

RELAZIONE ESPLICATIVA DEI PROTOCOLLI  
N. 15 E N. 16

PAGINA BIANCA

*Relazione esplicativa del Protocollo n. 15***Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms**  
(CETS No. 213)

## Explanatory Report

## Introduction

1. The High-level Conference on the Future of the European Court of Human Rights, organised by the Swiss Chairmanship of the Committee of Ministers, took place in Interlaken, Switzerland, on 18-19 February 2010. The Conference adopted an Action Plan and invited the Committee of Ministers to issue terms of reference to the competent bodies with a view to preparing, by June 2012, specific proposals for measures requiring amendment of the Convention. On 26-27 April 2011, a second High-level Conference on the Future of the Court was organised by the Turkish Chairmanship of the Committee of Ministers at Izmir, Turkey. This Conference adopted a follow-up plan to review and further the reform process.
2. In the context of work on follow-up to these two Conferences, the Ministers' Deputies gave renewed terms of reference to the Steering Committee for Human Rights (CDDH) and its subordinate bodies for the biennium 2012-2013. These required the CDDH, through its Committee of experts on the reform of the Court (DH-GDR), to prepare a draft report for the Committee of Ministers containing specific proposals requiring amendment of the Convention.
3. Alongside this report, the CDDH presented a Contribution to the High-level Conference on the future of the Court, organised by the United Kingdom Chairmanship of the Committee of Ministers at Brighton, United Kingdom, on 19-20 April 2012. The Court also presented a Preliminary Opinion in preparation for the Brighton Conference containing a number of specific proposals.
4. In order to give effect to certain provisions of the Declaration adopted at the Brighton Conference, the Committee of Ministers subsequently instructed the CDDH to prepare a draft amending protocol to the Convention (1). This work initially took place during two meetings of a Drafting Group of restricted composition, before being examined by the DH-GDR, following which the draft was further examined and adopted by the CDDH at its 76th meeting (27-30 November 2012) for submission to the Committee of Ministers.
5. The Parliamentary Assembly, at the invitation of the Committee of Ministers, adopted Opinion No. 283 (2013) on the draft protocol on 26 April 2013.
6. At its 123rd Session, the Committee of Ministers examined and decided to adopt the draft as Protocol No. 15 to the Convention. At the same time, it took note of the present Explanatory Report to Protocol No. 15.

**Commentary on the provisions of the Protocol****Article 1 of the amending Protocol***Preamble*

7. A new recital has been added at the end of the Preamble of the Convention containing a reference to the principle of subsidiarity and the doctrine of the margin of appreciation. It is intended to enhance the transparency and accessibility of these characteristics of the Convention system and to be consistent with the doctrine of the margin of appreciation as developed by the Court in its case law. In making this proposal, the Brighton Declaration also recalled the High Contracting Parties' commitment to give full effect to their obligation to secure the rights and freedoms defined in the Convention (2).

8. The States Parties to the Convention are obliged to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, and to provide an effective remedy before a national authority for everyone whose rights and freedoms are violated. The Court authoritatively interprets the Convention. It also acts as a safeguard for individuals whose rights and freedoms are not secured at the national level.

9. The jurisprudence of the Court makes clear that the States Parties enjoy a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged. This reflects that the Convention system is subsidiary to the safeguarding of human rights at national level and that national authorities are in principle better placed than an international court to evaluate local needs and conditions. The margin of appreciation goes hand in hand with supervision under the Convention system. In this respect, the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention, having due regard to the State's margin of appreciation.

*Entry into force / application*

10. In accordance with Article 8, paragraph 4 of the Protocol, no transitional provision relates to this modification, which will enter into force in accordance with Article 7 of the Protocol.

**Article 2 of the amending Protocol***Article 21 – Criteria for office*

11. A new paragraph 2 is introduced in order to require that candidates be less than 65 years of age at the date by which the list of three candidates has been requested by the Parliamentary Assembly further to its role in electing judges under Article 22 of the Convention.

12. This modification aims at enabling highly qualified judges to serve the full nine-year term of office and thereby reinforce the consistency of the membership of the Court. The age limit applied under Article 23, paragraph 2 of the Convention, as drafted prior to the entry into force of this Protocol, had the effect of preventing certain experienced judges from completing their term of office. It was considered no longer essential to impose an age limit, given the fact that judges' terms of office are no longer renewable.

13. The process leading to election of a judge, from the domestic selection procedure to the vote by the Parliamentary Assembly, is long. It has therefore been considered necessary to foresee a date sufficiently certain at which the age of 65 must be determined, to avoid a candidate being prevented from taking office for having reached the age limit during the course of the procedure. For this practical reason, the text of the Protocol departs from the exact wording of the Brighton Declaration, whilst pursuing the same end. It was thus decided that the age of the candidate should be determined

at the date by which the list of three candidates has been requested by the Parliamentary Assembly. In this connection, it would be useful if the State Party's call for applications were to refer to the relevant date and if the Parliamentary Assembly were to offer a means by which this date could be publicly verified, whether by publishing its letter or otherwise.

