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OPINION OF THE LEGAL SERVICE[1]

From:	Legal Service
To:	Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons (FREMP)
Subject:	Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) - Interpretative declaration concerning the last sentence of the second subparagraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU (competence of the Court of Justice in CFSP matters) - Compatibility with the Treaties

I. INTRODUCTION

1. During the meetings of the Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons (FREMP WP) of 9 February, 26 February, 18 March, 6 April, and 28 April 2022, delegations discussed the approach to be taken in the negotiations on accession to the European Convention on Human Rights (ECHR) in relation to the so-called "Basket 4". This concerns the articulation between the jurisdiction of the European Court of Human Rights (ECtHR) and the jurisdiction of the Court of Justice of the European Union (Court of Justice) in the area of Common Foreign and Security Policy (CFSP).

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2. During those meetings, delegations expressed the desire to deepen those discussions based on a draft text for an interpretative declaration concerning the jurisdiction of the Court of Justice in the area of CFSP. On 18 May 2022, the Commission submitted a non-paper on such a draft text, in consultation with the Presidency[2].

3. During a joint meeting of the FREMP WP and of the Working Party of Foreign Relations Counsellors (RELEX WP), on 23 May 2022, the working parties requested the opinion of the Council Legal Service on the compatibility of such an interpretative declaration with the Treaties, on the impact of such a declaration on the jurisdiction of the Court of justice and on the procedure which could be followed, should the Member States decide to adopt such a declaration.

4. Before setting out the legal analysis on the issues mentioned above, and in order to understand the context in which this declaration intervenes, this opinion sets out a brief summary of the background on the accession process, in particular as concerns Basket 4.

II. BACKGROUND ON THE ACCESSION PROCESS

5. According to Article 6(2) TEU, "The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties."

6. On the basis of this provision, and upon the recommendation of the Commission of 17 March 2010, the Council adopted a decision on 4 June 2010 authorising the opening of negotiations in relation to the accession agreement, and designated the Commission as negotiator (ST 10817/10). On 5 April 2013, the negotiations resulted in agreement among the negotiators on the draft accession instruments. The Commission then submitted a request for an opinion of the Court of Justice on the basis of Article 218(11) TFEU, on the compatibility of the draft agreement with the Treaties.

[2] WK 7238/2022

7. In the resulting Opinion 2/13 (Accession of the European Union to the ECHR) of 18 December 2014[3], the Court of Justice identified several aspects of the envisaged agreement which it deemed incompatible with EU primary law. One of those aspects relates to the specific characteristics of EU law as regards judicial review in CFSP matters.

8. In this regard, the Court of Justice, first, stated that it has not yet had the opportunity to define the extent to which its jurisdiction is limited in CFSP matters as a result of Article 24(1) TEU and Article 275 TFEU. Second, it held that on the basis of accession as provided for by the agreement envisaged, the ECtHR would be empowered to rule on the compatibility with the ECHR of certain acts, actions or omissions performed in the context of the CFSP, and notably of those whose legality the Court of Justice cannot, for want of jurisdiction, review in the light of fundamental rights. Third, the Court noted that it had already had occasion to find that jurisdiction to carry out a judicial review of acts, actions or omissions on the part of the EU, including in the light of fundamental rights, cannot be conferred exclusively on an international court which is outside the institutional and judicial framework of the EU. The Court of Justice thus concluded that the agreement envisaged failed to have regard to the specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in CFSP matters.

[3] Opinion 2/13 *(Accession of the European Union to the ECHR)* of 18 December 2014, EU:C:2014:2454. See Information Note from the Council Legal Service – ST 5227/15.

9. On 7 October 2019, the Council adopted supplementary negotiating directives (ST 12585/19) with a view to the resumption of the negotiations. Negotiations effectively resumed in June 2020, and the Chair of the "47+1" group (which has since become the "46+1" group), in charge of the negotiations, prepared a steering document[4] structuring the issues identified in Opinion 2/13 in groups, or "baskets". The issue of EU acts in the area of CFSP was placed in "Basket 4". Over the seven rounds of negotiations, the parties were able to reach a provisional agreement on "Basket 1" (EU-specific mechanisms of the procedure before the ECtHR) and "Basket 3" (principle of mutual trust between the EU Member States). The negotiators are poised to make progress on "Basket 2" (operations of inter-party applications and references for an advisory opinion under Protocol 16). By contrast, there has been no concrete progress so far on "Basket 4"[5].

