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Final Version

8th 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

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Draft legal instruments on the accession of the European Union to the European Convention on Human Rights

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Strasbourg, Monday 20 June (9.30 a.m.) – Friday 24 June 2011 (4.00 p.m.)

Agora, Room G04
Council of Europe

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I. Draft Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms

Preamble

The High Contracting Parties to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (ETS No. 5, hereinafter referred to as "the Convention"), being member States of the Council of Europe, and the European Union,

Having regard to Article 59, paragraph 2, of the Convention;

Considering that the European Union is founded on the respect for human rights and fundamental freedoms;

Considering that the accession of the European Union to the Convention will enhance coherence in human rights protection in Europe;

Considering, in particular, that the individual should have the right to submit the acts, measures or omissions of the European Union to the external control of the European Court of Human Rights (hereinafter referred to as "the Court");

Considering that, having regard to the specific legal order of the European Union, its accession requires certain adjustments to the Convention system to be made by common agreement,

Have agreed as follows:

Article 1 – Scope of the accession and amendments to Article 59 of the Convention

1. The European Union hereby accedes to the Convention, to the Protocol to the Convention and to Protocol No. 6 to the Convention.

2. Paragraph 2 of Article 59 of the Convention shall be amended to read as follows:

"2.*a*. The European Union may accede to this Convention and the Protocols thereto. Accession of the European Union to the Protocols shall be governed, *mutatis mutandis*, by Article 6 of the Protocol, Article 7 of Protocol No. 4, Articles 7 to 9 of Protocol No. 6, Articles 8 to 10 of Protocol No. 7, Articles 4 to 6 of Protocol No. 12 and Articles 6 to 8 of Protocol No. 13.

b. The status of the European Union as a High Contracting Party to the Convention and the Protocols thereto shall be further defined in the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms.

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, or of persons acting on their behalf. Nothing in the Convention or the Protocols thereto shall require the European Union to perform an act or adopt a measure for which it has no competence under European Union law.

d. Where any of the terms 'State', 'State Party', 'States' 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, Article 2 of Protocol No. 4, Articles 2 and 6 of Protocol No. 6, Articles 3, 4, 5 and 7 of Protocol No. 7, Article 3 of Protocol No. 12, and Article 5 of Protocol No. 13, they shall be understood as referring also to the European Union.

e. Where any of the terms 'national security', 'national law', 'national laws', 'national authority', 'life of the nation', 'country', 'administration of the State', 'territorial integrity', 'territory of a State' or 'domestic' appear in Articles 5, 6, 7, 8, 10, 11, 12, 13, 15 and 35 of this Convention, in Article 2 of Protocol No. 4 and in Article 1 of Protocol No. 7, they shall be understood as relating also, *mutatis mutandis*, to the European Union."

3. Paragraph 5 of Article 59 of the Convention shall be amended to read as follows:

"5. The Secretary General of the Council of Europe shall notify all the Council of Europe member States and the European Union of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it or acceded to it, and the deposit of all instruments of ratification or accession which may be effected subsequently."

Article 2 – Reservations to the Convention and its Protocols

1. The European Union may, when signing or expressing its consent to be bound by the provisions of this Agreement in accordance with Article 10, make reservations to the Convention and to the Protocol in accordance with Article 57 of the Convention.

2. Paragraph 1 of Article 57 of the Convention shall be amended to read as follows:

"1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. The European Union may, when acceding to this Convention, make a reservation in respect of any particular provision of the Convention to the extent that any law of the European Union then in force is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article."

Article 3 – Co-respondent mechanism

1. Article 36 of the Convention shall be amended as follows:

a. The heading of Article 36 shall be amended to read as follows: "Third party intervention and co-respondent".

b. The following paragraph shall be added at the end of Article 36:

"4. The European Union or a member State of the European Union may become a co-respondent to proceedings by decision of the Court in the circumstances set out in the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms. A co-respondent is a party to the case. The admissibility of an application shall be assessed without regard to the participation of a co-respondent in the proceedings."

2. Where an application is directed against one or more member States of the European Union, the European Union may become a co-respondent to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the Convention rights at issue of a provision of European Union law, notably where that violation could have been avoided only by disregarding an obligation under European Union law.

