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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.

[1] Document declassified by the European Commission on 28 January 2019.

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RESTREINT UE

COUNCIL OF
THE EUROPEAN UNION

Brussels, 18 March 2010

7668/10

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COVER NOTE

from:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	17 March 2010
to:	Mr Pierre de BOISSIEU, Secretary-General of the Council of the European Union
Subject:	**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 European Convention for the protection of Human Rights and Fundamental Freedoms

Delegations will find attached Commission document SEC(2010) 305 final.

Encl.: SEC(2010) 305 final

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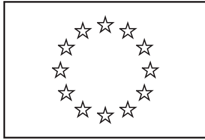

EUROPEAN COMMISSION

Brussels, 17.3.2010
SEC(2010) 305 final

RESTREINT UE

Recommendation for a

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

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EXPLANATORY MEMORANDUM

I. THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

Among the most remarkable decisions in promoting the international rule of law was the adoption, in 1950, of the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR), a multilateral convention in the framework of the Council of Europe (CoE). The Contracting Parties to the ECHR considered that "fundamental freedoms which are the foundation of justice and peace in the world are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend". Taking the first steps towards the collective enforcement of certain rights enshrined in the Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948, they established a system of external supervision in the area of respect of human rights.

Today, the ECHR is binding upon all 47 members of the CoE. With the entry into force of the 11th Protocol in 1994, the supervision of the ECHR is solely entrusted in the European Court of Human Rights ("Strasbourg Court"). Its judges are elected, with respect to each of the Contracting Parties, by the Parliamentary Assembly of the CoE from a list of three candidates nominated by that Contracting Party. The Strasbourg Court may receive individual applications and inter-state complaints. A judgment finding that there has been a violation of the ECHR is of declaratory nature and binding on the respondent Contracting Party. The execution of such judgments is supervised by the Committee of Ministers of the CoE. The substantive guarantees of the ECHR were supplemented by additional Protocols No. 1, 4, 6, 7, 12 and 13, of which Protocols No. 1 and 6 have been ratified by all Member States of the Union. According to the original version of its Article 59, only members of the CoE could become a party to the ECHR. However, Article 17 of Protocol 14, which will enter into force on 1 June 2010, amends Article 59 ECHR as to allow also the European Union to accede to the ECHR.

II. FUNDAMENTAL RIGHTS PROTECTION IN THE EUROPEAN UNION

The unique model of European integration brought about by the establishment of the three Communities has been conceived from the very beginning as a Community of law. The European Court of Justice (ECJ) held early on that this new autonomous legal order was entrusted with public powers for the common good of European nations and conferred enforceable fundamental freedoms on citizens. Since 1969[2] the ECJ affirmed that the respect for fundamental rights forms an integral part of the general principles of law the observance of which the ECJ ensures. In safeguarding those rights, the ECJ draws inspiration from constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, the ECHR having special significance in that

[2] The landmark rulings in this respect are the following: Judgment of 12 November 1969, case 29/69, Stauder, (1969) ECR, p. 419, of 17 December 1970, case 11/70, Internationale Handelsgesellschaft, (1970) ECR, p. 1125 and of 14 May 1974, case 4/73, Nold, (1974) ECR, p. 491.

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respect. Article 6(3) TEU which has been introduced by the Treaty of Maastricht, confirmed this case-law on the level of primary law. Today, the European Union defines itself as a Union of values (Article 2 TEU).

Endowed with a mandate from the European Council of Cologne 1999, a Convention consisting of members of national parliaments, the European Parliament, the governments and the European Commission elaborated the Charter of Fundamental Rights of the European Union (Charter). It was proclaimed by the Presidents of the European Parliament, the European Commission and the Council of the European Union on 7 December 2001 in Nice. The Charter was re-proclaimed on 12 December 2007. Article 6(1) TEU, as revised by the Treaty of Lisbon, incorporates the Charter into the primary law of the European Union.

