



Brussels, 7 February 2018
(OR. en)

8915/12
DCL 1

FREMP 63
JAI 267
COSCE 11
COHOM 83

DECLASSIFICATION

of document: 8915/12 RESTREINT UE/EU RESTRICTED

dated: 18 April 2012

new status: Public

Subject: Accession of the European Union to the European Convention for the protection of human rights and fundamental freedoms (ECHR):
= Exchange of views/Certain issues

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

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



COUNCIL OF
THE EUROPEAN UNION

Brussels, 18 April 2012

8915/12

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NOTE

from:	Presidency
to:	Council
nr prev. doc.:	10817 /10 FREMP 27 JAI 523 COHOM 153 COSCE 17 RESTREINT UE
Subject:	Accession of the European Union to the European Convention for the protection of human rights and fundamental freedoms (ECHR): = Exchange of views/Certain issues

1. Following the adoption by the Council on 4 June 2010 of a negotiating mandate and directives ¹, the Commission has conducted technical negotiations on behalf of the Union with a group (“CDDH-UE”) of 14 experts, selected in their individual capacity (7 from EU Member States, 7 from non-EU States), which has been appointed by the Steering Committee on Human Rights of the Council of Europe (“CDDH”) to elaborate a draft accession agreement.

¹ Doc. 10817/10 RESTREINT UE

2. Throughout this process, the Commission has regularly consulted the Working Party on fundamental rights, citizens' rights and free movement of persons ("FREMP"), which had been appointed as the special committee in accordance with Article 218 (4) TFEU.
3. In June 2011 CDDH-UE finalized the draft of the accession agreement and submitted it to the consideration of the High Contracting Parties to the ECHR and of the Union.
4. At the meeting of COREPER on 6 October 2011 25 delegations accepted the draft accession agreement, whereas the delegations of France and the United Kingdom expressed reservations as to the content of the proposed draft. Subsequently, on 12-14 October 2011 CDDH took note of the fact that the Union could not endorse the draft and reported accordingly to the Committee of Ministers of the Council of Europe. The Committee of Ministers has taken note of this report.
5. Meanwhile, discussions have resumed in FREMP in order to identify possible technical solutions to accommodate the concerns of the delegations which have expressed reservations on the draft accession agreement. Under the Polish Presidency of the Council, meetings have been held on 25 October, 3 November, 14-15 November, 29 November 2011. Work has continued under the current Presidency with meetings held respectively on 19 January, 16 February and 19 March 2012.

6. In the course of these meetings FREMP has addressed the numerous concerns of those delegations, including:
- the interpretation and adaptation of certain expressions employed in the ECHR with reference to the EU as a non-State Party,
 - the jurisdiction of the ECtHR in relation to alleged violations linked to acts adopted by the Union in the framework of the Common Foreign and Security Policy,
 - the scope of the co-respondent mechanism,
 - the scope of the prior involvement of the Court of Justice of the European Union, and
 - the conditions under which the EU and its Member States may exercise their right to vote in the Committee of Ministers of the Council of Europe when the latter is called to supervise the execution of judgments passed against the EU, alone or as a co-respondent.
7. FREMP has dealt with these issues at technical level and has identified possible compromise solutions. In Annex I to this note delegations will find the text of the draft accession agreement and of relevant passages of the explanatory report as presented by CDDH-EU including, in the form of amendments, possible wording proposals drafted in accordance with the positions expressed by delegations in FREMP. Concerning Article 7 (2) of the draft accession agreement on the voting rights in the Committee of Ministers, these suggestions are set out as alternative possibilities. The resulting modifications to the draft agreement are highlighted by underlining and (...).
8. At the meeting of FREMP on 19 March 2012, the French delegation could agree to the approach taken in the technical compromise proposals, subject to the scrutiny of the outcome of further negotiations with the High Contracting Parties.

9. The United Kingdom delegation has declared itself in agreement with most of the proposed technical compromise solutions. However, it has also requested that, prior to any agreement on any proposal for modification of the text, a general agreement be reached within the Council on the basic principles of the future internal rules which will have to be approved by the EU as a consequence of the accession.
10. The Presidency considers that any detailed discussion on the internal rules must be based on a text of the accession agreement which is (at least politically) agreed between the EU and its negotiating partners in the Council of Europe. At present it would appear premature to determine, even at the level of general principles, what the content of these internal rules should be. However, the Presidency has proposed a list of generic basic principles of the future internal rules which all delegations except the United Kingdom agreed on at the meeting of FREMP on 19 March 2012. These principles can be found in Annex II.
11. The Presidency notes that upon the adoption of the negotiating directives the Council, in a declaration, stated that the internal rules had to be approved before the conclusion of the accession agreement, i.e. when the accession agreement will have been approved by all parties.
12. The Presidency understands and shares the concerns expressed by the United Kingdom (as well as other delegations) on the impact that the internal rules will have on the operation of the Convention and its supervisory mechanism after the accession of the EU. It considers, however, that these concerns will be adequately addressed and best accommodated in a subsequent phase of the procedure, when discussing these internal rules.