14. Paragraph 2 of Article 23 has been deleted as it has been superseded by the changes made to Article 21.

*Entry into force / application*

15. In order to take account of the length of the domestic procedure for the selection of candidates for the post of judge at the Court, Article 8, paragraph 1 of the Protocol foresees that these changes will apply only to judges elected from lists of candidates submitted to the Parliamentary Assembly by High Contracting Parties under Article 22 of the Convention after the entry into force of the Protocol. Candidates appearing on previously submitted lists, by extension including judges in office and judges-elect at the date of entry into force of the Protocol, will continue to be subject to the rule applying before the entry into force of the present Protocol, namely the expiry of their term of office when they reach the age of 70.

**Article 3 of the amending Protocol**

*Article 30 – Relinquishment of jurisdiction to the Grand Chamber*

16. Article 30 of the Convention has been amended such that the parties may no longer object to relinquishment of a case by a Chamber in favour of the Grand Chamber. This measure is intended to contribute to consistency in the case-law of the Court, which had indicated that it intended to modify its Rules of Court (Rule 72) so as to make it obligatory for a Chamber to relinquish jurisdiction where it envisages departing from settled case-law (3). Removal of the parties' right to object to relinquishment will reinforce this development.

17. The removal of this right would also aim at accelerating proceedings before the Court in cases which raise a serious question affecting the interpretation of the Convention or the Protocols thereto or a potential departure from existing case-law.

18. In this connection, it would be expected that the Chamber will consult the parties on its intentions and it would be preferable for the Chamber to narrow down the case as far as possible, including by finding inadmissible any relevant parts of the case before relinquishing it.

19. This change is made in the expectation that the Grand Chamber will in future give more specific indication to the parties of the potential departure from existing case-law or serious question of interpretation of the Convention or the Protocols thereto.

*Entry into force / application*

20. A transitional provision is foreseen in Article 8, paragraph 2 of the Protocol. Out of concern for legal certainty and procedural foreseeability, it was considered necessary to specify that removal of the parties' right to object to relinquishment would not apply to pending cases in which one of the parties had already objected, before entry into force of the Protocol, to a Chamber's proposal of relinquishment in favour of the Grand Chamber.

**Article 4 of the amending Protocol**

*Article 35, paragraph 1 – Admissibility criteria: time limit for submitting applications*

21. Both Articles 4 and 5 of the Protocol amend Article 35 of the Convention. Paragraph 1 of Article 35 has been amended to reduce from six months to four the period following the date of the final

domestic decision within which an application must be made to the Court. The development of swifter communications technology, along with the time limits of similar length in force in the member States, argue for the reduction of the time limit.

*Entry into force / application*

22. A transitional provision appears at Article 8, paragraph 3 of the Protocol. It was considered that the reduction in the time limit for submitting an application to the Court should apply only after a period of six months following the entry into force of the Protocol, in order to allow potential applicants to become fully aware of the new deadline. Furthermore, the new time limit will not have retroactive effect, since it is specified in the final sentence of paragraph 4 that it does not apply to applications in respect of which the final decision within the meaning of Article 35, paragraph 1 of the Convention was taken prior to the date of entry into force of the new rule.

**Article 5 of the amending Protocol**

*Article 35, paragraph 1 – Admissibility criteria: significant disadvantage*

23. Article 35, paragraph 3.b of the Convention, containing the admissibility criterion concerning "significant disadvantage", has been amended to delete the proviso that the case have been duly considered by a domestic tribunal. The requirement remains of examination of an application on the merits where required by respect for human rights. This amendment is intended to give greater effect to the maxim *de minimis non curat praetor* (4).

*Entry into force / application*

24. As regards the change introduced concerning the admissibility criterion of "significant disadvantage", no transitional provision is foreseen. In accordance with Article 8, paragraph 4 of the Protocol, this change will apply as of the entry into force of the Protocol, in order not to delay the impact of the expected enhancement of the effectiveness of the system. It will therefore apply also to applications on which the admissibility decision is pending at the date of entry into force of the Protocol.

**Final and transitional provisions**

**Article 6 of the amending Protocol**

25. This article is one of the standard final clauses included in treaties prepared within the Council of Europe. This Protocol does not contain any provision on reservations. By its very nature, this amending Protocol excludes the making of reservations.

**Article 7 of the amending Protocol**

26. This article is one of the standard final clauses included in treaties prepared within the Council of Europe.

**Article 8 of the amending Protocol**

27. Paragraphs 1 to 4 of Article 8 of the Protocol contain transitional provisions governing the application of certain other, substantive provisions. The explanation of these transitional provisions appears above, in connection with the relevant substantive provisions.

28. Article 8, paragraph 4 establishes that all other provisions of the Protocol shall enter into force as of the date of entry into force of the Protocol, in accordance with its Article 7.

