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Delegations will find attached the declassified version of the above document.

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

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**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 3 June 2010

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**FREMP 26
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NOTE

from :	Presidency
to :	Council
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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)

I. INTRODUCTION

With the entry into force of the Lisbon Treaty, the legal basis (Article 6 TEU) to initiate negotiations in view of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter the "Convention") has been provided.

On 17 December 2009, the Swedish Presidency consulted the delegations of the Member States with a view to opening, under the Spanish Presidency, the preparatory phase of the discussions on the accession of the European Union to the Convention.

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In view of the submission to the Council of the Recommendation from the Commission to the Council for a Council Decision authorising the Commission to negotiate the accession agreement of the European Union to the Convention and aiming at the facilitation of the preparation of the Recommendation by the Commission, the Spanish Presidency proceeded to exploratory discussions, during three meetings of the Justice and Home affairs Counsellors (on 7.1.2010, 28.1.2010 and 15.2.2010).

On 7.2.2010 COREPER decided to allow participation -as an observer- of a delegate of the Court of Justice of the European Union in the meetings of the preparatory bodies of the Council.

On 11.2.2010 the Spanish Presidency consulted CATS on this file, while COREPER and Council took note of the state of play of the preparatory phase respectively on 18.2.2010 and 25/26.2.2010 as well as on 26.2.2010. On this occasion, the Council urged for a speedy conclusion of the negotiations on the above mentioned Recommendation.

The Recommendation from the Commission to the Council for a Council Decision authorising the Commission to negotiate the accession agreement of the European Union to the Convention was submitted to the Council on 17 March 2010¹.

The Working Party on Fundamental Rights, Citizens Rights and Fundamental Freedoms (FREMP) was assigned with the examination of the Recommendation. The Recommendation was discussed during seven meetings at Working Party level (on 22.3.2010, 30.3.2010, 7.4.2010, 28.4.2010, 6.5.2010, 19.5.2010, 25.5.2010) while the file was brought to the consideration of CATS on 12/13.4.2010 and of COREPER and COUNCIL, respectively on 14.4.2010 and 23.4.2010.

COREPER examined this file again on 27.5.2010 and lastly on 2.6.2010. The text of the draft Council Decision as well as of the negotiating directives as they arose from these discussions in COREPER are set out in Annexes I and II to this Note. The draft Council declarations to be inserted in the minutes of the Council are set out in Annex III to this Note.

¹ Doc. 7668/10 FREMP 5 JAI 227 COHOM 74 RESTREINT UE

II. RESERVATIONS

UK lodged a general scrutiny reservation on the file. Other delegations entered scrutiny reservations and parliamentary reservations.

III. CONCLUSION

Council is requested

- to adopt the Council Decision and the negotiating directives as set out in Annexes I and II to this Note and
- to insert the declarations as set out in Annex III to this Note, in the minutes of its session

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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

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 (hereafter " the Convention") 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 Convention, Member States present at the negotiations shall, in accordance with Article 4 (3) TEU, in full mutual respect support the Union negotiator in carrying out the tasks following from the Treaties.

Article 6

This Decision enters into force upon its adoption.

Article 7

This Decision is addressed to the Commission.

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 (hereafter "the Convention"). The agreement should contain provisions that provide legal certainty as to how the Convention 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 agreement:

- 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 European Union, 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 Convention 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 Convention 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 Convention and the protocols thereto, nor reservations or derogations made by them thereto (principle of neutrality regarding Member States' obligations).
- d) the Council of Europe bodies applying the Convention, namely the European Court of Human Rights (hereafter ECtHR) 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). This principle is without prejudice to the competence of the ECtHR to assess the conformity of the EU law with the provisions of the Convention.
- e) the Union should be allowed to participate in the ECtHR as well as in the other Council of Europe bodies - to the extent that their activities are linked to the purpose of the ECtHR - on an equal footing with other Contracting parties to the Convention (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 Convention 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 Convention 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.

The negotiations will ensure that the accession is without prejudice to Article 275 TFEU.

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 Convention, must be understood as referring, as the case may be *mutatis mutandis*, also to the Union as a Contracting Party.