3. Where an application is directed against the European Union, the European Union member States may become co-respondents to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the Convention rights at issue of a provision of the Treaty on European Union, the Treaty on the Functioning of the European Union or any other provision having the same legal value pursuant to those instruments, notably where that violation could have been avoided only by disregarding an obligation under those instruments.

4. Where an application is directed against and notified to both the European Union and one or more of its member States, the status of any respondent may be changed to that of a co-respondent if the conditions in paragraph 2 or paragraph 3 of this Article are met.

5. A High Contracting Party shall become a co-respondent only at its own request and by decision of the Court. The Court shall seek the views of all parties to the proceedings. When determining a request of this nature the Court shall assess whether, in the light of the reasons given by the High Contracting Party concerned, it is plausible that the conditions in paragraph 2 or paragraph 3 of this Article are met.

6. 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 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.

7. The respondent and the co-respondent shall appear jointly in the proceedings before the Court.

8. This Article shall apply to applications submitted from the date of entry into force of this Agreement.

Article 4 – Inter-Party cases

1. The first sentence of paragraph 2 of Article 29 of the Convention shall be amended to read as follows:

> "A Chamber shall decide on the admissibility and merits of inter-Party applications submitted under Article 33".

2. The heading of Article 33 of the Convention shall be amended to read as follows:

> "Article 33 – Inter-Party cases".

Article 5 – Interpretation of Articles 35 and 55 of the Convention

Proceedings before the Court of Justice of the European Union shall be understood as constituting neither procedures of international investigation or settlement within the meaning of Article 35, paragraph 2.*b*, of the Convention, nor means of dispute settlement within the meaning of Article 55 of the Convention.

Article 6 – Election of judges

1. A delegation of the European Parliament shall be entitled to participate, with the right to vote, in the sittings of the Parliamentary Assembly of the Council of Europe whenever the Assembly exercises its functions related to the election of judges in accordance with Article 22 of the Convention. The number of representatives of the European Parliament shall be the same as the highest number of representatives to which any State is entitled under Article 26 of the Statute of the Council of Europe.

2. The modalities of the participation of representatives of the European Parliament in the sittings of the Parliamentary Assembly of the Council of Europe and its relevant bodies shall be defined by the Parliamentary Assembly of the Council of Europe, in co-operation with the European Parliament.

Article 7 – Participation of the European Union in the Committee of Ministers of the Council of Europe

1. The European Union shall be entitled to participate in the Committee of Ministers, with the right to vote, when the latter takes decisions:

a. under Article 26, paragraph 2, Article 39, paragraph 4, Article 46, paragraphs 2 to 5, or Article 47 of the Convention;

b. regarding the adoption of Protocols to the Convention;

c. regarding the adoption or implementation of any other instrument or text addressed to the Court or to all High Contracting Parties to the Convention, or relating to the functions exercised by virtue of the Convention by the Committee of Ministers or the Parliamentary Assembly of the Council of Europe.

2. The exercise of the right to vote by the European Union and its member States shall not prejudice the effective exercise by the Committee of Ministers of its supervisory functions under Articles 39 and 46 of the Convention. In particular, the following shall apply.

a. Where the Committee of Ministers supervises the fulfilment of obligations either by the European Union alone, or by the European Union and one or more of its member States jointly, it derives from the European Union treaties that the European Union and its member States express positions and vote in a co-ordinated manner. The Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements shall be adapted to ensure that the Committee of Ministers effectively exercises its functions in those circumstances.

b. Where the Committee of Ministers otherwise supervises the fulfilment of obligations by a member State of the European Union, the European Union is precluded for reasons pertaining to its internal legal order from expressing a position or exercising its right to vote. The European Union treaties do not oblige the member States of the European Union to express positions or to vote in a co-ordinated manner.

c. Where the Committee of Ministers supervises the fulfilment of obligations by a High Contracting Party other than the European Union or a member State of the European Union, the European Union treaties do not oblige the member States of the European Union to express positions or to vote in a co-ordinated manner, even if the European Union expresses its position or exercises its right to vote.

Article 8 – Participation of the European Union in the expenditure related to the Convention

1. The European Union shall pay an annual contribution dedicated to the expenditure related to the functioning of the Convention. This annual contribution shall be in addition to contributions made by the other High Contracting Parties. Its amount shall be equal to 34% of

the highest amount contributed in the previous year by any State to the Ordinary Budget of the Council of Europe.

