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OPINION OF THE LEGAL SERVICE *

Subject: Proposal for a Council Decision concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (doc. 12892/2/08 REV 2)
- Legal basis

I. INTRODUCTION

1. The Working Party on Human Rights has asked the Council Legal Service for a written opinion on whether the Commission has proposed the correct legal bases for the draft Council Decision concerning the conclusion, by the European Community, of the UN Convention on the Rights of Persons with Disabilities ("the Convention"). The Commission has based its proposal on the following provisions of the EC Treaty: Articles 13, 26, 47(2), 55, 71(1), 80(2), 89, 93, 95, and 285, in conjunction with the 2nd sentence of the 1st paragraph of Article 300(2) and the 1st paragraph of Article 300(3).
2. The Legal Service would recall at the outset that the Council has already adopted a Decision on the signing of the Convention on 27 March 2007, which was based on Articles 13 and 95 of the EC Treaty, in conjunction with Article 300 (2), 1st sub-para, 2nd sentence.

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Therefore, the Council has already taken a position on the question of the legal bases for the participation by the Community in the Convention. As the text of the Convention has not changed since it was signed, there is no difference for this purpose between the Council decision on the signing of the Convention and the Council decision on its conclusion.

3. The Legal Service will nevertheless examine the other legal bases that the Commission has proposed. According to the case-law of the Court of Justice, the choice of the legal basis for a Community measure must be based on objective factors which are amenable to judicial review and which include, in particular, the examination of the aim and the content of the measure.¹ Furthermore, if the measure pursues a twofold purpose or has a twofold component, and if one of those is the main or predominant purpose or component, whereas the other is merely incidental, this measure must be based on a single legal basis, namely that required by the main or predominant purpose or component.² Only exceptionally, if it is established that the act simultaneously pursues a number of objectives that are inextricably linked, without one being secondary and indirect in relation to the other, may such an act be founded on the various corresponding legal bases if these legal bases are "compatible".³

II. AIM AND CONTENT OF THE CONVENTION

4. The aim of the Convention is stated in Article 1: "*The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity*".⁴

¹ See, for example, Case C-440/05, para. 61, Case C-155/91, para. 7, and Case C-42/97, para. 36.

² See, for example, Case C-338/01, para. 55.

³ See Case C-42/97, para. 38, Opinion 2/00, para. 23, and Cases C-94/03 and 178/03, paras. 36 and 43 respectively. See also the Legal Service note on the latter two cases in doc. 6548/06.

⁴ Underlining added. See also para. c) of the Preamble to the Convention: "*Reaffirming the universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms and the need for persons with disabilities to be guaranteed their full enjoyment without discrimination*".

Article 3 specifies that: "*The principles of the present Convention shall be: (a) respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons; (b) non-discrimination; (c) full and effective participation and inclusion in society; (d) respect for difference and acceptance of persons with disabilities as part of human diversity and humanity; (e) equality of opportunity; (f) accessibility; (g) equality between men and women; (h) respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.*"

5. As to the content of the Convention, its Article 4 defines general obligations for implementation of the Convention, and Article 5 prohibits all discrimination on the basis of disability, whilst permitting specific measures necessary to accelerate or achieve de facto equality of persons with disabilities (Article 5(4): positive discrimination).

The remaining substantive provisions of the Convention set out a series of specific rights and other measures for the benefit of persons with disabilities. The rights set out may be broadly divided into two those which are considered to be political and civil rights and those which are generally considered to be social, economic and cultural rights.

The political and civil rights are the following: right to life (Article 10), equal recognition before the law (Article 12), access to justice (Article 13), liberty and security of person (Article 14), freedom from torture or cruel, inhuman or degrading treatment or punishment (Article 15), freedom from exploitation, violence and abuse (Article 16), respect for the physical and mental integrity of the person (Article 17), liberty of movement and nationality (Article 18), freedom of expression and opinion (first part of Article 21), respect for privacy (Article 22(1)), respect for home and the family (Article 23), and participation in political and public life (Article 29).

