Decision n° 2008-564 – June 19th 2008

On May 26th 2008, the Constitution Council received a referral, pursuant to paragraph 2 of Article 61 of the Constitution, from Mr Jean-Pierre BEL et al…. Senators, and on May 27th 2008 from Mr Jean-Marc AYRAUT et al, Members of the National Assembly, for review of the constitutionality of the Act on Genetically Modified Organisms

THE CONSTITUTIONAL COUNCIL

Having regard to the Constitution;

Having regard to Ordinance n° 58-1067 of November 7th 1958 as amended (Institutional Act on the Constitutional Council);

Having regard to Council Directive 90/219/EEC of April 23rd 1990 as amended on the contained use of genetically modified organisms;

Having regard to European Parliament and Council Directive of March 12th 2001 as amended on the deliberate release of genetically modified organisms into the environment, repealing Council Directive 90/220/EC;

Having regard to EC Regulation n° 1829/2003 of the European Parliament concerning genetically modified food and animal feed;

Having regard to the decisions of the Court of Justice of the European Communities n° C-429/01 of November 27th 2003 and C-419/03 of July 15th 2004;

Having regard to the Civil Code;

Having regard to the Environment Code;

Having regard to the Criminal Code;

Having regard to the Rural Code;

Having regard to the observations of the Government registered on June 2nd 2008;

Having regard to the observations in response to the foregoing observations made by the Members of the National Assembly making the referral, registered on June 9th 2008

After having heard the Rapporteur :

ON THE FOLLOWING GROUNDS :

1 The Members of the National Assembly and Senators have referred for review by the Constitutional Council the Act on Genetically Modified Organisms, contesting the manner in which said statute was passed and the conformity with the Constitution of sections 2, 3, 6, 7, 8, 10, 11 and 14 thereof;

WITH RESPECT TO TO THE MANNER IN WHICH THE STATUTE WAS PASSED :

2. The Bill at the origin of the statute referred for review was passed on first reading by both Houses of Parliament then, on its second reading, by the Senate. At this stage of proceedings, the National Assembly tabled the procedural motion of a preliminary question regarding said text. The Prime Minister then convened a Joint Committee of both Houses, which proposed a text on the provisions under debate. This text, which was identical to that previously approved by the Senators, was subsequently passed by both Houses.

3. The Senators making the referral argue that the adopting of the procedural motion of the preliminary question entailed the rejection of the text under debate which could thus not come under further debate before a period of one year had elapsed. They contend that the continuation of the Parliamentary shuttle disregarded the provisions of paragraph four of Article 84 of the Rules of the National Assembly and thus paragraph four of Article 91 thereof, which two taken together constituted an extension of paragraph 1 of Article 34 of the Constitution. They claim that Article 45 of the Constitution has been infringed in that the Joint Committee was convened whereas, in their opinion, the relevant conditions had not been met. They contend lastly, that the proceedings employed infringe the right of amendment vested in Members of Parliament by Article 44 of the Constitution.

4. The Members of the National Assembly making the referral argue firstly that the report of the Committee on Economic Affairs, the Environment and the Territory on this Bill should have included an Appendix analysing the consequences of a Resolution on Directive 2001/18/EC referred to above passed by the National Assembly on November 7th 2000 and on these grounds they claim that that the provisions of Article 151-4 of the Rules of the National Assembly, which are an extension of Article 88-4 of the Constitution, have been disregarded. They contest the hasty manner in which the Joint Committee was convened after the vote on the procedural motion of the preliminary question and allege failure to comply with paragraph 42 of the Rules of the National Assembly whereby the presence of members of committees is obligatory at meetings thereof. They challenge the workings of the Joint Committee arguing that if the adopting of the procedural motion of the preliminary question resulted in the reopening of debate on all the Bill, it was not possible, without first examining amendments made to the latter, to proceed to a vote on all the clauses previously passed in the same terms by both Houses, and then to a vote on Clause 1 of the Bill amended on the second reading by the Senate. They consider that such proceedings, in the framework of a Joint Committee convened after the adopting of a preliminary question, infringes the right of amendment vested in Members of Parliament.