2. *a.* If the amount dedicated within the Ordinary Budget of the Council of Europe to the expenditure related to the functioning of the Convention, expressed as a proportion of the Ordinary Budget itself, deviates in each of two consecutive years by more than 2.5 percentage points from the percentage indicated in paragraph 1, the Council of Europe and the European Union shall, by agreement, amend the percentage in paragraph 1 to reflect this new proportion.

b. For the purpose of this paragraph, no account shall be taken of:

- a decrease in absolute terms of the amount dedicated within the Ordinary Budget of the Council of Europe to the expenditure related to the functioning of the Convention as compared to the year preceding that in which the European Union becomes a Party to the Convention;

- an increase in the amount dedicated within the Ordinary Budget of the Council of Europe to the expenditure related to the functioning of the Convention, expressed as a proportion of the Ordinary Budget itself, where this results from a decrease in absolute terms of the Ordinary Budget and either no change or a decrease in absolute terms of the amount dedicated within it to the expenditure related to the functioning of the Convention.

c. The percentage that results from an amendment under paragraph 2.a may itself later be amended in accordance with this paragraph.

3. For the purpose of this Article, the expenditure related to the functioning of the Convention comprises the total expenditure on:

a. the Court;
b. the supervision of the execution of judgments of the Court; and
c. the functioning, when performing functions under the Convention, of the Committee of Ministers, the Parliamentary Assembly and the Secretary General of the Council of Europe,

increased by 15% to reflect related administrative overhead costs.

4. Practical arrangements for the implementation of this Article may be determined by agreement between the Council of Europe and the European Union.

Article 9 – Relations with other Agreements

1. The European Union shall respect the provisions of:

a. Articles 1 to 6 of the European Agreement relating to Persons Participating in Proceedings of the European Court of Human Rights of 5 March 1996 (ETS No. 161);

b. Articles 1 to 19 of the General Agreement on Privileges and Immunities of the Council of Europe of 2 September 1949 (ETS No. 2) and Articles 2 to 6 of its Protocol of 6 November 1952 (ETS No. 10), in so far as they are relevant to the operation of the Convention; and

c. Articles 1 to 6 of the Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe of 5 March 1996 (ETS No. 162).

2. For the purpose of the application of the Agreements and Protocols referred to in paragraph 1, the Contracting Parties to each of them shall treat the European Union as if it were a Contracting Party to that Agreement or Protocol.

3. The European Union shall be consulted before any Agreement or Protocol referred to in paragraph 1 is amended.

4. With respect to the Agreements and Protocols referred to in paragraph 1, the Secretary General of the Council of Europe shall notify the European Union of:

a. any signature;

b. the deposit of any instrument of ratification, acceptance, approval or accession;

c. any date of entry into force in accordance with the relevant provisions of those Agreements and Protocols; and

d. any other act, notification or communication relating to those Agreements and Protocols.

Article 10 – Signature and entry into force

1. The High Contracting Parties to the Convention at the date of the opening for signature of this Agreement and the European Union may express their consent to be bound by:

a. signature without reservation as to ratification, acceptance or approval; or

b. signature with reservation as to ratification, acceptance or approval, followed by ratification, acceptance or approval.

2. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

3. This Agreement shall enter into force on the first day of the month following the expiration of a period of three months after the date on which all High Contracting Parties to the Convention mentioned in paragraph 1 and the European Union have expressed their consent to be bound by the Agreement in accordance with the provisions of the preceding paragraphs.

4. The European Union shall become a Party to the Convention, to the Protocol to the Convention and to Protocol No. 6 to the Convention at the date of entry into force of this Agreement.

Article 11 – Reservations

No reservation may be made in respect of the provisions of this Agreement.

Article 12 – Notifications

The Secretary General of the Council of Europe shall notify the European Union and the member States of the Council of Europe of:

a. any signature without reservation in respect of ratification, acceptance or approval;

b. any signature with reservation in respect of ratification, acceptance or approval;

c. the deposit of any instrument of ratification, acceptance or approval;

d. the date of entry into force of this Agreement in accordance with Article 10;

e. any other act, notification or communication relating to this Agreement.