13. In this respect, it must also be recalled that the internal rules, as well as the decisions authorising the signature and conclusion of the accession agreement, will have to be adopted by the Council acting unanimously (see Article 218 (8) TFEU). Furthermore, the decision concluding the agreement will have to be ratified by all Member States in accordance with their constitutional requirements. The Treaties, therefore, provide for a safeguard for the Member States with respect to the entire legal framework concerning the EU accession to the ECHR, including any internal rules to be adopted as a consequence of this.
14. At its meeting on 18 April 2012 COREPER took note of the results of discussions in FREMP. The Commission stated that it welcomed the preparatory work of the technical Working Party and it would take it into consideration in the continuation of the negotiations. The United Kingdom delegation reiterated its opposition against the resuming of negotiations unless prior agreement was found within the Council on the general principles concerning the internal rules in greater detail than as proposed by the Presidency. The French delegation declared itself satisfied with the outcome of discussions in FREMP
15. **In light of the above, the Council is invited to:**
- **exchange political views on the basis of the discussions in FREMP and COREPER;**
 - **take note of the result of discussions in FREMP and COREPER.**

Draft legal instruments on the accession of the European Union to the European Convention on Human Rights

I. Draft Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms

Preamble

The High Contracting Parties to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (ETS No. 5, hereinafter referred to as “the Convention”), being member States of the Council of Europe, and the European Union,

Having regard to Article 59, paragraph 2, of the Convention;

Considering that the European Union is founded on the respect for human rights and fundamental freedoms;

Considering that the accession of the European Union to the Convention will enhance coherence in human rights protection in Europe;

Considering, in particular, that the individual should have the right to submit the acts, measures or omissions of the European Union to the external control of the European Court of Human Rights (hereinafter referred to as “the Court”);

Considering that, having regard to the specific legal order of the European Union, which is not a State, its accession requires certain adjustments to the Convention system to be made by common agreement,

Have agreed as follows:

Article 1 – Scope of the accession and amendments to Article 59 of the Convention

1. The European Union hereby accedes to the Convention, to the Protocol to the Convention and to Protocol No. 6 to the Convention. 2.

Paragraph 2 of Article 59 of the Convention shall be amended to read as follows:

“2.a. The European Union may accede to this Convention and the Protocols thereto. Accession of the European Union to the Protocols shall be governed, mutatis mutandis, by Article 6 of the Protocol, Article 7 of Protocol No. 4, Articles 7 to 9 of Protocol No. 6, Articles 8 to 10 of Protocol No. 7, Articles 4 to 6 of Protocol No. 12 and Articles 6 to 8 of Protocol No. 13.

b. The status of the European Union as a High Contracting Party to the Convention and the Protocols thereto shall be further defined in the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms.

c. Accession to the Convention and the Protocols thereto shall impose on the European Union obligations with regard only to acts, measures or omissions of its institutions, bodies, offices or agencies (...). For the purposes of the Convention and of the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the "Accession Agreement"):

(aa) acts, measures or omissions of organs or agents of the member States of the European Union are attributable only to the latter, even if such acts, measures or omissions occur when the member States of the European Union implement the law of the European Union,

(bb) acts and measures are not attributable to the European Union where they have been performed or adopted in the context of the provisions of the Treaty on European Union on the common foreign and security policy of the European Union, except in cases where attributability to the European Union on the basis of European Union law has been established by the European Court of Justice.

d. Nothing in the Convention, the Protocols thereto or the Accession Agreement shall require the European Union to perform an act or adopt a measure for which it has no competence under the law of the European Union.

e. Where any of the terms 'State', 'State Party', 'States', or 'States Parties' appear in paragraph 1 of Article 10 and in Article 17 of this Convention, as well as in Articles 1 and 2 of the Protocol, (...) in Article (...) 6 of Protocol No. 6, in Article 3 of Protocol No. 7, in paragraphs 1 and 2 of Article 4 of Protocol No. 7, in Articles 5 and 7 of Protocol No. 7, in Article 3 of Protocol No. 12, and in Article 5 of Protocol No. 13, they shall be understood as referring also to the European Union as a non-State party to this Convention. Where any of the terms 'national law', 'administration of the State', 'national laws', 'national authority', or 'domestic' appear in paragraph 1 of Article 7, paragraph 2 of Article 11, Article 12, Article 13, and paragraph 1 of Article 35 of this Convention they shall be understood as relating also, *mutatis mutandis*, to the internal legal order of the European Union as a non-State party to this Convention and to its institutions, bodies, offices or agencies.

