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**COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW
(CAHDI)**

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**DRAFT REPORT ON THE CONSEQUENCES OF THE SO-CALLED “DISCONNECTION
CLAUSE” IN INTERNATIONAL LAW IN GENERAL AND FOR COUNCIL OF EUROPE
CONVENTIONS, CONTAINING SUCH A CLAUSE, IN PARTICULAR**
COMMENTS FROM DELEGATIONS

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RUSSIAN FEDERATION

The so called "disconnection clause" basically has been designed to prevent conflict of jurisdictions between the European Union and its member states in the context of their participation in Council of Europe conventions. However helpful the clause could be for the EU domestic application its consequences are still unclear for the cooperation between the EU member states and non-member states within a particular CoE convention:

- i. the clause is too broad and does not properly reflect its scope;
- ii. the clause itself and its relevant explanatory texts - the EU declaration and appropriate paragraphs in the explanatory reports - do not clarify whether the EU or its member states take on responsibility for full and consistent implementation of a particular instrument;
- iii. the clause does not establish an obligation whereby the EU or its member states have to inform non-EU parties to the convention of the distribution of competence within the EU and, thus, of the scope of application of the clause itself;
- iv. a uniform/standard clause does not allow the drafters to take account of different content and nature of particular conventions and their provisions.

We fully acknowledge the institutional specificity of the EU and the EU's interest in developing its legal acquis. It is true that the special nature of the EU demands a special approach as regards the participation by the EU/EC and its member states in multilateral treaties. Given the importance of the participation of the EU/EC and its member states in CoE conventions, the idea to introduce special EU-related provisions into conventions that simultaneously cover issues that fall under EU/EC and national competence ("mixed agreements", to use the EU terminology) seems justified. Such provisions should clarify the way in which the EU/EC and its member states implement such conventions, without creating any supplementary rights for the EU/EC and its member states or exempting them from any obligations. The provisions should be formulated in the clearest possible way, so that no doubts or suspicions arise as to any hidden meanings or aims.

The "disconnection clause" as formulated in 2005 Council of Europe Conventions (Convention on the prevention of terrorism, Convention on action against trafficking in human beings, Convention on money laundering and the financing of terrorism)¹ is a step forward compared with its earlier versions². Thus,

- it does not mention that EU members do not apply the convention;
- it mentions that the clause is without prejudice to the object and purpose of the convention;
- it also mentions that the clause is without prejudice to the full application of the convention with the other parties; the EU declaration made when the three Conventions were adopted, is even more explicit in this respect;

¹ "Parties which are members of the European Union shall, in their mutual relations, apply Community and European Union rules in so far as there are Community or European Union rules governing the particular subject concerned and applicable to the specific case, without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties".

² For example, contained in article 9 of the European convention relating to questions on copyright law and neighboring rights in the framework of transfrontier broadcasting by satellite (ETS No.153) and article 21 of the European convention for the protection of audiovisual heritage (ETS No.183):

"In their mutual relations, Parties which are members of the European Community shall apply Community rules and shall not therefore apply the rules arising from this Convention, except in so far as there is no Community rule governing the particular subject concerned".

- the EU declaration³ says that the clause is only applicable to the provisions that fall under EC competence;
- according to the EU declaration, the meaning of the clause is that EU members cannot invoke the convention directly among themselves, something that strengthens the understanding that the other parties remain free to invoke the convention fully in their relations with EU members;
- the Explanatory Reports⁴ mention the possibility for the other parties to be informed of the division of competence between the EU/EC and its members.

However, the 2005 formula is far from bringing conclusive clarity into the matter, partly due to its broad and "across-the-board" nature. Intended to be applied only to "those parts of the convention which fall within the competence of the Community/Union" (see EU declaration) the clause nevertheless does not contain required limits and thus may be considered as relating to the convention in whole. Accordingly, in the present wording the clause resembles vague (or general) reservations which are often considered incompatible with the object and purpose of the treaty and, thus, inadmissible under international law.

The clause also mentions "mutual relations" between EU members. This term seems unclear to us. If it relates only to reciprocal obligations, then the clause would not have been necessary at all: a possibility of *inter se* agreements exists in the law of treaties. As regards *erga omnes* or "standard-setting" obligations, one may wonder what "mutual relations" may mean.

A logical meaning of the clause may be that:

- it is up to the EU and its member states to decide (in accordance with EU law) whether the provisions of a convention will be implemented by individual member states or through adopting EU legislation;
- once such EU legislation is adopted, only the EU/EC is responsible for the implementation of the relevant provision of the convention vis-à-vis third parties.

However, these two elements can only be properly applied if and when the Community itself becomes a party to the convention. This is confirmed by the wording of the EU declaration: "the Community and the European Union Members States will be bound by the Convention". Unfortunately, the clause contains no clarification as to whether and how it is applied when a convention has been ratified by all or some EU member states but not by the EC.

