



Council of the European Union
General Secretariat

Brussels, 20 September 2019
(OR. en)

12349/19

RESTREINT UE/EU RESTRICTED

FREMP 127
JAI 961
COSCE 16
COHOM 103
CORLX 361
POLMIL 90
CFSP/PESC 706
CIVCOM 138

NOTE

From: Presidency
To: Permanent Representatives Committee
Subject: Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)

1. Upon a Recommendation from the Commission dated 17 March 2010,¹ the Council on 4 June 2010 adopted a decision ('authorisation decision') authorising the opening of negotiations on the Accession Agreement of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR'), together with negotiating directives, nominating the Commission as the Union negotiator and appointing the Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons ('FREMP') as the special committee in accordance with Article 218(4) TFEU.² The Council exchanged views on certain issues pertaining to an earlier draft of the accession agreement and decided to complement its negotiating directives at its meeting on 26 and 27 April 2012 ('the precedent of 2012').³ A provisional agreement was reached on the text of the draft accession agreement on 5 April 2013 ('draft accession agreement'), after which the Commission requested an

¹ ST 7668/10 INIT of 18 March 2010 RESTREINT UE. The declassified version of the document is dated 11 February 2019.

² ST 10817/10 INIT of 8 June 2010 RESTREINT UE. The declassified version of the document is dated 10 June 2015.

³ ST 8915/12 INIT of 18 April 2012 RESTREINT UE. The declassified version of the document is dated 7 February 2018.

RESTREINT UE/EU RESTRICTED

opinion from the Court of Justice of the European Union ('CJEU' or 'Court') on the compatibility of the draft accession agreement with the Treaties.

RESTREINT UE/EU RESTRICTED

2. Following Opinion 2/13 of 18 December 2014⁴, in which the CJEU held that the draft accession agreement was not fully compatible with EU law, the Commission has reflected on solutions to address the problems identified by the Court. On 29 May 2019, FREMP received a Commission services' 'Staff Working Document' that includes a comprehensive outline of the proposed Union position for the re-negotiation of the draft accession agreement of the EU to the ECHR.⁵ This comprehensive technical written contribution ('comprehensive technical contribution') is a condensed compilation of the previous technical written contributions by the Commission services.⁶ It takes account of comments that were made throughout the consultation of FREMP on the previous technical written contributions.⁷
3. At its meetings on 25 June, 11 July and 18 September 2019, FREMP examined and welcomed the comprehensive technical contribution. At those meetings, delegations encouraged the Commission to continue its efforts to enable swift accession by the Union to the ECHR, in particular by resuming the negotiations on the draft accession agreement. It was also expressed that, as highlighted by the Commission, the draft accession agreement should only be amended to the extent necessary in order to address the concerns raised by the CJEU in Opinion 2/13, taking account of the evolving case-law of the Court. In the discussions, particular attention was drawn to questions relating to mutual trust, jurisdiction of the CJEU over CFSP matters, and the autonomy of the EU legal order.
4. Furthermore, there was agreement in FREMP on the fact that the authorisation decision is still in force and, that in accordance with Article 218(4) TFEU, the Council may address directives to the negotiator as it deems fit.

⁴ Opinion of 18 December 2014, *Accession of the EU to the ECHR*, 2/13, EU:C:2014:2454.

⁵ WK 6866/2019 INIT of 5 June 2019.

⁶ WK 249/2016 on co-respondent, prior involvement of the CJEU, Art. 344 TFEU, Protocol 16 to the ECHR, and Art. 53 ECHR; WK 764/2016 INIT of 15 November 2016 on mutual trust; and WK 12044/2018 INIT of 12 October 2015 on judicial review of acts on the part of the EU in CFSP matters.

⁷ Previous technical written contributions were discussed at FREMP meetings on 4 November 2015, 26 April 2016, 1 December 2016 (mutual trust), and 15 November and 17 December 2018 (CFSP).