<u>As regards the Articles of the Rules of the Nationality Assembly referred to in the referral.</u>

5. Alleged failure to comply with Articles 42, 84 and 151-4 of the Rules of the National Assembly cannot per se result in legislative proceedings running counter to the Constitution. The argument raised by the Senators on the grounds of paragraph 3 of Article 84, which only applies to Private Members' Bills, is thus inoperative in the case in hand.

<u>As regards the continuing examination of the text and the convening of a Joint Committee</u>.

6. Article 45 of the Constitution provides:

“Every Government or Private Member's Bill shall be considered successively in the two Houses of Parliament with a view to the passing of an identical text.

If, as a result of a failure to agree by the two Houses, it has proved impossible to pass a Government or Private Member's Bill after two readings by each House or, if the Government has declared the matter to be one of urgency, after a single reading of such Bill by each House, the Prime Minister may convene a Joint Committee, composed of an equal number of members from each House, to propose a text on the provisions still under debate.

The text drafted by the Joint Committee may be submitted by the Government to both Houses for approval. No amendment shall be admissible without the consent of the Government.

If the Joint Committee fails to agree on a common text, or if the text is not passed as provided in the foregoing indent, the Government may, after a further reading by the National Assembly and by the Senate, ask the National Assembly to reach a final decision. In such an event, the National Assembly may reconsider either the text drafted by the Joint Committee, or the last text passed by itself, as modified, as the case may be, by any amendment(s) passed by the Senate”.

7. This Article 45 shows that, as is moreover reiterated by Article 109 of the Rules of the National Assembly, the fact that a Bill under consideration by Parliament is rejected by one of other of the two Houses does not interrupt the normal unfolding of proceedings provided for the passing by both Houses of a final text. The same holds good when the National Assembly adopts a procedural motion of the preliminary question designed, in the terms of paragraph 4 of Article 91 of said Rules, “to close debate” and as such the adoption of such a motion “leads to the rejecting of the text which was the object of said preliminary question”. Nothing precluded the consideration of the statute referred for review after the passing by the Members of the National Assembly of the motion on the preliminary question and the rejection of the text involved.

8. Furthermore, since the National Assembly had rejected the text previously adopted by the Senate there was “failure to agree by the two

Houses" and thus "provisions remaining under debate". Contrary to the claims made by the Senators, two readings did indeed take place before each of the two Houses, including the National Assembly where the motion on the preliminary question was debated and adopted. The conditions provided for in Article 45 of the Constitution whereby the Prime Minister may convene a Joint Committee, composed of an equal number of members from each House, were thus met. Moreover, insofar as the matter had been declared to be one of urgency, the existence of a second reading by the National Assembly was not a prior requirement for the convening of a Joint Committee of both Houses.

As regards the right of amendment

9. The combination of Article 6 of the Declaration of the Rights of Man and the Citizen of 1989, the first paragraph of Article 34 and 39 of the Constitution, together with Article 40, 41, 44, 45, 47 and 47-1 thereof, show that the right of amendment vested in Members of Parliament and the Government must be able to be exercised fully during the first reading of Government and Private Members' Bills by each of the two Houses. Such a right should not be restricted at such a stage in proceedings, having regard to the requirements of clarity and accuracy of Parliamentary debate, for reasons other than the rules of admissibility and the requirement that an amendment not be devoid of any connection with the purpose of the Bill tabled before the first House called upon to debate it.

10. The economy of Article 45 of the Constitution and in particular the first paragraph thereof provides that additions to or modifications of amendments tabled by Members of Parliament or the Government after the first reading of a Bill must have a direct connection with the provision under debate i.e must not have been passed in the same terms by each of the two Houses. However amendments designed to ensure compliance with the Constitution, coordination with provisions under debate or to rectify any material error are not subject to such a requirement.

11. In the case in hand, Members of Parliament of both Houses were freely able to exercise their right of amendment during the first reading of the statute referred for review, and also, where the Senate is

concerned, during the second reading in the Senate, within the limits recalled in the foregoing paragraph. If during the second reading before the National Assembly, the tabled amendments were not debated, this was because of the voting by the Members of the Assembly in favour of the preliminary question whereby "debate was closed" on the text submitted to them.

