



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 28 January 2014

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**FREMP 15
JAI 419
COHOM 119
COSCE 7**

DECLASSIFICATION

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Delegations will find attached the declassified version of the above document. Only the cover page has been corrected.

The text of this document is identical to the previous version.

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NOTE

by : the Presidency
to : Delegations
No. prev. doc. : 9292/10 FREMP 14 JAI 385 COHOM 111 COSCE 6 RESTREINT UE
Subject : Draft Council Decision authorising the Commission to negotiate the Accession Agreement of the European Union to the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR)

The Working Party on Fundamental Rights, Citizen's Rights and Free Movement of Persons (FREMP) met on 6 May 2010 in order to discuss the still pending issues with regard to the above mentioned file and in particular the co-respondent mechanism, the safeguarding of the intervention of the European Court of Justice when Union Law is at stake and the question of the negotiator, on the basis of a non-paper by the Commission, a paper by the Romanian delegation¹ and drafting proposals submitted by Germany . The outcome of the discussions on these issues is set out in the Presidency Working Document DS 1293/1/1 REV 1 of 7 May 2010.

With regard to the question of the negotiator, there is broad consensus in the Working Party that the negotiations should be carried out by the Commission , in consultation with the FREMP Working Party , in its quality as special Committee under Article 218 (4) TFEU.

¹ Doc. 8756/10 FREMP 12 JAI 315 COHOM 97 COSCE 4 RESTREINT UE.

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Furthermore, the FREMP Working Party discussed the text of the above mentioned draft Council Decision on the basis of document 9292/10 FREMP 14 JAI 385 COHOM 111 COSCE 6 RESTREINT UE and drafting proposals submitted by Germany and Finland. The text of the draft Council Decision, as it arose from the discussions in the Working Party and including a Presidency compromise proposal on Paragraph 10 of the Negotiating directives, is set out in the Annex to the present Note. Modifications with regard to the previous document are highlighted in bold and italics. Comments by delegations are set out in footnotes.

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ANNEX I

draft

COUNCIL DECISION

authorising [...] the negotiation of the Accession Agreement of the European Union to the European Convention for the protection of Human Rights and Fundamental Freedoms

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to Art 6 TEU and Protocol N° 8 related thereto.

Having regard to the Recommendation from the Commission.

Whereas the European Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

HAS DECIDED AS FOLLOWS:

Article 1

The opening of negotiations on behalf of the European Union in order to agree with the Contracting Parties to the European Convention for the protection of Human Rights and Fundamental Freedoms to the accession of the European Union to that Convention is authorised.

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Article 2

The Commission is nominated as the Union negotiator.

Article 3

The Commission shall conduct the negotiations in consultation with the Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons, as the special committee appointed by the Council, in accordance with Article 218 (4) TFEU. The Commission shall report regularly to the special committee on the progress of the negotiations and shall forward all negotiating documents without delay to this special committee.

Article 4

The negotiations shall be carried out in accordance with the negotiating directives set out in the Annex.

Article 5

[In view of the special situation resulting from the fact that all Member States are also Contracting Parties to the ECHR, Member States present at the negotiations [...] shall, in accordance with Article 4 (3) TEU, in full mutual respect **support the Union negotiator [...] in defending the Union position in accordance with the negotiating directives in force in the relevant time.**

Article 6

This Decision enters into force upon its adoption.

Negotiating directives

General Principles

1. The Union should negotiate an accession agreement to be concluded with the Contracting Parties to the European Convention for the protection of Human Rights and Fundamental Freedoms. The agreement should contain provisions that provide legal certainty as to how the ECHR will operate in the specific case of the European Union as a distinct legal entity, vested with autonomous powers next to all its Member States.

The negotiations will be conducted in conformity with Article 6 TEU and Protocol No 8 relating to Article 6 TEU.

Within the framework fixed by primary law, the accession should be governed by the following five basic principles, which should be reflected, where necessary, in the Accession Treaty:

- a) accession will neither affect the competences of the Union nor the powers of its institutions, bodies, offices or agencies; special regard should be given to the division of competences between the EU and its Member States and to the competence of the Court of Justice of the EU as well as to preservation of Union law and its unique legal system (principle of neutrality regarding Union powers);
- b) the substantive and procedural features of the system of the ECHR should be preserved also with respect to the Union to the largest extent possible compatible with the principles referred to under a) and c) – e) (principle of preservation of the ECHR system). Where special rules are deemed necessary by the European Union, it should be ensured that they shall not alter the essential nature of the system of the Convention.

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- c) accession should not affect the obligations of Member State under the ECHR and the protocols thereto, nor reservations or derogations made by them thereto (principle of neutrality regarding Member States' obligations);
- d) the CoE bodies applying the ECHR, namely the Strasbourg Court and the Committee of Ministers should not be called upon to interpret – even implicitly or incidentally – Union law and in particular its rules regarding the powers of the institutions and bodies of the Union and regarding the content and scope of Member States' obligations under Union law (principle of autonomous interpretation of Union law);
- e) the Union should be allowed to participate in the Strasbourg Court as well as in the other CoE bodies - to the extent that their activities are linked to the purpose of the Strasbourg Court - on an equal footing with other Contracting parties to the ECHR (principle of equal footing);

Before the negotiations have been concluded, the Union should decide whether it would be necessary to accompany the accession by any reservations or declarations of the Union.

