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**6th WORKING MEETING OF THE CDDH INFORMAL WORKING
GROUP ON THE ACCESSION OF THE EUROPEAN UNION TO THE
EUROPEAN CONVENTION ON HUMAN RIGHTS (CDDH-UE)
WITH THE EUROPEAN COMMISSION**

**Explanatory report to the draft agreement on the accession of the EU
to the Convention**

Strasbourg, Tuesday 15 March (9.30 am) – Friday 18 March 2011 (1.30 pm)

Agora Building, Room G05
Council of Europe

Explanatory Report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms

Introduction

1. The accession of the European Union (hereinafter referred to as “the EU”) to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter referred to as “the Convention”) constitutes a major step in the development of the protection of fundamental rights in Europe.

2. Discussed and evoked since the late 1970s, the accession became a principle enshrined in the Treaty on European Union, and a legal obligation, with the entry into force of the Lisbon Treaty, on 1 December 2009. Pursuant to Article 6, paragraph 2 of the Treaty on European Union, “The Union shall accede to the [Convention]. Such accession shall not affect the Union’s competences as defined in the Treaties”. Protocol No. 14 to the Convention, adopted in 2004 and entered into force on 1 June 2010, amends Article 59 of the Convention in order that the EU may accede to it.

I. Need for an accession agreement

3. This legal basis, although necessary, is not sufficient to allow the immediate accession of the EU. The Convention as amended by Protocols Nos. 11 and 14, has been drafted having in mind only state entities members of the Council of Europe as possible Contracting Parties. The accession to the Convention of the EU, as a non-state entity with a specific legal system, thus requires certain adaptations to the control machinery established. This includes: amendments to provisions in the Convention to ensure notably the participation of the Union in the implementation of the Convention; supplementary interpretative provisions; adaptations of the procedure before the European Court of Human Rights (hereinafter referred to as : “the ECtHR”) taking into account the characteristics of the legal order of the EU and, in particular, the specific relationship between an EU member State’s legal order and that of the EU itself; and other technical and administrative issues not directly pertaining to the text of the Convention, but for which a legal basis would be required.

4. It is therefore necessary to establish, by common agreement of the current High Contracting Parties to the Convention and the EU, the conditions of accession and the adjustments to be made to the control machinery established by the Convention.

5. The conclusion of an Accession Agreement also complies with the relevant provisions of the Treaty on European Union and of its Protocol No. 8, and of the Treaty on the Functioning of the European Union, where a number of conditions and of procedural requirements for the conclusion of the agreement are set.

6. As a result of the accession, the acts of the EU will be subject, like those of the other High Contracting Parties, to the review exercised by the ECtHR in the light of the rights guaranteed under the Convention.

7. Accession to the Convention will afford citizens protection against the action of the EU similar to that which they already enjoy against action by all the States Parties to the Convention, thereby improving judicial protection of fundamental rights in Europe for the individuals. This is all the more important since the EU member States have transferred substantial powers to the EU. At the same time, the competence of the ECtHR to assess the

conformity of the EU law with the provisions of the Convention will not prejudice the principle of the autonomous interpretation of the EU law.

8. While the EU's system for the protection of fundamental rights is supplemented and enhanced by the incorporation of the Charter of Fundamental Rights into its primary law, as a result of the accession the EU will be integrated into the fundamental rights protection system of the Convention. In addition to the internal protection of these rights by the internal law of the Union and the Court of Justice of the European Union (hereinafter referred to as: "the CJEU"), the EU will be bound to respect the Convention and placed under the external control of the ECtHR. This will further ensure the quality and coherence of the case-law on the protection of fundamental rights in Europe.

9. During the preparatory work on the Accession Agreement, there was agreement on the general principles which guided this work. The solutions proposed aim at preserving the principle of equal rights of all individuals under the Convention, the rights of the applicant in the procedure, and the equality of all High Contracting Parties. The current control mechanism of the Convention should be preserved as much as possible, by limiting amendments and adaptations to what is strictly necessary. Another principle agreed was to ensure, as far as possible, that the EU acceded to the Convention on an "equal footing" with the other Contracting Parties, *i.e.* with the same rights and the same obligations. It is also understood that the existing obligations of the States Parties to the Convention should not be affected by the accession, and that the distribution of competencies between the EU and its Member States as well as between the EU institutions shall be respected.

II. Principal stages in the preparation of the Accession Agreement

10. The question of the accession of the EU to the Convention has been debated on several occasions. Before the elaboration of this Agreement, the issue had been discussed in particular on two occasions.

11. In 2001, the Steering Committee for Human Rights (CDDH) set up a Working Group on the Legal and Technical Issues of a Possible EC/EU Accession to the European Convention on Human Rights (GT-DH-EU) and instructed it to carry out a study of the legal and technical issues that would have to be addressed by the Council of Europe in the event of possible accession by the EU to the Convention, as well as of the other means to avoid any contradiction between the legal system of the EU and the system of the Convention.

12. This study was adopted by the CDDH at its 53rd meeting in June 2002 and transmitted to the EU Convention convened following the Laeken declaration of the European Council (December 2001) and instructed to consider the key issues arising for the Union's future development with a view to assisting future political decision-making about such accession.

13. When drafting Protocol No.14 in 2004, it was decided to amend Article 59 of the Convention in view of possible accession by the EU, by adding a paragraph making provision for this possibility. Already at that time it was noted that further modifications to the Convention were necessary in order to make such accession possible from a legal and technical point of view¹, and that such modifications could be brought about either through an amending protocol to the Convention or by means of an accession treaty to be concluded between the EU, on the one hand, and the States Parties to the Convention, on the other.