**Article 9 of the amending Protocol**

29. This article is one of the standard final clauses included in treaties prepared within the Council of Europe.

Notes :

- (1) Namely those set out in paragraphs 12b, 15a, 15c, 25d and 25f of the Declaration. See the decisions of the 122nd Session of the Committee of Ministers (23 May 2012), item 2 - Securing the long-term effectiveness of the supervisory mechanism of the European Convention on Human Rights.
- (2) See in particular paragraphs 12.b. 3 and 11 of the Brighton Declaration.
- (3) See paragraph 16 of the Preliminary Opinion of the Court in preparation for the Brighton Conference.
- (4) In other words, a court is not concerned by trivial matters.

*Relazione Esplicativa del Protocollo n. 16***Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms****Explanatory Report****Introduction**

1. The proposal to extend the jurisdiction of the European Court of Human Rights (the Court) to give advisory opinions was made in the report to the Committee of Ministers of the Group of Wise Persons, set up under the Action Plan adopted at the Third Summit of Heads of State and Government of the Member States of the Council of Europe (Warsaw, 16-17 May 2005) "to consider the issue of the long-term effectiveness of the ECHR control mechanism". The Group of Wise Persons concluded that "it would be useful to introduce a system under which the national courts could apply to the Court for advisory opinions on legal questions relating to interpretation of the Convention and the protocols thereto, in order to foster dialogue between courts and enhance the Court's 'constitutional' role. Requests for an opinion, which would be submitted only by constitutional courts or courts of last instance, would always be optional and the opinions given by the Court would not be binding."<sup>1</sup> Such a new competence would be in addition to that accorded to the Court under Protocol No. 2 to the European Convention on Human Rights (the Convention)<sup>2</sup>, whose provisions are now principally reflected in Articles 47-49 of the Convention. The Group of Wise Persons' proposal was examined by the Steering Committee for Human Rights (CDDH) as part of its work on follow-up to the former's report.<sup>3</sup>

2. The Izmir High-level Conference on the future of the Court (26-27 April 2011), in its final Declaration, subsequently "[invited] the Committee of Ministers to reflect on the advisability of introducing a procedure allowing the highest national courts to request advisory opinions from the Court concerning the interpretation and application of the Convention that would help clarify the provisions of the Convention and the Court's case-law, thus providing further guidance in order to assist States Parties in avoiding future violations". The Ministers' Deputies decisions on follow-up to the Izmir Conference then invited the CDDH to elaborate specific proposals, with options, for introducing such a procedure.<sup>4</sup> The CDDH's Final Report to the Committee of Ministers on measures requiring amendment of the ECHR<sup>5</sup> included an in-depth examination of a more detailed proposal made by the experts of The Netherlands and Norway, reflected also in its Contribution to the Ministerial Conference organised by the United Kingdom Chairmanship of the Committee of Ministers.<sup>6</sup>

3. The question of advisory opinions was discussed at length during the preparation of the subsequent Brighton High-level Conference on the future of the Court (19-20 April 2012), to which the Court contributed a detailed "Reflection Paper on the proposal to extend the Court's advisory jurisdiction".<sup>7</sup> The final Declaration of the Brighton Conference, "[noting] that the interaction between the Court and national authorities could be strengthened by the introduction into the Convention of a further power of the Court, which States Parties could optionally accept, to deliver advisory opinions upon request on the interpretation of the Convention in the context of a specific case at domestic level, without prejudice to the non-binding character of the opinions for the other States Parties, invited] the Committee of Ministers to draft the text of an optional protocol to the Convention with this effect by the end

of 2013; and further invites the Committee of Ministers thereafter to decide whether to adopt it”.

4. Following the Brighton Conference, the 122nd Session of the Committee of Ministers (23rd May 2012) instructed the CDDH to draft the required text. This work initially took place during two meetings of a Drafting Group of restricted composition, before being examined by the plenary Committee of experts on the reform of the Court (DH-GDR), following which the draft was further examined and approved by the CDDH at its 77th meeting (22 March 2013) for submission to the Committee of Ministers. The key issues addressed during this process were: the nature of the domestic authority that may request an advisory opinion of the Court; the type of questions on which the Court may give an advisory opinion; the procedure for considering requests, for deliberating upon accepted requests and for issuing advisory opinions; and the legal effect of an advisory opinion on the different categories of subsequent case. The CDDH’s position on these issues is reflected in the commentary on the Protocol’s provisions in Section II below.

5. The Parliamentary Assembly, at the invitation of the Committee of Ministers, adopted Opinion No. 285 (2013) on the draft protocol on 28 June 2013.

6. At their 1176th meeting, the Ministers’ Deputies examined and decided to adopt the draft as Protocol No. 16 to the Convention (CEFS No. 214). At the same time, it took note of the present Explanatory Report to Protocol No. 16.