III. THE POLITICAL AND LEGAL IMPORTANCE OF AN ACCESSION OF THE UNION TO THE ECHR

Accession of the Union to the ECHR (hereinafter: "accession") will

- guarantee that any person claiming to be a victim of a violation of the ECHR by an institution or body of the Union is able to bring a complaint against the Union before the Strasbourg Court under the same conditions as those applying to complaints brought against Member States,
- reaffirm the pivotal role played by the ECHR system for the protection of fundamental rights in Europe
- enhance the credibility both internally and externally of the strong commitment of the Union to fundamental rights by submitting the Union's legal order fully and formally to the standards of and to the external judicial control exercised by the ECHR system, thereby complementing the introduction by the Treaty of Lisbon of a legally binding Charter of Fundamental rights which affords a level of protection of fundamental rights that may never be lower than that guaranteed by the ECHR,
- continue to ensure harmonious development of the case-law of the Court of Justice and the Strasbourg Court of Human Rights.

Moreover, the accession opens the way for the Strasbourg Court to attribute acts adopted by the institutions or bodies of the Union directly to the Union instead of attributing them – albeit implicitly – to Member States collectively[3]. Hence, as a consequence of the accession, the specificity of the Union as a distinct legal entity vested with autonomous powers will henceforth adequately be reflected in proceedings before the Strasbourg Court. Likewise, the Union will have at its disposal all rights which the ECHR gives to the Contracting Parties to defend the human rights conformity of its acts before the Strasbourg Court.

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[3] See Application No 56672/00 DSR – Senator Lines v Austria [and the other then 14 Member States].

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IV. PRIMARY LAW FRAMEWORK FOR THE ACCESSION

- In its Opinion 2/94 of 1996 the ECJ held that an accession by the Community to the ECHR could be based neither on any specific legal basis in the Treaties nor on then Article 235 of the EC Treaty (now Article 352 TFEU). Since the entry into force of the Lisbon Treaty a specific legal basis exists for the Union's accession to the ECHR, namely the first sentence of Article 6(2) TEU, which makes seeking such accession to the ECHR a duty for the Union and, correspondingly, its facilitation a duty for Member States, also in their capacity as existing Contracting Parties to the ECHR. Accordingly and 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 should adhere to the positions as expressed by the Union negotiator.

Regarding the additional protocols to the ECHR, Article 6(2) TEU provides for a legal basis for accession by the Union, without distinguishing according to the state of ratification by Member States.

However, primary law (Article 6(2) TEU and Protocol No 8 to the Lisbon Treaty) requires a certain number of guarantees to be provided for in an agreement relating to the accession, in order to preserve the specific characteristics of the Union law. Such guarantees concern in particular:

- the non affectation of the Union's competences as defined in the Treaties (second sentence of Article 6(2) TEU and Article 2 of Protocol No 8) and of the powers of its institutions (Article 2 of Protocol No 8);
- the Union's possible participation in the control bodies of the ECHR, namely the Committee of Ministers and the Parliamentary Assembly (Article 1(a) of Protocol No 8);
- the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and / or the Union as appropriate (Article 1(b) of Protocol No 8);
- the non affectation of the situation of Member States in relation to the ECHR, in particular in relation to the Protocols thereto, measures taken by Member States derogating from the ECHR in accordance with Article 15 thereof and reservations to the ECHR made by Member States in accordance with Article 57 thereof (Article 2 of Protocol No 8);
- the non affectation of Article 344 TFEU (Article 3 of Protocol N° 8).

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V. BASIC PRINCIPLES GOVERNING THE ACCESSION

In the view of the Commission, the accession should be governed, within the framework fixed by primary law, by five basic principles:

a) no new powers should be conferred on the institutions and bodies of the Union (principle of neutrality regarding Union powers);

b) accession should not affect the obligations of Member States under the ECHR and the protocols thereto (principle of neutrality regarding Member States' obligations);

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c) 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[4] (principle of autonomous interpretation of Union law);

d) 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 mission of the Strasbourg Court - on an equal footing with other Contracting parties to the ECHR (principle of equal footing);

e) 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) – d) (principle of preservation of the ECHR system).

