

## **Council of State**

No.W02.07.0254/II

The Hague, 12 September 2007

By government communication No. 07.002304 of 18 July 2007, Your Majesty, acting on the recommendation of the Minister of Foreign Affairs, the Minister for European Affairs and the Prime Minister and Minister of General Affairs, submitted to the Council of State for its consideration a request for advice on the mandate of the Intergovernmental Conference to revise the Treaty on the European Union and the Treaty establishing the European Community.

### 1. Introduction

At the European Council held on 21-22 June 2007, negotiations took place on amending the Treaty on the European Union ('the TEU') and the Treaty establishing the European Community ('the TEC') in order to increase the efficiency and democratic legitimacy of the enlarged European Union (EU) and the coherence of its external action. The outcome of the negotiations was a detailed mandate for a new Intergovernmental Conference ('the 2007 IGC').<sup>1</sup> This mandate is considered the sole basis and exclusive framework for the work of the 2007 IGC convened by the Portuguese Presidency on 17 July 2007, which must adopt a final text of a treaty amending the existing treaties.<sup>2</sup> In accordance with the request for advice, the Council of State has based its advisory opinion on the mandate for the 2007 IGC.<sup>3</sup>

#### *Request for advice*

In its request for advice, the government notes that at the European Council on 21-22 June 2007 the member states reached agreement on the method and content of a new treaty for the EU. This will be an ordinary amending treaty; there will be no question of the existing treaties being replaced by a single treaty with constitutional aspirations. The method used here will be in line with that used for, *inter alia*, the Treaties of Amsterdam and Nice. The

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<sup>1</sup> See Brussels European Council, 21-22 June 2007, Presidency Conclusions, Annexe I, Doc. 11177/07, pp. 15 *et seq.* In the original conclusions of the European Council, the annexe was still entitled *Draft IGC mandate*, but this was changed later (see Doc. 11177/07 Cor1 Rev1). For the official revised text of the mandate, see *IGC 2007 mandate*, Doc. 11218/07.

<sup>2</sup> See Brussels European Council, 21-22 June 2007, Presidency Conclusions, Annexe I, Doc. 11177/07, p. 15; *IGC 2007 mandate*, Doc. 11218/07, p. 2.

<sup>3</sup> For example, this advisory opinion does not refer to the draft text of the treaty drawn up for the 2007 IGC by the Portuguese Presidency on 23 July 2007 (CIG 1/07).

functioning of the EU will be improved by a series of amendments to the TEU and the TEC. Since the EU will have a single legal personality, the TEC will be renamed the Treaty on the Functioning of the Union ('the TFU').

### *Assessment framework*

The government has asked the Council of State for its views on the nature of a treaty as referred to in the conclusions of the European Council ('the proposed Reform Treaty'). Should this lead to findings regarding the approval of the treaty, the government has asked the Council of State to give these also. It assumes that the Council of State will make use of its previous advisory opinions dated 13 June 2003 (Advisory opinion on the European Convention),<sup>4</sup> 14 July 2003 (Advisory opinion on the European Constitution (Consultative Referendum) Bill),<sup>5</sup> 10 December 2004 (Advisory opinion on the approval of the Treaty establishing a Constitution for Europe)<sup>6</sup> and 15 September 2005 (Advisory opinion on the consequences of the European Union's institutional structures for national institutions).<sup>7</sup> The latter opinion, on the consequences of the EU's institutional structures for the role and operation of the national institutions and their mutual relations, was published after the 2005 referendum. In the government's view, it provides an accurate analysis of the legitimacy of European policy.

### *Structure of the report*

The Council of State would reply to the aforementioned request for advice in the following manner. It begins by analysing the process of European integration, the interest of the Netherlands in this process and the need to develop a vision of the kind of Europe the Netherlands would like to see (Section 2). Next, with reference to its advisory opinions on the European Convention, the European Constitution (Consultative Referendum) Bill and the Bill approving the Treaty establishing a Constitution for Europe, it gives its views on the nature of the proposed Reform Treaty (Section 3). Then, with reference to, *inter alia*, its advisory opinions on the European Constitution (Consultative Referendum) Bill, the Advisory Referendum Bill,<sup>8</sup> the Accession of Turkey (Consultative Referendum) Bill<sup>9</sup> and the

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<sup>4</sup> See *Parliamentary Papers, House of Representatives 2003-2004*, 28473, No. 35.

<sup>5</sup> See *Parliamentary Papers, House of Representatives 2002-2003*, 28885, A.

<sup>6</sup> See *Parliamentary Papers, House of Representatives 2004-2005*, 30025 (R 1783), No. 4.

<sup>7</sup> See *Parliamentary Papers, House of Representatives 2005-2006*, 29993, No. 22.

<sup>8</sup> See the Council of State's advisory opinion on the Bill proposed by MPs Duyvendak, Dubbelboer and Van der Ham, prescribing rules on the advisory referendum (the Advisory Referendum Bill) (*Parliamentary Papers, House of Representatives 2005-2006*, 30372, No. 7, p. 2).

consequences of the European Union's institutional structures for national institutions, it discusses the approval of the proposed Reform Treaty and ways of getting citizens involved in this (Section 4). The opinion concludes with a brief summary (Section 5).

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<sup>9</sup> See the Council of State's advisory opinion on the bill proposed by MP Wilders on the holding of a consultative referendum on the accession of Turkey to the European Union (the Accession of Turkey (Consultative Referendum) Bill) (*Parliamentary Papers, House of Representatives 2005-2006*, 30309, No. 4).

