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Subject: Accession of the EU to the European Convention on Human Rights
- questions about the submission of Union CFSP acts to the jurisdiction of
the European Court of Human Rights

Delegations will find attached the partially declassified version of the above-mentioned document.



ANNEX

**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 22 March 2013

7682/13 EXT 1 (12.08.2014)

**JUR 145
FREMP 32
JAI 218
COSCE 5
COHOM 46**

OPINION OF THE LEGAL SERVICE*

Subject : Accession of the EU to the European Convention on Human Rights
 - questions about the submission of Union CFSP acts to the jurisdiction of the
 European Court of Human Rights

I. INTRODUCTION

1. Within the framework of the Union's accession to the European Convention on Human Rights (the Convention), the submission of Union acts falling under the scope of the EU Common Foreign and Security Policy (CFSP) to the jurisdiction of the European Court of Human Rights (ECtHR) has been a matter of concern since the beginning of the discussions. At the meeting of the Working Party on Fundamental Rights, Citizen's Rights and Free Movement of Persons (FREMP) on 25 and 26 February 2013, the Council Legal Service was requested to give a written opinion on the interpretation to be given to the latest draft text and the consequences that Union responsibility for CFSP acts would have, notably as to the risks the ECtHR would declare the Treaties, and in particular Article 275 TFEU, incompatible with Articles 6 and 13 of the Convention.

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II. BACKGROUND

2. On 4 June 2010, the Council authorised the opening of negotiations.¹ Although it had been discussed within the Council, the authorisation Decision did not specifically address the issue of CFSP acts. The negotiating directives provided that "*the negotiations should ensure that the accession agreement creates obligations under the Convention (...) only with regard to acts and measures adopted by institutions, bodies, offices or agencies of the Union. The negotiations will ensure that the accession is without prejudice to Articles 263, paragraph 4, 275 and 276 and Article 10(1) of the Protocol 36 (...)*" (paragraph 3).

3. A draft accession agreement was circulated in June 2011 within the Council of Europe structures.² It contained a "general attribution clause" as part of a new point c. to be inserted in Article 59(2) of the Convention, drafted as follows: "*Accession to the Convention and the Protocols thereto shall impose on the European Union obligations with regard only to acts, measures or omissions of its institutions, bodies, offices or agencies, or of persons acting on their behalf (...)*". No distinction was made between CFSP or other acts adopted by EU institutions.

4. In April 2012, the Council unanimously agreed on the negotiating position to be taken by the Union for the second negotiation round which started in July 2012.³

"Accession to the Convention and the Protocols thereto shall impose on the European Union obligations with regard only to acts, measures or omissions of its institutions, bodies, offices or agencies. For the purposes of the Convention (...):

(aa) acts, measures or omissions of organs or agents of the member States of the European Union are attributable only to the latter, even if such acts, measure or omissions occur when the member States of the European Union implement the law of the European Union.

¹ Council Decision of 4 June 2010, doc. 10817/10 RESTREINT UE.

² Draft Legal Instrument on the Accession of the European Union to the European Convention on Human Rights, CDDH-UE (2011)6prov.

³ See doc. 8915/12 RESTEINT UE/EU RESTRICTED, page 8. The explanatory report was clarifying that CFSP acts not attributable to the EU would be attributed to Member States. At the FREMP meeting of 10 December 2012, the French Delegation suggested to insert this clarification in the text through rewording point (bb) as follows: "*(bb) the acts and measures performed or adopted in the context of the provisions of the Treaty on European Union on common foreign and security policy of the European Union shall be attributable solely to the Member States of the European Union, unless judicial review of such acts is attributed to the courts of the Union in the Union's legal order*", but this was not presented at the last negotiation round (see DS 1845/12).

(bb) acts and measures are not attributable to the European Union where they have been performed or adopted in the context of the provisions of the Treaty on European Union on the common foreign and security policy of the European Union, except in cases where attributability to the European Union on the basis of European Union law has been established by the European Court of Justice."

