CCBE

CONSEIL DES BARREAUX DE L'UNION EUROPEENNE RAT DER ANWALTSCHAFTEN DER EUROPÄISCHEN UNION CONSEJO DE LOS COLEGIOS DE ABOGADOS DE LA UNION EUROPEA CONSIGLIO DEGLI ORDINI FORENSI DELL'UNIONE EUROPEA RAAD VAN DE BALIES VAN DE EUROPESE UNIE CONSELHO DAS ORDENS DE ADVOGADOS DA UNIÃO EUROPEIA ΣΥΜΒΟΥΛΙΟ ΤΩΝ ΔΙΚΗΓΟΡΙΚΩΝ ΣΥΛΛΟΓΩΝ ΤΗΣ ΕΥΡΩΠΑΙΚΗΣ ΕΝΩΣΗΣ RADET FOR ADVOKATERNE I DEN EUROPAEISKE FAELLESKAB EUROOPAN UNIONIN ASIANAJAJALIITTOJEN NEUVOSTO RAÐ LÖGMANNAFELAGA I EVROPUSAMBANDINU RÅDET FOR ADVOKATFORENINGENE I DET EUROPEISKE FELLESSKAP RÅDET FOR ADVOKATSAMFUNDEN I DEN EUROPEISKA UNIONEN **COUNCIL OF THE BARS AND LAW SOCIETIES OF THE EUROPEAN UNION**

SUBMISSION OF THE CCBE FOR THE INTERGOVERNMENTAL CONFERENCE 2000 (OCTOBER 2000)

SUBMISSION OF THE CCBE FOR THE INTERGOVERNMENTAL CONFERENCE 2000

ON THE NEED:

- **To provide within the Treaty for an explicit legal basis for the accession of the EC to the ECHR**
- **To redraft Article 230(4) EC so as to allow more widely appeals against Community or EU Acts**

I. Introduction

1. The CCBE represents through the national Bars and Law Societies some 500,000 European Lawyers within and outside the European Union. In this capacity, the CCBE often submits its views on issues concerning access to justice and the effective judicial protection of citizens of the EU. It is a primary concern of the Bar that the European Union is and remains a Community based on the rule of law, i.e. a Community characterized by enforceable legislation which is subject to review and providing effective and adequate judicial protection to the citizens of the European Union.

2. The purpose of this submission is to point out that the adoption of the EU Charter of Fundamental Rights, which the CCBE has welcomed, does not take away the need in order to protect fundamental rights correctly in the EU, to provide within the Treaty for an explicit legal basis for the accession of the EC to the European Convention of Human Rights (ECHR).

3. It is further pointed out that, with the increased competences of the EU following the Treaties of Maastricht and Amsterdam, adequate protection of fundamental rights requires a redrafting of article 230(4) EC so as to widen standing to bring appeals against Community or EU Acts.

4. The CCBE has already stressed the need for the above changes to the Treaty in its submission for the Intergovernmental Conference 2000 of May this year. These very important issues have so far not been properly considered within the IGC discussions. The CCBE reiterates the need for them to be addressed.

II. The need to provide within the Treaty for an explicit legal basis for accession of the EC to the ECHR

5. The European Union is not a party to the ECHR nor to other European or international instruments for the protection of fundamental rights.

6. As the European Union is not a party to the ECHR, it is not subject to any direct control by the European Court of Human Rights ("ECtHR"). Moreover, the possibilities for challenging in court EU acts for infringement of fundamental rights are slight given the very narrow conditions of admissibility of direct appeals by private parties before the Community rights as against the EU acts (see section III below).

The first major lacuna: no review of the respect of fundamental human rights through an organ which is external to the European Union.

7. In the EU legal system, the only remedy for infringement of fundamental human rights by Community Institutions lies before the ECJ (and/or the EC Court of First Instance). There are no direct remedies before the ECtHR. This in itself is a serious lacuna.

8. It is not unknown for the ECJ itself to adopt views on the interpretation of fundamental human rights which differ from those later taken by the ECtHR. For Instance, in the *Orkem*[1] case, the ECJ indicated that the rights of any party accused of an infringement of the law to remain silent and not to incriminate itself was not guaranteed by the ECHR. Four years later, the ECtHR on the contrary indicated that this right was guaranteed by Article 6(1) of the ECHR[2]. There have been over the years now several such discrepancies between the case-law of the ECJ and that of the ECHR[3].

