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**NOTE**

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by :	Presidency
to :	Delegations
Subject :	Draft Council Decision authorising the Commission to negotiate the Accession Agreement of the European Union to the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR) -Co-respondent mechanism (Paragraph 10 of the Negotiating directives)

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In follow-up to the Meeting of the FREMP Working Party on 25 May 2010, delegations will find attached the Presidency document on the functioning of the co-respondent mechanism, based on DS 1355/10. The new version takes into account comments made by delegations in the course of the meeting. Modifications with regard to DS 1355/10 are highlighted by underlining and (...).

Co-respondent mechanism

Basic principles

Introduction

- Under Article 1 of the ECHR, a contracting Party is responsible *"for all acts and omissions of its organs"*. Hence, a contracting Party is responsible under the ECHR even if it does not control the legal instrument, the compliance with which necessarily entails the (alleged or established) violation of the ECHR.
- Consequently, a Member State is responsible under the ECHR for acts adopted by it, even if it could only have avoided the alleged violation of the ECHR by disregarding an obligation imposed to it by the secondary Union law and even if it does not control instruments of secondary law ("secondary law specific violation").
- Conversely, where the act complained of before the Strasbourg Court has been adopted by the Union, the latter is responsible under the ECHR also if it could only have avoided the alleged violation of the ECHR by disregarding an obligation under primary Union law ("primary law specific violation"). Again, it is irrelevant that the Union – being itself a creation of primary Union law – does not control the instruments pertaining to that layer of Union law.
- The concrete delimitation of the co-respondent mechanism should be subject to binding internal European Union rules.

## **Aim of the correspondent-mechanism**

The aim of this mechanism is to ensure that proceedings by non-Member States and individual applications could properly involve Member States and/or the Union, in accordance with the internal EU rules to be adopted in this respect. This implies:

- Allowing the entity – or the entities – author of the legal instrument of Union law, the compliance with which necessarily entails the alleged violation of the ECHR, to acquire the full status of party to the proceedings in order to defend the compatibility of that legal instrument with the ECHR.
- Ensuring that the entity – or the entities – author of the legal instrument of Union law, the compliance with which necessarily entails the established violation of the ECHR is bound by a judgment finding that there has been a violation.
- The co-respondent mechanism does not affect the rules on admissibility of complaints by the ECtHR, this not being the aim of this mechanism.
- In accordance with the Commission's view, the Union or, respectively, the Member States should be given the right to join the proceedings in any case brought against the other entity (and not only in cases which are, respectively, secondary or primary law specific).
- The internal rules of the Union related to the co-respondent mechanism will be of binding character and will be adopted unanimously.
- The examination and drafting of these internal rules will be conducted in parallel with the negotiations on the Accession of the European Union to the ECHR, but will be finalised and agreed upon not before the negotiations for Accession are terminated.

## Triggering of the mechanism

- When the act complained of before the Strasbourg Court has been adopted by a Member State and at least one of the alleged violations of the ECHR is secondary law specific, it is the Union that should join the proceedings as a co-respondent (pleading, by both parties on different alleged violations).
- When at least one of the alleged violations is primary law specific, Member States should join the proceedings as co-respondents <sup>1</sup>. The internal rules which will be adopted on the functioning of the co-respondent mechanism should address the question of the determination of the agent representing the Member States in the proceedings. According to a suggestion from the Commission, in the case referred to above the Member States should be represented by the Commission as the Union's agent (...). Another possibility would be that Member States join the proceedings on their own, considered collectively as masters of the Treaty and represented in that case by a common agent of their choice and different from the one representing the Union. In any event, the party which, according to the internal rules, should be responsible for conducting the proceedings, not only has a right, but also an obligation to do so. The rules of representation should be flexible enough to allow reaching an agreement on a case-by-case basis.
- However, also in this context, the principle of autonomous interpretation of Union law must be respected, meaning that the Strasbourg Court should not interpret rules regarding the content and scope of Member States' obligations under Union law and, hence, regarding the question whether or not the entity having adopted the act complained of has not formally complied with either secondary or primary Union law.