Scope of accession

5. The negotiations should ensure that the Union may accede to any of the existing or future Protocols to the Convention 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 Convention that it will at a first stage accede, in accordance with Article 218 TFEU, only to those protocols which all Member States have ratified.

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 Convention.

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 Convention, especially the election of all judges under Article 22 of the Convention. 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 Convention.

Financial issues

9. Any financial contribution by the Union to the Convention related expenditure (covering the operating costs of the ECtHR 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 formula which should be proportionate to the extent of European Union participation in the Convention's organs.

Issues related to the procedure before the ECtHR

10. a) The negotiations should ensure that proceedings brought by non-Member States and individual applications properly involve Member States and/or the Union, as appropriate.

b) The Union should have the right to join the proceedings brought against a Member State as a co-respondent, enjoying full rights as party to the proceedings, by notifying the ECtHR of the existence of an intrinsic link between the alleged violation of the Convention and a provision of Union law, giving its reasons on the existence of such link.

c) Likewise, Member States should have the right to join the proceedings brought against the Union as co-respondents, equally enjoying full rights as parties to the proceedings, by notifying the ECtHR of the existence of an intrinsic link between the alleged violation of the Convention and the TEU, TFEU or any other provision having the same legal value or where appropriate, the national law of the Member State or the Member States concerned, giving their reasons on the existence of such link.

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d) Such mechanism should ensure that the distribution of competences between the Member States and the Union remains unaffected and that the Union and its Member States should be able, within their respective competences, to defend the compatibility of the act complained of with the Convention.

11. The negotiations should ensure that the prior internal control by the Court of Justice of the European Union, in accordance with primary law, is respected also in cases where the conformity with the Convention of an act of an institution, body, office or agency of the Union, is at stake in a case brought before the ECtHR but the Court of Justice of the European Union has not had the opportunity to rule on the compatibility of that act with fundamental rights defined at the level of the Union.

Any such procedural means, allowing the Court of Justice of the European Union to assess the compatibility of such act with fundamental rights, should be meant to safeguard the subsidiary nature of the procedure before the ECtHR and should not result in causing unreasonable delays in such procedure.

12. The negotiations should ensure that Article 35(2)(b) of the Convention is without prejudice to the possibility for an individual to bring an application before the ACtHR after having sought redress before the Union jurisdiction, and that Article 55 of the Convention is without prejudice to the means of redress in disputes among Member States and between Member States and Union institutions or bodies before the Court of Justice of the European Union 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 has taken a unanimous decision concluding the agreement, after obtaining the consent of the European Parliament 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.

Draft Council declaration with regard to paragraphs 10 and 11 of the negotiating directives to be inserted in the minutes of the Council

In parallel with the negotiations in view of the agreement for the accession of the European Union to the Convention, the Council will discuss binding internal rules setting up a co-respondent mechanism as envisaged in paragraph 10 of the negotiating directives.

These rules should determine in which cases the mechanism would be triggered (e.g., when the alleged act presents an intrinsic link with primary or secondary Union law), the modalities of its application and representation of the co-respondents before the ECtHR. They should also determine the obligations or duties which apply to the European Union and its Member States in respect of each other during the proceedings and should deal as well with the execution of judgments of the ECtHR finding a violation of the Convention by an act of Union law, in particular with the modalities of repartition (allocation / division) of the responsibility between the European Union and the Member States.

If necessary, the internal rules should establish a procedure for settling disagreements between the European Union and its Member States arising in respect to the application of the co-respondent mechanism.

The abovementioned rules shall be in any case adopted unanimously before the conclusion of the accession agreement of the European Union to the Convention.

At the same time, the Council will unanimously adopt legally binding internal rules on the prior involvement of the Court of Justice of the European Union in assessing the compatibility of an act of an institution, body, office or agency of the Union with fundamental rights, as defined at the level of the Union, as set out in paragraph 11 of the negotiating directives.

Any mechanism adopted accordingly shall be compatible with the existing Treaties.

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Draft Council declaration with regard to the financial implications of the accession, to be inserted in the minutes of the Council

The Council invites the Commission to provide information on the possible budgetary implications of the accession.

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