9. These discrepancies in themselves indicate that there is a clear need for the EU should – as are its Member States – to be subject to a possible control as to the compatibility of its acts with the ECHR.

10. It is not satisfactory that, with the progressive transfer of powers to the European Communities, individuals lose the guarantees available through recourse to the ECHR.

11. In addition, it is paradoxical that, whilst in accordance with Article 49 of the Treaty on the European Union, accession to the ECHR is today regarded as a pre-condition for accession to the European Union, the European Union itself is not a party to the ECHR.

---

1 ECJ, judgment of 18 October 1989, *Orkem v. Commission*, Case 374/89, [1989] ECR 3283, para. 30.

2 ECtHR, judgment of 25 February 1993, *Funke v. France*, A. No. 256-A, para. 44.

3 On these discrepancies, see e.g. the question whether antitrust procedures should – already at the administrative level – be subject to the guarantees of Article 6 ECHR (compare *Stenuit, M&Co* and *Bendenourt* in the ECtHR with *Fedetab, Pioneer* and *Polypropylene* in the ECJ) or the question of whether Article 8 ECHR applies at all to undertakings (compare *Chappel* and *Niemietz* in the ECtHR with *Hoechst* in the ECJ); see on these discrepancies *inter alia* D. Waelbroeck, "Fundamental rights in the European Union – possible developments in the years to come", in *"The Developing role of the European Court of Justice"*, published by European Policy Forum.

12. While it is true that there may still be certain indirect remedies for interested parties before the ECtHR in case of infringement by the European Communities of fundamental rights, such remedies are at best very uncertain and indirect. Indeed, the only remedy currently open appears to be an action against EU Member States before the ECtHR for infringement by the EC Institutions of the provisions of the ECHR[4]. Nevertheless, it is not clear whether Member States can always be held liable for infringements of the ECHR by acts of EC institutions, nor whether such actions should be filed against all the 15 Member States collectively or against only one of them. It is not clear either to what extent the Member States can be held liable for infringements of the ECHR by EC Institutions nor whether it would be fair to hold them liable. It is not satisfactory finally for the EC Institutions that they may be indirectly condemned by the ECtHR without having had the opportunity to defend themselves.

13. **To protect fundamental rights correctly in the EU, the priority should be to provide within the Treaty for an explicit legal basis for the accession of the EC to the ECHR[5].**

III. The need to amend article 230(4) EC so as to allow more widely appeals against Community or EU acts

14. Moreover, it is essential that adequate remedies be open before the ECJ (or CFI) in case of violation by EC Institutions of the provisions of the ECHR. In their current wording, the EC Treaties do not give individuals adequate remedies in case of infringement of their rights by Institutions of the European Communities[6].

The second major lacuna: absence of an adequate control of the respect of fundamental Human rights through an organ which is internal to the European Union.

15. Under EC Article 230(4) EC, private parties are only entitled as of right to attack individual decisions of EU Institutions that are addressed to them. Other acts may only be challenged by private parties when they are exceptionally able to demonstrate that they are " directly and individually concerned" by them. Generally, this is interpreted to mean that the applicant must demonstrate that the act, though not formally addressed to him, is in fact an individual decision taken in the form of a regulation or of a decision addressed to others of which he is the *de facto* addressee. This very strict criterion makes it almost impossible, outside certain specific contexts, for private parties ever to challenge any act of which they are not the formal addressee (e.g. general acts, or acts addressed to others) even if these acts very specifically affect their situation and cause them grave and irreparable harm. The ECJ itself, in its 1995 Report for the Inter-Governmental Conference of 1996, indicated that the provisions of Article 230(4) EC may not be sufficient to guarantee adequate judicial

[4] See e.g. ECHR, judgment of 18 February 1999, *Matthews v. United Kingdom*, at para. 33.

[5] As is wellknown, the ECJ held in its Opinion 2/94 of 28 March 1996, [1996] ECR I-1759, that there was no legal basis in the Treaties for an accession of the EC to the ECHR.

[6] See e.g. C. Harlow, "Access to justice as a human right: The European Convention in the European Union", in Alston (ed.); *The EU and Human Rights*, Oxford, Oxford University Press, 1999, p. 187; D. Waelbroeck & A.-M. Verheyden, "Les conditions de recevabilité des recours en annulation des particuliers contre des actes normatifs communautaires à la lumière du droit comparé et de la Convention Européenne des Droits de l'Homme", *Cah.Dr.Eur.*, 1995, p. 1399.

protection against violations of fundamental human rights by EC Institutions[7]. In the recent Inter-Governmental Conferences, EC Article 230(4) EC has nevertheless not been modified in this regard.