The social, economic and cultural rights can be summarised as follows: rights for women with disabilities (Article 6), for children with disabilities (Article 7), accessibility to transport and other services (Article 9), rights in situations of risk and humanitarian emergencies (Article 11), the right to living independently and being included in the community (Article 19), the right to personal mobility (Article 20), the right to access to information (Article 21, 2nd part), the right to data protection (Article 22, 2nd sentence), the right to education (Article

24), the right of access to health care (Article 25), the right to habilitation and rehabilitation services (Article 26), the right of access to work and employment (Article 27), the right to an adequate standard of living and social protection (Article 28), the right to participation in cultural life, recreation, leisure and sport (Article 30), and the right to protection with regard to statistics and data collection (Article 31).

6. Many provisions of the Convention also include measures that do not constitute precise legal obligations but are rather aimed at encouraging positive attitudes towards persons with disabilities, e.g. through raising awareness in society and combating stereotypes. Measures envisaged for such purpose include public awareness campaigns and encouraging positive presentation in the media of persons with disabilities (e.g. Article 8 on awareness-raising). Equally, the Convention specifies in many cases, with regard to the rights that it sets out, that these rights are to be secured not only through legislative and administrative measures but also through social, educational and other measures (see e.g. Art. 16(1) concerning protection against exploitation and violence).

III. LEGAL BASES FOR THE DECISION ON THE CONCLUSION OF THE CONVENTION

7. Most of the provisions of the Convention are not covered by EC competences (e.g. Article 10 on the right to life, Articles 12 and 13 on equality before the law and access to justice, Article 14 on liberty and security of the person, Article 15 on freedom from torture or degrading treatment, Article 16 on freedom from exploitation, violence and abuse, Article 17 on protecting physical and mental integrity of persons with disabilities, etc.). Certain provisions come within the shared competences of the Member States and the Community (e.g. Article 9 on access to transport and other services). And with regard to aspects of certain other provisions, the Community has exercised its competence by adopting directives of minimum harmonisation (e.g. Article 27 on equal treatment in work and employment, and Article 24 on education in so far as it includes vocational training): see in particular Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, which covers discrimination *inter alia* against disabled persons.

8. In consequence, the Convention is a "mixed" agreement, i.e. to be concluded both by the Community and its Member States. The question of the legal bases for the conclusion by the Community has to be assessed with regard to those provisions of the Convention where the Community has competences.

The Legal Service will first examine Articles 13 and 95 EC which served as legal bases for the Council's decision on the signing of the Convention, before turning to the other legal bases proposed by the Commission.

i) *Articles 13 and 95 EC*

a) Article 13(1) EC

9. Article 13(1) EC reads as follows: "*Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred upon it by the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation*".

First, it should be noted that Article 13 (1) specifies that the scope of action taken under it must be "*within the limits of the powers conferred on it by the Community*". As the Legal Service has stated in a previous opinion, this means that the ambit of Article 13 is limited by the scope of the powers conferred upon the Community elsewhere in the Treaty. Therefore, under Article 13(1) EC, the Council can take measures to combat discrimination at Community level only to the extent that other provisions of the Treaty confer upon it the necessary legislative power, and under the conditions laid down in those provisions.⁵

Secondly, Article 13(1) is stated to be "*without prejudice to the other provisions of this Treaty*". In this connection, the Legal Service has noted that: "*The relationship between Article 13 EC and other legal bases of the Treaty has to be understood in the sense that, depending on the breadth of the action that is foreseen, recourse is possible both to Article 13 EC or to other legal bases in the Treaty which allow for the adoption of anti discrimination*

⁵ See Legal Service Opinion in doc. 14896/08, paras. 13 and 14.

measures. Accordingly, Article 13 is not to be used where other, more specific, legal bases exist in the Treaty, which provide the Community with sufficient authority to act. So, for example, in the case of legislation which exclusively concerns equal pay for male and female workers, Article 141(3) EC would be a sufficient and appropriate legal basis. Conversely, to the extent that a measure covers multiple grounds of discrimination, including among others, sex discrimination in the workplace, then Article 13 EC is the appropriate legal basis".⁶

10. Consequently, if the main aim and content of an act is to combat discrimination on one or more of the grounds mentioned in Article 13(1) EC, including disability, in several sectors or areas of activity covered by other provisions of the Treaty, then Article 13 (1) EC is the correct legal basis for the act and the legal bases provided by the Treaty in those other sectors or areas should not be used.