12. The voting in favour of the preliminary question, in the conditions which prevailed at that time, meant that all the provisions of the Bill needed to be re-debated. However the Joint Committee is merely required by paragraph 2 of Article 45 of the Constitution to "submit a text for approval" as regards the provisions in question. It did indeed make such submissions as regards clause 1, which has since become section 2 of the statute referred for review, and on the other clauses, rejecting while so doing all modifications of the previous version passed by the Senate.

13. The other restrictions complained of by the parties making the referral are to be found in paragraph 3 of Article 45 of the Constitution which provides that, when the text drafted by the Joint Committee is submitted by the Government to both Houses for approval, "no amendment shall be admissible without the consent of the Government"

14. The arguments based on an infringement of the right of amendment of Members of Parliament must therefore be dismissed. As is shown by the foregoing, the statute referred for review was not passed in proceedings which were unconstitutional.

WITH RESPECT TO SECTIONS 2, 3 AND 6 :

15. Section 2 of the statute referred for review inserts into the Environment Code an Article L531-2-1 dealing with the general principles pertaining to the use of genetically modified organisms. Section 3 of the statute modifies Articles L531-3 to L 531-5 of the same Code, and inserts an Article L 531-4-1 pertaining to the High Council on Biotechnologies. Section 6 of the statute introduces into the Rural Code Articles L 663-2 and L 663-3 pertaining to the technical conditions

intended to avoid the accidental presence of genetically modified organisms in other products.

16. The parties making the referrals argue that the second paragraph of section 2 of the statute referred, together with sections 3 and 6 thereof, distort the meaning and scope of the principle of precaution. They also claim that the second paragraph of this same section 2 runs counter to the constitutional objective that the law be intelligible and accessible and shows a failure by Parliament to exercise its full powers. Lastly they argue that the fifth paragraph of the same section fails to comply with the constitutional requirement concerning the transposing of Directives.

As regards the argument based on failure to respect the principle of precaution.

17. The parties making the referral contend that the provisions of sections 2 and 6 of the statute merely seek to address the sole risk of release of genetically modified organisms into neighbouring crops and to compensate for the economic consequences thereof, without requiring compliance with technical conditions designed to ensure greater protection for the preservation of the environment. Furthermore they argue that that vague definition of the powers of the High Council of Biotechnologies contained in section 3 of the statute demonstrates the shortcomings of Parliament in the laying down of procedural requirements deriving from the principle of precaution. Thus, when confronted with the "serious and irreversible risk" which the cultivation of genetically modified organisms poses for the environment, the statute fails to deal with the causing of possible damage to the environment and hence fails to respect the principle of precaution laid down by Article 5 of the Charter for the Environment.

18. Article 5 of the Charter for the environment provides : "When the occurrence of any damage, albeit unpredictable in the current state of scientific knowledge, may seriously and irreversibly harm the environment, public authorities shall, with due respect for the principle of precaution and the areas within their jurisdiction, ensure the implementation of procedures for risk assessment and the adoption of temporary measures commensurate with the risk involved in order to

preclude the occurrence of such damage". These provisions, like all the other rights and duties set out in the Charter for the Environment, have constitutional status. They are thus binding upon the Government and administrative authorities within the limits of the areas under their jurisdiction. It is thus incumbent upon the Constitutional Council, when asked to rule under Article 61 of the Constitution, to ensure that Parliament has not failed to respect the principle of precaution and has taken the necessary measures to ensure compliance with said principle by other public authorities.

19. Paragraph 1 of Article L 531-2-1 inserted into the Environment Code by section 2 of the statute referred for review provides: ""Genetically modified organisms shall only be cultivated, marketed or used when complying with respect for the environment, human health, agricultural structures, local ecosystems and production and commercial channels defined as being "GMO-free", and in a fully transparent manner. The definition "GMO-free" must be interpreted by referring to meaning given by the European Community. Pending the making of a definition at European level, the corresponding threshold shall be determined by regulation, after consultation with the High Council on Biotechnologies, on a species by species basis".