2. The negotiations should ensure that the Union should be liable for violations of the ECHR by failing to adopt an act or measure only to the extent that its system of competences would have allowed for the adoption of the act or measure at issue.

3. The negotiations should ensure that the accession agreement creates obligations under the ECHR and, as the case may be, under the [...] Protocols to which the Union may accede, only with regard to acts and measures adopted by institutions, bodies, offices or agencies of the Union.

4. The negotiations should ensure that it be clarified that terms used in the Convention which cannot literally be applied with regard to the Union as a Contracting Party to the ECHR, must be understood as referring, as the case may be *mutatis mutandis*, also to the Union as a Contracting Party.

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Scope of accession

5. The negotiations should ensure that the Union may accede to any of the existing or future Protocols to the ECHR and that the substantive provisions of the accession agreement shall also apply in relation to those Protocols to which the Union will accede in the future. In the negotiations, the Union shall indicate to the Contracting Parties to the European Convention for the protection of Human Rights and Fundamental Freedoms that it will at a first stage¹ accede, in accordance with Article 218 TFEU, only to those protocols which all Member States have ratified.²

Union Participation in the bodies of the Convention

6. As a distinct Contracting Party the European Union should receive the right to a judge, to be selected from three candidates who are proposed by the European Union. The judge should have the same status and duties as those of the other Contracting Parties to the ECHR.

7. An appropriate number of members of the European Parliament should be allowed to participate in sessions of the Parliamentary Assembly when the latter exercises functions related to the application of the ECHR, especially the election of all judges under Article 22 of the ECHR. Adaptations of the internal rules of the organs of the Council of Europe should be raised, where necessary, in order to guarantee appropriate participation of the Union in the selection procedures for judges.

8. The Union should be allowed to participate with a right to vote in the meetings of the Committee of Ministers of the Council of Europe when the latter exercises its role in relation to the ECHR.

¹ *In order to address the concerns expressed by some Member States, COM proposed to put the phrase "at least" instead of "at a first stage".*

² Some delegations supported the Accession of the EU to all existing Protocols.

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Financial issues

9. Any financial contribution by the Union to ECHR related expenditure (covering the operating costs of the European Court of Human Rights and costs related to the Committee of Ministers' activities to which the Unions participates) should take the form of a fixed amount, calculated according to a pre-established formula¹ which should be proportionate to the extent of EU participation in the ECHR organs.

Issues related to the procedure before the European Court of Human Rights

10². *The negotiations should ensure that in order to enable the Union and its Member States to defend, within their respective competences which shall remain unaffected, the compatibility of the act complained of with the ECHR, proceedings brought by non-Member States and individual applications, properly involve Member States and/or the Union, as appropriate. Hence, the Union should be allowed to join the proceedings as a co-respondent where it contends in a substantiated manner that there is an intrinsic link between the alleged violation of the ECHR and an act adopted on the basis of the TEU or of the TFEU. Likewise, Member States should be allowed to join the proceedings as a co-respondent where they contend in a substantiated manner that there is an intrinsic link between the alleged violation of the ECHR and the TEU, TFEU or any other provision having the same legal value.*

¹ Some delegations expressed their concerns about this paragraph and indicated that it should be examined in depth. The financial impact of the accession process for the Union, in terms of human and other resources, should be assessed in the course of the negotiations. The Presidency proposes that the Council, at the adoption of the Decision on the Negotiating directives makes a declaration, inviting the Commission to provide information on the possible budgetary consequences of the Accession.

² This issue is still under examination in the Working Party.

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11¹. The issue of the involvement of the ECJ regarding the compatibility of a legal act of the Union with fundamental rights should be addressed in the course of negotiations. In the cases brought before the Strasbourg Court where the ECJ has not had an opportunity to rule on the compatibility of an act of an institution, body, offices or agency the Union with fundamental rights defined at the level of the Union, the ECJ shall be given the opportunity to do so without causing serious delays in proceedings before the Strasbourg Court. In any case, the monopoly of the ECJ to annul an EU act should be safeguarded.

12. The negotiations should ensure that Article 35(2)(b) ECHR is without prejudice to the possibility for an individual to bring an application before the Strasbourg Court after having sought redress before the Union judicature and that Article 55 ECHR is without prejudice to the means of redress in disputes among Member States and between Member States and Union institutions or bodies before the ECJ and, in particular, to Article 344 TFEU.

Final clause

13. The agreement must provide for acceptance by the European Union so that it will only enter into force after the Council, after obtaining consent of the European Parliament, has taken a unanimous decision concluding the agreement and after having received the approval by the Member States in accordance with their respective constitutional requirements as set out in Article 218(8) TFEU.

¹ The Working Party is still examining this paragraph on the basis of various options on the table, bearing also in mind the multiple questions and problems that arise. However, a majority tends to back the so called judge Timmermans solution.