather than by ministerial order (Council of State Opinion 535/92 of 2 July 1992).

As regards rules and regulations below the rank of law, particular problems arise in the case of circulars and instructions. This area is a matter of some controversy, and it has been argued that such provisions, in specific cases and depending on their content, may have a regulatory effect (Constitutional Court Judgments 54/1990 of 28 March, and 103/1999 of 3 June; Supreme Court Judgment of 27 November 1989).

In practice, these instruments have been used to clarify very specific or highly technical aspects concerning the legislative consequences of a Community regulation or directive. However, as noted above, the ECJ does not favour this practice, insofar as circulars and instructions are not assured of the requisite official publication. Hence, the judgment against Spain for the non-transposition of a directive on workers' health and safety

(with respect to the Civil Guard) in relation to which various instructions had been issued, but which were not considered sufficient to ensure legal certainty for citizens in the exercise of their rights (ECJ, 12 January 2006, *Commission vs. Spain*, C-132/4). The obvious conclusion is that, in such cases, circulars and instructions must be published and communicated.

Finally, we emphasise the value of ensuring the coordinated, simultaneous production of the texts of draft laws and of the regulations that will develop them.

In order to overcome the problem of fragmented, patchwork regulation, beset by urgency, the results of which lack a systematic overall perspective and which, moreover, are often ephemeral in effect, it is advisable, especially when a complete legislative regulation is to be introduced, to simultaneously commission the preparation of the draft bill and the initial versions of the regulation, so that when the parliamentary process begins, the progressive shaping and perfecting of the regulatory text can be advanced *pari passu* (see, among others, Council of State Opinions 1786/2000, of 25 May 2000, and 1344/2001, of 19 July 2001).

4.4. Supplementary Report

As regards the development of the transposition legislation, let us first emphasise the importance of the supplementary report that accompanies draft texts (especially draft laws). This report, which should normally be accompanied by a corresponding double-entry table or transposition table, constitutes the best context in which to reflect in some detail on how to address the transposition of a particular directive. Another important aspect that could also be included in the report, and which has already been considered above, concerns the distribution of powers between the State and the Autonomous Communities.

The report could even be structured in the form of the Transposition Notes used in the UK⁸⁷. Since November 2001, almost all British legislation which incorporates Community directives must be accompanied by a Transposition Note, setting out how the main elements of the directive in question are being or will be incorporated into national law. The only exception to this general rule occurs in cases in which the resources required to produce the Note are significantly greater than the benefits that could be obtained with it.

This instrument contributes to improving the quality of transposition and provides everyone involved in the task with a more precise understanding of the scope of their work, while ensuring that all the main elements of the directive have actually been incorporated. Moreover, the procedure acquires greater clarity and transparency. In addition, and depending on its content, it could be used to inform the Commission of the details of the transposition carried out.

The main risk in such reports is that they may be used, when there are defects in the transposition, as evidence against the UK in the corresponding process of law. Nevertheless, this risk can be minimised if maximum benefit is obtained from the Transposition Note, by using it as a checklist to avoid failures in the transposition or to detect them and take appropriate action.

In preparing such a Note, and to ensure its purpose is met, a number of requirements must be met:

- The content must be clearly understandable, especially by those directly affected.
- It must be clearly shown how the executive has carried out the transposition of the main elements of the directive (double entry table).

⁸⁷ See Annex I of the 2007 Transposition Guide.

- Any action that constitutes over-implementation must be identified. For this purpose, specific formulas have been coined: *"These regulations do what is necessary to implement the Directive, including making consequential changes to domestic legislation to ensure its coherence in the area to which they apply"* or *"These regulations do more than is necessary to implement the Directive in the following areas..."*.
- Finally, it must be submitted to Parliament and, on occasion and for information purposes only, to the other Administrations affected or involved.

4.5. Creating a new report, on compliance with European law

As with any type of internal rule, an additional control might be considered, to assess the potential impact of new legislation as regards the Community context. This is borne out by the fact that some national rules, although initially considered to be external to Community law, were subsequently found to have an impact in this respect (for example, by directly or indirectly affecting its precepts or principles, including very general ones such as the right of establishment or the freedom to provide services). Accordingly, an additional control could be introduced, referring to all regulatory projects: there is no need for a specific procedure, and the most reasonable approach would be for the Report (or one of the reports already considered, and in this respect that prepared by the General Technical Secretariat would be very suitable) to include a comment on the impact of the proposed legislation with respect to the Community.

From another standpoint, consideration should be given to incorporating, in one of the above-mentioned reports, a reference to the conformity of the proposed text with Community rules.

Italy recently introduced an instrument to harmonize domestic and European law, with a broader scope than the report discussed above but with a similar purpose. This is the European *bollinatura*, introduced by Decree of the President of the Council of Ministers on 7 September 2007. This process consists of awarding a seal to certify that the project in question is in accordance with Community law, and its basic goal is to avoid any clash between the proposed rule or regulation and existing principles of European law. For this purpose, any application to include a project in the agenda of the Italian Council of Ministers is subject to a prior compliance check to be carried out by the area of government making the proposal. Moreover, the President of the Council (or the Minister delegated to this effect) and perhaps also the Minister for European Policies, may postpone to a future Council of Ministers any project or measure presented for government approval but which presents an evident contradiction with Community law.

Of course, we are not proposing that such a formula should be implemented in Spain without further consideration; it is still relatively untried and in this country its goals are achieved by the mandatory intervention of the Council of State, in its prior Opinion. But the report could require a contribution from the different General Technical Secretariats analysing the project's compliance with European law, in the same way as an evaluation is currently required to better control public spending and to prevent sex discrimination.

4.6. The Hearing

In the hearing, it would be useful to have more flexibility than is currently obtained from the present wording of Article 24 of the Government Act (especially as regards the relationship with the sectors most affected by the Community rules). Furthermore, an adequate

response is needed to calls for participation in compatibility-ensuring procedures during the Community decision-taking phase (for example, by enabling the sectors affected by the proposals to participate in this phase); such an involvement would be made evident if, as suggested, the law regulated the procedure to give a hearing to those affected, either during the policy-determining process or while the Spanish position in Brussels is being established.

Although the Community procedure does have its own hearing procedure, in which Spanish sectors have the opportunity to intervene through the European organizations to which they belong, it does not appear that this, in itself, can act as a substitute for a national equivalent during the transposition process. Moreover, such a hearing is mandatory in the case of regulatory provisions and is especially significant in cases where the Spanish sector does not consider itself well represented or when the transposition rule goes beyond the terms foreseen and discussed in Brussels.

In any case, we emphasise the desirability of employing the appropriate channels to clearly identify the focus of sectoral assertions and to examine them on merit, particularly as regards their relevance to ensuring the compliance of the draft law in question with the Community rules it is intended to complement. Not infrequently, with respect to a specific process of transposition, allegations of many kinds are made and sometimes these are quite unrelated to the accordancy between the draft text and the Community rules.

4.7. Documentation to be provided to the Commission

There is a further element of documentation to be submitted to the Commission. Its Communication on the Internal Market Strategy, Priorities 2003-2006, stated that a declaration of accordancy with Community law

should be communicated to the Commission, containing detailed information about the elements of the directive that have been transposed. For example, in the specific case that the internal procedures for incorporating Community law are fulfilled by merely confirming that the latter provision is already complied with, it would be necessary to notify the Commission of this circumstance, accompanied by the corroborating text of the internal rules that are considered to incorporate the provisions of the Community legislation.

Finally, the possibility of late transposition must be addressed: in order to avoid, as far as possible, the opening of an infringement procedure (or possibly as a defence in the pre-litigation phase), it should be made obligatory to submit to the Commission a statement of the reasons for such non performance, together with the draft text of the internal rules being developed, with a detailed timetable for the corresponding transposition procedure.

4.8. Legislative initiatives

It is beyond the scope of this Report to discuss issues specifically related to the participation of Parliament in the decision-taking process within the European Community, but it should not be forgotten that most of the laws that incorporate Community provisions originated as governmental legislative initiatives. Accordingly, we must refer, albeit briefly, to the specific procedures leading to the formulation of the corresponding draft bill and to this legislative process itself.

There is no special legislative procedure for the incorporation of Community rules, apart from the fast-track procedures which, as for other legislative initiatives, can be applied (emergency procedures, single-reading procedures, or with full legislative competence assigned to the Commission; this latter option is applicable because it is not affected by the prohibition

set out in Article 75.3 of the Constitution). In any case, the flexibility of the legislative process in Spain is such that the preparation of a legislative bill can be concluded in about two months.

The only feature of special note from the procedural point of view, located at the phase in which the legislative initiative is taken by the Government, before the adoption of the draft text and its remission as a bill to Parliament, is that of the mandatory opinion of the Plenary of the Council of State (Article 21.2 of the Basic Law on the Council of State, as amended by Basic Law 3/2004). This opinion must be attached to the draft bill when it is presented to Parliament.

If this step were omitted, the bill that should have been addressed by the opinion might be considered invalid, as an act by the Council of Ministers, although the impact of the omission could hardly be other, in practice, than that attributed – with all its consequences – by Parliament, since such an omission could be considered by the latter as a failure to present the full background details and would be grounds for passing a motion to reject the initiative or to call on the Government to regularize it.

An additional consideration is the fact that when the draft law (or, where appropriate, the draft regulation) reaches the Council of State, the main options regarding the transposition (such as the distribution of issues between the main transposition law and its subsidiary regulations) have already been decided; moreover, it is not uncommon for the opinion to be requested urgently (usually, due to the proximity of the deadline for transposition or because, indeed, it has already passed). In consequence, it is appropriate to reflect on how the Council of State might best carry out its role as regards the incorporation of Community provisions into internal law.

Within the global outlook on the process, including the phase of Community decision-taking and that of transposition (and as a guarantee of continuity between the two), studies and reports could be requested of the

Council of State, as suggested above, after approval of the Community rules – and even before, for example in the case of an analysis of the regulatory impact of the proposal – highlighting possible solutions to questions such as those concerning the distribution of issues between the law and its regulations, the need to coordinate the times when the various internal rules that complete the transposition come into force, the importing of legal categories and the adjustments necessary for their insertion into domestic law, and so on.

In any case, and returning once again to a general standpoint, let us be aware of the need for a careful balance between the quality of the new rules, the performance of Parliamentary review and the punctual conclusion of the process. *A priori*, we do not perceive any advantage in establishing any specific legislative procedure, with tighter deadlines, nor any value in creating a purpose-built legal format, specifically to address the transposition obligations that Spain must fulfil each year (in any case, a possibility offering very little conceptual appeal).

Whatever the solution adopted, what does seem essential is to assign the highest priority in parliamentary work to all bills required to incorporate Community legislation, and perhaps also to introduce certain specific provisions, for example to significantly reduce the time allowed when the purpose of the bill in question is to comply with an ECJ judgment against Spain, or to prevent the otherwise inevitable lapsing of a transposition bill due to the calling of a general election, (as happened, for example, in the Fourth Legislature with regard to the draft Bill on Public Administration Contracts).

That said, the early warning procedure will allow national parliaments to rule on Community legislation at the proposal stage. Furthermore, the European Parliament has significant power in matters subject to co-decision. In view of these considerations, intervention by the Spanish

Parliament could be more light-handed without prejudice to the necessary legitimacy of internal law.

5. Effects of the transposition

5.1. Compliance. Related obligations

When the internal rules for transposition are adopted within the time limit established by the European provisions, and their contents are correctly incorporated into Spanish legislation, the transposition obligations have been complied with. Nevertheless, two requirements must be taken into account, concerning formal procedure, that accompany the question of compliance with transposition obligations.

a) The requirement to inform the Commission

The transposition process concludes with the communication to the Commission of the transposition law, in the terms established by Article 10⁸⁸ of Act 30/1992 (as amended by Act 4/1999). To this end, and as observed above, it would be very useful to structure the supplementary report in a similar way to that of the Transposition Notes used by the UK, such that this report would also have the effect of providing due communication to the Commission.

The general rule is that the omission of this communication does not affect the validity of the internal rules, without prejudice to the possible consequences arising from a complaint of non performance or a claim for liability, from the Community standpoint (Supreme Court Judgment of 13 July 2004).

⁸⁸ The first section of this Article provides that where there exists an obligation under the EU Treaty or the Treaties of the European Communities or the acts of its institutions, this body must be informed of these general provisions or resolutions; accordingly, the public authorities must refer them to the organ of the General State Administration that is responsible for informing the above institutions.

However, there are some cases in which the reporting obligation is of greater significance, especially when internal implementation consists in the mere verification that the requirements of the Community law have already been met⁸⁹, such that the communication to the Commission becomes the only act explicitly recording the incorporation of the EU rules. And in other, more special, cases, in which the Commission has the power to monitor a State's implementation of Community rules (for example, when States are authorized to publish lists of exceptions to a Community freedom), the failure to provide adequate communication can indeed affect the validity of the internal rule (Supreme Court Judgment of 10 December 2002).

To fulfil this obligation to the European Union, which is one imposed on the State, not the Autonomous Communities, it is essential to have effective coordination between the two levels of government.

The problem arises because sometimes the Autonomous Communities fail to provide the Ministry of Foreign Affairs and Cooperation with information on their own regulations incorporating Community law, and so the State government is unaware of the regulatory complements adopted by the Autonomous Communities. In consequence, the Commission is not informed of the transposition and, perhaps considering that the rules have not been incorporated or have been done so, it may consider that a breach of obligation has taken place and act accordingly.

In this situation, it is essential to introduce measures to ensure the necessary coordination to meet this obligation. On the one hand, it seems appropriate, in order to avoid unnecessary repetition, to establish a single channel (or a main channel) for this purpose. Communication of the relevant information to the respective sectoral conference might constitute

⁸⁹ As in fact is allowed by the ECJ, which has stated that the provisions of the directive need not be formally or textually included in an express, specific legal or regulatory provision; it is sufficient that there be a general legal context that effectively ensures the full application of the directive, in a sufficiently clear and precise way (ECJ judgment of 9 September 1999, *Commission vs. Federal Republic of Germany*, Case 217-97).

the normal channel for complying with this obligation, and this option could be strengthened by express statutory provision (for example, as an addition to Act 2/1997 or as a future law governing the main issues concerning the European Community). Another possibility would be to refer the information to the Ministry of Foreign Affairs and Cooperation, as the body officially responsible for carrying out this mandatory communication to the Commission.

On the other hand, and as long as no reorganization is considered of the internal system of responsibilities, these measures would have to be accompanied by a specific mechanism to monitor the transposition of Community rules by the Autonomous Communities, and this could be implemented by the Ministry of Foreign Affairs and Cooperation or the Ministry of Public Administration.

In the same vein, it would be desirable for the Autonomous Community rules by which the incorporation of Community provisions is acknowledged to expressly state this fact.

b) Express reference to the provision being incorporated

In accordance with the technical regulatory guidelines approved by decision of the Council of Ministers on 22 July 2005, the term known as the interconnection clause should be located in one of the final provisions of each transposition document. This is the case in some of the most recent documents, but the mention of the Community rule being incorporated is sometimes placed in the introduction (or preamble) or in the very title of the internal rule, or in the heading of the specific provision by which the transposition is effected.

On several occasions (Opinions 131/2007, of 22 February 2007; 740/2007, of 17 May 2007; and 1504/2007, of 19 July 2007), the Plenary of the Council of State has pointed out, regarding the meaning and nature of the interconnection clause, that the mention of the Community rule

being transposed is a purely descriptive item, more suitably located in the preamble or the explanatory statement regarding the proposed rule, and should not be included in a legal precept, which is characterized by its plainly operative content.

The Autonomous Communities have not approved any provisions concerning how the interconnection clause should be included, but this is generally done in the preamble or in the explanatory statement.

5.2 Non-compliance. Liability to the European Union

The transposition obligation may be breached, in whole or in part, for various reasons: the non-performance of transposition or its late performance, incomplete transposition, inaccurate transposition, failure to comply with the requirements of publicity and communication, etc.

In this respect, the Spanish model, as described above, can be said to function, and to function well, although in recent years there has been some slippage (not so much in absolute percentages as in Spain's relative position, possibly due to the expansion of the European Union).

This assertion is well illustrated by the data obtained from successive examinations carried out by the Commission regarding the communication status of national implementation measures⁹⁰. In April 2004, Spain was ranked first, with a compliance rate of 99.47% (of the 2,447 Directives to be transposed, the corresponding implementing measure was reported for 2,434). In the Annex to the 24th Annual Report of the Commission on monitoring the application of Community law, the data for 10 January 2007 placed Spain in 19th place (98.95%), in the report for the following May,

⁹⁰ Since the domestic market is the main objective of Community directives, an interim transposition target of 98.5% has been established (thereby allowing a deficit of 1.5%). This is subject to review and assessment by the European Council in the spring of each year. Moreover, two additional controls are defined: the 'scoreboard', determined in July of each year, and the control for the Annual Report on the implementation of the Internal Market Strategy, in November.

Spain was in 20th position with 98.97%, behind, among others, Belgium, Denmark, Germany, UK, Austria, Netherlands, Sweden, Ireland, France and Finland. The latest data published (3 July 2007) put Spain in 22nd place (98.94%), ahead only of Italy, Greece, Luxembourg, Portugal and Romania.

The same report also presents data for the cases of non-compliance detected and those being examined in 2006 (Annexe 1 of the report):

- A total of 31 (5.49%) *ex officio* cases have been detected, and Spain is ranked third from last; in addition, 77 (7.81%) are being examined, and in this respect Spain is ranked second from last.
- Originating from complaints, 154 (14.68%) cases have been detected, and Spain is in last place, while 195 (11.49%) are under consideration, and only Italy is behind Spain in this respect.
- 30 (3.32%) cases of non-communication were detected, and a further 25 (4.37%) are being examined. In general, Spain is maintaining its relative position in this regard, although the percentages are rising.

The main consequence of a failure to carry out transposition, to do so late or to do so inadequately is the initiation of formal Community action for non-compliance.

Although the question is discussed in the following section of this Report, let us emphasize at this point the need to address, clearly and decisively, the creation of an internal system to determine responsibilities for failure to carry out the transposition of Community rules, or inadequate performance in this respect. The extension of regional powers regarding European affairs, as acknowledged in some of the new Statutes of Autonomy, makes it necessary to assert and to enforce, in strict conceptual and practical coherence, the responsibility of the Autonomous Community in question for any non-compliance attributable to it.

Independently of these considerations, and returning to the specific case of responsibility for breach of transposition obligations, some of the data set out in the above-mentioned 24th Annual Report are of particular interest.

According to Annexe 2 of the above Annual Report (data closed 31 December 2006), Spain was the object of a total of 69 letters of formal notice (73 in 2005 and 69 in 2004), 44 reasoned opinions (35 in 2005 and 17 in 2004) and 18 complaints to the Court of Justice of the European Communities (6 in 2005 and 13 in 2004).

In regard to the non-transposition of directives⁹¹, the following data show that most such problems are resolved during the pre-litigation stage:

- Spain received a total of 58 letters of formal notice: for non-communication, 30 (31 in 2005 and in 2004); for inadequate transposition, 10 (9 in 2005 and 7 in 2004); and for inadequate implementation, 18 (21 in 2004 and 22 in 2003).
- 37 reasoned opinions were issued: for non-communication, 17 (14 in 2005 and 3 in 2004); for inadequate transposition, 9 (5 in 2005 and 1 in 2004); and for inadequate implementation, 11 (7 in 2005 and 10 in 2004).
- Finally, there were 10 complaints for non-communication (2 in 2005 and 2004); 3 for inadequate transposition (1 in 2005 and 4 in 2004); and 2 for inadequate implementation (3 in 2005 and 6 in 2004).

Finally, we show the figures for infringement proceedings that took place in 2006, a total of 297 (9.12%, only ahead of Italy). Of this total, 156 (7.8%, second-to-last place) corresponded to procedures that were current on 31 December 2006; 98 reasoned opinions (8.84%, third to last) were

⁹¹ Excludes data for the incorrect application of various provisions of the Treaties or regulations or decisions, regarding which 11 letters of formal notice have been received (12 in 2005 and 9 in 2004), 7 reasoned opinions have been issued (9 in 2005 and 3 in 2004) and 3 suits have been filed before the ECJ (none in 2005 and 1 in 2004).

issued; 38 complaints were presented (10.58% and again second-to-last, ahead of Italy); and 15 procedures were initiated under Article 228 TEC⁹².

The data summarized above reflect a slight fall in Spain's degree of compliance with its obligations to transpose Community law. Certainly, this circumstance may be influenced by external factors, such as the increased complexity of the issues affected by Community rules or the imposition of tighter deadlines for the transposition procedure, but nevertheless there is an evident need to review the model under which transposition is currently undertaken. In accordance with above considerations, this review should focus on the following key ideas: first, viewing the stages of decision-taking and incorporation as a single process, thus making it possible to bring forward the start of the transposition and improve intra-departmental coordination; second, consolidating effective, continuous and dynamic supervision of compliance with the obligations of incorporation; third, designing a process for drafting rules that are appropriate to the needs and peculiarities of transposition. In short, it is necessary to introduce mechanisms to ensure compliance with the obligations of transposition by the State and to achieve the indispensable coordination with the Autonomous Communities.

⁹² This provision was amended by the Treaty of Lisbon. There are two new provisions. First, if the Commission considers that the Member State concerned has not taken the measures necessary for the implementation of the Court judgment, it may refer the matter to the ECJ, after offering the State the opportunity to submit its observations, indicating the amount of the lump sum or periodic penalty payment imposed on the Member State concerned and considered appropriate in the circumstances. Second, when the Commission brings a case before the ECJ pursuant to Article 226 TEC on the grounds that the Member State concerned has not complied with the obligation to notify measures transposing a directive adopted under a legislative procedure, it may, if it so deems appropriate, specify the amount of the lump sum or periodic penalty to be paid by the Member State concerned and considered appropriate in the circumstances. In this case, if the Court finds that there is an infringement, it may impose on the Member State concerned the payment of a lump sum or periodic penalty payment up to the amount specified by the Commission.

V. THE IMPLEMENTATION OF EUROPEAN LAW AND OF THE SPANISH LEGAL SYSTEM INTO WHICH IT IS INCORPORATED

Spain's integration within the European Union is supported at the very highest legislative level by Article 93 of the Constitution, which expands the ambit of domestic law to include Community law; this provision is complemented by Articles 95 and 96.1. The scope of Article 93, which to date has served for the ratification of all the treaties creating primary Community law, has been interpreted by the Constitutional Court and the Council of State, whose conclusions in this respect were analysed in the Report on Amendments to the Constitution, issued by the Plenary Council in February 2006.

Article 93, quite clearly, has provided the basis for the introduction of the *acquis communautaire*, which constitutes the body of actions taken in the construction of Europe, including those resulting from ECJ jurisprudence. With the exception of the principle of primacy of Community law over the Constitution, the absolute nature of which has not been acknowledged by the Constitutional Court, one can speak of the opening up of Spanish legislation to the principles developed by the ECJ regarding the relationships between European law and national rights.

The aim of the present chapter is to examine how the principles referred to have been carried out in practice in Spanish law. Following this review, we outline some suggestions to facilitate the introduction of these principles, and to overcome the difficulties that sometimes arise.

1. Community principles in the application of Spanish law

For the sake of clarity, the principles of interaction between European law and national law, with respect to Spain, are examined by grouping subjects in terms of their relationship with the effectiveness of Community law (both applicative and interpretive), its primacy (as regards the implications concerning legal certainty) and the State's responsibility to the Community and to individuals for any breach of Community law. Thus, all the points raised in the consultation request will be addressed.

1.1. Questions of effectiveness

Acceptance of the direct effectiveness of Community law is specifically supported under Article 93 of the Constitution, as has been pronounced and is well understood by the Supreme Court (Third Chamber), which in its Sentence of 28 April 1987 acknowledged that Community law has direct effect "by virtue of the partial transfer of sovereignty embodied in the accession of Spain to the Community, authorized by Basic Law 10/1985, of 2 August, in compliance with Article 93 of our Constitution, created for just this circumstance".

On the basis of these premises, the applicative and interpretive effectiveness of Community law has been assented to in the jurisprudence of the Supreme Court. Examination of this jurisprudence reveals its adherence to the requirements of the above-mentioned Article.

It is true that the extent of the direct effect of directives has led to decisions that have been criticized for their contradiction with the position of the ECJ, which has restricted this extent to the framework of relations between individuals and government (*Marshall* case, Judgment of 26

February 1986). In particular, criticisms have been made of the arguments presented by the First Chamber of the Supreme Court in several decisions (including the Judgments of 5 July 1997 and 20 February 1998), according to which directives determine not only the vertical effect, but also "the horizontal effect in conflicts between individuals if [the directive is] not transposed within the stipulated time and contains precise rules and immediate compliance is a distinct possibility". However, this argument is challenged by another decision handed down in the same Chamber, rejecting the direct effect of the provision of a directive "insofar as it confers rights on some individuals over others" (Judgments of 20 November 1996 and 31 January 1998).

Notwithstanding the above, the general impression is that Spanish case law is characterized by its awareness of the principles of interaction between Community law and national laws. In this respect, see, for example, the Judgment of the Third Chamber of the Supreme Court, handed down on 17 June 2003, in which legal justification number 16, which summarizes the "general principles of the application of European law" and contains numerous references to ECJ case law, makes the following statements about the effectiveness of directives:

- In all cases in which the provisions of a directive, from the point of view of their content, appear to be unconditional and sufficiently precise, these provisions may be invoked against any national provision that does not comply with the directive, unless implementation measures have been adopted within the stipulated period.
- This effect is known as direct vertical effectiveness, and is termed thus because it operates only concerning the relations between individuals and the State, and may be invoked by the former in this respect, but not by the latter.

- Directives do not have a direct horizontal effect, that is, concerning relations between individuals. Nevertheless, the ECJ has established that the directive must be taken into account in applying the law of the Member State, thus respecting the principle of judicial interpretation in the light of Community law.