10. In the supplementary negotiating directives, the approach chosen to respond to the challenges of Basket 4 was that of the so-called "reattribution mechanism", as proposed by the Commission. In essence, according to that mechanism, individual CFSP acts would be "reattributed" to one or more Member States for the purposes of the ECtHR, on the basis of ex-ante criteria. The national courts of that (or those) Member State(s) would be responsible to hear cases brought by individuals who claim their fundamental rights have been breached, and would thus also be responsible to review, and if necessary set aside, EU CFSP acts if they find it incompatible with higher-ranking Union law. That Member State would also bear international responsibility under the ECHR for the individual CFSP act at stake.

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4 "Paper by the Chair to structure the discussions at the sixth meeting of the CDDH ad hoc negotiation group (47+1) on the accession of the European Union to the European Convention on Human Rights", doc. 47+1(2020)2 of 31 August 2020.

5 The "46+1" group is aware that the EU is reflecting on the best approach to Basket 4. In addition, Turkey has made proposals for amendments to the accession instruments that are unrelated to Opinion 2/13 (e.g. on voting rules when the Committee of Ministers supervised the implementation of judgments).

11. However, it emerged from the discussions in the FREMP WP in the first trimester of 2022 that such a decentralised mechanism of control of EU legal acts by national courts would pose legal difficulties of principle in terms of the judicial architecture of the Union. Moreover, several delegations have raised practical and legal difficulties in national law with such a solution. Finally, doubts were expressed in the 46+1 group, when it was presented with an outline of the reattribution mechanism. Hence, the FREMP WP initiated the exploration of possible alternative solutions.

12. Among those solutions, one that has emerged as the most promising is that of approaching the issue through an intergovernmental interpretative declaration whose objective and purpose would be to reconcile the tension between, on the one hand, the obligation to accede to the ECHR set out in Article 6(2) TEU, and, on the other hand, the specific rules and procedures of the CFSP, in particular as concerns judicial review by the Court of Justice, as set out in Article 24(1) TEU and Article 275 TFEU.

13. The Council Legal Service has been asked to examine whether such a interpretative declaration is compatible with the Treaties, what its impact would be on the jurisdiction of the Court of justice and what procedure could be followed, should the Member States decide to agree on such a declaration.

III. LEGAL ANALYSIS

14. In order to answer those questions, this opinion will first examine whether a declaration can be used as an instrument in this context (A) and then analyse the substance of the declaration in light of the Treaties (B).

A. The draft declaration as a legal instrument

15. As to its form, the envisaged interpretative declaration by the Representatives of the Governments of the Member States, similarly to declarations agreed upon in the context of intergovernmental conferences, is an instrument of international law by which they agree on how they understand certain provisions of the Treaties of which they are all signatories and by which they are all bound.

16. Agreeing upon such a type of declaration is a prerogative recognised by international law to the signatories of international treaties, and notably by Article 31(3)(a) of the 1969 Vienna Convention on the Law of Treaties, according to which a subsequent agreement between the parties on the interpretation of a previous treaty is part of the context to be taken into account for interpreting that treaty. In the end, given the specific and unique characteristics of the EU legal order, it will, in any event, be for the Court of Justice to determine whether or not to take into account the declaration and define the significance which should be accorded to it, taking into account the fact that it would be agreed upon by the authors of the Treaties. In this regard, it may be noted that the Court of Justice has already accepted to take into consideration declarations as instruments for the interpretation of the EU Treaties[6], although it confirmed that it is not competent to review the legality of such declarations[7].

[6] Judgement of 2 March 2010, *Rottmann*, C-135/08, EU:C:2010:104, paragraph 40.
[7] Judgment of 16 June 2021, *Sharpston v Council*, C-684/20 P, EU:C:2021:486, paragraph 45.