5. During the negotiation round held in January 2013, some non-EU parties to the Convention claimed that point (bb) of the Council position would imply a carve-out in the scope of accession to the Convention with regard to certain type of acts and measures of the Union, which was not acceptable to them. However, attributability to the Member States of implementing acts was accepted (point (aa) of the Council position), with the understanding (agreed at FREMP) that such attributability would be without prejudice to the Union's indirect responsibility as co-respondent.

6. In this context, the Secretariat of the Council of Europe (CoE) put forward, in January 2013, the following proposal (the CoE proposal), its second paragraph being designed to replace points (aa) and (bb) of the April 2012 Council position:¹

"Accession to the Convention and the Protocols thereto shall impose on the European Union obligations with regard only to acts, measures or omissions of its institutions, bodies, offices or agencies, or of persons acting on their behalf (...)

*For the purposes of the Convention (...), an act, measure or omission of organs or agents of a member State of the European Union shall be attributable only to that State, even if such act, measure or omission occurs when the State implements the law of the European Union, **including Council decisions taken under the Treaty on the European Union**; this shall not preclude the European Union from being responsible as a co-respondent for a violation resulting from such an act, measure or omission, in accordance with Article 3 (2), (4) (5) and (7) of this Agreement".*

¹ See Appendix IV to the Meeting Report of the Fourth negotiation meeting, doc. 47+1(2013)R04, of 23.1.2013. The CoE Secretariat also proposed to insert a clarification in the explanatory report: *"Under EU law the acts of Member States implementing EU law and Council decisions under the TEU are attributable to Member States. For the sake of consistency, parallel rules should apply for the purposes of the Convention system. It should be recalled that the approach followed by the Court as regards the attributability of a certain action to either a Contracting Party or an international organisation under the umbrella of which that action was taken, has consistently been to have regard to the particular facts of each case, and in particular to the applicable legal basis. It is expected that the Court would follow the same approach also in respect of the EU, after its accession, including with regard to matters related to the EU common foreign and security policy. In fact, in none of the cases in which the Court has decided on the attribution of extra-territorial acts or measures by Contracting Parties operating in the framework of an international organisation (see inter alia Behrami and Saramati, para. 122; Al-Jedda, para. 76) there was a specific rule on attribution, for the purposes of the Convention, of such acts or measures to either the international organisation concerned or its members. Conversely, acts, measures and omissions of the EU institutions, bodies, offices or agencies, or of persons acting on their behalf are attributable to the EU in whichever context they occur, including with regard to matters related to the EU common foreign and security policy."* (see Appendix IV referred to in footnote 4 above). In preparation for the fifth negotiation meeting to be held in from 3 to 5 April 2013, the Chairperson proposed a slightly revised version of the two texts which does not fundamentally change the terms of the debate (see Revised chairperson's proposal on outstanding issues, doc. 47+1(2013)006, of 19.3.2013).

III. LEGAL ANALYSIS

A. Interpretation of the Council of Europe proposal as compared to the other draft texts

7. **NOT DECLASSIFIED**

8. **NOT DECLASSIFIED**

B. Scope of the Union's accession to the Convention and specificity of the CFSP

10. Article 6(2) TEU establishes that the Union's accession to the Convention "*shall not affect the Union's competences as defined in the Treaties*", a requirement repeated in Article 2 of Protocol N° 8 under which such accession "*shall not affect the competences of the Union or the powers of its institutions*".¹ Article 1 of the Protocol provides that "(...) [the accession agreement] *shall make provision for preserving the specific characteristics of the Union and Union law, in particular with regard to: (...) - the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or to the Union as appropriate*" (emphasis added).