f. Where any of the terms 'national security', 'economic well-being of the country', 'territorial integrity', or 'life of the nation' appear in paragraph 1 of Article 6, paragraph 2 of Article 8, paragraph 2 of Article 10, and paragraph 1 of Article 15 of this Convention they shall be applied, in proceedings brought against the European Union or to which the European Union is a co-respondent, in the same way as they would be applied in proceedings brought only against a High Contracting Party which is a State.

g. Insofar as the term 'everyone within their jurisdiction' appearing in Article 1 of this Convention refers to persons within the territory of a High Contracting Party, it shall be understood, with regard to the European Union, as referring to persons within the territories of the member States of the European Union to which the Treaty on the European Union (hereinafter: the "TEU") and the Treaty on the Functioning of the European Union (hereinafter: the "TFEU") apply. Insofar as that term refers to persons outside the territory of a High Contracting Party, it shall be understood, with regard to the European Union, as referring to persons which, if the alleged violation in question had been attributable to a High Contracting Party which is a State, would have been within the jurisdiction of that High Contracting Party.

h. With regard to the European Union, the term 'country' appearing in paragraph 1 of Article 5 of this Convention and in paragraph 2 of Article 2 of Protocol No. 4 and the term 'territory of a State' appearing in paragraph 1 of Article 1 of Protocol No. 7 shall mean the territories of the member States of the European Union to which the TEU and the TFEU apply."

3. Paragraph 5 of Article 59 of the Convention shall be amended to read as follows:

“5. The Secretary General of the Council of Europe shall notify all the Council of Europe member States and the European Union of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it or acceded to it, and the deposit of all instruments of ratification or accession which may be effected subsequently.”

Article 2 – Reservations to the Convention and its Protocols

1. The European Union may, when signing or expressing its consent to be bound by the provisions of this Agreement in accordance with Article 10, make reservations to the Convention and to the Protocol in accordance with Article 57 of the Convention.
2. Paragraph 1 of Article 57 of the Convention shall be amended to read as follows:

“1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. The European Union may, when acceding to this Convention, make a reservation in respect of any particular provision of the Convention to the extent that any law of the European Union then in force is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.”

Article 3 – Co-respondent mechanism

1. Article 36 of the Convention shall be amended as follows:
 - a. The heading of Article 36 shall be amended to read as follows: “Third party intervention and co-respondent”.
 - b. The following paragraph shall be added at the end of Article 36:

“4. The European Union or a member State of the European Union may become a co-respondent to proceedings by decision of the Court in the circumstances set out in the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms. A co-respondent is a party to the case. The admissibility of an application shall be assessed without regard to the participation of a co-respondent in the proceedings.”
2. Where an application is directed against one or more member States of the European Union, the European Union may become a co-respondent to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the Convention rights at issue of a provision of European Union law, notably where that violation could have been avoided only by disregarding an obligation under European Union law.
3. Where an application is directed against the European Union, the European Union member States may become co-respondents to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the Convention rights at issue of a provision of the Treaty on European Union, the Treaty on the Functioning of the European Union or any other provision having the same legal value pursuant to those instruments, notably where that violation could have been avoided only by disregarding an obligation under those instruments.

4. Where an application is directed against and notified to both the European Union and one or more of its member States, the status of any respondent may be changed to that of a co-respondent if the conditions in paragraph 2 or paragraph 3 of this Article are met.
5. A High Contracting Party shall become a co-respondent only at its own request and by decision of the Court. The Court shall seek the views of all parties to the proceedings. When determining a request of this nature the Court shall assess whether, in the light of the reasons given by the High Contracting Party concerned, it is plausible that the conditions in paragraph 2 or paragraph 3 of this Article are met.
6. In proceedings to which the European Union is co-respondent, if the Court of Justice of the European Union has not yet assessed the compatibility with the Convention rights at issue of the provision of European Union law as under paragraph 2 of this Article, then sufficient time shall be afforded for the Court of Justice of the European Union to make such an assessment and thereafter for the parties to make observations to the Court. The European Union shall ensure that such assessment is made quickly so that the proceedings before the Court are not unduly delayed. The provisions of this paragraph shall not affect the powers of the Court ¹.
7. The respondent and the co-respondent shall appear jointly in the proceedings before the Court ².
8. This Article shall apply to applications submitted from the date of entry into force of this Agreement.

