



**COUNCIL OF  
THE EUROPEAN UNION**

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**WORKING DOCUMENT FROM THE COMMISSION**

**FREMP meeting**

**(Brussels, 10 January 2011)**

**Previous involvement of the Court of Justice in the context of the accession of the  
European Union to the European Convention for the protection of  
Human Rights and Fundamental Freedoms**

**I. The problem to be addressed**

1. In proceedings before the European Court of Human Rights (ECourtHR), the following situation may arise:
  - a) in a case brought against a Member State (regarding an act or failure to act of that Member State), at least one of the alleged violations of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is of the nature that it could not have been avoided otherwise than by disregarding a provision of Union law which is enshrined in act of an institution, body, office or agency of the Union,

b) because of such "substantive link" between the alleged violation of the ECHR and an act of an institution, body, office or agency of the Union, a possible finding by the ECourtHR establishing the alleged violation would amount, incidentally, to a finding that the Union act at issue is itself incompatible with a fundamental right set forth in the ECHR,

c) the Union has joined the proceedings before the ECourtHR as a co-respondent,

d) the Court of Justice has not yet ruled on the validity of the Union act at issue on account of the fundamental right as defined at the level of the Union which constitutes the equivalent of the fundamental right set forth in the ECHR the violation of which has been alleged in the proceedings before the ECourtHR.

2. It must be recalled that, for the purpose of the exhaustion of domestic remedies as required by Article 35(1) ECHR, a reference to the Court of Justice for a preliminary ruling is not in itself a domestic remedy. Indeed, the decision to actually request such a ruling is not in the hands of the applicant – who can only submit the suggestion to that effect – but belongs to the national court. Hence, where a reference to the Court of Justice for a preliminary ruling was suggested by the applicant but not made by the national court, it must be assumed that the ECourtHR would accept exhaustion of domestic remedies and therefore not hold the application inadmissible on account of Article 35(1) ECHR.

3. Regarding the situation mentioned at point 1,

- the Court of Justice of the European Union, at paragraph 12 of its "Discussion document" of 12 May 2010 on certain aspects of the accession of the European Union to the ECHR, has stressed that "*in order to observe the principle of subsidiarity which is inherent in the [ECHR] and at the same time to ensure the proper functioning of the judicial system of the Union, a mechanism must be available which is capable of ensuring that the question of the validity of a Union act can be brought effectively before the Court of Justice before the [ECourtHR] rules on the compatibility of that act with the [ECHR]*",

- paragraph 11 of the negotiation directives of 4 June 2010 provides that the negotiations should ensure "*that the prior internal control by the Court of Justice of the European Union, in accordance with primary law, is applicable also in cases where the conformity with the [ECHR] of an act of an institution, body, office or agency of the Union is at stake in a case brought before the [ECourtHR] but [where] the Court of Justice of the European Union has not had the opportunity to rule on the compatibility of that act with fundamental rights defined at the level of the Union. Any such procedural means, allowing the Court of Justice of the European Union to assess the compatibility of such act with fundamental rights, should be meant to safeguard the subsidiary nature of the procedure before the [ECourtHR] and should not result in causing unreasonable delays in such procedure*"; in this connection the Council declaration annexed to the Council decision authorising the negotiation of the Accession Agreement of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Annex III) states that before the conclusion of the Accession Agreement "*the Council will unanimously adopt legally binding rules to the extent permitted by the Treaties, on the prior involvement of the Court of Justice of the European Union in assessing the compatibility of an act of an institution, body, office or agency of the Union with fundamental rights as defined at the level of the Union, as set out in paragraph 11 of the negotiation directives*".

## **II. Solutions**

### **1. Level of the Union**

4. At the level of the Union, it would seem necessary to lay down procedural rules allowing the Court of Justice, in the situation referred to at paragraph 1 *supra*, to assess the validity of the Union act at issue on account of the fundamental right as defined at the level of the Union which constitutes the equivalent of the fundamental right set forth in the ECHR the violation of which has been alleged in the proceedings before the ECourtHR.

5. Subject to the specificities mentioned at paragraphs 6 – 11 below, the general features of those procedural rules would be similar to those governing the preliminary ruling procedure.
6. The question of the validity of the Union act at issue would be brought before the Court of Justice by a request. As to the actors who would be entitled to make such request, it could be foreseen that these are the Commission and the respondent Member State.
7. The circumstances referred to at paragraph 1 *supra* would constitute conditions of admissibility of the request. Regarding, more particularly, the circumstance referred to at paragraph 1 sub d) *supra*, the requirement that the Court of Justice has not yet ruled on the validity of the Union act at issue on account of the relevant fundamental right is intended to cover both the situation in which that question has not been brought before the Court of Justice (be it in the context of an action for annulment or of a reference for a preliminary ruling) and that in which the Court of Justice has not actually ruled on the merits of such action for annulment or of a reference for a preliminary ruling.
8. The Court of Justice would decide on the merits of the request by a judgment or possibly, in certain circumstances, by an order (but not merely by an opinion).
9. The scope of the assessment to be carried out by the Court of Justice would be strictly limited to the validity of the Union act at issue on account of the relevant fundamental right. It would therefore not encompass other aspects of the validity of that Union act (e. g. compatibility with other fundamental rights, competence, choice of the legal basis, respect of essential procedural requirements). Such concentration of the procedure and, hence, of the pleadings will decisively contribute to "streamline" the procedure before the Court of Justice and thereby reduce its length.

