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STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

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**COMMITTEE OF EXPERTS ON THE SYSTEM OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (DH-SYSC)**

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# Overview of the exchange of views held by the DH-SYSC at its 1st meeting (25-27 April 2016) on the verification of the compatibility of legislation with the Convention (arrangements, advantages, obstacles)

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INTRODUCTION

1. At the 9th meeting of DH-GDR (17-20 November 2015), it was decided that the first exchange of information of the DH-SYSC on the implementation of the Convention and the execution of the judgments of the Court would focus on the mechanisms for ensuring the compatibility of legislation with the Convention (arrangements, advantages, obstacles). The CDDH endorsed this decision at its 84th meeting (see CDDH(2015)R84, para. 8).

2. To facilitate this exercise, the Secretariat had prepared the document DH-SYSC(2016)001, containing the text of Committee of Ministers Recommendation (2004)5 on this subject, the previous work carried out by the CDDH in this field in 2008 (Review of the implementation of Recommendation (2004)5 of the Committee of Ministers to the member States on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights)[1] as well as a selection of relevant texts on this issue.

3. At its first meeting (25-27 April 2016), the Committee of experts on the system of the European Convention on Human Rights (DH-SYSC) held a productive exchange of views, on the basis of relevant excerpts of national reports on the implementation of the Brighton Declaration (doc. DH-SYSC(2016)002 REV), and written contributions of the experts (doc. DH-SYSC(2016)006 REV regularly updated), on the mechanisms for ensuring the compatibility of legislation with the Convention (arrangements, advantages, obstacles), in response to the following questions:

1) *What mechanisms have been put in place at national level to ensure the compatibility of legislation (whether draft legislation, laws in force or administrative practice) with the Convention? How do these work (whether or not they are systematic, the competent authorities and any consultations – whether optional or mandatory)? What are the advantages of the mechanism chosen?*
2) *What obstacles have been encountered in establishing or applying these mechanisms? How have these been overcome?*
3) *Is there any assessment (or planned assessment) of the appropriateness and effectiveness of the mechanisms in question? If so, how does this work? What obstacles have been encountered in setting up or carrying out such an assessment?*

4. Concerning the follow-up on this exercise, the Committee decided that all contributions will be published on the specific web page which will be updated regularly. The Secretariat would draw up an "overview of good practice" based on all the sources quoted above. To that end, the experts were asked to submit any additional information to the Secretariat (DGI-CDDH-Reform@coe.int) by Thursday 30 June 2016. The "overview of good practice" would be submitted to the experts by written procedure in autumn 2016 with a view to its transmission to the DH-SYSC for adoption

[1] Extract from Activity report: Sustained action to ensure the effectiveness of the implementation of the ECHR at national and European levels (doc. CDDH(2008)008 Add. I).

at its 2nd meeting (8-10 November 2016). At its 2nd meeting, the DH-SYSC took note of the state of progress of the overview on the exchange of views and instructed the Secretariat to finalise the overview and to address it to the experts by Tuesday 20 December 2016. Experts would then be invited to address any drafting proposals by Friday 20 January 2017 in order for the Secretariat to elaborate a definitive version of the text for adoption during the 3rd meeting of the DH-SYSC (10-12 May 2017).

5. The present document addresses the three themes of the exchange of views in light of Recommendation (2004)5 (Appendix I), namely the compatibility of draft legislation, existing legislation and administrative practice with the Convention, in three distinct parts, even if particular focus is given on the first theme, which was at the heart of the exchange of views of the DH-SYSC. The advantages of the mechanisms put in place in the member States as well as the obstacles encountered are addressed under each part; although this choice may lead to repetitions it allows each part to stand autonomously. A fourth part is devoted to the question of the assessment of the appropriateness and effectiveness of the existing mechanisms. The first three parts contain a presentation of the verification mechanisms. It was deemed coherent to base this presentation on the review exercise carried out by the CDDH in 2008 referred to in § 2 above (hereafter "the 2008 review"), updating and revising the latter where appropriate. As to the sources, the present document is based primarily on the written and oral contributions made in the framework of the 2016 exchange of views,[2] which constitutes the most recent input on the topic in question. The provisional version of the document was enriched on the basis of new contributions with a view to its transmission to the DH-SYSC. It is recalled that relevant information will be also brought forward in the future, in the framework of the responses of member States to the Brussels Declaration. The present document contains already elements from the national reports provided to date.[3]

6. This introduction cannot be concluded without two preliminary observations. Firstly, it should be recalled that the issue of compatibility of domestic law with the Convention has been the subject of Council of Europe work before the adoption of the abovementioned Recommendation, namely between 1994 and 1996. With the accession of new member States to the Council of Europe, compatibility reviews have become a regular, important activity among others, for the Directorate of Human Rights' section in charge of relations with Central and East European countries. Following the adoption of Recommendation (2004)5, its importance was underlined at the High-Level Conferences (in the Brighton Declaration of 20 April 2012, item A.9.c.ii) and more recently in the Brussels Declaration of 27 March 2015, item B.1.d)). The CDDH addressed this issue on numerous occasions.[4] More recently, in its report on the longer-

[2] The term "2016 exchange of views" in this document refers to both the written submissions and oral presentations.

[3] As of 21 April 2017, 23 member States have submitted their reports on the national reports regarding the implementation of the Brussels Declaration.

[4] CDDH opinion on issues to be covered at the Interlaken Conference, doc. CDDH(2009)019 Addendum I; CDDH contribution to the Ministerial Conference organized by the United Kingdom Chairmanship of the Committee of Ministers, doc. CDDH(2012)R74 Addendum III; CDDH report on measures taken by the member States to implement relevant parts of the Interlaken and Izmir Declarations, doc. CDDH(2012)R76 Addendum I.

term future of the system of the European Convention on Human Rights adopted on 11 December 2015 (paras. 38, 52-54, 58 and 71), the CDDH concluded:

> "Governments should fully inform parliaments on issues relating to the interpretation and application of Convention standards, including the compatibility of (draft) legislation with the Convention (para. 197 v));
>
> Sufficient expertise on Convention matters should be made available to members of parliament, where appropriate, by the establishment, where appropriate, of parliamentary structures assessing human rights and/or by means of the support of a specialised secretariat and/or by means of ensuring access to impartial advice on human rights law, if appropriate in cooperation with the Council of Europe (para. 197 vi));
>
> There is a need for national authorities to check in a systematic manner the compatibility of draft legislation and administrative practice (including as expressed in regulations, orders and circulars) with the Convention at an early stage in the drafting process and consider, where appropriate, substantiating in the explanatory memorandum to draft laws why the draft bill is deemed compatible with the requirements of human rights provisions (para. 197 vii));
>
> The CDDH also stresses the importance of enhanced recourse by member States to the existing mechanisms of the Council of Europe (among them the Venice Commission), which offer the possibility of assessing compliance of legislation with Convention standards (para. 197 viii));
>
> The CDDH reiterates the significant role that national human rights structures and civil society can play in the implementation of the Convention. […] (para. 197 ix))".

