

Opinion of the Court

Admissibility of the request for an Opinion

- 1 Ireland and the United Kingdom, as well as the Danish and Swedish Governments, submit that the request for an Opinion is inadmissible or is, at any rate, premature. They argue that there is no agreement framed in sufficiently precise terms to enable the Court to examine the compatibility of accession with the Treaty. In the opinion of those Governments an agreement cannot be said to be envisaged at a stage where the Council has as yet not even adopted a decision in principle to open negotiations on the agreement.
- 2 Article 228(6) of the Treaty provides that the Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of the Treaty.
- 3 As the Court has stated, most recently in paragraph 16 of Opinion 3/94 of 13 December 1995 (not yet published in the ECR), the purpose of that provision is to forestall complications which would result from legal disputes concerning the compatibility with the Treaty of international agreements binding upon the Community.
- 4 The Court also stated in that Opinion (at paragraph 17) that a possible decision of the Court to the effect that such an agreement is, by reason either of its content or of the procedure adopted for its conclusion, incompatible with the provisions of the Treaty could not fail to provoke, not only in a Community context but also in that of international relations, serious difficulties and might give rise to adverse consequences for all interested parties, including third countries.

- 5 In order to avoid such complications, the Treaty has established the special procedure of a prior reference to the Court of Justice for the purpose of ascertaining, before the conclusion of the agreement, whether the latter is compatible with the Treaty.
- 6 That procedure is a special procedure of collaboration between the Court of Justice on the one hand and the other Community institutions and the Member States on the other whereby, at a stage prior to conclusion of an agreement which is capable of giving rise to a dispute concerning the legality of a Community act which concludes, implements or applies it, the Court is called upon to ensure, in accordance with Article 164 of the Treaty, that in the interpretation and application of the Treaty the law is observed.
- 7 As regards the existence of a draft agreement, there can be no doubt that, in this particular case, no negotiations had been commenced nor had the precise terms of the agreement for accession of the Community to the Convention been determined when the request for an Opinion was lodged. Nor will they be so when the Opinion is delivered.
- 8 In order to assess the extent to which the lack of firm information regarding the terms of the agreement affects the admissibility of the request, the purposes of the request must be distinguished.
- 9 As is clear from the observations submitted by the Governments of the Member States and by the Community institutions, accession by the Community to the Convention presents two main problems: (i) the competence of the Community to conclude such an agreement and (ii) its compatibility with the provisions of the Treaty, in particular those relating to the jurisdiction of the Court.
- 10 As regards the question of competence, in paragraph 35 of Opinion 1/78 of 4 October 1979 ([1979] ECR 2871) the Court held that, where a question of competence has to be decided, it is in the interests of the Community institutions and

of the States concerned, including non-member countries, to have that question clarified from the outset of negotiations and even before the main points of the agreement are negotiated.

- 11 The only condition which the Court referred to in that Opinion is that the purpose of the envisaged agreement be known before negotiations are commenced.
- 12 There can be no doubt that, as far as this request for an Opinion is concerned, the purpose of the envisaged agreement is known. Irrespective of the mechanism by which the Community might accede to the Convention, the general purpose and subject-matter of the Convention and the institutional significance of such accession for the Community are perfectly well known.
- 13 The admissibility of the request for an Opinion cannot be challenged on the ground that the Council has not yet adopted a decision to open negotiations and that no agreement is therefore envisaged within the meaning of Article 228(6) of the Treaty.
- 14 While it is true that no such decision has yet been taken, accession by the Community to the Convention has been the subject of various Commission studies and proposals and was on the Council's agenda at the time when the request for an Opinion was lodged. The fact that the Council has set the Article 228(6) procedure in motion presupposes that it envisaged the possibility of negotiating and concluding such an agreement. The request for an Opinion thus appears to be prompted by the Council's legitimate concern to know the exact extent of its powers before taking any decision on the opening of negotiations.
- 15 Furthermore, in so far as the request for an Opinion concerns the question of Community competence, its import is sufficiently clear and a formal Council decision to open negotiations was not indispensable in order further to define its purpose.