VI. SPECIFIC ISSUES TO BE DEALT WITH IN THE ACCESSION AGREEMENT

1. Preservation of the situation of individual Member States in relation to the ECHR and its Protocols

In accordance with the principle of neutrality regarding Member States' obligations the accession shall not affect the situation of Member States in relation to the ECHR, in particular in relation to the Protocols thereto, measures taken by Member States derogating from the ECHR in accordance with Article 15 thereof and reservations to the ECHR made by Member States in accordance with Article 57 thereof.

Indeed, on the one hand, all EU Member States are not bound to the same extent by the various instruments of the "ECHR corpus" (i.e. the ECHR itself and the Protocols thereto), as Protocols 4, 7, 12 and 13 have not been ratified by all Member States. Furthermore, some Member States have made reservations[5] to certain provisions of the ECHR or to one or several of the Protocols to the ECHR. Finally, Member States may avail themselves, under certain circumstances ("*war or other public emergency threatening the life of the nation*") of the right to derogate[6] from their obligations under the ECHR[7].

On the other hand, Article 216, paragraph 2, TFUE stipulates that international "*agreements concluded by the Union are binding upon the institutions of the Union and on its Member* States".

Accordingly the negotiations should ensure that the accession agreement creates obligations under the substantive provisions regarding human rights and fundamental freedoms (Article 1 to 18 of the ECHR and, as the case may be, the relevant provisions of any Protocol to which

[4] Including in particular the question whether a Member State was obliged under Union law to adopt a given act.
[5] Pursuant to Article 57 ECHR.
[6] Pursuant to Article 15 ECHR.
[7] The situation regarding the ratifications of the Protocols and the reservations and derogations is documented on the website of the treaty office of the CoE (http://conventions.coe.int).

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the Union may accede) only with regard to acts and measures adopted by institutions or bodies of the Union.

2. Scope of the accession

Once it is ensured that the situation of individual Member States in relation to the ECHR corpus is preserved, it remains to be decided to which of the Protocols to the ECHR that have not been ratified by all Member States the Union should accede. This concerns Protocols 4 (on free movement and expulsion), 7 (on expulsion, procedural guarantees in criminal matters and equality between spouses), 12 (general prohibition of discrimination) and 13 (complete abolition of the death penalty).

Article 6(2) TEU provides for a legal basis for the Union to accede to any of the existing or future Protocols to the ECHR. Article 218 TFEU, and in particular its paragraph 8, applies the same way to the accession to these Protocols as to accession to the ECHR itself.

As a matter of fundamental rights policy, the Commission is deeply convinced that any of the Protocols – including those which have not been ratified by all Member States – may be of potential relevance as regards the exercise of the Union's powers and that an accession to each of them is therefore highly desirable as matter of principle. Further, it should be noted that certain guarantees enshrined in these Protocols are also reflected in the Charter[8].

However, in the interest of a swift agreement on the negotiation directives, the Commission deems it sufficient that the negotiations ensure that the Union may accede to any of the – existing and 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. The decision as to which Protocols the Union will accede on top of the ECHR itself could be made at a later stage, preferably at the moment of conclusion of the accession agreement.

3. Non affectation of the Union's competences and of the powers of its institutions

In conformity with Article 6(2) TEU and Article 2 of Protocol No 8, the negotiations should ensure that the accession does not affect the Union's competences as defined in the Treaties and the powers of its institutions. This is of particular importance, as also the failure by the Union to adopt an act or measure might constitute a violation of the ECHR. The Union should therefore be liable for such violations only to the extent that its system of competences would have allowed for the adoption of the act or measure at issue.