³ The EU declaration is reproduced in Explanatory Reports and reads as follows: "The European Community/European Union and its Member States reaffirm that their objective in requesting the inclusion of a 'disconnection clause' is to take account of the institutional structure of the Union when acceding to international conventions, in particular in case of transfer of sovereign powers from the Member States to the Community.

This clause is not aimed at reducing the rights or increasing the obligations of a non-European Union party vis-à-vis the European Community/European Union and its Member States, inasmuch as the latter are also parties to this Convention.

The disconnection clause is necessary for those parts of the convention which fall within the competence of the Community / Union, in order to indicate that European Union Member States cannot invoke and apply the rights and obligations deriving from the Convention directly among themselves (or between themselves and the European Community/Union). This does not detract from the fact that the Convention applies fully between the European Community/European Union and its Member States on the one hand, and the other Parties to the Convention, on the other; the Community and the European Union Members States will be bound by the Convention and will apply it like any party to the Convention, if necessary, through Community/Union legislation. They will thus guarantee the full respect of the Convention's provisions vis-à-vis non-European Union parties".

⁴ "The European Community would be in a position to provide, for the sole purpose of transparency, necessary information about the division of competence between the Community and its Member States in the area covered by the present Convention, inasmuch as this does not lead to additional obligations placed on the Community".

A situation may arise when the EU/EC, not having ratified a convention, is not obliged to ensure conformity of its legislation with the convention, while the EU member states that have ratified the convention have no means of implementing it due to the transfer of relevant competences to the EU/EC. The question is whether such member states may be held accountable for violating the convention if EU/EC legislation does not properly reflect its provisions? From the perspective of non-EU parties, the obligations under the convention would in any way be considered as not properly fulfilled by such member states. The disconnection clause is thus of no use, unless “mutual relations” are interpreted as “domestic legal order”, an interpretation that in our view would be contrary to Article 27 of the Vienna Convention on the Law of Treaties and hardly accepted by other parties.

It should be noted in this context that during the 2005 negotiations EU representatives clearly stated that the clause is to be applied only in the case of simultaneous EU/EC and national participation in a convention. We consider this idea as one of the main elements of the mechanism of the disconnection clause although it has never been reflected in the texts of the three Conventions or in any related official document. There could be at least two ways to address the issue: (1) to include in the convention itself or EU/EC declaration the obligation of the EU/EC to become party to every convention that touches upon EU/EC competence and in which at least two EU member states participate; and (2) to state clearly in the convention that the clause does not apply until both the EU/EC and at least two of its members become parties to it. In our view both options would ensure full implementation of the convention with or without the EU/EC participating in it.

Meanwhile, there are no signs of the EU/EC preparing to become a party to any new Council of Europe convention.

Further, for the clause to be of practical use, non-EU parties to a convention should be fully informed of the distribution of competence between the EU/EC and its member states in matters covered by the convention as well as of particular provisions of the convention to which the clause applies. Indeed, other parties are entitled to know which entity is responsible for the implementation of any given treaty provision. This is particularly important when a convention does not contain provisions falling under EU/EC competence at the time of its elaboration, while later some national competence is transferred to the EU/EC and as a result the disconnection clause starts to apply.

Finally, the 2005 formula, having been the result of urgent and emotional negotiations, can hardly be considered an example of good treaty technique. To us it would be preferable to formulate the clause in such a way as to make it unnecessary to accompany it with lengthy explanations of its scope and content. The EU/EC declarations, which supplement conventions, should rather contain detailed information concerning the distribution of competence over provisions of conventions between the EU/EC and its member states.

To sum up, the current “disconnection clause” leaves a significant room for improvement. So far it has created a problem rather than ensured full and consistent implementation of Council of Europe conventions within the EU. The clause has been criticised in legal writings (see Constantin Economides, *“La clause de déconnexion en faveur du droit communautaire: une pratique critiquable”*, 2006 *Revue Générale de Droit International Public*, p. 273-302). Taking this into account, the Committee might wish to elaborate a model EU clause that would be politically neutral and legally clear, and could be included - possibly with necessary modifications depending on the type and content of a given treaty - in new Council of Europe conventions that touch upon issues that fall, at least potentially, under EU/EC competence. First and foremost, the new clause should address the problem of non-synchronised ratification of conventions by the EU/EC and its member states.

A separate but related issue is the participation of the EU/EC and its member states in bodies established by conventions, including monitoring ones. In particular, the number of votes to be allocated to the EU/EC and the use of the right to vote by the EU/EC and by its member states are issues to discuss.

Taking account of the terms of reference given to the CAHDI to analyse the consequences of the “disconnection clause” for international law in general, the Committee might also consider the practice of similar clauses in multilateral instruments concluded outside the Council of Europe.