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COSCE 14

NOTE

by :	Presidency
to :	Delegations
Subject :	Draft Council Decision authorising the Commission to negotiate the Accession Agreement of the European Union to the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR). -Involvement of ECJ regarding the compatibility of legal acts of the Union with fundamental rights (Paragraph 11 of the Negotiating directives)

Following the FREMP Working Group meeting on 25 May 2010, delegations will find attached a revised version of the document from the Presidency on the options under consideration to ensure the preservation of the characteristics of the Union's system of judicial protection. Changes with respect to the previous version (DS 1356/10) are highlighted by underlining and (…).

ANNEX

Accession of the EU to the ECHR and the preservation of the ECJ's monopoly on the interpretation of EU law: options under discussion

A. Introduction

- One of the basic principles on which basis the negotiations for the accession of the EU to the ECHR must be conducted, according to Protocol nº 8 to the Treaty of Lisbon, is that the accession shall not affect the competences of the Union or the powers of its institutions. This point is also highlighted in paragraph 1 a) of the draft Negotiating directives, in particular with respect to the competence of the Court of Justice of the European Union.
- Under Articles 263 and 264 of the TFEU, the ECJ has the competence to review the legality of legislative acts or other acts of the EU Institutions, and, if necessary, to declare the act concerned void. This includes the competence to rule on the compatibility of acts of EU institutions with fundamental rights.
- According to Art. 35(1) ECHR, the ECtHR may only deal with a matter "*after all domestic remedies have already been exhausted according to the general recognized rules of international law"* . Since this pre-requisite may be interpreted as being fulfilled also in cases brought to the ECtHR where the question of the compatibility of a Union act with fundamental rights has not previously been submitted to the ECJ, the question arises as to whether it is necessary to set up a specific mechanism to ensure, in these cases, an intervention of the ECJ prior to the ruling of the ECtHR.
- Different options have been proposed by delegations in the ongoing discussions in FREMP Working Party on the Negotiating mandate, and also discussed in other fora.[1] The ECJ itself has submitted a discussion document on the issue on this matter.[2]
- In any case, it will be assessed that all mentioned options are compatible with existing Treaties.

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1 Public hearing on 18 March 2010 organized by AFCO Commission of the European Parliament on the accession of the EU to the ECHR.

2 See the document of 5 May 2010.

- At the last meeting of the FREMP Working Party on 6 May 2010, several delegations have asked the Presidency to prepare a document summarizing the options under discussion, as a basis for further debates on this question, which should be finalized in the course of negotiations.

B. Options under discussion

1. No specific mechanism is required[1].

The previous involvement of the ECJ in the area of fundamental rights is sufficiently ensured by the requirement that an individual applicant can bring a complaint to the Strasbourg Court only after having exhausted "all domestic remedies". Under Article 267 of the TFEU, a national court of last instance is obliged to make a preliminary reference to the ECJ, where a question regarding the validity or the interpretation of a legal act of the Union is raised before it.

Based on the ECtHR case law, according to which the arbitrary failure of a court of last instance of a MS to make a preliminary reference to the ECJ may constitute, if it appears to be arbitrary, a violation of the right to a fair trial under Article 6 ECHR[2], it could be argued that in such cases the ECtHR would only rule on this violation, while refraining from assessing the compatibility of the act complained with the ECHR under other reasons of complaint raised by the applicant. This would also imply that the Strasbourg Court interprets the requirement of exhaustion of domestic remedies in the sense that the applicant must have raised the question of compatibility of the act of the EU with fundamental rights already before the national court and have formally requested (or informally suggested, where national law does not provide for this possibility) a preliminary reference to the ECJ on such matter.

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1 Position reflected in the Commission's recommendation for a Council decision authorising the Commission to negotiate the Accession agreement of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, doc. 7668/10 RESTREINT UE FREMP 5 JAI 227 COHOM 74.

2 See ECtHR, Schweighofer vs. Austria, 24 August 1999, no. 35673/97; Lutz vs. Germany, 13 February 2007, no. 15073/07.

However, given the competence of the national courts (Articles 267 and 274 TFEU) to interpret Union law, and taking into consideration that according to the case law of the ECJ the obligation to refer a question of interpretation of EU law, even by a Court of last instance, suffers exceptions (such as in the case of an "*acte clair*"), it is also possible that the ECtHR may consider that the local remedies have been exhausted when a national court of last instance, although requested by the applicant to raise the question before the ECJ, has adopted a final decision without having requested a preliminary ruling, and that no further intervention of the ECJ is needed[1].