In witness whereof the undersigned, being duly authorised thereto, have signed this Agreement.

Done at ..... the ....., in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe and to the European Union.

II. Draft Rule to be added to the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements

Rule 18 – Judgments and friendly settlements in cases to which the European Union is a party

Where the Committee of Ministers supervises the fulfilment of obligations either by the European Union alone, or by the European Union and one or more of its member States jointly, the High Contracting Parties shall:

a. without prejudice to the provisions under sub-paragraphs *b* and *c*, consider decisions by the Committee of Ministers as adopted if a simple majority of the representatives entitled to sit on the Committee on behalf of those High Contracting Parties that are not member States of the European Union is in favour;

b. consider decisions by the Committee of Ministers under Rules 10 and 11 as adopted if two thirds of the representatives entitled to sit on the Committee on behalf of those High Contracting Parties that are not member States of the European Union are in favour; and

c. consider decisions by the Committee of Ministers under Rule 17 as adopted if, in addition to the majority set out in Article 20.*d* of the Statute of the Council of Europe, a simple majority of the representatives casting a vote on behalf of those High Contracting Parties that are not member States of the European Union is in favour.

III. DRAFT 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 human rights in Europe.

2. Discussed since the late 1970s, the accession became a legal obligation under the Treaty on European Union when the Treaty of Lisbon came into force on 1 December 2009. Pursuant to Article 6, paragraph 2, of the Treaty on European Union, "[t]he Union shall accede to the [Convention]. Such accession shall not affect the Union's competences as defined in the Treaties". Protocol No. 8 to the Treaty of Lisbon set out a number of further requirements for the conclusion of the Accession Agreement. Protocol No. 14 to the Convention, which was adopted in 2004 and which entered into force on 1 June 2010, amended Article 59 of the Convention to allow the EU to accede to it.

I. Need for an Accession Agreement

3. The above provisions, although necessary, were not sufficient to allow for an immediate accession of the EU. The Convention, as amended by Protocols Nos. 11 and 14, was drafted to apply only to Contracting Parties who are also member States of the Council of Europe. As the EU is neither a State nor a member of the Council of Europe, and has its own specific legal system, its accession requires certain adaptations to the Convention system. These include: amendments to provisions of the Convention to ensure that it operates effectively with the participation of the EU; supplementary interpretative provisions; adaptations of the procedure before the European Court of Human Rights (hereinafter referred to as "the Court") to take into account the characteristics of the legal order of the EU, 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 is required.

4. It was therefore necessary to establish, by common agreement between the EU and the current High Contracting Parties to the Convention, the conditions of accession and the adjustments to be made to the Convention system.

5. As a result of the accession, the acts, measures and omissions of the EU, like every other High Contracting Party, will be subject to the external control exercised by the Court in the light of the rights guaranteed under the Convention. 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 Court to assess the conformity of EU law with the provisions of the Convention will not prejudice the principle of the autonomous interpretation of the EU law.

6. The EU is founded on the respect for fundamental rights, the observance of which is ensured by the Court of Justice of the European Union (hereinafter referred to as "the CJEU") as well as by the courts of the EU member States; accession of the EU to the Convention will further enhance the coherence of the judicial protection of human rights in Europe.

7. As general principles, the Accession Agreement aims to preserve the equal rights of all individuals under the Convention, the rights of applicants in the Convention procedures, and the equality of all High Contracting Parties. The current control mechanism of the Convention should, as

far as possible, be preserved and applied to the EU in the same way as to other High Contracting Parties, by making only those adaptations that are strictly necessary. The EU should, as a matter of principle, accede to the Convention on an equal footing with the other Contracting Parties, that is, with the same rights and obligations. It was, however, acknowledged that, because the EU is not a State, some adaptations would be necessary. It is also understood that the existing rights and obligations of the States Parties to the Convention, whether or not members of the EU, should be unaffected by the accession, and that the distribution of competences between the EU and its member States and between the EU institutions shall be respected.

II. Principal stages in the preparation of the Accession Agreement

8. Before the elaboration of this Agreement, the accession of the EU to the Convention had been debated on several occasions.