10. The actors entitled to participate in the proceedings (by submitting written observations and by participating in the hearing) should as a matter of principle be the same as those mentioned in Article 23 of the Statute of the Court of Justice of the European Union (Member States, Commission and the institution, body, office or agency of the Union which adopted the act the validity of which is in dispute). However, unlike in a preliminary ruling procedure, in the situation referred to at paragraph 1 *supra*, there are by definition no proceedings pending before a court of a Member State and hence no "parties" to such proceedings which could participate in the proceedings before the Court of Justice. However, given the fact that the Member State which is the respondent before the ECourtHR may participate in the proceedings before the Court of Justice, it seems appropriate for the sake of equality of arms to give the applicant before the ECourtHR the same right.
11. As to the legal instrument in which the procedural rules set out at paragraphs 4 - 10 *supra* could be laid down, the Council decision concluding the Accession Agreement [Article 218 (6) and (8) TFEU] would seem to be the most appropriate place. This instrument has to be adopted unanimously and moreover requires for its entry into force approval by Member States in accordance with their respective constitutional requirements. If need be, more detailed and technical rules could be laid down in the Rules of procedure of the Court of Justice.
12. It is important to stress that the procedural rules set out at paragraphs 4 - 10 *supra* would not amount to conferring new competences on the Union or new powers on the Court of Justice of the European Union. Rather would they – with a view to preserving the specific characteristics of the Union and Union law in the context of the Union's accession to the ECHR (see Article 1 of Protocol Nr. 8) – address a type of situation in which the Court of Justice would exercise its power to "*ensure that in the interpretation and application of the Treaties the law is observed*", as enshrined in Article 19 (1) TEU by declaring an act of the Union invalid in case it is incompatible with fundamental rights as defined at the level of the Union. Since these fundamental rights are addressed to the institutions, bodies, offices and agencies of the Union [Article 51 (1) Charter of Fundamental Rights], the abovementioned procedural rules would at the same time enhance the control of the respect, by these institutions etc., of their obligation to "*act within the powers conferred on [them] in the Treaties*" [Article 13 (2) TEU].

## 2. Level of the ECHR / Accession Agreement

13. Regarding the interplay between the procedural rules set out at paragraphs 4 - 10 *supra* and the procedure before the ECourtHR there is a twofold objective:
14. Firstly, the application of those procedural rules should not result in causing unreasonable delays in the procedure before the ECourtHR.
15. Secondly, the Court of Justice should be able to conduct a proper and thorough assessment of the validity of the Union act at issue on account of the relevant fundamental right, allowing all participants – including the applicant before the ECourtHR – to express themselves in an effective manner.
16. In order to meet these objectives, two options can be envisaged:
  - a) A provision in the ECHR providing for the proceedings before the ECourtHR to be stayed at the request of the respondent Member State and / or of the Union as a co-respondent. Such staying of the proceedings would require that a request to the Court of Justice to rule on the validity of the Union act at issue pursuant to the procedural rules set out at paragraphs 4 - 10 *supra* has been made. The proceedings before the ECourtHR would then automatically resume after a decision by the Court of Justice on that request or, at the latest, after a specified period (e. g. 15 months).
  - b) The ECourtHR applies and, if need be, adapts its Rules of Court in such a way as to take account of situations in which the Court of Justice has been requested to rule on the validity of the Union act at issue pursuant to the procedural rules set out at paragraphs 4 - 10 *supra*.
17. In this connection, it should be borne in mind that the phase of written pleadings before the ECourtHR normally lasts several months, that for submissions by the Union as a co-respondent and for a reply thereto by the applicant additional time limits will have to be set by the ECourtHR and that all such time limits are amenable to be extended by the ECourtHR.

18. Both options should allow the Court of Justice to rule on the validity of the Union act at issue on account of the relevant fundamental right before the ECourtHR decides on the merits of the application before it, thereby ensuring the operation of the principle of subsidiarity also in situations where, technically, domestic remedies are exhausted within the meaning of Article 35(1) ECHR.
  
19. Whichever option is chosen, it is clear that any request to the Court of Justice to rule on the validity of the Union act at issue, pursuant to the procedural rules set out at paragraphs 4 - 10 *supra*, should be treated with expedition, e. g. by means of the Court of Justice giving priority to such procedure and, possibly, of provision to be made for a shortening of relevant time limits within the procedure, it being understood that such shortening should however remain moderate and not lead to the same degree of acceleration as that characterizing the urgent procedure pursuant to Article 104 b of the Rules of Procedure of the Court of Justice.

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