4. Co-respondent mechanism

a) The Union joining proceedings against a Member State as a co-respondent

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[8] E. g. Article 4 of Protocol 7 (ne bis in idem, cf. Article 50 of the Charter), Article 4 of Protocol 4 (on mass expulsion, cf. Article 19(1) of the Charter).

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The Commission considers it essential that the Union receives the right to join the proceedings as a co-respondent in all cases brought against a Member State, within a certain time limit from the notification of the application to the Member State concerned.

This is of particular importance in cases where the alleged violation of the ECHR by a Member State concerns an act that has been adopted in compliance with an obligation under Union law (be it under primary or secondary law) and where the Member State concerned could only have avoided that alleged violation by disregarding its obligation under Union law.

First, only by acquiring the full status of party to the proceedings, the Union will benefit from the full panoply of party rights that will enable it to defend the conformity with the ECHR of the provision of Union law at issue, including that of requesting referral of the case to the Grand Chamber of the Strasbourg Court[9].

Secondly, after having joined as co-respondent, the Union will be equally bound by a judgment of the Strasbourg Court finding a violation of the ECHR and, hence, be under an obligation to execute such judgment which obligation may include the obligation to abolish or amend the provision of Union law at issue. Without a co-respondent mechanism, the Strasbourg Court could render a judgment only against the Member State, even where a human rights violation stems from an act of Union law. However, the Member State would then be unable to execute such judgment since it is obviously not in a position to abolish or amend the act of Union law at issue.

Thirdly, depending on the circumstances of the case, the co-respondent mechanism will allow the Strasbourg Court to limit itself to finding a human rights violation in its judgment, without necessarily having to rule on the question whether that violation is attributable to the Union, the Member State or to both – a question that could turn on the interpretation of the Union law involved. The introduction of a co-respondent mechanism is therefore also necessary to comply with the principle of autonomous interpretation of Union law.

A mere intervention of the Union as a third party[10] with the Member State concerned being the sole respondent would be insufficient to fulfil any of these three functions.

b) Member States joining proceedings against the Union as a co-respondent

Regarding certain specific situations[11] it may be appropriate for Member States to have the right to join the proceedings as a co-respondent in a case brought against the Union. However, in the light of the principle of autonomous interpretation of Union law these specific situations should not be specified in the accession agreement but should be defined in internal rules of the Union.

c) Internal rules

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[9] Pursuant to Article 43 ECHR.

[10] Pursuant to Article 36(2) ECHR.

[11] This may be of relevance e. g. in cases where the act complained of has been adopted by a Member State acting in the scope of Union law and where the case has been brought against the Union.

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The introduction of a co-respondent mechanism should be accompanied by internal legal rules of the Union to regulate:

- the types of situations in which the Union or a Member State will join the proceedings as a co-respondent,
- the coherent conduct of proceedings by the Member State concerned and by the Union where one has actually joined the proceedings as a co-respondent,
- the execution of a judgment of the Strasbourg Court finding a violation of the ECHR, especially with regard to the condemnation of the co-respondents to monetary just satisfaction[12].

5. Non affectation of Article 344 TFEU and other means to preserve the monopoly of the ECJ for deciding disputes on the interpretation or application of Union law

a) Inter-state applications between Member States before the Strasbourg Court

Under the existing case-law of the ECJ[13], the submission by a Member State of instruments of Union law to a judicial forum other than the ECJ, for purposes of seeking a declaration that another Member State breached the provisions of those instruments constitutes a violation of Article 344 TFEU (ex Article 292 of the EC treaty). Upon a proper construction the latter provision also prohibits disputes between Member States concerning their obligations under the ECHR, to the extent that these obligations are identical to those under Union law, i.e. where a Member State, acting in the scope of Union law, is bound by the corresponding fundamental rights defined in the context of the Union (under the Charter as well as under general principles of Union law). For the same reasons, any Member State should also refrain from intervening[14] in proceedings initiated by an individual application against another Member State where the latter acts in the scope of Union law.