¹ See the Explanatory Report to Protocol No. 14, paragraph 101.

14. The entry into force of the Lisbon Treaty in December 2009 and the last ratification of Protocol No. 14 to the Convention in February 2010 (which determined its entry into force on 1 June 2010) created the necessary legal pre-conditions for the accession.

15. Between November 2009 and May 2010, the CDDH and its Bureau discussed the best way to proceed with respect to the organisation of work on the EU accession to the Convention. On the basis of this discussion, the Committee of Ministers' deputies adopted at their 1085th meeting (26 May 2010) ad hoc terms of reference for the CDDH "to elaborate, no later than 30 June 2011, in co-operation with representative(s) of the EU to be appointed by the latter, legal instrument(s), setting out the modalities of accession of the European Union to the European Convention on Human Rights, including its participation in the Convention system; and, in this context, to examine any related issue".² On the EU side, the Justice and Home Affairs Council adopted on 8 June 2010 a Council Decision authorising the European Commission to negotiate an accession agreement of the EU to the Convention.

16. At its 70th meeting, in June 2010, the CDDH decided to entrust an informal group of 14 members (7 coming from member States of the EU and 7 coming from non-member States of the EU), chosen on the basis of their expertise with the task of drafting, together with the EU representative(s), legal instrument(s) setting out the modalities of accession of the EU to the Convention, including its participation in the Convention system, and, in this context, to examine all related issues.

17. This informal working group (CDDH-UE) held its first working meeting with the European Commission in July 2010. At that meeting, the participants agreed on the working methods and drew up a provisional list of issues to be discussed regarding the accession, which were examined at the subsequent meetings. The informal group held in total ... working meetings with the Commission, reporting regularly to the CDDH on the progress and on the outstanding issues.

18. An important development was the meeting on 17 January 2011 between delegations from the ECtHR and the Court of Justice of the European Union (hereinafter: the CJEU), in the context of the regular meetings between the two courts. As is usual on the occasion of these meetings, subjects of common interest were discussed, including the accession of the EU to the Convention and in particular the question of the possible prior involvement of the CJEU in cases in which the EU is a co-respondent. The Joint Declaration by the Presidents of the two courts resuming the results of the discussion provided, in this respect, valuable reference and guidance for the negotiation on one of the most delicate aspects of the accession.

19. The CDDH approved the draft Accession Agreement and sent it to the Committee of Ministers on The Parliamentary Assembly adopted an opinion on the draft accession agreement (Opinion No. ... of ...). The accession agreement was adopted by the Committee of Ministers on ... and opened for signature on ...

² CM/Del/Dec(2010)1085E / 28 May 2010

III. Comments on relevant provisions of the Agreement

A – General provisions and scope of the accession
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Article 1 - Object

20. With regard to the operative provision providing for the accession of the EU to the Convention, it was decided that the ratification of the Accession Agreement by the 47 High Contracting Parties to the Convention and by the EU, and the consequent entry into force, will have the simultaneous effect of amending the Convention and include the EU among its Parties, without the need for a further deposit of an instrument of accession to the Convention by the EU.

21. Paragraph 2 constitutes the operative clause allowing the accession of the EU to Protocol(s) No. [...] by means of the ratification of the Accession Agreement by the 47 High Contracting Parties to the Convention and by the EU, without the need for a further deposit of an instrument of accession to such protocol(s) by the latter. It is understood that subsequent accession by the EU to other protocols would require the deposit of a separate accession instrument.

22. It is observed that the final clauses of the protocols only provide for participation of the “Council of Europe member States” and do not refer to accession as a possible means to express consent to be bound. A literal interpretation of these provisions could therefore call into question the possibility of the EU of acceding to the protocols once it has become a party to the Convention. However, having regard to the accessory nature of the protocols, the amendment of Article 59, paragraph 2 allowing the EU to accede to the Convention *and to its protocols* would constitute a sufficiently solid legal basis permitting the EU’s accession to the latter. As a result, no amendment to the protocols would be required for the purpose of EU accession.

Article 2 – Scope of the accession

23. The amendments agreed concern paragraphs 2 and 5 of Article 59 of the Convention.

24. Paragraph 2 of Article 59, as amended, defines the scope of the accession of the EU to the Convention. It is now subdivided into four subparagraphs.

25. Under letter a), the original wording of Article 59 paragraph 2 is amended by adding an explicit reference to the possibility for the EU to accede to the protocols to the Convention, thereby clearly establishing an explicit legal basis in this respect.

26. The drafting agreed under letter b) reflects the conditions set out in Article 2 of Protocol No. 8 relating to Article 6, paragraph 2 of the Treaty on European Union, pursuant to which the accession of the EU shall not affect its competences or the powers of its institutions.

27. The inclusion in Article 59 of an interpretation clause with regard to terms such as “State”, “State Party” and to the other terms referring to State entities (letters c) and d)) aims at improving the readability of the Convention and its protocols without amending it. It is underlined that all the protocols contain a provision to the effect that as between the High

Contracting Parties their substantive provisions shall be regarded as additional articles to the Convention, and that all the provisions of the latter shall apply accordingly. These provisions clarify the accessory nature of the protocols in relation to the Convention. It follows that the general interpretation clause to be embodied in the Convention would also apply to the additional protocols without requiring their amendment in that respect.

28. Letter c) refers to the terms “State”, “State Party”, “States” or “States Parties”³, which, after the accession, shall be understood as referring also to the EU as a High Contracting Party.

