



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

**Opinion of the Court on Draft Protocol No. 16 to the Convention
extending its competence to give advisory opinions
on the interpretation of the Convention.**

(Adopted by the Plenary Court on 6 May 2013)

1. The Draft Protocol is the result of a lengthy process culminating in the Brighton Declaration which invited the Committee of Ministers to draft the text of an optional protocol by the end of 2013.
2. The Court recalls its earlier contribution to the discussion of this issue, which took the form of a reflection paper circulated to States and other interested parties in March 2012¹. That paper reflected the diversity of views within the Court on the merits of the proposal. In the present opinion, the Court will confine itself to commenting on the model developed by the Steering Committee on Human Rights (CDDH).
3. The Court welcomes the fact that the drafters of the Protocol have taken account of points contained in the Court's reflection paper, which was in turn informed by the results of earlier inter-governmental discussions. The exercise thus provides a good example of a constructive exchange of ideas between States and the Court.
4. The Protocol's purpose of enabling a dialogue between the highest national courts and the European Court is well described in the third paragraph of the Preamble to the Protocol, which refers to enhanced interaction between the Court and national authorities, and to reinforced implementation of the Convention in accordance with the principle of subsidiarity. The Court fully subscribes to these aims.
5. The main elements of the new procedure are set out in five Articles.
6. Under Article 1 § 1 "highest courts and tribunals", as specified by the Contracting Party in accordance with Article 10, are authorised to seek an opinion. The explanatory report (paragraph 8) explains the reasoning behind this approach, namely limiting the number of courts empowered to avail themselves of the procedure, whilst leaving the Contracting Party a degree of flexibility to accommodate special features of its judicial system. The Court agrees with this line. Moreover, it notes the optional nature of the procedure, which is consistent with the view expressed in its reflection paper.
7. Article 1 § 2 provides that the requesting court or tribunal may seek an advisory opinion only in the context of a case pending before it. Again this corresponds to what the Court

¹ "Reflection paper on the proposal to extend the Court's advisory jurisdiction", ref. no. 3853038. This document is available on the Court's website under the rubric "The Court/Reform of the Court/Reports and Notes".

advocated in its reflection paper, notably on the basis that there should not be an abstract review of legislation.

8. Article 1 § 3 stipulates that the requesting court should give reasons for its request and should provide the legal and factual background to the case. As regards the requirement of a reasoned request, it should not be for the Strasbourg Court to have to work out for itself in which respect the national court requires its opinion. For the procedure to function properly, the relevant issues of Convention law should be adequately identified and discussed at the national level. As regards the second requirement the explanatory report (paragraph 11), correctly in the Court's view, stresses the need to allow the Court to focus on the question of principle brought before it. The Court should not be called upon to review the facts or the national law in the context of this procedure. Nor is it for the Court to decide the case pending before the requesting court.

9. Article 2 relates to the role of the Grand Chamber. The Court welcomes the fact that, under the terms of the draft, the Grand Chamber Panel will have discretion as to whether to accept a request. The draft Protocol would require the Court to give reasons for refusing a request. This goes against the opinion expressed by the Court in its reflection paper. The Court expressed a preference for issuing general guidelines on the scope and functioning of its advisory jurisdiction, rather than being obliged to give reasons for every refusal. The Court however accepts that it may be useful to give reasons. Such an approach would enhance the aim of creating a constructive dialogue with the national courts. The Court envisages that such reasons will normally not be extensive.

10. Article 3 provides for the intervention of various parties in the proceedings, conferring a right to participate on the Government of the State of the requesting court and the Commissioner of Human Rights. Concerning the parties to the domestic proceedings, the Court would confirm the view expressed in the last sentence of paragraph 20 of the Explanatory Report that it would, as a matter of course, invite such parties to take part in the procedure before the Court. In this way the principle of equality would be respected. It would envisage providing for such an invitation in the Rules of Court.

11. Article 4 requires reasons to be given for the Court's opinions and provides for the possibility for individual judges to deliver separate opinions. This is in keeping with the Rules of Court on advisory opinions under the current system (Rule 88 § 2) although it has been the practice of the Court when issuing advisory opinions to endeavour to speak with one voice.

12. Article 5 states that advisory opinions are not to be binding. This reflects the majority view of the Court as expressed in its reflection paper (paragraph 24). The explanatory report (paragraphs 25-27) provides the background to this. Firstly, it is in the nature of a dialogue that it should be for the requesting court to decide on the effects of the advisory opinion in the domestic proceedings. Secondly, as indicated above, it will be open to a dissatisfied party to bring an application to Strasbourg once a final decision has been given at national level.

13. The Court notes two important practical and partly related issues. The first is that, since the domestic proceedings are stayed pending the delivery of the opinion, there is a clear need for the advisory procedure to be completed within a reasonably short time and therefore for it to be given a degree of priority. This is underlined at paragraph 17 of the explanatory report, where it is also pointed out that this implies an obligation for the requesting court to be

precise and complete in the formulation of its request. The Court accepts the need for expeditious handling of requests and simply recalls that this requires the cooperation of all those concerned.

14. The second issue is a linguistic one. Paragraph 13 of the explanatory report states that requests may be made in the language used in the domestic proceedings and Article 1 § 3 of the Draft Protocol indicates that requests are to be accompanied by annexes of relevant documents “setting out the relevant legal and factual background of the pending case”. The Court notes that the possibility of submitting the request in that language is not included in the text of the Protocol. The Court is opposed to the proposal that it should be for it to ensure translations of such requests and accompanying documents. Even if it can understand the thinking behind this, the result is to impose on the Court a costly burden of translation. At paragraph 23 the explanatory report points out that in many legal systems the domestic proceedings can be resumed only once the opinion has been made available in the language of those proceedings. Here again the Court has hesitations about what is meant by the suggestion that the Court would “co-operate” with the national authorities in the timely preparation of such translations. The Court is of the view that this could involve a considerable increase in its workload and, in fact, raises the question of who should pay for the translation. It is obvious that if the Court should assume the responsibility for the translations, the corresponding budgetary resources must be made available to it.

Conclusion

15. The Court has no serious difficulty with the proposed draft as it stands, except for the reservation made at paragraph 14 above relating to the proposed linguistic regime. It concludes by reiterating its appreciation that the CDDH has produced a final draft that largely accords with the Court’s reflections on the subject.