¹ Based on a proposal by FR, FREMP has suggested to the negotiator to propose an amendment of this paragraph aiming at allowing the use of the mechanism for prior involvement of the ECJ not only in cases in which it "has not yet assessed the compatibility with the Convention rights at issue of the provision of European Union law" relevant to the proceedings before the Strasbourg Court (in the current wording of Article 3 (6)), but also in cases when the ECJ has not had the possibility to interpret the provision of Union law with respect to the Convention.

² Based on a proposal by FR and UK, FREMP has suggested to the negotiator to propose an amendment of this paragraph aiming at allowing for an exception to the general rule whereby judgments against the EU and one or more Member States acting as co-respondents should be pronounced jointly. According to these proposals, when so requested by the EU and the co-respondent Member State(s), the Court should differentiate their responsibility in a judgment finding a violation of the Convention.

Article 4 – Inter-Party cases

1. The first sentence of paragraph 2 of Article 29 of the Convention shall be amended to read as follows:

“A Chamber shall decide on the admissibility and merits of inter-Party applications submitted under Article 33”.

2. The heading of Article 33 of the Convention shall be amended to read as follows:

“Article 33 – Inter-Party cases”.

Article 5 – Interpretation of Articles 35 and 55 of the Convention

Proceedings before the Court of Justice of the European Union shall be understood as constituting neither procedures of international investigation or settlement within the meaning of Article 35, paragraph 2.b, of the Convention, nor means of dispute settlement within the meaning of Article 55 of the Convention.

Article 6 – Election of judges

1. A delegation of the European Parliament shall be entitled to participate, with the right to vote, in the sittings of the Parliamentary Assembly of the Council of Europe whenever the Assembly exercises its functions related to the election of judges in accordance with Article 22 of the Convention. The number of representatives of the European Parliament shall be the same as the highest number of representatives to which any State is entitled under Article 26 of the Statute of the Council of Europe.

2. The modalities of the participation of representatives of the European Parliament in the sittings of the Parliamentary Assembly of the Council of Europe and its relevant bodies shall be defined by the Parliamentary Assembly of the Council of Europe, in cooperation with the European Parliament.

Article 7 – Participation of the European Union in the Committee of Ministers of the Council of Europe

1. The European Union shall be entitled to participate in the Committee of Ministers, with the right to vote, when the latter takes decisions:
 - a. under paragraph 2 of Article 26, paragraph 4 of Article 39, paragraphs 2 to 5 of Article 46, or Article 47 of the Convention;
 - b. regarding the adoption of Protocols to the Convention;
 - c. regarding the adoption of any other instrument or text:
 - relating to the Convention or to any Protocol to the Convention to which the European Union is a party and addressed to the Court or to all High Contracting Parties to the Convention or to the Protocol concerned,
 - relating to decisions by the Committee of Ministers under the provisions referred to in point a) of this paragraph

or

 - relating to the functions exercised by the Parliamentary Assembly of the Council of Europe under Article 22 of the Convention.

2. The exercise of the right to vote by the European Union and its member States shall not prejudice the effective exercise by the Committee of Ministers of its supervisory functions under Articles 39 and 46 of the Convention. In particular, the following shall apply :

OPTION A: BINDING PROCEDURAL RULES

"¹a) Where the Committee of Ministers (hereinafter: the "Committee") supervises the fulfilment of obligations either by the European Union alone, or by the European Union and one or more of its member States jointly, the following shall apply:

aa) If a decision by the Committee under paragraph 3 or 4 of Article 46 of the Convention has not been adopted, although its adoption has been requested by two thirds of the representatives entitled to sit on the Committee on behalf of those High Contracting Parties that are not member States of the European Union, a panel shall be constituted.

That panel shall consist of one member designated either by the respondent or jointly by the respondent and the co-respondent or co-respondents, as the case may be, of one member designated by the High Contracting Parties that have requested the adoption of the decision at issue and of one chairperson, designated by the two aforementioned members.

The panel, after consulting with the respondent and the co-respondent or co-respondents, as the case may be, and with the High Contracting Parties that have requested the adoption of the decision at issue, shall propose the adoption of a decision by the Committee.

[Option 1]

If the respondent, the co-respondent or co-respondents, as the case may be, and the High Contracting Parties that have requested the adoption of the decision at issue (hereinafter: the "parties concerned") accept the proposed decision, the latter is deemed to be adopted by the Committee. Any of the parties concerned is deemed to have accepted the proposed decision unless they explicitly reject it within four weeks of having received communication thereof.

¹ Since the proposed alternatives for the text of Article 7 (2) a) are entirely new with respect to the current text of the draft accession agreement, modifications are not highlighted.

If any of the parties concerned does not accept the proposed decision, the Court shall rule, as the case may be, on the question of interpretation or on whether the European Union alone or the European Union and one or more of its member States jointly, as the case may be, have fulfilled their obligations under paragraph 1 of Article 46 of the Convention.