#### Commentary on the provisions of the Protocol

##### Article I

7. Paragraph 1 of Article I sets out three key parameters of the new procedure. First, by stating that relevant courts or tribunals “may” request that the Court give an advisory opinion, it makes clear that it is optional for them to do so and not in any way obligatory. In this connection, it should also be understood that the requesting court or tribunal may withdraw its request.

8. Second, it defines the domestic authority that may request an advisory opinion of the Court as being the “highest courts or tribunals... as specified by [the High Contracting Party] under Article 10”. This wording is intended to avoid potential complications by allowing a certain freedom of choice. “Highest court or tribunal” would refer to the courts and tribunals at the summit of the national judicial system. Use of the term “highest”, as opposed to “the highest”, permits the potential inclusion of those courts or tribunals that, although inferior to the constitutional or supreme court, are nevertheless of especial relevance on account of being the “highest” for a particular category of case. Thus, along with the requirement that a High Contracting Party specify which highest courts or tribunals may request an advisory opinion, allows the necessary flexibility to accommodate the particularities of national judicial systems. Limiting the choice to the “highest” courts or tribunals is consistent with the idea of exhaustion of domestic remedies, although a “highest” court need not be one to which recourse must have been made in order to satisfy the requirement of exhaustion of domestic remedies under Article 35, paragraph 1 of the Convention. It should avoid a proliferation of requests and would reflect the appropriate level at which the dialogue should take place. It can be noted that under Article 10 (see further below), a High Contracting Party may at any time change its specification of those of its highest courts or tribunals that may request an advisory opinion. In some cases, the constitutional arrangements of a High Contracting Party may provide for particular courts or tribunals to hear cases from more than one territory.

This may include territories to which the Convention does not apply and territories to which the High Contracting Party has extended the application of the Convention under Article 56. In such cases, when specifying a court or tribunal for the purposes of this Protocol, a High Contracting Party may specify that it excludes the application of the Protocol to some or all cases arising from such territories.

9. The third parameter concerns the nature of the questions on which a domestic court or tribunal may request the Court's advisory opinion. The definition – "questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto" – is that which was used by the Group of Wise Persons and endorsed by the Court in its Reflection Paper, which was in turn inspired by Article 43, paragraph 2 of the Convention on referral to the Grand Chamber. It was felt that there were certain parallels between these two procedures, not limited to the fact that advisory opinions would themselves be delivered by the Grand Chamber (see Article 2, paragraph 2). That said, when applying the criteria, the different purposes of the procedure under this Protocol and that under Article 43, paragraph 2 of the Convention will have to be taken into account. Interpretation of the definition will be a matter for the Court when deciding whether to accept a request for an advisory opinion (see Article 2, paragraph 1).

10. Paragraph 2 of Article 1 requires the request for an advisory opinion to be made in the context of a case pending before the requesting court or tribunal. The procedure is not intended, for example, to allow for abstract review of legislation which is not to be applied in that pending case.

11. Paragraph 3 of Article 1 sets out certain procedural requirements that must be met by the requesting court or tribunal. They reflect the aim of the procedure, which is not to transfer the dispute to the Court, but rather to give the requesting court or tribunal guidance on Convention issues when determining the case before it. These requirements serve two purposes. First, they imply that the requesting court or tribunal must have reflected upon the necessity and utility of requesting an advisory opinion of the Court, so as to be able to explain its reasons for doing so. Second, they imply that the requesting court or tribunal is in a position to set out the relevant legal and factual background, thereby allowing the Court to focus on the question(s) of principle relating to the interpretation or application of the Convention or the Protocols thereto.

12. In providing the relevant legal and factual background, the requesting court or tribunal should present the following:

- The subject matter of the domestic case and relevant findings of fact made during the domestic proceedings, or at least a summary of the relevant factual issues;
- The relevant domestic legal provisions;
- The relevant Convention issues, in particular the rights or freedoms at stake;  
If relevant, a summary of the arguments of the parties to the domestic proceedings on the question;
- If possible and appropriate, a statement of its own views on the question, including any analysis it may itself have made of the question.

13. The Court would be able to receive requests in languages other than English or French, as it does at present for individual applications. Requesting courts or tribunals may thus address the Court in the national official language used in the domestic proceedings.

14. Paragraph 1 of Article 2 sets out the procedure for deciding whether or not a request for an advisory opinion is accepted. The Court has a discretion to accept a request or not, although it is to be expected that the Court would hesitate to refuse a request that satisfies the relevant criteria by (i) relating to a question as defined in paragraph 1 of Article 1 and (ii) the requesting court or tribunal having fulfilled the procedural requirements as set out in paragraphs 2 and 3 of Article 1. As is the case for requests for referral to the Grand Chamber under Article 43 of the Convention, the decision on acceptance is taken by a five-judge panel of the Grand Chamber.