16. Hence, judicial protection of private parties in the EC remain today very restricted and is undoubtedly much less protective than the judicial systems of the Member States. Arguably, it is in itself inconsistent with the requirements laid down by the ECtHR in that regard[8].

17. Since on the other hand the ECJ and CFI have *exclusive competence* to declare EC acts invalid, it is clear that private parties have no remedies before any other courts even in their own Member State against acts of EC Institutions which may infringe their fundamental rights (or indeed any other of their rights)[9]. As has often been observed, the ability of national courts to refer questions of validity of Community acts to the ECJ under the preliminary ruling procedure is not a satisfactory substitute for the strict conditions of admissibility of direct actions for annulment before the ECJ. Indeed, the preliminary ruling procedure is not a direct remedy for private parties to invoke at will but depends on the willingness of the national courts to exercise their discretion refer questions to the ECJ[10].

---

[7] See para. 20 of that report.

[8] For an analysis of the compatibility of the system of judicial remedies in the EC, and in particular of Article 230(4) EC with the provisions of the ECHR, as interpreted by the ECtHR, see D. Waelbroeck and A.-M. Verheyden, *op.cit.*

[9] See ECJ, *Foto-Frost*, (314/85), [1987] ECR 4199. See already ECJ, *Internationale Handelsgesellschaft* (11/70), [1970] ECR 1125, 1134: "the validity of the Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or to principles of a national constitutional structure."

[10] In practice, setting aside a national act as being based on an invalid EU act requires a prior decision of the ECJ on the invalidity of the EU act. National courts may not decide themselves that the EU act is invalid (see above). They have to refer the question of invalidity to the ECJ. Attacking Community acts by way of preliminary rulings on their validity is relatively difficult as the challenge can be successful only if both the national and Community courts co-operate. They must each play their part:

- In the first place, national law must provide for judicial proceedings. In some legal systems, particular decisions are taken by the administration without appeal to a court. In such cases, no preliminary ruling can be sought. Moreover, in many national legal systems, the legality of acts of parliaments cannot be challenged at all. The only remedy offered will often be the illegality of the law as a defence once a party is prosecuted for infringement of the law, which is hardly a very attractive remedy.
- Furthermore, Article 234 does not require that preliminary rulings be asked in all cases where Community law is to be applied. It is only where the national court has doubts on the validity of a Community act that it must refer the matter to the Court of Justice or if the matter is raised before a court of last instance (which may take many years of lengthy and costly procedure before the relevant question is asked). However, even where there is an obligation to refer, there is no sanction against courts infringing this obligation. In arbitration procedures, *inter alia*, no possibilities of preliminary rulings are provided for.
- In many cases, challenging a Community act which has to be implemented in fifteen Member States will require actions in multiple fora which is certainly not in the interest of economy of procedure.
- Once the national court has requested a preliminary ruling, the Court of Justice decides on the question of validity under the special procedure of Article 234 which permits the individual only a limited right to argue why the act should be considered illegal as well as limited rights for Institutions to defend themselves. Normally, the Court of Justice will not rule on the validity of an act when it has not been expressly asked to do so. If it regards the question as not being properly put, it may declare it inadmissible, and in any event often does not give a full reply to the questions put.

In any event, the procedure for obtaining a preliminary ruling through national courts is much longer than a direct action before the ECJ. A ruling may therefore come too late. The logic of obliging the parties to go to

Experience shows that it is mostly extremely difficult to obtain references under the preliminary ruling procedures and may take many years until – if at all – the case is heard by the highest judicial body of the Member State who is then in principle obliged to refer the matter to the ECJ[11].

18. **Adequate protection of fundamental rights does therefore require a redrafting of EC Article 230(4) EC so as to allow more widely appeals against all Community or EU acts.**

* *
*

national courts while the ECJ simultaneously prohibits national courts to rule on the validity of Community acts is not absolutely evident. In any event, since the question has necessarily to be referred back to the ECJ under EC Article 234, it is unclear why a system opening the gates for action under EC Article 230 before the Court of First Instance would entail a flood of cases before the ECJ.

[11] This is not changed by the above-referenced Foto-Frost case-law. Lower courts may under this case-law not declare an EC act invalid, but they may always reject arguments of illegality.