7. Secondly, the issues addressed by Recommendation (2004)5 are closely linked with the measures taken by States Parties to incorporate the Convention in their domestic legal order, to foster greater awareness of the Convention standards[5] that include, primarily, publication and dissemination of the case-law and all kinds of specialist works (reports, bulletins or circulars) or events with participation of national stakeholders (conferences, seminars, workshops). These measures are presented in the CDDH report on the measures taken by the member States to implement relevant parts of the Brighton Declaration.[6] Furthermore, the issues addressed are also related to the measures, which are taken by member States to enhance the domestic capacity for the execution of the Court's judgments in light of Recommendation CM/Rec(2008)2 on efficient domestic capacity for rapid execution of judgments of the European Court of Human Rights, and which were examined in the framework of the work carried out by the DH-SYSC and its drafting group DH-SYSC-REC with a view to the drafting of a guide to good practice of the implementation of the said recommendation.

[5] See also § 13 of the Appendix to Recommendation (2004)5.
[6] Doc. CDDH(2016)R85 Addendum 1.

## I. COMPATIBILITY OF DRAFT LEGISLATION WITH THE CONVENTION

8. The compatibility of draft legislation with the Convention is subject to the most elaborate verification mechanism(s). Systematic supervision of draft laws is generally carried out at the executive and then at the parliamentary level and even with the involvement of the Constitutional Court. National human rights structures ("NHRS")[7] are also consulted.

9. In many member States, the drafters of the law are requested to examine the compatibility of their draft with the Convention (the Czech Republic, Denmark, Finland, Germany, Iceland, Ireland, Italy, Lithuania, the Netherlands, Norway, Romania, the Russian Federation, the Slovak Republic, Sweden, Switzerland, United Kingdom). This does not preclude these States from having additional subsequent verification carried out by other bodies.

### i) The verification mechanisms

*Verification by the executive*

10. In general, verification of conformity with the Convention and its protocols starts **within the ministry which initiated the draft law** (Croatia, France, Germany, Latvia, Slovenia). In France, for example, each ministry has one or several divisions in charge of drafting texts. In Poland, before a decision is taken to draft a new statute, legislative drafting rules require the preparation of an analysis of the current legal order taking into account human rights protection treaties binding Poland.

11. In addition, in a large number of member states, special responsibility is entrusted to **certain ministries or departments**. In most cases it is the Chancellery, the Ministry of Justice (Austria, Germany, the Netherlands) and/or the Ministry of Foreign Affairs that have to verify such conformity. In the Netherlands, although the Ministry of Justice bears primary responsibility, this does not detract the other ministries from the responsibility of ensuring the highest quality of legislation. Consultations between ministries may also be held with regard to the verification of the conformity of draft laws (the Czech Republic, Germany, the Netherlands).

12. In many member States, **the Government Agent** has a leading role in advising as to whether draft laws are compatible with the provisions of the Convention (Belgium, Croatia, Cyprus, the Czech Republic, Estonia, Germany, Latvia, Poland, Romania, Ukraine). The Agent is therefore empowered, on this basis, to submit proposals for the amendment of these draft laws or of any new legislation that is envisaged. For example, in accordance with the presidential decree No. 657 (as amended on 25 July 2014), the Ministry of Justice of the Russian Federation, together with other competent state authorities, analyses judgments delivered by the Constitutional Court and the European Court with the aim of making proposals for the reform of the legislation currently in force and the further implementation of the said proposals.

[7] They include both national human rights institutions ("NHRIs"), which comply with the Paris Principles and other bodies and offices engaged with human rights at national level.

13. Some member States have **a specialised office** (a specific entity within a ministry, for example) competent to examine draft laws.[8] This office has an in-depth knowledge of the Convention and of the case-law of the Court (Austria, Cyprus, Georgia, Greece, Lithuania, Monaco, the Slovak Republic, Sweden, Switzerland). In some other member States, there are no specialised offices but the officers in charge of the examination of draft laws are required to have a good knowledge of the European Convention on Human Rights and of the case-law of the Court.

14. The national law increasingly provides that when a draft text is forwarded to Parliament, it should be accompanied by an extensive explanatory memorandum, which must also indicate and set out possible questions under the constitution and/or the Convention (e.g. Estonia). In some member States, it should be accompanied by a formal statement of compatibility with the Convention (Bosnia and Herzegovina, Cyprus, the Czech Republic, Estonia, Latvia, Lithuania, the Netherlands, the Slovak Republic, Slovenia, Switzerland, United Kingdom). In Denmark, the Ministry of Justice has emphasized in its annual official letter (2015) concerning legislative matters to all the ministries that, if a proposal entails essential considerations regarding the Convention, these should be reflected therein.

*Verification by the Parliament*

15. In addition to verification by the executive, examination is also undertaken by the legal services of the Parliament and/or its **different parliamentary committees** (Germany, Ireland). In the Czech Republic, the Parliamentary Institute, as a research unit belonging to Parliament, may be seized. In Romania, projects of normative acts are drafted in consultation with the Legislative Council. The latter is a specialised advisory body of Parliament, which follows the compatibility of the said projects with the constitution and international treaties.