[Option 2]

The Committee shall, not earlier than after 2 months and not later than after 4 months proceed to a vote on the panel's proposal.

Any representative entitled to sit on the Committee shall be deemed to have voted in favour of the panel's proposal, unless he or she has explicitly stated reasons to the contrary; these reasons shall be recorded in the minutes of the proceedings of the Committee.

bb)

[Option 1 – if in aa) Option 1 is retained -]

If a decision by the Committee other than under paragraph 3 or 4 of Article 46 of the Convention and other than establishing that the respondent and, as the case may be, the co-respondent have taken all the necessary measures to abide by the judgment or establishing that the terms of a friendly settlement have been executed has not been adopted, although its adoption has been requested by a simple majority of the representatives entitled to sit on the Committee on behalf of those High Contracting Parties that are not member States of the European Union, a panel shall be constituted.

That panel shall consist of one member designated either by the respondent or jointly by the respondent and the co-respondent or co-respondents, as the case may be, of one member designated by the High Contracting Parties that have requested the adoption of the decision at issue and of one chairperson, designated by the two aforementioned members.

The panel, after consulting with the respondent and the co-respondent or co-respondents, as the case may be, and with the High Contracting Parties that have requested the adoption of the decision at issue, shall propose the adoption of a decision by the Committee.

The Committee shall, not earlier than after 2 months and not later than after 4 months proceed to a vote on the panel's proposal.

Any representative entitled to sit on the Committee shall be deemed to have voted in favour of the panel's proposal, unless he or she has explicitly stated reasons to the contrary; these reasons shall be recorded in the minutes of the proceedings of the Committee.

[Option 2 – if in aa) Option 2 is retained -]

Letter aa) shall also apply where a decision by the Committee other than under paragraph 3 or 4 of Article 46 of the Convention Ministers and other than establishing that the respondent and, as the case may be, the co-respondent have taken all the necessary measures to abide by the judgment or establishing that the terms of a friendly settlement have been executed has not been adopted, although its adoption has been requested by a simple majority of the representatives entitled to sit on the Committee on behalf of those High Contracting Parties that are not member States of the European Union.

cc) A decision by the Committee of Ministers establishing that the respondent and, as the case may be, the co-respondent or co-respondents have taken all the necessary measures to abide by the judgment or establishing that the terms of a friendly settlement have been executed shall be considered as adopted

[Option 1] if, in addition to the majority set out in Article 20.d of the Statute of the Council of Europe, a simple majority of the representatives casting a vote on behalf of those High Contracting Parties that are not member States of the European Union is in favour.

If a decision is not considered as adopted, pursuant to the previous sentence, although the majority set out in Article 20.d of the Statute of the Council of Europe has been attained, a panel shall be constituted.

That panel shall consist of one member designated, as the case may be, either by the respondent or jointly by the respondent and the co-respondent or co-respondents, as the case may be, of one member designated by the High Contracting Parties that have not voted in favour of the adoption of the decision at issue and of one chairperson, designated by the two aforementioned members.

The panel, after consulting with the respondent and the co-respondent or co-respondents, as the case may be, and with the High Contracting Parties that have not voted in favour of the adoption of the decision at issue, shall propose the adoption of a decision by the Committee.

The Committee shall, not earlier than after 2 months and not later than after 4 months, proceed to a vote on the panel's proposal.

Any representative entitled to sit on the Committee shall be deemed to have voted in favour of the panel's proposal, unless he or she has explicitly stated reasons to the contrary; these reasons shall be recorded in the minutes of the proceedings of the Committee."

[Option 2] if a majority of three quarters of the representatives casting a vote is in favour."

OPTION B: NON-BINDING ARRANGEMENT (“GENTLEMAN’S AGREEMENT”) ¹

New wording for Article 7 (2) a of the draft accession agreement:

“2. The exercise of the right to vote by the European Union and its member States shall not prejudice the effective exercise by the Committee of Ministers of its supervisory functions under Articles 39 and 46 of the Convention. In particular, the following shall apply:

a) In relation to cases where the Committee of Ministers (hereinafter: the "Committee") supervises the fulfilment of obligations either by the European Union alone, or by the European Union and one or more of its member States jointly, the Committee shall agree on practical arrangements to ensure that it may effectively exercise its functions in those circumstances.”

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¹ This option has been submitted by the UK delegation at the meeting of FREMP on 16 February 2012. Being entirely new, only the differences with respect to the draft accession agreement are highlighted.