15. Unlike the procedure under Article 43, however, the panel must give reasons for any refusal to accept a domestic court or tribunal's request for an advisory opinion. This is intended to reinforce dialogue between the Court and national judicial systems, including through clarification of the Court's interpretation of what is meant by "questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto", which would provide guidance to domestic courts and tribunals when considering whether to make a request and thereby help to deter inappropriate requests. The Court should inform the High Contracting Party concerned of the acceptance of any requests made by its courts or tribunals.

16. Paragraph 2 of Article 2 states that it is the Grand Chamber of the Court (as defined in Article 26 of the Convention – see further under Article 6 below) that shall deliver advisory opinions following acceptance of a request by a five-judge panel. This is appropriate given the nature of the questions on which an advisory opinion may be requested and the fact that only the highest domestic courts or tribunals may request it, along with the recognised similarities between the present procedure and that of referral to the Grand Chamber under Article 43 of the Convention.

17. The prioritisation to be given to proceedings under this protocol would be a matter for the Court, as it is with respect to all other proceedings. That said, the nature of the question on which it would be appropriate for the Court to give its advisory opinion suggests that such proceedings would have high priority. This high priority applies at all stages of the procedure and to all concerned, namely the requesting court or tribunal, which should formulate the request in a way that is precise and complete, and those that may be submitting written comments or taking part in hearings (see Article 3 below), as well as the Court itself. Undue delay in the advisory opinion proceedings before the Court would also cause delay in proceedings in the case pending before the requesting court or tribunal and should therefore be avoided (see further under paragraph 23 below).

18. Paragraph 3 of Article 2 states that the panel and the Grand Chamber shall include ex officio the judge elected in respect of the High Contracting Party to which the requesting court or tribunal pertains. It can be noted that this is also the case for the Grand Chamber when sitting in its full composition on a case brought before it under Articles 33 or 34 of the Convention (see Article 26, paragraph 4 of the Convention). Paragraph 3 also establishes a procedure for circumstances where there is no such judge, or that judge cannot sit. This procedure is intended to be identical to that established under Article 26, paragraph 4 of the Convention and to be based upon the same list.

### Article 3

19. Article 3 gives to the Council of Europe Commissioner for Human Rights and to the High Contracting Party whose domestic court or tribunal has requested the advisory opinion the right to submit written comments to and take part in any hearing before the Grand Chamber in proceedings concerning that request. The intention is that the Commissioner have an equivalent right under the Protocol to participate in advisory opinion proceedings as s/he does

under Article 36, paragraph 3) of the Convention to make a third party intervention in proceedings before a Chamber or the Grand Chamber. The wording used in the Protocol, although slightly different to that found in the Convention, is intended to have the same effect. Since advisory opinion proceedings would not be adversarial, neither would it be obligatory for the government to participate, although it would always retain the right to do so, in the same way as does a High Contracting Party in proceedings brought by one of its nationals against another High Contracting Party (see Article 36, paragraph 1 of the Convention on third party interventions).

20. The President of the Court may invite any other High Contracting Party or person to submit written comments or take part in any hearing, where to do so is in the interest of the proper administration of justice. This mirrors the situation concerning third party interventions under Article 36, paragraph 2 of the Convention. It is expected that the parties to the case in the context of which the advisory opinion had been requested would be invited to take part in the proceedings.

21. It will be for the Court to decide whether or not to hold a hearing on an accepted request for an advisory opinion.

#### Article 4

22. Paragraph 1 of Article 4 requires the Court to give reasons for advisory opinions delivered under this Protocol; paragraph 2 of Article 4 allows for judges of the Grand Chamber to deliver a separate (dissenting or concurring) opinion.

23. Paragraph 3 of Article 4 requires the Court to communicate advisory opinions to both the requesting court or tribunal and the High Contracting Party to which that court or tribunal pertains. It is expected that the advisory opinion would also be communicated to any other parties that have taken part in the proceedings in accordance with Article 3. It is important to bear in mind that in most cases advisory opinions will have to be admitted to proceedings that take place in an official language of the High Contracting Party concerned that is neither English nor French, the Court's official languages. Whilst respecting the fact that there are only two official languages of the Court, it was considered important to underline the sensitivity of the issue of the language of advisory opinions. It should also be taken into account that the suspended domestic proceedings can in many legal systems be resumed only after the opinion is translated into the language of the requesting court or tribunal. In the event of concerns that the time taken for translation into the language of the requesting court or tribunal of an advisory opinion may delay the resumption of suspended domestic proceedings, it may be possible for the Court to co-operate with national authorities in the timely preparation of such translations.

24. Paragraph 4 of Article 4 requires the publication of advisory opinions delivered under this Protocol. It is expected that this will be done by the Court in accordance with its practice in similar matters and with due respect to applicable confidentiality rules.

#### Article 5

25. Article 5 states that advisory opinions shall not be binding. They take place in the context of the judicial dialogue between the Court and domestic courts and tribunals. Accordingly, the requesting court decides on the effects of the advisory opinion in the domestic proceedings.