However, it is not appropriate to provide in the accession agreement for the inadmissibility of inter-state applications between Member States regarding acts adopted in the scope of Union law. Such a provision could invite the Strasbourg Court to rule – implicitly – on the interpretation of EU law, namely on the content and scope of Member States' obligations under EU law[15], which would be at odds with the principle of autonomous interpretation of Union law.

The issue should therefore be dealt with internally namely either by an internal legal rule of the Union prohibiting inter State applications between Member States regarding acts adopted in the scope of Union law or by recalling Member States' obligations under Article 344 TFEU in an appropriate declaration on the occasion of the conclusion of the accession agreement.

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[12] Pursuant to Article 41 ECHR.

[13] Judgment of 30 May 2006, C-459/03, Commission v Ireland, (2006) ECR, p. I-4635.

[14] Pursuant to Article 36 ECHR.

[15] Including in particular the question whether a Member State was obliged under EU law to adopt a given act.

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However, it should be ensured in an appropriate way that, in case of an inter-state application between Member States, the Strasbourg Court will suspend proceedings at the request of the Union or the respondent State.

b) Applications brought by the Union against a Member State before the Strasbourg Court or vice versa

Any application brought by the Union against a Member State concerning an act adopted in the scope of Union law would be clearly prohibited by Union law since it would constitute a circumvention of the infringement procedure under Article 258 TFEU.

Likewise, in the absence of a general competence under the Treaties in the area of fundamental rights, the Union is also precluded from bringing applications before the Strasbourg Court[16] against a Member State where the latter acts outside the scope of Union law.

Any application brought by a Member State against the Union would constitute a circumvention of the action for annulment under Article 263 TFEU or, as the case may be, of the action for failure to act under Article 265 TFEU.

Again, the Commission takes the view that it is not appropriate to provide in the accession agreement for the inadmissibility of inter-state cases between the Union and a Member State, since such a provision would unnecessarily modify the ECHR system. Rather, this issue should be dealt with by an internal legal rule of the Union or by an appropriate declaration on the occasion of the conclusion of the accession agreement.

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[16] Pursuant to Article 33 ECHR.

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c) Means ensuring the previous involvement of the ECJ regarding the compatibility of a legal act of the Union with fundamental rights

Where a legal act of the Union is implemented by an institution or body of the Union itself, the previous involvement of the ECJ in the area of fundamental rights is sufficiently ensured by the requirement that an individual applicant can bring a complaint to the Strasbourg Court only after having exhausted "*all domestic remedies*"[17].

Conversely, where a legal act of the Union is implemented by a Member State, the accession will make it possible, in theory, for the Strasbourg Court to rule on the compatibility of the act complained of (and thus, by implication, of the underlying legal act of the Union) with the ECHR without the ECJ being able to rule previously on that act on account of fundamental rights. However, it must be recalled that a national court of last instance is obliged under Article 267 TFEU to make a preliminary reference to the ECJ, where a question regarding the validity or the interpretation of a legal act of the Union is raised before it. Therefore, in the Commission's view the scenario whereby a legal act of the Union that would raise serious fundamental rights objections would not be the subject matter of a preliminary reference under Article 267 TFEU should arise very rarely in practice.

The likelihood of this scenario could be further minimized by using certain avenues which however, admittedly, depend of the future development of the case law of the Strasbourg Court itself:

– Already according to the existing case law of Strasbourg Court, the arbitrary failure of the highest court of a Member State to make a preliminary reference may constitute a violation of the right of fair hearing under Article 6 ECHR[18]. Building on this case law, it could be envisaged that where an alleged violation of Article 6 ECHR has been established, the Strasbourg Court only pronounces itself on this violation while refraining from assessing the compatibility of the act complained of (and thus, by implication, of the underlying Union act) with the substantive provisions of the ECHR the violation of which is alleged.