Deletion of draft Rule 18 and replacement by the following:

“II. Draft decision of the Committee of Ministers’ deputies: gentleman’s agreement on voting in cases to which the European Union is a party

Regarding the voting procedures, the Deputies agreed upon a Gentleman’s Agreement amongst themselves to the effect that in the circumstances set out in Article 7.2(a) of the Accession Agreement, the European Union and its Member States will not deploy their votes in such a way as to:

- (a) cause the adoption of a decision or resolution which two thirds¹ of non-EU Member States oppose; nor to
- (b) block the adoption of a decision or resolution which two thirds² of non-EU Member States support."

b³. Where the Committee of Ministers otherwise supervises the fulfilment of obligations by a member State of the European Union, the European Union is precluded for reasons pertaining to its internal legal order from expressing a position or exercising its right to vote. The European Union treaties do not oblige the member States of the European Union to express positions or to vote in a co-ordinated manner.

c⁴. Where the Committee of Ministers supervises the fulfilment of obligations by a High Contracting Party other than the European Union or a member State of the European Union, the European Union treaties do not oblige the member States of the European Union to express positions or to vote in a co-ordinated manner, even if the European Union expresses its position or exercises its right to vote.

¹ Alternatively: a simple majority.

² Alternatively: a simple majority.

³ This text is unchanged with respect to the current draft accession agreement.

⁴ This text is unchanged with respect to the current draft accession agreement.

Article 8 – Participation of the European Union in the expenditure related to the Convention

1. The European Union shall pay an annual contribution dedicated to the expenditure related to the functioning of the Convention. This annual contribution shall be in addition to contributions made by the other High Contracting Parties. Its amount shall be equal to 34% of the highest amount contributed in the previous year by any State to the Ordinary Budget of the Council of Europe.
2.
 - a. If the amount dedicated within the Ordinary Budget of the Council of Europe to the expenditure related to the functioning of the Convention, expressed as a proportion of the Ordinary Budget itself, deviates in each of two consecutive years by more than 2.5 percentage points from the percentage indicated in paragraph 1, the Council of Europe and the European Union shall, by agreement, amend the percentage in paragraph 1 to reflect this new proportion.
 - b. For the purpose of this paragraph, no account shall be taken of:
 - a decrease in absolute terms of the amount dedicated within the Ordinary Budget of the Council of Europe to the expenditure related to the functioning of the Convention as compared to the year preceding that in which the European Union becomes a Party to the Convention;
 - [an increase in the amount dedicated within the Ordinary Budget of the Council of Europe to the expenditure related to the functioning of the Convention, expressed as a proportion of the Ordinary Budget itself, where this results from a decrease in absolute terms of the Ordinary Budget and either no change or a decrease in absolute terms of the amount dedicated within it to the expenditure related to the functioning of the Convention.] ¹

¹ Text in brackets proposed for deletion in accordance with the opinion of the Directorate of Programme, Finances and Linguistic services of the Council of Europe.

- c. The percentage that results from an amendment under paragraph 2.a may itself later be amended in accordance with this paragraph.
3. For the purpose of this Article, the expenditure related to the functioning of the Convention comprises the total expenditure on:
- a. the Court;
 - b. the supervision of the execution of judgments of the Court; and
 - c. the functioning, when performing functions under the Convention, of the Committee of Ministers, the Parliamentary Assembly and the Secretary General of the Council of Europe, increased by 15% to reflect related administrative overhead costs.
4. Practical arrangements for the implementation of this Article may be determined by agreement between the Council of Europe and the European Union.

Article 9 – Relations with other Agreements

1. The European Union shall, within the limits of its competences, respect the provisions of:
- a. Articles 1 to 6 of the European Agreement relating to Persons Participating in Proceedings of the European Court of Human Rights of 5 March 1996 (ETS No. 161);
 - b. Articles 1 to 19 of the General Agreement on Privileges and Immunities of the Council of Europe of 2 September 1949 (ETS No. 2) and Articles 2 to 6 of its Protocol of 6 November 1952 (ETS No. 10), in so far as they are relevant to the operation of the Convention; and
 - c. Articles 1 to 6 of the Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe of 5 March 1996 (ETS No. 162).

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2. For the purpose of the application of the Agreements and Protocols referred to in paragraph 1, the Contracting Parties to each of them shall treat the European Union as if it were a Contracting Party to that Agreement or Protocol.
3. The European Union shall be consulted before any Agreement or Protocol referred to in paragraph 1 is amended.
4. With respect to the Agreements and Protocols referred to in paragraph 1, the Secretary General of the Council of Europe shall notify the European Union of:
 - a. any signature;
 - b. the deposit of any instrument of ratification, acceptance, approval or accession;
 - c. any date of entry into force in accordance with the relevant provisions of those Agreements and Protocols; and
 - d. any other act, notification or communication relating to those Agreements and Protocols.