Regarding the interpretative effectiveness of Community law, the Supreme Court has made other rulings also referring to ECJ doctrine. Among these, the following can be cited: the above-mentioned Judgment of the First Chamber of 20 November 1996 (which states that the directive "should constitute a signpost for interpreting existing and future national laws to achieve the [directive's] stated purpose when national law has not yet been adapted in this respect"); the judgment of the First Chamber of 23 June 2006 (which refers to "the doctrine of interpretation in conformity, under which, in applying national law, whether its provisions were adopted before or after the Community directive, the court should endeavour to conform with the purpose of the Directive"); and the Judgment of the Third Chamber of 19 April 2006 (which, analysing a recommendation of the EU Council, evoked the *Grimaldi* case, Judgment of 13 December 1989, to uphold the duty of national courts to take into account Community directives when resolving cases brought before them, despite the non-binding nature of such directives).

1.2. Questions of primacy

The primacy of Community law over non-Constitutional national law, the only level discussed in this section (apart from the analysis of conflicts between Community law and the Constitution), has been accepted in accordance with Articles 96.1 and 93 of the Constitution. The final paragraph of the first of these precepts, which prevents a treaty from being amended, repealed or suspended unilaterally by an internal rule, recognizes

the supremacy of the latter instrument over national law, thus guaranteeing the primacy of the treaty over legal provisions to the contrary, whether adopted previously or subsequently. Additionally, the fact that the treaties embodied in Community law have been ratified under Article 93 of the Constitution means that these treaties, the rules contained therein and the Community legal system in general are recognised as binding on individuals and national authorities, including the legislature.

Thus, the Constitutional Court (in its Judgment 28/1991, of 14 February) referred simultaneously to Article 93 of the Constitution and to ECJ doctrine to justify the primacy of Community law over national law, such that, from the moment of accession, "the Kingdom of Spain is bound to the law of the European Communities, both primary and secondary, which – in the words of the Court – constitutes a legal system in its own right, incorporated into that of each of the Member States and which prevails over their judicial bodies".

Having established the primacy of Community law over general provisions of a non-Constitutional rank, two issues remain to be addressed: the power/duty not to apply certain national rules and the review of final rulings when, in either case, a breach of Community law is committed.

a) As regards internal rules that are contrary to Community law, acceptance of the *Simmenthal* doctrine – which obliges the national court to set aside any provisions of national law which may conflict with Community law – was not without initial difficulties, as illustrated by a series of judgments handed down by the Third Chamber of the Supreme Court during the period 23-30 November 1990, declaring itself incompetent to rule on the incompatibility between Community rules and national laws adopted subsequently; in these decisions, the Supreme Court, after recalling that the ECJ had repeatedly ruled that individuals had the right to appeal to national courts to supervise the internal rules adopted by the Government to develop Community directives, held that this supervision in

the Spanish legal system was subject to the "absolute limit" imposed by Article 1 of the Contentious-Administrative Jurisdiction Act (as adopted in 1956), which assigned to the (national) jurisdiction "the prosecution of provisions (of a general nature) of a rank below that of law". In contrast to this conclusion, the above-mentioned Constitutional Court Judgment 28/1991, which considered the contradiction between national law and Community law to be "merely a problem of selecting the law applicable to the case in question", irrelevant to the constitutionality of the law, granted the ordinary court powers to rule on inapplicability that would otherwise be denied to it, stressing that such a solution was in full conformity with the indications of Community law in the light of the *Simmenthal* doctrine.

In its Report on amendments to the Constitution, the Council of State referred to the position of the Constitutional Court, whose doctrine in this respect remains in force, noting that the power/duty of Spanish courts to refrain from applying Spanish rules, whatever their rank, when they are in contradiction with European legislation, "*prima facie* appears to be incompatible with their subjection to the rule of law, as provided for in the Constitution (Article 117.1)", even though a constitutional change of a jurisprudential nature had taken place.

From the exercise of this power/duty by the ordinary courts, the following conclusions can be drawn:

- Early doubts having been overcome, it is now generally accepted that "national courts are bound to apply Community law in its entirety and to protect the rights which the latter confers on individuals, setting aside any provisions of national laws which may conflict [with Community law], regardless of whether such laws were adopted before or after approval of the Community rule" (Judgments of the Third Chamber of the Supreme Court of 1 October 2003 and 7 October 2005).

- As regards provisions with the rank of law, the application of the primacy of Community law over national law was set out by the Third Chamber of the Supreme Court in its Judgment of 24 April 1990, in terms of repeal and unconstitutionality, noting that "earlier rules that are contrary to Community law should be viewed as repealed, while those adopted subsequent to Community law must be considered unconstitutional due to the absence of competence (under Articles 93 and 96 of the Constitution), but the ordinary court shall not be required to examine the issue of unconstitutionality (Article 163 CE) in order to set aside the national rule, because this court is bound by the ECJ jurisprudence that has established the *pro comunitate* principle".

Irrespective of whether the breach of Community law by national law renders the latter unconstitutional, invalid or ineffective, the fact is that the current system does not provide any mechanism for the elimination *erga omnes* of such a contradictory law; the current system is merely based on an indeterminate supervision of conformity with Community law by the court before which a particular dispute is brought. This raises the residual problem, if any contradiction is observed, of the persistence of the national law that infringes Community rules. This situation, with possible severe impediments from the standpoint of the principle of legal certainty, as has been pointed out by the ECJ, was highlighted in the Report on amendments to the Spanish Constitution, in which the Council of State suggested "regulation by an organic law of the attribution of effects *erga omnes* to the statement, made in an *ad hoc* procedure, that a law is contrary to Community law". Such a procedure could be performed by the Supreme Court or by the Constitutional Court.

- On the other hand, with respect to regulations in national legislation that are contrary to Community law, compliance with the requirements of legal certainty has been facilitated by the fact that the Supreme Court has confirmed on numerous occasions that these can "not

only be set aside but declared null and void" (Judgment of the Third Chamber of 14 October 2004, which cites other judgments that also declare the invalidity of certain provisions contained in national regulations when such provisions are contrary to Community law).

The above judgment echoed that of the aforementioned Supreme Court ruling of 17 June 2003, which endorsed the annulment of regulations that are incompatible with Community law, on the basis of the supervision of regulatory power (which is generally attributed to the courts, under Article 106 of the Constitution), and specifically, the power to annul any general provisions that are in any way in breach of the law (this power being conferred, in particular, to the jurisdiction of administrative courts under Article 70.2 of the Law governing this issue). Thus, "a breach of the rules of European Community law, under the principle of the primacy of the latter over national law, constitutes one of the infringements of law that may be presented by such measures, as evidenced by the fact that it is included among the grounds on which an appeal may be lodged under Article 86.4 of the Law of Jurisdiction", and may give rise to the measure being declared null and void.

It is much more difficult to determine whether the Government has unambiguously accepted its contentious power/duty to set aside national rules that are contrary to Community law, along the lines set out by the ECJ in the *Fratelli Costanzo* case, Judgment of 22 June 1989.

On a note that is more anecdotic than demonstrative of the Administration's position, let us mention the Report of the Administrative Contracting Advisory Board, No. 57/2005, of 19 December, issued in response to an inquiry made by the President of the Provincial Council of Huesca. According to this inquiry, if Spain did not transpose the content of Directive 2004/18/EC of the European Parliament and of the Council, of March 31, on the coordination of procedures for the award of public contracts for works, supply and services before 31 January 2006, "we, in

the public administrations, will have to implement this measure, given its direct effect". Consequently, the inquiry requested details of the provisions of the consolidated text of the Public Administration Contracts Act, approved by Royal Decree 2/2000, of 16 June, which, in the opinion of the Advisory Board, "contravene Directive 2004/18/EC and, therefore, would not be applicable".

In response to this consultation, the Administrative Contracting Advisory Board, after declaring itself incompetent to provide the details requested, put forward the following considerations about "the Community legal system, its transposition into the domestic law of the Member States and the effects of non-transposition".

- If the breadth of the terms in which the consultation request addresses the direct effect of Community directives were accepted – full implementation of their contents – it would be "unnecessary to carry out a transposition after expiry of the deadline for doing so; this action would be of no interest because the directive would already be in place, to all effects". This solution was rejected by the ECJ, which held that only in specific circumstances of non-incorporation or incorrect incorporation would the directive be invoked, but this did not exempt the national administration from adopting measures to implement it.
- The direct effect "takes place if the provisions of the directives are unconditional and sufficiently precise or otherwise in those aspects of the policies that are sufficiently clear and concise". In consequence, such aspects can be invoked by individuals before the courts of the Member States and before the public administration itself (citing the *Fratelli Costanzo* case).
- Finally, the Advisory Board recalled that the doctrine of the direct effect of directives had been applied in specific situations "that

provoked no objection from the European Community and that did not exclude the possibility that the complete transposition of the directives might be carried out at a later date". In this regard, it mentioned two recommendations addressed to contracting authorities in 1986 and 1994, according to which certain provisions of Community directives on public procurement that had not yet been transposed into national law (specifically, regarding the publicity given to calls for tenders) were nevertheless applicable.

The reasoning set out in the above Report is based on the idea that the principles of direct effect and of primacy, taken together as two aspects of the same concept, can lead to the public administration displacing national regulatory provisions by applying the provisions of the directive yet to be transposed (when the time limit for doing so has been exceeded), although such a displacement should be undertaken only with great caution.

The same outcome was proposed in the Advisory Board recommendation of 22 January 2007, according to which, given the non-transposition of Directive 2004/18/EC and in view of doubts about the thresholds applicable in administrative hiring (whether they should be those set out in the consolidated text of the Public Administration Contracts Act by Order EHA/4110/2005 or those detailed in Regulation 2083/2005 of the Commission), contracting authorities were advised to apply the latter, thus producing the direct effect of Community law and avoiding a possible infringement of the directive in question.

Another example of the difficulty encountered by the Administration's acceptance of the power/duty doctrine arising from *Costanzo* can be found in Council of State Opinion 1619/2007, of 17 October 2007, concerning a draft amendment to the Regulations on Value Added Tax, approved by Royal Decree 1624/1992, of 29 December (among other provisions). In developing this amendment, the Directorate General for Taxation, as the

competent area of management for implementing the procedure, ruled that certain paragraphs of the VAT Act were contrary to Community law, by making some exemptions conditional on prior administrative recognition; accordingly, given the Administration's obligation not to apply internal rules that are incompatible with a directive, it was proposed that the contradiction should be corrected by means of a regulatory provision disassociating the administrative recognition from the application of these exemptions. The Council of State opposed the introduction of such a provision, as a matter of fundamental principle, based on several arguments, including the insufficient rank of regulations to refer amendment of the VAT Act to ECJ jurisprudence; however, this was ruled without prejudice to the duty of the Administration, should such a contradiction really exist and "in the absence of a specific mechanism that allows a more flexible correction of national law", to promote the appropriate legislative amendment.

b) With regard to the review of final decisions that are contrary to Community law, in the exercise by the Spanish Administration of its power to review such decisions, the doctrine of the Council of State should be considered; its opinion, as well as mandatory, is enabling, and so only if it is favourable may the Administration declare invalid, on its own initiative, "administrative acts that have exhausted all available administrative appeals or which have not been challenged in due time" (Article 102.1 of Act 30/1992, of 26 November). To analyse the position of the State Council, two cases should be distinguished:

- In its verdict on the text of the bill which would subsequently become Act 4/1999, the Council of State (Opinion 5356/97, of 22 January 1998) highlighted the problems that could be caused by the non-legislative implementation of Community law "with the disappearance [understood as "in administrative channels"] of the power of *ex officio* review of favourable decisions that may be annulled", because the Administration would only be

able to use the instrument of *ex officio* review in cases where a situation of nullity arose *ipso jure*, and in all other cases it would have to declare the existence of adverse effects and subsequently present a challenge before the administrative court "which is not exactly a rapid procedure". The suppression of this revisory mechanism meant the loss of a tool that was useful for implementing Community decisions that required the invalidation of a rule acknowledging rights.

This problem was again considered by the Council in its 1999 Report, which diagnosed the situation arising from the amendments introduced by Act 4/1999, regarding legislative review, and found that such changes clearly meant that "the domestic administrative measure that infringes Community law (unless there is a case for annulment characterized as such) may not be removed from the judicial sphere by means of the *ex officio* review of invalid acts stipulated in Article 102 of Act 30/1992". The Council, however, did not propose the addition of a new instance of invalidity to the list set out in Article 62.1 of Act 30/1992, referring to infringements of Community law in general, as this would go far beyond the real extent of the problem, disrupting the very theory of the invalidity of administrative acts; instead, the Council proposed that "under Article 102 of Act 30/1992, public authorities be granted the possibility of using the instrument of *ex officio* review when the invalidation of a rule is imposed by a Community decision".

In its 2000 Report, the Council of State took a broader approach to a more specific problem, that of the channels for Spain's compliance with Community decisions on State aid deemed to be incompatible with the common market. Leaving aside "for the present" the hypothesis that an *ad hoc* rule should be issued to remove domestic obstacles from the process of implementing a Community decision, the Council suggested that consideration be given "to the desirability of preparing a general provision with sufficient legal standing, to comprehensively address the procedure for

the national implementation of Community decisions that invalidate State aid, the reimbursement of which is required".

The latter approach prevails in the General Subsidies Act 38/2003, of 17 November; here, Title II defines the cases in which subsidies must be reimbursed, distinguishing between cases in which the subsidy-awarding decision was invalid at the outset (Article 36) and those in which the decision is held to be inoperative regardless of its initial validity (Article 37). In particular, paragraph h) of the latter Article states as a cause for reimbursement of the amounts received, together with the corresponding amount of interest, "the adoption, under the provisions of Articles 87-89 of the Treaty on European Union, of a decision which results in the necessity for reimbursement". Consequently, the legislator rejected the declaration of the nullity of State aid received in breach of Community law, but required its reimbursement, referring to provisions of the Treaty establishing the European Community – not to those of the European Union, as stated literally – regarding the substantive system from which the obligation to make such reimbursement is derived.

In short, since the disappearance of the possibility of administrative review of rights-acknowledging rules that are subject to annulment, the Council of State has been concerned about the absence of appropriate mechanisms to expel from the judicial domain final decisions that have been declared contrary to Community law, especially as regards State aid that is incompatible with the common market. This concern is less acute in the present context, following the provision for a method of reimbursement for such aid in the General Subsidies Act 38/2003, of 17 November, but it persists in other cases, in which a breach of Community law by a favourable decision has been identified.

- The question of a legislative provision (on the basis of which final decisions have been taken) being declared in breach of Community law was recently addressed by the Council of State, when it informed of subsequent

applications for an *ex officio* review of tax decisions applying a rule established under Spanish legislation on value added tax, but declared contrary to Community law by the ECJ in its Judgment of 6 October 2005, finding against Spain in a complaint brought for non-compliance (see, among others, Opinions 1495/2006, of 26 October 2006, and 946/2007, of 24 May 2007). In these Opinions, the Council of State upheld the irreversibility of the decisions that had become final, "even when the legal precept cited in justification was subsequently declared to be contradictory to Community law", based on the following arguments:

- The general effectiveness of ECJ rulings in non-compliance actions. Although the judgment declaring non-compliance by a Member State has *ex tunc* effect, by virtue of the principles of direct effect and of primacy (which imply, for the authorities of that Member State, the prohibition against applying the incompatible regime, on the one hand, and the obligation to take all necessary measures to ensure the full impact of Community law, on the other), the ECJ has stated that, in the absence of Community legislation, it is for the domestic legal system of each State to designate the competent authorities and to design the procedural rules governing judicial actions to safeguard the rights which Community law confers on those brought to court. In short, it cannot be understood how the retroactivity of the ECJ ruling can enable the review of a firm decision issued by a national authority, when the Court itself "leaves it to the laws of the Member States to decide whether such a review should take place or not" (in support of this conclusion, see *Kühne*, Judgment of 13 January 2004, and *i-21*, Judgment of 19 September 2006).

- The limits under domestic law, derived from legal certainty, to the general rule of *ex tunc* effectiveness. The principle of legal certainty is guaranteed under a constitutional provision (Article 9.3 of the Constitution) "which not only has the most obvious effect of retaining unchanged situations that have become consolidated (through legal concepts such as

prescription, firmness and many other related notions), but paradoxically, cooperates in practice to ensure that the legal system can be more easily amended *pro futuro* to better suit it to current legal and constitutional rules, without forcing it to estimate the retroactive effects of a ruling of nullity or of unconstitutionality with respect to assumptions or cases that are unknown and therefore impossible to evaluate or judge".

In conclusion, as stated in the 2006 Council of State Report, unless at least one of the grounds for invalidity under Article 62.1 of Act 30/1992 is observed, taking into account the fact that the declaration of incompatibility with Community law does not *per se* suppose such invalidity, we uphold the general principle of the irreversibility of final administrative decisions, which, in general and with regard to the declarations of unconstitutionality of legal provisions (Article 40.1 of the Constitutional Court Basic Law) has been extended to administrative proceedings that have been declared final, in accordance with the principles of *favor acti* and of legal certainty.

1.3. Questions of responsibility

Let us now analyse from the Spanish standpoint the two dimensions of State responsibility for breaches of Community law: that generated with respect to the Community and that produced with respect to individuals.

a) With respect to the first of these aspects, the only external accountability of the State – in this respect it is irrelevant which public power originated the alleged infringement – is determined in the Spanish legal system in the second paragraph of Article 93 of the Constitution, which assigns to Parliament or the Government the duty of ensuring the fulfilment of treaties concluded under this provision, and that of decisions issued by international or supranational agencies to which the corresponding competencies have been transferred. The fact of sole State

responsibility for any breach of Community law gives rise to two difficulties, as advised by the Council of State in the Report on amendments to the Constitution, namely:

- The indeterminate nature of the instruments that Parliament and the Government can apply, apart from the limits imposed by Article 155.1 of the Constitution, to perform the compliance-ensuring functions assigned to them.

- With regard to the non-existence of a mechanism by which it would be generally possible to transfer to the territorial agency responsible for non-compliance the economic consequences of State responsibility, it was considered desirable "that in this Constitutional reform to adapt it to our membership of the European Union, a specific reference should be included to the creation of a national law to establish the cases in which State liability for breach of Community law is attributable to an Autonomous Community and the procedure by which compensation for such liability shall be obtained from the latter".

Despite the absence of a general mechanism, partial reforms have been undertaken in order to address other sectoral problems posed by the imposition of Community sanctions of an administrative nature. These provisions include:

- Responsibility for the management of funds from the European Union is provided for in Article 7 of the General Subsidies Act 38/2003, of 17 November, paragraph 1 of which provides that "*public authorities or their agencies or management offices that, in accordance with their respective powers, perform acts of management and control of financial assistance received from the European Agricultural Guidance and Guarantee Fund (Guidance and Guarantee sections), the European Regional Development Fund, the European Social Fund, the Financial Instrument for Fisheries Guidance or the Cohesion Fund, as well as any other Community*

funds, shall assume the responsibilities arising from these actions, including those produced by decisions of the European Union, and especially in relation to the process of settlement of accounts and the implementation of budgetary discipline by the European Commission".

- The responsibility for failure to comply with environmental standards for inland water is stipulated in Act 62/2003, of 30 December, which adds an Article 121 *bis* to the consolidated text of the Water Act, approved by Royal Legislative Decree 1/2001, of 20 July, stating that "*the competent public authorities in each river basin which fail to meet the environmental objectives set with respect to water planning or do not comply with their duty to report on these issues, thus leading to the Kingdom of Spain being sanctioned by European institutions, shall assume the corresponding share of responsibility for the consequences of such non-compliance*".

- Liability for non-compliance with commitments regarding budget stability is considered in the consolidated text of the Budgetary Stability Act, approved by Royal Legislative Decree 2/2007, of 28 December, in which Article 10.5 provides that public-sector authorities, including the administrations of the Autonomous Communities "*that produce or contribute to producing non-compliance with Spain's obligations to the European Union, under the Stability and Growth Pact, shall assume the corresponding share of responsibility for the consequences of such non-compliance*".

b) The principle of State responsibility to individuals for a breach of Community law has been accepted in Spanish law without discord. This has undoubtedly been facilitated by the total, direct and objective way in which both the Constitution and the legislature have constructed the general system of compensation for any harm caused by the functioning of public services.

This acceptance is evidenced in the doctrine of the Council of State and in the jurisprudence of the Contentious-Administrative Chambers of the National High Court and of the Supreme Court.

In addressing liability claims against the Administration, the State Council has examined claims for compensation filed by individuals claiming an infringement of Community law. In its reports on these issues, the Council of State has considered whether compensation should be awarded, after analysing whether there are grounds for such compensation, in terms of both Community and domestic requirements. In other words, because (as noted in the 2000 Report) the concurrence of the three conditions laid down by the ECJ for compensation to be payable by the State declared in breach of Community law is not sufficient for there to exist a duty to redress the harm that the claimant alleges to have suffered from the breach; in addition, it is necessary that the conditions established under national legislation (for the recognition of administrative liability) should be met. The duty of redress, therefore, only arises when both conditions are fulfilled.

In the first of these phases, in which the concurrence of the conditions required by the ECJ must be determined, the Council of State has demonstrated its close attention to the case law that has established the principle of compensation being payable for breaches of Community law; see, for example, Opinion 3399/98, of 12 November 1998, which cited numerous ECJ judgments and restated the configuration of each of the three conditions:

- a) that the legal provision infringed is intended to confer rights on individuals;
- b) that the breach is sufficiently clearly established;
- c) that there is a direct causal link between the breach of the obligation incumbent on the State and the harm sustained by the victims.

In the second phase, the application for compensation for a breach of Community law must be examined in the light of the corresponding domestic law (Articles 139 and following of Act 30/1992, of 26 November). From this perspective, one of the requirements to be met by such claims is that they must be presented within one year of the occurrence of "the fact or the act giving rise to the compensation or of the manifestation of its harmful effect" (Article 142.5 of the same Act). Thus, a claim for compensation was dismissed in Opinion 2555/2000, of 14 September 2000, because it was presented after the expiry of this period.

The Spanish jurisdictional domain, too, has taken note of ECJ doctrine on the principle of State liability for harm caused to individuals as a result of a breach of Community law. Thus, the compensatory mechanism inaugurated by the ECJ in *Francovich and Bonifaci*, in its Judgment of 19 November 1991, has been integrated into the Spanish legal structure such that a judge's allegiance may be to both national and Community law. In this context, the High Court Judgment of 7 May 2002 and the Supreme Court Judgment of 12 June 2003 can be considered milestones of case law, these being the first instances in which these courts directly upheld and applied European Community criteria.

In the first of these judgments, the Contentious-Administrative Chamber of the National High Court held that the State's delay in incorporating a Community directive was sufficiently well established to constitute a breach of Community law; this, together with the fact that the directive granted rights to individuals, plus the existence of a causal link between the breach and the harm alleged, led the Court to rule the concurrence of the ECJ conditions. Having established this, the High Court then considered, from the standpoint of Spanish law, whether the action for compensation was presented within the stipulated time limit, since "the process through which the claim demanding accountability must be presented (...) in accordance with Community jurisprudence, and once the

State's obligation to make redress has been established, must be conducted in accordance with the requirements set out in the respective national law regarding liability".

Similarly, the Supreme Court, in its ruling of 12 June 2003, upheld the concurrence of the above-mentioned three requirements, taking into account the interpretive guidelines provided by the ECJ itself in response to the pre-litigation question raised in this case. In particular, the gravity of the offence alleged by the Commission, the little or no room for manoeuvre open to the State, the manifest nature of the breach, the absence of legal justification in the arguments put forward by the Kingdom of Spain, the conscious nature of the infringement, the failure to comply with the instructions set out in the directive regarding its interpretation, and the absence of any justification by the Spanish authorities with respect to certain aspects of the State rules, all led the Supreme Court to the conclusion that a sufficiently-apparent breach of Community law had been committed.

2. Problems and suggestions

In view of the terms of the Government's consultation request, in which issues relating to the application of European law are formulated regarding the consequences of the principles of primacy, direct effect (with reference to the elimination of domestic rules that are contrary to Community law) and State responsibility for breaches of Community law, as well as for any breaches committed by the Autonomous Communities in the incorporation of Community law, the problems identified can be classified according to the principle corresponding to each case.

2.1. Concerning the principles of direct effect and primacy

Focusing on the administrative dimension, two issues warrant careful consideration: the Administration's power/duty to set aside domestic rules and to review final decisions, when, in either case, they are in breach of Community law.

a) The Administration's power/duty to set aside domestic law that is incompatible with Community rules

Various factors make it advisable to address with caution any proposal to facilitate the consolidation into Spanish law of this action, viewed by the ECJ in the *Costanzo* case as an extension of the administrative scope of the *Simmenthal* doctrine, which already granted this prerogative to national judges.

Such caution is required, first, due to the doubts expressed by some jurists about the validity of the authority referred to in the ECJ jurisprudence, doubts based on the ten-year-long absence of any confirmation of the *Costanzo* doctrine, although allusion could be made to other recent rulings (the *Jiménez Melgar* case, Judgment of 4 October 2001, and the *CIF* case, Judgment of 9 September 2003) which again recognized the power/duty to disqualify the application of internal legislation that is contrary to Community law, with respect to all State agencies, including administrative authorities. Second, there has been criticism that the equal consideration given to judicial and administrative agencies in this context ignores the fact that the two powers do not have the same means with which to interpret Community law: the former can (or should, if their decisions are not subject to subsequent appeal in domestic law, under Article 234 of the Treaty establishing the European Community) address the ECJ for a ruling on the interpretation or validity of Community

law when doubts arise about a judicial question; the latter, however, are denied access to the pre-litigation mechanism. Third, there are constitutional issues in many Member States concerning the power in question, due to the absence of support in national legislation for this procedure; when the administrative authorities are unable to apply laws that are contrary to the Constitution, it is conceptually inconsistent to admit such a possibility when they are contrary to Community law.

In these circumstances, the Council of State considers the most prudent approach is to renounce express recognition in Spanish law of the power/duty of the Administration to set aside internal rules that are contrary to Community law.