26. The fact that the Court has delivered an advisory opinion on a question arising in the context of a case pending before a court or tribunal of a High Contracting Party would not prevent a party to that case subsequently exercising their right of individual application under

Article 34 of the Convention, i.e. they could still bring the case before the Court. However, where an application is made subsequent to proceedings in which an advisory opinion of the Court has effectively been followed, it is expected that such elements of the application that relate to the issues addressed in the advisory opinion would be declared inadmissible or struck out.

27. Advisory opinions under this Protocol would have no direct effect on other later applications. They would, however, form part of the case-law of the Court, alongside its judgments and decisions. The interpretation of the Convention and the Protocols thereto contained in such advisory opinions would be analogous in its effect to the interpretative elements set out by the Court in judgments and decisions.

#### Article 6

28. Article 6 reflects the fact that acceptance of the Protocol is optional for High Contracting Parties to the Convention. It thus does not have the effect of introducing new provisions into the Convention, whose text remains unchanged. Only between High Contracting Parties that choose to accept the Protocol do its provisions operate as additional Articles to the Convention, in which case its application is conditioned by all other relevant provisions of the Convention. It is understood that this, in conjunction with Article 58 of the Convention, would allow a High Contracting Party to denounce the Protocol without denouncing the Convention.

#### Article 7

29. Article 7 is based on one of the model final clauses approved by the Committee of Ministers and contains the provisions under which a High Contracting Party to the Convention may become bound by the Protocol.

#### Article 8

30. The text of Article 8 is taken from Article 7 of Protocol No. 9 to the Convention and is based on the model final clauses approved by the Committee of Ministers. The number of High Contracting Parties whose expression of consent to be bound is required for the Protocol to enter into force was set at ten.

#### Article 9

31. Article 9 specifies, as an exception to Article 57 of the Convention, that High Contracting Parties may not make a reservation in respect of the Protocol.

#### Article 10

32. Article 10 is based on a standard clause used in Council of Europe treaties. It is intended explicitly to allow High Contracting Parties to make declarations on material issues arising under the Protocol, in this case to specify which of their highest courts or tribunals will be able to request advisory opinions from the Court. It also allows for further declarations to be made at any time adding to or removing from the list of specified courts or tribunals. All such declarations are addressed to the Secretary General of the Council of Europe, as depositary of multilateral agreements made within the organisation.

#### Article 11

33. Article 11 is one of the usual final clauses included in treaties prepared within the Council of Europe. Its paragraph d. refers to the procedure established under Article 10 of the Protocol for specifying which of a High Contracting Party's highest courts or tribunals may request advisory opinions from the Court (see paragraph 32 above).

Notes

<sup>1</sup> See doc. 10601/2013 para. 135.

<sup>2</sup> See doc. 8 N. 144.

<sup>3</sup> See the 2011 Activity Report announcing the long-term effectiveness of the control system of the European Convention on Human Rights, doc. 10601/2013 Addendum I para. 47-44 and the 2011 Opinion on the issues to be covered at the Interlaken Conference, doc. 10601/2013 Addendum I para. 17.

<sup>4</sup> See also COMELEC doc. 2011/1/13/US. These instructions were subsequently transformed into the terms of reference for the biennium 2012-2013. The 2011 subordinate body, the Committee of experts on the reform of the Court (10601/13).

<sup>5</sup> See doc. 10601/2012/R74 Addendum I para. 50 and Appendix A.

<sup>6</sup> See doc. 10601/2012/R74 Addendum III para. 17.

<sup>7</sup> See doc. 1384/18, 20 February 2011.

*Piano d'azione sentenza Torreggiani ed altri*



*Ministero della Giustizia*

**Esecuzione della sentenza della Corte EDU**

*(Sentenza Torreggiani e altri v/Italia 43517/09)*

**Il Piano presentato dal Governo Italiano il 27 novembre 2013 (a sei mesi dalla definizione della sentenza) e confermato il 25 marzo 2014 si articola in quattro aree d'intervento:**

1. interventi di natura normativa volti a ridurre gli ingressi in carcere e a favorire forme di graduale uscita dal sistema attraverso l'adozione di misure alternative alla detenzione che accompagnino il ritorno alla comunità esterna;
2. interventi di natura organizzativa e gestionale attraverso l'introduzione di un regime più aperto per i detenuti non in "alta sicurezza", centrato sulla graduale riconduzione della cella a luogo del riposo e non a luogo ove trascorrere la quasi totalità della giornata;
3. interventi di natura edilizia, programmati sulla base delle necessità del nostro patrimonio di edilizia penitenziaria;
4. previsione di modalità e procedure sia per il rimedio "preventivo", che eviti cioè il perpetuarsi di situazioni di violazione di quanto riscontrato dalla Corte, sia per il rimedio "compensativo" di coloro che hanno subito un trattamento in tale violazione, in forme non unicamente o prioritariamente finanziarie, ma centrate su possibili specifici benefici penitenziari.