17. It must be stressed that resorting to such an interpretative declaration can only be done in very particular circumstances, as an *ultima ratio*. In the present case, such a declaration could be envisaged as it would not bring about a modification of the Treaties nor circumvent the procedures foreseen for modifying them, but would be limited to reconcile and clarify the interaction between two existing provisions of the Treaties in order to ensure that both maintain their *effet utile* – including as concerns the obligation to accede to the ECHR – without introducing new elements not already present in the Treaties. In other words, it would be fully compatible with the letter and the spirit of the Treaties.

18. It is important to note that the instrument of the declaration would be part of political package accompanying the Council decision concluding the agreement on accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, which shall only "*enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements*" (Article 218(8) TFEU). This special procedural requirement indicates the particular importance which the authors of the Treaties attach to such a Council decision. In this regard, the link between the interpretative declaration and the Council decision on conclusion could be reflected through a reference to the declaration in the Council decision[8].

19. As concerns the timing of the approval of such a declaration, it would have to be in place by the time the negotiations in Strasbourg are completed and a text is agreed at technical level. Indeed, the Member States' Governments would need to have expressed their interpretation by agreeing upon the declaration beforehand. Moreover, agreeing upon the declaration at an earlier stage would ensure that the Court of Justice can, as the case may be, already take it into consideration when deciding on an opinion on the draft Agreement, if it is seized under Article 218(11), as is very likely.

[8] Nevertheless, this would not entail that the Court of Justice would have jurisdiction over the declaration itself. See footnote 5.

20. As to the procedure for approval, the declaration would be intergovernmental in nature, and would have to be agreed upon by the Representatives of the Governments of the Member States. This could be done, for instance, in the margins of a meeting of the Coreper.

21. To conclude, a declaration could thus be envisaged as an instrument to help addresses the issues of Basket 4 in a manner which internalises it – so without requiring negotiations in Strasbourg with the other members of the Council of Europe.

B. The content of the draft declaration

22. As to its content, it follows from its wording that the draft interpretative declaration seeks to reconcile Article 6(2) TEU with Article 24(1) TEU and the first paragraph of Article 275 TFEU, in order to promote and preserve the *effet utile* of all those provisions, while reconciling any tension between those provisions.

23. More specifically, paragraph 1 recalls that according to Article 6(2) TEU, the EU is under a legal obligation to accede to the ECHR. Paragraph 2 is a citation of Opinion 2/13 (para. 256), where the Court of Justice states that the accession to the ECHR is only possible if jurisdiction to carry out a judicial review of acts, actions or omissions on the part of the European Union, in the light of fundamental rights, is not conferred exclusively on the ECtHR. Paragraph 3 is a citation of the judgment of 28 March 2017, Rosneft (C-72/15, EU:C:2017:236, para. 66), where the Court of Justice recalled its constant case-law according to which the Treaties have set up a complete system of legal remedies and procedures designed to ensure judicial review of the legality of European Union acts based on both the Treaties and the Charter of Fundamental Rights, and has entrusted such review to the Courts of the European Union.

24. Those three paragraphs thus set out the first part of the equation, namely the obligation to accede – which does not require any treaty amendment to be "activated" and is binding on the Union – and the condition set out by the Court of Justice for any such accession.

25. Paragraph 4 cites Article 24(1) TEU and Article 275 TFEU, according to which the CFSP is subject to specific rules and procedures and that the Court of Justice of the European Union does not have jurisdiction with respect to the provisions relating to the CFSP nor with respect to acts adopted on the basis of those provisions, except to monitor compliance with Article 40 of the Treaty on European Union and to rule on the legality of decisions providing for restrictive measures against natural or legal persons. Paragraph 5 is a citation of the judgment of 24 June 2014, Parliament/Council (C-658/11, EU:C:2014:2025, para. 70), repeated in subsequent judgments[9], where the Court of Justice has ruled that the last sentence of the second paragraph of Article 24(1) TEU and the first paragraph of Article 275 TFEU introduce a derogation from the rule of the general jurisdiction which Article 19 TEU confers on the Court to ensure that in the interpretation and application of the Treaties the law is observed, and they must, therefore, be interpreted narrowly.

26. Those two paragraphs thus set out the second part of the equation, namely that CFSP is subject to specific rules and procedures and that the jurisdiction of the Court of Justice is very limited, a derogation which, however, must be interpreted narrowly.

[9] See, for example, judgment of 19 July 2016, *H v Council and Others*, C-455/14 P, EU:C:2016:569, paragraph 40 and the case-law cited.

