Contra arguments plea Government

Considering the discussions this morning, it indeed may be safe to conclude that a majority of the integrity breaches will be criminal acts. The examples presented by the Ombudsman today focused on third parties rather than the investigated persons. The discussion on Art. 32 sec.2 confirmed the weak position of the investigated persons turned suspect versus the "*verschoningssrecht*" of the witnesses only (In this regard I refer to point 16 of my rebuttal).

Whereas the law cannot deal with, and protect each aspect of human behavior, laws are written to cover a wide spectrum of an issue provided for in an ordinance, and should be considered to that extent. Laws should be clear, and the people governed by such a law should be willing to abide by and cooperate with the law, in particular when their cooperation is required. Not having the rights of the people, (not just limited to third parties finding themselves involved in an investigation) properly safeguarded, may cause the Integrity Chamber losing its teeth as a result of non-cooperation by the people.

While it should not be so that every step/action of the Integrity Chamber can be challenged, being faced with a binding recommendation, for example, without the right of having been heard, or contest certain actions of the Chamber before providing a binding advice on the matter, is contrary to basic rights and procedural principles.

Boundaries between administrative and criminal procedures

The Government is of the opinion that should the situation arise whereby the boundaries between the administrative investigation by the Integrity Chamber and a possible criminal investigation become **nebulous/vague/unclear**, the matter will resolve itself in criminal proceedings that may follow. Laws have to be clear and fair. It appeared from the proceedings this morning that even government has problems interpreting some very important articles of the law.
For example: art. 3 sec. 4 jo. art. 9 Rijkswet politie (for completeness sake I submitted a copy of LB-ham landsrecherche); art. 23 of the ordinance in relationship to art. 5 of the constitution.

Review *ex ante* of the law should widely consider possible infringements against the Constitution. Leaving it up to the Court after the situation occurs in a specific situation *ex post*, makes review of the law *ex ante* superfluous.

Not only has it been established that other than alleged by the Government, the two investigations (administrative and criminal) can run parallel, with no provisions are established how to deal with the information acquired by the chamber. The concern of the Ombudsman is that administrative investigation would start by the Integrity Chamber and eventually may end at the Prosecutor's office with no rules for these procedures. Leaving up to a protocol does not provide the required guarantees to protect the rights of those involved in the investigations.

The Government acknowledges that the two investigations may at times complement one another; investigation of 'integrity breaches' by an independent body preceding a criminal

investigation. The case referred to in the Saunders' arrest covering a 'preparatory investigation', which under circumstances does not require the guarantees of a judicial procedure, is not applicable here. The Integrity Chamber does not execute preparatory investigations, but functions as an independent administrative body (ZBO). Furthermore in the case referenced by government (Fayed vs. the United Kingdom) a judicial review was built into the process. Considering the two investigations complimentary, and the entanglement this brings, confirms the concerns of the Ombudsman. The issue that the Saunders arrest discusses, is the matter of transfer of information from one body to the other, and the protection of the rights of the persons involved.

Considering that law enforcement is a concern according to Government, caution is required in the transfer and use of information acquired under the obligation to cooperate, in continuation of the investigation as a criminal case in the fight against corruption.
The words 'complementing' and 'nebulous' used by Government confirm 'entanglement' of the two systems.

Important questions: who determines "reasonable necessary"; internal supervision not adequate; no means of recourse before and during investigations (see Lvo health inspection, art.16 beslissing…) and art. 5 (machtiging) and art. 53, 54.

The Saunders arrest has proven that the lines between the two investigations can in fact become nebulous and has established clear guidelines to protect the suspect. Just like in a criminal case, the court determined that, in an administrative case, the suspect cannot be forced to incriminate himself and that the government must respect the 'free will' of the individual. The suspect can therefore choose to remain silent in an administrative case insofar as this is *"wilsafhankelijk bewijsmateriaal"*. The court further established that evidence obtained *via coercion or oppression*, during that course of the administrative investigation, can be excluded from evidence in the criminal proceedings. This has not been provided for in the Ordinance.

Though the government has indicated that the matter '*will resolve itself in possible criminal proceedings*', the Ombudsman does not share this view. A matter of such crucial importance should not be left up to a judge *ex post.* There must be procedural guarantees in the ordinance that such evidence will not be used in a criminal case, because at the moment that the judge decides, the right to remain silent would have already been violated.

The Government further argues that as long as the person in question has not been charged as a suspect in a criminal case, the rights based on criminal procedures cannot be exercised by the person in question.
This means that a person may remain under administrative investigation with the duty to cooperate with the investigation, but without the rights provided by a criminal investigation. What happens with the information acquired based on the administrative authority of the Chamber is left in accordance with the Government to the discretion of the Integrity Chamber when the case is turned over to the Public prosecutor, and subsequently to the judge in criminal proceedings which may follow. The Ombudsman cares to note that this again supports her point, I refer to the guidelines provided in the Saunders arrest.

Administrative authority in combination with the duty to cooperate resemble authorities in criminal investigations, both are subject to imprisonment. The Colast Est. arrest establishes that the mere fact that certain authorities pursuant to article 4 of the Ordinance do not require prior judicial authorization, constitutes an infringement on article 8 sec. 2 EVRM. Whereas a judge may review the manner in which the authority was used (entering of places, gathering information, review and confiscating documents, cooperation etc.) after the fact, however, this may be too late for the person involved (*mosterd na de maaltijd).* Providing for same before the Ordinance take effect is therefore required. The Ordinance does not meet the requirements of article 8 sec. 2 EVRM.

The Sanoma arrest establishes that infringement on article 8 sec. 1 EVRM (privacy of correspondence) also requires judicial authorization beforehand. The Sanoma arrest goes further than the Colast Est. arrest by providing that not only judicial authorization is required, but provisions should be established by law. Supervision by an independent external entity or body is required. Not even the prosecution is considered impartial according to the case.

Whereas Government presently alleges that the Supervisory Committee (pursuant to article 18 being internal supervision and possibly not equipped with expertise) can be deemed to be *'other independent and impartial decision-making body'* as meant by the European Court on Human Rights (Case Sanoma), Government earlier on has consistently argued in defense of the grievances brought forward by the Ombudsman, the reintroduction of the Supervisory Committee, is a means of returning to a system of internal supervision, setting the Supervisory Council, which was deemed external supervision, aside. As such the supervisory committee does not need the guidelines established by the Colas Est. and Sanoma arrest.

Considering the many assumptions presented by Government in the course of this procedure, and changes of interpretation of certain parts of the law by Government even before the law takes effect, such as the interpretation of article 3 sec. 4, in addition to the opinion that if a conflict between administrative and criminal authority arises, this will resolve itself;
the Ombudsman concludes that the Court should take a close look at the grievances presented by the Ombudsman pertaining to the entanglement of the two systems.

(The council of advice see art. 32 sec 2 and art. 18)
The proceedings before the Constitutional Court are not contentious, it is not a matter of who is right and who is wrong, but the interest of the society and the rights of the people are the issues at stake. The Ombudsman is charged by the Constitution to alert the Court when a conflict between protecting the general interest of the society and the fundamental rights of the people the law serves arises. It is now up to the Court to decide as charged by the Constitution.