## 2. The Netherlands and Europe

The nature of the proposed Reform Treaty cannot be assessed without having a clear picture of what the process of European integration since the Second World War has meant. This has been discussed in the advisory opinion on the consequences of the European Union's institutional structures for national institutions, from which the following is taken.<sup>10</sup>

### *2.1 Status of nation-states*

International relations within Europe have been transformed in the decades since the Second World War. A negative, defensive notion of national sovereignty has gradually yielded to the notion that peace, security and prosperity can be assured only by ever closer cooperation among European states.

The EU does not constitute a threat to the nation-state. It is a cooperative structure that protects and strengthens the actions of nation-states in an open world. Each nation-state can sustain its own legal order only in ever closer cooperation with those of other states. The sovereign state that is not dependent on anything or anyone – if it ever existed at all – is a thing of the past. Countries increasingly find themselves having to choose between taking part in a European legal order and seeking to exercise some commensurate influence on it, or retaining their autonomy and as a result being ever more frequently subject to the unilateral or joint decisions of other more influential states.

By participating in first the European Coal and Steel Community (ECSC), then the European Communities and now the EU, the Netherlands has opted from the very beginning of European cooperation for the first of these alternatives – taking part in the European legal order. For the Netherlands, the question has never been whether a European Union would come into existence, but what kind of Union, and how. That is a question which, in the case of the Netherlands, must ultimately be answered by government and parliament.

### *2.2 The process of European integration*

#### *The objectives of European cooperation*

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<sup>10</sup> See *Parliamentary Papers, House of Representatives 2005-2006*, 29993, No. 22, pp. 1-6.

The goal of European cooperation is to serve both nation-states and their citizens. The EU's objective – as is clear from the preambles to the treaties – is not only economic cooperation, but also peace and security. Thus, the preamble to the 1951 Treaty establishing the European Coal and Steel Community refers consecutively to:

- safeguarding world peace by creative efforts equal to the dangers which menace it;
- the contribution which an organised and vital Europe can bring to civilisation, which is indispensable to the maintenance of peaceful relations;
- the recognition that Europe can be built only by concrete actions which will create a real solidarity, and by the establishment of common bases for economic development;
- the collective contribution, by expanding the basic production of the member states, to raising the standard of living and furthering the works of peace;
- substituting for historic rivalries a fusion of essential interests and establishing, by creating an economic community, the basis for a broader and deeper community among peoples long divided by bloody conflicts; and laying the bases of institutions capable of giving direction to the future common destiny of the member states.

The 1957 Treaty establishing the European Economic Community (EEC) widened European cooperation dramatically, but accorded entirely with the objectives previously formulated in the framework of the ECSC. The same applies to the widening and deepening of European cooperation in the Single European Act and the Treaties of Maastricht, Amsterdam and Nice, and to the enlargements that gradually turned the original Communities of six member states into a Union of twenty-seven. For the Netherlands, opting for European cooperation was a logical choice. Traditionally, Dutch foreign policy has been strongly oriented towards peace and trade. Particularly since the achievement of Economic and Monetary Union (2002) and developments in the Second Pillar (provisions on a common foreign and security policy, 1992) and the Third Pillar (provisions on police and judicial cooperation in criminal matters, 1999), the European Union has increasingly impinged on the core of national life.

### *The interest of the Netherlands in the process of European integration*

As far as the Netherlands is concerned, what stands out most clearly is its economic dependence on Europe.<sup>11</sup> The Dutch economy is open. The Netherlands has a small home market and is heavily dependent for its economic growth on trends in other countries, especially its neighbours. The Netherlands is dependent for about two thirds of its Gross Domestic Product on exports, about 80% of which are sold within Europe, most notably in Germany. It is becoming less and less feasible to build up and maintain a competitive edge independently. Another contributory factor is that, although the EU is the most tightly knit union of states, it is now by no means the only one. Such groupings also exist in the Americas and Asia, including the North American Free Trade Agreement (NAFTA), MERCOSUR in South America and the Association of Southeast Asian Nations (ASEAN). As a result, negotiations increasingly take place between trade blocs rather than individual states. The EU provides the Netherlands with access to European markets under conditions that can be known in advance, and to the rest of the world (through the World Trade Organisation and the EU's many trade and association agreements). This internationalisation constitutes a trend that will continue in the foreseeable future as a result of trade liberalisation and technological advances.

Cooperation within the EU is also necessary for the Netherlands in order to prevent damaging policy competition. The internal market, the importance of which is undeniable, compels member states to cooperate and harmonise their policies.

In view of these Dutch interests, the question for the Netherlands is therefore not *whether* there is a need for a socioeconomic order at European level, but *what kind of* order is needed and *how* it should be achieved. Again, this is a question which, in the case of the Netherlands, must be answered by government and parliament.

In addition, the nation-state as a democracy governed by the rule of law has itself become increasingly dependent on European cooperation. Cooperation between states is needed in order to tackle cross-border problems effectively. Especially now that the borders are open, this also applies in such policy fields as law enforcement and migration. The fight against terrorism is another clear example, as are energy and the environment.

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<sup>11</sup> See Netherlands Bureau for Economic Policy Analysis (CPB), *Macro Economische Verkenning 2006* ('Macro-economic outlook 2006'), Chapter 6.