16. One or several parliamentary committees may be responsible for the systematic and continuous verification of the compatibility of all draft laws (Human Rights Committee in Cyprus, Croatia, Latvia, Lithuania, Romania, United Kingdom; Constitutional Law Committee in Austria, Finland, Italy, Portugal, the Slovak Republic; Legal Affairs Committee in Cyprus, Germany, Lithuania). In Latvia, the Government Agent's Office is invited to provide its opinion and, if deemed necessary, to participate in those sessions. Otherwise, it can happen that committees in charge of studying draft laws more generally are also requested to examine them with a view to their compatibility with human rights standards (Andorra, Bulgaria, Croatia, Denmark, Greece, Iceland, Poland, Sweden). In the Netherlands, the Parliament mostly calls on the expertise of academics and the Netherlands Institute for Human Rights. If the parliamentary committee in charge of examining the compatibility of draft laws considers that there are inconsistencies with the Convention, it may request additional information from those who drafted the law (Finland).

17. An additional example is that of Croatia where the Parliament organises presentations, with the assistance of relevant parliamentary committees, in order to

[8] See the contributions received at:
http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/Compatibility-en.asp

inform a public that may be composed of members of parliament, representatives of the executive and judiciary authority, as well as by legal experts.

*Consultations*

18. Other consultations to ensure compatibility with human rights standards can be envisaged at various stages of the legislative process. In some cases, consultation is optional. In others, notably if the draft law is likely to affect fundamental rights, consultation of a specific institution is compulsory, as established by law.

19. **Compulsory consultations** include, *inter alia*, consultation of a higher court, like the State Council (Belgium, France, Luxembourg, the Netherlands, Spain) or the Supreme Court (Cyprus. If the government has not consulted the required court, the text, or as is the case of France, ordinances and some decrees, will be tainted by procedural irregularity. The example of Ukraine where the consultation with the Government Agent is mandatory can also be noted. In Norway, draft legislation shall be subject to public consultation, unless very narrow exceptions apply. In the consultation process, anyone shall be allowed to comment on the draft.

20. Consultation of a higher court can also be **optional**, as it is the case in numerous member states (see notably the Czech Republic, Poland, Portugal). The example of the Council on Legislation should also be mentioned (Sweden). This is a body whose members are former or current justices of the Supreme Court and of the Supreme Administrative Court and whose task is to ensure the constitutionality of draft bills, which also includes the compatibility test with the Convention.

21. In some States, it can also be provided for that the Head of State may refer to the Attorney General for its opinion on the text in question (Cyprus), or refuse to sign the draft law and send it back to Parliament (Estonia, the Slovak Republic, Portugal).

22. Consultation, be it optional or compulsory, **of non-state actors** competent in the field of human rights may also be foreseen. In Austria, the ministry concerned carries out a general consultation procedure inviting interested parties. Other consulted bodies may be independent national institutions for the promotion and protection of human rights (Denmark, France, Greece, Ireland, Latvia, Luxembourg, the Netherlands, Portugal), non-governmental organisations (Austria, Finland, Latvia, Sweden), individual experts (Latvia, Liechtenstein), institutes or centres for protection of human rights (the Netherlands), political parties (Switzerland) or professional associations (Austria, the Netherlands). In other member States, regional and local government offices, professional associations, non-governmental organisations, academia, and civil society are invited to submit their comments concerning the draft law (Austria, Poland, the Slovak Republic).

23. Draft laws are also referred to the Council of Europe for expertise (Armenia). However, this request for an opinion does not replace an internal examination of compatibility with the Convention.

ii) Examples of mechanisms aimed at increasing the effectiveness of the verification

*Impact assessments of draft legislation*

24. In France, the text justifying the draft law is accompanied by an impact assessment containing information on how the draft law would function within the framework of European law and its impact on the domestic legal order. When the draft law, as well as its justification, and its impact assessment are finalised by the concerned ministry, these three documents are submitted for analysis to the Secretariat General of the Government under the authority of the Prime Minister. In Ireland, in the course of preparing draft legislation, Government Departments should use the mechanism of a Regulatory Impact Assessment which (depending on the context of the legislation) may include a chapter relating to human rights. A Regulatory Impact Assessment is a tool used when a new regulation or regulatory change is being considered to address particular policy issues, in order to explore alternative options to the use of regulation. The Regulatory Impact Assessment identifies the objectives to be achieved and examines the possible impacts of the various options available. In relation to the latter, the relevant Government Department assesses whether the proposals impinge disproportionately on the rights of citizens. Where significant human rights impacts are identified, a high level of analysis of the proposed regulation is required. In examining such impacts, consideration is given to the European Convention on Human Rights. In the Netherlands, the officials involved in the examination of draft legislation have at their disposal an integral framework for the assessment of legislation that includes several models for testing draft legislation against the fundamental rights laid down in the Convention and its Protocols.

*Compatibility guides/human rights training*

25. In the Czech Republic, the office of the Government Agent has been developing a methodological textbook (interactive compatibility guide) for the attention of government officials responsible for the drafting of new legislation, as well as for members of Parliament, on the manner in which to proceed to the verification of the compatibility of draft texts with the Convention. This textbook will be published on the internet. This initiative is accompanied by the recent establishment of a database accessible from the internet containing the translations or summaries of the Court's case-law, as well as the publication for more than three years, of a quarterly newsletter containing a selection of summaries reflecting the Court's recent case-law. It is envisaged to propose training sessions to civil servants of the ministries' legal services in order to familiarise them with the methodological textbook. The same type of guide was put in place in Switzerland by the Federal Office of Justice: https://www.bj.admin.ch/dam/data/bj/staat/legistik/hauptinstrumente/gleitf-f.pdf

26. In Poland, the scope of the professional training of legislators organised by the Government Legislation Office includes, in accordance with the ordinance of the Prime Minister, the impact of international obligations of Poland in the area of human rights on the law-making process.

