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No Donum Danaorum! A reply to Daniel Thym's "A Trojan Horse?"

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With all due respect to my friend and colleague Daniel Thym, I feel compelled to express my diverging views. Let me explain the reasons.

Member States "Primary Respondents"?

Thym's blog rests on the assumption that according to the Draft Accession Agreement of the European Union to the European Convention on Human Rights, "Member States will be primary respondents" before the European Court of Human Rights (ECtHR) even in cases where Member States are implementing EU law without having any discretion whatsoever. This is, in my view, a misreading of the Agreement. What the agreement does say in Article 1(4) is that "(f)or the purposes of the Convention, of the protocols thereto and of this Agreement, an act, measure or omission of organs of a member State of the European Union or of persons acting on its behalf shall be attributed to that State, even if such act, measure or omission occurs when the State implements the law of the European Union …". However, this is nothing new. In fact, it merely repeats the rule firmly established in the ECtHR's case law (*Matthews, Bosphorus*) that Member State cannot flee their Convention obligations by creating international or supranational organisations (in German: "keine Flucht ins Völker-/Europarecht").

What is more important: This is a rule of substantive law, not of procedural law. It does not mean that Member States *must* be the primary respondents in EU law cases brought before the ECtHR. This becomes crystal clear when having a look at Article 3(3) of the Draft Accession Agreement, which reads: "Where an application is directed against the European Union, the European Union member States may become co-respondents to the proceedings in respect of an alleged violation…". Voilà the procedural rule which we have been looking for. It means that under the co-respondent mechanism, applicants will be free either to direct their application against an EU Member State, the EU becoming co-respondent (this is what we find in Article 3(2)) *or* to direct their application against the EU, the Member States becoming co-respondents (Article 3(3)).

No Threat to Effectiveness of EU Law

Next, the blog expresses the fear that the effectiveness of EU law could be impaired under the Draft Accession Agreement. The co-respondent mechanism, which allows for the involvement of the Court of Justice of the European Union (CJEU) in a case pending before the ECtHR (Article 3(6) of the Agreement), is seen as a possible incentive for national judges to bypass the CJEU. The national judge, so the argument runs, might decide not to refer a case to Luxembourg because the CJEU may be involved later on anyway. In order to assess this argument, one has to distinguish between legal and psychological aspects.

From the legal point of view, I do not see how a possible but by no means certain future involvement of the CJEU should detract from the obligation of courts adjudicating at last instance under Article 267(3) TFEU to refer a case to the CJEU. Since under the co-respondent mechanism there is only an opportunity to have the CJEU involved, this is not capable of weakening the obligations under Article 267(3) TFEU. More importantly, this is a question of interpretation of EU law proper. Therefore, the CJEU judges dispose of all the means necessary to ensure that the effectiveness of EU law is not impaired.

Psychologically speaking, it cannot be excluded that national judges adjudicating at last instance decide to disobey their obligation under Article 267(3)

TFEU, given the opportunity to have the CJEU involved later on. But this is nothing for which the co-respondent mechanism should be blamed. It is simply the consequence of the architecture of Article 267 TFEU which basically rests on voluntary cooperation between national judges and the CJEU.

No Threat from Protocol No. 16

A last point made by Daniel Thym is that the newly introduced preliminary ruling procedure to the ECtHR under Protocol No. 16 (not yet in force) might pose a danger to the effectiveness of EU law since national courts may be inclined to refer a case first to the ECtHR, not to the CJEU. Again, I think that this fear is not justified. We simply have to remind ourselves that there exist preliminary ruling procedures to the national constitutional courts as well. They do not impair the effectiveness of EU law. This is so because in *Simmenthal II*, the CJEU held that national courts are obliged to refer a case first to the Luxembourg court, not to the national constitutional court. The same should hold true, *mutatis mutandis*, for the ECtHR.

No re-bargaining of the Accession Agreement!

Therefore, I cannot join Daniel Thym in his call for a re-bargaining of the Accession Agreement. This Agreement, and the co-respondent mechanism in particular, creates a carefully balanced framework to have the EU at the Convention table and at the same time to have the autonomy of EU law secured. It should be recalled that under the current state of affairs, cases involving questions of interpretation of EU law may come up to the ECtHR without there being any procedural means to have the CJEU involved. From that perspective, the rules of the Draft Accession Agreement can only be seen as an improvement.

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