The question, then, is not *whether* we want to defend the democratic state under the rule of law through European cooperation, but *what kind of* democracy and rule of law we seek, within *what kind of* European democratic legal order. Since European and Dutch institutional structures are so closely interwoven, it is impossible to separate a vision of European cooperation, and the Netherlands' place within it, from a vision of the Netherlands as a democratic state under the rule of law. A vision of the EU requires a vision of the nation-state and its future.

### *2.3 The relationship of the Netherlands to the European Union*

The Netherlands as it is today can only be understood in its historical context and its international (European) setting. As awareness of the historical context fades, opposition to the international (European) setting is growing.

The EU is as strong as the foundations on which it rests: nation-states and their citizens. External developments and internal causes have left nation-states more vulnerable, and this has made citizens feel uncertain, in the Netherlands as elsewhere. As Her Majesty Queen Beatrix said many years ago, we can only become good Europeans if we are fully self-confident in our own identities; in fact, beneficial cooperation depends on this. Today's and tomorrow's Europe can only be built upon our own foundations.<sup>12</sup>

Uncertainty about our own foundations may be one of the main reasons why it has proved so difficult to get a debate on the EU started in the Netherlands. Admittedly, political and public interest in the EU has recently rekindled, but there is still too little debate on the fundamental issues: the kind of Europe the Netherlands would like to see, the national choices it must make in order to achieve this, and the implications for how it sees itself as a state. Discussion of the EU must not be limited to a debate about money or a technocratic debate for insiders.

The EU can only continue to serve the interests of nation-states if these states know what they want for themselves and what purpose they expect the EU to serve. Otherwise it will end up being used as a smokescreen behind which politicians in The Hague hide when they have willingly cooperated on difficult decisions in Brussels but shrink from taking responsibility for them openly. The related parliamentary scrutiny and political management are discussed in more detail in Section 4.3 below.

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<sup>12</sup> From a speech made on 17 November 1982 during Queen Beatrix's state visit to the United Kingdom.

The initiators of the referendum of 1 June 2005 on the Treaty establishing a Constitution for Europe wanted to provoke a political and public debate which would shed more light on the issues.<sup>13</sup> However, this did not happen. Two factors played a part here: (1) the implication that people were being asked to express their views about a present or future state and its constitution, and (2) the misconception that the content of the Treaty was entirely new, whereas most of it had already become part of the European legal order through earlier treaties. The referendum certainly mobilised public interest in the EU, but the political debate remained limited.

What the referendum has made clear is that the Dutch do not feel a real sense of connection with the EU. Dutch citizens apparently do not have as much confidence in European cooperation as was assumed in the past. In many people's minds, the EU is associated with technocratic decision-making and over-regulation, which are problems they also encounter at home.

This scepticism on the part of the public is due not only to the way the EU functions, but also to the way the Dutch government handles EU affairs. People's feeling that they do not count in the EU is closely related to their feeling that their opinions do not count in their own country. They will feel themselves to be both Dutch and European citizens only if they continue to feel at home in their own country. The EU is no obstacle to this. Article 6, paragraph 3 of the TEU states that the Union 'shall respect the identities of its member states'.

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<sup>13</sup> See the explanatory memorandum to the Bill proposed by MPs Karimi, Dubbelboer and Van der Ham on holding a consultative referendum on the Constitutional treaty for the European Union (the European Constitution (Consultative Referendum) Bill) (*Parliamentary Papers, House of Representatives 2002-2003*, 28885, No. 3, p. 8).



### 3. The nature of the proposed Reform Treaty

#### 3.1 Preliminary remarks

The EU has a number of special features that distinguish it from other groupings of states.<sup>14</sup> One of these is its own autonomous legal order, which complements rather than replaces those of its member states.<sup>15</sup> In late 1991 (when the Treaty of Maastricht was in the process of being adopted), the Court of Justice of the European Communities (ECJ) ruled that the EEC Treaty, 'albeit concluded in the form of an international agreement, nonetheless constitutes the constitutional charter of a Community based on the rule of law'.<sup>16</sup> The last fifty years have seen a process of constitutionalisation within the European partnership whereby the performance of tasks by Community institutions has become subject to a number of basic rules and principles. These rules and principles, some of which are now applicable to the Union as a whole, are in a substantive sense the constitution of the EU.<sup>17</sup>

Although it was the Treaty establishing a Constitution for Europe that first gathered together these basic rules and principles in a treaty-based written constitution, its content was largely a codification (or recodification) of the existing treaties and case law; only a small number of its provisions were actually new.<sup>18</sup> These provisions were partly prompted by dissatisfaction with the functioning of the EU, and were designed to improve it. However, the main difference between the Treaty establishing a Constitution for Europe and the earlier amending treaties, such as the Treaties of Maastricht, Amsterdam and Nice, lay not so much in its content as in the constitutional symbolism that it was meant to convey, with a strong emphasis on democracy and fundamental rights, and hence on European citizenship.

In its advisory opinion on the proposal by MPs Karimi, Dubbelboer and Van der Ham on the holding of a *consultative* referendum on the constitutional treaty for the European Union, the Council of State gave its views on the nature of the Treaty establishing a Constitution for

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<sup>14</sup> See the Council's advisory opinion on the Bill proposed by MP Van der Staaij, stating that there are grounds to consider a proposal to amend the Constitution by introducing a requirement that treaties concerning the European Union be approved by a two-thirds majority of the votes cast in the States-General (*Parliamentary Papers, House of Representatives 2006-2007*, 30874 (R 1818), No. 5, p. 2).