20. Article L 663-2 of the Rural Code, as worded by section 6 of the statute referred, provides: "The planting, harvesting, storing and transport of plants authorized pursuant to Article L 663-2 of the Environment Code or under European regulations shall comply with technical requirements concerning in particular the distance between crops or their isolation, designed to avoid any accidental presence of genetically modified organisms in other products. The technical requirements as to distance shall be fixed on a crop by crop basis. They shall specify the perimeters within which no genetically modified organisms shall be grown. They shall ensure that the presence of genetically modified organisms in other products be below the threshold fixed by Community regulations".

21. Firstly, the above provisions determine the principles underlying the technical conditions for introducing genetically modified plants into the environment after they have been authorized by law. Article L 533-2, L

533-3 and L 533-5 of the Environment Code, as amended by the statute referred for review, provide: "any deliberate release into the environment of a genetically modified organism for which no particular measure of containment has been taken to limit the contact thereof with persons or the environment" requires prior authorization. Such authorization is delivered by the administrative authority either before a voluntary release of GMOs not intended for the market, or the placing on the market of a genetically modified product, and is only granted after consultation with the High Council on Biotechnologies "which examines the risks which such release may pose for the environment". Furthermore Article L 532-2 requires that any use of a genetically modified organism which may pose a danger or risks for the environment be carried out in a contained manner. These provisions are designed to prohibit the cultivating in open fields of genetically modified organisms which, in the current state of knowledge and techniques, may seriously and irreversibly affect the environment. The fact that the technical conditions governing crops of genetically modified organisms do not exclude the accidental presence of such organisms in other products does not constitute any failure to comply with the principle of precaution.

22. Secondly, section 3 of the statute sets up the High Council on Biotechnologies vested with the task of keeping the Government informed on all issues involving genetically modified organisms or any other biotechnology and assessing the risks for the environment and human health which the use of genetically modified organisms may involve. Contrary to the claims made by the parties making the referral, Article L 531-3 of the Environment Code does not merely provide that this advisory body may automatically examine any issue coming under its terms of reference, but it clearly specifies the cases in which the opinion of the High Council must be obtained and lays down the attributions of said Council. Furthermore paragraph 2 of Article L 531-2-1 of the Environment Code provides that "decisions to grant authorisations for genetically modified organisms shall only be taken after a prior independent and transparent assessment of the risks for the environment and human health….carried out by a group of experts in accordance with the principles of competence, pluralism, transparency and impartiality". The provisions of section 9 of the statute lay down the

conditions for an ongoing surveillance by the administrative authority of the sanitary and phytosanitary state of plants and the possible appearance of unwanted effects on the environment due to agricultural practices. Lastly, Articles L 533-3-1 and L 533-8 of the Environment Code provide that in the event of the discovery of risks for the environment after the granting of authorization, the administrative authority may take appropriate measures including, where necessary, suspension of the authorisation. When making such provisions, Parliament took measures needed to ensure the respect by public authorities of the principle of precaution where genetically modified organisms are concerned.

23. As is shown by all the foregoing, the provisions of sections 2, 3 and 6 of the statute referred for review do not run counter to the Charter for the Environment.

<u>As regards the arguments based on failure to exercise full powers and to respect the constitutional objective that the law be accessible and intelligible</u>.

24. The parties making the referral argue that by leaving it to Regulations to define the notion of "GMO-free" the first paragraph of Article L 531-2-1 of the Environment Code referred to above is not in conformity with the Constitution. Furthermore said paragraph disregards the constitutional objective that the law be intelligible and accessible.

25. Firstly, Parliament must exercise to the full the powers vested in it by the Constitution, and in particular by Article 34 thereof. The full exercise of these powers, and in particular the constitutional objective that the law be intelligible and accessible, which derives from Articles 4,5, 6 and 16 of the declaration of the Rights of Man and the Citizen of 1789, place it under a duty to enact provisions which are sufficiently precise and unequivocal. Protection must be afforded to all from interpretations which run counter to the Constitution or from the risk of arbitrary decisions, without leaving it to Courts of law or Administrative authorities to fix rules which the Constitution provides should be the sole preserve of statute law.

26. Secondly, under Article 34 of the Constitution, statutes determine the basic principles of the "preservation of the environment".

27. When passing the abovementioned statutory provisions, Parliament intended to allow the co-existence of genetically modified organisms and conventional or biological crops. To this end, it decided to lay down thresholds for the adventitious or technically unavoidable presence of authorised genetically modified organisms below which products will not be considered to be genetically modified.

