COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 12/03/14

CAHDI (2014) Inf 6
English only

COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW

(CAHDI)

CONFERENCE PROCEEDINGS

Legal conference of the Austrian Federal Chancellery: "Working together for Europe – The interrelation between the Council of Europe, the European Union and the Member States"

Diplomatic Academy Vienna, 15 November 2013

47th meeting
Strasbourg, 20-21 March 2014

Document presented by the delegation of Austria

Public International Law Division and Treaty Office
Directorate of Legal Advice and Public International Law, DLAPIL

cahdi@coe.int - fax +33 (0)3 90 21 51 31 - www.coe.int/cahdi

CONFERENCE PROCEEDINGS

LEGAL CONFERENCE OF THE AUSTRIAN FEDERAL CHANCELLERY: WORKING TOGETHER FOR EUROPE -THE INTERRELATION BETWEEN THE COUNCIL OF EUROPE, THE EUROPEAN UNION AND THE MEMBER STATES

DIPLOMATIC ACADEMY VIENNA, 15 NOVEMBER 2013

I. INTRODUCTION

On 15 November 2014, Austria assumed the chairmanship of the Committee of Ministers of the Council of Europe (CoE) for a period of six months.

Initially, the Austrian Federal Chancellery invited 180 experts from jurisprudence and the legal professions to a symposium at the Diplomatic Academy Vienna. The symposium addressed questions of cooperation and conflict in the relationship between the European Union (EU), the CoE and the member states of both. After discussing the legal foundations of the CoE and the EU, the symposium focused on concrete examples such as data protection, media law and anti-discrimination law.

The one-day symposium produced insights about the EU's competences to conclude treaties and the consequences for the member states' capacity to act in the CoE, as well as about the development of soft law and its transformation into binding law.

II. LEGAL FRAMEWORK CONDITIONS

1. The CoE-Perspective

a. Relationship between CoE/EU and the EU's accession to the ECHR

According to *Christoph Grabenwarter*, member of the Austrian Constitutional Court, there had been an increasing competition between the EU and the CoE over the last decades. This was especially caused by the reference to human rights and the European Convention on Human Rights (ECHR) in the EU-treaties.

As early as 2006, the accession of the EU to the ECHR had been recommended in the Juncker-Report. The accession had been provided for in the EU-legal order since the Treaty of Lisbon had come into force and was likewise provided for in the ECHR. A draft agreement on accession was currently examined by the ECJ. The process of accession was far advanced by now.

b. Legal development

Grabenwarter also focused on the CoE's tasks according to Article 1 of its statute. The subsidiarity clause in Article 1(c) of the statute applied to the EU as well. However, this provision had been "applied with utmost flexibility" so far.

Thereafter, *Grabenwarter* addressed the CoE's forms of action: Treaties, on the one hand, were legally binding and had a maximum potential of conflict towards EU-law. On the other hand, soft law, especially of the Committee of Ministers, was the most typical form of action. While the lack of a binding force of resolutions, recommendations and legal opinions was their key problem, soft law nevertheless brought legal development: If recommendations and resolutions were referred to in judgements of the European Court of Human Rights, they gained some legal authority. Cross-referencing of judgements generated new soft law.

In *Grabenwarter's* opinion, this trend towards soft law was to be seen critically: In terms of democratic legitimacy, soft law, devised by experts in task groups, lagged behind laws adopted by parliaments or treaties.

c. Subsidiarity towards EU-law

Finally, *Grabenwarter* discussed "disconnection clauses" in CoE law. The tendency of shielding supranational EU-law from public international law caused a fragmentation of the latter. As a consequence, third countries were not able to force EU-member states to apply international treaties among themselves.

2. The EU-Perspective

Professor *Dr. Bruno de Witte* (University of Maastricht and European University Institute in Florence) examined the EU's competences in foreign relations and its impact on the venues of the international cooperation of its member states.

a. Interaction between "venue" and "framing"

Choosing the "venue" of international cooperation – EU, CoE, bilateral or multilateral cooperation – was, according to *De Witte*, part of the legal agenda-setting. In the fragmented architecture of international cooperation, the structure of the decision making process was particularly determined by the interaction between venue and legal framework ("framing").

While the EU had an *acquis communautaire*, there was no uniform CoE-law due to inconsistent ratification by the member states. Since the CoE's aims were eminently vaguely formulated in its statue, the member states could almost freely decide in which field they would engage in law-making.

b. Political, institutional and legal considerations

According to *De Witte*, choosing the law-making instrument was accompanied by political considerations: the geographical classification of the problem; being bound to well-established venues of law-making ("path-dependency"); the rules and quality of the decision-making environment; the effectiveness of enforcement; and the role of institutional protagonists.

The EU's exclusive and concurring competences spoke in favour of its engaging in law-making: If used by the EU, these competences could prevent member states from enacting divergent legislation due to the principle of sincere cooperation. This was the legal implementation of "path-dependency". However, the limits of the EU-competences as well as the strictness of the EU's procedural rules spoke against EU-action.

III. COOPERATION IN PARTICULAR SUBJECTS

1. Data Protection

Professor Dr. *Astrid Epiney* (University of Fribourg) summarised the aims of the revision of the CoE-Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. The Convention was to continue to set a minimum standard and to allow further specification through soft law. The envisaged close connection to human dignity and to Article 8 ECHR was innovative. Data processers had to adopt a "privacy by design"-approach. However, the envisaged text explicitly refrained from stipulating a "right to be forgotten".

Epiney considers the revision of the CoE-Convention and of the EU-General Data Protection Regulation to be largely congruent. However, the delimitation of competences in the context of the

revision was a dilemma which was “hardly resolvable”. The question arose how far the EU-member states’ obligation of sincere cooperation according to Article 4(3) TEU extended towards the EU; furthermore, at which stage member states violated the principle of *effet utile* of EU-law in the field of mixed agreements, if they participated in the negotiations on the revision of the CoE-Convention. In this context, *Epiney* referred to the judgment of the European Court of Justice in the case of *Commission v. Sweden* (C-246/07), where the Court had extended the obligation of sincere cooperation to an “obligation of unity in international representation” of the EU.

However, if the EU acceded to the CoE-Convention, the latter would become an integral part of EU-law. As far as EU-competences were concerned, voting powers in the *comité consultatif* would then be exercised by the EU-Commission, acting for the member states. Insofar, there would be a dual obligation of the EU-member states: From a perspective of international law, they would be bound as signatories of the Convention; in addition, they would be bound according to Article 216(2) TFEU. As a consequence, the principle of sincere cooperation would entail an obligation of the EU and the member states to cooperate closely.

2. Media law, anti-discrimination and cyber-crime

Professor Dr. *Udo Fink* (University of Mainz) discussed the field of media regulation, in which the EU had apparently terminated the cooperation: The Commission blocked the revision of the CoE’s Convention on Transfrontier Television, since there was, in the light of the EU-Audiovisual Media Services Directive 2010/13/EU, no remaining competence of the EU-member states to negotiate in the CoE.

Professor Dr. *Christa Tobler* (University of Basel and Leiden) compared the anti-discrimination law of the EU and the CoE. Professor Dr. *Susanne Reindl-Krauskopf* (University of Vienna) compared the CoE-Convention on Cybercrime with EU-Directive 2013/40/EU on attacks against information systems.

(based on conference proceedings
by Maximilian Kall, Berlin)