<sup>15</sup> See the judgment by the Court of Justice of the European Communities in Case 6/64, *Costa v. ENEL*, Jur. 1964, p. 1203, and Opinion 1/91, EEA I, Jur. 1991, p. I-6079.

<sup>16</sup> See Opinion 1/91, EEA I, Jur. 1991, p. I-6079, para. 21, in which the term 'constitution' refers to the full set of basic rules and principles of an international body, rather than the constitution of a state.

<sup>17</sup> See also the advisory opinion on the European Constitution (Consultative Referendum) Bill (*Parliamentary Papers, House of Representatives 2002-2003*, 28885, A, p. 2).

<sup>18</sup> See the advisory opinion on the European Constitution (Consultative Referendum) Bill (*Parliamentary Papers, House of Representatives 2002-2003*, 28885, A, p. 2, and the advisory opinion on the approval of the Treaty establishing a Constitution for Europe (*Parliamentary Papers, House of Representatives 2004-2005*, 30025 (R 1783), No. 4, p. 4).

Europe with respect to its approval. The Council did not comment on the desirability of holding a referendum, but made its remarks in the light of the proposers' *wish to enable* a consultative referendum on the Treaty to be held. It gave its views on the reasons that the proposers put forward for their proposal. In making this assessment of the possibility and desirability of holding a referendum, the Council of State concluded that approval of the Treaty establishing a Constitution for Europe, in which the fundamental rights were enshrined and the pillar structure was abandoned, was to some extent comparable to approval of a national constitutional amendment.<sup>19</sup> However, its opinion also expressly pointed out the differences between a national constitution and the Treaty establishing a Constitution for Europe. The latter, it said, could not be equated with a national constitution, for the EU could not be considered a state. This is also apparent from the proposed Reform Treaty, which merely amends the existing treaties and is thus in line with the constitutional development of the Union as described above.

In its advisory opinion on the European Constitution (Consultative Referendum) Bill, the Council referred to elements of method and content in the Treaty establishing a Constitution for Europe and to elements associated with the symbolism of the Treaty. These elements led the Council to conclude that the Treaty establishing a Constitution for Europe was unusual in nature. In the following sections, the Council will assess, with reference to the same elements, the nature of a treaty as referred to in the conclusions of the Brussels European Council of 21-22 June 2007.

### *3.2 Method*

It was in the Treaty establishing a Constitution for Europe that the Union's basic rules and principles first assumed the form of a treaty-based written constitution.<sup>20</sup> By establishing a single European Constitution in which institutional arrangements and decision-making procedures concerning what are still known as the First, Second and Third Pillars were regulated in a coherent manner, the Treaty broke with the traditional manner of revising treaties.<sup>21</sup> The Treaty was also drafted in an unusual way, namely by a broad-based 'convention' which included representatives of the various national parliaments. The

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<sup>19</sup> See *Parliamentary Papers, House of Representatives 2002-2003*, 28885, A.

<sup>20</sup> See the advisory opinion on the European Convention, *Parliamentary Papers, House of Representatives 2003-2004*, 28473, No. 35, p. 2.

<sup>21</sup> See the advisory opinion on the approval of the Treaty establishing a Constitution for Europe, (*Parliamentary Papers, House of Representatives 2004-2005*, 30025 (R 1783), No. 4, p. 2).

convention requested and received comments from numerous segments of European society, and actively consulted representatives of many societal groups in a variety of ways.<sup>22</sup>

The proposed Reform Treaty will be different. It will be drawn up in accordance with the classic procedure, on the basis of a strict and extremely detailed mandate. It will not replace the existing treaties with a single document, as the Treaty establishing a Constitution for Europe was meant to do. This is phrased as follows in the Presidency Conclusions of the Brussels European Council of 21-22 June 2007:

‘The constitutional concept, which consisted in repealing all existing Treaties and replacing them by a single text called “Constitution”, is abandoned.’<sup>23</sup>

By embodying the provisions on the Union’s common foreign and security policy (currently the Second Pillar) in the TEU, the pillar structure will be partly maintained. In that respect the proposed Reform Treaty is in line with the customary amendment procedure for existing European treaties, as applied in the Treaties of Amsterdam and Nice.

### 3.3 Content

In assessing the nature of the proposed Reform Treaty, two elements are particularly important with regard to content: the Charter of Fundamental Rights and the division of competences between the EU and the member states.

#### *The Charter of Fundamental Rights*

The Charter of Fundamental Rights will not be embodied in the proposed Reform Treaty. However, via the reference in Article 6, paragraph 1 of the TEU, the Charter will be binding upon EU institutions and bodies and, to the extent that they implement EU legislation, upon the member states. From a legal point of view, this is above all a clarification of the existing commitment to fundamental rights.<sup>24</sup> Indeed, Article 6 of the TEU already states that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. The second paragraph of Article 6 goes on to

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<sup>22</sup> See also the advisory opinion on the European Constitution (Consultative Referendum) Bill (*Parliamentary Papers, House of Representatives 2002-2003*, 28885, A, p. 2).

<sup>23</sup> See also European Council, Brussels, 21-22 June 2007, Presidency Conclusions, Annexe I, Doc. 11177/07, p. 15.

<sup>24</sup> This is also apparent from the general provisions of the Charter and the accompanying official explanatory notes (see *Official Journal*, 2000, C 364/1).

state that the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR') and as they result from the constitutional traditions common to the member states, as general principles of Community law.

