



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 8 November 2011

16385/11

LIMITE

**FREMP 100
JAI 795
COHOM 257
COSCE 20**

NOTE

by : Presidency
to : COREPER
No. prev. doc. : 14842/11 FREMP 90 JAI 686 COHOM 228 COSCE 16

Subject : Accession of the European Union to the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR):
- State of play

A. Introduction

On 6 October 2011 Coreper took note of the state of play of the negotiations for the accession of the European Union to the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR) (doc. 14842/11).

At that meeting, it was noted that some delegations expressed concerns on several issues resulting from the draft accession agreement as elaborated by informal working group CDDH-UE (doc. CDDH-UE(2011)16).

In view of the meeting of CDDH in Strasbourg, which was scheduled to take place on 11-14 October 2011 and which was called to endorse the draft text and to submit it to the Committee of Ministers, it was therefore decided to inform the Union's negotiating partners about the fact that no unanimous EU position had yet been reached and that further internal discussions were needed.

Discussions have subsequently resumed in the Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons (FREMP), which has met on 25 October and on 3-4 November to examine the proposals of delegations for amendment of the draft accession agreement.

Substantial progress has been made at those meetings, thanks to the constructive attitude of all delegations. However, given the number and importance of the concerns expressed by delegations, further discussions will be needed at Working Party level.

With the present note the Presidency would like to inform Coreper about the state of play in these discussions.

B. Outstanding issues.

The following are the main issues raised and discussed by FREMP concerning the draft accession agreement.

1. Adaptations deriving from the particular nature of the EU as non-State contracting party.

The UK delegation has proposed several amendments to the draft agreement in order to take into account the particular nature of the EU as a non-State High Contracting Party and the specificities of its legal order.

Certain modifications to the draft agreement, and in particular to the provisions amending Article 59 ECHR, have been put to the attention of FREMP, which has positively taken note of the proposals and will continue examination at a later date. These proposals aim at better defining the meaning of certain terms employed by the ECHR and its Protocols with respect to the EU as a non-State party. They also aim at clarifying the concept of "jurisdiction" within the meaning of Article 1 ECHR, with regard to the EU as a party to the ECHR.

Other modifications have been proposed in the Preamble to the draft Accession agreement, to Article 1 (2) c) and Article 9.

These proposals will have to be reviewed at a future meeting of FREMP.

2. Scope of the Accession - provisions on CFSP

FREMP examined the proposal of the FR delegation to exclude in Article 1(2) (c) acts, measures and omissions based on Title V of TEU (provisions on a common foreign and security policy). Many delegations could not accept such an exclusion and considered that it would not be in conformity neither with TEU Article 6(2) nor with Protocol 8. Several delegations pointed out that such an exclusion, as proposed by France, would be too wide in the light of TFEU Article 275 and questioned the legal and political appropriateness of this exclusion. The possibilities of dealing with French concerns by way of a reservation were discussed. The French delegation provided clarifications as to its aims in securing such a carve-out.

In view of the legal and political complexity of the issue the Presidency considers that further discussions are necessary at FREMP level.

3. Co-respondent mechanism

In order to clarify the requirements that need to be met for the co-respondent mechanism to apply, the UK proposed to revert to an earlier draft of Articles 3(2) and (3) of the draft accession agreement. This amendment should be accompanied by further details in the future internal rules. Other delegations could not support this proposal. It was considered that the internal rules could set out further details on determining and limiting the use of the co-respondent mechanism. The UK delegation showed willingness to examine alternative paths to ease their concerns but highlighted that discussions were related to the future internal rules.

FREMP also examined the proposal of the UK delegation for a new provision (Article 3 (3a)) allowing a Member State to become a co-respondent where its national law was called into question.

While some delegations could go along with a change in that direction, most delegations did not support this and saw no need for such a change. The UK from its part demonstrated reluctance not to include such a new provision but showed willingness to examine alternative paths to ease their concerns.

On these issues, further discussions will follow in FREMP, also by examining possible draft proposals for the relevant internal rules.

