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From: Outgoing Presidency

To: Delegations

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Subject: Proposal for a Council decision on the signing, on behalf of the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence

 and

 Proposal for a Council decision on the conclusion, by the European Union, of the Council of Europe Convention on preventing and combating violence against women and domestic violence

Delegations will find below a Presidency report on the information and exchange of views about the above-mentioned proposals provided during the JHA Counsellors meeting on 28 June 2016.

The discussion on the “mapping exercise” by Cion during the FREMP meeting on 25 May 2016 has brought more clarity on the provisions of the Istanbul Convention, related legal basis and *acquis*. The mapping exercise has shown that the EU has external competence in quite a large part of the domain of the Istanbul Convention. On this basis, JHA Counsellors discussed the competence issue at the meeting on 28 June 2016 along the following lines:

General considerations presented by the Commission

In view of requests by a number of delegations, Cion presented its views on the existence and the extent of exclusive external EU competences in relation to the Council of Europe Convention on preventing and combating violence against women and domestic violence (‘Istanbul Convention’) in greater detail whilst re-iterating its position that the EU should accede to the full extent of its competences (both shared and exclusive) to maximise the (political and legal) impact of the accession.

Under established case-law of the CJEU, the legal test to determine whether the EU has exclusive external competence by virtue of Article 3(2) TFEU has to take into account the areas covered by the EU rules and by the provisions of the international agreement, their foreseeable future development and the nature and content of those rules and those provisions, in order to determine whether the agreement is capable of undermining the uniform and consistent application of the EU rules and the proper functioning of the system which they establish. A "risk" of affectation or alteration of scope was seen as sufficient in this regard. It was also stressed that for assessing whether an area was largely covered by common rules, the case law reflected a pragmatic and inclusive approach towards the notion of "area" without compartmentalising policy domains on formalistic grounds. On that basis, Cion considered that the question of exclusive competence had to be determined on the basis of broadly construed areas and not in an “atomistic” fashion in relation to individual provisions of the Convention. The most relevant areas in this particular case are the protection of crime victims of violence against women as well as the impact of violence against women on the residence status and the treatment of asylum claims of victims. For both areas the mapping table provided by Cion shows that they are largely covered by common rules. Cion recalled that it was not necessary for the areas covered by the international agreement and the Union legislation to coincide fully.

Cion emphasised the importance of the aspect of "alteration of scope" of common rules in the context of Article 3(2) TFEU. This concept has frequently been used in more recent case law (e.g. in *Broadcasters* C-114/12, and in *Green Network* C-66/13) and appears to be particularly relevant where basic concepts/definitions are at stake. Where an international agreement contains definitions of core notions for the area concerned, the Court has found it '*undeniable*' that such definitions may have a 'horizontal effect on the scope of the body of common EU rules' in that area (in the *Broadcasters* decision). On that basis, sufficient affectation or alteration risks can be assumed where the international agreement is based on a concept that differs from the one guiding the EU acquis. This can also be the case where the Convention changes the definition of wording used in the acquis or imposes the systematic application of an underlying concept and rules when implementing the Convention.

On future developments of EU acquis, Cion stated that, where considerable acquis has been developed in an area or where areas are at stake in which EU acquis develops rather dynamically, an affectation or alteration risk is increased as a consistent interpretation of the body of acquis will emerge which may be shaped by concepts developed in international instruments. Cion considers both migration and asylum and the protection of crime victims such dynamic areas where further developments are to be expected.

Cion recalled that it is acknowledged that exclusive competence can exist in areas of minimum EU acquis where the international agreement also sets minimum protection standards, in the light of recent CJEU case law that has further developed since Opinion 2/91.

Specific considerations of the Commission for the areas asylum and migration

Article 59(1) – Substantial EU acquis exists covering this area and regulating the conditions under which an independent residence status is granted to victims following separation/divorce from the violent perpetrator. As regards a relationship to a third-country national, the Convention may influence the interpretation of Article 15(3) of the Family Reunification Directive 2003/86/EC. The concrete interpretation of the terms "particularly difficult circumstances", which are used in both instruments and not defined in the EU acquis, will be shaped by the understanding of that expression under the Istanbul Convention which requires a gender-specific and gender-sensitive interpretation. In the Cion's view, this amounts to a risk of 'affectation' and 'alteration of scope' within the meaning of Article 3(2) TFEU. A similar situation arises in relation to the interpretation of the EU rules on the rights of third country spouses of mobile EU nationals.

According to Article 13(2) (c) of Directive 2004/38/EC, divorce shall not entail the loss of residence status in cases of particularly difficult circumstances such as having been a victim of domestic violence during the relationship. Again, although one particular example (domestic violence) is specifically mentioned, the Convention imposes an obligation to consistently take into account all forms of violence covered by the Convention (also beyond domestic violence) as such particularly difficult circumstances and to apply a gender perspective. This may affect the overall interpretation of the relevant provisions of Directive 2004/38/EC which has to be carried out in the light of the Convention.