In its advisory opinion on the European Convention,<sup>25</sup> the Council of State noted that, since its solemn proclamation on 7 December 2000, the Charter had played a part in a number of suits brought before the Court of First Instance of the European Communities (CFI), which had above all treated it as a confirmation of fundamental rights already acknowledged in the Community legal order and as an express acknowledgement of their importance.<sup>26</sup> The CFI had also deemed the rights laid down in the Charter to be general legal principles that were common to the constitutional traditions of the member states.<sup>27</sup> The ECJ has since also ruled that 'the principal aim of the Charter, as is apparent from its preamble, is to reaffirm rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [...] ECHR, the Social Charters adopted by the Community and by the Council of Europe and the case law of the Court [...] and of the European Court of Human Rights.'<sup>28</sup>

In the light of the foregoing, the reference to the Charter in the proposed Reform Treaty, as a result of which the Charter becomes binding, should be seen as confirmation that the protection of fundamental rights is an integral part of EU cooperation.<sup>29</sup> However, this does not result in an essential difference compared with the existing situation.

### *The Union and the member states*

A second key element when assessing the proposed Reform Treaty is the division of competences between the Union and the member states. This division will not be substantially affected by the proposed Reform Treaty. However, the Treaty does regulate more specifically the limits of the Union's competences, both horizontally (between EU institutions and bodies) and vertically (between the Union and the member states). For instance, it states that the provision of the TEU on the fundamental principles concerning

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<sup>25</sup> See *Parliamentary Papers, House of Representatives 2003-2004*, 28473, No. 35, p. 13.

<sup>26</sup> See the CFI's judgment on Case T-211/02, *Tideland Signal v. Commission*, Jur. 2002, p. II-3781.

<sup>27</sup> See the CFI's judgment on Case T-54/99, *max.mobil Telekommunikation Service v. Commission*, Jur. 2002, p. II-313.

<sup>28</sup> See the ECJ's judgment on Case C-540/03, *Parliament v. Council*, Jur. 2006, p. I-5769, para. 38. See also the ECJ's judgment of 3 May 2007 on Case C-303/05, *Advocaten voor de wereld VZW v. Council* (no further details available).

<sup>29</sup> In this connection, see also the Council's information on the Charter of Fundamental Rights of the European Union, *Parliamentary Papers, House of Representatives 2000-2001*, 21501-21520, A, p. 3.

competences will specify that the Union will *only* act within the limits of the competences conferred upon it by the member states in the Treaties. Furthermore, the TFU will include a provision clearly specifying that the member states will again exercise their competence to the extent that the Union has decided to cease exercising its competence.<sup>30</sup>

In this connection, the Council of State also refers to the protocol on services of general interest and of general economic interest that will be appended to the TEU and the TFU under the terms of the mandate for the 2007 IGC. The protocol will specify that, in accordance with their different geographical, social or cultural situations, the member states have the essential role and wide discretion in providing, commissioning and organising services of general economic interest and non-economic services of general interest.

The limits of the Union's competences are also reflected in the 'emergency-brake procedures', which apply to such matters as social security, mutual recognition of judicial decisions and definition of criminal offences and penalties in connection with cross-border crime, as well as in the protocol which assigns national parliaments a key role in assessing proposed legislative instruments for compliance with the proportionality and subsidiarity principles.

### 3.4 Symbols

The name of the Treaty establishing a Constitution for Europe reflected a particular vision of European cooperation. The existing treaties were to be repealed and replaced by a treaty which, as a single, binding constitutional document embracing the entire constitutional order, was unprecedented in the Union's political history.<sup>31</sup> The new document no longer pursues such a goal. It does not repeal the existing treaties. The state symbols of European unification that were included in the Constitution for Europe, such as the flag, the anthem and the motto, and the renaming of items of European legislation as 'laws' and 'framework laws', are no longer to be found in the proposed Reform Treaty. Furthermore, it no longer explicitly codifies the supremacy of EU law.<sup>32</sup>

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<sup>30</sup> See European Council, Brussels, 21-22 June 2007, Presidency Conclusions, Annexe I, 11177/07, pp. 17 and 20.

<sup>31</sup> See the advisory opinion on the approval of the Treaty establishing a Constitution for Europe (*Parliamentary Papers, House of Representatives 2004-2005*, 30025 (R 1783), No. 4, p. 2).

<sup>32</sup> Nevertheless, the ECJ's case law on the subject will be maintained. A declaration on this will be adopted by the 2007 IGC. See Brussels European Council, 21-22 June 2007, Presidency Conclusions, Annexe I, 11177/07, p. 16.

The significance of these changes should not be underestimated. EU terminology and symbols are apt to create expectations among citizens, and form potential points of reference for the further development of both EU policy, whose dynamics are inherent in the integration process, and EU case law, with its characteristic emphasis on teleological interpretation. In the past, treaty terminology and symbolism have played an important part in the development of the EU. There is no reason to assume that things will be any different in the future.

In this respect, the proposed Reform Treaty is perfectly clear. Unlike the Treaty establishing a Constitution for Europe, it provides no arguments for a gradual expansion of the EU towards a more explicit state or federation.