4. Scope of the ECJ's prior involvement.

The French delegation suggested to amend Article 3 (6) of the draft accession agreement in order to better clarify the scope of the ECJ's powers in relation to the prior involvement mechanism set out in the provision. FREMP has taken note of the French delegation's proposal, which will need to be discussed further.

5. Judgements in case the Union and one or more Member States are co-respondents.

Both FR and UK delegations proposed to amend Article 3 (7) of the draft accession agreement to allow for an exception to the general rule whereby judgements against the EU and one or more Member States acting as co-respondents should be pronounced jointly.

According to these proposals for modification, the text of the draft accession agreement should be supplemented by stating that, when so requested by the EU and the co-respondent Member State(s), the Court should differentiate their responsibility in a judgement finding a violation of the Convention.

The proposal was discussed by FREMP and was deemed as acceptable by most delegations.

6. Participation of the Union in the Committee of Ministers under Articles 39 and 46 ECHR

In accordance with the negotiating directives, which aim at a participation of the Union in the European Court of Human Rights and other bodies of the Council of Europe whose activities are linked to the purpose of the ECHR on equal footing with other High Contracting Parties, the draft accession agreement provides for the participation of the Union in activities of the Committee of Ministers, among others according to Articles 39 (Friendly settlements) and 46 (Binding force and execution of judgments) of the ECHR.

In order to address the question of the majority of the EU Member States in the Council of Europe and the consequent issue of voting balance in the Committee of Ministers when carrying out the activities foreseen in the aforementioned Articles, special voting arrangements have been provided in the draft accession agreement.

The UK and FR delegations raised strong objections to these special arrangements and to the principle set out in Article 7 (2) of the draft accession agreement, and specified by the proposed amendments to Rule 18, whereby the voting rights on the EU and its Member States would be limited when participating in the exercise of the supervisory competences of the Committee of Ministers concerning judgements in which the EU, on its own, or along with one or more Member States, has been found in breach of the Convention.

Both delegations considered that this would set a precedent with regard to other international fora in which the EU and its Member States participate jointly. As one possible solution to these concerns the FR delegation proposed to maintain the current voting rules, giving the EU and its Member States full voting rights also in the above cases, but providing for a procedural safeguard mechanism whereby High Contracting Parties which are not EU Member States may question decisions concerning the correct execution of a judgement

Other delegations contested the legal and political advisability of deviating from the principles set out in the draft accession agreement, noting among others that such a limitation would be necessary to preserve the impartiality of the Committee of Ministers in the exercise of its functions according to Articles 39 and 46 ECHR. As was pointed out during the discussion, this impartiality should not only be preserved in the concrete operation of the Committee of Ministers, but also appear to the outside as being preserved, in order to protect the standing of the Committee in the exercise of its delicate functions.

As to the proposed argument whereby this limitation could amount to a precedent in respect of other international fora, it was deemed not conclusive considering the specificity of the supervisory mechanism entrusted to the Committee of Ministers.

It must be noted that the arrangement set out in the text of the draft accession agreement has been strongly advocated by the EU's negotiating partners.

Further discussions will be needed in FREMP in order to devise possible compromise solutions.

7. Participation of the EU to the expenditures related to the Convention.

The UK delegations insisted on further clarification of the financial implications of the proposed rule on participation of the EU to the expenditures related to the Convention, stating that this was to be considered as a precondition for its assent to the draft Accession Agreement.

The Commission, while reiterating the considerations already contained in the draft explanatory report to the Accession Agreement (see para. 82-88), stated that further specification is subject to the finalisation of the agreement and of the internal rules which will be discussed at EU level.

C. Conclusions.

The Presidency will continue to inform Coreper on the developments in the discussions. Furthermore, once FREMP has thoroughly debated the issues at stake and identified clear alternative options to accommodate the concerns of all Member States, the Presidency will turn again to Coreper to obtain its guidance as to the way forward in the negotiations.

It is finally necessary to recall that the expression of any position of the EU vis-à-vis the negotiating partners, including any request to re-open negotiations on the draft agreement on specific points, may take place only after an acceptable compromise agreement has been found among all Member States.