**In una comunicazione al Governo in data 6 marzo 2014 il Comitato per l'esecuzione delle sentenze ha richiesto chiarimenti relativamente ai seguenti punti:**

- a) La definizione di un rimedio compensativo domestico che riguardi sia chi è attualmente in carcere sia chi è invece uscito.
- b) La necessità che la combinazione del rimedio compensativo e preventivo coinvolga sia coloro che sono in esecuzione della sentenza, sia coloro che sono in custodia cautelare.
- c) La necessità di avere un quadro circa:

- I dati aggiornati sul sovraffollamento (rapporto presenze/capacità),
- gli effetti delle misure adottate
- l'effettiva capacità del sistema detentivo italiano e i criteri secondo cui è calcolata, la progressiva riduzione del sovraffollamento, le statistiche aggiornate sulla detenzione.

Il Rapporto intermedio presentato dal Governo italiano ha affrontato le questioni qui sopra elencate, fornendo le informazioni richieste e indicando le soluzioni previste ai problemi posti dalla sentenza, con l'elencazione dei provvedimenti legislativi predisposti e i loro effetti, nonché i progressivi passi per l'attuazione di un radicale cambiamento nel modello di detenzione proposto.

Tale Rapporto intermedio è stato pubblicato nel sito del Comitato per l'esecuzione delle sentenze del Consiglio d'Europa nell'aprile scorso. Nelle tabelle che seguono sono indicati i passi successivamente compiuti e, quindi, la situazione attuale a un anno dal momento in cui la sentenza è divenuta definitiva.

I provvedimenti adottati seguono i principi espressi nelle Raccomandazioni adottate dal Comitato dei Ministri del Consiglio d'Europa nell'ultimo decennio. In particolare:

- il maggior utilizzo di misure sanzionatorie non privative della libertà, come da Rec (1999)22;
- la riduzione della custodia cautelare in carcere, come da Rec (2006)13;
- l'ampliamento delle possibilità di accesso a misure alternative al carcere, come da Rec (2000)22.

Naturalmente il processo di cambiamento richiede continuità e implementazione graduale. Proprio per questo il Governo è impegnato a proseguire lungo la strada intrapresa al fine di definire un sistema detentivo non soltanto pienamente rispettoso dell'inderogabile divieto espresso dall'articolo 3 della Convenzione europea per i diritti dell'uomo, ma anche in linea con il complessivo disegno delineato dalle Regole penitenziarie europee (Rec (2006)2) e dalle successive Raccomandazioni relative alla detenzione degli stranieri (CM/Rec (2012)12), al codice etico degli operatori penitenziari (CM/Rec (2012)5), al sistema di Probation (CM/Rec (2010)1).

#### 1. INTERVENTI DI MODIFICA NORMATIVA ED EFFETTI OTTENUTI

<p><u>Decreto Legge 78/2013 convertito in Legge 9 agosto 2013 n. 94</u></p>	<p>Il decreto e la conseguente legge hanno previsto:</p> <ul style="list-style-type: none"> <li>- un aggiornamento del catalogo dei reati più gravi per i quali, al passaggio in giudicato della sentenza, è obbligatorio l'ingresso in carcere, eliminando i reati di modesta entità;</li> <li>- la possibilità di avviare un procedimento per la concessione della liberazione anticipata prima dell'emissione dell'ordine di carcerazione, per favorire così la sospensione dell'esecuzione della pena nei casi meno gravi e permettere l'accesso alle misure alternative senza un preliminare</li> </ul>
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	<p>passaggio per il carcere;</p> <ul style="list-style-type: none"> <li>- la possibilità di beneficiare della detenzione domiciliare, senza un preventivo ingresso in carcere per soggetti vulnerabili e bisognosi di maggiore tutela (donne incinte, ultrasessantenni non recidivi, ecc), quantomeno nei casi in cui debba essere espiata una pena non superiore ai quattro anni;</li> <li>- l'eliminazione delle preclusioni per i recidivi reiterati, nei cui confronti una legge approvata nel 2005, poneva un'astratta presunzione di pericolosità, fondata solo sul fatto della reiterazione delle condanne, indipendentemente dalla gravità del fatto criminoso commesso, spesso di modesta entità e riconducibile a contesti di marginalità sociale o dipendenza da sostanze psicoattive (proprio tale legge è stata una delle cause dell'aumento numerico di detenuti registrato negli ultimi anni);</li> <li>- l'eliminazione delle disposizioni più severe, sempre per i recidivi, in materia di accesso alle misure alternative per favorirne un percorso di reinserimento sociale.</li> </ul>
<p><u>Decreto Legge 146/2013, convertito in Legge 21 febbraio 2014 n. 10</u></p>	<p>Il decreto e la conseguente legge hanno previsto:</p> <ul style="list-style-type: none"> <li>- la trasformazione in autonoma figura di reato con previsione di una pena più breve delle condotte illecite legate al traffico di sostanze stupefacenti di lieve entità;</li> <li>- l'ampliamento dell'uso di dispositivi di controllo a distanza come il "braccialetto elettronico";</li> <li>- la stabilizzazione dell'istituto della detenzione domiciliare per pene e residui di pena fino a 18 mesi (tale misura era stata precedentemente adottata come misura eccezionale valida fino al 31 dicembre 2013);</li> <li>- l'identificazione anticipata dei detenuti stranieri colpiti da provvedimento di espulsione, in modo da evitare il loro successivo passaggio per i Centri d'identificazione al termine dell'esecuzione della pena;</li> <li>- la previsione eccezionale (liberazione anticipata speciale) per il periodo 2010-2015 dell'aumento della detrazione di pena (liberazione anticipata di cui all'articolo 54 dell'Ordinamento penitenziario) da 45 a 75 giorni a semestre per i detenuti che abbiano dato prova di partecipazione all'opera di rieducazione;</li> <li>- l'istituzione del Garante nazionale delle persone private della libertà personale, come organismo indipendente le cui connotazioni verranno regolamentate in modo tale da corrispondere a quanto richiesto dal Protocollo opzionale delle Nazioni Unite alla Convenzione contro la tortura (OPCAT) per l'istituzione di un Meccanismo nazionale di prevenzione (NPM);</li> <li>- la previsione di una procedura giurisdizionale di reclamo (di cui all'articolo 69, comma 6, dell'Ordinamento penitenziario) da parte del</li> </ul>