2. A specific mechanism is required

If, on the contrary, it is considered that the existing provisions do not ensure the proper involvement of the ECJ and that the setting up of a special mechanism is required allowing the ECJ to rule on the compatibility of an EU act with fundamental rights before the decision of the ECtHR, different options have been proposed.

- Judge Timmermans option[2]: The Commission should be granted the possibility, once a claim is lodged by an individual before the ECtHR and has been declared admissible, to request the ECJ to rule on the compatibility of an EU act with the fundamental rights. In such cases, the procedure before the Strasbourg Court should be suspended until ECJ has given its ruling[3].

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1 See the opinion of the Council Legal Service of 11 May 2010, doc. 9693/10.

2 Presentation by ECJ Judge Timmermans at the hearing of AFCO Commission of the EP on 18 March 2010.

3 According to the opinion of Judge Timmermans, this possibility would not require an amendments of the EU Treaties, insofar as the mechanism resolves a problem deriving from the accession, and considering that the ECJ case law states that an international agreement concluded by the EC (or EU) may attribute new competences to the ECJ.

- Proposal by the Romanian delegation: within the deadline for submitting written observation provided by the ECtHR rules of procedure, either the COM or the MS shall have the possibility to ask the ECJ to rule on the compatibility of an EU act with EU primary law, including the compatibility with fundamental rights, if the Luxembourg Court has not been called upon to give its opinion during the national procedure. The decision taken by the ECJ in such cases will be binding. The ECJ should treat such procedures with priority, in order to allow the EU and/or the MS to submit its position before the ECtHR within the indicated period of time (…).

C. Issues to be considered if a specific mechanism is set up

- Possible delays in the procedure before the Court of Strasbourg: several delegations have raised the concern that, in case any mechanism were set up, additional delays for the citizens who brought a case before the ECtHR could derive from its application. It could be considered (see the proposal by the Romanian delegation outlined above) that, if the ECJ should deal with this cases by way of urgency this risk could be minimized. However, according to the Commission, these cases, taking into account the importance of the subject matter of the decision, should be treated according to the ordinary procedure before the ECJ, allowing for a thorough examination of the circumstance of the case.

- Effects of the ECJ ruling with respect to the ECtHR: some delegations expressed concerns that this mechanism would raise the risk of "clashes" between the two European courts. In this regard, it is useful to recall what the ECJ states in its reflection document on this question: "*what is at stake in the situation referred to is not the involvement of the Court of Justice as the supreme court of the European Union, but the arrangement of the judicial system of the Union in such a way that, where an act of the Union is challenged, it is a court of the Union before which proceedings can be brought in order to carry out an internal review before the external review takes place"*

- The adoption of the mechanism would require a specific mandate for the negotiator, as well as specific indications in the Negotiating directives (paragraph 11) specific provisions on the accession mechanism (…). In this regard a decision must be taken in regard to the paragraph 11 of the negotiating directives. In all cases, the precise details of the mechanism and, in particular, the adoption of the internal rules in the EU regarding the application of the mechanism, including the competence to activate the mechanism and the procedure before the ECJ, can only be discussed and adopted once the negotiation with the High Contracting Parties to the ECHR ends, and in accordance with the results of such negotiation [1].

D. Intermediate options

If neither of the two options outlined above should be acceptable to all delegations, intermediate solutions which combine elements of both should be explored, such as the adoption of provisions of soft law encouraging national courts, especially courts of last instance to consider a more strict interpretation of the obligation to refer a case to the ECJ according to Article 267 (3) TFEU where the compatibility of an act of EU law with fundamental rights is raised before them.

These alternative scenarios would have to be, if necessary, the object of further reflection in the light of the discussions on the main options outlined under letter B), as well as in the light of the ongoing negotiations with the High Contracting Parties to the ECHR, and will require also an assessment of their legal validity.

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[1] According to the opinion of the Council Legal Service (doc. 9693/10), the adoption of the mechanism would require the amendment of the TFEU.