28. Parliamentary debate shows that by referring to the "Community definition", Parliament intended that in the current state of the law, when making Regulations the competent authority should take into consideration, without however being bound to adopt the same, the labelling thresholds laid down by Article 12 and 24 of Regulation 1829/2003 referred to above and by Article 21 of Directive 2001/18/EC when traces of authorised genetically modified organisms are adventitious or technically unavoidable. Parliament has thus placed a limit on the tolerance threshold for traces of adventitious or technically unavoidable genetically modified organisms, and required that such thresholds by fixed species by species after consultation of the High Council on Biotechnologies. It has made it compulsory for the fixing of such limits to respect "freedom to consume and produce products with or without GMOs, without this being harmful for the environment and the specific nature of conventional and quality crops".

29. By thus setting out the conditions governing the issuing by the Council of State of a Decree by specifying the abovementioned thresholds and referring to Community law, Parliament did not fail to exercise its powers to the full, nor did it infringe the constitutional objective that the law be intelligible and accessible.

<u>As regards the argument based on failure to comply with the constitutional requirement as to the transposition of Directives.</u>

30. Under the fourth paragraph of Article L 531-2-1 of the Environment Code, as worded pursuant to section 2 of the statute

referred for review: "The conclusions of all studies and tests carried out in these laboratories shall be made available to the public without adversely affecting the interests listed in I of Article L 124-4 and II of Article L. 124-5 and the protection of intellectual property when the genetically modified organism has not at such time been afforded legal protection as such".

31. Contrary to the claims of the parties making the referral, these provisions are not designed to transpose Directive 2001/18/EC and hence their argument based on the patent incompatibility with said Directive must be dismissed.

WITH RESPECT TO SECTION 7:

32. Section 7 of the statute referred for review inserts into the Rural Code an Article L 671-13 of which indent 3° punishes by two years' imprisonment and a fine of 75 000€ the destruction or damaging of crops authorised under Articles L 533-5 and L 533-6 of the Environment Code. Indent 5 of this Article L 671-15 increases the sentence to three years' imprisonment and a fine of 150 000 € when the crop destroyed was authorised under Article L 533-3 of the same Code.

33. The parties making the referral firstly argue that the penalties incurred for such offences are patently disproportionate, in particular in view of the absence of any requirement of *mens rea* which makes it possible to charge such offences when crops are accidentally destroyed. They contend secondly that these provisions introduce an unwarranted difference with the offence of destruction of another person's property provided for by the Criminal Code and thus infringe the principle of the necessity of punishments and the principle of equality before criminal law.

34. Article 8 of the Declaration of 1789 proclaims: "The Law must prescribe only those punishments which are strictly and evidently necessary". Article 34 of the Constitution provides: "Statutes shall also determine the rules concerning ... crimes and other major offences and the penalties they carry". Article 61 of the Constitution does not vest the Constitutional Council with any general power of appreciation and

decision-making similar to that conferred upon Parliament, but merely confers upon it jurisdiction to rule on the conformity with the Constitution of statutes referred to it for review. Hence, if the necessity of punishments imposed upon those committing offences falls under the scope of the powers of appreciation of Parliament, it is incumbent upon the Council to ensure that there is no patent disproportion between a given offence and the penalties incurred for commission thereof.

35. Firstly, in the absence of any precise indication as to the *mens rea* of the offence, the principle set out in Article 121-3 of the Criminal Code whereby no offence can be committed in the absence of *mens rea* will automatically apply. Hence, only persons acting deliberately and fully aware that genetically modified organisms were cultivated on the piece of land involved can be convicted of the offence provided for in 3° of Article L 671-15 of the Rural Code.

36. Secondly, Parliamentary debate shows that Parliament intended, by creating a specific offence, to respond to repeated destruction of authorised crops of genetically modified organisms and thus, by introducing punishments designed to serve as a deterrence, ensure protection for such crops, in particular for those grown for research purposes. Furthermore the setting up of a national register making known to the public the nature and location of land on which genetically modified organisms are cultivated increases the risk that such crops may be deliberately destroyed. Under these circumstances, the prison terms laid down by Article L 671-15 of the Rural Code, which moreover do not exceed those imposed pursuant to Articles 322-2 and 322-3 of the Criminal Code on persons committing the offence of destruction, damage and deterioration of the property of another, and the fines introduced by these same Articles, which in actual fact are comparable with those provided for by Articles L536-3 to L 536-7 of the Environment Code for offences of deliberately releasing genetically modified organisms, do not fail to respect the principle of the necessity of punishments nor that of equality before criminal law.