As already noted (paras. 4-5 above), the aim and content of the Convention is to promote and secure "*the full and equal enjoyment of rights for persons with disabilities*" (Art. 1), "*on an equal basis with other persons*". Equally, the Convention covers several sectors and activities that fall within the scope of the Treaty. That is the case in particular with regard to equal treatment in work and employment (Article 27 of the Convention) and access to transport and other services (Article 9).

11. Therefore, the Legal Service confirms (as already indicated in two previous written opinions concerning the Convention⁷) that Article 13(1) is a correct legal basis for the conclusion of the Convention by the Community.

⁶ Same Legal Service opinion in doc. 14896/08, para. 12. Underlining added here.

⁷ Docs. 9603/04 and 8813/04. In those opinions, which were issued in the context of the negotiating mandate to be given to the Commission, the Legal Service did not take a position on whether other legal bases in the Treaty (in particular Articles 13(2) and 95 EC) might be applicable as well. It should also be noted that the situation was different in the case of the programme on Fundamental rights and Citizenship in the EC general framework programme on Fundamental rights and Justice 2007-2013 (see Legal Service opinion in doc. 11208/05). That case concerned the promotion of fundamental rights in general amongst the public, non-discrimination being only one aspect. However, the EC does not have a general competence in the area of fundamental rights. Therefore, it was necessary in that case to have recourse to several legal bases in addition to Article 13 (2) EC, as well as to limit the objectives and activities of the programme to areas falling within the scope of the Treaty.

b) Article 13(2) EC

12. Article 13(2) EC allows for the Community to adopt "*incentive measures*" to support action taken by the EU Member States in order to contribute to the achievement of the objectives in Article 13(1). Article 13(2) specifies that such measures cannot involve any harmonisation of the laws and regulations of Member States.

As already noted (para. 6 above), the Convention contains many references to measures for raising awareness and promoting positive perceptions of persons with disabilities. Equally, the Convention stipulates in many instances that the rights which it sets out are to be secured not only by legislative and regulatory acts but also by social, educational and other measures including the provision of information (see e.g. Article 16 on freedom from exploitation, violence and abuse). These measures would constitute incentive measures within the meaning of Article 13(2).

13. The Legal Service considers that it would be justified to consider such other measures as constituting a substantial component of those parts of the Convention where the Community has a competence, and that they are not merely secondary and incidental for the purpose of effectively securing the rights of disabled persons under the Convention. On that basis, it would also be justified to include Article 13(2) as a relevant legal basis for the conclusion of the Convention by the Community

c) Article 95 EC

14. Article 95 EC refers to the adoption of "*measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market*". Like Article 13(1) EC, Article 95 EC, whilst also being subject to the same proviso of "*save as otherwise provided in this Treaty*", is of general scope in so far as it can be used to cover a range of sectors and areas. According to the case-law, Article 95 EC may be used "*where there are differences between the laws, regulations or administrative provisions of the Member States which are such as to obstruct the fundamental freedoms and thus have a direct effect on the functioning of the internal market*".⁸

⁸ Case C-210/03, *Swedish Match*, para. 29. The fundamental freedoms referred to are the free movement of workers, the right of establishment, the freedom to provide services and the free movement of capital.

15. The Council based its decision on the signing of the Convention on Article 95 EC as well as Article 13 EC. The justification was that it was necessary to remove differences in the relevant laws, regulations or administrative provisions of the Member States which had a direct effect on the functioning of the internal market, and that this factor did not constitute a secondary and indirect component of the parts of the Convention where the Community has power to act, in relation to the objective of combating discrimination against persons with disabilities. Therefore, Article 95 remains a necessary additional legal basis for the conclusion of the Convention.
16. The Legal Service observes that the combination of Articles 13 and 95 EC does not give rise to an incompatibility of procedures.