RESTREINT UE/EU RESTRICTED

5. In particular, at the FREMP meeting on 18 September and on the basis of a Presidency Note set out in doc. 11741/19 EU RESTREINT, delegations agreed on certain further elements that should be taken into account when the negotiations on the accession agreement are resumed with the Contracting Parties to the ECHR. These elements include in particular the following:
- a) in order to safeguard the autonomy of the EU legal order and the exclusive competence of the CJEU to give the definitive interpretation of rules of EU law, other than the provisions of the ECHR and the EU accession agreement, the Council of Europe bodies applying and interpreting the ECHR⁸
 - should not have power to interpret or apply rules of EU law, other than the provisions of the ECHR and the EU accession agreement,⁹
 - will treat rules of EU law, other than the provisions of the ECHR and the EU accession agreement, as a matter of fact, and follow the interpretation given to that law by the courts of the Union,¹⁰
 - cannot bind the EU when giving meaning to rules of EU law, other than the provisions of the ECHR and the EU accession agreement;¹¹
 - b) The EU's accession to the ECHR can have no effect on the operation of the EU institutions in accordance with the EU constitutional framework.¹²

⁸ Opinion of 30 April 2019, *CETA*, 1/17, para. 111 and 118-119.

⁹ Opinion of 30 April 2019, *CETA*, 1/17, paras. 120-136, esp. paras. 122 and 132-134.

¹⁰ Opinion of 30 April 2019, *CETA*, 1/17, paras. 107-108, 111, 118-136, esp. paras. 130-133, 148-151, 160; and, *inter alia*, Opinion of 18 December 2014, *Accession of the EU to the ECHR*, 2/13, EU:C:2014:2454, para. 183; Opinion of 18 April 2002, *Agreement on the establishment of a European Common Aviation Area*, 1/00, EU:C:2002:231, paras. 20 and 21; cf. also para. 1(a) and (d) of Annex II (Negotiating directives) to the 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), ST 10817/19 INIT of 8 June 2010 RESTREINT UE.

¹¹ Opinion of 30 April 2019, *CETA*, 1/17, paras. 130.

¹² Opinion of 30 April 2019, *CETA*, 1/17, paras. 118-119.

RESTREINT UE/EU RESTRICTED

6. A synthetic overview of the required amendments to the negotiated instruments (draft accession agreement and draft explanatory report) could be found in Annex I to this Note.
7. In addition to the Commission's technical contribution, FREMP also discussed about the EU's internal rules. In this regard, FREMP noted that the Council, in its declaration for the minutes in relation to the authorisation decision¹³ and subsequently by way of the precedent of 2012¹⁴, took the view that internal rules had to be approved before the conclusion of the accession agreement by the EU. It must also be recalled that the internal rules, as well as the decisions authorising the signing and conclusion of the accession agreement, will have to be adopted by the Council acting unanimously in accordance with Article 218(8) TFEU. Finally, the decision concluding the agreement will need to be approved by the Member States in accordance with their respective constitutional requirements in order for it to enter into force.
8. Hence, even if the final approval of the internal rules must be based on the final text of the accession agreement that is agreed between the EU and its negotiating partners in the Council of Europe, FREMP considers it important to have at least a general framework on the main basic elements and principles of the internal rules. Following the authorisation decision and the precedent of 2012,¹⁵ FREMP shall continue the discussions on the internal rules in parallel to the negotiations, in particular in order to bring more clarity to the different types of situations in which the Union or a Member State will join the proceedings or be held responsible, especially in the area of CFSP, as well as possible technical solutions thereto. Some basic elements and principles on the future internal rules can be found in Annex II to this note.

¹³ Council declaration with regard to paragraphs 10 and 11 of the negotiating directives to be inserted in the minutes of the Council, Annex III of ST 10817/10 INIT of 8 June 2010 RESTREINT UE. The declassified version of the document is dated 10 June 2015.

¹⁴ ST 8915/12 INIT of 18 April 2012 RESTREINT UE. The declassified version of the document is dated 7 February 2018.

¹⁵ Council declaration with regard to paragraphs 10 and 11 of the negotiating directives to be inserted in the minutes of the Council, Annex III of ST 10817/10 INIT of 8 June 2010 RESTREINT UE. The declassified version of the document is dated 10 June 2015- Also ST 8915/12 INIT of 18 April 2012 RESTREINT UE. The declassified version of the document is dated 7 February 2018.