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Article 10 – Signature and entry into force

1. The High Contracting Parties to the Convention at the date of the opening for signature of this Agreement and the European Union may express their consent to be bound by:
 - a. signature without reservation as to ratification, acceptance or approval; or
 - b. signature with reservation as to ratification, acceptance or approval, followed by ratification, acceptance or approval.
2. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.
3. This Agreement shall enter into force on the first day of the month following the expiration of a period of three months after the date on which all High Contracting Parties to the Convention mentioned in paragraph 1 and the European Union have expressed their consent to be bound by the Agreement in accordance with the provisions of the preceding paragraphs.
4. The European Union shall become a Party to the Convention, to the Protocol to the Convention and to Protocol No. 6 to the Convention at the date of entry into force of this Agreement.

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Article 11 – Reservations

No reservation may be made in respect of the provisions of this Agreement.

Article 12 – Notifications

The Secretary General of the Council of Europe shall notify the European Union and the member States of the Council of Europe of:

- a. any signature without reservation in respect of ratification, acceptance or approval;
- b. any signature with reservation in respect of ratification, acceptance or approval;
- c. the deposit of any instrument of ratification, acceptance or approval;
- d. the date of entry into force of this Agreement in accordance with Article 10;
- e. any other act, notification or communication relating to this Agreement.

In witness whereof the undersigned, being duly authorised thereto, have signed this Agreement.

Done at the, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe and to the European Union.

II. Proposed modifications to the paragraphs of the explanatory memorandum directly relevant with respect to the parts of the agreement modified above:

a) Integration of paragraph 21 through the addition of further paragraphs 21 a. - 21. c.

"21. The provisions under paragraph 2.c and d reflect the requirement under Article 2 of Protocol No. 8 to the Treaty of Lisbon that the accession of the EU shall not affect its competences or the powers of its institutions (...).

21 a. Paragraph 2.c clarifies that accession to the Convention imposes on the EU obligations with regard to acts, measures or omissions of its institutions, bodies, offices or agencies. Conversely, acts, measures or omissions of organs or agents of the member States of the EU are attributable only to the latter, even if such acts, measures or omissions occur when the member States of the EU implement the Treaty on European Union, the Treaty on the Functioning of the European Union, or any other provision having the same legal value pursuant to those instruments (the EU "primary law") or a legal provision contained in acts of the EU institutions (the EU "secondary law"). This implies, inter alia, that in cases where, in the absence of an act of an institution, body, office or agency of the EU, the applicant claims to be individually aggrieved by a provision of EU primary law, the application is not admissible *ratione personae* if it is directed against the Union. Conversely, where the subject matter of an application is an act of an institution, body, office or agency of the EU and where the legal base of such an act is a provision of EU primary law, the application is only admissible *ratione personae* if it is directed against the EU. In such a situation, however, the limitation of the EU's responsibility for omissions laid down in paragraph 2.d is of relevance (cf. paragraph 21 c. of this explanatory report).

21b. In cases where an act or measure which has been performed or adopted in the context of the provisions of the Treaty on European Union on the common foreign and security policy of the European Union is not attributable to the European Union the applicant must exhaust domestic remedies in the Member State concerned before bringing an application before the Court. Conversely, decisions of the European Union providing for restrictive measures in the context of the European Union's common foreign and security policy are attributable only to the European Union. Therefore, where an applicant, being individually aggrieved by such a decision, wishes to bring an application before the Court against the European Union, he must beforehand exhaust domestic remedies before the Court of Justice of the European Union under articles 263 and 275 TFEU. Thus, an act or measure which has been performed or adopted in the context of the provisions of the Treaty on European Union on the common foreign and security policy of the European Union is either attributable to the European Union or to one or more Member States.

21 c. Paragraph 2.d limits the responsibility of the EU for omissions to circumstances in which the EU's system of competences would have allowed for the act or measure to which the omission complained of relates to be performed or adopted by the EU institutions, bodies, offices or agencies. This provision becomes relevant for instance where the omission complained of relates to steps (such as administrative or judicial acts or measures) to be taken in order to protect an individual against interferences with a right or freedom guaranteed by the Convention and where the EU's system of competences would not have allowed for those steps to be taken by the EU institutions, bodies, offices or agencies. It is likewise of relevance with regard to omissions to take the necessary steps to abide by a final judgment of the Court, as required by Article 46, paragraph 1, of the Convention. In particular, where an amendment to EU primary law is required in order to abide by a final judgment of the Court, the EU institutions by themselves cannot bring about such an amendment but can only take the preparatory steps for making such an amendment, as provided for in Article 48 of the Treaty on European Union.