*Public consultation mechanisms*

27. Public consultation mechanisms exist in certain countries (*e.g.* Greece). Recently, the Croatian government has set up a new website (https://savjetovanja.gov.hr) to facilitate public consultations. It enables the user to see all open consultations in one place, and the subsequent reports on results of the public consultation. It also enables registered users to comment directly on a specific provision, or to make comments on the draft proposal in general.

iii) Advantages-obstacles

28. It was unanimously noted that the co-existence/co-intervention of a multitude of actors to verify the compatibility of draft legislation with the Convention allows for a strong system of checks and balances. The functioning problems of the *ex ante* mechanism may also be counterbalanced in great part by the existence of the *ex post* control. Among the obstacles/difficulties encountered, the following can be noted:

- Lack of resources: limited human and financial resources to analyse the fast-evolving case law of the Court at different levels of governance and to address all the possible Convention issues in a timely manner;
- Time constraints: short time limits that may prevent the Office of the Government Agent to perform in-depth analyses of all possible aspects of draft legislation;
- Obstacles in interpreting the Convention in the light of domestic legislation: lack of a relevant Court ruling concerning an issue similar to the one addressed in the draft legislation that could serve as a point of reference.
- Difficulties stemming from the need to take into account differences in the legal systems of other member states to which the Court's judgments or decisions apply;
- Insufficient training/awareness of the Convention and the scope of its application which may lead to formal, and not substantial, verification of the draft normative text or preclude the competent authorities from identifying that the particular draft legislation might involve HR issues.

29. The mechanisms referred to in §§ 24-25 above are key to address some of the above issues.

## II. COMPATIBILITY OF EXISTING LEGISLATION WITH THE CONVENTION

30. During the 2008 review, it was noted that the main general mechanism to ensure that existing laws are compatible with the standards laid down in the Convention is the referral to a court, and where the case might be, the Constitutional Court. The information provided in the framework of the 2016 exchange of views demonstrated that, at present, the involvement of the executive, and in particular of the Government Agents, becomes increasingly significant in this area due, in particular, to their role in the process of the execution of the Court's judgments.

i) The verification mechanisms

*Verification by the executive*

31. In some member States, a specialised office within a ministry or a person in charge of human rights or Convention matters (coordinators, plenipotentiaries for human rights etc.) is entrusted to examine all new judgments of the Court and to inform the ministries or the relevant departments of the ministry which are responsible for the legislation concerned as well as the domestic courts.

32. In a large number of member States, the Government Agent provides information to all relevant authorities on all judgments and decisions rendered by the Court in individual applications brought against the State concerned. The Agent may also be empowered, on this basis, to submit proposals for the amendment of existing laws or of any new legislation which is envisaged (Estonia, Germany, Greece, Poland, the Russian Federation). In some member States, all the ministries are responsible to check and adjust the laws under their purview.

33. In many member states, the combination of the above approaches is applied, as for instance in the Netherlands, where the system is based on two principles: a) the primary responsibility as to the policy content lies with the relevant ministry; b) overall expertise on the Convention is concentrated in contact points with a more general responsibility of informing the other ministries.

34. In some member states, in addition to the role of the individual ministries, specialised offices or the Government Agent, special structures involving various ministries and other relevant institutions, are established to follow the Court case-law, analyse the domestic law and propose amendments which are necessary to implement the Court judgments, such as e.g. inter-ministerial or inter-institutional committees (the Czech Republic, Poland).

35. In some member States, legislative works aimed at implementing the Court's judgments may be regulated more explicitly. For instance, in Romania, following a judgment of the Court where it is found that a domestic act is in violation of the Convention, the Government must present to Parliament a draft law within three months following the notification of the Court's judgment. In Poland, in accordance with the internal order of the Minister of Justice, the Legislative Department institutes legislative works on its own initiative if they are necessary to implement a ruling of the European Court of Human Rights.

36. Amendments to domestic acts may also be proposed following judgments against other States Parties, as for instance in Belgium following the judgment in *Salduz v. Turkey*. In Latvia, in the light of the Court's judgments in the cases brought against other States in which Latvia had intervened as a third party, numerous amendments to the *Civil Procedure Law* and other relevant legislative acts were introduced for improving regulation on child abduction, which is closely connected with the Hague Convention of 25 October 1980 on the *Civil Aspects of International Child Abduction*. These amendments introduced a procedure providing for forced execution of the order

for the child's return to the country of his or her domicile. The newly drafted legal framework was based on the Court's case-law; it introduced a clear mechanism on the child's return, on the one hand, and ensured the protection of child's rights, on the other hand. In addition, following friendly settlements and unilateral declarations, the practice of issuing administrative circulars in order to guide authorities on how to interpret the law according to the case-law of the Court was explored (Spain).

*Verification by the judiciary*

37. In most cases, judicial institutions are only required to examine the compatibility of an existing law when a case raises compatibility issues (in such circumstances they apply the relevant provision of the Convention and not the law in question). It is very rarely possible to bring a case directly before these bodies with a view to challenging an existing law, if the person who brought the case is not necessarily affected by the implementation of this law.

38. In many member States a case may be lodged with the **Constitutional Court** to challenge an existing law (Armenia, Austria, Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Estonia,[9] Germany, Hungary, Latvia, Lithuania, Poland, Portugal, Romania, Russian Federation, Serbia, the Slovak Republic, Slovenia, Spain, Ukraine). In most of them, the case may be referred to the Constitutional Court by the highest State authorities (Head of State, Head of the Government, Parliament, Chair of the Supreme Court, Chancellor of Justice…). Sometimes, the Constitutional Court can study it *ex officio* (the Czech Republic, Hungary, Serbia), or the case may either be submitted by an individual (Austria, Latvia, Slovenia, Turkey), also by means of the special constitutional complaint procedures as in Germany, Poland and Turkey) or by the Ombudsperson (Poland, Portugal, the Slovak Republic, Slovenia, Spain). It may also be raised by the courts, either by way of action (referral by parliamentary committees, the President of the Republic, and also by the Public Defender of Rights in the case of infra-legislative texts), or by way of exception (referral of an indispensable disposition by a regular tribunal in order to settle the case), or by a way of a question of law (Poland).

39. If the challenged legislation is not in conformity with the relevant provisions, the Constitutional Court can annul it or decide that it loses effect (Croatia, the Czech Republic, Germany, Hungary, Liechtenstein, Portugal, Poland, the Slovak Republic, Spain, "the former Yugoslav Republic of Macedonia"). In addition, by way of an example, the Constitutional Court of the Slovak Republic can suspend the effect of the challenged regulation. If the Constitutional Court finds the said regulation not to be in conformity, it shall be considered null and void. The body that issued this text will have to harmonise it within six months. In some member States, a judgment of the Constitutional Court on the non-conformity to the Constitution or international agreement, among others, is a basis for reopening proceedings or for quashing the final decision.