### *3.5 Conclusion*

The Council of State concludes that the proposed Reform Treaty will be a treaty whose content, methodology and goals are in keeping with the EU's constitutional development as described in Section 3.1. Taken individually, many of the differences between the proposed Reform Treaty and the Treaty establishing a Constitution for Europe amount in strictly legal terms to shifts in emphasis, changes of form and abolition of symbols; the same was true, but in reverse, of the Treaty establishing a Constitution for Europe in relation to earlier treaties. Taken together, more far-reaching significance should be attached to changes such as the abandonment of the idea of a single written constitution, the decision not to include the Charter of Fundamental Rights, the sharper delimitation of the Union's competences (including those in the protocol on services of general interest and of general economic interest) and the decision not to include the symbols of European unification.

The purpose of all these changes is to rid the proposed Reform Treaty as far as possible of the elements from the Treaty establishing a Constitution for Europe which could have laid a basis for the development of the EU into a more explicit state or federation. This means that the proposed Reform Treaty is substantially different from the Treaty establishing a Constitution for Europe.

## 4. Approval of the proposed Reform Treaty

### *4.1 Approval of treaties in general*

Under the Dutch constitutional system, the power to make the Kingdom of the Netherlands party to a treaty lies with the government. Except where prior approval is not required, treaties to which the government believes the Kingdom should accede must, partly because this is a requirement of international law,<sup>33</sup> be submitted to parliament for approval as soon as possible. Parliament uses this approval procedure to decide whether the Kingdom should accede to a given treaty.

The Dutch Constitution includes specific arrangements for treaties containing provisions that either conflict with the Constitution or require measures to be taken that conflict with it. Under Article 91, paragraph 3 of the Constitution, the Kingdom may accede to such a treaty without the Constitution having to be amended before the treaty comes into force in respect of the Kingdom, provided that the act of approval has been adopted in both houses of parliament by at least two-thirds of the votes cast.<sup>34</sup> The Constitution makes no distinction between bilateral and multilateral treaties as regards their approval. Yet in actual fact there is a difference that must be taken into account when treaties are approved. If a bilateral treaty is rejected, the status quo simply continues. However, if a multilateral treaty is rejected by only one or a few of the parties, that is usually not the case in practice. A party that rejects such a treaty may rapidly find itself isolated.

#### *4.2 Use of referendums when approving treaties*

As indicated in the previous section, the Dutch Constitution includes self-contained arrangements for the accession of the Kingdom to treaties. These do not provide for a referendum of any kind. The question is whether the Constitution does nevertheless offer any scope for this. The Council of State discussed this in, *inter alia*, its 2005 Annual Report.<sup>35</sup>

##### *(a) Binding referendums*

The prevailing view as to whether binding referendums are permissible is that they should only be permitted if the Constitution makes express provision for this. Article 81 of the Constitution states: 'Acts of Parliament shall be enacted jointly by the Government and the States General.' Government and parliament are thus jointly – and exclusively – responsible

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<sup>33</sup> See Article 18 of the Vienna Convention on the Law of Treaties, *Treaty Series 1972*, 51.

<sup>34</sup> In fact, the Council does not consider Article 91, paragraph 3 of the Constitution applicable to the approval of the proposed Reform Treaty as referred to in the conclusions of the European Council held on 21-22 June 2007, since the treaty does not contain provisions that conflict with the Constitution or require measures to be taken that conflict with it.

<sup>35</sup> See Council of State, *Jaarverslag [annual report] 2005*, pp. 54-57.

for adopting Acts of Parliament. Acts approving treaties are no exception. A binding legislative referendum would require a constitutional amendment.

*(b) Non-binding referendums*

Here things are less clear-cut. There is nothing in the Constitution to prevent the legislator from holding such referendums on an *ad hoc* basis, provided that it indicates that there is a special justification for departing from the self-contained arrangements for approving treaties and provided that the referendum procedure is governed by an Act of Parliament.<sup>36</sup> Mere precedent will not suffice. That would create a substantive basis for the referendum as a structural instrument (in this case, for use when approving treaties) which would not be in keeping with the self-contained arrangements in the Constitution.

In determining what may be deemed a special justification for holding a non-binding referendum when approving treaties, the Council of State believes that the following factors must in any case be taken into account.

(1) It is important to examine whether the content, methodology and goals of the treaty, taken together, are so far-reaching as to justify holding a consultative referendum in addition to the normal constitutional approval procedure.

(2) When deciding whether to hold a referendum on the approval of a treaty, it is important to take account of the difference between bilateral and multilateral treaties.

(3) It is important to consider whether an *ad hoc* referendum is a suitable instrument for involving citizens in the decision-making process. Referendums should not become a means of legitimisation that politicians and members of parliament can use at will to promote their own views.<sup>37</sup>

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<sup>36</sup> See the European Constitution (Consultative Referendum) Act (*Parliamentary Papers, House of Representatives 2002-2003*, 28885, A, p. 1). See also the final report by the National Advisory Committee on the Relationship between Voters and Policymaking, The Hague 1985, pp. 81-89, and the government's memorandum on that report (*Parliamentary Papers, House of Representatives 1987-1988*, 18807, No. 9, p. 26).

<sup>37</sup> There is no such risk with *advisory* referendums, which are initiated by citizens. See the Council's advisory opinion on the Bill proposed by MPs Duyvendak, Dubbelboer and Van der Ham stating that there are grounds to consider an amendment to the Constitution introducing provisions on the corrective referendum (*Parliamentary Papers, House of Representatives 2005-2006*, 30174, No. 5, pp. 1-2) and the Council's advisory opinion on the Bill proposed by MP Wilders on the holding of a consultative referendum on the accession of Turkey to the European Union (the Accession of Turkey (Consultative Referendum) Bill) (*Parliamentary Papers, House of Representatives 2005-2006*, 30309, No. 4, pp. 1-2).