Article 59(2) - Cion sees a risk of affectation in particular in so far as this paragraph obliges MS parties to the Convention to grant an exception from the rules on expulsion of illegally residing third country nationals under the Return Directive (2008/115/EC) for victims of violence under the Convention. This creates a systematic exception not provided for as such by the *acquis*, under which MS remain free to take account of compassionate, humanitarian or other reasons pursuant to Article 6(4) of the Directive. The creation of a systematic exception could be described as “harmonisation outside the Treaties” and therefore creates a risk of modifying the approach of the Directive which relies on a case-by-case situational assessment of the situation.

Article 60 and 61 - So far, the EU *acquis* includes gender as an element of the individual position and personal circumstances relevant for the assessment of facts and circumstances (Article 4(3) (c) of the Qualifications Directive 2011/95/EU). In addition, recital 30 and Article 10(1)(d) of that Directive addresses gender-related aspects when determining membership of a particular social group; However, Article 60(2) of the Convention goes further according to its explanatory report (para 312) and requires that this gender-sensitive interpretation is given to "each of the 1951 Convention grounds". Cion argues that the systematic obligation to apply gender-sensitive interpretations shapes the common understanding of grounds for asylum and harmonises these elements beyond the current regime under EU *acquis*. In a similar fashion the Convention (Article 61) also reinforces the gender-sensitive interpretation of reception conditions and the non-refoulement principle.

Specific considerations of the Commission on victims' rights acquis

The EU has developed substantial acquis along similar lines of victims' rights covered in titles IV and VI of the Convention, in particular in the Victims' Rights Directive 2012/29/EU, and for specific groups (children exposed to sexual abuse and exploitation: Directive 2011/93/EU). As such, the Istanbul Convention and the acquis on victims' rights are based on the same rationale. Nevertheless, the Convention is, while following the same concept as the EU acquis, more elaborate and detailed and spells out more concrete obligations, which will shape the interpretation of the EU acquis. The acquis is generally based on a gender-neutral approach and does not specifically address the issue of violence against women (even if the Victims' Rights Directive recognises in its recital that women are affected disproportionately by violence committed in a close relationship).

An extensive part of this EU acquis will be subject, in the light of the Convention, to a systematic gender-sensitive interpretation of the obligations. Moreover, procedural criminal law acquis has been evolving constantly, and the detailed nature of the Istanbul Convention can thus interfere with the autonomous development and interpretation of EU acquis in this area.

For illustration purposes Cion mentioned the following (non-exhaustive) examples of a concrete impact of the Convention:

- Article 9 (1) (d) of the Victims' Rights Directive includes a provision that victim support services shall provide for "advice related to financial and practical issues arising from the crime", whereas Article 20(1) of the Convention is more specific, referring to the provision of, when necessary, [...] financial assistance, housing, education, training and assistance in finding employment".
- Similarly, Article 9(1) of the Directive requires the provision of different types of information. The Convention, in Article 24, provides, in that regard, for the concrete obligation to set up state wide round the clock free telephone lines as a particular means of providing information not required by current EU rules.
- For the support to victims of sexual violence, Article 25 imposes the existence of "sexual violence referral centres", whereas Article 9(2) of the Directive is less specific.

Cion further invoked an existing precedent of the Council acknowledging exclusive EU external competence in the area of victims' rights. Council Decision (EU) 2015/2071 subjected the ratification of the 2014 Protocol to the ILO Forced Labour Convention with regard to matters relating to judicial cooperation in criminal matters to prior EU authorization which is only needed where competence in the meaning of Article 3(2) TFEU is at stake. The recital of the above Decision, according to which the Decision was binding upon the UK and IE because of their adherence to the Victims' Rights Directive, followed the same logic.

Cion concluded by articulating its hope that this information would enable MS to come forward with their political positions on support for EU accession to the Convention and to actively engage in discussions on concrete formulations allowing the identification of a universally acceptable text.

Cion further proposed an approach focusing on a common understanding that would allow a swift adoption of the signing decision whilst leaving some of the more complex technical matters (e.g. the details of a code of conduct) to the negotiation of the conclusion decision.

Exchange of views

Six delegations intervened asking the Cion to provide them with a written version of the oral presentation it had just delivered and raised further questions concerning the division of competences, amongst others on the impact which the provisions of the Convention on preventive aspects may have on the EU acquis.

In its clarifications, the Cion:

- asked delegations to rely on the oral presentation delivered by it;
- stated that it had only provided a list of (non-exhaustive) examples of the Convention's concrete impact and had not focussed in particular on the preventive aspects. Cion pointed out however, that attention should be drawn to the protection area of the Convention as a whole, which also comprises the preventive aspects.
- underlined that whereas the Member States remained competent for substantial parts of the Convention, the EU has competence for a considerable part of the Convention's provisions, and should therefore ratify the Convention alongside Member States.

- expressed its interest in collecting contributions from Member States on possible outstanding issues.

On the basis of the mapping exercise of the last FREMP meeting, as well as the above elaboration of the Cion MSs are invited to take a political position on whether the EU should accede to the Istanbul Convention and if so, what the scope of accession should be.