40. Several member States refer to their **general courts** (including supreme courts), which can decide not to apply to the specific case a law that is found in contradiction with the Convention (Bulgaria, Croatia, the Czech Republic, Denmark, Estonia,

[9] Constitutional review procedure at the Supreme Court.

Finland, France, Germany, Greece, Iceland, Luxembourg, Norway, Portugal, the Slovak Republic, Sweden, Switzerland, Turkey). The French *Cour de Cassation* indicates its proposed amendments in its annual reports.

*Verification by NHRS*

41. NHRS may consider **existing laws** with a view to examining their compatibility with the standards laid down in the Convention (Bulgaria, Croatia, France, Greece, Latvia, Portugal, Romania, the Slovak Republic, Sweden). In Finland, the Parliamentary Ombudsman is, together with the Chancellor of Justice, the guardian of the law according to the Constitution and can draw the government's attention to possible shortcomings in existing laws and recommend amendments. In Ireland, the Irish Human Rights and Equality Commission Act of 2014 gave to that NHRI numerous powers to this end.

42. The findings of NHRS may take the form of recommendations (Belgium, Croatia, the Czech Republic, Ireland, the Netherlands, Portugal, Spain), reports (Croatia, Cyprus, Hungary, Ukraine), comments (the Slovak Republic), or decisions (Sweden).
NHRS may send the formal conclusions of such exercises to Parliament and the government. As noted above, ombudsmen may also have the power to initiate the procedure for the review of the constitutionality or legality of general acts in light of the Convention (Slovenia, Spain).

ii) Examples of mechanisms aimed at increasing the effectiveness of the verification

43. In Poland, the Government Legislation Centre prepares the positions of the Government in proceedings before the Constitutional Court. It consults the Minister of Foreign Affairs if the subject of the case pending before the Constitutional Court relates to the compatibility of a normative act with international human rights regulations, in particular the Convention (the latter is specifically mentioned in the relevant Rules). This procedure made it possible for the Government Agent, for instance, to signal to the Government Legislation Centre, and thus to the Constitutional Court, a problem with legislation identified earlier by the Strasbourg Court in one of the judgments in respect of Poland, pending under the supervision of the Committee of Ministers. In the Netherlands, certain laws include the presence of an evaluation clause by means of which the potential effects in the area of human rights of the legislation must be evaluated by the Council of State (*Raad van State*) as a follow-up to its adoption.

iii) Advantages-obstacles

44. The existence of multiple actors in the process was again considered as a key element to guarantee the strength of the verification mechanism regarding existing legislation. As far as the **executive** is concerned, it was agreed that the systematic information given by the Government Agent to various agencies on the case-law of the Court against the country concerned, through systematic publication measures on the relevant judgments, and through dialogue with the ministries concerned (the Czech Republic, Estonia, Poland, Spain) has triggered important legislative changes. The

general obstacles/difficulties encountered by the executive, as well as methods to overcome them, referred to under Part I, also apply in respect of existing legislation.

45. As far as the verification operated by **constitutional courts** is concerned, it was acknowledged that many constitutional courts had devoted numerous leading judgments to the case-law of the ECHR in order to guide the ordinary courts. The main advantage of this mechanism is that it results in legal provisions found by the constitutional court to be incompatible with the Convention being removed from the legal system (together with their legal effects).

46. **Ordinary courts** are well-placed to identify, remedy, and signal any possible shortcomings of the legislation that arise in the application of the law. Firstly, the difficulties may stem from the fact that there are few Court judgments or decisions in the areas of competence of some authorities that could serve as a point of reference for them. Secondly, difficulties may arise from the need to take into account differences in the legal systems of other member states to which the Court's judgments or decisions apply. Additional obstacles may be linked to insufficient knowledge about the Convention and the Court's case-law on the part of persons dealing with the legislative process and to problems with applying the relevant case-law of the Court by persons who do not deal with the Court's case-law on a daily basis. Those obstacles can be overcome by training and awareness-raising activities.

## III. COMPATIBILITY OF ADMINISTRATIVE PRACTICE

47. The Appendix to Recommendation (2004)5 defines the administrative practice as follows (§§ 9-10):

> "This recommendation also covers, wherever necessary, the compatibility of administrative regulations with the Convention, and therefore aims to ensure that human rights are respected in daily practice. It is indeed essential that bodies, notably those with powers enabling them to restrict the exercise of human rights, have all the necessary resources to ensure that their activity is compatible with the Convention.
>
> It has to be made clear that the recommendation also covers administrative practice which is not attached to the text of a regulation. It is of utmost importance that states ensure verification of their compatibility with the Convention."

48. The 2008 review exercise revealed the following:

- The type of mechanism used to verify the compatibility of administrative practices varies greatly, although in most cases verification seems to be carried out by the national courts or specific independent bodies (ombudspersons or national human rights institutions);
- In the same way that the member States cannot reasonably be asked to verify systematically all their existing laws, they cannot be asked to check the compatibility of all their existing rules, regulations and practices. It is necessary,

however, to run checks of this sort in a specific area when, for instance, some experience has been gained with the application of a rule at national level, or following a new judgment by the Court with regard to another member state;
- Although member States provided considerably less information in this area than in others, largely because the interpretation of the concept of "administrative practices" varies so much between them, some countries did provide examples of specific amendments.

49. Despite the absence of sufficient information regarding this specific theme in the 2016 exchange of views, it is obvious that the institutional framework of the existing mechanisms has not changed since the 2008 review.

*Verification by the executive*

50. It is obvious that the mechanisms now in place allow **for a more systematic *ex ante* verification**. This is due to the executive's enhanced preventive role (in particular the Government Agents) not only *via* **dissemination measures** (Cyprus, Estonia, Germany, Latvia, Serbia) but also **with a specific role in verifying the compatibility of administrative practice** (e.g. the Chancellor of Justice in Estonia). In Poland, executive regulations (ordinances, orders) must be compatible with the Constitution and the Convention, among others, in the same way as laws adopted by the Parliament, and are subject to the same mechanisms of *ex ante* and *ex post* verification.