<u>WITH RESPECT TO SECTION 8:</u>

37. Section 8 of the statute referred for review introduces into the Rural Code Articles L 663-4 and L 6634-5 which make any farmer cultivating a genetically modified organism of which the putting on the market is authorised fully liable for any economic loss due to the accidental presence of this genetically modified organism in the production of another farmer. Pursuant to indents 2 to 4 of Article L 663-4 of the Rural Code, such liability will be incurred when the following conditions are met :

"1° The crops in which the presence of the genetically modified organism is found have been cultivated on a plot of land or come from a hive situated near to the plot of land on which said genetically modified organism is cultivated and have been harvested during the same growing season ;

2° Said crop was initially designed to be sold as a product not subject to the labelling requirement mentioned in 3°, or to be used in manufacturing such a product,

3° Labelling is compulsory under Community provisions concerning labelling of products containing genetically modified organisms".

38. The parties making the referral argue that the system for compensating conventional farmers not having recourse to genetically modified organisms "in the event of their own crops being contaminated" is subjected to "patently too restrictive" conditions and is based on the "sole loss in value of the contaminated product due to a difference in price" and hence adversely affects the freedom of enterprise of said farmers and does not ensure adequate relief for the infringement of their right to property.

39. Under article L 663-5 of the Rural Code, as worded pursuant to the statute referred for review, the provisions of Article L 663-4 of the same Code do not preclude raising the question of "the liability of farmers cultivating a genetically modified organism, of distributors and persons holding a authorisation for the putting on the market of said organism and a plant variety protection certificate" on grounds other than the

injury arising from the depreciation in the value of the harvested crop. These provisions, which simplify the system of compensation for economic loss, do not limit the right of farmers who have sustained injury to seek relief on any other grounds, independently of the conditions provided for by Article L 663-4 mentioned above, or on any other heads of claim. These provisions thus do not impose any restriction on the principle of liability which derives from Article 4 of the Declaration of 1789 and are not aimed at nor result in adversely affecting freedom of enterprise and infringing the right to property.

- WITH RESPECT TO SECTION 10:

40. Section 10 of the statute referred for refers inserts into the Rural Code an Article 663-1 the final paragraph of which is worded as follows : "The administrative authority shall establish a national register indicating the nature and location of plots of land on which genetically modified organisms are cultivated. Prefectures shall publicise said register by all appropriate means, in particular by making it available through the Internet".

41. The Senators making the referral argue that by establishing a national register which does not include "information concerning studies and tests previously carried out on the GMO involved" Parliament has not ensured the correct transposing of Directive 2001/18/EC and thus failed to comply with Article 88-1 of the Constitution. The Members of the National Assembly making the referral argue on the same grounds that Parliament has infringed Article 7 of the Charter for the Environment.

As regards the argument based on failure to comply with the requirement of transposing of Directives :

42. Paragraph 1 of Article 88-1 of the Constitution provides: "The Republic shall participate in the European Communities and in the European Union constituted by States which have freely chosen, by virtue of the treaties that established them, to exercise some of their

powers in common". The transposing into domestic law of a Community Directive thus derives from a constitutional requirement.

43. It is the task of the Constitutional Council, when, under Article 61 of the Constitution, a statute designed to transpose a Community Directive into domestic law is referred for review to ensure compliance with said requirement.

44. Firstly, the transposing of a Community Directive cannot run counter to a rule or principle inherent in the constitutional identity of France, unless the constituent authority has given its consent thereto.

45. Secondly, required to give its ruling before the promulgation of a statute within the time allotted by Article 61 of the Constitution, the Constitutional Council cannot request a preliminary ruling from the Court of Justice of the European Communities under Article 234 of the Treaty creating the European Community. It may therefore only rule that a statutory provision clearly incompatible with the Directive which it is designed to transpose is unconstitutional. In all events it is the task of national Courts, if need be, to make a request for a preliminary ruling from the Court of Justice of the European Communities.