(4) Of crucial importance in all referendums is whether a clear, unequivocal choice can be formulated.

(5) It is important to know whether, after a non-binding referendum, the legislator will take a separate decision on the act of approval concerned and whether it will then have genuine latitude to disregard the result of the referendum.<sup>38</sup> If the government or parliamentary parties indicate that they will in any case abide by the result of the referendum, it can no longer be deemed non-binding.<sup>39</sup>

These are the factors the government should weigh up when determining whether it is possible or desirable to hold a non-binding referendum on the approval of the proposed Reform Treaty. Another relevant issue in this case is whether the government believes that the questions raised by the referendum on the Treaty establishing a Constitution for Europe have been answered. If so, what special justification can there be to consult citizens once more by means of a non-binding referendum?

#### 4.3 Alternatives

As indicated in the Council of State's advisory opinion on the consequences of the European Union's institutional structures for national institutions of state, the system of representative democracy offers other, more permanent ways of involving citizens in the EU.<sup>40</sup>

In that opinion, the Council of State made a number of recommendations to bring the Dutch legal order more into line with that of the EU. The main recommendations were as follows:

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<sup>38</sup> See also the Council's advisory opinion on the Bill proposed by MPs Duyvendak, Dubbelboer and Van der Ham, prescribing rules on the advisory referendum (the Advisory Referendum Bill) (*Parliamentary Papers, House of Representatives 2005-2006*, 30372, No. 7, p. 2).

<sup>39</sup> The Council of State has already pointed this out in its advisory opinion on the European Constitution (Consultative Referendum) Bill (*Parliamentary Papers, House of Representatives 2002-2003*, 28885, A, p. 4). In that opinion, the Council of State stated that the reference to legitimacy in the preamble and the explanatory memorandum to the Bill was unfortunate, as it could imply – quite wrongly – that approval of the Treaty establishing a Constitution for Europe would be legally impossible, or in any case less correct, in the absence of a referendum. The Council of State also recommended that the passage on the meaning of consultative – but in practice binding – referendums be deleted from the explanatory memorandum.

<sup>40</sup> See the advisory opinion on the European Constitution (Consultative Referendum) Bill (*Parliamentary Papers, House of Representatives 2002-2003*, 28885, A, p. 4) and the advisory opinion on the consequences of the European Union's institutional structures for national institutions of state (*Parliamentary Papers, House of Representatives 2005-2006*, 29993, No. 22, pp. 1-2).

- Provide better information on the meaning of the EU, its functioning and the links between the EU and the Netherlands, for example by encouraging systematic emphasis on European topics in education and the media.
- Strengthen the links between the EU and its citizens by ensuring that independent citizens' organisations and groups of citizens who work in the public interest are involved at an early stage in the preparation of national positions on EU decisions, for instance through parliamentary hearings.
- Strengthen parliamentary scrutiny of Dutch input into the EU decision-making process by applying the subsidiarity test and by treating EU legislative initiatives as though they were national bills.
- Strengthen political management at ministerial and cabinet level in order to develop a specific vision of European cooperation.<sup>41</sup>

Since that opinion was published in 2005, a good deal has changed in the Netherlands with regard to the last two items. The two houses of parliament have set up a Temporary Committee on the Subsidiarity Test, which assesses pre-selected items of proposed EU legislation for compliance with the subsidiarity and proportionality principles set out in the TEC;<sup>42</sup> they initiate debates on Europe more often;<sup>43</sup> they have improved their gathering of information on EU topics, among other things by involving members of the European Parliament (MEPs) more closely in the work of the national parliament;<sup>44</sup> permanent parliamentary committees are involved more closely in EU topics that concern them; government debates annually with the House of Representatives on the EU's programme of legislation;<sup>45</sup> and the Prime Minister now has a greater part to play in placing topics on the agenda for the European Council.<sup>46</sup>

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<sup>41</sup> See *Parliamentary Papers, House of Representatives 2005-2006*, 29993, No. 22.

<sup>42</sup> See *Parliamentary Papers, House of Representatives 2005-2006*, 30389, No. 1.

<sup>43</sup> See, for example, *Parliamentary Papers, House of Representatives 2006-2007*, 21501-21520, Nos. 344 and 356.

<sup>44</sup> See the amended motion by MP Timmermans *et al.* on full participation by heads of delegations of Dutch MEPs in the annual debate on the State of the European Union (*Parliamentary Papers, House of Representatives 2005-2006*, 30303, No. 19).

<sup>45</sup> See, for example, *Parliamentary Papers, House of Representatives 2006-2007*, 22112, No. 480.

<sup>46</sup> See *Bulletin of Acts and Decrees 2006*, 557.

Especially in the light of the recommendations by the National Convention,<sup>47</sup> the Council of State feels that the first two of the aforementioned recommendations should also be acted on, to encourage citizens to participate and be involved in the EU.

#### *4.4 Conclusion*

To sum up, the Council of State notes that the Constitution includes self-contained arrangements for the approval of treaties. A consultative referendum on the approval of the proposed Reform Treaty as referred to in the conclusions of the European Council – unlike the approval of all the current EU treaties that are comparable to the proposed Reform Treaty – requires a special justification, and the factors mentioned in Section 4.2 must in any case be taken into account. This particularly applies in the present instance, which involves a renegotiated multilateral treaty with 26 other member states. Regardless of what decision is reached on the matter, the Council of State reiterates its recommendation that efforts be made to encourage citizens to participate and be involved in the EU.