This renunciation should not be construed as a denial of that power/duty, whose construction by the ECJ is ever less controversial and whose compatibility with the Constitution, once the *Simmenthal* doctrine has been accepted, provokes no major objections. Nevertheless, in the opinion of the Council of State, the Spanish government, instead of promoting the introduction of a legal provision concerning the power/duty to set aside domestic law when it is incompatible with Community law, should focus more on addressing the causes that produce this incompatibility. Such causes can be found in the absence of incorporation – or in the overdue incorporation – of directives, their inadequate transposition or the failure to eliminate incompatible elements from domestic law. In other words, given that the *Costanzo* doctrine presupposes the existence of a Community rule that has direct effect, prevailing over a contrary internal rule, if cases can be avoided in which a single factual situation might be subject to conflicting Community and national rules, the Administration would not have to reject the latter in favour of the former, in application of the principles of direct effect and primacy. Accordingly, what is needed is to concentrate on improving the incorporation of Community law into the national legal system and stripping

the latter of conflictive elements, rather than attempting to grant powers to the Administration to set aside national provisions when these priority tasks have not been properly implemented.

Notwithstanding the priority nature of other proposals (in particular those aimed at improving the incorporation of Community law and the removal of redundant legislation), a more ambitious suggestion might be made, to bring Spanish legislation in line with the requirements of ECJ jurisprudence in this area. This suggestion would consist in legally enabling (for example, through a provision of Act 30/1992, of 26 November) the Administration to set aside any domestic rule that is contrary to Community law, with the exercise of this power being subject to the prior assent of the Council of State or equivalent advisory body to the Autonomous Communities.

To justify this suggestion, let us recall that, of the criticisms made of the *Costanzo* doctrine (assuming doubts regarding its validity are assuaged and difficulties concerning its conformity with the Constitution are overcome), there remains the problem concerning the impossibility of the Administration addressing a pre-litigation inquiry to the ECJ for a ruling on the interpretation or validity of Community law; this represents a major obstacle to assessing whether or not there is a contradiction between the two law systems. The intervention of the Council of State, or equivalent regional body, if mandatory and binding, would alleviate this problem by enabling a dialogue between the domestic advisory body and the Community court.

The scope of the concept of judicial body, in the context of Article 234 of the Treaty establishing the European Community, may not match that accorded to this term in the national law of different countries, and so the ECJ has defined it precisely, requiring the concurrence of the following components: establishment by legislative act, permanence, compulsory jurisdiction, adversarial proceedings, judgments determined by the

application of legal rules, and independence. The flexibility shown by the ECJ in managing all these characteristics has resulted, as regards Spanish law, in the *a priori* admissibility of pre-litigation questions referred to it by economic and administrative courts, the non-jurisdictional nature of which is manifest, in accordance with the parameters applicable to our own system.

In the light of this ECJ jurisprudence, it could reasonably be hypothesised that it might now be appropriate to confer full legitimacy on the Council of State to consider a pre-litigation inquiry regarding the interpretation or validity of a Community provision, and to make its opinion mandatory and binding with respect to the setting aside of national rules when they are incompatible with the Community provision. This would be appropriate because in such a case the Council of State would embody the defining characteristics of a judicial body for the purposes of the above-mentioned Article 234, i.e., functional and organizational autonomy, independence in the exercise of the advisory tasks assigned to it, under the corresponding regulatory Basic Law (Article 1.2), together with compulsory jurisdiction, with its effectiveness in the issue in question being derived from the fact that a Council of State opinion rejecting the existence of any contradiction between the Community provision and the domestic rule would mean the latter could not be set aside.

In summary, by introducing a procedure as suggested above, if during legislative proceedings any question were raised concerning compatibility between the domestic rules and the respective areas of Community law (a situation that in any case would be exceptional if the incorporation procedure were improved and redundant/incompatible rules eliminated) it would be mandatory to consult this matter with the competent body, national or regional. Thus, the Council of State would be called upon to issue an opinion in the case of rules proposed by the national Administration. In any case, the advisory body would have to assess the

appropriateness of the referral of the pre-litigation inquiry before making any binding ruling on the presence or absence of legislative contradiction. This reform would consolidate the means available to the government and the courts to interpret Community law when exercising their respective powers to set aside internal rules as being incompatible with that law. Furthermore, regardless of whether a dialogue is established between the consulting administration and the ECJ, the mandatory intervention of the Council of State and/or the equivalent regional bodies would make them the normal channel for expressing and resolving doubts about the compliance of domestic rules with Community law, and their opinion would become a guarantee of the proper exercise of the above-mentioned power/duty, as well as an appropriate mechanism, if any contradiction is observed, for proposing the adoption of measures to correct the Spanish legal system accordingly.

b) The governmental review of final decisions held to be contrary to European law

Taking into account the above-described distinction arising from the doctrine of the Council of State, we must now differentiate, when addressing the question of the governmental review of final decisions held to be contrary to Community law, cases in which the breach of the latter is attributed to a specific administrative act – on the one hand – from those in which the declaration of non-compliance affects a domestic regulatory provision, on the basis of which decisions were taken and became final prior to the declaration, on the other.

Differential treatment of the two cases is justified, in the opinion of the Council of State, by the different degrees of importance assigned by each to the principles of effectiveness and of legal certainty.

- In the first situation, a classic case of which is that of State aid which is ruled by the European Commission to be incompatible with the

common market, the revocation of a specific act is required to implement a decision of the Commission or an ECJ judgment.

The problem that occurs in this respect is the absence of a specific generally applicable mechanism to allow the elimination of obstacles in domestic law, in order to implement European decisions regarding a contradiction between the act in question and Community law. In view of this absence, the Council of State has highlighted the inadequacy of the review techniques available under Spanish law with respect to favourable decisions that do not present a flaw making them automatically null and void. Thus, it is impossible to revoke Article 105.1 of Act 30/1992, of 26 November, which is applicable only to decisions imposing a lien or which are unfavourable, and nor may any *ex officio* review be made of Article 102.1 of the same Act, which can be used only to redress invalid decisions.

Concerning the particular case of State aid, the solution to this problem lies in the General Subsidies Act 38/2003, of 17 November (Article 37), in which one of the causes of reimbursement is a Community decision according to which the amounts received must be returned.

However, it remains possible that in other areas it may be necessary to revoke a favourable decision or its effects in order to satisfy the requirements of Community law. On the one hand, it should be borne in mind that the Commission exercises supervisory powers through special procedures, not only with respect to State aid, but also in other areas, either in accordance with a provision of the Treaty establishing the European Community (for example, to defend fair competition, under Article 86.3) or according to a provision of secondary legislation (for example, in air transport, under Regulation 2408/92 of the Council, of 23 July, on access for European Community air carriers to intra-Community air routes); in the exercise of these powers, the Commission may take decisions the performance of which involves the revocation of a decision declaring rights. Moreover, infringement proceedings, as a horizontal

procedure to enforce Community law, may be initiated in response to the positive behaviour by a State – by its adopting a favourable act – that incurs in the breach of a duty imposed by Community law. In such a case, if the ECJ ruled the existence of non-compliance, the defaulting State would be obliged, under Article 228.1 of the Treaty establishing the European Community, to take the measures necessary to implement the judgment, in this case, by revoking the corresponding administrative act.

It follows from the above that the effectiveness of a decision by the Commission or a judgment against Spain handed down by the ECJ, in the context of an infringement procedure, may require the Administration to perform the definitive withdrawal of a decision; nevertheless, there is no channel by which such a withdrawal may be carried out if the decision in question is declaratory of rights and is not intrinsically invalid.

In consequence, as suggested by the Council of State in its 1999 Report, it is necessary to create a mechanism that would enable, in general, the revocation of final decisions when this is required by a Community decision or judgment. This mechanism, which could be included in a paragraph of Article 102 of Act 30/1992, does not involve any alteration to the doctrine on the invalidity of administrative decisions, as it is not based on the invalid or annulable nature of the decision to be eliminated from the judicial domain, but on the fact that this elimination is necessary in order to comply with a Commission decision or an ECJ judgment. In the legal configuration of this revocation procedure, it would be useful to include two provisos: first, to facilitate its activation, it should be possible for it to be undertaken, not only at the initiative of the Administration that adopted the measure in question, but also at the request of the interested party; second, in order to ensure rapid compliance with Community notifications of incompatibility, and for the sake of legal certainty, there should be a time limit for demanding the revocation of a

decision that has been declared incompatible, this period to be computed from the date of the Community decision or ECJ judgment in question.

- In the second case, an infringement of Community law is declared with respect to a domestic regulatory provision under which administrative decisions have become final before this declaration was made.

In the opinion of the Council of State, it is not appropriate to create a specific channel for the revocation of such acts.

First, it cannot be argued that the existence of such a channel is a requirement arising from ECJ judgments. The latter, in the absence of Community rules in this respect, leave it to the domestic law of each Member State to establish the procedural regulations governing the means of protecting the rights that Community law confers on individuals, although subject to the limits derived from the rules of equivalence and effectiveness; therefore, these regulations must be no less favourable than those concerning similar appeals for domestic judicial review nor make it impossible in practice or excessively difficult to exercise the rights conferred. Although it is true that in the field of taxation the ECJ is increasingly forceful in invoking the rule of effectiveness to require Member States to provide the instruments necessary to make it possible for taxpayers to recover sums paid in breach of Community law (*Reemtsma Cigarettenfabriken* case, Judgment of 15 March 2007), it should not be forgotten that this trend in jurisprudence coexists with another, much more nuanced, line in which the ECJ relies on the principle of legal certainty to deny that administrative bodies are obliged to reconsider a decision which has become final (*i-21* case, Judgment of 19 September 2006). In conclusion, when use is made of the domestic legal system (Article 102.1 of Act 30/1992, of 26 November; Article 217 of the General Taxation Act 58/2003, of 17 December) to address applications for the judicial review of final decisions, on the grounds that such decisions are based on a legal provision subsequently declared to be contrary to Community law, it is

clear that the rule of equivalence is fulfilled, and at the same time that the rule of effectiveness does not appear to be breached, because the review is not impossible, but limited to cases of manifest invalidity.

Second, the creation of a channel for reviewing decisions on the basis of the declared contravention of Community law of the provisions on which these decisions were based would break the general rule (unchallenged in Spanish law) that the revocation of a rule in the application of which final administrative decisions have been issued does not in itself establish the invalidity of such decisions (this rule, in the case of the revocation of regulatory provisions, is embodied in Articles 102.4 *in fine* of Act 30/1992, of 26 November, and Article 73 of Act 29/1998, of 13 July, governing contentious-administrative courts. For the case of a declaration of unconstitutionality of laws, the rule was deduced by the Constitutional Court from Article 40.1 of the Basic Law establishing this Court, based on the principles of *favor acti* and legal certainty).

In summary, while the existence of a channel for the revocation of final administrative decisions, when so required by a Commission decision or by an ECJ judgment, may be necessary to ensure the effectiveness of this decision or judgment, the introduction of a mechanism to eliminate final administrative decisions based on a regulatory provision declared contrary to Community law would not be appropriate, since, not having been required by the ECJ, it would violate the general rule to the contrary under Spanish law.

2.2. Concerning the principle of legal certainty

Compliance with the obligation, derived from this principle, to eliminate situations of uncertainty caused by the existence in domestic law of provisions incompatible with Community law requires the establishment

of mechanisms to prevent the continued effective existence of such provisions.

In proposing such mechanisms, and to provide an adequate response to the consultation request, let us first address the involvement of the Administration in eliminating legislation that is incompatible with Community requirements and, second, examine the possibility of attributing effects *erga omnes* to the declaration made by the ECJ that certain provisions of national legislation are incompatible with Community law. Therefore, in seeking to comply with the need (as mentioned in the consultation request) "to eliminate domestic rules that are wholly or partially contrary" to European law, it is essential to adopt a broader approach than the strictly administrative outlook (which is predominant in this Report) because this task is one that must involve the different branches of government, working together.

a) Intervention by the Administration in adjusting legislation in response to Community requirements

The principle of legal certainty, as formulated by the ECJ, can be supported by the repeal (or amendment) and *ex officio* review of domestic provisions that are contrary to Community law, in the case in question, those of a regulatory rank.

- With respect to the first of these procedures, the Council of State gave early warning (on the accession of Spain to the European Communities) of the advisability of proceeding "to explicitly repeal domestic rules that are contrary to Community law or to make a formal statutory declaration of their new scope, and doing so, in each case, using internal legislation of a rank not below that of the rules in question" (Opinion 48,700, of 29 January 1986). It is imperative, therefore, to respect the principle of legislative hierarchy when repealing or amending national provisions that are incompatible with European law, whilst recalling that,

according to Opinion 1619/2007 cited above, the *Costanzo* doctrine cannot be called upon as a basis for adapting particular legal provisions to achieve compliance with ECJ jurisprudence by means of regulatory reforms.

In this framework, the Administration, either by using its own regulatory authority, or by promoting the exercise of legislative power by Parliament, may intervene in adapting the domestic legal system by means of preventive and remedial action against improper situations.

- Preventive measures. Frequently, in the development of an internal rule transposing a Community directive, the text identifies the provisions whose repeal is required by the entry into force of the transposition or, at least, includes a nonspecific derogatory clause affecting any provision that is of equal or lower rank and has a contrary effect. In any case, the rule *lex posterior derogat anterior* causes the expulsion from domestic law of rules that are contrary to the directive being transposed, unless the incorporation provision has a lower rank than such rules (or the rules have areas of application unaffected by Community law, and in which their full force and effect will continue).

However, the same does not seem to be the case when the Community rule is a regulation. Given that a domestic rule may not reproduce a Community regulation, which is characterized by the completeness of its direct effect, but at the same time by its incapacity to expel contrary provisions from national law, although it takes precedence over them, such provisions often remain in force and maintain the appearance of constituting valid rules. In other words, as no incorporation is performed, except when the Community regulation allows a complementary domestic rule, the task of identifying and repealing incompatible internal rules is omitted, and consequently there is a loss of legal certainty. For this reason, it would be useful for the report on the impact of each proposed Community regulation, drafted during its preparation, to point out the rules that would be affected by its

introduction, so that the official publication of the legislative document, once approved, in the Official Journal of the European Union could be followed at the national level by the repeal of any contrary provisions. As noted above, it is appropriate and possibly of considerable importance that the Council of State should perform an advisory role concerning this report on the regulatory impact of any proposed regulation.

A more difficult task is that of eliminating inappropriate legislation following the adoption of a Community regulation when it is not sufficient to simply repeal an incompatible internal standard, because the latter also applies to situations that are unaffected by Community law. Since, as stated by the ECJ in the *ICI* case, in its Judgment of 16 July 1998, in such a case the State continues to be obliged to maintain legal certainty, it would therefore be necessary to amend the scope of the rule concerned to clarify that it does not extend to situations covered by the Community regulation.

Whether the incompatible rule is repealed or whether it ceases to apply to situations addressed by the corresponding Community law, the body responsible for negotiating this law in Brussels must take a leading role in the execution of these tasks, in the same way that the body that negotiates a directive is responsible for its subsequent transposition.

This model of a preventive approach was applied in the agreement reached by the Council of Ministers at its meeting of 8 June 2007, at the proposal of the Minister of Agriculture, Fisheries and Food. According to this decision, the Council of State was instructed to carry out a study on the adaptation of the Spanish legal system to new international and Community law requirements concerning measures against illegal, unreported and unregulated fishing. This agreement reflected the interest in ensuring compliance with European obligations in this field, by implementing "the legislative, regulatory or administrative practices necessary to undertake without delay the effective implementation" of Community rules. Thus, one of the aims of the report commissioned was to monitor the proposed

regulation during its examination by the European institutions "to ensure that when the body of measures is approved by the Union, the Spanish system is ready to immediately carry out the adjustments necessary for all the new measures to be implemented".

- Corrective action. When a problematic situation is detected, arising from the existence of domestic provisions that are contrary to Community law, the Administration must not remain indifferent but promote the changes needed to eliminate such situations.

In order to facilitate administrative intervention, a mechanism could be established to inform the Government of any final judgments ruling domestic laws incompatible with European law, so that the executive, after consulting with the Council of State if this is deemed necessary, could exercise its legislative initiative to correct the situation that produced the displacement of the domestic legal provision.

- Let us also recall the potential of the hitherto underused technique of *ex officio* review of general provisions, under Article 102.2 of Act 30/1992 of 26 November. This precept imposes a duty on the Administration originating an invalid regulation to declare this circumstance as soon as it becomes aware of the fact, although such a declaration is subject to the mandatory prior assent of the Council of State, or the equivalent advisory body in the corresponding Autonomous Community.

Therefore, if Article 62.2 of the statute were amended as proposed above, that is, to include the breach of Community law among the determinants of the invalidity of the regulations, it would be possible to resort to the *ex officio* declaration of this invalidity by the Administration as an active means of eliminating improper provisions from the legal system. Furthermore, in view of the characteristics of the intervention of the advisory body competent in this case, it might be possible (as suggested above) for it to engage in dialogue with the ECJ about the interpretation or

validity of Community law, when it is necessary to rule on the existence or otherwise of a conflict between domestic and European law.

In conclusion, the Administration could take an active role in eliminating situations of uncertainty caused by the existence in domestic law of provisions incompatible with Community law; on the one hand, by identifying the rules affected by a Community regulation about to be adopted and, in general, those incompatible with European law, in order to initiate the procedure for their repeal or amendment; and on the other hand, by using the technique of *ex officio* review when the existence of a regulatory measure that opposes the tenets of Community law becomes apparent.

b) The judicial declaration, with non-specific effect, of the non-compliance of an internal rule with European law

As a difficulty in ensuring compliance with the principle of legal certainty, the present Report has already observed the non existence of any channel for the elimination *erga omnes* of legislation contrary to Community law, as a result of the diffuse nature of the supervision of compliance by domestic laws with Community law by ordinary courts judging a dispute. It would be worthwhile, therefore, to consider a possible solution to this problem, one that would satisfy the requirements of the above-mentioned principle while respecting the limits resulting from the *Simmenthal* doctrine, that is, it should enable the elimination of the rule that infringes Community law, without prejudice to the power of the judge to set it aside without waiting for its removal from the domestic legal system.

In accordance with the ideas put forward by the Council of State in the Report on amendments to the Constitution, regarding the advisability of a judicial review and the elimination of legislation considered contrary to Community law, this review could be performed by assigning an *erga*

omnes effect to the declaration made in this regard in an *ad hoc* procedure. Returning to this idea, we outline a proposal designed to transform the existing diffuse model of supervision into another, more focused, one. However, this proposal should be addressed with the utmost caution, as the Council of State is well aware of the conceptual and practical difficulties that its implementation would entail.

That said, it would be useful to consider which body should be given the authority to make such a general declaration of non-compliance between a national law and Community law, and in which cases the procedure designed for this purpose should be applied.

- As regards the jurisdictional issue, the Council of State believes there is sufficient justification for the above-described procedure being carried out by the Constitutional Court.

Solid reasons may be advanced in support of this approach; despite the contrary position upheld by the Constitutional Court itself in the above-cited Judgment 28/1991 as well as in other, later ones, in general, the courts have ruled in favour of considering that laws infringing Community law are fundamentally flawed by indirect unconstitutionality, to the extent that they breach provisions that the Constitution (in Articles 93 and 96) requires to be observed. The explanation of the consequences of the breach of Community law by national law in terms of unconstitutionality would favour the view that the Constitutional Court should have jurisdiction to rule on any contradiction in this respect.

But, apart from this issue (the study of which is a matter for academics), the Spanish model of constitutional justice may be called upon in a more generic fashion to support the proposal made. This model is based on the Constitutional Court's exclusive power to declare the invalidity of a regulation, and for this judgement to have the force of law. Thus, the ordinary court has no such power. Nonetheless, this has not prevented

these courts from being granted, pursuant to the *Simmenthal* doctrine, the power to set aside a law that is contrary to Community law, without ruling on its validity. In other words, the status of 'negative legislator', located outside the ordinary jurisdiction, corresponds to the Constitutional Court, and so only the latter can declare with effects *erga omnes* the exclusion of a rule with the rank of law from the domestic legal system. On the other hand, as the ordinary courts have the jurisdiction to give an abstract ruling on the compliance of a law with Community law, this ruling would be upheld as regards its effectiveness. Thus, the offending law would be valid, but ineffective in general. However, this option is considered less satisfactory from the perspective of legal certainty.

Moreover, the proposed solution to the question of jurisdiction would assign a European role to the Constitutional Court, by which the latter, without losing its fundamental characteristics as an institution of State, would contribute to eliminating dysfunctions from the Spanish legal system.

- In terms of organizing the procedure to achieve a general declaration of the compliance or otherwise of a national law with Community law, the first aspect to emphasise is that the ECJ (as made apparent in the *IN.CO.GE* case, Judgment of 22 October 1998) does not preclude the existence of such a procedure, provided it does not prejudice the judicial power to set aside the domestic rule deemed to be incompatible. Therefore, in view of the *Simmenthal* doctrine, the main feature that must be provided by the above-stated procedure is its lack of suspensive effect on the particular dispute in which the compatibility between the domestic rule and Community law is in question.

On the basis of this idea, the Council of State considers that an appropriate mechanism could take the form of a question that must be considered whenever a final judgment sets aside a legal regulation that is contrary to Community law. Thus, when a court resolves a dispute in which a conflict arises between the domestic law applicable to the case and a

Community law, and a contradiction between the two is observed, such that the former is displaced by the direct effect and primacy of the latter, the court would be required to approach the Constitutional Court, once the judgment became final, to obtain its opinion about the contradiction in question; if the Constitutional Court confirms the opinion of the first court, its declaration would produce the general effect of invalidating the corresponding legal measure. However, a hypothetical Constitutional Court decision to the contrary, i.e., favourable to the validity of the national law, would have no effect on the judgment handed down by the first court (which gave rise to the consultation), in view of its finality.

In short, the creation of a process of this nature, the regulation of which would need to be included in the Constitutional Court Basic Law, would satisfy the two stated goals: first, legal certainty would be favoured by a focused model to supervise the compliance of national law with Community law, whilst avoiding – by means of the ruling made by the Constitutional Court – that depending on the criteria adopted by different courts, certain legal provisions might be applied in some cases and not in others; and, second, a greater degree of legal certainty would be obtained, whilst preserving the power of the ordinary courts to set aside, in the case in question, any rule deemed to infringe Community law (in accordance with the *Simmenthal* doctrine). Furthermore, this would also prevent the issue from having a delaying effect on the resolution of the original dispute. Finally, the proposed mechanism would need to have a complementary nature with respect to any repealing or amending legislation, such that the mechanism would be rendered irrelevant if the corrective measures implemented by the Administration resulted in Parliament determining the removal of the provision in question from the legal domain.

In order to complete the concentration of judicial control of domestic rules that infringe Community law, in this case at the infra-legislative level, certain amendments could be made to specify the judiciary's power to set

aside regulatory measures that infringe Community law. This power, as noted above, has been acknowledged by the Third Chamber of the Supreme Court.

These changes would have a substantive and a procedural scope. In the first aspect, it would be appropriate to amend paragraph 2 of Article 62 of Act 30/1992, of 26 November, which lists the defects that determine the invalidity of administrative provisions (including the violation of "*the Constitution, laws or other administrative provisions of a higher rank*") to include among such defects the infringement of Community law. In the second respect, after an infringing regulatory measure has been declared invalid, Articles 26 and following of Act Law 29/1998, of 13 July, regulating Contentious-Administrative courts, should be amended to state that an appeal may be made against such a measure, either directly or indirectly (by challenging a decision adopted in implementation of the measure, on the basis of its incompatibility with a Community rule); it should also be stated that the court which renders a final, favourable judgment, considering the content of the measure applied to be contrary to Community law, should refer to a higher instance the corresponding question (which in this case would not be the illegality of the measure, but its incompatibility with European law).

2.3. Concerning the principle of conforming interpretation

The obligation, resulting from this principle, to interpret domestic law in the light of European law, has been accepted without discord by Spanish courts, as observed above.

However, to provide regulatory coverage to the principle, and to better ensure its validity in judicial actions, the Council of State is of the opinion that it should be expressed as positive law. Accordingly, an Article 5 *bis* could be included in the Judicial Power Act to establish the principle of

interpretation in conformity with the Constitution. Thus, a correlative basis would be established between the two criteria that are preferential in the interpretation of Spanish law, since both the Constitution and European law prevail to give specific meaning to the regulatory measures applicable.

The principle being examined, which implies the prohibition of any interpretive construction leading to an outcome that is directly or indirectly contrary to the objectives pursued by European law, should be formulated in general terms, i.e., excluding the nuances related to the nature of the decision providing the basis for interpretation, because what is proposed is the incorporation of a statement of principles which, far from impeding reaction to developments in case law, makes it possible. Furthermore, use could also be made of the new article to declare the preeminent value of ECJ jurisprudence, in its capacity as the Community institution responsible for setting common standards for the interpretation and application of European law by national courts.

In summary, taking Article 5.1 of the Judicial Power Act as a model, the implementation of the above principle would be supported by the introduction of a precept in the above law recognising the duty of judges and courts to interpret and apply domestic law in accordance with the rules and principles of European law, in conformity with the interpretation of these rules and principles given by the ECJ.

2.4. Concerning the principle of State responsibility for an infringement of European law

Taking an approach similar to that used to address the application of this principle in Spain, we now address separately the problems raised in each of the two areas of State liability for a breach of Community law: responsibility to the Community and responsibility to individuals.

a) Responsibility to the European Community

With regard to State responsibility to the European Community, we shall make three observations, based on the following ideas: the importance of the pre-litigation stage of the Community procedure for non-compliance, which must be considered as a whole; the consequences of the singularity of this responsibility; and the need to translate unfavourable ECJ rulings into measures to reverse the infringement of European law that has been identified.

- The main mechanism through which State responsibility to the European Community is established, that of proceedings for infringement, is preceded by a preliminary phase in which the Commission, after identifying a breach of Community rules by a Member State, sends it a formal notice describing the terms of the alleged infringement, such that the State has the opportunity to present its observations, before the Commission determines its position in a reasoned opinion (Art. 226 TEC).

Given the importance of this preliminary phase (which may prevent a complaint being brought before the Court, insofar as it provides the Member State with the opportunity to present its defence against the charges made by the Commission), the Council of State considers that careful attention should be given to maximise the effectiveness of the response made at this stage. To do so, steps must be taken to ensure the letter of formal notice is rapidly transmitted to the ministerial department responsible for preparing the reply (and to the Autonomous Communities or other public bodies concerned, as appropriate), making use of the coordination mechanisms proposed above with regard to the procedure for the transposition of directives. Moreover, it is advisable to promote the early involvement

of the State Legal Service of the ministry responsible for drafting the response, in order to assess its legal and procedural consequences, because this document may determine, in due course, the defence strategy to be adopted in litigation before the ECJ.