- 16 Finally, if the Article 228(6) procedure is to be effective it must be possible for the question of competence to be referred to the Court not only as soon as negotiations are commenced (Opinion 1/78, paragraph 35) but also before negotiations have formally begun.
- 17 In those circumstances, the question of Community competence to proceed to accession having been raised as a preliminary issue within the Council, it is in the interests of the Community, the Member States and other States party to the Convention to have that question settled before negotiations begin.
- 18 It follows that the request for an Opinion is admissible in so far as it concerns the competence of the Community to conclude an agreement of the kind envisaged.
- 19 However, the same is not true as regards the question of the compatibility of the agreement with the Treaty.
- 20 In order fully to answer the question whether accession by the Community to the Convention would be compatible with the rules of the Treaty, in particular with Articles 164 and 219 relating to the jurisdiction of the Court, the Court must have sufficient information regarding the arrangements by which the Community envisages submitting to the present and future judicial control machinery established by the Convention.
- 21 As it is, the Court has been given no detailed information as to the solutions that are envisaged to give effect in practice to such submission of the Community to the jurisdiction of an international court.
- 22 It follows that the Court is not in a position to give its opinion on the compatibility of Community accession to the Convention with the rules of the Treaty.

Competence of the Community to accede to the Convention

- 23 It follows from Article 3b of the Treaty, which states that the Community is to act within the limits of the powers conferred upon it by the Treaty and of the objectives assigned to it therein, that it has only those powers which have been conferred upon it.
- 24 That principle of conferred powers must be respected in both the internal action and the international action of the Community.
- 25 The Community acts ordinarily on the basis of specific powers which, as the Court has held, are not necessarily the express consequence of specific provisions of the Treaty but may also be implied from them.
- 26 Thus, in the field of international relations, at issue in this request for an Opinion, it is settled case-law that the competence of the Community to enter into international commitments may not only flow from express provisions of the Treaty but also be implied from those provisions. The Court has held, in particular, that, whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community is empowered to enter into the international commitments necessary for attainment of that objective even in the absence of an express provision to that effect (see Opinion 2/91 of 19 March 1993 [1993] ECR I-1061, paragraph 7).
- 27 No Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field.

- 28 In the absence of express or implied powers for this purpose, it is necessary to consider whether Article 235 of the Treaty may constitute a legal basis for accession.
- 29 Article 235 is designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty.
- 30 That provision, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the Community. On any view, Article 235 cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose.
- 31 It is in the light of those considerations that the question whether accession by the Community to the Convention may be based on Article 235 must be examined.
- 32 It should first be noted that the importance of respect for human rights has been emphasized in various declarations of the Member States and of the Community institutions (cited in point III.5 of the first part of this Opinion). Reference is also made to respect for human rights in the preamble to the Single European Act and in the preamble to, and in Article F(2), the fifth indent of Article J.1(2) and Article K.2(1) of, the Treaty on European Union. Article F provides that the Union is to respect fundamental rights, as guaranteed, in particular, by the Convention.

Article 130u(2) of the EU Treaty provides that Community policy in the area of development cooperation is to contribute to the objective of respecting human rights and fundamental freedoms.

- 33 Furthermore, it is well settled that fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. In that regard, the Court has stated that the Convention has special significance (see, in particular, the judgment in Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41).
- 34 Respect for human rights is therefore a condition of the lawfulness of Community acts. Accession to the Convention would, however, entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order.
- 35 Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235. It could be brought about only by way of Treaty amendment.
- 36 It must therefore be held that, as Community law now stands, the Community has no competence to accede to the Convention.

In conclusion,

THE COURT

composed of: G. C. Rodríguez Iglesias, President, C. N. Kakouris, D. A. O. Edward, J.-P. Puissechet and G. Hirsch, Presidents of Chambers, G. F. Mancini, F. A. Schockweiler (Rapporteur), J. C. Moitinho de Almeida, P. J. G. Kapteyn, C. Gulmann, J. L. Murray, P. Jann, H. Ragnemalm, L. Sevón and M. Wathelet, Judges,

after hearing the views of First Advocate General Tesauro and Advocates General Lenz, Jacobs, La Pergola, Cosmas, Léger, Elmer, Fennelly and Ruiz-Jarabo Colomer,

gives the following opinion:

As Community law now stands, the Community has no competence to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Rodríguez Iglesias	Kakouris	Edward	Puissechet
Hirsch	Mancini	Schockweiler	Moitinho de Almeida
Kapteyn	Gulmann	Murray	Jann
Ragnemalm	Sevón	Wathelet	

Luxembourg, 28 March 1996.

R. Grass

G. C. Rodríguez Iglesias

Registrar

President