27. Paragraph 6 addresses those two parts of the equation together, and it is this paragraph which expresses the interpretation of the Member States in this regard:

– it establishes that there is a need to ensure consistency between the requirements of Article 6(2) TEU, Article 19 TEU and Article 47 of the Charter of Fundamental Rights of the European Union, on the one hand, and the derogations set out in the last sentence of the second paragraph of Article 24(1) TEU and in the first paragraph of Article 275 TFEU, on the other hand;

– it concludes that in order to ensure this consistency, the Treaties must be interpreted as granting the Court of Justice jurisdiction related to, and strictly within the limits of, actions introduced by applicants who claim they are victims of violations of fundamental rights caused by acts, actions or omissions by the European Union that, following the Union's accession to the European Convention on Human Rights, would be amenable to judicial review by the European Court of Human Rights (strict parallelism between the jurisdiction of the two courts).

28. The declaration thus limits itself to reflect an agreed interpretation rendered necessary by the introduction of Article 6(2) TEU by the Treaty of Lisbon, and it would not contradict the Treaties nor amend them.

29. The declaration thereby addresses the concerns expressed by the Court of Justice in Opinion 2/13. Indeed, in that opinion, the Court of Justice noted that "*as EU law* [then stood], *certain acts adopted in the context of the CFSP fall outside the ambit of judicial review by the Court of Justice. That situation is inherent to the way in which the Court's powers are structured by the Treaties, and, as such, can only be explained by reference to EU law alone. (…) on the basis of accession as provided for by the agreement envisaged, the ECtHR would be empowered to rule on the compatibility with the ECHR of certain acts, actions or omissions performed in the context of the CFSP, and notably of those whose legality the Court of Justice cannot, for want of jurisdiction, review in the light of fundamental rights.*"[10]

[10] Paragraphs 252 to 254.

30. As to the effect of such a declaration, on the one hand, it cannot be excluded that the Court of Justice would make a literal reading of Article 24(1) TEU and Article 275 TFEU, and may decide that such a declaration is insufficient in order to allow the accession of the EU to the ECHR.

31. On the other hand, since Opinion 2/13, the Court of Justice has already interpreted its jurisdiction more widely than the literal wording of those provisions suggest. Indeed, as set out in a comprehensive information note of the Council Legal Service (ST 9498/21), since that opinion, in all subsequent cases to have come before it so far concerning CFSP acts, the Court of Justice decided that it had jurisdiction, even if always on specific grounds[11].

32. In this context, the interpretative declaration would draw on the *raison d'être* of those provisions and on a systematic reading of the provisions of the Treaties on its own jurisdiction, which the Court has followed in its case-law since Opinion 2/13. In this regard, it would avoid a curious situation whereby a clear obligation to accede to the ECHR, as set out in Article 6(2) TEU, would be deprived of any *effet utile*. It would thus resolve what would otherwise be an inherent tension in the Treaties, while at the same time clarifying the limits to the jurisdiction of the Court in Justice in the context of CFSP to cases that would be admissible before the ECtHR.

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[11] The most striking example is the judgment of 25 June 2020, *SatCen v KF* (C-14/19, EU:C:2020:492, para. 83 to 85), where the Court of Justice ruled that, since the EU Satellite Center Staff Regulations excluded judicial review both by national courts and EU courts, "*if the Court and the General Court declined to exercise the jurisdiction conferred on them by Articles 263 and 268 TFEU* [respectively, actions for annulment and for damages], *the result would be (...) that such decisions would be exempt from any judicial review, either by the EU courts or the national courts*, *without that decision to decline jurisdiction being justified by a concern to respect the allocation of jurisdiction between the EU courts and the national courts required by the FEU Treaty. In such circumstances, it is for the Court of Justice and the General Court to exercise the jurisdiction conferred on them by the FEU Treaty, in order to ensure the existence of effective judicial review (...)"*. The General Court has taken a more restrictive approach in its order of 10 November 2021, KS and KD v Council and Others, T-771/20, which is currently subject to a pending appeal before the Court of Justice in Cases C-29/22 P and C-44/22 P, see footnote 4 above.