- As noted above, the exclusive external responsibility of the State to the Community poses two problems: the absence of instruments available to Parliament and the Government, apart from the case provided for in Article 155.1 of the Constitution, to ensure compliance with European law, pursuant to Article 93 of the Constitution; and the non existence of a mechanism that enables, in a general way, the economic consequences of such responsibility to be transferred to the Autonomous Community causing the infringement.

Setting aside the first of these difficulties, which has already been addressed elsewhere in this Report, it seems appropriate to pause briefly to consider the second question, to which a legal remedy may be proposed, subject to the need to include a linkage in the constitutional text, as observed in the Report on amendments to the Constitution. In this respect, various partial reforms have been attempted previously, aimed at addressing the problem posed by the imposition of coercive fines and Community sanctions of an administrative nature. In contrast to this sectoral approach, the Council of State is of the view that the possibility of obliging the territorial entity responsible to pay the coercive fine (or a lump sum) imposed by the ECJ in response to non-compliance with an initial judgment against Spain, a possibility that is expressly contemplated by other Member States with a decentralized structure, should be addressed on the basis of a general approach.

The above-mentioned legal provisions could provide a basis for future regulations in this respect, which would need to include the

granting of a hearing to the administrations implicated in proceedings for the attribution of responsibility.

In exchange for the transfer of responsibility to the Autonomous Communities in cases in which they are held responsible for the non-compliance, they should be assigned a more prominent role in the defence of their actions, in the context of infringement proceedings. The involvement of regional institutions to this effect was addressed by the Conference on Issues Related to the European Communities (CARCE) in an Agreement adopted on 29 November 1990, subsequently replaced by the current Agreement, dated 11 December 1997, concerning the participation of the Autonomous Communities in proceedings before the ECJ. Clause 11 of this Agreement, specifically concerning the infringement procedure, establishes measures such as the referral to the Autonomous Communities of the complaint documents, letters of formal notice, reasoned opinions and other communications received from the European Commission insofar as these are related to the powers of the Autonomous Communities, and the designation by the Autonomous Communities of lawyers or advisers to assist the State Legal Service before the ECJ, when a representation is made to this Court, if the alleged non-compliance arose from an action or omission by one or more Autonomous Communities.

Recognition at the legal level of the participation of the Autonomous Communities whose powers are involved, both in the pre-litigation and in the jurisdictional phases of infringement proceedings, by measures similar to those contained in the above-mentioned Agreement (which was signed by all the Autonomous Communities except that of the Basque Country), would benefit the involvement of these entities in the defence of their actions and would contribute to the distribution of responsibilities if judgment were ultimately given

against the Kingdom of Spain in these proceedings. As a limit factor, intervention by the Autonomous Communities in the horizontal process of control, or in any of the special procedures, must respect the unity of the defence presented by the Kingdom of Spain to the administrative and judicial bodies of the European Community, and thus the preeminent decision-taking role of the State Attorney.

- Finally, consideration should be given to strengthening the mechanisms for monitoring ECJ judgments against Spain, so that, by means of systematic communication to the institutions concerned, the adoption of the measures necessary for the implementation of such judgments would be ensured, as required by Article 228.1 of the EC Treaty.

b) Responsibility to individuals

The principle of State responsibility to individuals for a breach of Community law has been received without special objection in the doctrine of the Council of State and in the case law of the Chambers of the Contentious-Administrative Court and the Supreme Court. Nevertheless, it remains necessary to adapt the Spanish compensation system to the construction of this principle by the ECJ. This adaptation should start from the legal recognition of the right of individuals to be compensated for any harm they suffer to their property and their rights as the result of a breach of Community law by the public authorities. However, this recognition need not involve the incorporation into domestic law of the requirements laid down by the ECJ to declare the existence of State responsibility, because if this were so the system would lack the flexibility required to respond to new situations in case law that may affect these requirements.

Having recognised the principle of responsibility, it should be clarified that the conditions of substance and form applied under domestic law to the declaration of liability also apply when individuals allege infringements

of Community law. That is, in terms of regulating the requirements for liability in these cases (such as those relating to the concept of compensable injury and the presumption of harm), the definition of compensation payable and the formal channels to request it, we must consider the rules of Articles 139 and following of Act 30/1992, of 26 November, laid down in the Regulations on procedures to be adopted by public authorities regarding liability, approved by Royal Decree 429/1993, of 26 March, unless the infringement arises from the operation of the justice department, in which case the system applicable is that established by the Judicial Power Act.

The introduction of liability for infringement of Community law as a principle, and the referral to the general rules as to the conditions of substance and form, as could be achieved under Article 139 of Act 30/1992, the first provision of Title X of this law, which stipulates the principles of the national system, would confirm the jurisprudential criteria sustained both by the ECJ and by the Supreme Court. Indeed, according to these criteria, an action for liability must be conducted through the channels provided for in domestic law, which requires the court to perform a dual test to ascertain compliance with the requirements of Community case law, on the one hand, and the conditions laid down in Spanish legislation, on the other.

Finally, it is possible that adapting the Spanish system to the above-described principle might require further modification to respond to possible liability arising from the inactivity of the legislature, in failing to transpose a directive, as a result of the inadequacy of Article 139.3 of Act 30/1992, of 26 November, which provides for the consequences of a legislative act that has been adopted, but does not address the question of liability for failure to adopt one.

In this regard, it should be noted that the rule of effectiveness operates as a limit to the referral to domestic law for liability proceedings to be initiated; thus, the ECJ requires that national rules must not make it

virtually impossible or excessively difficult to obtain compensation. For this reason, a provision should be included to acknowledge the possibility of arguing legislative omission as a determining circumstance in the breach of Community law.

PART TWO

VI. SOME REFLECTIONS ON THE ROLE OF THE COUNCIL OF EUROPE IN EUROPEAN INTEGRATION

After the Second World War and the subsequent formation of two clearly-defined political blocs, the democracies of Western Europe directed their efforts toward creating a common European space. To this end, a conference was held in The Hague in 1948, which resulted in the signing by Belgium, France, Luxembourg, Netherlands, Great Britain, Ireland, Italy, Denmark, Norway and Sweden of the Statute of the Council of Europe. This was done in London on 5 May 1949.

This Council was formed with the aim of promoting freedom and democracy in Europe. It has played a significant role in the democratisation of authoritarian political systems, as happened recently with the countries of Eastern Europe. At present, the Council has 47 Member States, one of which is the Kingdom of Spain.

The main bodies of the Council of Europe are the Committee of Ministers, composed of the Foreign Ministers of the Member States, and the Parliamentary Assembly, composed of the representatives of the parliaments of each of the Member States (318 in all). In addition, within the Council itself, important roles are played by the Congress of Local and Regional Authorities, which in 1994 succeeded the Conference of Local Authorities of Europe (created in 1957) and consists of two chambers: the Chamber of Local Authorities and the Chamber of Regions. Finally, the institutional structure of the organization has a General Secretariat, whose head is elected by the Parliamentary Assembly.

The Council of Europe is an organization of political cooperation, not one of integration, with the corresponding consequences on both the decisions taken by its agencies, which are of a persuasive nature rather than binding, and the effectiveness of its rules, which do not seek

compliance via mandatory enforcement. This is the main aspect that distinguishes the European Council from the European Communities, because the latter were configured from the outset as archetypal organizations of integration.

From this starting point, the evolution of the European Communities toward a more ambitious configuration, that of the European Union, presenting, together with elements of an economic nature, others of equal or greater importance, of a political nature, has led to questions being posed regarding the role of the Council of Europe in constructing the continent-wide system.

However, the very nature of the Council of Europe, far from being an obstacle to achieving the goals set out in its founding statute, has enabled this organization to continue to play an important role in bringing together and reinforcing democratic values among the countries of Europe, to the point that access to the Council of Europe has come to be a prior stage to subsequent membership of the European Communities.

The consultation request made by the Government invited the Council of State to "consider Spain's position as a member of the Council of Europe, both in terms of the rules it adopts and, very specially, concerning the jurisprudence of the European Court of Human Rights and how to ensure the effectiveness of its judgments". These questions, notwithstanding the issues they raise in themselves, should be analysed without losing sight of the mutual interactions that may exist in their relations with the Community system and its institutions. These interactions constitute the first and principal object of this consultation.

It is first necessary to define and examine the various events by which the will of the agencies comprising the Council of Europe is determined and expressed, distinguishing between those with no regulatory value (i.e., non-normative decisions with special authority) and those that

do have such value (i.e., conventions and agreements). Moreover, although the consultation request stipulates rules adopted within the Council of Europe, we must also take into account the agreements concluded by the Council with other international or supranational organizations, since relations with the European Communities are channelled through this type of instruments, some of which could soon come to be very significant to the achievement of a unified European system to protect human rights. After this initial consideration, we shall examine the effectiveness of the decisions taken by the European Court of Human Rights and analyse whether and how to implement them in Spanish law.

1. Non-normative decisions with special authority

1.1. Nature and content of the different types of decisions

The Treaty of London conferred decision-taking powers on the Committee of Ministers and on the Parliamentary Assembly of the Council of Europe, and further powers were subsequently assigned to the Congress of Local and Regional Authorities.

a) The Committee of Ministers can adopt resolutions, make recommendations and issue declarations.

- Resolutions (Article 20 of the Treaty of London). These are used in three areas: first, in relation to the internal organization and functioning of the Council of Europe, and in particular to invite new States to join the organization; second, in interpreting the provisions of the Treaty of London, when an amendment is to be introduced, which is compatible with its content and therefore does not require the use of the review procedure provided for in Article 41 of the Treaty; and finally, in the exercise of the functions assigned to the Committee of Ministers in relation to the definitive

text of agreements negotiated within the Council of Europe and, in some cases, concerning their implementation.

Their adoption requires, in the first of these cases, a simple majority of the votes cast, although to invite new States to join, a two-thirds majority is needed of all the representatives entitled to participate in sessions of the Committee of Ministers (Article 20.b) and c) of the Treaty of London). In the remaining cases, a two-thirds majority is required of the representatives entitled to participate in meetings of the Committee of Ministers (Article 20.d) of the Treaty of London).

Of particular importance are the resolutions adopted in the third of the above areas, aimed at supporting the fulfilment of certain agreements concluded within the Council of Europe, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, the Framework Convention for the Protection of National Minorities, the Partial Agreement in the field of Social Security and Public Health, the European Social Charter and the Code of Social Security. The award of the European Diploma of Protected Areas also takes the form of a resolution.

- Recommendations (Articles 15.b) and 20.a) of the Treaty of London). Recommendations are used by the Committee of Ministers to transmit its opinion to Member States on any matter in which there is a "common policy". In addition, they are issued in support of compliance with the European Social Charter and the European Charter for Regional or Minority Languages.

Their adoption requires, in principle, the unanimity of the votes cast and a majority of the representatives entitled to participate in meetings of the Committee of Ministers, which confers special authority on such recommendations (Article 20.a) of the Treaty of London). However, it

should be noted that the Minister Delegates, at their meeting No. 519 *bis*, held in November 1994, reached a gentlemen's agreement under which the rule of unanimity would not be applied. In fact, a considerable number of internal rules of the Member States arise from these recommendations.

The Committee of Ministers, in accordance with Article 15.b) of the Treaty of London, can monitor compliance with these recommendations, and invite Member States to explain the actions taken in this respect.

- Declarations. Although not mentioned in the Treaty of London, declarations are sometimes used to solemnly express the position of the Member States represented on the Committee of Ministers, in relation to any matter considered of special significance.

The subjects of these declarations are usually of a political nature, broadly speaking. On recent occasions, the Committee of Ministers has paid special attention to the process of European construction (see, for example, the declaration of Belgrade of 22 June 2007 "One Europe - Our Europe"), the role of the media (the declaration of February 12, 2004 on freedom of political debate in the media; that of 2 March 2005 on the freedom of expression and information in the media in the context of the fight against terrorism; that of 27 September 2006 on guaranteeing the independence of public service media in the Member States; and that of 31 January 2007 on protecting the role of the media in a democracy when challenged by a process of media concentration), the transparency of electoral processes (the declaration of 13 May 2004 on the Code of Good Practice in Electoral Matters), internal issues that may affect regional or global stability (with special attention to secessionist movements) (the declaration of 26 March 2003 on the referendum in the Chechen Republic, that of 24 May 2006 on the referendum on the independence of the Republic of Montenegro, and that of 13 September 2006 on the intention to call a referendum on independence in the Moldovan region of Transnistria), the situation of hostages in areas of conflict or of political prisoners (the declarations of 24

March 2004 and 23 March 2005 on the presidential pardon for political prisoners in Azerbaijan, and the declaration of 27 June 2006 on Russian hostages in Iraq), internal disturbances (the declaration of 25 March 2004 on the recent unrest in Kosovo) and the problem of terrorism (the declaration of 12 September 2001 on combating international terrorism).

There is a continuity in the declarations of the Committee of Ministers in relation to the protection of human rights, a concern that is singular in some cases (the declaration of 21 January 2004 on the protection of human rights during armed conflicts, internal disturbances and tensions, that of 13 May 2005 on human rights and the rule of law in the information society, and that of 19 May 2006 on sustained action to ensure effectiveness of the implementation of the European Convention on Human Rights).

The communications issued by the President of the Committee of Ministers or by the Committee of Ministers in its own right, are more frequent than declarations, and are of a less solemn nature.

Care should be taken not to confuse the declarations issued by the Committee of Ministers with the three (also termed declarations) made at the summits of Heads of State and Government of the Member States of the Council of Europe, the third of which took place in Warsaw on 16-17 May 2005. These latter documents are not, strictly speaking, decisions by the organization, but serve to establish its future lines of action.

b) The Parliamentary Assembly may adopt resolutions, recommendations, opinions (*avis*) and written declarations.

Until 2004, the Assembly also adopted orders (which in some doctrinal statements were termed directives) in the area of its internal workings; these were instructions addressed by the Parliamentary Assembly to one or several of its committees. This category of events has been eliminated but some of its characteristics remain and are apparent in resolutions.

The fundamental regulatory mechanism of the recommendations, resolutions and opinions is, apart from the Treaty of London, the Regulations of the Assembly, adopted in Resolution 1202 (1999), on 4 November.

- Resolutions (Article 23.1.b) of the Treaty of London and Article 27 of the Rules of the Assembly). These are used in matters within the competence of the Assembly, both to regulate aspects of its internal organization (Article 30 of the Treaty of London) and to express the Assembly's opinion on political issues of major importance.

A proposed resolution must be signed by at least ten representatives from five national delegations (Article 23.2 of the Rules of the Assembly).

Recent resolutions that are noteworthy for the timeliness and significance of the matters discussed include No. 1539 (2007) of 16 March, on the United States and international law and No. 1567 (2007) of 28 June, on the need for an international response to Iran's nuclear programme.

Resolutions require a majority of the votes cast (Article 40.c) of the Rules of the Assembly).

Sometimes Parliamentary Assembly resolutions constitute an initial positioning, prior to a recommendation being made. Such was the case, for example, of Resolution 1562 (2007) of 27 June, on secret detentions and illegal transfers of detainees in Member States of the Council of Europe, and Resolution 1564 (2007) of 28 June, on the prosecution of offences falling within the jurisdiction of the International Criminal Tribunal for the former Yugoslavia, which led to the subsequent adoption, on the same date, of two recommendations by the Parliamentary Assembly to the Committee of Ministers. This also occurred with Resolution 1539 (2007) of 16 March, which gave rise to Recommendation 1788 (2007) of 16 March, on the United States and international law.

- Recommendations (Article 22 of the Treaty of London and Article 23.1) of the Rules of the Assembly). By means of recommendations, the Assembly refers to the Committee of Ministers the conclusions reached after discussion of an issue that it is outside its powers and corresponds to governments. In addition to the conclusions, and where appropriate, it may address proposals to the Committee on measures to be adopted to achieve the goals pursued.

The broad interpretation of the above statutory provision has sometimes led to the Assembly addressing its recommendations directly to the Member States.

The proposed recommendation must be signed by at least ten representatives from five national delegations (Article 23.2 of the Rules of the Assembly).

To adopt a recommendation, a two-thirds majority of the votes cast is required (Article 40.a) of the Rules of the Assembly).

Recent recommendations that are noteworthy for the timeliness and significance of the matters discussed include No. 1801 (2007) of 27 June, on secret detentions and illegal transfers of detainees in Member States of the Council of Europe, and No. 1803 (2007) of 28 June, on the prosecution of offences falling under the jurisdiction of the International Criminal Tribunal for the former Yugoslavia.

- Opinions (Article 24 of the Rules of the Assembly). Opinions consider issues that are submitted by the Committee of Ministers to the Parliamentary Assembly for consideration.

Opinions deal with various questions, such as the accession of new Member States (Opinion 261 (2007) of 17 April, on the admission of the Republic of Montenegro to the Council of Europe), draft conventions or agreements of the Council of Europe with other organizations or among its Member States (to cite just two cases, Opinion 262 (2007) of 19 April, on

the Memorandum of Understanding between the Council of Europe and the European Union and Opinion 263 (2007) of 20 April, on the draft Convention for the protection of children against abuse and exploitation), budgetary matters (such as the recent Opinion 264 (2007), of 24 May, on the Council of Europe budget for 2008, and Opinion 265 (2007) of 24 May on the Assembly's spending provision for 2008), and the implementation of the European Social Charter.

The adoption of an opinion requires a two-thirds majority of the votes cast (Article 40.a) of the Rules of the Assembly).

- Written declarations (Article 53 of the Rules of the Assembly). By means of such declarations the Assembly takes a formal position on an issue matter within the competence of the Council of Europe.

Declarations are limited in extension, and may not exceed 200 words.

They must be signed by 20 representatives of at least three states and two political groups. Written declarations are not sent to committee, nor do they give rise to debate in the Assembly. After presentation, they are printed and distributed among the Parliamentary representatives, any of whom may add their signature. In that case, the declaration will be distributed again two weeks after the end of the session. If prior to the opening of another session no further signatures have been added, this possibility ceases to be available.

These declarations may not contain messages for commercial purposes or for the benefit of persons or associations whose ideas or activities are incompatible with the principles of the Council of Europe. Neither may they contain racist, xenophobic or intolerant language or words or expressions whose meaning produces an affront to human dignity.

Written declarations will be published unless the President of the Assembly deems them inadmissible on the grounds that their content is contrary to the above stipulations.

In any event, these written declarations are of lesser importance than the resolutions, recommendations and opinions of the Assembly.

c) The Congress of Local and Regional Authorities, like the Parliamentary Assembly, may adopt resolutions, recommendations and final declarations.

The rules governing this institution and its actions are set out in Statutory Resolution (2007) 6, of 2 May, of the Committee of Ministers; in the Charter of the Congress of Local and Regional Authorities of the Council of Europe, the current text of which, subject to the appropriate review, is contained in the Annexe to the same resolution; and in the Rules of Congress, adopted by Resolution 133 (2002), of 4 June.

- Resolutions (Article 2.5 of Resolution (2007) 6, of 2 May; Rule 32.c) of the Rules of Congress). Resolutions advise local and regional authorities and their associations on all matters within the jurisdiction of Congress. These resolutions are also referred to the Parliamentary Assembly and to the Committee of Ministers, even if these are not the principal addressees.

The adoption of resolutions requires a majority of the votes cast.

- Recommendations (Article 2.5 of Resolution (2007) 6, of 2 May; Rule 32.a) of the Rules of Congress). Recommendations are normally proposed by Congress to the Committee of Ministers, and their implementation is entrusted to the governments of each of the Member States. They are sometimes addressed to other European or international organizations.

The adoption of recommendations requires a two-thirds majority of the votes cast.

- Reviews (Articles 2.2 and 2.5 of Resolution (2007) 6, of 2 May; Rule 32.a) of the Rules of Congress). Reviews are issued by Congress in connection with matters related to the powers or essential interests of local or regional corporations and which are submitted to it for consideration by the Parliamentary Assembly or the Committee of Ministers, usually in the form of draft recommendations or agreements made by these bodies.

The adoption of opinions requires a two-thirds majority of the votes cast.

- Final declarations. These are adopted at the end of ordinary or international meetings organized by the Congress, and contain proposals for action at the local or regional level, addressed to the authorities of the Member States or of other international organizations.

- Written declarations (Article 35 of the Rules of Congress). These declarations, which may not exceed 200 words, are made on matters within the competence of the Congress, and must be signed by representatives of at least three different States.

These declarations are published and distributed among the other representatives; they are not debated or voted on, neither in committee nor in plenary sessions of the Congress nor in either of its two Chambers.

If other representatives sign the document, it is again distributed before the start of the next session with the new signatures.

The significance of these written declarations, like those of the Parliamentary Assembly, is small compared with that of the other instruments (discussed above) available to the Congress of Local and Regional Authorities.

1.2. The effectiveness of the organization's decisions

We must distinguish decisions addressed by a Council of Europe body to another area of the same organization from decisions addressed to the Member States.

a) The first category includes recommendations made by the Parliamentary Assembly to the Committee of Ministers in relation to an issue within the competence of the Council of Europe or opinions issued by the latter on matters referred to it by the Committee. Also included in this category are the views of the Congress of Local and Regional Authorities, when sought by the Parliamentary Assembly or the Committee of Ministers.

In principle, these decisions have no legal force since, as the title indicates, they are only recommendations and opinions, of persuasive value to the addressees, although they do possess a special authority (*auctoritas*), especially when issued by the Parliamentary Assembly, given the important supervisory function played by the latter over the Committee of Ministers, by virtue of the dual mandate conferred on its representatives.

As an exceptional case, legal effectiveness is granted to some of the resolutions adopted by the Committee of Ministers, the Parliamentary Assembly and the Congress of Local and Regional Authorities, specifically those concerning purely organizational matters.

b) The second category is constituted of the resolutions and recommendations made by the Committee of Ministers to the Member States; the Parliamentary Assembly resolutions; and the resolutions and recommendations made by the Congress of Local and Regional Authorities on matters of general interest, apart from the declarations made by the same bodies.

In keeping with the very nature of the Council of Europe as an entity focused on cooperation, and not integration, its resolutions and recommendations have no binding effect on the Member States, which are not legally obliged to implement the provisions or guidelines expressed. Nevertheless, these decisions exert their own degree of effect, thanks to the broad consensus required for their adoption, in terms of the level of political commitment of the governments of each of the Member States to enable the organization to reach its objectives.

From the standpoint of this commitment, the resolutions and recommendations of the Council of Europe have varying degrees of significance for each of the Member States, depending on the subject in question, the greater or lesser number of countries who voted in favour and the weight and importance assigned to the issue.

Thus, Member States are more likely to follow the guidelines set by the Council of Europe in matters in which there are no considerations that might clash with their domestic and foreign policies. This potential conflict of interest, which should be accepted as natural in the organization of intergovernmental cooperation, tends to arise particularly in relation to certain decisions of the Parliamentary Assembly, when these directly clash with government policy in one or more Member States. Moreover, such conflict has sometimes led to individual representatives in the Assembly forming groups according to political convictions rather than national delegations; thus, it is not uncommon for representatives to supervise and criticise the actions of their own governments, a situation facilitated, as observed above, by the dual mandate of these representatives.

Another of the factors involved is the greater or lesser degree of support for resolutions or recommendations within the Council of Europe. The rule of unanimity having been discarded, all Council of Europe decisions are taken by simple or qualified majority. The majority criterion, while facilitating the adoption of resolutions or recommendations, also impedes

compliance with them by States that have voted against. Similarly, dissent by one or more of the leading countries reduces the authority of the corresponding resolution or recommendation.

However, notwithstanding these considerations, there is a particular category of resolutions and recommendations that, insofar as they are adopted to ensure the proper implementation of or compliance with certain agreements or agreements concluded within the Council of Europe, enjoy interpretive effectiveness. This is true especially of the resolutions issued by the Committee of Ministers in relation to the European Convention for the Protection of Human Rights and Fundamental Freedoms; nevertheless, the Committee and, sometimes, the Parliamentary Assembly may address recommendations to the Member States regarding their domestic regulatory action, in the framework of certain agreements or conventions, and the Congress of Local and Regional Authorities may issue resolutions and recommendations in implementation of the European Charter of Local Self-Government.

Even in these cases, however, the decisions of the Council of Europe are not truly binding, and the Member States are not legally obliged to incorporate their content into domestic legislation.

In this regard, the Constitutional Court, concerning various questions raised about constitutionality, in which the proponents claimed that certain international decisions and agreements had been breached, including a recommendation by the Committee of Ministers and a convention concluded within the Council of Europe, made clear, in its Judgment 36/1991, of 14 February, that the decisions of the Council of Europe do not produce normative effects, unlike its conventions that are subsequently ratified by the Kingdom of Spain; on the contrary, they merely have informative effectiveness regarding the actions of the public authorities and, in particular, those of the legislature. The contents of these decisions, said the Constitutional Court, "should inspire the actions of our government, but are

not binding on the legislature and may not be taken as a reference for deciding on the constitutionality of the law" (Legal Basis, para. 5).

This informative effectiveness of Council of Europe decisions is evident in some internal provisions, both regulatory and legislative. However, relatively few Spanish regulatory provisions are based on Council of Europe decisions, and these mainly refer to recommendations by the Committee of Ministers, in contrast to the many occasions on which domestic laws and regulations take into account the provisions of agreements and agreements concluded within the Council of Europe and ratified by the Kingdom of Spain. The reason for this, obviously, is that the former decisions are not legally binding, while the latter are. For the same reason, the recommendations most commonly cited in Spanish legislation are those adopted pursuant to an agreement or convention previously ratified by Spain or in the framework of a common policy established by the Council of Europe on the basis of conventional instruments.

Moreover, the informative effectiveness of Council of Europe decisions is also present in constitutional jurisprudence, albeit faintly so and almost always tied to specific agreements or conventions which, because of their normative value, are invoked to interpret Spanish legislation by means of Article 10.2 of the Constitution (for example, Constitutional Court Judgments 196/2006, of 3 July and 57/1994, of 28 February, Legal Basis para. 4).

