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OUTCOME OF PROCEEDINGS

From: General Secretariat of the Council
On: 26 April 2016
To: Delegations

Subject: Outcome of the Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons

1. Introduction

During the Netherlands Presidency in the first half of 2016 the topic of EU accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) was discussed in the Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons (FREMP) on two occasions: on 8 March 2016 and on 26 April 2016. The outcome of the meeting on 8 March 2016 is set out in doc. 7551/16. Section 2 of this document sets out the summary of discussions of this item in the FREMP of 26 April 2016.

2. Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms

The Commission presented an integrated paper on all technical issues as set out in doc. WK 249/16.

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Delegations were also informed of the public hearing organised in the EP AFCO Committee on 20 April 2016 where both the Union negotiator as well as the Presidency Chair had been present to give a state of play.

The Commission representative emphasised the commitment of the Union to EU accession as evidenced by the lunch discussions of the Justice Ministers on 9 October 2015 as well as the recent appearance of President Juncker in PACE where he explained that accession remained a top priority for COM. At the same time due regard needed to be given to the legal difficulties raised.

With regard to the paper, the Commission explained the importance of proceeding in a pragmatic way in order to implement the opinion of the CJEU and argued in favour of changing the accession instruments only where strictly necessary in order not to provide solutions that would be too intrusive of the Strasbourg system. COM also explained that the head of EU delegation would intervene at the next meeting of CDDH in June 2016 in order to provide a state of play.

On mutual trust and CFSP, the Commission explained that it was waiting for the outcome of the pending cases in ECtHR (Avotins, meanwhile judgment rendered on 23 May 2016) and CJEU (C-72/15 and C-455/14, expected by fall 2016). After those cases COM would be in a position to table a written technical contribution also on CFSP and mutual trust.

Delegations had no general comments.

Paragraphs 1-9

Acquisition of the procedural status of co-respondent

The Commission representative explained that no changes had been introduced to paragraphs 1-4 in the text. In the view of the Commission it was inevitable that the accession instrument would have to be changed to foresee the unconditional right to become co-respondent(s) and the systematic notification of all applications.

As regards paragraphs 5-9 the Commission representative explained that the draft agreement should exclude ECtHR power to depart from the rule of joint responsibility except where the co-respondent Contracting Party has made a reservation under Article 57 of ECHR.

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Furthermore, it was considered that there should be a possibility for the co-respondent to autonomously terminate its participation in the proceedings. Such a case would arise for example where the Union becomes a co-respondent where MSs implement a Regulation. If subsequently CJEU is seized via prior involvement and declares the provision which has been applied against the applicant invalid, the normative link between the alleged violation and the provision (retroactively invalidated) never existed. In that case the Union and MSs could insist that only the MS is held responsible.

Most Member States agreed in broad terms with this line of reasoning. It was considered that this should be further explained in the explanatory report. There were some hesitations about the legal effect of invalidating an act. The Commission maintained that legal responsibility would only be for the MS in that instance and that it would be up to EU internal rules how to solve this between MSs and EU. Delegations were reminded that an earlier draft of internal rules already contained provisions on this. Some delegations considered that the possibility for co-respondent to agree to divide responsibility should be maintained even if ECtHR discretion was removed.

Paragraphs 10-12

Prior involvement of CJEU

The Commission representative explained that the solution in paragraph 12 contained a few precisions regarding the unconditional right of the EU as a co-respondent to request CJEU involvement on the basis of its own interpretation of the case law of ECtHR.

Most delegations agreed that removing any ECtHR discretion on this was the only way forward but expressed doubts as to how this would be seen by negotiating partners.

Paragraphs 13-26

Article 344 and Protocol 16.

The Commission representative explained that no changes had been made to this part of the document and also urged that delegations would read this part in the light of the fact that there were already very few interstate cases. The Commission acknowledged the complexity of the proposed solution but considered that it was unlikely to ever be used.

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Some delegations expressed regret that the Commission had not taken on board their comments on this proposed solution regarding in particular time delays, complexity as well as intrusiveness to the Strasbourg system. One delegation raised the question of access to justice for the applicant since this procedure could lead to excessively long procedural delays. The Commission representative suggested that amending procedural rules to enact certain procedural tools to mitigate delays could be envisaged.

Some delegations reiterated that this should be dealt with internally.

There was broad provisional support for this solution, practical questions were raised that could be addressed in the procedural rules of both courts and/or internal rules.

Paragraphs 27-30

Article 53

Delegations did not have comments on this part.
