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European Union

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## DECLASSIFICATION

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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)
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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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# RESTREINT UE



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 31 May 2010**

**10408/10**

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## **OUTCOME OF PROCEEDINGS**

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of : Permanent Representatives Committee

on : 27 May 2010

No. prev. doc. : **10206/10 FREMP 21 JAI 474 COHOM 135 COSCE 11 RESTREINT UE**

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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)

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The Permanent Representatives Committee met on 27.5.2010 to examine the above mentioned draft Council Decision on the basis of documents **10207/10FREMP 22 JAI 475 COHOM 136 COSCE 12** and **10206/10 FREMP 21 JAI 474 COHOM 135 COSCE 11 RESTREINT UE**.

The text of the draft Council Decision and the negotiating directives thereto, as they arose from the discussions in the Committee are set out respectively in Annex I and Annex II to this Outcome of proceedings. Modifications with regard to document **10206/10 FREMP 21 JAI 474 COHOM 135 COSCE 11 RESTREINT UE** are highlighted by bold. Deletions are highlighted by [...].

## **RESTREINT UE**

Draft Council declarations with regard to Paragraphs 10 and 11 of the negotiating directives are set out in Annex II to this Outcome of proceedings

The UK delegation reiterated its general scrutiny reservation, while the DK delegation lodged a Parliamentary scrutiny reservation.

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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 (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 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. 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.

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

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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.

## 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 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 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.



## 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 formula<sup>1</sup> 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

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 European Court of Human Rights of the existence of an intrinsic link between the alleged violation of the ECHR 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 European Court of Human Rights the existence of an intrinsic link between the alleged violation of the ECHR and the TEU, TFEU or any other provision having the same legal value **or where appropriate, the national law of Member States or the Member States concerned**, giving their reasons on the existence of such link..

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<sup>1</sup> 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.

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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 ECHR.

11. The negotiations should ensure that the [...] internal control by the ECJ, **in accordance with primary law**, is respected also in cases where the conformity with the ECHR of an act of an institution, body, office or agency of the Union is at stake in a case brought before the European Court of Human Rights but the ECJ 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 ECJ to assess the compatibility of such act with fundamental rights, should be **meant** to safeguard the subsidiary nature of the procedure before the European Court of Human Rights and should not result in causing **undue** delays in such procedure.

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.

**Draft declaration of the Council with regard to paragraph 10 of the negotiating directives to be adopted simultaneously to the adoption of the Council decision authorizing the opening of negotiations for the accession of the EU to the ECHR**

In parallel with the negotiations in view of the agreement for the accession of the EU to the ECHR, 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 Law of the EU), 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 EU and the 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 EU law, especially with the modalities of repartition [allocation / division] of the responsibility between the EU 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 EU to the ECHR.

**Draft Council declaration with regard to paragraph 11 of the negotiating directives, to be inserted in the minutes of the Council which will adopt the draft Council Decision**

"At the same time, the Council will adopt unanimously, legally binding internal rules on the prior involvement of the ECJ 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."