



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 4 November 2011

DS 1675/11

Friends of Presidency (FREMP)

(Brussels, 4 November 2011)

ACCESSION OF THE EUROPEAN UNION TO THE ECHR

WORKING DOCUMENT FROM THE PRESIDENCY

I. INTRODUCTION

1. The Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons (further referred to as FREMP) at its meeting on 3 November 2011 examined outstanding issues as raised by France¹ and UK² as well as the issues listed in the Presidency paper,³ prepared on the basis of the outcome of the FREMP meeting on 25 October 2011.
2. On the basis of discussions on 3 November 2011 and in preparation of Coreper on 10 November 2011 delegations are invited to examine the issues as set out in section II at the Friends of Presidency meeting (FREMP) on 4 November 2011.

¹ DS 1636/11

² DS 1624/11

³ DS1656/11

II. DRAFT AGREEMENT ON THE ACCESSION OF THE EUROPEAN UNION TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS ⁴

1) Preamble

3. FREMP examined the Presidency compromise proposal to word the relevant paragraph of the preamble as follows:

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

4. In the light of discussions on 3 November 2011 the Presidency concludes that this compromise proposal is acceptable to delegations.

2) Article 1(2) (c)

UK proposal

5. FREMP examined the Presidency compromise proposal proposing that the relevant section of the draft Accession Agreement should be worded as follows:

c. Accession to the Convention and the Protocols thereto shall impose on the European Union obligations with regard only to acts, measures or omissions of its institutions, bodies, offices or agencies (...). Nothing in the Convention, the Protocols thereto, or the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, shall require the European Union to perform an act or adopt a measure for which it has no competence under European Union law.

⁴ Draft Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, CDDH (2011) 009.

6. In addition the Presidency proposed to amend paragraph 21 of the explanatory report as regards the scope and effects of EU accession.
7. The UK delegation could not accept the Presidency compromise proposal and insisted on keeping the rest of the provision as set out in the UK drafting proposal according to which Article 1(2) (c) should read as follows:

c. Accession to the Convention and the Protocols thereto shall impose on the European Union obligations with regard only to acts, measures or omissions of its institutions, bodies, offices or agencies. Nothing in the Convention, the Protocols thereto, or the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, shall impose obligations on the European Union in respect of a provision of the Treaty on European Union, the Treaty on the Functioning of the European Union, the Treaty establishing the European Atomic Energy Community, or any other provision having the same legal value pursuant to those instruments, or in respect of an act, measure or omission which is required rather than permitted by those instruments. Nothing in the Convention, the Protocols thereto, or the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, shall require the European Union to perform an act or adopt a measure for which it has no competence under European Union law.

8. Other delegations could not go along with this proposal as regards the second sentence. The UK delegation showed willingness to examine alternative paths to ease their concerns. The Presidency considers that further discussions are necessary.

FR proposal

9. FREMP examined the proposal of the French 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).

10. 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. 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.

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

3) Article 1 (2) (c)(bis), Article 1(2) (d) and (e), new proposed 1(4)

12. In the light of the informal discussions and by way of compromise the Presidency invites delegations to examine possible drafting along the following lines:

a) New wording of Article 59 (2) (d) and (e):

"d. Where any of the terms 'States', 'State', 'State Party' or 'States Parties' appear in paragraph 1 of Article 10 and in Article 17 of this Convention, as well as in Articles 1 and 2 of the Protocol, in Article 6 of Protocol No. 6, in Article 3 of Protocol No. 7, in Paragraphs 1 and 2 of Article 4 of Protocol No. 7, in Articles 5 and 7 of Protocol No. 7, in Article 3 of Protocol No. 12, and in Article 5 of Protocol No. 13, they shall be understood as referring also to the European Union as a non-State party to this Convention."

