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MEETING DOCUMENT

From: Presidency
To: Working Party on fundamental rights, citizens' rights and free movement of persons
On: 21 April 2015

Subject: Technical written contribution from the Commission services
- Co-respondent mechanism
- Prior involvement of the CJEU

1. Co-respondent mechanism

1. Regarding the acquisition of the procedural status of co-respondent, Article 3 (5) of the draft Accession Agreement provides the following

"A High Contracting Party shall become a co-respondent either by accepting an invitation from the Court or by decision of the Court upon the request of that High Contracting Party. When inviting a High Contracting Party to become co-respondent, and when deciding upon a request to that effect, the Court shall seek the views of all parties to the proceedings. When deciding upon such a request, the Court shall assess whether, in the light of the reasons given by the High Contracting Party concerned, it is plausible that the conditions in paragraph 2 or paragraph 3 of this article are met."

Article 3 (2) and (3) of the draft Accession Agreement read as follows:

"2. Where an application is directed against one or more member States of the European Union, the European Union may become a co-respondent to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded of a provision of European Union law, including decisions taken under the Treaty on European Union and under the Treaty on the Functioning of the European Union, notably where that violation could have been avoided only by disregarding an obligation under European Union law.

3. Where an application is directed against the European Union, the European Union member States may become co-respondents to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded of a provision of the Treaty on European Union, the Treaty on the Functioning of the European Union or any other provision having the same legal value pursuant to those instruments, notably where that violation could have been avoided only by disregarding an obligation under those instruments."

2. The ECJ objects to Article 3 (5) since in carrying out the review required under that provision the ECourtHR would have to assess the rules of EU law governing the division of powers between the EU and its Member States as well as the criteria for the attribution of their acts or omissions¹.

¹ Opinion A-2/13, grounds 222 – 225.

3. Moreover, it can be deduced from statements made in the context of the prior involvement of the ECJ² read in conjunction with the View of the AG³ that the ECJ objects to the lack of a provision in the draft Accession Agreement providing for the EU and the Member States, as the case may be, to be systematically informed by the ECourtHR of any applications notified to the other.
4. Hence, the draft Accession Agreement should be amended to the effect that where an application before the ECourtHR is directed against one or more Member States or against the EU, the EU and the Member States, as the case may be,
 - have an unconditional right to become co-respondent(s) to the proceedings at its (their) own request, without the acquisition of such procedural status depending on an assessment by the ECourtHR even of the plausibility of the reasons stated in a request made to that effect,
 - be systematically informed by the ECourtHR of any applications notified to the other.
5. As regards the joint responsibility of the respondent and the co-respondent, Article 3 (7) of the draft Accession Agreement provides the following:

"If the violation in respect of which a High Contracting Party is a co-respondent to the proceedings is established, the respondent and the co-respondent shall be jointly responsible for that violation, unless the Court, on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, decides that only one of them be held responsible."
6. The ECJ objects to that provision inasmuch as it implies
 - the possibility that a Member State be held responsible, together with the EU, for the violation of a provision of the ECHR in respect of which that Member State has made a reservation in accordance with Article 57 ECHR⁴,

² Opinion A-2/13, ground 241.

³ Paragraphs 222 - 228 of AG Kokott's View of 13 June 2014.

⁴ Opinion A-2/13, grounds 226 – 228.

- a power of the ECourtHR to hold solely responsible either the respondent or the co-respondent for a violation of a provision of the ECHR in respect of which the co-respondent has joined the proceedings, even where both jointly have made a request for the apportionment of responsibility⁵.

7. Hence, the draft Accession Agreement should be amended in such a way as to

- exclude a power of the ECourtHR to depart from the rule of joint responsibility of the respondent and the co-respondent for the violation in respect of which the latter has joined the proceedings

- provide one single exception to that rule, regarding the case in which a Contracting Party which is a co-respondent to the proceedings has made a reservation in accordance with Article 57 of the ECHR which precludes it from being held responsible for that violation.

8. Furthermore, the Explanatory Report would have to clarify that where the respondent has made a reservation in accordance with Article 57 ECHR to the provision of the ECHR whose violation is alleged, the application is anyway inadmissible *ratione materiae* / as manifestly ill-founded, according to the usual criteria applied by the ECourtHR⁶. This is even so where the co-respondent to the proceedings has not made such reservation, since the admissibility of an application is to be assessed solely in respect of the respondent, without regard to the participation of a co-respondent in the proceedings⁷.

⁵ Opinion A-2/13, grounds 229 – 234.

⁶ Cf. ECourtHR, 15 July 2002, Kalashnikov v Russia, appl. n° 47095/99, paragraph 107.

⁷ Cf. Article 3 (1) of the draft Accession Agreement

9. Finally, thoughts should be given to one of the situations likely to be addressed by the (*ex hypothesi* disappearing⁸) power of the ECourtHR to hold solely the respondent responsible for a violation of a provision of the ECHR. It is the situation where during the proceedings before the ECourtHR the normative link between a provision of EU law and an alleged violation of the ECHR, which was underlying the acquisition of the procedural status of co-respondent, turns out never to have existed⁹. In order to deal adequately with that situation, the possibility for the co-respondent to leave the proceedings autonomously should be envisaged. It is noteworthy that the Explanatory Report¹⁰ – albeit without being supported by any provision of the operative text of the draft agreement – already envisages the possibility of terminating the co-respondent's participation in the proceedings.

2. Prior involvement of the ECJ

10. Article 3 (6) of the draft Accession Agreement reads as follows:

"In proceedings to which the European Union is a co-respondent, if the Court of Justice of the European Union has not yet assessed the compatibility with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded of the provision of European Union law as under paragraph 2 of this article, sufficient time shall be afforded for the Court of Justice of the European Union to make such an assessment, and thereafter for the parties to make observations to the Court. The European Union shall ensure that such assessment is made quickly so that the proceedings before the Court are not unduly delayed. The provisions of this paragraph shall not affect the powers of the Court."

⁸ Cf. point 7 above.

⁹ Namely due to a decision of the ECJ under the "prior involvement procedure" invalidating or interpreting in a manner consistent with fundamental rights the provision of EU law whose compatibility with an ECHR right has been called into question by the allegation of that right having been violated.

¹⁰ Paragraph 59.

11. The ECJ objects to Article 3 (6) insofar as it allows the ECourtHR to ascertain, when deciding whether to afford "sufficient time" for the ECJ to assess the compatibility of a provision of EU law with a right defined in the ECHR whose violation is alleged, whether the ECJ has already given a ruling on the same question of law as that at issue in the proceedings before the ECourtHR (and hence to interpret the case-law of the Court of Justice)¹¹. Moreover, it objects to the Explanatory Report on the basis of a reading thereof which would limit the scope of the prior involvement procedure, in the case of secondary law, solely to questions of validity (and hence excluding questions of interpretation in the light of the rights guaranteed by the ECHR)¹².
12. Hence,
- Article 3 (6) of the draft Accession Agreement should be amended in such a way as to provide for an unlimited right of the EU as a co-respondent to initiate the prior involvement procedure (on the basis of its own interpretation of the case of the Court of Justice)
 - paragraph 66 of the Explanatory Report should be amended in order to clarify that the prior involvement procedure also covers the interpretation (and not only the validity) of secondary law.

¹¹ Opinion A-2/13, grounds 238 – 241

¹² Opinion A-2/13, grounds 242 – 247.