29. Under letter d) are regrouped all the other terms referring to State entities in the Convention or in the protocols (“national security”⁴, “national law”⁵, “national laws”⁶, “national authority”⁷, “life of the nation”⁸, “country”⁹, “administration of the State”¹⁰, “territorial integrity”¹¹ and “domestic”¹²), which, after the accession, shall be understood as relating also, *mutatis mutandis*, to the EU as a High Contracting Party.

30. With particular regard to the term “domestic”, this term should be understood as “internal” to the legal order of a High Contracting Party. This is confirmed by the French wording of Article 35 of the Convention. Following the same interpretation, it is understood that as a necessary consequence of its accession, the judicial system of the EU shall not be considered as “another procedure of international investigation or settlement” the submission to which would make an application inadmissible pursuant to Article 35, paragraph 2, letter b of the Convention.

31. A technical amendment to Article 59, paragraph 5 is agreed in order to take into account the accession of the EU.

Article 3 – Reservations to the Convention and to its protocols

32. The EU should accede to the Convention, as far as possible, on an “equal footing” with the other High Contracting Parties. Therefore, the conditions applicable to the other High Contracting Parties with regard to reservations, declarations and derogations under the Convention should also apply to the EU. For reasons of legal certainty, it was however agreed to include in the Accession Agreement a provision allowing the EU to make reservations under Article 57 of the Convention under the same conditions as any other High Contracting Party. This would also include the right to make reservations when acceding to existing or future additional protocols. It is understood that any reservations should however be consistent with relevant international law rules.

³ Appearing in Article 10, paragraph 1 and in Article 17 of the Convention, and in Articles 1 and 2 of Protocol No. 1, Articles 2 and 3 of Protocol No. 4, Article 2 and 6 of Protocol No. 6, Articles 3, 4 and 5 and 7 of Protocol No. 7, Article 3 of Protocol No. 12, and Article 5 of Protocol No. 13 to the Convention.

⁴ Appearing in Article 6 paragraph 1, Article 8, paragraph 2, Article 10, paragraph 2 and Article 11, paragraph 2 of the Convention, in Article 2, paragraph 3 of Protocol No. 4 and in Article 1, paragraph 2 of Protocol No. 7.

⁵ Appearing in Article 7 of the Convention.

⁶ Appearing in Article 12 of the Convention.

⁷ Appearing in Article 13 of the Convention.

⁸ Appearing in Article 15 of the Convention.

⁹ Appearing in Articles 5, paragraph 1, letter f and 8, paragraph 2 of the Convention and in Article 2, paragraph 2 of Protocol No. 4.

¹⁰ Appearing in Article 11, paragraph 2 of the Convention.

¹¹ Appearing in Article 10, paragraph 2 of the Convention.

¹² Appearing in Article 35 of the Convention.

33. Since the current wording of Article 57 only refers to “States”, technical adaptations to the text of paragraph 1 of that provision are necessary in order to make reference to the possibility for the EU to make reservations within the meaning of that provision.

34. A provision is added clarifying that the EU shall make its reservations to the Convention and to the protocols mentioned in Article 1 when expressing its consent to be bound by the provisions of this Agreement in accordance with Article 11.

B – Procedure before the European Court of Human Rights

Article 4 – Introduction of a co-respondent mechanism

35. A new mechanism is being introduced in order to allow the EU to be considered, and where necessary join, as co-respondent in proceedings instituted against one or more of its member States and, conversely, to allow one or more EU member State(s) to be considered, and where necessary join, as co-respondent(s) in proceedings instituted against the EU.

Reasons for the introduction of the mechanism

36. The introduction of this mechanism was considered necessary to accommodate the specific situation of the EU - as a supranational organisation with an autonomous legal system - becoming a Party to the Convention alongside the EU member States. It is a special feature of the EU legal system that acts adopted by its institutions may be implemented by organs of its member States and, conversely, that provisions of the EU founding treaties agreed upon by its member States may be implemented by organs of the EU. With the accession of the EU, there arises thus the unique situation in the Convention system in which the High Contracting Party enacting a legal act and the High Contracting Party implementing that act may differ from each other.

37. Therefore, the introduction of the co-respondent mechanism seeks to accommodate the Convention system to this specific situation, by allowing the High Contracting Party which has enacted a legal act to participate in the proceedings before the ECtHR as co-respondent with the High Contracting Party which has implemented that act. If the ECtHR establishes a violation of the Convention, the co-respondent will be equally bound both by the obligations under Article 46 to fully repair the victim’s legal and factual situation (individual measures) and to draw all necessary conclusions with regard to parallel cases (general measures). The co-respondent mechanism is thus no procedural privilege for the EU or its member States, but a means to avoid gaps in participation, accountability and enforceability under the Convention system. This corresponds to the very purpose of EU accession and serves the proper administration of justice.

38. Given its purpose to fill the gaps identified above, the application of the co-respondent mechanism should be limited to cases concerning violations of the Convention allegedly committed jointly by the European Union and one or more of its member States. Where an applicant alleges, in the course of one application, separate violations against the European Union on the one hand, and its member States on the other, the specific situation of separate High Contracting Parties enacting and implementing a legal provision does not arise. Accordingly, there is no need for a co-respondent mechanism with regard to those cases.