	<p>detenuto con la previsione da parte del magistrato di sorveglianza di ordinare all'Amministrazione penitenziaria di porre rimedio.</p>
<p><b>Legge 28 aprile 2014 n. 67 dal titolo "Deleghe al Governo in materia di pene detentive non carcerarie e di riforma del sistema sanzionatorio. Disposizioni in materia di sospensione del procedimento con messa alla prova e nei confronti degli irreperibili".</b></p> <p>La legge era stata annunciata nelle precedenti comunicazioni ed è stata ora approvata e pubblicata sulla Gazzetta Ufficiale il 2 maggio 2014.</p>	<p>La nuova legge prevede:</p> <ul style="list-style-type: none"> <li>- l'estensione agli adulti del sistema, già positivamente sperimentato nel sistema minorile, secondo cui per i reati puniti con reclusione fino a 4 anni o pena pecuniaria o per i quali è prevista la citazione diretta a giudizio, l'imputato può chiedere la sospensione del processo con messa alla prova. La misura, applicabile una sola volta e con esclusione dei soli delinquenti abituali, consiste in lavori di pubblica utilità e comporta la prestazione di condotte riparatorie e (se possibile) risarcitorie, con l'affidamento al servizio sociale per lo svolgimento di un programma di recupero. L'esito positivo della prova estingue il reato, mentre in caso di trasgressione del programma o di nuovi delitti la misura è revocata (il periodo di prova sospende la prescrizione). L'istituto si configura come analogo al sistema di <i>probation</i> previsto in diversi Paesi del Consiglio d'Europa;</li> <li>- la previsione della detenzione domiciliare come pena principale da applicare a tutte le contravvenzioni attualmente punite con l'arresto e a tutti i delitti la cui pena edittale massima è di 3 anni di reclusione; nel caso di pene il cui massimo edittale è tra 3 e 5 anni, è il giudice decide, tenendo conto della gravità del reato e della capacità a delinquere;</li> <li>- la possibilità per la detenzione non carceraria di avere durata per singoli giorni della settimana o fasce orarie, con l'eventuale applicazione di braccialetto elettronico, tenuto conto della tutela della persona offesa (resta esclusa la possibilità per chi non ha domicilio o per chi viola le prescrizioni);</li> <li>- la possibilità di affiancare la detenzione domiciliare con la sanzione del lavoro di pubblica utilità;</li> <li>- la depenalizzazione del reato di immigrazione clandestina;</li> <li>- la delega al governo per la trasformazione di un'ampia platea di reati minori in illeciti amministrativi;</li> <li>- l'eliminazione del processo in contumacia: se l'imputato è irreperibile, il giudice sospende il processo, potendo però acquisire le prove non rinviabili e sospendendo la prescrizione (nuove ricerche dell'imputato sono avviate alla scadenza di un anno e per ogni anno successivo).</li> </ul>
<p><b>Conversione in legge del Decreto Legge 36/2014</b></p> <p>(legge di conversione approvata definitivamente il 14 maggio 2014)</p>	<p>Con sentenza n. 32 depositata il 25 febbraio 2014, la Corte Costituzionale ha dichiarato l'illegittimità costituzionale del Decreto legge 30 dicembre 2005 (convertito in Legge 21 febbraio 2006 n. 49) in materia di detenzione, traffico, cessione, coltivazione e altro di sostanze stupefacenti. Per effetto della sentenza della Corte, è stata</p>