51. In some member States, the ministry that initiates legislation is also responsible for verifying existing regulations and practices, which implies knowledge of the latest developments in the case-law of the Court (Germany, Monaco). The aliens policy in the Netherlands is an indicative example in this regard. This policy seldom is incorporated in legislation, but it does have significant human rights implications. The legal experts of the responsible department assess whether the freedom to develop the new policy is limited by rules of higher (international) law. If necessary, they can call on the Legislation and Legal Affairs Department at the Ministry of Justice for advice. This department annually renders around 250 advices on compatibility with the Convention to colleagues in other government departments, to the Constitutional Affairs and Legislation Department of the Ministry of the Interior and Kingdom Relations and to the Legal Department of the Ministry of Foreign Affairs. The Parliament can raise the compatibility with the Convention of a (proposed) policy for discussion.

52. The appointment in the relevant ministries, or other institutions, of persons specialised in human rights issues may also contribute to aligning administrative practices applied by these authorities to the Convention standards. For instance, in Bulgaria, the Ministry of Justice has started the establishment of a focal point network of human rights experts of the Bulgarian authorities in compliance with the measures of the Brighton Declaration. The persons appointed from all ministries and from the Administration of the Council of Ministers were trained (in cooperation with the Norwegian Human Rights Institute under the Norwegian Financial Mechanism) in order to enhance the knowledge of the European human rights standards. In Poland, in both the Police and the Border Guard, plenipotentiaries for human rights were appointed at the central level and in the respective field units to ensure the conformity of action of the Police and Border Guard officials with the Convention.

53. This role can also be exercised in the framework of the process of the execution of the Court's judgments, like in Germany or in Poland, where the Public Prosecutor General issued several sets of guidelines addressed to the prosecution units in order to ensure that the manner of conducting preparatory proceedings complies with obligations of the effective investigation deriving from the Convention (*e.g.* in cases of the alleged misconduct by the Police officers or in cases concerning hate crimes). In this way, in Belgium, the *Trabelsi v. Belgium* judgment of 4 September 2014 has led the Ministry of Justice to prepare the distribution of a general note on the temporary measures. This general note was aimed at informing the agents of services potentially working with such temporary measures on the obligations deriving from the latter in virtue of the Convention. Since the *Yoh Ekale Mwanje v. Belgium* judgment of 20 December 2011, instructions have been given by the administration to the different medical services of closed transit centres, given the distance from the territory, in order to guarantee a better follow-up in the medical care of residents. In this way, when the resident signals that he was under medical treatment outside, a contact is made with his general practitioner in order to ensure the continuity of treatment.

*Verification by the judiciary*

54. Verification mainly takes place within the framework of court proceedings brought by individuals with legal standing to act or even by state organs, persons or bodies not directly affected, either before domestic courts (Denmark, Estonia, France, Greece, Iceland, Lithuania, Luxembourg, Norway, Sweden, Switzerland, Turkey, United Kingdom), the Constitutional Court (Armenia, Serbia, the Slovak Republic), or both (the Czech Republic, Poland, Slovenia, Spain). In most cases, judicial institutions are only required to examine the compatibility of an administrative practice when a case raises compatibility issues (in such circumstances, they apply the relevant provision of the Convention and not the administrative practice in question).

*Verification by NHRS*

55. In addition to their other roles, when seized by the government or the parliament, NHRS, mediators or chancellors of justice, play an important role in the verification of how administrative practices are applied and, notably, the Convention, which is part of national law. In some countries, it is specified that these institutions may also, under certain conditions, consider individual complaints and initiate enquiries on their own initiative (Austria, Finland, France, Latvia, Luxembourg, the Russian Federation, Sweden). Ombudsmen may also have the power to initiate the procedure for the review of the constitutionality or legality of regulations (Portugal, Slovenia, Spain).

*Advantages-obstacles*

56. The observations made under Part II also apply here: the courts are well-placed to identify, remedy and signal any possible shortcomings of the legislation that arise in the application of the law. Firstly, the difficulties may stem from the fact that there are few of the Court's judgments or decisions in the areas of competence of some authorities that could serve as a point of reference for them. Secondly, difficulties may arise from the need to take into account differences in the legal systems of other member States to which the Court's judgments or decisions apply. Additional obstacles may be linked to insufficient knowledge about the Convention and the Court's case-law

on the part of persons dealing with the legislative process and to problems with applying the relevant case-law of the Court by persons who do not deal with the Court's case-law on a daily basis. While those obstacles can be overcome by training and awareness-raising activities (see Parts I and II), other legal obstacles are difficult to overcome: this is the case when administrative courts cannot raise *ex officio* the question of the compatibility with the Convention in the course of administrative proceedings. The enhancement of *ex ante* verification mechanisms for the compatibility of administrative practice may be particularly relevant in this regard.

57. Finally, it is recalled that the DH-SYSC, at its 1st meeting, noted that, if the question of the compatibility of administrative practice with the Convention needs to be looked at in greater depth, an exchange of views could be held on that specific issue.[10]

## IV. ASSESSMENT (OR PLANNED ASSESSMENT) OF THE APPROPRIATENESS AND EFFECTIVENESS OF THE EXISTING MECHANISMS

58. The question of the assessment of the effectiveness of the mechanisms put in place was raised in the framework of the relevant work carried out by the CDDH during the 2008 review. The difficulty to accurately assess the effectiveness of the verification mechanisms in use was noted then, while in fact, little information was forthcoming on the assessment of the effectiveness of these tools. The main explanations given to account for this lack of information were as follows:

- member States have not considered it helpful to assess the effectiveness of control mechanisms, as they already regard them as effective and appropriate;
- control mechanisms are regarded as too recent to be assessed;
- the complexity of the subject at hand makes it difficult to consider making an overall assessment of the mechanisms that verify compatibility;
- compatibility with human rights standards is only one of several criteria; the others needed to be checked are the compatibility of laws with the constitution, international law, European law and the domestic legal system;
- for an assessment to be carried out, criteria would need to be set for measuring the success or failure of the functioning of a verification mechanism, and it would be difficult to determine what these criteria should be.

59. During the 2016 exchange of views, a vast majority of member States noted that **no special mechanisms** have been put in place to assess the appropriateness and effectiveness of the compatibility mechanisms. Certain member States argued that this was not necessary since the evaluation is on-going as the different mechanisms put in place operate under a system of checks and balances. It was further noted (the Czech Republic, Germany) that a judgment of the Court or of a Constitutional Court finding that the legislative measures were compatible with the Convention constitutes a form of assessment of the verification mechanism. **A form of evaluation also takes place in the framework of the execution process**. For example, the annual reports prepared by Government Agents regarding the execution of the Court's judgments for the attention of Parliaments present detailed information on the required changes to the law (or to the

[10] See doc. DH-SYSC(2016)R1, § 14.

practice of its application). This may serve as a basis for possible evaluation of the progress made (Bulgaria, Poland).