39. The introduction of the co-respondent mechanism is also fully in line with Article 1 (b) of Protocol No. 8 to the Treaty on the Functioning of the European Union, which requires the

Accession Agreement to provide for “the mechanisms necessary to ensure that (...) individual applications are correctly addressed to Member States and / or the Union, as appropriate”. Using the language of this protocol, the co-respondent mechanism offers the opportunity to “correct” applications in two ways. Firstly, the mechanism would allow the EU to join the proceedings as co-respondent in cases in which the applicant has directed the application only against one or more of its member State(s), and *vice versa*. Secondly, the co-respondent mechanism may ensure that the EU “remains” in a case as a co-respondent in cases in which an application was directed against both the EU and one or more of its member States. For example, in the case of an application concerning a member State’s implementation of an EU legal act, the applicant would arguably be directly affected only by the member State’s act, but not necessarily by its legal basis, for which the EU bears responsibility. In such an instance, the co-respondent mechanism would ensure that the High Contracting Party bearing responsibility for the legal basis of the act complained is involved in the case as a co-respondent and may be held, where appropriate, jointly responsible for a violation. The latter example also demonstrates that the co-respondent mechanism is in the first place designed to be in the interest of the applicants and is not meant to operate to their detriment.

Third party interventions and the co-respondent mechanism

40. The co-respondent mechanism is closely linked to the already existing possibility of third party interventions within the meaning of Article 36 of the Convention, with the difference that the latter only gives a third party the opportunity to submit written comments in a case before the ECtHR, but without the possibility to bind that third party itself by the judgment (Article 46 paragraph 1 of the Convention). However, because of a certain similarity between third party interventions and the co-respondent mechanism, Article 36 is considered the most convenient place where provisions regarding this new mechanism could be added.

41. It is understood that a third party intervention may often be the most appropriate way to involve the EU in a case. The introduction of the co-respondent mechanism should thus not be seen, as regards the EU, as a substitute to a third party intervention. In order to distinguish these two forms of participation, the newly added paragraph 4 of Article 36 requires, for the co-respondent mechanism to apply, the appearance of a substantive link between at least one of the alleged violations of the rights enshrined in the Convention and an act or measure by an institution, body, office or agency of the EU - or a failure to act, where such action is allegedly required under the Convention. While it will be for the ECtHR to interpret the meaning of “substantive link”, it is understood that the criterion requires a certain qualifying element, such as a causative interrelation, in order to distinguish cases in which EU law is merely applied by the domestic courts or other authorities from those cases in which an action, a certain measure or a failure to act by the Union appears to lie at the heart of the alleged violation.

Outline of the procedure under the co-respondent mechanism

42. During the preparatory work on the Accession Agreement, it was understood that the co-respondent mechanism would not alter the current practice under which the ECtHR makes a preliminary assessment of an application, with the result that many manifestly ill-founded or otherwise inadmissible applications are not communicated. Therefore, the co-respondent mechanism should only be applied to cases which have been notified to a High Contracting Party.

43. For those cases selected by the ECtHR for notification, the procedure initially follows the information indicated by the applicant in the application form.

A. Applications directed against both the EU and one or more of its member State(s)

44. In a notified case which has been directed against both the EU and one (or more) of its member States in respect of at least one alleged violation, it is understood that the ECtHR would consider the High Contracting Party which bears responsibility for the implementation of that act as respondent, and the High Contracting Party which bears responsibility for the legal basis, but not for the implementation of that act, as a co-respondent. Internal EU rules may regulate how the member State(s) and the EU should present their position and their arguments in that situation.

B. Applications directed against one or more member State(s) of the European Union, but not against the European Union itself (or vice versa)

45. In cases in which the application is directed against one (or more) member State(s) of the EU, but not against the EU itself (or *vice versa*), the co-respondent mechanism would allow a High Contracting Party which is substantively implicated by the application, but not indicated in the application form as a respondent, to join the proceedings as a co-respondent. If the ECtHR considers this appropriate, it will invite, on its own motion, that High Contracting Party to join the proceedings as co-respondent (paragraphs 46 to 49 below). However, if that is not the case, a High Contracting Party may also, on its own initiative, ask the ECtHR to be invited to join the proceedings as co-respondent (paragraphs 50 to 52 below).

The Court invites a High Contracting Party to join the proceedings as co-respondent

46. In the initial stage of the proceedings, the ECtHR identifies an application which should be notified to the respondent and which might, in the interest of the proper administration of justice, be suitable for the application of the co-respondent mechanism.

47. When notifying the case to the original respondent, the ECtHR informs the potential co-respondent and invites the latter to join the proceedings. Should a substantive link between the alleged violation and a provision of EU law become subsequently apparent, the ECtHR may also make such an invitation at a later stage in the proceedings.

48. When inviting the potential co-respondent to join the proceedings, the ECtHR shall set a short time-limit (e.g. 8 weeks) for the potential co-respondent to reply to the invitation. At the same time, the ECtHR shall inform both the applicant and the original respondent about such invitation, and set a time-limit (e.g. 4 weeks) for comments. This time-limit should be shorter than the time-limit given to the potential co-respondent, in order to allow the latter to consider the possible submissions made by the applicant and the original respondent before replying to the ECtHR.

49. When the potential co-respondent receives an invitation by the ECtHR to be joined to the proceedings, it shall inform the ECtHR of its acceptance of the invitation within the set time-limit. The ECtHR shall then take note of such acceptance and inform the Parties to the case as well as the potential co-respondent of its decision to join the latter to the proceedings. On the other hand, it was understood that the EU or its member States could not be compelled against their will to become a co-respondent, just as any other High Contracting Party could not be obliged to take part in proceedings which had not been directed against that Party by the applicant.