Finally, the absence of a genuinely binding force in Council of Europe decisions means that the Spanish Administration has felt no need to create *ad hoc* institutional structures to incorporate them into the Spanish system. Nevertheless, this does not represent non-compliance, but rather a decentralized approach to performance, which takes place within each ministerial department, especially in the development and approval of regulations and draft legislation.

These considerations highlight the fact that that unilateral decisions by the Council of Europe, as made very clear above, have no legally binding force, as indeed is typical of intergovernmental cooperation organizations, which are still far from achieving the "regulatory myth" in the very apt expression coined in French doctrine, that has been achieved by integrative organizations like the European Communities. The Council of Europe has compensated for the absence of such a legally binding effect by adopting numerous regulatory texts – agreements and conventions – which, without being exactly decisions of the organization, are prepared by it and serve to enhance collaborative ties with other organizations or to harmonise the legal systems of the States that ratify them.

2. Agreements concluded with other organizations

The Council of Europe sometimes concludes agreements with other international organizations, for general or specific purposes, in order to improve cooperation in specific geopolitical areas or in certain activity sectors, as appropriate.

These agreements are the responsibility of the Committee of Ministers, as provided for in Articles 13 and 15.a) of the Treaty of London and in Statutory Resolution 51 (30), of 3 May. However, it is the Secretary General who, in practice, negotiates such agreements, subject to subsequent approval by the Committee of Ministers.

Agreements can be concluded in the form of a treaty (including the exchange of letters) or as unilateral resolutions by the Parties.

These agreements are binding, internally, on all organs of the Council of Europe and, externally, on all its Member States. In the latter case, this is so to the extent that the Committee of Ministers has decided to use the rule of unanimity for the adoption of such agreements, in accordance with paragraph 6 of Article 20.a) of the Treaty of London.

Among the general purpose organizations which have concluded agreements with the Council of Europe are the Organization of American States and the United Nations. Those with specific purposes with which it has come to such agreements include the United Nations Educational, Scientific and Cultural Organization, the Food and Agriculture Organization of the United Nations, the World Trade Organization, the Organization for Economic Cooperation and Development, the World Health Organization, the International Labour Organization and the Organization for Security and Cooperation in Europe.

As regards this analysis, such agreements may be relevant to relations between the Council of Europe and the European Communities, as a means of achieving closer links between the two. This is well illustrated by the following conventional instruments: the Agreement between the Community and the Council of Europe of 16 June 1987 on the consolidation and strengthening of their cooperation; the exchange of letters between the Secretary General of the Council of Europe and the President of the Commission, of 5 November 1996, supplementing the above Agreement of 16 June 1987; the Joint Declaration on cooperation and partnership between the Council of Europe and the European Union, of 3 April 2001; and the Memorandum of Understanding signed by the Committee of Ministers of the Council of Europe on 14 May 2007 and by the European Union on 23 May 2007.

Of particular interest is the last of the above documents – the Memorandum of Understanding between the European Union and the Council of Europe, 2007 – both for its timeliness and for the commitments undertaken as a result, aimed at establishing close cooperation based on a shared set of priorities and, where possible, strengthening relations in areas of common interest, such as human rights and fundamental freedoms, the rule of law and legal cooperation, democracy and good governance,

democratic stability, intercultural dialogue and cultural diversity, education, youth and the promotion of human contacts, and social cohesion.

3. Conventions and agreements concluded within the Council

3.1. Development and effects of conventions and agreements, internationally

The regulatory activity of the Council of Europe is limited to the conventions and agreements it adopts. These are negotiated within the institutional framework provided by the Council itself. Initiatives are normally taken by the Parliamentary Assembly, but the final text is adopted by decision of the Committee of Ministers, which subsequently, by a two-thirds majority of the votes cast and a majority of the representatives entitled to participate in meetings of the Committee of Ministers (Article 20.d) of the Treaty of London, Statutory Resolution (93)27 of 14 May), presents the conventions and agreements to be signed by the Member States and, where appropriate, to be ratified by the Member States and even by non-Member States, whether European or otherwise, or members of the European Communities.

The difference between conventions and agreements lies in how States give their consent: in the former case, this is done by depositing an instrument of ratification, acceptance or approval; in the latter, by signature, subject or otherwise to ratification, acceptance or approval. In any case, non-member States of the Council of Europe are only bound by means of accession.

In all, 202 conventions and agreements have been concluded within the Council of Europe, of which 40 are open only to the Member States,

163 to European States that are not members, 148 to non-European States (and therefore non members) and 45 to the European Communities.

The Kingdom of Spain has signed or, where appropriate, ratified 104 of the 202 conventions and agreements. Comparatively speaking, our country, although it joined the Council of Europe almost forty years after its creation, presents a similar level of commitment to that of the founding states – Belgium (119), France (118), Luxembourg (123), Netherlands (134), Great Britain (111), Ireland (95), Italy (116), Denmark (128), Norway (129) and Sweden (127), and other major European countries such as Germany (114).

The conventions ratified by Spain include the following: the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950; the European Social Charter of 18 October 1961; the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, of November 26, 1987; and the Framework Convention for the Protection of National Minorities of 1 February 1995.

Among the agreements ratified by Spain, and apart from those relating to the organization of the Council of Europe itself (for example, concerning the sites of headquarters for its institutions, or relating to privileges and immunities, or regarding persons participating in proceedings before the European Court of Human Rights), those concerning the areas of health and social security are of outstanding importance.

Undoubtedly, conventions and agreements exert a harmonizing effect, in the sense of achieving or improving rapprochement between the legal systems of the Member States. Furthermore, this harmonization, in some cases, extends beyond the geographical area of Europe; a number of conventions and agreements are open for signature by non-member States, in some cases, non-European. However, although a significant number of

conventions and agreements are indeed open to the latter States, it remains true that at present not many countries (25), other than the members of the Council of Europe, have ratified and therefore are bound by any of its conventions. Thus, ten agreements have been ratified by Israel, seven by the Vatican, five by Belarus, four each by South Africa and Tunisia, three each by Mexico and the United States, two each by Canada, Costa Rica and New Zealand and one each by Bahamas, Bolivia, Burkina Faso, Chile, Korea, Ecuador, Japan, Kazakhstan, Kyrgyzstan, Mauritius, Morocco, Panama, Senegal, Tonga, Trinidad and Tobago and Venezuela.

In any case, it should remain clear that these conventions and agreements are not statutory acts of the Council of Europe that are imposed on all its Member States, but rather, conventional instruments of an inter-State nature. In other words, they are concluded within the Council of Europe but are not binding on all its Member States, but only on those who so give their consent. Thus, the signing and, where appropriate, ratification of these conventions and agreements is not, in principle, compulsory for Member States. An exception to this is the European Convention for the Protection of Human Rights and Fundamental Freedoms, whose signing and ratification are required of any State wishing to join the Council of Europe.

One of the aims of the Council of Europe is to ensure that its conventions and agreements have a large number of Contracting Parties, and for this purpose the general interests of the organization must be reconciled with the individual ones of each of the States. Accordingly, States may express their reservations concerning the content of these documents; more importantly, new categories of conventional instruments have been created, termed partial agreements, enlarged agreements and enlarged partial agreements.

Partial agreements were created by Statutory Resolution 51(62) of 2 August, and enlarged agreements and enlarged partial agreements, by Statutory Resolution 93(28) of 14 May.

Partial agreements are concluded between Member States of the Council of Europe, enlarged agreements between all the Member States and one or more non-members, and enlarged partial agreements between certain Member States and one or more non-member States.

The Committee of Ministers must approve the adoption of such agreements by a majority of two-thirds of the votes cast and a majority of the representatives entitled to participate in Committee sessions.

A special characteristic of the partial, enlarged and enlarged partial agreements is that they are financed from their own budget, derived from the contributions made by States that are Parties to such agreements. In contrast, the costs of the conventions and agreements described above are covered by the ordinary budget of the Council of Europe.

To date, seven partial agreements have been concluded, one enlarged agreement and six enlarged partial agreements. Enlarged and enlarged partial agreements are of some importance because they can open up channels of cooperation with States that are not members of the Council of Europe and in some cases not even European.

The Kingdom of Spain has signed six of the seven partial agreements that have been adopted. These six agreements refer to the Council of Europe Development Bank, Public Health and Social Security, the European Pharmacopoeia, the Cooperation Group in the fight against drug abuse and illicit trafficking in drugs (*Pompidou Group*), the Cooperation Group for the Prevention of, Protection Against, and Organisation of Relief in Major Natural and Technological Disasters, and the European support fund for the co-production and distribution of creative cinematographic and audiovisual works (*Eurimages*). On the other hand, it has not signed the partial

agreement establishing the European Card for Substantially Handicapped Persons.

Furthermore, the Kingdom of Spain is party to five of the six enlarged partial agreements. These five agreements have established the European Centre for Global Interdependence and Solidarity (North-South), the Youth Card, to promote and facilitate youth mobility in Europe, the European Audiovisual Observatory, the European Centre for Modern Languages (*Graz Centre*) and the Group of States against Corruption (*GRECO*). However, it has not signed the enlarged partial agreement on sport (*EPAS*).

Finally, the Kingdom of Spain participates in the only enlarged agreement concluded to date, establishing the Commission for Democracy through Law (*Venice Commission*).

3.2. Incorporation into Spanish law of conventions and agreements, and their effects

The conventions and agreements concluded under the auspices of the Council of Europe and ratified by our country, once officially published in the Official State Gazette, form part of Spanish law, under the provisions of Article 96.1, paragraph 1, of the Constitution. Thus, in principle there is no need for the approval of any internal regulations for the incorporation of such agreements and conventions into national legislation.

The conventions and agreements of the Council of Europe have a lower rank than the Constitution, according to Article 95.1 of the latter, which states that the conclusion of an international treaty containing stipulations contrary to the Constitution shall require prior constitutional review, and according to Article 27.2.c) of the Constitutional Court Basic Law 2/1979, of 3 October, which states that international treaties can be declared unconstitutional.

However, the conventions and agreements of the Council of Europe enjoy a supra-legislative value in regard to the interpretation of fundamental rights and public liberties, as the Constitutional Court, under Article 10.2 of the Constitution, has interpreted the rules relating to fundamental rights and freedoms recognized by the Constitution in accordance with the provisions of numerous Council of Europe conventions, especially the European Convention for the Protection of Human Rights and Fundamental Freedoms, in line with the judgments of the European Court of Human Rights. In consequence, the provisions of this Convention, together with the treaties and agreements in this respect concluded within international organizations, especially the United Nations, and in view of their reception in constitutional jurisprudence, have come to provide interpretive guidance in determining the constitutionality of laws and other decisions by public authorities.

The Constitutional Court, however, has stated that the interpretation referred to in Article 10.2 of the Constitution does not make such treaties and international agreements "a self-sufficient standard of validity" of the rules and decisions of public authorities with respect to fundamental rights, because such texts and agreements are in fact an interpretive source that contributes to better identifying the content of constitutional rights that this Court is called upon to protect (see, among others, Supreme Court Judgments 77/1995, of 22 May, Legal Basis, para. 2; and 64/1991, of 22 March, Legal Basis, para. 4).

4. European Convention for the Protection of Human Rights and Fundamental Freedoms

After establishing the Council of Europe, the Member States, in the interest of achieving the goals of freedom and democracy set out in the Treaty of London, drafted the European Convention for the Protection of

Human Rights and Fundamental Freedoms, concluded in Rome on 4 November 1950. This text contains a list of rights and provides a mechanism for their judicial protection, namely the European Court of Human Rights.

Other international organizations, operating both worldwide and at the regional level, have developed conventional protection instruments in the same field. The former include the United Nations, with the Universal Declaration of Human Rights in 1948, the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights of the same date. Among the latter are the Organization of American States, with the Declaration of the Rights and Duties of Man (1949) and the American Convention on Human Rights (1978), and the Organization of African Unity, with the African Charter on Human and Peoples' Rights (1981).

The most important qualitative difference between the protection system of the Council of Europe and that of other international organizations is that the former has created a court for this specific purpose, the European Court of Human Rights, unlike the other international organizations mentioned, except the Organization of American States, with the American Court of Human Rights, which bears some resemblance to the European Court of Human Rights, although individuals cannot address the American Court, which they can in the case of the European one.

In addition, the Council of Europe has adopted other conventions, with their own supervisory organs. For example, compliance with the European Social Charter of 1961 is monitored by the European Committee of Social Rights, while the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1989) is administered by the European Committee for the Prevention of Torture.

It is important to emphasise that the European Convention for the Protection of Human Rights and Fundamental Freedoms expresses the decision to ensure the effective application in Europe of a "collective guarantee" of the rights enunciated by the Universal Declaration of Human Rights of 10 December 1948.

This "collective guarantee" is based not only on the manifest willingness of the States Parties to uphold certain universal values, but also on their common interest in safeguarding democracy throughout Europe and in securing the foundations of an ever closer union among the States of which it is comprised. Thus, the Convention seeks to ensure that these countries respect human rights, the rule of law and the principles of pluralist democracy. Its acceptance, including the compulsory jurisdiction of the European Court of Human Rights and the equally mandatory character of its rulings, is a condition of membership of the Council of Europe (Committee of Ministers Resolution DH (2001) 80, of 25 July). The Convention, therefore, forms an integral part of the Member States' internal legal order.

Thus, unlike with classical international treaties, the purpose of the Convention is not the creation of reciprocal obligations between the Parties, but the establishment of objective obligations, by States Parties, that do not rely on the principle of reciprocity. Thus, the States must guarantee the rights recognized in the Convention to all persons within their jurisdiction, regardless of their nationality (ECHR Judgments of 9 February 1967, on the use of languages in education in Belgium, and of 18 January 1978, in *Ireland vs. United Kingdom*).

The Convention has been amended by fourteen protocols, of which the Kingdom of Spain has only ratified the Additional Protocol and numbers 6, 11 and 14. Numbers 11 and 14 addressed means of restructuring the control mechanism established by the Convention, which is effected by the

European Court of Human Rights, although the second of these protocols has not yet entered into force.

5. European Court of Human Rights

From a practical standpoint, the success of the European Convention for the Protection of Human Rights and Fundamental Freedoms is largely accounted for by the control mechanism established for it, which has made an effective reality of the guarantee of rights and freedoms stated.

The protection afforded by the Convention, after the signing of Additional Protocol No. 11, is provided by two institutions:

- The European Court of Human Rights, based in Strasbourg, which is an international court with the power to impose mandatory sentences in response to individual and state claims of breaches of the Convention;
- The Committee of Ministers, which is the main political body of the Council of Europe and on which the Convention confers the specific power of supervising the execution of Court judgments.

5.1. The execution of Court judgments

The execution of ECHR judgments remains poorly understood, but it is of paramount importance.

Under Article 46.1 of the Convention, the States "undertake to abide by the final judgment of the Court in any case to which they are parties". This commitment involves precise legal obligations, such as the provision of fair satisfaction (usually an amount of money) as decided by the Court under Article 41 of the Convention. This compensation covers, as appropriate, material and moral harm, costs and expenses. Its payment is an obligation that is strictly and clearly defined in the judgment.

However, the payment of fair satisfaction cannot always properly repair the consequences of the violation of rights. Thus, the execution of the sentence may also involve, depending on the circumstances, the adoption of "individual measures" such as the reopening of an unfair procedure, the destruction of information that has violated the right to privacy or the annulment of an expulsion decision that failed to take into consideration the risks of violation of rights that may exist in the destination country, among others. Moreover, "general" measures may be required, whether legislative, regulatory, jurisprudential or of another kind, in order to effectively prevent the occurrence of further violations similar to those already recognised.

These obligations have been illustrated on many occasions by the European Court of Human Rights. In its judgment of 13 July 2000 (re *Scozzari and Giunta*) the Grand Chamber summarized the obligation of States, with respect to general measures to prevent further violations of the Convention and individual ones to compensate the appellant for the consequences of the violation, as follows: "by Article 46 of the Convention the High Contracting Parties undertook to abide by the final judgments of the Court in any case to which they were parties, execution being supervised by the Committee of Ministers. It follows, inter alia, that a judgment in which the Court finds a breach imposes on the respondent state a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects (see, *mutatis mutandis*, the *Papamichalopoulos and Others v. Greece* (Article 50) judgment of 31 October 1995"). It is understood, furthermore, that the State is free, under the supervision of the Committee of Ministers, to choose the means to fulfil its legal obligation under Article 46 of the

Convention, provided these are consistent with the conclusions set out in the Court judgment.

However, if the State does not choose an appropriate means to redress the violation observed, the European Court itself may directly order the measure to be taken in the case. The Court used this power for the first time in 2004, when in two cases it ordered the release of plaintiffs who had been arbitrarily detained in violation of Article 5 of the Convention (ECHR Judgment of 8 April 2004, *re Assanidze vs. Georgia*, and 8 July 2004, *re Ilascu/Russia vs. Moldova*).

5.1.1. Individual protection measures

Individual measures are required, according to the Committee of Ministers, when the observed violation continues to have negative consequences for the complainant and for which the just satisfaction awarded does not provide due compensation. These measures, thus, are aimed at preventing the continued existence of this improper situation and eliminating, as far as possible, its consequences (*restitutio in integrum*).

Individual measures depend on the nature of the violation observed and on the plaintiff's situation. Particular importance is granted to the reopening and reconsideration of internal procedures, which in some cases is the only effective means of redressing the violation of the Convention.

In view of the implementation problems raised by the absence, in some countries, of national legislative provisions that allow such a reopening of proceedings, the Committee of Ministers has issued a Recommendation to States on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights (Recommendation (2000) 2, January 19), inviting them to ensure this possibility at the domestic level.

A problem arises because the European Court of Human Rights is an international court, not a supranational one (the European Convention was ratified by means of Article 94 of the Constitution and not by Article 93), which determines the effectiveness of its judgments, which are binding on the Member States (Article 46.1 of the Convention) but not executive, and so a plaintiff who has obtained a favourable decision cannot call upon this Court to enforce the judgment, which is incumbent on the States Parties by means of the corresponding procedures in their domestic legal systems.

In any case, if domestic law permits only imperfect redress of the consequences of the violation, the European Court will grant the injured party fair satisfaction (Article 41 of the Convention), in the terms described above.

The fact that Court judgments are not enforceable and the provision of fair satisfaction as a subsidiary means of redress has meant that some countries, including Spain, have not introduced *ad hoc* enforcement mechanisms into their domestic law. Mechanisms for this purpose, however, are established in a large number of national legal systems.

a) States with ad hoc mechanisms for the implementation of ECHR judgments

At present, some thirty countries have a specific procedure for implementing the judgments of the European Court of Human Rights. These countries are Germany, Austria, Belgium, Bosnia-Herzegovina, Bulgaria, Croatia, Czech Republic, Slovakia, Slovenia, France, Greece, Hungary, Latvia, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Norway, Netherlands, Poland, Romania, Russia, San Marino, Switzerland, Turkey and Ukraine. In some others, such as Italy, draft legislative reforms were developed in this respect, but were not ultimately approved.

On examination of the characteristics of the provisions of these national legislations, the following conclusions may be drawn⁹³:

- All of these countries except Ukraine authorize the reopening of criminal proceedings, since it is in this situation where violations of human rights and fundamental freedoms provoke the most serious consequences, notably the loss of personal freedom.

However, some States also allow the reopening of civil proceedings (Bulgaria, Croatia, Slovakia, Lithuania, Macedonia, Moldova, Norway, Romania, Switzerland, Turkey and Ukraine) or administrative ones (Bosnia-Herzegovina, Slovakia, Latvia, Lithuania, Norway, Romania, Switzerland, Turkey).

- The requirement for the reopening of domestic proceedings is in some cases the mere existence of a judgment of the European Court of Human Rights recognising that a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms has taken place, while in other cases it is also required that such violation should have been reflected in the disputed judgment handed down by a domestic court (in Germany, Austria, Bulgaria and Norway for criminal proceedings) or that the violation continues to produce negative consequences on the plaintiff at the time that implementation of the Strasbourg Court judgment is requested (in Slovakia this is so for criminal proceedings, and in Poland, for civil proceedings), or finally, that fair satisfaction is not sufficient to redress the harm done to the plaintiff, i.e., that redress cannot be obtained other than by implementing the Court judgment (this is so in the Czech Republic, France, Hungary, Lithuania, Norway, Netherlands and San Marino for

⁹³ *Vid.* Reform of the European Convention on Human Rights –Declaration of the Committee of Ministers “Ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels”. ACTIVITY REPORT, Strasbourg, 7 April 2006. Addendum III: “Information submitted by Member States with regard to the implementation of the five recommendations mentioned in the Declaration adopted by the Committee of Ministers at its 114th session (12 May 2004)”.

criminal proceedings and in Slovakia and Poland for civil proceedings, in Moldova for criminal and civil proceedings, in Turkey for civil and administrative proceedings and in Switzerland for all proceedings).

Exceptionally, the Moldovan legal system envisages the reopening of proceedings of a civil nature without requiring a previous judgment by the European Court of Human Rights, where a procedure for amicable settlement is brought before the latter Court.

- The reopening of proceedings requires, in general, the concurrence of certain requirements of legitimacy and of action in due time.

Legitimacy is usually attributed to both the principal plaintiff and to the public prosecutor. However, in some systems it is assigned exclusively to the plaintiff (in Macedonia, for criminal and civil proceedings, and in Poland and Turkey for civil and administrative procedures) or to the prosecutor (in Bulgaria and Luxembourg, for criminal proceedings, and in Malta, in general). In one special case (the Russian Federation), it is the Chief Justice of the Supreme Court who has this legitimacy.

Regarding the time limit applied, national legislations are divided between those which, when personal freedom is at stake, do not set any time limit or specifically state that it does not exist, and those that, for the sake of legal certainty, establish a time limit, counting from the date when the judgment of the European Court of Human Rights became final (thus, with this *dies a quo*, Belgium allows six months for the reopening of criminal proceedings; in Croatia it is thirty days for civil proceedings; in the Czech Republic it is six months for criminal proceedings; in France it is one year for criminal proceedings; in Macedonia it is twenty days for civil proceedings; in Moldova it is six months for criminal proceedings and three months for civil proceedings, notwithstanding that, in the event of an amicable settlement, the lawsuit may be filed while the settlement is pending; in San Marino the period is one year for criminal proceedings; in

Turkey it is one year for criminal proceedings and three months for civil and administrative proceedings; or since it became known to the plaintiff (with this *dies a quo*, Norway allows six months for civil proceedings, and in the Netherlands it is three months for civil proceedings), or since the judgment was published in the official gazette (with this *dies a quo*, Poland allows six months for criminal proceedings and three months for civil and administrative proceedings). Moreover, some jurisdictions establish a dual limit, of a cumulative nature: one, counting from the date of the judgment of the European Court of Human Rights, and the other counting from when the domestic court handed down the disputed judgment (thus, in Latvia, for administrative procedures, there is a limit of three months from the judgment of the European Court of Human Rights, provided no more than three years have passed since the domestic judicial decision in question was issued; in Switzerland, for all proceedings, the limit is ten days from the judgment of the European Court of Human Rights, provided no more than ten years have passed since the disputed judgment of the domestic court was issued).

- In most cases, the request to reopen proceedings must be presented before the courts of ordinary jurisdiction and, specifically, before the one that issued the contested decision. However, in two countries the application is directed to the Constitutional Court (in the Czech Republic for criminal proceedings and in Malta for all cases in general).

In the normal situation, when proceedings are reviewed within the ordinary jurisdiction, the power to rule on the request to reopen proceedings normally corresponds to the Supreme Court. If it decides affirmatively, the matter is then referred to the courts of instance, as is typical of judicial review. However, in several legal systems the application for proceedings to be reopened are addressed, from the outset, to the trial court, which rules on the question, as is characteristic of proceedings for annulment (in Croatia, for criminal and civil proceedings, in Macedonia, for

civil proceedings, and in Romania for criminal, civil and administrative proceedings) or to the court that delivered the final judgment (in Turkey, for criminal, civil and administrative proceedings). In a third model, lying between these two, the application must be submitted to the Supreme Court, which either decides for itself on the merits of the case (in Ukraine) or has the option of deciding on the merits of the application made or of simply agreeing to its consideration and referring it to the courts of instance (in Belgium and France).

In the exceptional case of countries in which applications for judicial review must be raised before the Constitutional Court, in the Czech Republic, the question is reviewed by the Constitutional Court itself, and in Malta, the Constitutional Court, if it considers there are sufficient reasons to reopen proceedings, will refer the matter to the ordinary courts.

- The presentation of the application for a review of the rulings of domestic courts does not automatically suspend the execution of such rulings, although suspension may be requested by the parties or the public prosecutor and may be so decided by the court. As an exception to this general rule, in Bulgaria execution is automatically suspended in the case of criminal proceedings.

- Finally, laws reforming the Codes of Criminal and Civil Procedure sometimes contain a transitional provision by virtue of which the mechanism for reopening proceedings is applicable to ECHR judgments handed down before approval of the Codes. In these cases, a period of time is allowed, from the entry into force of the reform law, to request the reopening of proceedings (thus, six months are allowed in Belgium, and one year in France and Turkey).

b) States with no ad hoc mechanisms for enforcing judgments and where there exists a court ruling for this to be done

Among the States that lack specific provisions on the enforcement of the decisions of the European Court of Human Rights, special attention is warranted, because of the similarity to the situation in Spain, in the case of those where judicial decisions have been made to review judgments or reopen internal proceedings, on the basis of general provisions to this effect in national legislation. This is the case, among others, in Denmark, Finland, Sweden, Ireland and the UK. It is also the situation that used to apply in some countries that have subsequently approved *ad hoc* procedures for such implementation.

In any event, on very few occasions have courts agreed to review or reopen domestic proceedings (indeed, they have only occasionally been asked to do so). Therefore, one cannot speak of an established judicial practice in favour of the domestic implementation of European Court judgments, notwithstanding the undoubted value of such a course, from a comparative point of view.

In particular, in these countries one finds a broad interpretation, in varying degrees, of the justifications for the review of judgments or the reopening of proceedings, especially as regards "new facts, circumstances or documents", which is one of the most commonly used formulas to request the implementation of ECHR judgments.

However, in some cases a different procedure, of constitutional rank, has been used, justified by provisions other than those stipulated as justifying review or reopening.