Article 13(1) EC provides for the Council to act unanimously, whereas Article 95 EC provides for the co-decision procedure. However, the co-decision procedure is only applicable to internal acts of the Community, and not to international agreements concluded by it. Rather, Article 300(3), 1st sub-paragraph EC provides that such agreements are to be concluded by the Council after consulting the European Parliament. Article 300(3), 3rd sub-paragraph EC stipulates that by way of derogation, agreements entailing amendment of an act adopted under the co-decision procedure are to be concluded after the assent of the European Parliament has been obtained. However, the Legal Service does not consider that the Convention, which lays down certain minimal standards⁹ for promoting and protecting the rights of persons with disabilities, would entail an amendment to any internal act which has been adopted under the co-decision procedure. In this case, therefore, the applicable procedure under Article 300 (3), 1st sub-paragraph EC requires the consultation of the European Parliament and not its assent.

17. In consequence, the Legal Service confirms that the Commission's proposal correctly refers to Article 300(2), 1st paragraph, 2nd sentence and Article 300(3), 1st paragraph, as the applicable procedural legal bases for the conclusion of the Convention by the Community.

⁹ Cf. Opinion 2/91 of the Court of Justice concerning Convention 170 of the ILO, para. 18.

ii) *Other legal bases proposed by the Commission*

18. The other legal bases proposed by the Commission for the decision on the conclusion of the Convention are Articles 26 EC (common customs tariff), Article 47(2) EC (freedom of establishment), Article 55 EC (freedom to provide services), Article 71(1) EC (common transport policy), Article 80(2) EC (sea and air transport), Article 89 EC (State aids), Article 93 EC (VAT and other indirect taxation) and Article 285 EC (statistics).
19. All the above provisions are specific sectoral legal bases. As already indicated (para. 10 above), if the main aim and content of an act is to combat discrimination on one or more of the grounds mentioned in Article 13(1) EC, including disability, in several sectors or areas of activity covered by other provisions of the Treaty, then Article 13(1) EC is the correct legal basis for the act and it is not permissible to use the legal bases provided by the Treaty in those other sectors or areas¹⁰. Since that is the case with regard to the parts of the Convention where the Community has power to act (see para. 10 above), Article 13(1) EC is the correct legal basis and the above-mentioned sectoral legal bases proposed by the Commission should not be added.

¹⁰ Each of the matters covered by these legal bases have to be considered as secondary elements that are directly related to the main objective of the measure which is to combat discrimination against persons with disabilities. For example, with regard to Article 26 EC (common customs tariff), there is no mention of customs tariffs and duties in the Convention. Furthermore, even supposing that Article 4 of the Convention ("*General obligations*") implicitly covers favourable customs tariffs for equipment to be used by persons with disabilities, this would still represent one specific element amongst several others which are all intended to promote the effective integration into society of persons with disabilities. Therefore, this element would constitute a secondary and accessory component, within the meaning of the case-law, and consequently Article 26 EC should not be added as a legal basis. Essentially the same observation is applicable to the other sectoral legal bases proposed by the Commission: Article 47(2) EC (freedom of establishment), Article 55 EC (freedom to provide services), Article 71(1) EC (common transport policy), Article 80(2) EC (sea and air transport), Article 89 EC (State aids), Article 93 EC (VAT and other indirect taxation) and Article 285 EC (statistics).

IV. CONCLUSION

20. The Legal Service is of the opinion, for the reasons given above, and contrary to the proposal of the Commission, that Articles 26, 47(2), 55, 71(1), 80(2), 89, 93 and 285 of the EC Treaty are not correct legal bases for the draft Council Decision on the conclusion of the 2006 UN Convention on the Rights of Persons with Disabilities. The correct and sufficient legal bases are Articles 13 and 95 of the EC Treaty, in conjunction with Article 300(2), 1st subparagraph, 2nd sentence of the same Treaty.
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