A High Contracting Party requests to be invited by the Court to join the proceedings as co-respondent

50. Additionally, the potential co-respondent may learn about the case either through the ECtHR's system of publication of communicated cases or by being informed by the original respondent, possibly on the basis of specific EU internal rules. The ECtHR's system of publication of communicated cases should, for this purpose, ensure a rapid publication of the cases and of relevant information, including the date of notification of the case to the original respondent. The potential co-respondent may then, on its own initiative, ask the ECtHR to be invited to join the proceedings as a co-respondent. This system would serve as a "safety net" should the ECtHR not have issued such an invitation to the potential co-respondent. A request to be joined to the proceedings should be reasoned.

51. If the ECtHR receives a request from a potential co-respondent to be invited to join the proceedings, it informs both the applicant and the original respondent about the request, and sets a short time-limit (e.g. 8 weeks) for comments.

52. Taking into account that request, as well as possible submissions made by the applicant and the original respondent (including possible joint submissions with the potential co-respondent), the ECtHR decides on the admission of the co-respondent to the proceedings and informs the Parties to the case as well as the co-respondent of its decision. It is expected that such requests will normally be granted, unless there are exceptional reasons to suggest the contrary, such as requests which are manifestly incomplete or inconsistent. The decision of the ECtHR to join a High Contracting Party to a case as a co-respondent may (e.g. in order to protect the interest of the applicant) place specific conditions on such admission (such as, for instance, providing legal aid to the applicant) if this were to be considered necessary in the interest of the proper administration of justice.

Effects of the co-respondent mechanism

53. The ECtHR may at any stage of the proceedings decide to terminate the participation of the co-respondent, attaching due attention to any joint representation by the respondent and the co-respondent to that effect. In the absence of such a decision, both the respondent and the co-respondent continue to participate in the proceedings until the latter are terminated.

54. In cases of friendly settlements within the meaning of Article 39 ECHR, the agreement of both the original respondent and the co-respondent should be necessary.

55. In respect of unilateral declarations, it is understood that, for a violation in which both Parties - i.e. the original respondent and the co-respondent - are allegedly involved, such declarations would require the agreement of both Parties.

56. The respondent and the co-respondent should be entitled to make joint submissions to the ECtHR as regards their opinion about the allocation of responsibility in a given case. When delivering a judgment in cases involving co-respondents, it is understood that the ECtHR is free to develop its judicial practice as regards the allocation of responsibility between respondents. The ECtHR may, already now, identify in its judgments the act which is at the origin of a violation and hold the Parties jointly responsible if appropriate. It can be expected that this may become the general practice in cases where there would otherwise be a risk of assessing the distribution of competences between the EU and its member States, and that the respondent and the co-respondent will, in their submissions to the ECtHR, draw the attention of the latter to any such risk in the case at hand. It should however be recalled that the objective of the ECtHR's judgments is to rule on whether there has been a violation of the Convention and not to judge on the validity of an act or its

underlying legal provisions or to rule on the distribution of competencies between the EU and its member States.

57. Requests for a referral to the Grand Chamber within the meaning of Article 43 of the Convention may be made by any of the Parties involved, including the co-respondent Party who will be able to make such a request without prior consent of the original respondent. If the request for such a referral is accepted, it is understood that the Grand Chamber will examine the case as a whole, in respect of all alleged violations considered by the Chamber and with regard to all Parties involved.

58. Considering that Article 59 paragraph 4 states that the Convention shall come into force for any new High Contracting Party at the date of its deposit of the instrument of ratification, it is understood that the co-respondent mechanism will not have retroactive effect, *i.e.* it would not be applied to cases brought before the ECtHR prior to the date of the accession of the EU. The co-respondent mechanism may, however, apply with regard to any application introduced to the ECtHR after the EU has acceded, even where that case concerns acts by EU member States based on EU law which had entered into force prior to the accession.

59. The Accession Agreement requires that the EU shall adopt internal rules setting out the respective obligations of the EU and of its member States in relation to the functioning of the co-respondent mechanism. These rules should, for instance, indicate the circumstances in which a request to join the proceedings as a co-respondent could - or shall - be made to the ECtHR¹³, the modalities to agree on friendly settlements or unilateral declarations, and the possibility to make joint submissions to the ECtHR regarding the allocation of responsibility. The internal EU rules should also set out modalities to ensure the execution of ECtHR judgments in cases involving co-respondents, including with regard to the allocation of just satisfaction to the applicant. Moreover, more detailed rules on the functioning of this mechanism may also be included in the Rules of the Court.

Ensuring the prior involvement of the Court of Justice of the European Union in cases in which the European Union is a co-respondent

60. Cases in which the EU is a co-respondent would typically arise from individual applications against acts adopted by the authorities of EU member States for the application or implementation of EU law. In principle, the applicant will first have to refer the matter to the courts of the member State concerned. In accordance with Article 267 TFEU, those courts may or, in certain cases, must refer a question to the CJEU for a preliminary ruling on the interpretation and/or validity of the provisions of EU law at issue. However, if such a reference for a preliminary ruling were not made, the ECtHR would be required to adjudicate on an application calling into question provisions of EU law, without the CJEU having the opportunity to review the conformity of that law with fundamental rights as set out in the notification of that case.

61. That situation might not arise often, but it cannot be ruled out that a national court or and tribunal fails to avail itself of the possibility – or of the duty – to make a reference for a preliminary ruling. This would be a particularly sensitive issue as the parties to the case are merely in the position to suggest (but not to compel) to make such a reference, which is also the reason for not considering Article 267 TFEU as a legal remedy to be exhausted by the applicant before referring the matter to the ECtHR.