– The preliminary reference is not a domestic remedy, because it is not in the hands of the applicant. However, it could be envisaged that the Strasbourg Court interprets the requirement of exhaustion of domestic remedies as implying that an applicant must raise an alleged violation of the ECHR by the act complained of (and thus, by implication, by the underlying legal act of the Union) already before the national court and formally requests – or, where national law does not foresee this possibility – at least informally suggests a preliminary reference to the ECJ.

These issues – which are both in the interest of the Strasbourg Court and of the ECJ – should be dealt with in an appropriate way in the course of negotiations.

6. Rights of intervention under Article 36 ECHR

Third party intervention in support of individual applications brought by nationals of a Contracting Party under Article 36(1) ECHR can by its very nature not actively be exercised

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[17] Pursuant to Article 35 (1) ECHR.

[18] Applications No 35673/97, Schweighofer v Austria; No. 15073/037, Lutz v Germany.

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by the Union since Union citizenship is not an equivalent of the concept of nationality within the meaning of this provision. This could be clarified in an appropriate way in the context of negotiations.

As regards Article 36(2) ECHR, although this right of intervention is not an appropriate substitute for the co-respondent mechanism to be created, one should not exclude its exercise by the Union in appropriate cases and subject to internal Union rules governing such exercise. Therefore, no modification of Article 36(2) ECHR appears necessary in respect of the Union.

7. Institutional questions arising from the Union's position as a Contracting Party to the ECHR

a) Participation of Union representatives in the Strasbourg Court and the other bodies of the ECHR

The accession agreement should provide for participation of Union representatives in the Strasbourg Court and in the other bodies of the ECHR - to the extent that their activities are linked to the judicial tasks of the Strasbourg Court - on an equal footing with other Contracting Parties.

The presence in the Strasbourg Court of a judge elected for each Contracting Party is one of the founding principles of the ECHR. This principle is based on the need to ensure that each legal system is represented within the Court. It is also a reflection of the *collective guarantee system* established by the ECHR in which each Contracting Party is required to participate.

Furthermore, it reinforces the legitimacy of decisions adopted by the Court. The principle of the presence in the Court of a judge elected for the Union is therefore of the highest interest to the Union, as Union law is a separate, autonomous and highly specialised legal order. One of the main benefits of accession is to ensure that the Union's legal system is adequately represented within the Court and that this Court has the necessary expertise to take full account of the specificities of Union law.

The only solution in line with the general principles underlying the ECHR system and corresponding to the Union's interests is to have a permanent full-time judge (and not an "*ad hoc* judge"), who enjoys the same status and has the same duties as his peers and who intervenes not only in cases brought against the Union or involving Union law but also in other cases.

As for the method of electing the Union judge, the normal procedure provided for in Article 22 ECHR should apply also to him. This would ensure that the Union judge has the same legitimacy as his peers. The procedure to be used by the Union to draw up its list of three candidates as required in Article 22 ECHR is an internal Union matter and should not be a matter for the negotiations nor for the Accession Treaty. 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 on the election of judges under Article 22 ECHR.

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Furthermore, in accordance with the principle of collective guarantee underlying the ECHR system, the Union should fully participate in that system and therefore should have a right to vote in the Committee of Ministers when the latter exercises functions pursuant to Articles 39[19], 46 and 47 of the ECHR. Furthermore, it follows from the status of the Union as a Contracting Party to the ECHR that full participation of the Union in the Committee of Ministers should apply also for the elaboration and adoption of additional protocols to the ECHR. It will be for internal rules of the Union to govern the use by the Union and by Member States of their respective rights to vote in the context of supervising the execution of judgments passed against the Union or against the Member States, taking account the mutual obligations of sincere cooperation between the Union and the Member States.

b) Financial issues

Pursuant to Article 50 ECHR the expenditure of the Strasbourg Court is borne by the CoE budget. In order to avoid the need for the Union to be involved in the CoE's annual budgetary procedure, any financial contribution by the Union to ECHR related expenditure (covering the operating costs of the Strasbourg Court 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.