RESTREINT UE/EU RESTRICTED

9. As an outcome of the discussions held in FREMP on 18 September 2019, it was agreed that FREMP shall recommend Coreper to issue a mandate to the Working Part of Foreign Relations Counsellors (RELEX) for the purpose of assisting FREMP on certain issues in relation to Section III of Annex II.
10. FREMP, as the special committee in accordance with Article 218(4) TFEU, invites the Commission to report regularly on the progress of the negotiations once they have resumed, and forward all negotiating documents to it without delay.¹⁶

In light of the above, the Permanent Representatives Committee is recommended to:

- a) invite the Council to express its commitment to the swift resumption of the negotiations on the Accession Agreement of the EU to the ECHR,
- b) invite the Council to adopt the supplementary negotiating directives as set out in Annex I to this Note in accordance with Article 218 TFEU,
- c) invite the Council to take note of the outcome of the discussions in FREMP and COREPER as set out in this Note, and in particular regarding the basic elements and principles of the future internal rules, and
- d) issue a mandate to the Working Party of Foreign Relations Counsellors (RELEX) for the purpose of assisting FREMP in relation to Section III of Annex II of this Note with the following:
 - the principle of and criteria for ex ante designation of the Member State to which individual acts of Union agents in the field of CFSP are attributed, taking into account the necessity to ensure an appropriate publicity of that designation in order to ensure compliance with Article 13 of the ECHR;

¹⁶ Cf. Article 3 of the 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, Annex I of ST 10817/10 INIT of 8 June 2010 RESTREINT UE. The declassified version of the document is dated 10 June 2015.

RESTREINT UE/EU RESTRICTED

- in so far as relevant, the articulation with the accountability and jurisdiction rules included in the relevant SOFA/SOMA Agreements and rules provided for in the Agreements concluded by the EU with Third States pursuant to Article 37 TEU;
 - the full compensation of the financial burden on the Member State as well as the political (reputational) impact on the Member State concerned, including where the ECtHR rejects the claim.
-

**SYNTHETIC OVERVIEW OF THE REQUIRED AMENDMENTS TO THE
NEGOTIATED INSTRUMENTS**

The negotiated instruments should be amended in the following way:

a) Where an application before the ECtHR directed against one or more Member States or against the EU has been notified to the respondent, the EU and the Member States, as the case may be,

- shall be systematically informed by the ECtHR of that application¹⁷,

- have an unconditional right to become co-respondent(s) to the proceedings, in respect of a given alleged violation notified by the ECtHR, at its (their) own request, without the acquisition of that procedural status depending on an assessment by the ECtHR even of the plausibility of the reasons stated in a request made to that effect¹⁸.

b) Where the EU or the Member States are co-respondents to the proceedings, in respect of a given alleged violation notified by the ECtHR, and where the ECtHR finds that the violation has occurred,

- as a rule, the ECtHR may not depart from the rule of joint responsibility of the respondent and the co-respondent for that violation¹⁹,

¹⁷ New provision of the draft Accession Agreement, to be inserted in Article 3.

¹⁸ Amendment of Article 3(2) – (5) of the draft Accession Agreement.

¹⁹ Amendment of Article 3(7) of the draft Accession Agreement.

RESTREINT UE/EU RESTRICTED

- however, where a Contracting Party which is a co-respondent to the proceedings has made a reservation in accordance with Article 57 of the ECHR which precludes it from being held responsible for that violation, that Contracting Party shall not be included in the joint responsibility²⁰.

c) It is clarified that where the respondent has made a reservation in accordance with Article 57 ECHR to the provision of the ECHR whose violation is alleged, the application is inadmissible for being incompatible *ratione materiae* with the ECHR, according to the usual criteria applied by the ECtHR²¹.

d) The co-respondent has a right to terminate its participation in the proceedings autonomously²².

e) Where the EU is a co-respondent to the proceedings, it has an unconditional right to request that ‘sufficient time’ be afforded for the prior involvement procedure to take place²³.

f) It is clarified that the prior involvement procedure also covers the interpretation (and not only the validity) of secondary law²⁴.

g) ²⁵The ECtHR is to inform the EU of any application under Article 33 ECHR brought by one Member State against another as well as of any reference under Protocol 16 made by a Member State’s highest court or tribunal.