62. Therefore, in order to respect the principle of subsidiarity also in that situation, an internal EU procedure should be put in place with a view to ensure that the CJEU may have

¹³ For instance, when the alleged violation could have been avoided only by disregarding the EU law.

the opportunity to review, in the form of a ruling, the conformity of the EU act at issue with fundamental rights before the ECtHR completes its review. The CJEU would however not be automatically seized in that situation, but only upon a request made by an actor entitled to do so as defined by EU law (presumably, the Commission and/or the original respondent State). All parties to the proceedings before the ECtHR, and namely the respondents and the applicant, should have the right, albeit not the obligation, to make observations in the procedure before the CJEU. In the context of that procedure, the applicant might also be granted legal aid if necessary.

63. It should be noted that the EU legal act, the validity of which is assessed by the CJEU in the context of such procedure, is not identical with the individual act aggrieving the applicant. Rather, it constitutes the legal basis of the latter, which itself emanates from the respondent member State. In this respect, the procedure would not constitute a remedy within the meaning of Article 13 of the Convention.

64. The ruling of the CJEU would have no direct effect on the proceedings before the ECtHR and would leave unaffected the latter's independent jurisdiction under the Convention. It would be fully up to the ECtHR to assess, in each case, the consequences to be drawn from the CJEU's assessment of the compatibility of a EU legal act with fundamental rights.

65. The ruling of the CJEU may, however, have indirect effects, depending on the national law of the member State concerned. It would in any event inform the pleadings of the EU – in its capacity as a co-respondent – in the proceedings before the ECtHR.

66. In case the CJEU declares the EU legal act at issue invalid, such ruling may, under certain circumstances, lead to an anticipated termination of the procedure before the ECtHR. The concrete impact depends in the first place on the consequences the national law of the respondent member State attaches to the ruling of the CJEU. If that national law – autonomously – provides for a re-opening of the proceedings before domestic courts and if thereupon the alleged violation is fully remedied (or compensation offered to the applicant), the applicant may lose his victim status within the meaning of Article 34 of the Convention. It would obviously be for the ECtHR alone to assess, on the basis of its own criteria, whether this is the case. Conversely, if the national law of the respondent member State does not allow for a re-opening of the proceedings, the EU – in its capacity as a co-respondent – would be in a position to make a unilateral declaration recognising the alleged violation of the Convention which presents a "substantive link" with the EU legal act having been declared invalid. Hence the ECtHR may strike out the application, provided that it is satisfied, in accordance with its own criteria, that such unilateral declaration offers a sufficient basis for finding that respect for human rights does not require the continued examination of the case.

67. In case the CJEU does not declare the EU legal act at issue invalid, there is no – even indirect – effect of such ruling on the procedure before the ECtHR. The latter would continue to examine the merits of the application, on the basis of, *inter alia*, pleadings by the EU, in its capacity as a co-respondent. The latter may refer to the ruling of the CJEU.

68. It is understood that the procedure of the ECtHR should take into account the proceedings before the CJEU. The examination of the conformity of the act at issue with the Convention should not resume before the parties and possible third party interveners have had the opportunity to properly assess the possible consequences of the position adopted by the CJEU. As in any other co-respondent case, the applicant and possible third party interveners should be given the opportunity to submit observations in that regard to the ECtHR, within a time-limit to be prescribed in accordance with the rules of the ECtHR.

69. The procedures of the ECtHR should be applied and, if need be, adapted in order to take into account the proceedings before the CJEU. One possibility to reach this aim would be to fix the time-limits for observations by the EU as a co-respondent in such a way as to allow the CJEU to give its ruling within these time-limits. In order not to unduly delay the proceedings before the ECtHR, the internal rules of the EU shall ensure that the ruling is delivered under an accelerated procedure. In that regard, it has been observed that an accelerated procedure before the CJEU already exists and that the CJEU has been able to give rulings under that procedure within 6 to 8 months.

Article 5 – Inter-Party cases

70. The term “*High Contracting Party*” is already used in the text of Article 33 of the Convention. Changing the heading to “*Inter-Party cases*” would make it correspond more precisely to the substance of Article 33 after the accession. Pursuant to the accession, and in accordance with the current wording of Article 33, all States Parties to the Convention, including EU member States, could bring a case against the EU and *vice versa*.

71. It is recalled that EU member States are prevented from submitting disputes “*concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein*” (Article 344 of the Treaty on the functioning of the European Union). Such principle is also recalled in Article 3 of Protocol No. 8 relating to Article 6, paragraph 2 of the Treaty on European Union. It was noted that internal EU rules would deal with the question whether inter-party applications between EU member States, or between the EU and one of its member States, at least regarding acts adopted in accordance with EU law, should be allowed or not. In this respect, it is also recalled that the Convention does not oblige Parties to bring a case against another Party, but merely entitles them to do so.

Article 6 – Interpretation of Article 55 of the Convention

72. As regards Article 55 of the Convention which excludes other means of dispute settlement concerning the interpretation or application of the Convention, it is agreed that this provision should not be understood as preventing the operation of the rule set out in Article 344 of the Treaty on the Functioning of the European Union.

C – Institutional and Financial Issues

Article 7 - Election of judges

73. In accordance with the need to ensure the accession of the EU on an “equal footing” with the other High Contracting Parties, the judge elected in respect of the EU shall participate equally with the other judges in the work of the ECtHR and have the same status and duties. It is also recalled that, as laid down in Article 21, paragraphs 2 and 3 of the Convention, the judges of the ECtHR are independent and act in their individual capacity. The internal practice and the Rules of the Court shall deal with the effects that the presence of a judge elected in respect of the EU may have on the on the various formations in which the ECtHR may sit.