33. As concerns the impact of the declaration on the competence of the Court of Justice in CFSP matters, as drafted, it would clarify that the Treaties grant jurisdiction to the Court of Justice in the very limited and specific case of actions introduced by applicants who claim that they are victims of violations of fundamental rights caused by acts, actions or omissions by the European Union that, following the Union's accession to the ECRH, would be amenable to judicial review by the ECtHR.

34. Hence, the Treaties, as interpreted by such a declaration, would allow applicants that have standing to introduce an action before the ECtHR, to introduce an action before the General Court on the basis of Article 263 TFEU (action for annulment) or Article 268 TFEU (action for damages) and the subsequent appeals before the Court of Justice. Since the text refers to "*jurisdiction related to actions introduced by applicants* (…)" (emphasis added) the Treaties, as interpreted by the declaration, would also allow national courts which are reviewing the acts of Member States which implement CFSP provisions to introduce preliminary references before the Court of Justice (Article 267 TFEU).

35. The applicants concerned would be limited to those applicants that have standing to bring an action before the ECtHR. This is because the Treaties, as clarified by the draft declaration, grant such jurisdiction to the Court of Justice only in so far as necessary for the operation of Article 6(2) TEU, i.e. in order to ensure that the Court of Justice has the opportunity to carry out a judicial review of acts, actions or omissions on the part of the European Union, in the light of fundamental rights, before the ECtHR reviews them. Jurisdiction related to cases brought by applicants who would not have standing before the ECtHR would not be necessary, and thus not covered by the Treaties as interpreted by the declaration.

36. According to the case-law of the ECtHR, only physical persons and legal persons which are "non-governmental organisations" within the meaning of Article 34 of the Convention have standing before the ECtHR. "Governmental organisations", are the central organs of third States, but also decentralised authorities that exercise "public functions", i.e. which participate in the exercise of governmental powers or run a public service under government control[12]. Moreover, the ECtHR has consistently held that the ECHR does not provide for the institution of an *actio popularis*, but only allows standing to "victims", which denotes the person or persons directly or indirectly affected by an alleged violation[13].

37. If deemed appropriate, the text of the draft declaration could be amended in order to explicitly link the admissibility before the Court of Justice and those before the ECtHR[14].

38. Moreover, as the declaration would not and cannot, amend the Treaties, the rules on admissibility set out in Article 263 TFEU, and notably the requirement for direct and individual concern, would apply to applicants.. Similarly, for actions for damages under Article 268 TFEU, the presumption would be that the Court of Justice would apply its ordinary case-law to determine whether an act can lead to damages being awarded, and notably the requirement for a "sufficiently flagrant violation of a superior rule of law for the protection of the individual" for discretionary acts.

39. Here also, the text of the draft declaration could be amended to explicitly indicate this[15].

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12 See Registry of the ECtHR, Practical Guide on Admissibility, 30 April 2022, paragraphs 9 to 16, available at https://www.echr.coe.int/documents/admissibility_guide_eng.pdf.

13 See Registry of the ECtHR, Practical Guide on Admissibility, 30 April 2022, paragraphs 9 to 16, available at https://www.echr.coe.int/documents/admissibility_guide_eng.pdf.

14 A possible solution could be to add, after "applicants", the phrase "who have standing before the ECtHR".

15 A possible solution could be to add, "in accordance with the rules of the Treaties" after "introduced".

IV. CONCLUSION

40. In light of the above, the Council Legal Service is of the opinion that:

a) an interpretative declaration is an instrument that could be envisaged in the present case, in light of the very specific circumstances, in order to reconcile and clarify the interaction between two existing provisions of the Treaties, with a view to avoiding that the obligation set out in Article 6(2) TEU would be deprived of any *effet utile*;

b) such a declaration should be agreed upon by the time the negotiations in Strasbourg are completed and the text is agreed at technical level. This can be done in the margins of a meeting of the Coreper;

c) as concerns the substance of the draft declaration, it would clarify that the Treaties as they stand, in light of the existing case-law of the Court, grant jurisdiction to the Court of Justice, in CFSP matters, in the very limited and specific case of actions introduced by applicants, who claim that they are victims of violations of fundamental rights caused by acts, actions or omissions by the European Union, that have standing to bring an action before the ECtHR.