²⁰ Amendment of Article 3(7) of the draft Accession Agreement.

²¹ Amendment of the draft Explanatory Report.

²² New provision of the draft Accession Agreement, to be inserted in Article 3.

²³ Amendment of Article 3(6) of the draft Accession Agreement

²⁴ Amendment of paragraph 66 of the draft Explanatory Report.

²⁵ Points g) – i) to be addressed by new provisions of the draft Accession Agreement (new Article X).

RESTREINT UE/EU RESTRICTED

- h) If the EU informs the ECtHR that an infringement procedure has been brought by the Commission or by a Member State against the Member State that has initiated a procedure under Article 33 ECHR or Protocol 16, the ECtHR is to automatically suspend the procedure.
- i) In the case referred to under h), the EU is to inform the ECtHR of the outcome of such infringement procedure. Where the CJEU has found that by initiating the procedure under Article 33 ECHR or Protocol 16 the Member State concerned has failed to fulfil its obligations under the EU Treaties, the ECtHR is to strike out the case from the register, otherwise the procedure before the ECtHR continues.
- j) The ECtHR's jurisdiction under Article 33 ECHR is excluded regarding disputes between the EU and a Member State²⁶.
- k) It is clarified that the procedure for the prior involvement of the CJEU does not apply in respect of a procedure before the ECtHR that has been initiated by a request for an advisory opinion made pursuant to Protocol 16²⁷.
- l) It is clarified that the use of the powers conferred on Member States by Article 53 ECHR is limited by the requirements flowing from EU law, as interpreted by the CJEU²⁸.

²⁶ New provision of the draft Accession Agreement, amending Article 33 ECHR.

²⁷ Amendment of the draft Explanatory Report stating that the prior involvement procedure presupposes a co-respondent situation, i.e. adversarial proceedings brought against a Member State or against the EU before the ECtHR, whereas there would be no such situation in a procedure under Protocol 16.

²⁸ Amendment of the draft Explanatory Report or new provision in the draft Accession Agreement.

RESTREINT UE/EU RESTRICTED

m) The fundamental importance of the principle of mutual trust between EU Member States, allowing an area without internal borders to be created and maintained, is explicitly recognised²⁹. In that provision it should be furthermore stated, in order to reflect the most recent case-law of the CJEU on mutual trust,³⁰ that pursuant to the principle of mutual trust between the Member States, Union law governing cross-border acts to be performed by one Member State in relation to another Member State

- may require each Member State to presume, to an extent determined by EU law as interpreted by the CJEU, that fundamental rights have been observed by all other Member States,

and

- may in any event provide that a judicial decision of one Member State is to be recognised and/or executed in another Member State if the defendant failed to exhaust domestic remedies against that decision in the Member State of origin,

n)³¹Where the subject matter of an application before the ECtHR is an act of the EU, that act shall be deemed to be an act of one or more Member States, for the purposes of the ECHR, of the protocols thereto and of the accession agreement, if the EU and that Member State (or those Member States) jointly make a declaration to that effect.

²⁹ New provision of the draft Accession Agreement (new Article Y).

³⁰ Cf. judgment of 25 July 2018, *Minister for Justice and Equality (LM)*, C-216/18 PPU, EU:C:2018:586, paras. 35-37, 43 and 47; judgment of 5 April 2016, *Aranyosi and Căldăraru*, Joined Cases C-404 and 659/15 PPU, EU:C:2016:198, paras. 78, 82, 88, 92-94; judgment of 16 February 2017, *C.K. and Others*, C-578/16 PPU, EU:C:2017:127, paras. 74 and 75.