74. It is agreed that a delegation of the European Parliament should be entitled to participate, with the right to vote, in the sittings of the Parliamentary Assembly of the Council of Europe (and its relevant bodies) whenever it exercises its functions related to the election of judges under Article 22 of the Convention, and that the European Parliament be entitled to

the same number of representatives in the plenary Assembly as the State(s) entitled to the highest number of representatives pursuant to Article 26 of the Statute of the Council of Europe. For this purpose, an amendment to the Convention is necessary to create the legal basis for the participation of the European Parliament in the sittings of the Parliamentary Assembly when it acts as an organ of the Convention.

75. Detailed modalities for the participation of the European Parliament in the work of the Parliamentary Assembly and its relevant bodies are to be defined by the Parliamentary Assembly in its internal rules, after consultation with the European Parliament. It is also understood that the modalities for the selection of candidates in respect of the EU, to be submitted to the Parliamentary Assembly, will be defined by internal EU rules.

Article 8 - Participation of the EU in the Committee of Ministers of the Council of Europe

76. The question of the scope of the participation of the EU to the Committee of Ministers arises with respect to two main aspects.

77. On the one hand, the Convention explicitly gives to the Committee of Ministers of the Council of Europe a number of functions, the main one being, the supervision of the execution of the ECtHR's judgments under Articles 46 and of the terms of friendly settlements under Article 39. The Committee of Ministers is also entitled to request advisory opinions from the ECtHR on certain legal questions concerning the interpretation of the Convention and of the Protocols (Article 47) and to reduce, at the request of the plenary Court, the number of judges of the Chambers (Article 26, paragraph 2).

78. On the other hand, a number of questions directly linked with the functioning of the Convention system and its implementation are not explicitly dealt with in the Convention itself. The latter does not contain, for instance, specific provisions regarding its amendment and the adoption of additional protocols, or regarding the more detailed exercise of some of the Convention-based functions indicated above¹⁴. Nor does it deal with the adoption or the implementation of a number of other legal instruments and texts, such as recommendations, resolutions and declarations, which are directly related to the functioning or the implementation of the Convention. Such legal instruments and texts may be addressed, for example, to the member States of the Council of Europe in their capacity of High Contracting Parties to the Convention, to the Committee of Ministers itself¹⁵, to the ECtHR¹⁶ or, where appropriate, to other competent bodies¹⁷.

79. The accession of the EU to the Convention would put an end to the *de facto* identity between the High Contracting Parties to the Convention and the member States of the Council of Europe. It becomes therefore necessary (in the same way as in Article 7 above) to draw a clearer distinction between the "statutory" functions, which the Committee of Ministers performs in accordance with the Statute of the Council of Europe, and the "Convention-based" functions. The latter are performed by the Committee of Ministers in its capacity as an organ of the Convention on the basis of specific provisions of the latter, and when addressing issues directly linked to the functioning or the implementation of the Convention, including

¹⁴ For instance, the Committee of Ministers has adopted specific rules for the exercise of its supervision activity. On questions not specifically dealt with in these rules, the Committee of Ministers' ordinary rules apply.

¹⁵ See, for instance, Resolution CM/Res(2010)26 establishing an Advisory Panel of Experts on Candidates for the Election as Judge to the European Court of Human Rights, which entrusts the Committee of Ministers with the task of appointing the members of the Advisory Panel.

¹⁶ See, for instance, Resolution CM/Res(2004)3 on judgments revealing systemic problems.

¹⁷ See, for instance, the replies by the Committee of Ministers to the recommendations made by the Parliamentary Assembly following its own survey of the implementation of the Court's judgments.

the adoption of amending and additional protocols. On the basis of this distinction, it is considered that such "Convention-based" functions should be performed with the participation, including the right to vote, of all the High Contracting Parties to the Convention, including the European Union.

80. It is therefore proposed to amend Article 54 of the Convention by adding two new paragraphs, respectively referring to the Committee of Ministers acting as an organ of the Convention pursuant to specific provisions of the latter (i.e. Article 26, paragraph 2, Article 39, paragraph 4, Article 46 and Article 47), and when performing other functions as an organ of the Convention in matters directly linked with the functioning or the implementation of the Convention system. This shall include, as outlined above, taking decisions regarding the adoption or the implementation of amending and additional protocols to the Convention, as well as any other instrument or text addressed to the High Contracting Parties to the Convention or to the ECtHR, or relating to the functions of the Committee of Ministers as an organ of the Convention. The existing text of Article 54 remains as the third paragraph of the article, thereby preserving the powers, composition and prerogatives of the Committee of Ministers as a statutory organ of the Council of Europe.

Article 9 - Participation of the EU in the expenditure related to the Convention

81. According to Article 50 of the Convention, the expenditure on the ECtHR shall be borne by the Council of Europe. Pursuant to the accession, the EU should contribute to the expenditure of the entire Convention system alongside the other High Contracting Parties. It is understood that the EU accession, like the accession of any new High Contracting Party, should lead to an increase in the resources available for the Convention system. It is also noted that under the current system the amount of the contribution of each High Contracting Party is not linked to the ECtHR's workload in respect of that Party, but is based on the method of calculating the scales of member States' contributions to Council of Europe Budgets established by the Committee of Ministers in 1994. It is also recalled that the budget of the ECtHR and of the other entities involved in the functioning of the Convention system are part of the ordinary budget of the Council of Europe, and that the contribution of the EU would be clearly and exclusively affected to the financing of the Convention system.