46. Paragraph 3 of Article 31 of the Directive 2001/18/EC requires Member States to establish public registers designed to record and make known to the public the location of the release of genetically modified organisms carried out for research purposes or the putting on the market of the same, without requiring that said registers include information as to studies and tests previously carried out on said genetically modified organisms.

47. The disputed provision which establishes, at national level, such a register designed to be made known to the public is not patently incompatible with Directive 2001/18/CE and thus is not an infringement of Article 88-1 of the Constitution.

<u>As regards the argument based on failure to respect Article 7 of the Charter for the Environment :</u>

48. Article 7 of the Charter for the Environment provides: "Everyone has the right, in the conditions and to the extent provided for by law, to have access to information pertaining to the environment in the possession of public bodies and to participate in the public decision-taking process likely to affect the environment"

49. These provisions, like all the other rights and duties defined in the Charter of the Environment, have constitutional status. The very terms thereof indicate that it is the task of Parliament to lay down "the conditions and limits" governing the exercising by any person of the right to have access to information concerning the environment held by the public authorities. Only the measures concerning the application of the said conditions and limits laid down by Parliament are left to be made by regulations.

50. The opinions of the High Council on Biotechnologies regarding each application for an authorisation to release genetically modified organisms are made public, in accordance with Articles L 531-3 and L 531-4 of the Environment Code. The national register indicating the nature and location of plots of land where genetically modified organisms are cultivated is made available to the public. Hence, when not providing that said register should include details of studies and tests previously carried out on authorised genetically modified organisms, Parliament did not distort the principle of the right to information which it is incumbent upon it to implement.

WITH RESPECT TO ARTICLE 11 :

51. I of Article 11 of the statute referred for review amends Article L 532-4 of the Environment Code; II inserts an Article L 532-4-1; III amends Article L 535-3. I and II deal with the contents of the files put together by farmers and made available to the public in the framework of the approval procedure for contained use of genetically modified organisms. III, which applies to the release of genetically modified organisms into the environment for research purposes or for the putting on the market thereof, deals with the protection of confidential information or intellectual property rights. Indent 3 of Article 532-4-1 and indent 2 of II of Article L. 535-3, as worded pursuant to the 9th and 13th indent of

section 11 of the statute provide that, in both of said cases, "The list of information which may in no case be kept confidential shall be determined by a Decree of the Council of State".

52. The Senators making the referral argue that by introducing a confidentiality clause in favour of farmers growing genetically modified organisms and leaving it to a Decree of the Council of State to determine "the list of information which may in no case be kept confidential", section 11 of the statute "does not ensure a proper transposing of the Directive in that it runs counter to the general purpose of the latter, namely the public's right of permanent access to information". The Members of the National Assembly making the referral argue for their part that Parliament has failed to exercise a power vested in it by Article 7 of the Charter for the Environment.

<u>As regards the arguments based on failure to comply with the requirement of transposing of Directives.</u>

53. Although the transposing into domestic law of a Directive is a constitutional requirement, it is clear from the Constitution and in particular Article 88-4 thereof that this requirement does not result in adversely affecting the separation between matters which are the preserve of statute law and those which are the preserve of regulations as determined by the Constitution.

54. Article L 535-3 as amended of the Environment Code merely reiterates the provisions of Article 25 of Directive 2001/18/EC with the exception of those of paragraph 4 thereof.

55. Parliament's leaving it to the Council of State to determine by Decree the list of information which may in no case be kept confidential cannot be considered per se as having patently failed to comply with Directive 2001/18/EC and thus as running counter to Article 88-1 of the Constitution.

<u>As to the argument based on the failure of Parliament to exercise fully the powers vested in it</u>

56. Under Article 7 of the Charter for the Environment, everyone has the right "in the conditions and to the extent provided for by law", to have access to information pertaining to the environment in the possession of public authorities. Article 34 of the Constitution provides: "Statutes shall determine the rules concerning .... the fundamental guarantees granted to citizens for the exercise of their civil liberties" and also "the rules concerning ... crimes and other major offences and the penalties they carry". Statutes shall also determine the basic principles of the "preservation of the environment".