11. Respect for fundamental rights is a basic principle of the Union that applies to all its acts in whatever Union's competence area they are adopted or performed.² In accordance with its Article 51, the Charter of Fundamental Rights (the Charter) applies to all Union activity with no exception.³

¹ In order to comply with this requirement, the draft accession agreement states that "*nothing in the Convention (...) shall require the European Union to perform an act or adopt a measure for which it has no competence under the law of the European Union*".

² Article 2 TEU lists the respect for human rights as one of the founding values of the Union and common to the Member States. Under Article 6(3) TEU, fundamental rights, as guaranteed by the Convention and as they result from the constitutional traditions common to the Member States, constitute general principles of the Union's law.

³ As the Court said, "*the duty to respect fundamental rights is imposed (...) on all the institutions and bodies of the Union*" (see point 83 of Case C-130/10, judgment of 19 July 2012, *EP v. Council* (not yet published)). See also Case C-617/10, judgment of 26 February 2013, *Åkerberg* (not yet published) where the Court stated that "*the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law*" (point 19) and that "*the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter*" (point 21). Under Article 52(3) of the Charter, which is part of primary law, the meaning and scope of the rights recognised in the Charter that are also guaranteed by the Convention are the same as those laid down in the Convention.

12. Therefore, when acceding to the Convention, the EU should ensure that the provisions on attribution of responsibility in cases before the ECtHR to either the Union or to the Member States should be drafted in accordance with Union law, both as regards distribution of competences between the EU and its Member States, including the specificity of the CFSP, and in a manner ensuring that the result complies with the Union's obligation to respect fundamental rights and would thus not risk being declared incompatible with Articles 6 and 13 of the Convention on the right to a fair trial and to an effective remedy.

13. Article 24(1), second subparagraph, TEU summarises the different specificities of the CFSP, stating that the CFSP "*is subject to specific rules and procedures*" and recalling the specificities of CFSP acts as non-legislative acts and the limited jurisdiction of the ECJ over such acts.

1. Specificities of CFSP acts and their implementation

14. Under Title V (CFSP) of the TEU, the European Council and the Council are empowered to take a number of decisions.¹ Besides decisions of general strategic or organisational nature, international CFSP positions,² and international CFSP agreements, there are mainly two types of CFSP decisions taken by the Council:

¹ The European Council may, *inter alia*, adopt decisions setting out the strategic interests and objectives of the Union on a particular subject or a specific country or region (Articles 22(1) TEU), identifying strategic interests, determining objectives and defining guidelines for the CFSP (Article 26(1) TEU) or establishing a common defence (Article 42(2) TEU). The Council may, *inter alia*, adopt decisions establishing a permanent structured cooperation (Article 46 TEU), conclude international agreements for the EU (Article 37), adopt certain financing decisions (Article 41), define the European Defence Agency rules (Article 45(2)) or appoint EU Special representatives (Article 33, see Council Decision 2013/133/CFSP of 18 March 2013 appointing the European Union Special Representative for the Sahel (OJ L 75, 19.3.2013, p. 29)).

² See for instance in the field of disarmament and non-proliferation, Council Decision 2010/212/CFSP of 29 March 2010 relating to the position of the European Union for the 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (based on Article 29 TEU, OJ L 90, 10.4.2010, p. 8) or Council Decision 2012/166/CFSP of 23 March 2012 in support of activities of the Organisation for the Prohibition of Chemical Weapons (OPCW) in the framework of the implementation of the EU Strategy against Proliferation of Weapons of Mass Destruction (based on Article 26(2) TEU, OJ L 87, 24.3.2012, p. 49).