82. The participation of the EU in the expenditure related to the Convention system would not require any amendment to the Convention. However, the calculation method of the EU contribution needs to be defined in the accession agreement, which would provide the legal basis in this respect. The proposed method aims at being as simple and stable as possible and, as such, does not necessarily require the participation of the EU to the budgetary procedure of the Council of Europe.

83. The relevant expenditure taken into account are those which are directly related to the Convention on which the accession will have an impact, namely: the costs of the ECtHR, of the process of supervision of the execution of its judgments and decisions, and also of the Parliamentary Assembly and of the Committee of Ministers, for their respective Conventional functions. In addition, administrative overhead costs related to the Convention system are considered (building, logistics, IT etc.). The amount of the relevant expenditure is then put in relation with the Ordinary budget of the Council of Europe (including the employer's contributions to the pensions), in order to identify the relative weight, in percentage, of such expenditure. On the basis of the relevant figures for the last years, this percentage is fixed in the accession agreement to X%. Accordingly, for each year (A), the amount of the expenditure related to the functioning of the Convention shall be considered as corresponding to X% of the Ordinary Budget of the Council of Europe for the previous year (A-1).

84. This percentage will constitute the basis to calculate annually the amount of expenditure to which the EU shall contribute. As to the determination of the rate of contribution of the EU to such expenditure, it is agreed that it shall be identical to that of the State(s) providing the highest contribution to the Ordinary Budget of the Council of Europe for the year, pursuant to the method of calculating the scales of member States' contributions to Council of Europe Budgets established by the Committee of Ministers in 1994, in its Resolution Res(94)31.

85. In order to ensure the stability of the calculation method proposed, a safeguard clause is added to the Accession Agreement to the effect that, if the actual relative weight of the expenditure related to the Convention system on the general budget varied substantially, the percentage fixed in the accession agreement shall be revised by agreement between the EU and the Council of Europe. If for two consecutive years the difference between the percentage calculated on the real figures and the percentage fixed in the accession agreement was more than 2,5 percentage points (i.e. given the percentage fixed at 40%, the real figure was below 37,5%, or above 42,5%), the percentage fixed in the accession agreement shall be revised. This mechanism shall obviously apply also to any new percentage resulting from subsequent agreements between the EU and the Council of Europe.

86. The technical and practical arrangements for the implementation of the provisions set out in the Accession Agreement can be determined in detail by the Council of Europe and the EU.

D – Miscellaneous and Final Provisions

Article 10 – Relations with other Conventions and Agreements

87. A number of other Council of Europe conventions and agreements are strictly linked to the Convention system, even though they are self-standing treaties. It is for this reason necessary to ensure that the EU, as a party to the Convention, respects the relevant provisions of such instruments and is, where appropriate, treated as if it were a party to them. This is the case, in particular, for the European Agreement relating to Persons Participating in Proceedings of the European Court of Human Rights (ETS No. 161), and of the Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe (ETS No. 162), which sets up the privileges and immunities granted to the Judges of the Court during the discharge of their duties. In addition, after the accession of the EU as a party to the Convention, the EU should also undertake to respect the privileges and immunities of other persons involved in the functioning of the Convention system, such as the staff of the Registry of the ECtHR, members of the Parliamentary Assembly and representatives in the Committee of Ministers, which are covered by the General Agreement on Privileges and Immunities of the Council of Europe (ETS No. 002) and its first Protocol (ETS No.010).

88. It is understood that the accession of the EU to such instruments and their amendment would require a cumbersome procedure. Moreover, the system of the General Agreement on Privileges and Immunities of the Council of Europe is only open to member States of the Organisation. Therefore, the Accession Agreement imposes an obligation on the EU on the one hand - as a Contracting Party to the Convention - to respect the provisions of these instruments, and on the other hand on other Contracting Parties to treat the EU as if it were a party to these instruments. These provisions are accompanied by other operative provisions regarding the duty to consult the EU about relevant events in the life of these

instruments (accessions, amendments, etc.) and the duties of the Secretary General, as depositary of these instruments, to notify the EU about such events.

89. The inclusion of these provisions in the Accession Agreement would also indirectly ensure their respect by future member States of the Council of Europe, that would not be parties to the Accession Agreement but would be requested to respect its provisions (see Article 12 below).

Article 11 – Signature and Entry into Force

90. This article is one of the usual final clauses included in treaties prepared within the Council of Europe, with the necessary adaptations to this specific Agreement such as, for instance, the fact that the Agreement should only be open to the High Contracting Parties to the Convention at the date of its opening for signature and to the EU.

91. As regards States becoming members of the Council of Europe and High Contracting Parties to the Convention after the opening for signature of this agreement, the possible need to ensure that they are bound by the provisions of the agreement which have “permanent” effects (i.e. the provisions which do not have as only effect the amendment of the Convention) shall be ensured otherwise, for instance by including among their obligations with a view to the accession to the Council of Europe the engagement to respect the provisions of the accession agreement which would still be applicable after its entry into force.

Article 12 – Reservations

92. Given the particular nature of the Accession Agreement, it is agreed that no reservations shall be allowed. This is without prejudice to the possibility, for the EU, to make reservations to the Convention, as indicated under Article 4.

Article 13 – Notifications

93. This article contains one of the usual final clauses included in treaties prepared within the Council of Europe, with the necessary adaptations to this specific Agreement.