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<sup>1</sup> The internal rules to be adopted should specify if, in certain cases, the application of the co-respondent mechanism in case of primary-law specific violations is not necessary, being it sufficient that the agent of the Union defend both the secondary and primary law act.

- Nevertheless, the fulfillment of these requirements should be reconciled with the procedural features of the system of the ECHR.
- From a procedural point of view, a possible way to proceed could be that ECtHR gives notice simultaneously to the relevant Member State and to the European Union about the application and in any case when the respondent party is a European Union Member State. Another possibility would be to ensure that it is the Member State concerned that alerts the Union of cases brought against it which fall within the categories described above.

### **Conditions for triggering the mechanism**

1. It is for internal legal rules of the Union to define the types of situations in which either entity will join the proceedings as a co-respondent. Such rules could e.g. foresee that the co-respondent mechanism is only triggered if:

***Option 1:*** at least one of the (alleged) violations of the ECHR is, respectively, primary law specific or secondary law specific.

***Option 2:*** Union law is at stake, the Union should join in all cases.

***Option 3:*** Union law is at stake and the Member States concerned call the Union to the proceedings.

2. The conditions for triggering the co-respondent mechanism before the ECtHR should respect the principle of autonomous interpretation of EU law.

3. Once the Union or the Member State have decided to join the proceedings according to the above mentioned internal rules, then, either:

a) the Union or the Member States submit a request to the ECtHR to join the proceedings as co-respondents, contending in a substantial manner, respectively, that there is an intrinsic link between the alleged violation of the ECHR and an act adopted on the basis of the Treaties, or that there is an intrinsic link between the alleged violation of the ECHR and the Treaties, or any other provision having the same legal value;

or

b) the Union or the Member State notify the ECtHR whether the Member State or, respectively, the Union shall join the other as party in the procedure;

or

c) other options may be envisaged.

### **Procedural Rules**

- Internal legally binding rules of the Union should also ensure a coherent conduct of proceedings between the two co-respondents.
- Such rules would merely clarify and operationalise the obligations which are incumbent on the Union and on the Member States already by virtue of their mutual duty of sincere cooperation.
- The setting up of a mechanism allowing to settle disagreements between the co-respondents, without referring the issue to the ECJ, could be envisaged.
- Taking the case of the Union joining in the proceedings as a co-respondent, the internal rules should provide for the Union to defend the compatibility with the ECHR of the act complained of, only with regard to the alleged violations of the ECHR which concern the Union act at stake. Regarding all other alleged violations of the ECHR, the act complained of would exclusively remain with the Member State concerned.

## Execution of the judgment

- Internal legally binding rules of the Union should also deal with the execution of a ECtHR judgment finding a violation of the ECHR or decisions taken with respect to friendly settlements or unilateral declarations.

(...)

- In the case of the Union joining the proceedings as a co-respondent and a situation where the violation of the ECHR which has been recognized or implied by the ECtHR is secondary law specific, the Union should consider amending or abolishing the instrument of secondary law at stake in order to avoid future violations of the same kind (implementations of general measures).
- Internal rules should address the procedure, whereby the co-respondent decide on the possible individual measures to be taken and their practical implementation (issues related to payment of just satisfaction and *restitutio in integrum*). In particular, internal legal rules of the Union should deal also with the question of who shall bear that (monetary) "just satisfaction". (This is of special importance in cases where one of the violations of the ECHR which has been established by the Strasbourg Court is secondary law specific while another is not). The internal rules should also clearly ensure that the injured party should be given, without delay, just satisfaction. In any case, the injured party should not be affected by potential divergences that might occur on this topic between MS and EU.
- In addition, internal rules should address the issue of coordination of positions concerning referral of cases to the Grand Chamber pursuant to Article 43 ECHR
- During the internal discussions possible alternative solutions should be considered. In any case, due attention should given to the coherence of the solution chosen with the criteria ordinarily applied by the ECtHR to determine the share of just satisfaction.