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Delegations will find attached Commission document SEC(2010) 305 final/3.

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Brussels, 17.3.2010
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Recommendation for a

**COUNCIL DECISION**

**authorising the Commission to negotiate the Accession Agreement of the European Union to the European Convention for the protection of Human Rights and Fundamental Freedoms**

## EXPLANATORY MEMORANDUM

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

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

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

### II. FUNDAMENTAL RIGHTS PROTECTION IN THE EUROPEAN UNION

The unique model of European integration brought about by the establishment of the three Communities has been conceived from the very beginning as a Community of law. The European Court of Justice (ECJ) held early on that this new autonomous legal order was entrusted with public powers for the common good of European nations and conferred enforceable fundamental freedoms on citizens. Since 1969[1] the ECJ affirmed that the respect for fundamental rights forms an integral part of the general principles of law the observance of which the ECJ ensures. In safeguarding those rights, the ECJ draws inspiration from constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, the ECHR having special significance in that respect. Article 6(3) TEU which has been introduced by the Treaty of Maastricht, confirmed this case-law on the level of primary law. Today, the European Union defines itself as a Union of values (Article 2 TEU).

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

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

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

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

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

Moreover, the accession opens the way for the Strasbourg Court to attribute acts adopted by the institutions or bodies of the Union directly to the Union instead of attributing them – albeit implicitly – to Member States collectively[2]. Hence, as a consequence of the accession, the specificity of the Union as a distinct legal entity vested with autonomous powers will henceforth adequately be reflected in proceedings before the Strasbourg Court. Likewise, the Union will have at its disposal all rights which the ECHR gives to the Contracting Parties to defend the human rights conformity of its acts before the Strasbourg Court.

## IV. PRIMARY LAW FRAMEWORK FOR THE ACCESSION

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

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

**SENTENCE DELETED**

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

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

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

## V. BASIC PRINCIPLES GOVERNING THE ACCESSION

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

**PARAGRAPHS DELETED**

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**PAGES 5-11 DELETED**

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## VII. THE CHOICE OF THE UNION NEGOTIATOR

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

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Recommendation for a

**COUNCIL DECISION**

**authorising the Commission to negotiate the Accession Agreement of the European Union to the European Convention for the protection of Human Rights and Fundamental Freedoms**

**RECOMMENDATION**

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

- to authorise the opening of negotiations on behalf of the European Union in order to agree with the Contracting Parties to the European Convention for the protection of Human Rights and Fundamental Freedoms to the accession of the European Union to that Convention;
- to nominate the Commission as the Union negotiator;
- to appoint a special committee to assist the Commission in this task;
- to adopt the negotiating directives contained in the Annex;
- **POINT DELETED**

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**ANNEX**

**Negotiating directives**

**DELETED**

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