³¹ Points n) and o) to be addressed by new provisions of the draft Accession Agreement (new Article Z).

o) In the case referred to under n),

- the application is deemed to have been directed against the designated Member State or Member States,

- the proceedings before the ECtHR are suspended for e.g. three months and, in case a domestic remedy has been lodged during that period, for so long as the domestic procedure is ongoing.

p) ³²The Council of Europe bodies

- should treat rules of EU law, other than the provisions of the ECHR and the EU accession agreement, as a matter of fact, and follow the prevailing interpretation given to that law by the courts of the Union;

- should, following the prior involvement procedure, be bound by the opinion given by the CJEU on rules of EU law, other than those set out in the ECHR and the accession agreement.

³² This would need to be reflected in the Explanatory Report.

Basic elements and principles of the future internal rules

The following basic elements and principles are based on, *inter alia*, the authorisation decision,³³ the exchange of views discussed in the Council on 26 and 27 April 2012,³⁴ and the comments and contributions provided by the delegations in FREMP on the comprehensive technical contribution by the Commission services.

Accordingly, the internal rules should concern in particular the following matters and rely on the following basic elements and principles:

Section I: Rules of Procedure

- a) the selection of three candidates for the office of a judge at the ECtHR to be nominated by the Union pursuant to Article 22 of the ECHR;
- b) the representation of the Union before the ECtHR;
- c) the criteria for triggering the participation of the Union or the Member States as co-respondents in the proceedings before the ECtHR, including the criteria for not triggering such participation of the Union in the area of CFSP;
- d) the conduct of the proceedings by the respondent and the co-respondent(s), including with regard to the relinquishment of jurisdiction and the referral to the Grand Chamber of the ECtHR in accordance with Articles 30 and 43 of the ECHR as well as to friendly settlements in accordance with Article 39 of the ECHR and unilateral declarations;

³³ ST 10817/10 INIT of 8 June 2010 RESTREINT UE. The declassified version of the document is dated 10 June 2015.

³⁴ ST 8915/12 INIT of 18 April 2012 RESTREINT UE. The declassified version of the document is dated 7 February 2018.

RESTREINT UE/EU RESTRICTED

- e) the termination, on the part of the co-respondent, of its participation in the proceedings before the ECtHR;
- f) the making of the request to the ECtHR that sufficient time be afforded for the prior involvement procedure to take place as well as the features of that procedure itself;

Section II: Execution of judgments

- g) the execution of judgments of the ECtHR finding a violation of the ECHR in cases where the Union is a co-respondent in the proceedings before the ECtHR, where the Union's participation as co-respondent in the proceedings before the ECtHR has been terminated, including the issue of the ultimate financial responsibility for any just satisfaction afforded to an injured party in accordance with Article 41 of the ECHR;

Section III: CFSP

- h) the principle of and criteria for ex ante designation of the Member State or Member States³⁵ to which individual acts of Union agents³⁶ in the field of CFSP are attributed, taking into account the necessity to ensure an appropriate publicity of that designation in order to ensure compliance with Article 13 of the ECHR;
- i) in so far as relevant, the articulation with the accountability and jurisdiction rules included in the relevant SOFA/SOMA Agreements and rules provided for in the Agreements concluded by the EU with third countries pursuant to Article 37 TEU;

³⁵ The issue of possible designation of more than one Member State would need further examination.

³⁶ The situation of the involvement of third countries in CFSP missions would need further examination.

RESTREINT UE/EU RESTRICTED

- j) the conduct of the proceedings before the ECtHR by the respondent Member State or Member States, where the Union's participation as co-respondent in the proceedings before the ECtHR has not been triggered in the area of CFSP or where an individual act of Union agents in the field of CFSP have been re-attributed to a Member State;
 - k) the execution of judgments of the ECtHR finding a violation of the ECHR in cases where an individual act of Union agents in the field of CFSP has been re-attributed to a Member State or Member States where the Union's participation as co-respondent in the proceedings before the ECtHR has not been triggered in the area of CFSP;
 - l) the full compensation of the financial burden on the Member State or Member States as well as the political (reputational) impact on the Member State concerned, including where the ECtHR rejects the claim.
-