#### 5. Summary

The government asked the Council of State for its views on the nature of a treaty as referred to in the conclusions of the European Council. Should this lead to findings regarding the approval of the treaty, the government asked the Council of State to give these also. The Council of State's findings are as follows.

First of all, it points to the Netherlands' objectives in relation to, and its interest in the process of European integration, as well as the need to develop a vision of the kind of Europe the Netherlands would like to see. Since European and Dutch institutional structures are so closely interwoven, it is impossible to separate a vision of European cooperation and the Netherlands' place within it from a vision of the Netherlands as a state. A vision of the EU requires a vision of the Netherlands and its future.

The Council of State notes that the content, methodology and goals of the proposed Reform Treaty are in keeping with the EU's constitutional development. Taken individually, many of the differences between the proposed Reform Treaty and the Treaty establishing a Constitution for Europe amount in strictly legal terms to shifts in emphasis, changes of form and abolition of symbols; the same was true, but in reverse, of the Treaty establishing a

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<sup>47</sup> See National Convention, *Hart voor de publieke zaak* ('Commitment to government'), September 2006.

Constitution for Europe in relation to earlier treaties. However, the purpose of these changes, taken together, is to rid the proposed Reform Treaty as far as possible of the elements from the Treaty establishing a Constitution for Europe which could have formed a basis for the development of the EU into a state or federation. That the goals are clearly different is apparent from the emphasis on the role of national parliaments, the limits to the competences of the EU, the 'emergency-brake procedures' and the protocol on services of general interest and of general economic interest. All this means that the proposed Reform Treaty is substantially different from the Treaty establishing a Constitution for Europe.

The Council of State also believes that, in assessing the possibility and desirability of holding a consultative referendum on the approval of the proposed Reform Treaty, account must first be taken of the restrictions laid down in the Constitution. This currently makes no provision for a binding referendum. The legislator can decide to hold a non-binding referendum on an *ad hoc* basis, but this must be based on a special justification. Mere precedent will not suffice. That would create a substantive basis for the referendum as a structural instrument (in this case, for use when approving treaties) that is not in keeping with the self-contained arrangements in the Constitution.

In determining what may be deemed a special justification for holding a non-binding referendum when approving treaties, the Council of State believes that the following factors must in any case be taken into account.

(1) It is important to examine whether the content, methodology and goals of the treaty, taken together, are so far-reaching as to justify holding a consultative referendum in addition to the normal constitutional approval procedure.

(2) When deciding whether to hold a referendum on the approval of a treaty, it is important to take account of the difference between bilateral and multilateral treaties.

(3) It is important to consider whether an *ad hoc* referendum is a suitable instrument for involving citizens in the decision-making process. Referendums should not become a means of legitimisation that politicians and members of parliament can use at will to promote their own views.<sup>48</sup>

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<sup>48</sup> There is no such risk with *advisory* referendums, which are initiated by citizens. See the Council of State's advisory opinion on the Bill proposed by MPs Duyvendak, Dubbelboer and Van der Ham stating that there are grounds to consider an amendment to the Constitution introducing provisions on the corrective referendum (*Parliamentary Papers, House of Representatives 2005-2006*, 30174, No. 5, pp. 1-2) and the Council of State's advisory opinion on the Bill proposed by MP Wilders on the holding

(4) Of crucial importance in all referendums is whether a clear, unequivocal choice can be formulated.

(5) It is important to know whether, after a non-binding referendum, the legislator will take a separate decision on the act of approval concerned and whether it will then have genuine latitude to disregard the result of the referendum.<sup>49</sup> If the government or parliamentary parties indicate that they will in any case abide by the result of the referendum, it can no longer be deemed non-binding.<sup>50</sup>

These are the factors that the government should weigh up when determining whether it is possible or desirable to hold a non-binding referendum on the approval of the proposed Reform Treaty. Another relevant issue in this case is whether the government believes that the questions raised by the referendum on the Treaty establishing a Constitution for Europe have been answered. If so, what special justification can there be to consult citizens once more by means of a non-binding referendum?

Finally, the Council of State reiterates its recommendation that efforts be made to encourage citizens to participate and be involved in the EU.

The Council of State has no objection to the publication of this report.

Herman Tjeenk Willink

Vice-President of the Council of State

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of a consultative referendum on the accession of Turkey to the European Union (the Accession of Turkey (Consultative Referendum) Bill) (*Parliamentary Papers, House of Representatives 2005-2006*, 30309, No. 4, pp. 1-2).

<sup>49</sup> See also the Council of State's advisory opinion on the Bill proposed by MPs Duyvendak, Dubbelboer and Van der Ham, prescribing rules on the advisory referendum (the Advisory Referendum Bill) (*Parliamentary Papers, House of Representatives 2005-2006*, 30372, No. 7, p. 2).

<sup>50</sup> The Council of State has already pointed this out in its advisory opinion on the European Constitution (Consultative Referendum) Act (*Parliamentary Papers, House of Representatives 2002-2003*, 28885, A, p. 4). In that report, the Council of State stated that the reference to legitimacy in the preamble and the explanatory notes to the proposed initiative was unfortunate, as it could imply – quite wrongly – that approval of the Treaty establishing a Constitution for Europe would be legally impossible, or in any case less correct, in the absence of a referendum. The Council also recommended that the passage on the meaning of consultative – but in practice binding – referendums be deleted from the explanatory notes.

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