57. By merely leaving it in general terms to regulations to determine the list of information which may in no case be kept confidential, Parliament, in view of the detrimental effect of such measures on information protected by the rules of confidentiality, failed to exercise its full powers. Hence the recourse to a Decree of a the Council of State set out in indent 3 of Article L 532-4-1 and indent 2 of II of Article L 535-3, as worded pursuant to indents 9 and 13 of the statute referred for review, is unconstitutional.

<u>As regards the consequences of the unconstitutional nature of the provisions referred for review</u>

58. The determination of information which in no case may be kept confidential is required, in the event of contained use of genetically modified organisms, by Article 19 of Directive 90/219/CE referred to hereinabove and, in the event of deliberate release of such organisms, by Article 25 of Directive 2001/18/EC. Hence the drawing up of lists containing such information derives from the constitutional requirement of the transposing into domestic law of Community Directives. Any immediate finding that the challenged provisions are unconstitutional would be tantamount to disregarding such a requirement and entailing patently disproportionate consequences. Therefore, in order to enable Parliament to rectify its failure to exercise its full powers, the effects of the finding of unconstitutionality shall be postponed until January 1st 2009.

WITH RESPECT TO SECTION 14

59. Section 14 of the statute referred for review concerns deliberate released of genetically modified organisms. 10° thereof inserts into the Environment Code an Article L 533-8 of which I is worded as follows :

"After the granting of authorization pursuant to Articles L 533-5 or L533-6, when the administrative authority has specific reasons for considering that an authorized genetically modified organism poses a risks for the environment or human health due to new or additional information which has become available after the granting of authorization and affect the assessment of the risks posed for the environment or human health or due to the re-assessment of existing information on the basis of new or additional scientific knowledge, said authority may :

"1° Temporarily restrict or forbid the use or sale of said genetically modified organism on its territory, after consultation of the High Council on Biotechnologies;

2° In cases of severe risks, take emergency measures consisting in particular in suspending the placing on the market of said product or revoking the authorization granted and informing the public of this fact"

60. The Senators making the referral claim that these provisions fail to comply with the obligation to inform the public as set out in Article 23 of Directive 2001/18/EC, whereby "The Member State shall ensure that in the event of a severe risk, emergency measures such as suspension or termination of the placing on the market shall be applied, including information to the public".

61. The foregoing quoted provisions constitute a safeguard clause enabling the administrative authority to revoke authorisation for placing on the market of genetically modified organisms if new risks appear. In the absence of a severe risk, safeguard measures shall be taken after consultation of the High Council on Biotechnologies, of which the opinion shall be made public as required by Article L 531-3 of the Environment Code. When emergency measures are applied in the event

of a severe risk, said measures shall be made known to the public as provided for by new Article L 533-8 of the same Code. In these conditions, the challenged provisions patently do not fail to comply with the obligation to keep the public informed as provided for by Article 23 of Directive 2001/18/CE and hence do not run counter to Article 88-1 of the Constitution.

62. The Constitutional Council is not required proprio motu to review any other question of conformity with the Constitution,

HELD

Article 1 - As from January 1st 2009, indent 3 of Article L 532-4-1 and indent 2 of II of Article L 5535-3 of the Environment Code, as worded pursuant to indents 9 and 13 of section 11 of the Act on Genetically Modified Organisms, shall be unconstitutional.

Article 2 - Sections 2, 3, 6, 7 ,8, 10 and 14, and the rest of section 11 of the Act on Genetically Modified Organisms, are not unconstitutional.

Article 3 - This decision shall be published in the Journal officiel of the French Republic

Deliberated by the Constitutional Council sitting on June 9th 2008 and composed of Messrs Jean-Louis DEBRE, President, Guy CANIVET, Jacques CHIRAC, Renaud DENOIX de SAINT MARC, Olivier DUTHEILLET de LAMOTHE, Valéry GISCARD d'ESTAING Mrs Jacqueline de GUILLENCHMIDT, Messrs Pierre JOXE and Jean-Louis PEZANT, Mrs Dominique SCHNAPPER and Mr Pierre STEINMETZ.