21 d. It should also be noted that, since the Court under the Convention has jurisdiction to settle disputes between individuals and the High Contracting Parties (as well as between High Contracting Parties) and therefore to interpret the provisions of the Convention, the decisions of the Court in cases to which the EU is party will be binding on the EU's institutions, including the CJEU."

b) More detailed language in paragraphs 22 - 24, drafted in essence along the following lines:

"22. An interpretation clause is added to Article 59 of the Convention with regard to terms such as "State", "State Party" and other State-specific concepts (paragraph 2.e and f); this avoids amending the substantive provisions of the Convention and the Protocols, thereby maintaining their readability. All of the Protocols provide that their substantive provisions shall be regarded as additional articles to the Convention, and that all the provisions of the latter shall apply accordingly; this clarifies the accessory nature of the Protocols to the Convention. It follows that the general interpretation clause added to the Convention will also apply to the Protocols without their needing to be amended to that effect.

23. By virtue of the first sentence of paragraph 2.e, various terms that explicitly refer to "States" as High Contracting Parties to the Convention (that is, "State", "State Party", "States" or "States Parties") will, after the accession, be understood as referring also to the EU as a High Contracting Party. The second sentence of paragraph 2.e contains a further list of terms which refer more generally to the concept of a State, or to certain elements thereof. The inclusion of the terms 'national law', 'national laws', 'national authority' and 'domestic' in that list is justified since those terms should be understood as referring to the internal legal order of a High Contracting Party. The inclusion of the term 'administration of the State' in that list is justified since pursuant to Articles 298 and 336 of the Treaty on the Functioning of the European Union, the institutions, bodies, offices and agencies of the EU have the support of a public administration and of a civil service.

24. Paragraph 2.f addresses terms in the Convention and the Protocols which are contained in provisions dealing with the justification of restrictions placed on the exercise of certain rights guaranteed by the Convention ('national security', 'economic well-being of the country', 'territorial integrity' and 'life of the nation'). The EU institutions may be lead, within the limits of their competences as defined autonomously by the Treaty on European Union and the Treaty on the Functioning of the European Union, to adopt measures restricting the rights and freedoms defined in the Convention. By way of illustration, such is the case of a number of legal acts of the Union which for the purpose of combating terrorism and cross-border crime provide for the exchange of personal data, including DNA and dactyloscopic data, and thereby may restrict the right to respect for private life within the meaning of Article 8 of the Convention. The objectives of public interest pursued by such measures may in some cases come under the said terms, as interpreted autonomously by the Court. Therefore the said terms shall be applied, in proceedings brought against the European Union or to which the European Union is a co-respondent, in the same way as they would be applied in proceedings brought only against a High Contracting Party which is a State. As regards the application to the EU of the expression "life of the nation", it was noted that it may be interpreted as allowing the EU to take measures derogating from its obligations under the Convention in relation to measures taken by one if its member States in time of emergency in accordance with Article 15 of the Convention." (...)

25. Article 59(2)(g) is an additional interpretation clause which clarifies how the term "everyone within their jurisdiction" in Article 1 of the Convention will apply to the European Union. As jurisdiction under Article 1 of the ECHR is primarily territorial, it clarifies that the EU is required to secure the rights of persons within the territories of the member States of the EU to which the Treaty on European Union and the Treaty on the Functioning of the European Union apply. Nevertheless, the Court has recognized that in certain exceptional circumstances, a High Contracting Party may exercise jurisdiction outside its territorial borders¹. Accordingly, where the Convention might apply to persons outside the territory to which the Treaties apply, the clause clarifies that they should be regarded as being within the jurisdiction of the EU only where they would be within the jurisdiction of a High Contracting Party which is a state had the alleged violation been attributable to that High Contracting Party.

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¹ Al-Skeini v United Kingdom, Application No.55721/07, paragraphs 131-132.

Basic principles of the future internal rules.

The Council's role towards that of the Commission after the accession is a very important issue which will be regulated in the internal rules. In this context the internal rules will deal especially with the following matters:

- a) The representation of the Union before the ECourtHR.
- b) The triggering of the co-respondent mechanism and coordination rules, including a code of conduct, for the purpose of the conduct of the procedure before the ECourtHR by the respondent and the co-respondent. This code of conduct should also comprise rules on joint friendly settlements.
- c) Rules regarding the selection of three candidates to be EU judge in the ECourtHR.
- d) Relevant rules regarding the prior involvement of the ECJ.
- e) The internal rules should explain in more detail the circumstances in which the Union will agree a position, and the circumstances in which the Member States remain free to speak and act as they choose, both in the ECourtHR and in the Committee of Ministers.
- f) There should be specific rules on the issue whether the EU or one or more MS should take the necessary steps to abide by the judgment in cases where an application regarding an act or measure of a MS or regarding an omission has been directed solely against the Union.
- g) The internal rules should contain details on the division of the afforded satisfaction by the ECourtHR between respondent and co-respondent.