60. In certain instances, **some more concrete evaluation steps** were put forward. For instance, when it was found that there was a lack of an appropriate compatibility testing procedure when certain amendments or new proposals are introduced to the draft legislation already pending before the Parliament, or are introduced after their adoption following the Parliament's first reading, a discussion for a procedure for performing a compatibility test in those cases was initiated (Latvia). In Slovenia, it was considered that the impact assessment to ensure the compatibility of draft laws with the Convention and its Protocols could be made systematic and mandatory. A draft law on State Administration proposed that a new task of the Ministry of Justice would also be "the verification of the suitability of draft laws from the perspective of human rights and fundamental freedoms". The aim is to give more emphasis to preliminary verifications by Ministries when proposing a draft law and to ensure additional verification systems in the intergovernmental procedure. In addition, every draft law prepared by the government would need to have a written statement about the compatibility of its provisions with the rights and freedoms enshrined in the Convention and its Protocols ('statement of compatibility').

Appendix

Recommendation Rec(2004)5 of the Committee of Ministers to Member States on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights

*(adopted by the Committee of Ministers on 12 May 2004 at its 114th Session)*

The Committee of Ministers, in accordance with Article 15.*b* of the Statute of the Council of Europe,

Considering that the aim of the Council of Europe is the achievement of greater unity among its members, and that one of the most important methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms;

Reiterating its conviction that the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention") must remain the essential reference point for the protection of human rights in Europe, and recalling its commitment to take measures in order to guarantee the long-term effectiveness of the control system instituted by the Convention;

Recalling the subsidiary character of the supervision mechanism set up by the Convention, which implies, in accordance with its Article 1, that the rights and freedoms guaranteed by the Convention be protected in the first place at national level and applied by national authorities;

Welcoming in this context that the Convention has now become an integral part of the domestic legal order of all states parties and noting in this respect the important role played by national courts;

Recalling that, according to Article 46, paragraph 1, of the Convention, the high contracting parties undertake to abide by the final judgments of the European Court of Human Rights (hereinafter referred to as "the Court") in any case to which they are parties;

Considering however, that further efforts should be made by member states to give full effect to the Convention, in particular through a continuous adaptation of national standards in accordance with those of the Convention, in the light of the case-law of the Court;

Convinced that verifying the compatibility of draft laws, existing laws and administrative practice with the Convention is necessary to contribute towards preventing human rights violations and limiting the number of applications to the Court;

Stressing the importance of consulting different competent and independent bodies, including national institutions for the promotion and protection of human rights and non-governmental organisations;

Taking into account the diversity of practices in member states as regards the verification of compatibility;

Recommends that member states, taking into account the examples of good practice appearing in the appendix:

I. ensure that there are appropriate and effective mechanisms for systematically verifying the compatibility of draft laws with the Convention in the light of the case-law of the Court;

II. ensure that there are such mechanisms for verifying, whenever necessary, the compatibility of existing laws and administrative practice, including as expressed in regulations, orders and circulars;

III. ensure the adaptation, as quickly as possible, of laws and administrative practice in order to prevent violations of the Convention;

Instructs the Secretary General of the Council of Europe to ensure that the necessary resources are made available for proper assistance to member states which request help in the implementation of this recommendation.

**Appendix to Recommendation Rec(2004)5**

**Introduction**

1. Notwithstanding the reform, resulting from Protocol No. 11, of the control system established under the European Convention on Human Rights (hereinafter referred to as "the Convention"), the number of applications submitted to the European Court of Human Rights (hereinafter referred to as "the Court") is increasing steadily, giving rise to considerable delays in the processing of cases.

2. This development reflects a greater ease of access to the European Court, as well as the constantly improving human rights protection in Europe, but it should not be forgotten that it is the parties to the Convention, which, in accordance with the principle of subsidiarity, remain the prime guarantors of the rights laid down in the Convention. According to Article 1 of the Convention, "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". It is thus at national level that the most effective and direct protection of the rights and freedoms guaranteed in the Convention should be ensured. This requirement concerns all state authorities, in particular the courts, the administration and the legislature.

3. The prerequisite for the Convention to protect human rights in Europe effectively is that states give effect to the Convention in their legal order, in the light of the case-law of the Court. This implies, notably, that they should ensure that laws and administrative practice conform to it.

4. This recommendation encourages states to set up mechanisms allowing for the verification of compatibility with the Convention of draft laws and existing legislation, as well as administrative practice. Examples of good practice are set out below. The implementation of the recommendation should thus contribute to the prevention of human rights violations in member states, and consequently help to contain the influx of cases reaching the Court.

**Verification of the compatibility of draft laws**

5. It is recommended that member states establish systematic verification of the compatibility with the Convention of draft laws, especially those which may affect the rights and freedoms protected by it. It is a crucial point: by adopting a law verified as being in conformity with the Convention, the state reduces the risk that a violation of the Convention has its origin in that law and that the Court will find such a violation. Moreover, the state thus imposes on its administration a framework in line with the Convention for the actions it undertakes vis-à-vis everyone within its jurisdiction.

6. Council of Europe assistance in carrying out this verification may be envisaged in certain cases. Such assistance is already available, particularly in respect of draft laws on freedom of religion, conscientious objection, freedom of information, freedom of association, etc. It is nonetheless for each state to decide whether or not to take into account the conclusions reached within this framework.

**Verification of the compatibility of laws in force**

7. Verification of compatibility should also be carried out, where appropriate, with respect to laws in force. The evolving case-law of the Court may indeed have repercussions for a law which was initially compatible with the Convention or which had not been the subject of a compatibility check prior to adoption.

8. Such verification proves particularly important in respect of laws touching upon areas where experience shows that there is a particular risk of human rights violations, such as police activities, criminal proceedings, conditions of detention, rights of aliens, etc.