"e. Where any of the terms 'national security', 'national law', 'economic well-being of the country', 'territorial integrity', 'administration of the State', 'national laws', 'national authority', 'life of the nation', or 'domestic' appear in Paragraph 1 of Article 6, Paragraph 1 of Article 7, Paragraph 2 of Article 8, Paragraph 2 of Article 10, Paragraph 2 of Article 11, Article 12, Article 13, Paragraph 1 of Article 15 and Paragraph 1 of Article 35 of this Convention they shall be understood as relating also, mutatis mutandis, to the European Union, insofar as they relate to matters falling within the competence of the European Union."

b) New Article 59 (2) (f):

"f. Insofar as the term 'everyone within their jurisdiction' appearing in Article 1 of this Convention refers to situations related to the territory of a High Contracting Party, it shall be understood, with regard to the European Union, as referring to situations related to the territories of the member States of the European Union to which the Treaty on European Union and the Treaty on the Functioning of the European Union apply. Insofar as that term refers to situations other than related to the territory of a High Contracting Party, it shall be understood, with regard to the European Union, as referring to situations where, if the alleged violation in question had been attributable to a High Contracting Party which is a State, the person concerned would have been within the jurisdiction of that High Contracting Party."

c) New Article 59 (2) (g):

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

d) More detailed language in para. 24 of the explanatory report (replacing current first sentence):

- The inclusion of the terms 'national security', 'economic well-being of the country', 'territorial integrity' and 'life of the nation' in the "mutatis mutandis" list is justified since the EU institutions may be lead, within the limits of their competences as defined autonomously by the Treaty on European Union and the Treaty on the Functioning of the European Union, to adopt measures restricting the rights and freedoms defined in the Convention. The objectives of public interest pursued by such measures may in some cases come under the said terms, as interpreted autonomously by the ECourtHR.

- The inclusion of the terms 'national law', 'national laws and 'national authority' in the "mutatis mutandis" list is justified since those terms should be understood as referring to the internal legal order of a High Contracting Party [possibly merging with current last sentence of para. 24].

- The inclusion of the term 'administration of the State' in the "mutatis mutandis" list is justified since pursuant to Articles 298 and 336 of the Treaty on the Functioning of the European Union, the institutions, bodies, offices and agencies of the EU have the support of a public administration and of a civil service.

4) Articles 3(2) and (3)

13. 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). This amendment should be accompanied by further details in the future internal rules.
14. 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.

15. In the light of the discussions, the Presidency considers that further discussions are necessary at Coreper level.

5) Article 3(3) (a)

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

17. 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.

18. In the light of the discussions, the Presidency considers that further discussions are necessary.

6) Article 3(6)

19. The French delegation presented a new drafting proposal as follows:

*In proceedings to which the European Union is co-respondent, if the Court of Justice of the European Union has not yet assessed the compatibility with **or interpretation with regard to** the Convention rights at issue of the provision of European Union law as under paragraph 2 of this Article, then sufficient time shall be afforded for the Court of Justice of the European Union to make such an assessment and thereafter for the parties to make observations to the Court. The European Union shall ensure that such assessment is made quickly so that the proceedings before the Court are not unduly delayed. The provisions of this paragraph shall not affect the powers of the Court **in matters relating to the interpretation of the Convention.***

20. Delegations are invited to examine this proposal at the meeting on 4 November 2011.

7) Article 3 (7)

21. 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, 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.
22. The proposal was discussed by FREMP and was deemed as acceptable by most delegations.
23. The Presidency therefore suggests to mandate the negotiator to propose an amendment of the draft Accession agreement along the lines suggested by the UK and FR delegations.

8) Article 7 (2) and Rule 18 of the Rules of procedure of the Committee of Ministers

24. The UK and FR delegations raised strong objections 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.
25. Both delegations noted 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 delegations 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.

26. 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 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.
27. Some delegations however expressed interest in the FR proposal to address the issue via the introduction of specific procedural safeguards, rather than via an amendment of the voting rules, requesting further consideration of the matter.
28. In the light of the discussions, the Presidency considers that further discussions are necessary at Coreper level.

9) Article 8

29. 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.
30. 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.
31. The Presidency would invite delegations to consider this argument, and to come forward with any concrete proposal on the proposed text of Article 8 they deem appropriate.

10) Article 9 (1)

32. The UK delegation proposed to amend the first sentence of Article 9 (1) to read: "1. The European Union shall, within the limits of its competences".

33. This suggestion was deemed acceptable by FREMP. The Presidency therefore suggests to mandate the negotiator to ask for its addition to the draft Accession Agreement.

III. CONCLUSIONS

34. The Presidency invites Friends of Presidency (FREMP) to examine the Presidency proposals at its meeting on 4 November 2011 and to agree on them with a view to preparing the Coreper of 10 November 2011.