- Denmark

Article 977.1 of the Danish Code of Criminal Procedure (*retsplejelov*) states that application can be made for proceedings to be reopened when new information (*nye oplysninger*) appears which, had it been available during the judicial process, would have led to acquittal or mitigated the sentence. The Special Court of Review (*Den særlige klageret*) hears such applications for reopening.

In the *Jersild* case (ECHR Judgment of 23 September 1994, ResDH (95) 212 of 11 September), the ECHR concluded that the judgment against the appellant, a journalist who had transmitted racist messages, had violated Article 10 of the European Convention, which guarantees freedom of expression, because the journalist had been convicted without it having been established that he intended to commit a crime.

Subsequently, based on the above-mentioned Article 977.1 of the Code of Criminal Procedure, the proceedings were reopened. On 4 June 1996, the Court of Appeal of Eastern Denmark acquitted the journalist and ordered the State to pay the costs of both the original proceedings and the subsequent ones.

- Finland

Chapter 31, Section 9, Number 4, of the Finnish Code of Judicial Procedure allows proceedings to be reopened if the final judgment handed down was based on a misapplication of law.

In the *Z* case (ECHR Judgment of 25 February 1997), the ECHR held that Article 8 of the Convention would be breached if the appellant's medical reports were made public in 2002, as had been ruled in earlier court hearings. The Minister of Justice, at the request of the Minister of Foreign Affairs, appeared before the Supreme Court arguing that the court decision was a misapplication of the law, and therefore requested its annulment in accordance with the above-mentioned Chapter 31, Section 9, Number 4 of the Code of Judicial Procedure. On 19 March 1998, the

Supreme Court granted the application and extended the period of confidentiality.

- Sweden

Article 1.5 of Chapter 59 of the Code of Judicial Procedure provides for the annulment of judgments and the subsequent reopening of the proceedings in question when procedural irregularities (*rättegångsfel*) that may have influenced the decision are detected.

To date, no such reopening of proceedings has taken place following a judgment by the European Court of Human Rights against Sweden.

However, in the *Anderson* case, the Supreme Court of Sweden (Judgment of 4 November 1988), following a European Court judgment with respect to a case to which Sweden was not party, that of *Ekbatani* (in which it was found that Article 6 of the Convention had been breached due to the non-performance of a hearing in criminal proceedings concerning a fine), decided to reopen the case after being informed that an appellant had raised a complaint to the European Commission of Human Rights and that the case in question was in the same situation as the one described above.

The Supreme Court based its decision to reopen the proceedings on Article 1, No. 5 of Chapter 59 of the Code of Judicial Procedure. In the new proceedings, before the Court of Appeal, the sentence originally imposed was confirmed.

- Ireland

In the *Open Door & Dublin Well Woman Centre* case (ECHR Judgment of 19 October 1992), the Court held that a decision of the High Court of Ireland of 19 December 1985, confirmed (with modifications) by the same High Court on 16 March 1988, which restricted the right of the appellants to give certain advice on abortion, violated Article 10 of the Convention.

Following the above ECHR judgment, the Fourteenth Amendment was introduced into the Constitution of Ireland, allowing information on abortion to be given and received.

Following the judgment and at the application of one of the appellants, referring to the above-mentioned constitutional amendment, the High Court, in its judgment of 23 June 1995, declared the challenged decision to be unconstitutional and awarded costs to the appellants.

- United Kingdom

On application by the convicted party, the Criminal Cases Review Commission may refer proceedings for reconsideration before the Court of Appeal when any of the circumstances set out in section 13 of the Criminal Appeal Act of 1995 are observed, among which are, in paragraph a), the real possibility that the sentence will not be upheld in the new proceedings.

In the case of *Rowe and Davis* (ECHR Judgment of 16 February 2000), the ECHR ruled there had been a violation of Article 6.1 of the Convention in a criminal case in which, in the first instance, the prosecution, without the agreement of the judge and at its own initiative, decided that certain evidence should not be communicated to the judge or to the defence. The Court of Appeal, which had twice examined the evidence in question, could not remedy the defects of the first-instance proceedings because it had not been present at the statements of the witnesses and, therefore, depended on the outcome of the hearings before the first-instance court and on the prosecution's explanations regarding the relevance of this evidence. Following the ECHR judgment, the Criminal Cases Review Commission, created by the Criminal Appeal Act, returned the case to the Court of Appeal, finding that there was "a possibility that these convictions would not be upheld" as was eventually the case.

In the *Welch* case (ECHR Judgments of 9 February 1995 and 26 February 1996, ResDH (97) 222 of 15 May), the ECHR concluded that the

forfeiture ordered on 24 August 1988 by the court of first instance in criminal proceedings concerning narcotics had violated Article 7.1 of the European Convention. In the context of the same proceedings, the High Court issued a restraint order against Mr. Welch. Following the ECHR judgment, this order was overturned. In addition, the UK Government gave an undertaking to the Committee of Ministers not to apply the confiscation order in any way.

c) Execution of ECHR judgments in Spanish law

- Ordinary and constitutional courts

In six cases, of the 33 in which judgment was given against Spain, the national courts have been required to enforce ECHR judgments:

- In the first case⁹⁴, following the ECHR Judgment of 6 December 1988, the appellants requested the annulment of the proceedings held before the ordinary courts and, when this application was rejected by the Supreme Court (Judgment of 4 April 1990), applied to the Constitutional Court, which granted the relief requested (Judgment 245/1991, of 16 December).

- In the second⁹⁵, after the ECHR Judgment of 23 June 1993, the appellant filed for amparo directly, without going through the ordinary courts, requesting the execution of the European Court judgment. The Constitutional Court ruled the writs of amparo to be inadmissible (Order of 31 January 1994).

- In the third⁹⁶, following the ECHR Judgment of 28 October 1998, the appellant went directly to the Constitutional Court, which ruled the writ of amparo to be inadmissible due to its manifest lack of constitutional content (Order of 11 March 1999). The appellant then filed an appeal for

⁹⁴ Re *Bultó*, also known by the names of those convicted as *Barberá, Messeguer y Jabardo*.

⁹⁵ Re *Ruiz Mateos*.

⁹⁶ Re *Castillo Algar*.

review before the ordinary courts and, when this was dismissed by the Supreme Court (Judgment of 27 January 2000), presented a further appeal to the Constitutional Court, which denied the amparo requested (Judgment 96/2001, of 24 April).

- In the fourth⁹⁷, following the ECHR Judgment of 25 July 2002, the appellant requested the annulment of proceedings before the ordinary courts and when this was rejected by the Supreme Court (Judgment of 9 December 2002), presented an appeal before the Constitutional Court, where it was dismissed (Judgment 313/2005, of 12 December).

- In the fifth⁹⁸, following the ECHR Judgment of 29 February 2000, the appellant filed an appeal for review before the ordinary courts and when this was dismissed (Supreme Court Decision of 20 November 2000), raised an appeal before the Constitutional Court, where it was also dismissed (Judgment 197/2006, of 3 July).

- In the sixth⁹⁹, following the ECHR Judgment of 18 February 2003, the appellant simultaneously filed an appeal for review before the ordinary courts and a writ of amparo before the Constitutional Court. When the first of these was declared inadmissible (Supreme Court Decision of 29 April 2004), the appellant requested the annulment of the latter proceedings and, when this was denied (Supreme Court Decision of 29 October 2004) filed a further writ of amparo, which was dismissed (Supreme Court Judgment 70/2007, of 16 April).

In the light of these issues, both the Supreme Court and the Constitutional Court have been shaping a line of case law in relation to the enforcement of ECHR judgments.

Both courts assume that these judgments are of a declarative nature and lack executive effect in domestic law and, therefore, that the States

⁹⁷ *Re Perote Pellón*.

⁹⁸ *Re Fuentes Bobo*.

⁹⁹ *Re Prado Bugallo*.

Parties to the European Convention for the Protection of Human Rights and Freedoms are not required to take specific enforcement mechanisms aimed at reviewing judgments that have been challenged or aimed at the reopening of proceedings.

From this starting point, the Supreme Court concluded that in our system there are no appropriate legal measures for the enforcement of ECHR judgments, since neither the annulment of proceedings nor the appeal for judicial review are suitable for this purpose:

- In the case of the annulment of proceedings, because Article 240 of the Judicial Power Act 6/1985, of July 1, does not allow the annulment of final judgments in criminal proceedings, even when, as in the first of the cases mentioned, the latter are in the enforcement phase.

- In the case of judicial review, because the legal grounds that justify it are strictly construed and do not include ECHR judgments, which for this purpose cannot be considered a "new fact". However, in the last of the cases cited, in which the case at issue involved an alleged breach of the right to confidentiality of communications, the Supreme Court considered it a "new fact" that the prosecution evidence obtained by police wiretaps had been declared illegal by the Strasbourg Court; notwithstanding, the appeal for judicial review was not admitted, on the grounds that there was other evidence that demonstrated the guilt of the convicted party.

For its part, the Constitutional Court has held, regarding an action for amparo, that the rejection of an application for the annulment of proceedings or of one for judicial review is not contrary to the right to effective judicial protection recognized in Article 24 of the Constitution, since the motivation expressed in this respect by the Supreme Court, as summarised above, is not in any way unreasonable or arbitrary.

In any case, the Constitutional Court has indicated that the domestic execution of ECHR judgments is not a question which, by its nature, is

subject to appeal for amparo, since the function of the latter is limited exclusively to the protection of the fundamental rights and public freedoms recognized in the Constitution.

Precisely for this reason, the lack of enforceability of ECHR judgments and the absence of internal enforcement mechanisms in Spanish law do not preclude the Constitutional Court from examining, as it has observed, whether, on consideration of the writ of amparo presented, a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms upheld in such judgments given by the Strasbourg Court also implies a violation of the fundamental rights and public freedoms recognized by the Constitution, since the above-mentioned Convention forms part of our domestic law, according to Article 96.1 of the Constitution, and the rules set out in the Constitution relating to fundamental rights and public freedoms should be interpreted, under Article 10.2 of the same Constitution, in accordance with the international treaties and agreements in this respect ratified by Spain, among which the aforementioned Convention occupies a special place.

In any case, for such a violation to justify the granting of the amparo requested, the case law of the Constitutional Court requires that the following circumstances be present:

- First, that the violation has occurred within criminal proceedings in which legal rights as essential as that of personal freedom are at stake.

- Second, that the violation has influenced the outcome of the judgment, so that without it the judicial decision being challenged would have been different.

- Third, that the violation is current, that is, that the violation ruled by the ECHR to have taken place continues to produce negative consequences for the parties affected.

- And finally, that the violation cannot be redressed through the fair satisfaction of a pecuniary nature contemplated in the Convention or in any other way.

In accordance with this doctrine, the Constitutional Court upheld the appeal for amparo when the above conditions were found to be present: first, the violation of the right to a public hearing with all the guarantees recognized in Article 6.1 of the Convention, as required by the ECHR, was in turn a violation of Article 24.1 of the Constitution, thus calling into question the criminal convictions imposed; second, the violation in question was related to sanctions still pending, i.e., there was a still-present breach of the right to personal liberty enshrined in Article 17.1 of the Constitution itself; finally, the loss of personal freedom resulting from the possible execution of the judgment could not be repaired by equivalence, as it was not enough, from the constitutional standpoint, to award monetary compensation as provided for in the Convention (Constitutional Court Judgment 245/1991, of 16 December).

However, the Constitutional Court ruled the writ for amparo inadmissible when it found that the breach of rights found by the ECHR had not occurred within criminal proceedings, nor as a result of the same had sanctions been imposed that represented a still-present breach of the right to personal liberty (Rulings of 31 January 1994).

Furthermore, the Constitutional Court ruled the writ for amparo inadmissible when it found that, although the proceedings challenged by the Strasbourg Court were of a criminal nature, the sanctions imposed had already been discharged and there was, therefore, no still-present breach of the rights of the convicted party (Constitutional Court Judgment 96/2001, of 24 April).

Similarly, the Constitutional Court dismissed the writ for amparo when it found that although the proceedings being challenged were of a

criminal nature, the breach of rights was not currently present, as was confirmed by the ECHR, which concluded that the finding of a violation of rights constituted in itself fair compensation for all moral harm (Constitutional Court Judgment 313/2005, of 12 December).

In the same way, the Constitutional Court dismissed the writ for amparo when it found that it was not criminal proceedings in which personal freedom was at stake, but a dismissal from employment based on statements made by a worker; although, according to the ECHR, this disciplinary measure had violated the appellant's freedom of expression, it could not be accepted that the effects of the loss of employment represented a still-present breach of the right to free speech (Constitutional Court Judgment 197/2006, of 3 July).

Finally, the Constitutional Court dismissed the writ for amparo when it found (in agreement with the ruling of the Supreme Court) that, regardless of the illegal evidence that had motivated the ECHR judgment, there was other incriminating evidence against the appellant, and therefore the ECHR ruling did not affect the outcome of the judgment whose annulment was sought (Constitutional Court Judgment 70/2007, of 16 April).

- Possible procedural alternatives for the enforcement of judgments of the European Court of Human Rights

As discussed above, ordinary and constitutional jurisdictions agree that Spanish law lacks an *ad hoc* mechanism for the enforcement of ECHR judgments. This has not prevented the Constitutional Court from emphasising that "the legislature should establish appropriate procedural channels making it possible to achieve through judicial proceedings the effectiveness of ECHR rulings in cases in which (...) a breach of fundamental rights is found to have occurred in the imposition of a criminal

conviction that remains pending execution" (Constitutional Court Judgment 254/1991, of 16 December, Legal Basis 5, para. 3).

The Committee of Ministers, in its recommendation (2000) 2, of 19 January, invited States to ensure that at the national level it is possible to achieve, as far as possible, *restitutio in integrum* through the review or reopening of domestic judicial proceedings.

In view of these considerations and of the wording of the consultation request made to this Council – a request including the question of how the effectiveness of ECHR decisions may be ensured – let us now examine this question.

To this end, several alternatives have been considered in academic and judicial circles, especially those of the petition for judicial review and the annulment of proceedings.

- The petition for review. In civil matters (Article 510 of the Civil Procedure Act), criminal ones (Article 954 of the Criminal Procedure Act), administrative litigation (Article 102 of the Contentious-Administrative Jurisdiction Act) and labour litigation (Article 234 of the Labour Procedure Act), the petition for judicial review is allowable in certain circumstances, but not that in which the ECHR rules there has been a violation of the Convention, in a final judgment handed down by any Spanish court.

Moreover, to the extent that such a petition is of an extraordinary nature, the reasons for its justification are interpreted strictly, and so it cannot be considered, without violating its institutional status and role, that an ECHR judgment constitutes a new fact that was unknown when the contested final judgment was handed down and which would therefore justify its annulment. This has been ruled by the Supreme Court, conclusively, in most of the above-mentioned areas. This interpretation of the nature of the petition for judicial review has also been endorsed by the Constitutional Court.

Nevertheless, and following the pattern set in neighbouring countries, in some of which have a new justification for such review has been introduced, consisting of a judgment by the ECHR according to which a violation of the Convention has been caused by a final decision of a national court, many of the doctrinal observations made in Spain have also considered this to be the most suitable approach to take in Spanish law.

It should be noted, at this point, that the basic requirement justifying a petition for judicial review is the appearance of new circumstances, which are usually not apparent during the court's deliberations and therefore could not be taken into account. Accordingly, the court would have ruled correctly in accordance with the evidence presented during the proceedings and, of course, in accordance with the legal rules applicable to the case. In contrast, ECHR judgments do not introduce new facts into the judicial debate, but merely state, in view of the same factual data considered by the national court, that there has been a violation of law consistent with a breach of the Convention. Hence the introduction of a basis for judicial review, as has been proposed in some doctrinal sectors, does not appear to be the most appropriate means of ensuring the enforcement of ECHR judgments.

- The annulment of proceedings. Section 1 of Article 240 of the Judicial Power Act, as amended by Act 19/2003, of 23 December, states that "nullity *ipso facto*, in any case, and defects of form in procedural decisions lacking the essential prerequisites to achieve their purpose or which result in a breach of rights, shall be effected through the judicial means established for this purpose against the ruling in question, or by other means enabled by procedural laws" and adds, in the first paragraph of Section 2, that "without prejudice to the foregoing, the court or tribunal may, on its own initiative or upon request by the party involved, before any decision ending the proceedings is taken, and when correction cannot be performed, declare, after hearing the parties, the nullity of all or any

proceedings". In general, therefore, proceedings may not be annulled once a final judicial decision has been issued, although the first paragraph of section 241.1, of the Judicial Power Act, as amended by Act 6/2007 of 24 May, states that "exceptionally, those who are legitimate party or should have been so, may request in writing the annulment of judicial decisions based on any violation of a fundamental right among those referred to in Article 53.2 of the Constitution, provided that this fact could not be denounced before the final decision was taken, and provided that said decision is not subject to ordinary or extraordinary appeal".

The major obstacle to the use of this approach is that the annulment of proceedings is only possible, according to the wording of Act 6/1985, of 1 July, when no final decision has been taken, while all the cases brought before the ECHR have been decided by the Spanish court as a final judgment. Hence, the Supreme Court, in the cases submitted to it before that date, rejected the annulment of proceedings requested by the appellants, even when the judgments that were challenged were in the process of implementation. This jurisprudential interpretation was, moreover, confirmed by the Constitutional Court.

In the light of these circumstances, it has been suggested in doctrinal sectors that the Judicial Power Act should be reformed, to give the courts the power to declare the nullity of proceedings even after a final judgment has been handed down. This was the aim of the reform introduced by Act 5/1997, of 4 December, later complemented by Act 6/2007, of 4 May. Hence, there currently exists a channel by which proceedings can be annulled, even after a final judgment, when any of the fundamental rights referred to in Article 53.2 of the Constitution have been breached.

It can be argued, however, that the annulment of judicial proceedings, as currently configured, is not a suitable mechanism for the enforcement of ECHR judgments, because nullity can only be ordered, according to Article 241.1, para. 1, of the Judicial Power Act, if a breach of

the fundamental right "could not be denounced before the final decision was given", a circumstance that occurs only very exceptionally. Not surprisingly, the Supreme Court, following the above reforms, has continued to reject the annulment of proceedings in such cases (Decisions of 9 December 2002 and 29 October 2004).

In addition, the annulment of proceedings ordered by the court of instance, as the result of an ECHR judgment, would call into question the actions taken by higher courts and even by the Constitutional Court. It should be noted that, strictly speaking, not every violation of rights ruled to have occurred by the European Court must lead, by its very nature, to the annulment of proceedings, which ultimately means that the court of instance is attributed the power to determine whether such an annulment is applicable, even if it must follow different criteria from those considered by the higher courts.

- In conclusion: a proposal for legislative reform

In order to overcome the difficulties that would result from the introduction of new causes of judicial review or annulment, as described above, it is considered more appropriate for legislative provision to be made of a specific mechanism, establishing that the Supreme Court shall decide on the reopening of proceedings that are contested and, if necessary, review the judgment itself; if this is not possible in view of the nature of the breach of rights held to have occurred, it should declare the nullity of the proceedings and return the case to the court in which the breach occurred. This kind of mechanism has been adopted in countries such as France and Belgium.

The area of application of this mechanism should extend to proceedings in which violations of fundamental rights and civil freedoms occur and in which certain harmful effects, such as the deprivation of freedom, persist. The Council of State sees as more problematic the

possible extension of this measure to cases in which personal freedom is not at stake.

Furthermore, requirements of legitimacy and time limits would need to be established. The first of these would apply both to the party involved and to the public prosecutor. The time allowed for the process should be reasonably short, and should count, in any event, from the moment of notification to the party concerned of the final decision by the European Court of Human Rights.

Attention should be paid to the possible suspension of the execution of the contested judgment. This suspension should not be automatic, and would be decided taking into account the possible liability, in terms of the indemnity award that might subsequently be ordered against the State.

But the most important aspect, in any case, is to regulate the substantive conditions to be met for the proceedings to be reopened, among which it seems appropriate to include the following, in accordance with Recommendation (2000) 2, of 19 January, of the Committee of Ministers of the Council of Europe, which has already been accepted in other countries and does not differ from the criteria set out in our own constitutional jurisprudence:

- First, that the violation ruled by the ECHR to have occurred had a decisive influence on the content of the contested decision or that there were procedural errors or irregularities of a sufficiently serious nature to call into question the decision;

- Second, that the violation cannot be redressed by the payment of the fair satisfaction awarded under Article 46.2 of the Convention, or in any way other than a reopening of the proceedings.

In response to these requirements, especially the first-cited, let us recall that the violation of fundamental rights held by the ECHR to have occurred does not necessarily affect the substance of the contested decision

by the domestic court, which will remain unchanged unless it is proven that the judgment had been influenced by this violation. A good example of this is to be found in the doctrine applied by the Council of State in its Opinion 598/2006, of 22 June. In this Opinion, concerning a claim for damages due to the abnormal functioning of the Administration of Justice, citing Article 294 of the Judicial Power Act, the Council of State assessed the relevance of the ECHR judgment of 25 April 2006¹⁰⁰, in which there was ruled to have been a violation of the presumption of innocence enshrined in Article 6.2 of the Convention with regard to the denial of compensation sought by a Spanish citizen for the deprivation of liberty following a conviction that was later overturned by the Constitutional Court at a hearing for amparo. According to the Council of State, the ECHR had ruled there had been a violation of the right to presumption of innocence, not because compensation was denied to the person who was detained and subsequently acquitted (by virtue of the presumption of innocence), but because the reasons set forth in the ruling given by the Ministry of Justice revealed that the denial of compensation was based on the "presumed guilt" or on the absence of an "absolute certainty of the person's innocence." Accordingly, the Council of State concluded, in its report in 2006, that to correctly execute the ECHR judgment, "the analysis of whether the acquittal or dismissal took place due to the non-existence of the alleged offence does not justify the reopening of proceedings but, rather, an examination of the actions of the judiciary", although it went on to add, "there does not appear to be any danger to the right to the presumption of innocence if the Administration merely examines the wording of the acquittal or dismissal order, in order to determine whether it expressly states as the motive for acquittal or dismissal the non-existence of the alleged offence. From this, it may conclude whether or not the case addressed in Article 294 of the Judicial Power Act applies". This reasoning

¹⁰⁰ *Re Puig Panella*

explains the caution and circumspection with which, apart from the special circumstances of the situation under examination, we must address the impact of ECHR judgments on domestic law for the parties to the proceedings.

5.1.2. General measures of implementation

General measures to prevent such breaches of rights are necessarily complex, both in their definition and in their implementation. Thus, from the outset, the national authorities need to perform an in-depth analysis of the causes that have led to the violation of the Convention.

On the occasion of the fiftieth anniversary of the Convention, the Committee of Experts for the improvement of procedures for the protection of human rights (DH-PR) prepared a list of the general measures taken by States Parties in implementing the decisions taken by Convention bodies after its creation. The Directorate General of Human Rights regularly updates this list, most recently in May 2006.

These general measures consist, fundamentally, in approving the corresponding legislative reforms or in adjusting the internal judicial interpretation to the criteria of the Convention, as it is interpreted by the ECHR.

a) The need for legislative reforms

In certain cases, it is clear from the facts of a case that the violation in question is the consequence of a domestic law. Sometimes, it is the very absence of legislation which is at the origin of the violation. In such cases, the State, in order to comply with the ECHR judgment, must amend the existing law or adopt appropriate legislation.

In this respect, the ECHR itself has pointed out that a declaration that a violation of the Convention has taken place requires the State to take

positive action to prevent the provision causing the breach from remaining in force; otherwise, more such violations might occur due to circumstances which, in principle, should have disappeared (ECHR Judgment of 19 November 1991, re *Vermeire v. Belgium*, in which judgment was given against Belgium for not having reformed its civil laws to implement the principle of equal inheritance rights for children born out of wedlock, as established in ECHR Judgment of 13 June, 1979, re *Marckx*).

As regards Spain, and to cite one prominent example, the aforementioned ECHR judgments of 28 October 1998 and 25 July 2002, on two of the issues outlined above, led to the adoption of Act 9/2003, of 15 July, amending Act 4/1987, of 15 July, on the powers and organization of military courts, which made various amendments to ensure the objective impartiality of the members of military courts.

The Committee of Ministers, in its Recommendation 2004 (5) of 14 May, invited Member States to establish mechanisms to verify the compatibility of the bills and acts adopted, as well as that of administrative practices, with the provisions of the Convention. We suggest that the procedures for creating internal rules should include a specific obligation (or require a note to this effect in one or more of the reports already made, notably in that of the General Technical Secretariat) to assess the compatibility of the proposed rules with ECHR jurisprudence.

b) Interpretation in conformity with the European Convention and the direct application of its provisions

In most cases, the origin of the violation ruled to have occurred by the Strasbourg Court lies not in a conflict between domestic law and the Convention, but in the case law of the national courts, that is, in the usual interpretation made of domestic provisions and of the Convention. It is then that a change in jurisprudence is required, in the direction indicated by the ECHR, in order to achieve the necessary conformity.

When the courts, in the individual cases brought before them, automatically adjust their interpretation of national law to the requirements of the Convention, following judgments given by the Strasbourg Court, they give such judgments direct effect in domestic law. This is currently the case in almost all Member States, including Spain, given that Article 10.2 of the Constitution provides that "the rules relating to fundamental rights and public freedoms recognized by the Constitution shall be construed in accordance with the Universal Declaration of Human Rights and with the international treaties and agreements in this respect that are ratified by Spain".

In consequence, the Constitutional Court, in accordance with the above-mentioned Article 10.2 of the Constitution, has concluded that "the case law of the European Court of Human Rights (...) not only serves as an interpretative criterion for the application of constitutional principles protecting fundamental rights" but "is also immediately applicable in our legal system" (Judgment 303/1993, of 25 October, Legal Basis No. 8). A good example of this is the legal basis of the decisions of the Constitutional Court itself, in which ECHR judgments are often cited.

To achieve this goal, the Committee of Ministers of the European Council, in its Recommendation (2002) 13, of 18 December, stressed the desirability that Member States should ensure the publication of the Convention and of ECHR judgments and their dissemination among national authorities. Spain has largely put this recommendation into practice, since the judgments are published by the Government in the Information Bulletin of the Ministry of Justice (as well as in other publications) and are communicated to the General Council of the Judiciary, the Supreme Court and the Constitutional Court. Moreover, the text of the Convention and the judgments is accessible both in print and electronically.