- a) decisions on restrictive measures, based on Article 29 TEU, such as for instance measures against Syria,¹ by which the Council imposes restrictions on exports and imports, on financing of certain enterprises, on infrastructure projects, on financial support for trade, in the transport sector, visa bans and freezing of assets. Parts of such decisions are then implemented through a Council Regulation adopted under Article 215 TFEU;²
- b) decisions relating to crisis management operations, based on Articles 42(4) and 43(2) TEU, such as military operations like Operation Atalanta against piracy off the Somali coast³ or civilian operations like "EUCAP SAHEL" (capacity building in security matters),⁴ which *inter alia* set out the mission and the mandate, and determine the chain of command.
15. The TEU sets up a specific mechanism for the implementation of CFSP decisions which, particularly for crisis management operations, very much lies on Member States:⁵

- CFSP decisions imposing restrictive measures are implemented and applied by Member States in accordance with their own rules and means (such as restrictions on financial support for trade or visa bans). In addition, a major part of those measures are implemented through EU Regulations under Article 215 TFEU (directly applicable in Member States);
- CFSP decisions establishing military and/or civilian operations rely for their implementation and execution on capabilities made available by Member States. These capabilities keep a statutory link with their respective national authorities. CFSP decisions that involve the use of the capabilities of Member States and of Union's resources (i.e. operation with a civilian component), include provisions ensuring that the Member State or the EU institution having seconded a member of their staff is responsible for answering any claims linked to the secondment, from or concerning the staff member and is responsible for bringing any action against the seconded person.⁶ In addition, a mechanism for compensating damages caused to third parties during an operation is usually provided for in the Status of Forces or Mission Agreement (SOFA or SOMA) concluded with the host country, which is without prejudice to possible actions brought to the courts of Member States.

¹ See Council Decision 2012/739/CFSP of 29 November 2012 concerning restrictive measures against Syria and repealing Decisions 2011/782/CFSP (OJ L 330, 30.11.2012, p. 21).

² See Council Regulation (EU) No 36/2012 of 18 January 2012 concerning restrictive measures in view of the situation in Syria and repealing Regulation (EU) No 442/2011 (OJ L 16, 19.1.2012, p. 1).

³ See Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (OJ L 301, 12.11.2008, p. 33).

⁴ Council Decision 2012/392/CFSP of 16 July 2012 on the European Union CSDP mission in Niger (EUCAP Sahel Niger) (OJ L 187, 17.7.2012, p. 48).

⁵ See notably Article 29 TEU: "Member States shall ensure that their national policies conform to the Union positions" and Article 42(3) TEU: "Member States shall make civilian and military capabilities available to the Union for the implementation of the [CFSP], to contribute to the objectives defined by the Council (...)" (emphasis added).

⁶ See e.g. Article 7(2) of the EUCAP SAHEL Decision (footnote 13 above): "*The Member State, Union institution, or the EEAS respectively, shall be responsible for answering any claims linked to the secondment from or concerning the member of staff seconded, and for bringing any action against that person*".

The political control and strategic direction of such operations is exercised by the Political and Security Committee "*under the responsibility of the Council and of the High Representative*" (second paragraph of Article 38 TEU) and the operation commander is appointed by the Council (a person put at the disposal by a Member State, for military operations, and an EEAS agent, for civilian operations).

2. *Limited ECJ jurisdiction and other remedies*

16. Another specificity of CFSP is the less extensive system of legal remedies available. The first paragraph of Article 275 TFEU states that the ECJ "*shall not have jurisdiction with respect to the provisions relating to [CFSP] nor with respect to acts adopted on the basis of those provisions*".

However, the second paragraph of Article 275 TFEU gives the ECJ jurisdiction to review¹ the "*legality of [CFSP Council] decisions providing for restrictive measures against natural or legal persons*". No other action is expressly mentioned,² save for cases where the ECJ would be called to "*monitor compliance with Article 40 [TEU]*" (i.e. the mutual "non-affectation" clause between CFSP and the rest of the Treaties).

17. Therefore, CFSP decisions on restrictive measures are submitted to a full control of legality by the ECJ and where such decisions are implemented through a regulation based on Article 215 TFEU, as is customary, the full range of legal actions provided for in the Treaties may be brought to the ECJ against such measures, including actions for damages. **NOT DECLASSIFIED**

¹ In accordance with the conditions laid down in the fourth paragraph of Article 263 TFEU on actions for annulment brought by natural or legal persons.