8. Technical adaptations of the ECHR with regard to the Union as a Contracting Party

Several provisions of the ECHR contain terms which cannot literally be applied with regard to the Union as a Contracting Party, such as "state"[20], "country" or "nation". The accession agreement should therefore clarify that these terms must be understood as referring, as the case may be *mutatis mutandis*, also to the Union as a Contracting Party.

Furthermore, it should be clarified that Article 35(2)(b) ECHR[21] 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, in compliance with the requirement of exhaustion of domestic remedies. In the same vein, it should be clarified that Article 55 ECHR[22] is without prejudice to the means of redress in disputes between Member States or between a Member State and an institution of the Union before the ECJ.

Should the negotiations lead to the result that the substantive provisions of the accession agreement such as those on the preservation of the situation of individual Member States in relation to the ECHR and its Protocols or on the co-respondent mechanism, are enshrined only

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19 As amended by Article 15 of Protocol No 14.

20 E.g. Articles 10(1), 11(2), 17, 56(1) ECHR.

21 This provision reads as follows: "*The Court shall not deal with any application submitted under Article 34 that* […] *is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information*".

22 This provision reads as follows: "*The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention*".

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in the accession agreement but not incorporated into the ECHR, it goes without saying that the Strasbourg Court would have to receive jurisdiction on those provisions of the accession agreement, to the same extent as its jurisdiction on the ECHR pursuant to its Article 32.

9. Entry into force of the accession agreement

An early entry into force of the Accession agreement is welcome. Consequently, the EU should be open to consider proposals to that effect. However, as far as the EU is concerned, Article 218(8) TFEU requires, in addition to unanimity within the Council for the adoption of the decision concluding the Accession agreement, that all Member States approve this decision in accordance with their respective constitutional requirements for this conclusion decision to enter into force. This should be reflected in the final clauses of the agreement.

VII. THE CHOICE OF THE UNION NEGOTIATOR

According to Article 218(3) TFEU, the Council appoints the Union negotiator. As the envisaged agreement is neither falling within the remit of the Union's Common Foreign and Security Policy nor principally related thereto, the Commission should be appointed as Union negotiator.

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Recommendation for a

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

RECOMMENDATION

In the light of the foregoing, the Commission recommends to the Council:

– to authorise 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;

– to nominate the Commission as the Union negotiator;

– to appoint a special committee to assist the Commission in this task;

– to adopt the negotiating directives contained in the Annex;

– to recall, in view of the special situation resulting from the fact that all Member States are also Contracting Parties to the ECHR, that Member States present at the negotiations shall adhere to the Union position as expressed by the Union negotiator.

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ANNEX

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 Convention will operate in the specific case of the European Union as a separate legal person with autonomous powers next to all its Member States. Where, exceptionally, special rules are deemed necessary, they should not alter the essential nature of the system of the Convention. Where appropriate, the accession agreement should be accompanied by reservations and declarations of the European Union.

2. The negotiations should ensure that accession of the European Union to the Convention will neither affect the competences of the Union nor the powers of its institutions.

3. The negotiations should ensure that the accession agreement creates obligations under the substantive provisions regarding human rights and fundamental freedoms (Article 1 to 18 of the ECHR and, as the case may be, the relevant provisions of any Protocol to which the Union may accede) only with regard to acts and measures adopted by institutions or bodies 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, 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.

Union Participation in the bodies of the Convention and financial issues

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.

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 on the election of judges under Article 22 of the Convention.

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 functions under the Convention.

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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.

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

10. The negotiations should ensure that a co-respondent mechanism is designed allowing the Union to join the proceedings as a co-respondent in all cases brought against a Member State and vice versa.

11. The issue of the previous involvement of the ECJ regarding the compatibility of a legal act of the Union with fundamental rights should be addressed in an appropriate way the course of negotiations.

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.

Final clauses

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.

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