Joint communication from Presidents Costa and Skouris

Delegations from the European Court of Human Rights (ECHR) and the Court of Justice of the European Union (CJEU) met on 17 January 2011 at the seat of the CJEU, in Luxembourg, in the context of the regular meetings of the two courts. As is usual on the occasion of these meetings, subjects of common interest were discussed. The first subject related to the application of the Charter of Fundamental Rights of the European Union and the second to the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

1. As regards the Charter, it was observed that it has swiftly become of primary importance in the recent case-law of the CJEU. Since 1 December 2009, the date on which the Treaty of Lisbon entered into force and the date on which that treaty conferred on the Charter the status of primary law of the EU, it has been cited in some thirty judgments. Thus the Charter has become the reference text and the starting point for the CJEU's assessment of the fundamental rights which that legal instrument recognises. It is thus important to ensure that there is the greatest coherence between the Convention and the Charter insofar as the Charter contains rights which correspond to those guaranteed by the Convention. Article 52(3) of the Charter provides moreover that, in that case, the meaning and scope of the rights under the Convention and the Charter are to be the same. In that connection, a "parallel interpretation" of the two instruments could prove useful.

2. The accession of the EU to the Convention constitutes a major step in the development of the protection of fundamental rights in Europe. The Member States of the EU have enshrined the principle of that accession in the Treaty of Lisbon. As regards the Council of Europe, Protocol No 14, which entered into force on 1 June 2010, amends Article 59 of the Convention in order that the EU may accede to it. As a result of that accession, the acts of the EU will be subject, like those of the other High Contracting Parties, to the review exercised by the ECHR in the light of the rights guaranteed under the Convention.

In the context of this review of consistency with the Convention, a distinction can be drawn between direct actions and indirect actions, namely, on the one hand, individual applications

directed against measures adopted by EU institutions subsequent to the accession of the EU to the Convention and, on the other, applications against acts adopted by the authorities of the Member States of the EU for the application or implementation of EU law. In the first case, the condition relating to exhaustion of domestic remedies, imposed under Article 35(1) of the Convention, will oblige applicants wishing to apply to the ECHR to refer the matter first to the EU Courts, in accordance with the conditions laid down by EU law. Accordingly, it is guaranteed that the review exercised by the ECHR will be preceded by the internal review carried out by the CJEU and that subsidiarity will be respected.

By contrast, in the second case, the situation is more complex. The applicant will have, first, to refer the matter to the courts of the Member State concerned, which, in accordance with Article 267 TFEU, may or, in certain cases, must refer a question to the CJEU for a preliminary ruling on the interpretation and/or validity of the provisions of EU law at issue. However, if, for whatever reason, such a reference for a preliminary ruling were not made, the ECHR would be required to adjudicate on an application calling into question provisions of EU law without the CJEU having the opportunity to review the consistency of that law with the fundamental rights guaranteed by the Charter.

In all probability, that situation should not arise often. The fact remains, however, that it is foreseeable that such a situation might arise because the preliminary ruling procedure may be launched only by national courts and tribunals, to the exclusion of the parties, who are admittedly in a position to suggest a reference for a preliminary ruling, but do not have the power to require it. That means that the reference for a preliminary ruling is normally not a legal remedy to be exhausted by the applicant before referring the matter to the ECHR.

In order that the principle of subsidiarity may be respected also in that situation, a procedure should be put in place, in connection with the accession of the EU to the Convention, which is flexible and would ensure that the CJEU may carry out an internal review before the ECHR carries out external review. The implementation of such a procedure, which does not require an amendment to the Convention, should take account of the characteristics of the judicial review which are specific to the two courts. In that regard, it is important that the types of cases which may be brought before the CJEU are clearly defined. Similarly, the examination

of the consistency of the act at issue with the Convention should not resume before the interested parties have had the opportunity properly to assess the possible consequences of the position adopted by the CJEU and, where appropriate, to submit observations in that regard to the ECHR, within a time-limit to be prescribed for that purpose in accordance with the provisions governing procedure before the ECHR. In order to prevent proceedings before the ECHR being postponed unreasonably, the CJEU might be led to give a ruling under an accelerated procedure.

3. The two courts take the view that the results of their discussion can usefully be made known in the context of the negotiations on accession ongoing between the Council of Europe and the EU. They are determined to continue their dialogue on these questions which are of considerable importance for the quality and coherence of the case-law on the protection of fundamental rights in Europe.

Strasbourg and Luxembourg, 24 January 2011.