² I.e. neither actions for annulment brought by others (Member States, European Parliament, Commission) than persons, nor preliminary rulings, nor the other types of actions, such as infringement actions, actions for failure to act, pleas of illegality or actions for damages.

18. **NOT DECLASSIFIED**

19. **NOT DECLASSIFIED**

20. **NOT DECLASSIFIED**

21. **NOT DECLASSIFIED**

C. Requirements of Articles 6, 13 and 34 of the Convention

22. Articles 6 of the Convention confers upon all persons the right to a fair and public hearing by an independent and impartial tribunal established by law in the determination of their civil rights and obligations or of any criminal charge against them. Article 13 of the Convention ensures the right of all persons whose fundamental rights and freedoms have been violated to have an effective remedy before a national authority.

23. On the right to a fair trial, the ECtHR stated that the right of access to the courts has a prominent place in a democratic society and that "*it would not be consistent with the rule of law in a democratic society or with the basic principle underlying Article 6 § 1 - namely that civil claims must be capable of being submitted to a judge for adjudication - if a State could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on categories of persons*".¹

24. On the right to an effective remedy, settled case law of the ECtHR requires the provision of a domestic remedy allowing a competent national authority, which does not need to have judicial nature, both to deal with the substance of the relevant Convention complaint and to grant appropriate relief. Contracting Parties have discretionary powers as to the manner in which they conform to their obligations under this provision. In addition, "*in certain circumstances the aggregate of remedies provided by national law may satisfy the requirements*".² Further to that "*(...) Article 13 does not go so far as to guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the ground of being contrary to the Convention*".³ In other words, the mere fact for the legal system in question not to provide for a remedy to control the constitutionality of laws was not considered to be contrary to Article 13 of the Convention.

25. In addition, Article 34 of the Convention, as interpreted by the ECtHR, provides that individual applications may be brought by persons, NGOs or groups of individuals to the ECtHR only if such persons are directly affected by the act or omission.⁴

¹ See case *Oleynikov v. Russia*, n° 36703/04, 14 March 2013, § 58.

² See *Chahal v. UK*, n° 22414/93, 15 November 1996, § 145.

³ See *James v. UK*, n° 8793/79, 21 February 1986, § 85.

1. ⁴ Under settled ECtHR case-law, "*an applicant cannot claim to be a "victim" within the meaning of Article 34 of the Convention unless he is or has been directly affected by the act or omission in question or runs the risk of being directly affected by it. (...) The Convention does not institute for individuals a kind of actio popularis for its interpretation and thus does not permit individuals to complain against a law in abstracto simply because they feel that it contravenes the Convention*" (see Case *Monnat v. CH*, n°. 73604/01, 21 September 2006, § 31). See also the ECtHR *Segi* Decision (referred to in footnote **NOT DECLASSIFIED**), notably pages 6 to 9, where the ECtHR recalled that "*the right of individual petition cannot be used to prevent a potential violation of the Convention (...) it is only in highly exceptional circumstances that an applicant may nevertheless claim to be a victim (...) owing to the risk of a future violation*".

When dismissing its *Segi* case (see footnote **NOT DECLASSIFIED**), the ECtHR particularly noted that the contested Council common position was not directly applicable in the Member States, that the relevant provision (on cooperation between Member States) was not directed at individuals and did not affect them directly, and that the concrete measures for implementation of it "*would be subject to the form of judicial review established in each legal order concerned, whether international or national*". It concluded that "*the mere fact that the names of two of the applicants (...) appear in the list referred to in that provision as "groups or entities involved in terrorist acts" may be embarrassing, but the link is much too tenuous to justify application of the Convention*".

D. Risks involved by the proposed texts as to the compatibility with the Convention

26. **NOT DECLASSIFIED UNTIL THE END OF THE DOCUMENT (page 15)**