**Verification of the compatibility of administrative practice**

9. This recommendation also covers, wherever necessary, the compatibility of administrative regulations with the Convention, and therefore aims to ensure that human rights are respected in daily practice. It is indeed essential that bodies, notably those with powers enabling them to restrict the exercise of human rights, have all the necessary resources to ensure that their activity is compatible with the Convention.

10. It has to be made clear that the recommendation also covers administrative practice which is not attached to the text of a regulation. It is of utmost importance that states ensure verification of their compatibility with the Convention.

**Procedures allowing follow-up of the verification undertaken**

11. In order for verification to have practical effects and not merely lead to the statement that the provision concerned is incompatible with the Convention, it is vital that member states ensure follow-up to this kind of verification.

12. The recommendation emphasises the need for member states to act to achieve the objectives it sets down. Thus, after verification, member states should, when necessary, promptly take the steps required to modify their laws and administrative practice in order to make them compatible with the Convention. In order to do so, and where this proves necessary, they should improve or set up appropriate revision mechanisms which should systematically and promptly be used when a national provision is found to be incompatible. However, it should be pointed out that often it is enough to proceed to changes in case-law and practice in order to ensure this compatibility. In certain member states compatibility may be ensured through the non-application of the offending legislative measures.

13. This capacity for adaptation should be facilitated and encouraged, particularly through the rapid and efficient dissemination of the judgments of the Court to all the authorities concerned with the violation in question, and appropriate training of the decision makers. The Committee of Ministers has devoted two specific recommendations to these important aspects: one on the publication and the dissemination in member states of text of the Convention and the case-law of the Court (Rec(2002)13) and the other on the Convention in university education and professional training (Rec(2004)4).

14. When a court finds that it does not have the power to ensure the necessary adaptation because of the wording of the law at stake, certain states provide for an accelerated legislative procedure.

15. Within the framework of the above, the following possibilities could be considered.

**Examples of good practice**

16. Each member state is invited to give information as to its practice and its evolution, notably by informing the General Secretariat of the Council of Europe. The latter will, in turn, periodically inform all member states of existing good practice.

*I. Publication, translation and dissemination of, and training in, the human rights protection system*

17. As a preliminary remark, one should recall that effective verification first demands appropriate publication and dissemination at national level of the Convention and of the relevant case-law of the Court, in particular through electronic means and in the language(s) of the country concerned, and the development of university education and professional training programmes in human rights.

*II. Verification of draft laws*

18. Systematic supervision of draft laws is generally carried out both at the executive and at the parliamentary level, and independent bodies are also consulted.

*By the executive*

19. In general, verification of conformity with the Convention and its protocols starts within the ministry which initiated the draft law. In addition, in some member states, special responsibility is entrusted to certain ministries or departments, for example, the Chancellery, the Ministry of Justice and/or the Ministry of Foreign Affairs, to verify such conformity. Some member states entrust the agent of the government to the Court in Strasbourg, among other functions, with seeking to ensure that national laws are compatible with the provisions of the Convention. The agent is therefore empowered, on this basis, to submit proposals for the amendment of existing laws or of any new legislation which is envisaged.

20. The national law of numerous member states provides that when a draft text is forwarded to parliament, it should be accompanied by an extensive explanatory memorandum, which must also indicate and set out possible questions under the constitution and/or the Convention. In some member states, it should be accompanied by a formal statement of compatibility with the Convention. In one member state, the minister responsible for the draft text has to certify that, in his or her view, the provisions of the bill are compatible with the Convention, or to state that he or she is not in a position to make such a statement, but that he or she nevertheless wishes parliament to proceed with the bill.

*By the parliament*

21. In addition to verification by the executive, examination is also undertaken by the legal services of the parliament and/or its different parliamentary committees.

*Other consultations*

22. Other consultations to ensure compatibility with human rights standards can be envisaged at various stages of the legislative process. In some cases, consultation is optional. In others, notably if the draft law is likely to affect fundamental rights, consultation of a specific institution, for example the Conseil d'Etat in some member states, is compulsory as established by law. If the government has not consulted it as required, the text will be tainted by procedural irregularity. If, after having consulted the specific institution, it decides not to follow the opinion received, it accepts responsibility for the political and legal consequences that may result from such a decision.

23. Optional or compulsory consultation of non-judicial bodies competent in the field of human rights is also often foreseen. In particular, these may be independent national institutions for the promotion and protection of human rights, the ombudspersons, local or international non-governmental organisations, institutes or centres for human rights, or the Bar, etc.

24. Council of Europe experts or bodies, notably the European Commission for Democracy through Law ("the Venice Commission"), may be asked to give an opinion on the compatibility with the Convention of draft laws relating to human rights. This request for an opinion does not replace an internal examination of compatibility with the Convention.

*III. Verification of existing laws and administrative practice*

25. While member states cannot be asked to verify systematically all their existing laws, regulations and administrative practice, it may be necessary to engage in such an exercise, for example as a result of national experience in applying a law or regulation or following a new judgment by the Court against another member state. In the case of a judgment that concerns it directly, by virtue of Article 46, the state is under obligation to take the measures necessary to abide by it.

*By the executive*

26. In some member states, the ministry that initiates legislation is also responsible for verifying existing regulations and practices, which implies knowledge of the latest developments in the case-law of the Court. In other member states, governmental agencies draw the attention of independent bodies, and particularly courts, to certain developments in the case-law. This aspect highlights the importance of initial education and continuous training with regard to the Convention system. The competent organs of the state have to ensure that those responsible in local and central authorities take into account the Convention and the case-law of the Court in order to avoid violations.

*By the parliament*

27. Requests for verification of compatibility may be made within the framework of parliamentary debates.

*By judicial institutions*

28. Verification may also take place within the framework of court proceedings brought by individuals with legal standing to act or even by state organs, persons or bodies not directly affected (for example before the Constitutional Court).

*By independent non-judicial institutions*

29. In addition to their other roles, when seized by the government or the parliament, independent non-judicial institutions, and particularly national institutions for the promotion and protection of human rights, as well as ombudspersons, play an important role in the verification of how laws are applied and notably how the Convention, which is part of national law, is applied. In some countries, these institutions may also, under certain conditions, consider individual complaints and initiate enquiries on their own initiative. They strive to ensure that deficiencies in existing legislation are corrected, and may for this purpose send formal communications to the parliament or the government.