5.2. Ensuring the execution of ECHR judgments

Once the final ECHR judgment has been communicated to the Committee of Ministers, this Committee invites the respondent State to inform it of the steps taken to effect payment of the sum awarded by the Court by way of just satisfaction and, when called for, to adopt the individual and general measures required to comply with the judgment, with any reservations or modifications that may be applicable. After receiving this information, the Committee subjects it to careful review. When the Committee finds that the State has complied with the judgment, it issues a statement that the obligations arising under Article 46.2 of the Convention have been discharged.

The Directorate General of Human Rights assists the Committee of Ministers in this activity. Working closely with the authorities of the State ruled to have contravened the Convention, the Directorate identifies the measures that need to be taken in order to comply with the ECHR judgment. At the request of the Committee of Ministers, the Directorate-General provides opinions and advice based on the experience and practice of the Convention authorities.

Until the State takes satisfactory measures, the Committee of Ministers will continue to require explanations and will issue a final resolution. While an issue remains under consideration, the Committee of Ministers may take various measures to promote execution of the judgment, such as "interim" or "provisional" resolutions describing the measures already taken and setting a provisional schedule for the possible reforms to be undertaken by the State concerned.

If the execution of the judgment is impeded, the Directorate General of Human Rights will often initiate additional and more frequent contacts with the authorities concerned to discuss possible solutions.

The Committee of Ministers can use all its powers to require the State concerned to respect the judgments of the European Court. In practice, however, the Committee of Ministers very seldom resorts to political and diplomatic pressure, as this organ was intended to constitute a forum for constructive dialogue through which the States can reach satisfactory solutions with respect to the enforcement of judgments.

Finally, it is important to note that Additional Protocol No. 14 to the Convention, ratified by Spain but which has not yet entered into force, provides that where the interpretation of a judgment impedes its execution, the Committee of Ministers may request, by a majority of two thirds of its representatives, that the European Court rule on the issue (new Article 46.3 of the Convention), and, by the same majority, may bring an infringement action before the Grand Chamber (new Articles 46.4 and 46.5 of the Convention).

6. Impact of the European Convention for the Protection of Human Rights and Fundamental Freedoms in European Union law: the supervision of Community institutions by the European Court of Human Rights

The protection of fundamental rights within the Community has developed in two well-defined stages: first, through the jurisprudential recognition of these rights by the ECJ; subsequently, for reasons of legal certainty, it was proposed that such rights be expressed in the rules of the Community: the European Union is currently in this latter stage, which is not yet concluded.

Both in case law and in Community legislation, the European Convention for the Protection of Human Rights and Fundamental Freedoms has always constituted an essential point of reference, and this has major implications in any judicial review by the ECHR, in its role as guarantor of

compliance with the Convention of acts by Community institutions and of ECHR judgments.

6.1. The protection of fundamental rights in Community jurisprudence

The European Convention for the Protection of Human Rights and Fundamental Freedoms has been a key tool for the development and recognition of these rights and freedoms within the European Union.

The European Communities (the European Coal and Steel Community, the European Economic Community and the European Atomic Energy Community) were created in the 1950s as organizations for economic integration, and their founding treaties did not contain any statement of rights, unlike the national constitutions of their Member States. For this reason, the German and Italian Constitutional Courts did not accept the principle of the primacy of Community law in those areas in which the protection of individual rights was not compatible with their national Constitutions.

In consequence, the ECJ, in various statements, has held that fundamental human rights are an integral part of the general principles of Community law and noted that such rights are based on common constitutional traditions and on international human rights instruments to which the Member States are party, especially the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECJ sentences of 12 November 1969, re *Stauder*, Case 29/69; of 17 December 1970, re *Internationale Handelsgesellschaft*, Case 11/70; of 14 May 1974, re *Nold*, Case 4/74; and of 13 December 1979, re *Hauer*, Case 44/79).

6.2. The protection of fundamental rights in Community legislation

Despite the efforts of the ECJ, it was still felt that Community rules should include a definitive categorisation of fundamental rights to ensure their better and more effective protection.

To this end, the European Commission, in its Memorandum of 4 April 1979, proposed an alternative: either accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms or the approval of a specific Community catalogue of such rights and freedoms. Both options have been explored, but with rather unsatisfactory results.

6.2.1. The initial reception of the definitive categorisation of fundamental rights in the Treaty on European Union 1992

Over a decade was to pass before a tentative, albeit significant, legal recognition of rights was approved, and it was situated between the two alternatives proposed by the European Commission Memorandum of 1979.

Specifically, the Treaty on European Union, adopted at Maastricht on 2 February 1992, provided in Article 6.2 that "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law".

This provision, therefore, implied neither adherence to the European Convention nor the adoption of a Community catalogue of rights and freedoms, but only the express assumption – by means of a Community instrument of the first rank – of ECJ jurisprudence, which had already recognized that the protection of human rights and fundamental freedoms, as guaranteed by the European Convention, form part of the general principles of Community law.

6.2.2. The unsuccessful attempt at accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms: Opinion 2/1994 of 28 March 1996, of the Court of Justice of the European Communities

A further step was taken, clearly in favour of the first of the options proposed in the Memorandum, when the European Council asked the ECJ for a binding opinion regarding possible accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Court, in its Opinion 2/1994 ("Accession of the Community to the Convention for the Protection of Human Rights and Fundamental Freedoms") of 28 March 1996, noted that the Community "has only those powers which have been conferred upon it" , and that "in the present state of Community law (...), no provision of the Treaty gives the Community institutions, in general, the power to adopt rules on human rights", and so it concluded that "the Community has no competence to accede to the Convention for the Protection of Human Rights and Fundamental Freedoms".

Underlying this ruling were misgivings concerning the control that would be exerted by the ECHR on the activities of the Community institutions and on the Court of Justice itself. Consequently, and according to the terms of the above Opinion, the protection of the rights recognized in the European Convention as regards the actions of Community institutions is afforded by the ECJ in Luxembourg, in accordance with Article 46 of the Treaty on European Union.

6.2.3. Returning to positivization in the Charter of Fundamental Rights of the European Union

In view of the Community's declared lack of competence to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Union has further considered the idea of formulating its own catalogue of rights and freedoms, subject always to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

This is the stated purpose of the Charter of Fundamental Rights of the European Union, proclaimed by the European Parliament, the Council and the Commission at the European Council meeting held in Nice on 7-9 December 2000. Apart from the main problem posed by this Charter, namely its lack of legal enforceability, we also note that its preamble expressly refers to "the rights as they result, in particular, from (...) international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights".

Subsequently, the Treaty establishing a Constitution for Europe, signed in Rome on 29 October 2004 and which, finally, did not enter into force, stated in Article I-9.3 that "the fundamental rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States form part of Union law as general principles". This provision was very similar to the aforementioned Article 6 of the Treaty on European Union of 1992, which aimed to incorporate the consolidated case law of the Court of Justice in Luxembourg, which was also reflected in the same Article I-9.3 of the aborted Treaty establishing a Constitution for Europe.

Thus, both the Charter of Fundamental Rights of the European Union, and the aforementioned Treaty establishing a Constitution for Europe – which incorporated the Charter – were intended to make express recognition of the work done by the Council of Europe concerning the protection of human rights, while advising of the existence of a series of common principles in this area.

6.3. The "equivalence" between the protection of fundamental rights in the European Union and the guarantees recognized by the European Convention: the *Bosphorus* judgment of the European Court of Human Rights

The continual reference made in case law and in Community legislation to the European Convention for the Protection of Human Rights and Fundamental Freedoms is one of the factors that have led the ECHR to consider that the protection of such rights and freedoms in the European Union level is "equivalent" to that of the Convention.

More specifically, the ECHR, in its judgment of 30 June 2005 (the *Bosphorus* case), addressed the prosecution of decisions taken by a State Party to the European Convention, in compliance with the obligations of its membership of an international or supranational organization (the European Community, in the case in question), and in particular, whether such acts could be declared contrary to the Convention when the organization referred to had not acceded to it.

In this judgment, the Strasbourg Court started from two basic understandings:

- On the one hand, that the European Convention does not prevent the Contracting Parties from transferring their sovereign powers to an international or supranational organization, although the latter is not

responsible for a breach of the Convention as long as it is not a Contracting Party (paragraph 152).

- On the other hand, that the Contracting Parties are responsible for all acts and omissions of their organs arising from the need to comply with their international legal obligations (paragraph 153).

In an attempt to reconcile these two aspects, the ECHR observed that the Contracting Parties to the European Convention are not exonerated from responsibility, with respect to a possible violation of the Convention, by the mere fact that they are complying with obligations arising from their membership of international or supranational organizations, since otherwise it would be possible to limit or exclude the guarantees provided in the Convention, under treaty commitments made subsequently, at their discretion (paragraph 154).

According to the ECHR, a State measure adopted in accordance with international legal obligations must be considered justified, that is, it is in accordance with the European Convention, when the international or supranational organization in question offers a protection of fundamental rights "at least equivalent" to that guaranteed by the Convention. This jurisprudential declaration requires two clarifications: first, the notion of "fundamental rights" includes both substantive guarantees and the mechanisms for the control of these rights; and second, "equivalent" protection is taken to mean that which is "comparable", because the requirement of an identical protection would be contrary to the interest of international cooperation among diverse organizations (paragraph 155).

Furthermore, the Court added, if it is felt that the international organization in question offers "equivalent" protection, then it must be presumed, unless proven otherwise, that the State has not departed from the requirements of the Convention when it does no more than implement

legal obligations flowing from its membership of the organization (paragraph 156).

With this, the ECHR concluded that Community law offers protection of fundamental rights "equivalent" to that recognized by the European Convention. In this conclusion, it took into account both the substantive guarantees and the control mechanisms of Community law.

- With regard to the former, the ECHR noted that in both ECJ case law and the amendments to the Treaties establishing the Union there are continual references to the fact that fundamental rights form part of the general principles of Community law.

- With regard to the latter, the ECHR noted that despite restricting the access of individuals to the ECJ, the actions brought before it by Community institutions or Member States constitute an important means of control of EU rules that indirectly benefits individuals. In addition, the control by national courts of Community law, with the help of concepts such as the primacy of Community law, direct applicability or liability for non-compliance, together with techniques such as pre-litigation inquiry, is essentially the mechanism that informs individuals when a Member State or another individual has committed a breach of Community law (paragraph 164).

In conclusion, the content of the *Bosphorus* judgment can be summarized in two ideas: first, that the ECHR is competent to prosecute acts by States Parties to the European Convention performed in fulfilment of obligations deriving from their membership of international or supranational organizations (thus corroborating the prior judgment of 18 February 1999, re *Matthews*); second, that the actions of Member States of the European Union carried out in implementation of Community obligations are presumed, subject to proof to the contrary, to be in accordance with

the European Convention, as the substantive guarantees and procedural controls offer protection "equivalent" to that of the Convention.

6.4. Possible future lines of development after the *Bosphorus* judgment: Protocol No. 14 to the European Convention, the Memorandum of Understanding between the Council of Europe and the European Union and the Lisbon Treaty

Without prejudice to the evaluation corresponding to the *Bosphorus* judgment, its content, strictly interpreted, does not exclude judicial control by the ECHR of actions by European Union Member States, given that the stated "equivalence" between the Community and European systems of protection of fundamental rights can be challenged, as the European Court itself acknowledges in paragraph 156 above, when, in response to the circumstances of the case in question, it is understood that the protection offered by the organization concerned, in this case the European Union, of the rights recognized in the Convention is "manifestly deficient".

Therefore, at present, we cannot speak of a European rule on human rights, either from the substantive standpoint or in judicial terms, and so the possibility of eventual EU accession to the Convention remains open.

In particular, the draft Treaty establishing a Constitution for Europe (Article I-9-2) overcame the objections, in terms of competence, that had previously been raised by the ECJ.

Within the Council of Europe itself, attempts have been made to facilitate achieving this objective. Thus, although under Article 59.1 ("Signature and ratification") of the European Convention, only Member States of the Council of Europe may be party to the Convention, Protocol No. 14 of 13 May 2004, amending the control mechanism, adds a new paragraph 2 to Article 59 which states, concisely, that "the European Union may accede to the Convention".

This provision provides the means by which the European Union can sign and ratify the Convention; if this were done, it would lead to the institutionalization of a single European system of judicial protection – through the ECHR – against Community acts, not only those dictated by the Member States under Community law, but also those issued by the Community institutions themselves.

An important step in this regard was taken in 2007 when the Memorandum of Understanding was signed between the Council of Europe and the European Union, in which both parties committed themselves to close cooperation in certain areas of common interest, among which are those of human rights and fundamental freedoms. In this regard, the following was agreed:

- The Council of Europe and the European Union will base their cooperation on the principles of the indivisibility and universality of human rights; respect for the rules established in this area by the Council of Europe and the United Nations, in particular the European Convention for the Protection of Human Rights and Fundamental Freedoms; and preservation of the coherence of the system of human rights protection in Europe (Paragraph 16).

- The European Union respects the Council of Europe as the Europe-wide reference source for human rights. The relevant Council of Europe norms will be cited as a reference in European Union documents. The decisions and conclusions of its monitoring structures will be taken into account by the European Union institutions where relevant. The European Union will develop cooperation and consultations with the Commissioner for Human Rights with regard to human rights.(Paragraph 17).

- In the field of fundamental rights and public freedoms, coherence of Community and European Union law with the relevant conventions of the Council of Europe will be ensured. This does not prevent Community and

European Union law from providing more extensive protection (Paragraph 19).

- Early accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms would contribute greatly to coherence in the field of human rights in Europe. The Council of Europe and the European Union will examine this further (Paragraph 20).

- The European Union Agency for Fundamental Rights strengthens the European Union's efforts to ensure respect for fundamental rights within the framework of the European Union and Community law. It respects the unity, validity and effectiveness of the instruments used by the Council of Europe to monitor the protection of human rights in its Member States. The question of cooperation between the Council of Europe and the Agency will be the subject of a bilateral cooperation agreement between the Council of Europe and the Community (Paragraph 22).

In accordance with this Memorandum, the Lisbon Treaty introduces a new Article 6.2 to the Treaty on European Union, which provides that it "shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms". Notwithstanding, the Lisbon Treaty also reworded Article 6.1 of the Treaty on European Union, to recognize that the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted on 12 December 2007 in Strasbourg, has the same legal value as the Treaties.

6.5. Final considerations

It is paradoxical to be discussing the possible accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, when one of the requirements, in terms of political negotiation, imposed on States for entry into the European

Union is their prior membership of the Council of Europe, which necessarily involves the signing and ratification of the Convention.

On the other hand, whether or not the European Union accedes to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the ECHR has recognized its jurisdiction over acts of the States Parties to the European Convention conducted in the implementation of Community law. Accordingly, the Spanish authorities, both administrative and judicial, when they incorporate Community rules into Spanish law and, where appropriate, determine the compliance of the latter with Community norms, must always bear in mind the provisions of the Convention, as interpreted by the ECHR.

This task is particularly sensitive as regards the transposition of Community directives, due to conflicts that may arise between the provisions contained in the latter and the guarantees of the European Convention. In any case, and unless there is a very evident contradiction between the two jurisdictions, national rules, in principle, must follow the precepts of Community law. Of course, if a violation of the European Convention is alleged, the national laws may be reviewed by the national courts or, as a result of a pre-litigation inquiry, by the ECJ, which on many occasions has ruled that the rights and freedoms recognized in the Convention form part of the general principles of Community law.

The same conclusion has been reached with respect to Community provisions, such as regulations, which are of direct applicability; except in (very unlikely) cases of a manifest breach of the Convention, national authorities must apply such provisions in the specified terms, subject to possible subsequent interpretation, as indicated above, by the national court or, where appropriate, the ECJ.

CONCLUSIONS

1. Preliminary considerations

Although the purpose of this chapter is to provide an orderly summary of the conclusions already advanced in the preceding chapters, or which can be derived directly from the analysis presented in them, it is advisable, at the outset, to recall some ideas that were very briefly outlined in the Introduction and in Chapter One.

The first of these is that the present Report does not seek to analyse the entire body of tasks to be performed by the State in its role as an actor in the process of European integration, nor to propose solutions to the problems that arise in the performance of this role.

The European Union, "on which the Member States confer competences to attain objectives they have in common", in the terms that the Lisbon Treaty added to Article I of the founding treaty, is not an international organization, but a legal and political entity of a new kind, which cannot be analysed in terms of the categories created to explain relationships between States in the framework established by the Treaties of Westphalia. It is also an entity involved in a continuous process of transformation, the final form of which remains uncertain. This process is driven by the Member States according to "models" that do not always coincide, which are projected both onto the changes to be made in the institutional structure of the Union, and on the use to be made of the powers that are already available. These high-level policy goals fall outside the remit of the consultation request made to the Council of State, but their existence cannot be ignored in the preparation of our response.

As emphasised in the Introduction, the study requested focuses on the functions (viewing the Union, as it were, in a static mode, at the present phase of its evolution) incumbent upon the General State Administration, and this obviously includes the Government, which has overall responsibility

for its direction. The Government's powers, however, are not limited to this role of managing the general, civil and military administrative organization. In addition, as the supreme body of executive power, and with the decisive, though not exclusive, competence of legislative initiative, it must ensure coordination between the General State Administration and that of the Autonomous Communities, and present before Parliament the projects necessary for this coordination or, more generally, to properly develop the relationship between our law system and that of the European Community, systems among which the degree of overlap is so extensive that it is inappropriate to think of them as separately organized.

Secondly, we must also remember that the executive, which is the focus of our attention in this study, is characterised by a complexity that arises from the system of territorial organization of power established by the Spanish Constitution. Thus, the severe problem of coordinating the actions of the various ministerial departments in relations with the European Union is compounded by that produced by the division of powers between the State and the Autonomous Communities. Problems in the latter respect do not arise, like those mentioned previously, from the relations between administrative bodies, but from those between different entities. In a State such as Spain, which in addition to being a member of the European Union, is structured constitutionally into territorial powers that are endowed with political autonomy, the work of government is conducted at three different levels, each of which performs its particular functions both in the creation of law and in its application.

Finally, we must remember, as was also stated in the Introduction, that both the ascending and the descending phases are elements within a single procedure for the creation of rules and therefore must be considered jointly in order to assess their weaknesses and to propose suitable remedies.

2. European Union law: the questions submitted and the answers proposed

In relation to the European Union, the Government's consultation request was framed as follows:

Regarding what has been called the ascending phase of Spain's participation in the European decision-taking process, the Government considers that the study should consider the following issues:

- The area of Community decision-taking processes, in the different EU institutions, in which the General State Administration may participate, and the rules to which such participation is subject.
- The procedural and organizational forms of interministerial coordination for Spanish participation in such decisions, especially regarding the actions of the Interministerial Committee for European Union Affairs and the Permanent Representation of Spain to the European Union.
- The ways in which recently-developed procedures for regional participation may be integrated into the actions of the General State Administration.

Regarding the 'descending phase', the study should consider the following questions:

- How to ensure compliance with the general obligations arising from Community law in the development and implementation of Spanish legislation, with special attention to the need for interministerial coordination in this context.
- The procedures required to ensure the inclusion of specific obligations arising from rules of Community law, within the time limits specified in this regard, and the consequences of any non-compliance.

- The consequences of the principles of primacy and direct effect on the validity and applicability of Spanish rules, considering the need to eliminate national rules that are partially or totally contrary to European law, and to consider the effects of the introduction of new legal categories, arising from Community law, into our legal system.
- The consequences of the principle of State responsibility for breaches of Community law.
- The needs arising from the development and implementation of Community law with respect to relations between the General State Administration and the Autonomous Communities, as regards both ensuring compliance with Spain's obligations to the Union and the consequences of any breaches in this respect.

In addition to inviting a response to these specific issues, the Government also requested the Council to analyse and respond to any other question that called for attention in relation to the subject of the consultation.

As an attempt to answer the questions in accordance with their formulation and in the same order as proposed, would not properly emphasize the connection that exists between them and would inevitably lead to repetition, the Council of State, while strictly respecting the content of the request, believes it is preferable to present the recommendations and suggestions that summarize its response in accordance with the following scheme.

2.1. Organizational reforms needed to strengthen the unity of direction and leadership in European affairs and to ensure better coordination

As is apparent from the study carried out, the different States, each according to its own structures and traditions, present different models of organization and coordination in their European actions. None of these models are identical, and each has advantages and disadvantages. In these conclusions, we propose what could be a particularly Spanish model for European action, although it might include, to a greater or lesser extent, specific elements from other models, as described in the study and which need not be reexamined here.

The basic criteria to take into account in the construction of this model are, on the one hand, the aim to achieve effectiveness and unity in the overall management of Spain's European activities; and secondly, to improve the coordination of all potential actors in this process, including the Autonomous Communities.

The first question, in essence, inquires as to how best to ensure visible and effective leadership in the process. As remarked above, this issue has been resolved in different ways in the various countries. The solutions adopted range from conferring the ultimate political responsibility for the process on the Office of the President of the Government or of the Prime Minister, to formulas locating the centre of gravity in the domain of a strong Ministry of Finance or in a specific Department for European Affairs.

a) Unity of management and leadership

A possible model for Spain would have to take into account both existing administrative structures and established practices, supported by a

record of undisputed positive results, such as the reality of the composite structure of the State, created on the basis of the Autonomous Communities. Nevertheless, we propose a reconsideration and a change in the functions currently performed by the Interministerial Committee on European Union Affairs and the Conference for European Community Affairs.

In a line of continuity with existing processes, it might be considered that coordination should be performed at the very highest level and that differences between departments should be resolved by the General Committee of Subsecretaries and Secretaries of State, reinforcing their roles in European affairs and in particular, in ministerial coordination. But since the function of this Committee is to prepare for meetings of the Council of Ministers, and in view of its very numerous members, this does not appear to be the most advisable option.

From a more innovative standpoint, we view as preferable the proposal to create a Government Executive Committee for European Affairs, with full decision-taking authority, headed by a Vice-President of the Government and having as permanent members the Ministers of Economy and Finance, of Foreign Affairs and of Public Administration. Further members could be included, on a flexible basis, depending on the specific issues to be addressed in each case. This Government Executive Committee would determine the multiannual strategic design and the scheduling of priorities in European affairs, and would assume ultimate responsibility for ministerial coordination.

That said, and even if it is not considered appropriate to create this Executive Committee, it would in any case be advisable that all matters relating to the European Union should be addressed and resolved at the highest level within a single ministerial department. This department would not be conceived in terms of a Ministry for European Affairs, as exists in other countries, but rather as one that not only acted as the final arbiter between discordant ministerial positions, but also one that, under a unified

criterion, had the power to intervene in the sensitive matters provoking such differences, or which required coordination among the Autonomous Communities, in order to establish a single position to be adopted by the Kingdom of Spain. It would be a Ministry of the Presidency, acting as a Ministry of State, with respect both to the European Union and to the Autonomous Communities; obviously, such a Ministry of State would be quite different from those described as such in our historical tradition.

However, the development of a Ministry of the Presidency in these terms would not necessarily represent a drastic alteration or the disappearance of the present Secretary of State for the European Union (SEUE). Rather, this Secretariat of State would be adapted and strengthened. This Secretary of State, equipped with the necessary resources corresponding to the increased volume and importance of its functions, would adopt a clearly horizontal profile with respect to the other departments, consistent with the cross-cutting, ubiquitous nature of European law. Its action, moreover, would enjoy visible, strong political support.

The Secretary of State could be adapted in diverse ways. One possibility would be to incorporate the SEUE within the Ministry of the Presidency, in the terms described above. This relocation would emphasise the internal, cross-cutting dimension of the European function, although it would distance it somewhat from what in the context of the European Union continue to be "external relations", both with EU institutions and with the other Member States.

Another option might be to attribute a double perspective to the SEUE, with the head of this body being appointed by the Government at the joint proposal of the Minister of the Presidency and the Minister for Foreign Affairs and Cooperation. The SEUE would report to the first of these in all matters related to interdepartmental coordination and the internal dimension of European law and policies, while it would continue to account

to the Ministry of Foreign Affairs for all issues pertaining to relations with the European Union and its Member States.

b) Interministerial coordination

The SEUE, structured in either of the two ways suggested, with its centre of gravity, in any case, in the area of the Presidency, would play a leading role in ministerial coordination, addressing and overcoming conflicts and differences unresolved at lower levels of government. Thus, the SEUE would need to inform the competent sectoral ministries of European issues to be resolved and designate the appropriate ministry for this purpose; the latter, after appropriate interdepartmental consultations, would then and in good time recommend to the SEUE the Spanish position to be adopted, including, where appropriate, observations or disagreements. Any remaining differences among the ministries concerned should be resolved with the intervention of the SEUE, which could convene *ad hoc* meetings of those best qualified to resolve the question, including not only the officials from the ministries in discord but also specialists and officials for European affairs from within the Secretariat of State itself. If differences remained, the Secretary of State would have the final word in most cases, although if necessary the issue could also be referred to higher levels.

It is precisely in the exercise of these functions of coordination that siting the SEUE within a strong ministry endowed with cross-cutting powers makes most sense. Furthermore, this decision-taking function would be complemented by the communication of the Spanish position to the REPER (with the degree of flexibility advisable in each case), which would also provide an incentive to ensure the effective presence in the latter body of officials from each of the Ministries involved.

c) Participation by the Autonomous Communities in State decisions

At present, the mechanisms for incorporating the Autonomous Communities into the actions of the State are concentrated within the

Conference for European Community Affairs and the sectoral conferences, and these have been providing solutions that should be given more legislative support, to make them more effective and to take into account the amendments made to the new Statutes of Autonomy. It is necessary to regulate procedures for regional participation in establishing the State position and to examine the different levels of competence conferred in each case and the extent to which the issues affect each of the Autonomous Communities.

With respect to internal participation, we suggest strengthening the working groups and the Secretariats of the sectoral conferences, in order to streamline decision-taking.

At the political level, it would seem difficult to eliminate the rotating system introduced in the CARCE Agreements and developed within different sectoral conferences. However, at the technical level, all the Autonomous Communities could benefit from a different system, focused on specialization, and based on voluntary action, technical expertise and the degree of implication (dependent on the experience of those responsible).

