

Meijers Committee

Standing committee of experts on international immigration, refugee and criminal law

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To (by e-mail)

The members of the Informal Group on Accession of the EU to the ECHR (CDDH-UE) of the Council of Europe and

The members of the delegation for the negotiations on accession of the EU to the ECHR of the European Commission

Reference Regarding Datum

CM1105
Admissibility of claims in the light of accession of the EU to the ECHR
Utrecht, 23 May 2011

Dear Sir/madam,

With the entry into force of the Lisbon Treaty and the entry into force of Protocol 14 of the European Convention on Human Rights (ECHR) important steps have been taken in the accession of the EU to the ECHR. Hereby the protection of human rights within the EU is taken to a higher level. The Standing Committee of experts on International Immigration, refugee and criminal law (the Meijers Committee) is pleased with this promising development in the field of human rights. However, the accession of the EU to the ECHR also confronts both institutions with new questions regarding how to deal with claims before the European Court of Human Rights (ECtHR) for alleged violations committed in the context of cooperation within the EU. According to the Meijers Committee the current negotiations between the EU and the Council of Europe are a good opportunity to address some of these legal issues. Especially regarding the admissibility of complaints, either against the EU itself, against the EU and one of its Member States, or against two or more Member States, the Meijers Committee would like to share with you some remarks. The Meijers Committee is concerned that these issues might escape to the attention of the participants during the discussions regarding the accession.

Introduction

In 1950, the ECHR was drafted in a context in which, as a rule, all facts relevant in the proceedings of citizens more or less took place within the boundaries of one specific state. This was also the case for human rights violations; in essence, where human rights violations occurred, only one state was responsible and accountable for these violations. However, the situation in the European society of 2011 is completely different. The EU developed into a leading institution with proper competences regarding legislation and jurisdiction. Supplementary to these substantive competences of the EU, its Member States have developed intensive cooperation in judicial matters, e.g. in order to combat crime and illegal migration. In all these circumstances human rights violations may occur.

• Commissie Meijers
Permanente commissie van deskundigen in internationaal vreemdelingen-, vluchtelingen- en strafrecht

• Comité Meijers
Comité permanent d'experts en droit international de l'immigration, des réfugiés et du droit pénal

• Meijers-Ausschuss
Ständiger Ausschuss von Experten im internationalen Ausländer-, Flüchtlings- und Strafrecht

Because of the important subsidiarity principle with regard to the protection of human rights at a national level, complaints lodged with the ECtHR are only admissible if all national legal remedies have been exhausted. This principle, however, generates new questions regarding the admissibility of claims against the EU itself and against Member States involved in the alleged violations committed in the course of interstate cooperation.

Admissibility criteria

In cases of alleged violations by the EU or one of its institutions or bodies, the Meijers Committee presumes that in order for these claims to be admissible, all remedies offered by the EU itself against this specific action have to be exhausted.

In this regard the Meijers Committee suggests including the next provision in the Protocol of accession, notably with regard to its second paragraph (b) regarding the matter of exhaustion of legal remedies in the European Union, which are of a different character than those in the High Contracting Parties:

Article 35.

Admissibility criteria

1. *The Court may only deal with the matter:*

- a. *In case the application is directed against one of the High Contracting Parties, if all domestic remedies in that State Party have been exhausted, according to the generally recognised rules of inter-national law, and within a period of six months from the date on which the final decision was taken; or*
- b. *In case the application is directed against the European Union, if all remedies available within the legal order of the European Union have been exhausted, according to the generally recognised rules of inter-national law, and within a period of six months from the date on which the final decision was taken*

Exhaustion of domestic remedies

More difficulties probably will arise in the context of complaints regarding alleged violations that occur during the cooperation between Member States. Would any violation occur during interstate cooperation, it can easily happen that the applicant is, for understandable and good reasons, unaware which very Member State must be held responsible for the alleged violation. This is especially the case in the context of cooperation between Member States of the EU, whereas this cooperation is often based on the principle of mutual recognition. Applicants may not even have legal remedies in the Member States most responsible or only detect the role of Member States in violation of human rights when prosecuted. In these cases, applicants are likely to be overcharged by requiring them to exhaust the legal remedies in all Member States involved before being able to refer their application to the ECtHR. The Meijers Committee therefore proposes that in such situations, it might suffice to exhaust the legal remedies in accordance with article 35 of the Convention in only one of the High contracting Parties involved.

On the basis of mutual trust and the collective responsibility of state parties for the guarantees under the Convention, a living instrument as the ECHR should be given a practical and effective meaning. In a context of intensive cooperation between the Member States (on the basis of mutual recognition or other intensive modalities), the collective responsibilities of the High Contracting parties to the ECHR require that at the moment of admissibility, the application does not need to relate to all Member States that finally are responsible for the violation. This way the Court can, depending on the merits of the case, provide for an adequate and effective remedy against alleged violations in the context of Member State cooperation.

In this regard the Meijers Committee suggests including the next provision in the Protocol of accession:

Article 35a.

Exhaustion of domestic remedies

In case of an application directed against more than one of the High Contracting Parties, in which it later emerges from the facts that one of these High Contracting Parties is the sole state responsible for the alleged violation of the Convention and the legal remedies in that state have not been exhausted, or

in case the Court judges at any phase of the proceedings that another High Contracting Party than the one against which the complaint was lodged and where the legal remedies have been exhausted is to be held responsible for the alleged violation of the Convention, the Court can decide:

- a. to refer the applicant back to the High Contracting Party that is to be held responsible for the alleged violation, in order to exhaust the domestic remedies available there, before resubmitting an application against that High Contracting Party; or*
- b. to settle the application in the usual manner for reasons of procedural autonomy.*

The Court hereby takes into account whether it should have been clear to the applicant that effective remedies were available in the other High Contracting Party that he should have used.

We hope you will find these comments useful. Should any questions arise, the Meijers Committee is prepared to provide you with further information on this subject.

Yours sincerely,



Prof. dr. C.A. Groenendijk
Chairman

c.c. All the participants in the 5th working meeting of the CDDH-UE with the European Commission on 28 January 2011.

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