Accordingly, the periods during which each Autonomous Community is responsible for a particular area of attention should be sufficiently extensive and should enable a certain degree of material specialization according to the specific capacities and interests of each Autonomous Community. As a preferred alternative, this specialization could be attained by several Autonomous Communities working jointly (or even by all of them); these would constitute stable working groups, responsible for directing and coordinating the position of the Autonomous Communities, for extended periods; their personnel would consist of specialists hired, not in terms of their origin from one or other Autonomous Community, but according to their ability and experience.

This solution could be developed by technical bodies that, in close collaboration with the working groups of the different sectoral conferences, would designate the specialists from among the respective Autonomous Community team members. The link with the sectoral conferences would also help maintain continuity between the ascending and descending phases of the process.

In parallel to this proposed relocation of the SEUE, making it part of, or at least functional within the Ministry of the Presidency, it might be advisable to create in this same department a Secretariat of State for relations and coordination with the Autonomous Communities, as the overall body responsible for these functions, or otherwise to confer them on the SEUE, in conjunction with the Presidency.

2.2. Reforms to be made to the system of public service and to departmental organization to match them to the situation arising from our membership of the European Union

a) The system of public service

Knowledge and skills within the public service system must be enhanced to ensure Spain's effective participation in the institutions and bodies of the European Union. At present, deficiencies in this respect are preventing the country from achieving its objectives in Europe.

These necessary improvements involve, particularly, fluency in the use of the working languages of the Union. There is also a need for a better understanding of European Union functioning and law, negotiation techniques and the legal and administrative systems of the other Member States.

The possession of these skills and knowledge needs to be ascertained in entrance procedures to public service, and should be assessed in careers

promotion and development. In parallel, resources must be allocated to the promotion and retraining of existing staff, with incentives and training programmes to provide officials with the means and opportunities to acquire or improve these skills. Above all, a pathway to European promotion should be facilitated, both within the institutions of the European Union and in those of other Member States.

To achieve these goals, we should make use of the expertise of EU officials who, perhaps given incentives to do so, decide to join the General State Administration or to work in its environment.

The exchange of information and officials with other Member States, as well as the creation of specific training programmes, are actions that are specifically supported by the European Union, under the provisions of the new Article 176 D of the Treaty on the Functioning of the European Union, incorporated by the Treaty of Lisbon. This Article reflects EU support for the efforts made by States in this regard, and provides for the adoption of regulations in this respect, by the ordinary legislative procedure. Spain should actively participate in the preparation of these regulations and apply the appropriate means for their effective implementation.

b) Departmental organization

Departmental organization in Spain must be in accordance with the relative importance of our European Union participation within the functions of State. Participation in Community decision-taking, the incorporation of European law into national law and its application in Spain can no longer be considered only as "foreign" policy, because they are activities that increasingly impact on many areas of internal activity, at all levels of administration.

The increased weight of the European dimension is not yet sufficiently reflected at organizational and functional levels. Therefore, we must adapt

our internal organization, originally conceived from the standpoint of negotiating entry into the European Communities, and of taking the first steps as a member state, to the current phase of full integration and development, in which we seek to play a significant role following the recent enlargements of the Community.

In regard to the internal organization of each Ministry, solutions should be flexible, in accordance with the varying degree to which each is affected by European law. In general, a single centre needs to be created – or reshaped and strengthened if one already exists – with suitable rank and resources, with the specific task of promoting and monitoring European initiatives, based on existing regulations, together with the programme and priorities that are periodically established by the Commission and the Council. Ultimately, thus, this centre should be responsible for all scheduling and management in this respect in Spain. All projects and drafts distributed by the European institutions must be examined by the relevant ministry, so that the legislative acts of the European Union are always known and contemplated during their gestation, not just at the time of their incorporation and application.

The body described above should also coordinate within and between departments. This will require it to have a generalist outlook within the Ministry and sufficient rank to be effective. Moreover, its functions must be clearly, precisely and specifically stipulated.

A body of such a nature should form part of the Sub-Secretariat, and can be configured, as appropriate in each case, either as a Directorate General for European Affairs or through the Technical General Secretariat itself, redesigned to pay more attention to European affairs, with the support of a specialized sub-Directorate General, dedicated to these questions.

2.3. Increasing Spain's activity in the tasks to be performed prior to the preparation of policy initiatives or documents when, even if they lack full legal force, these affect the policies of the Member States

Spain must increase its presence in the preparation of Community initiatives of all kinds, and achieve more active participation in these policies and in the formation of European law. To do so, planning and scheduling must be carried out to achieve national goals, both short and long term, so that Spain's interests and priorities are incorporated into the corresponding European dimension.

In the first place, there should be a broad strategic overview on the basis of which essential guidelines and priorities can be established, agreed with the maximum degree of consensus and representing the basic ideas concerning Spain's contribution to the European Union. The aim is to achieve long-term continuity and consistency in Spain's actions with respect to the institutions of the Union.

Secondly, there should be multi-year planning to provide a periodic reflection on the goals we wish to achieve in the medium term and on the appropriate means to achieve them. We should also consider the structural problems and obstacles observed in the relationship between European and domestic law, and the best ways to overcome these issues. This planning could be fostered by the Secretariat of State for the European Union, and in its development it would be desirable to involve not only the State but also the Autonomous Communities; this co-involvement could be developed by the proposed Secretariat of State for relations and coordination with the Autonomous Communities.

In addition, it seems necessary, within the context of the national administration, to carry out a periodic scheduling on a shorter-term basis, perhaps annually, as part of the above procedure, taking into account the

priorities of the Commission (which establishes its calendar of activities each year) and the Council (which does so every 18 months). Consideration should also be given to foreseeable initiatives in terms of European regulations pending full development, and to assessing the situation of domestic law in relation to the requirements of European law: these would include transpositions to be performed (and not just those close to the deadline for completion), implementation issues that have arisen in the implementation of European rules or as a result of ECJ judgments, and initiatives, that in the opinion of the Ministries concerned, should be promoted in Europe. This scheduling should be divided by sectors and proposed by each of the ministries in their respective areas of competence.

Over and above this scheduling, and for its execution, there must be a stronger degree of involvement in the creation of European regulations, avoiding the passivity that has sometimes been observed regarding this kind of preparatory work undertaken by the Commission. The ministries – at the prompting of the European affairs specialist body recommended above – must react swiftly to any consultation process initiated by the Commission, this being particularly important in relation to the Green Papers produced. All drafts and projects issued by the Commission should be distributed to the competent ministries in Spain; indeed, the awareness and better understanding of which Spanish interests could be affected by a particular initiative being prepared could serve to enter into contact with groups representing Spanish social interests, from the earliest stages of such initiatives. All of these activities should be oriented such that, when a proposal is adopted, the Administration is able to determine and express Spain's position in the respect without delay.

Together with the above – agility in reaction – a more proactive attitude is required, for Spain to have a greater presence in promoting initiatives, whilst ensuring that these are made widely known, in order to secure the support of other actors in the decision-taking process. The basic

impulse for such initiatives should come from the ministries that identify the need for or desirability of a particular action at European level; recommendations should then be communicated to the Permanent Representation, through the Secretariat of State for the European Union, proposals, studies, reports, etc. circulated within the Commission, in order to obtain the support of other Member States.

Both the reaction to external initiatives and the preparation of those originating in Spain need to be grounded on solid legal foundations (with support from the sub-Secretariat of the same ministry, the State Legal Counsel and, where appropriate, the Council of State), together with comprehensive, reliable knowledge of the social reality affected by the initiative (which can be derived from greater openness of the Administration to experts and groups representing the interests concerned) and with a view of the probable attitudes or reactions of other Member States and of the European institutions to such initiatives.

2.4. Reforms to be introduced into the procedure by which Spain participates in the development of European regulations, in order to ensure the continuity of the process intended to achieve, when necessary, their incorporation into Spanish law

The ascending and descending phases are, in fact, two inseparable aspects of a single regulatory process and we must reject a fragmented view of the process, in which administrative action is only intermittent, due to successive interventions by different offices. What is needed is a joint overview of the process, enabling continuity, and this might be enabled by the appointment *ab initio*, for each initiative or group of Community initiatives, of a department or small team to take responsibility for the entire process, including incorporation of the Community provisions and

even the supervision of their domestic application (the knowledge held by such a department would be valuable if Spain's actions were called into question by the Commission or the ECJ). To achieve these goals, it would be useful to regulate the procedure to be followed in Spain, continuously but with successive actions depending on the evolution of the European initiative.

As soon as it is made aware of a Commission initiative, the ministry or ministries competent in this area should obtain the available documentation (drafts, initial proposals, impact reports, etc.); this would normally be provided by the REPER to the above-mentioned body specialized in European affairs, which, in turn, should communicate it to the competent department or office in this area. From this moment, the preparatory work must begin – contacts with other departments, with the sectoral conference, with the sectors affected, etc. – to take part in the creation of the initiative, thus foreshadowing the Spanish position and ensuring proper coordination between the administrative authorities that are potentially affected. In this regard, special attention should be paid to the legislative acts of the European Union, but also to Green Papers, White Papers and soft law instruments in general.

From these very early stages, appointments can be made to the team that will be responsible for developing the initiative and ensuring that the Spanish standpoint is taken into consideration in producing the Community regulations and that these are subsequently incorporated or applied correctly in Spain.

At least in relation to initiatives considered of particular importance for Spain, an impact study should be conducted, as the basic document setting out the fundamental elements to be taken into account during the process. This study would include an assessment of the initiative's foreseeable effects in Spain, from different standpoints (legal, economic,

social, environmental, etc.), stating the interests involved and Spanish priorities in relation to the area addressed by the initiative.

From the legal perspective, this study should include aspects such as the Community basis for action and the European regulatory framework in which it is to be developed, a forecast of the legislative reforms that would be required in Spain, and of the amendments, repeals and reforms that could be needed, a consideration of the problems that might arise in the incorporation process, including those arising from the use of categories alien to Spanish law. Whether the initiative takes the form of a directive or, in general, rules calling for the approval of new domestic legislation, forecasts will be needed concerning the legislative rank of the provisions required, the distribution of powers between the State and the Autonomous Communities in the matter in question, and problems of interdepartmental coordination that may arise following approval of the proposal (in particular, regarding the ministerial departments concerned, as to the factors determining which of them should lead the negotiation process and the subsequent incorporation and application in Spain).

The Council of State, either through consultations on specific aspects or through studies or reports produced in parallel to the legislative process, could support this process by foreseeing potential problems and suggesting possible solutions. Thus, the Council of State would function more effectively, as a result of its earlier intervention, rather than the current situation in which it only becomes involved at the end of the process of the incorporation or application of European law, when there remains little room for manoeuvre and for proposing solutions that do not involve delays and possible liability toward the Community.

An impact study as described above should contribute to establishing Spain's position, assessing the interests at stake and determining priorities. It should be concluded, in any case, soon after the Commission's approval of the proposal, to enable a rapid decision to be reached on the Spanish

position, one that is sufficiently finalised (although still flexible) with which to approach negotiations at preparatory Council meetings (and, where appropriate, at comitology committees), as well as in the ministerial configurations of the Council.

Once the initiative has been approved, the legal consequences of its adoption must rapidly be determined (including, if applicable, a timetable for transposition), an analysis made of the legislative repeals and amendments required, and the appropriate regulatory drafts prepared, depending on the final content of the initiative. The report by the General Technical Secretariat of each ministry, which must be produced regarding any regulatory initiative, must examine and expressly confirm its compliance with European law. However, this examination should not be limited to the draft regulations issued for the incorporation of European law, but should extend to all initiatives, both legislative and regulatory, promoted by the ministry concerned.

2.5. Establishing a legal framework to ensure the incorporation of Community directives within the time period stipulated and to facilitate solutions to the problems that may arise from the constitutional division of powers in relation to this task

As well as the problems of an organizational nature discussed above, particular attention should be paid to creating a legal framework for the instruments that ensure transpositions into national law are effected within the time allowed for this purpose.

From this standpoint, more attention to the European element is needed, as the general rules of procedure and organization (Governance Act 30/1992, on the organization and operation of the General State Administration) contain very few specific provisions in this respect. Apart

from a possible reform of the Constitution, in which – as recommended by the Council of State in its report on constitutional reform – it would be useful to interrelate certain provisions (primarily relating to transposition insofar as it affects the Autonomous Communities or the reshaping of certain policy instruments), it is highly advisable to verify that the above legal framework is appropriate to the demands of Community membership.

In this report, we have emphasised the importance of a pro-active outlook, planning for contingencies. To strengthen our position in this respect, rules must be adopted to plan for the transposition procedure; while such planning is important at earlier stages, it is absolutely essential when the actual transposition is being initiated, when the Community regulatory framework has been established and when responsibility rests solely with the competent national bodies. Accordingly, the approval of an annual schedule of transpositions might be required, with a similar obligation being imposed on each ministry, comparable to the French model: this would involve a transposition programme for each directive in force, stipulating the departments that are competent to perform the transposition, the texts to be drafted, and the time available for this purpose.

From the same standpoint, we emphasize the desirability of periodically issuing a guide for transposition, along the lines of the Transposition Notes in the UK. To do so, a provision should be introduced whereby, at specified intervals, the Government would be required to prepare such a guide, detailing the norms to be observed and the procedure to be followed. This guide would be the perfect place in which to present recommendations or to advise on certain practices, such as obtaining additional reports in the case of particularly complex Community rules. This approach, too, would highlight the benefits of the above-recommended earlier intervention by the Council of State, when appropriate.

Indeed, irrespective of the final, mandatory report by the Council of State on the transposition process, the effectiveness of which is sometimes limited because it is issued when decisions have already been taken, when time is short and sometimes even after the transposition deadline has expired, an earlier, wider-ranging intervention by the Council of State, through discretionary consultations, could sometimes contribute to resolving pre-existing problems and constraints. For example, this might be useful in complex cases affecting Spanish legislation or regarding the introduction of a Community provision into Spanish law, in the resolution of jurisdictional conflicts between departments or with the Autonomous Communities, and even in the case of the State's exercise of alternative powers (as referred to below), or in determining exactly what should be subject to law or regulation in the transposition process.

From the procedural standpoint, the specific nature of transposition makes it advisable to develop, if not a specific, detailed procedure, then at least the options enabling a rapid, satisfactory response to the various issues that may arise. Again we emphasize the importance of organization and coordination; the procedure for designating the body responsible for the transposition must be formalised and a mechanism provided for the expeditious resolution of potential conflicts.

Apart from organizational questions, certain specific provisions should be introduced:

- Explicit provision should be made for an *ad hoc* procedure to shorten the time allowed for legislative delegation to be carried out. Among other suggestions, we propose the early assignation of delegated competences for the rules to be promulgated (not just the basic text, but also the regulations that are to be developed and approved directly by the Government, thus connecting the techniques of legislative delegation and of de-legalization) and the joint preparation of the different regulatory texts.

- In this respect, too, and as in most cases the incorporation of Community legislation must be verified by means of domestic measures, at diverse levels, provision should be made for the joint consideration of the various regulatory projects comprising the transposition process, especially when the same Ministry is responsible and in the case of rules and regulations of different ranks. As an alternative to fragmented, patchwork regulation, beset by urgency, giving rise to results lacking a systematic standpoint and often of ephemeral effectiveness, it is preferable to prepare the bill and the first drafts of the regulations simultaneously so that when parliamentary proceedings for the former have begun, work on the regulatory texts can take place *pari passu*.
- Special reference should be made to the Government's exercise of legislative initiatives to incorporate Community rules. We believe it essential to formally stipulate the priority nature, in parliamentary procedure, of all bills incorporating European rules.

A very particular aspect of the temporal dimension of transposition lies in the constitutional model of the division of powers between the State and the Autonomous Communities. Assuming that the Community element does not alter the internal distribution of powers, current legislation does not provide any mechanism to ensure that the Kingdom of Spain fulfils its transposition obligations when the Autonomous Communities are responsible for carrying out this incorporation.

It seems, therefore, imperative to create a mechanism by means of which, under the above circumstances, the State will meet its Community obligations. This would require a type of substitute power to be exercised by the State, a mechanism like the Italian *cedevolezza* clause, by virtue of which once the deadline for transposition has expired, the State legislation would take effect in the Autonomous Communities that had not passed their own rules, and this State legislation would be applicable and effective until

the eventual entry into force of the corresponding measures by the Autonomous Communities in question.

The ideal context in which to introduce such a mechanism would be the Constitution, but it could also be included in a statute measure, on the basis of the function of ensuring compliance with obligations to the European Union, a matter that is the sole prerogative of the Kingdom of Spain. As observed by the Constitutional Court (in particular, in Judgment 252/1988), only an inadequate interpretation of constitutional and statutory provisions could inhibit this guarantee function and deprive the State of the instruments needed to ensure compliance with its obligations to the Community.

Thus, in practice the State would be able to make use of such an instrument and exercise its legislative power in a provisional, precautionary and substitutive way. This would be especially necessary in cases in which this constituted the only way for Spain to fulfil its transposition obligations. It should always be emphasised that such an exercise of State power would be temporary, that it would only take place if the Autonomous Community in question failed to perform the necessary transposition within the stipulated time limit, and that it would only remain until the Autonomous Community approved its own transposition rules.

2.6. Measures to purge domestic law of provisions incompatible with European law

Under the principle of legal certainty, as constructed by the ECJ, it is not sufficient for the integration of Community law into the domestic sphere to be *de facto*, embodied in the correct application of European law by the national courts. It also requires integration *de jure*, to be conducted through the establishment of favourable objective conditions for this

application, by removing the uncertainties generated by the persistence in domestic law of provisions contrary to Community law.

Achieving this objective is, thus, an end in itself, and one that does not seem to have been given sufficient attention. Therefore, we suggest that appropriate reforms be introduced to bring our law into line with European law, establishing a continuous process of repeal and reform involving each of the following areas of governance:

- Parliament: in the same way that it is responsible for incorporating Community directives when this requires the exercise of legislative power, so must Parliament take responsibility for removing situations of uncertainty arising from the existence of legal provisions that are contrary to European law. In carrying out this task, which may consist of the simple derogation of the offending law or, otherwise, its amendment (in cases in which its application is to be maintained for situations unaffected by Community law), the Government must contribute by means of legislative initiative.

- The Government and the Administration: in relation to the above, the Administration, by promoting the exercise of legislative power by Parliament, or by making use of its own regulatory power, or by the automatic review of provisions of a general nature (depending on the rank of the measures affected), must take an active role in purging domestic law. As far as possible, the Administration's participation in this process should be systematic in nature, and the following two instrumental measures would help achieve this: first, identification (in the impact report for each proposed Community rule, especially for regulations) of the national provisions that are contrary to the European text; and second, communication to the Government of final judgments that set aside national laws as being incompatible with European law. Both of these mechanisms are aimed at facilitating recognition of the situations in which regulatory intervention would be necessary; this could be preceded by

consultation with the Council of State, depending on the complexity of the reform needed.

-The Constitutional Court: the indeterminate nature of how ordinary courts should control compliance by domestic law with European law, with respect to a particular litigation, hampers the achievement of legal certainty. This problem could be overcome by attributing the Constitutional Court, in the Act establishing its functions and competences, the power to remove such non-compliant laws from the Spanish system. This power should be exercised when an inquiry is referred to it, obligatorily, by an ordinary court that has handed down a final judgment setting aside a legal provision found to be contrary to Community law. The proposed solution respects Community case law and is based on the Constitutional Court's exclusive power to declare a law invalid. If it were adopted, this Court would come to play a highly significant role with respect to the European dimension.

-The ordinary jurisdiction: the invaluable contributions made by the ordinary courts in purging regulatory provisions that are incompatible with Community law would be aided by two regulatory changes: classing breaches of Community law as grounds for ruling the invalidity of the regulations in Article 62.2 of Act 30/1992, of 26 November; and amending Articles 26 and following of Act 29/1998, of 13 July, regulating the Contentious-Administrative Courts, in order to clarify the possibility of challenging administrative provisions believed contrary to Community law, through the filing of direct or indirect judicial appeals.

In short, the issue must be addressed in a comprehensive fashion, as only joint action by the different areas of State power will enable the creation within the Spanish legal system of a space that is basically free of dysfunctional elements.

2.7. Strengthening closure clauses: ensuring the effectiveness and primacy of Community law and accountability for non-compliance

Most of the recommendations made concerning the descending phase of Community law are designed to avoid non-compliance with European obligations and, specifically, to avoid legislative conflicts that may occur in cases in which a single situation is potentially subject to conflicting Community and national provisions. In this respect, suggestions have been made to address the causes that give rise to incompatibility between the two legal systems, i.e., the failure to transpose Community directives, or their late transposition, until this situation is rectified, inadequate transposition and the failure to implement necessary repeals and reforms of domestic law. A possible conflict between jurisdictions may also be avoided by consulting European law as the preferred hermeneutic criterion, under the principle of interpretation in conformity. Formalising this approach in the Judicial Power Act would provide regulatory coverage to its application by the Spanish courts.

Although the application under Spanish law of the principles of direct effect and primacy, in general, has been satisfactory, certain weaknesses remain, which could be corrected by strengthening the operation of principles such as system closure clauses, from the national perspective.

With respect to the efficacy and primacy of Community law, the administrative dimension of these principles is reflected in the Administration's power and duty to set aside domestic rules and to review firm decisions, when they appear to be in contradiction with European law. Given the difficulties involved in the first of these questions, it may be advisable to make the exercise of this power subject to the prior favourable report of the Council of State or equivalent advisory body of the Autonomous Communities (depending on whether the provision in question is contained within national or regional legislation); this proposal would

provide a suitable mechanism to centralize cases involving doubts concerning compliance between different legal systems. As to the second issue raised, we recommend a paragraph be included in Article 102 of Act 30/1992, of November 26, in which, stipulating a term in which this is to be done, the Administration may revoke, at its own initiative or at the request of the interested party, final administrative decisions when this outcome is specifically required by a decision of the European Commission or an ECJ judgment. This approach would provide a specific channel for the effective withdrawal by the Administration of its own decisions when so required by the European authorities.

Finally, the failure to meet European obligations may generate State liability.

Given that external accountability corresponds exclusively to the State, and that in this respect it is irrelevant which public power has originated the non-compliance in question, consideration should be given to the legal possibility of making the periodic penalty payment or lump sum fine imposed by the ECJ for non-compliance with European law payable by the Autonomous Community that had provoked the situation. This is not an alternative, but complementary to the measure designed to ensure the subsidiary application of the national rules when this is not done within the period stipulated by the Community. Consequently, the transfer of liability would come into play when the non-observance of Community obligations were the result, not of the failure to incorporate a directive, but of any other act or omission by the Autonomous Community. In return, there would have to be greater participation of the Autonomous Community alleged to have originated such an infringement in the corresponding proceedings brought before the ECJ, although the State Legal Counsel would continue to exercise ultimate control in this respect.

3. Questions raised concerning the Council of Europe

At the end of its consultation request, the Government asks us to consider the consequences for our system of Spain's membership of the Council of Europe "both in terms of the rules it adopts and, very specially, concerning the jurisprudence of the European Court of Human Rights and how to ensure the effectiveness of its judgments".

After studying the different legislative categories that exist within the Council of Europe, and having found that only its conventions are legally binding, we observed that, overall and in accordance with the provisions of Article 10.2 of the Constitution, the case law of the ECHR, in its interpretation of the European Convention for the Protection of Human Rights and Fundamental Freedoms, has been satisfactorily incorporated into Spanish law, especially in the jurisprudence of the Constitutional Court and in that of the Supreme Court.

However, notwithstanding the manifest interpretive potency of the ECHR, discussions are known to take place in academic and judicial circles regarding the execution *inter partes* of this Court's judgments, as these, although of mandatory acceptance under the provisions of the European Convention, are not viewed in Spanish law as sufficient cause for reopening proceedings that have been concluded by a final judgment.

In consequence, apart from possible considerations of expediency regarding the implementation or otherwise of ECHR judgments in Spanish law, and taking as a relevant fact the wording of the consultation referred to this Council, inquiring as to how to ensure the effectiveness of ECHR decisions, it should be noted that most of the countries in our context (almost 30, in total) have enacted statutory provisions that specifically contemplate the execution of such judgments: this is the case, for example, in France, Germany, Austria and Switzerland, to name a few significant examples. In others, like the UK, it is in principle judicial practice, under

ordinary legislation, to favour the reopening of proceedings in which the ECHR has observed a breach of the Convention.

Regarding this latter question and when it is considered appropriate to implement ECHR judgments in Spain, the most appropriate mechanism for this purpose could be located at a midpoint between the action for judicial review and that for annulment of the proceedings, in which the Supreme Court would have to determine the reopening or otherwise of proceedings that have been challenged and, where appropriate, review the judgment itself; if this were not possible because of the nature of the breach in question, the Supreme Court could declare the nullity of the proceedings and remit the case to the court in which the breach had occurred.

These conclusions rest on the firm understanding that proceedings should not be reopened merely on the existence of a contrary judgment by the ECHR; in addition, the conditions set out in Recommendation 2000 (2) of 19 January, by the Committee of Ministers of the Council of Europe, must be satisfied: first, that the breach observed by the ECHR had a decisive influence on the content of the contested decision, or there were procedural errors or irregularities that were sufficiently serious to call into question this decision; secondly, that the breach cannot be redressed with the payment of just satisfaction awarded under Article 46.2 of the Convention, or in any way other than by a reopening of the proceedings. The concurrence of these requirements, especially the second, circumscribe this reopening fundamentally to criminal trials in which a custodial sentence is being implemented.

Moreover, it should not be forgotten that ECHR convictions are often based on the failure of Spanish law to comply with the provisions of the European Convention. Therefore, without prejudice to a possible implementation *inter partes* of the judgment handed down, these cases require the preparation and approval of legislative projects of various kinds,

as is indeed being done at present. Nevertheless, and as a general recommendation, in the development of regulatory provisions, it would be useful to include a specific procedure evaluating the compatibility of their contents with ECHR case law, or otherwise refer such an analysis to one of the offices involved (for example, the General Technical Secretariat).

Madrid, 14 February 2008

THE SECRETARY GENERAL,

THE PRESIDENT,

FIRST VICE-PRESIDENT OF THE GOVERNMENT, AND
MINISTER OF THE PRESIDENCY.

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