9. The Steering Committee for Human Rights (CDDH) adopted at its 53rd meeting in June 2002 a study[1] 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, which it transmitted to the Convention on the Future of Europe, convened following the Laeken Declaration of the European Council (December 2001), in order to consider the key issues arising for the EU's future development with a view to assisting future political decision making about such accession.

10. When drafting Protocol No. 14 to the Convention in 2004, the High Contracting Parties decided to add a new paragraph to Article 59 of the Convention providing for the possible accession of the EU. It was, however, noted even at that time that further modifications to the Convention were necessary to make such accession possible from a legal and technical point of view.[2] Such modifications could be made either in an amending protocol to the Convention, or in an accession treaty between the EU and the States Parties to the Convention.

11. The entry into force of the Treaty of Lisbon in December 2009 and of Protocol No. 14 to the Convention in June 2010 created the necessary legal preconditions for the accession.

12. The Committee of Ministers adopted, at the 1085th meeting of the Ministers' Deputies (26 May 2010), ad hoc terms of reference for the CDDH to elaborate, in co-operation with representatives of the EU, a legal instrument, or instruments, setting out the modalities of accession of the EU to the European Convention on Human Rights, including its participation in the Convention system[3]. On the EU side, the Council of the EU adopted on 4 June 2010 a Decision authorising the European Commission to negotiate an agreement for the EU to accede to the Convention.

13. The CDDH entrusted this task to 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. This informal working group (CDDH-UE) held in total eight working meetings with the European Commission, reporting regularly to the CDDH on progress and on outstanding issues. In the context of these meetings, the informal group also held two exchanges of views with representatives of civil society, who regularly submitted comments on the working documents.

14. In the context of the regular meetings which take place between the two courts, delegations from the Court and the CJEU discussed on 17 January 2011 the accession of the EU to the Convention, and in particular the question of the possible prior involvement of the CJEU in cases to which the EU is a co-respondent. The Joint Declaration by the Presidents of the two European courts

1. Document CDDH(2002)010 Addendum 2.
2. See the explanatory report to Protocol No. 14, paragraph 101.
3. CM/Del/Dec(2010)1085, of 26 May 2010.

summarising the results of the discussion provided valuable reference and guidance for the negotiation.

15. 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 ...

III. Comments on relevant provisions of the Agreement

Article 1 – Scope of the accession and amendments to Article 59 of the Convention

16. It was decided that, upon its entry into force, the Accession Agreement would simultaneously amend the Convention and include the EU among its Parties, without the EU needing to deposit a further instrument of accession. This would also be the case for the EU's accession to the Protocol and to Protocol No. 6. Subsequent accession by the EU to other Protocols would require the deposit of separate accession instruments.

17. The amendments to the Convention concern paragraphs 2 and 5 of Article 59.

18. Article 59, paragraph 2, of the Convention, as amended, defines the scope of the accession of the EU to the Convention. It is divided into five sub-paragraphs.

Possible accession to other Protocols

19. Under paragraph 2.*a*, a provision is added to Article 59, of the Convention to permit the EU to accede to the Protocols to the Convention. To ensure that this provision can serve as a legal basis for the accession to those Protocols, Article 59, paragraph 2.*a*, states that the provisions of the Protocols concerning signature and ratification, entry into force and depositary functions[4] shall apply, *mutatis mutandis*, in the event of the EU's accession to those Protocols.

Reference in the Convention to further provisions in the Accession Agreement

20. Article 59, paragraph 2.*b*, of the Convention provides that the status of the EU as a High Contracting Party to the Convention shall be further defined in the Accession Agreement. Such explicit reference to the Accession Agreement makes it possible to limit the amendments made to the Convention. For instance, provisions about privileges and immunities and about the participation of the EU in the Committee of Ministers of the Council of Europe are thus dealt with in the Accession Agreement. In so far as the Accession Agreement will still have legal effect after the EU has acceded, its provisions will be subject to interpretation by the Court. To implement the Accession Agreement, the EU may need to adopt internal legal rules regulating various matters, including the functioning of the co-respondent mechanism. Similarly, the Rules of Court may also need to be adapted.

Effects of the accession

21. The provision under paragraph 2.*c* reflects the requirement under Article 2 of Protocol No. 8 to the Treaty of Lisbon that the accession of the EU shall not affect its competences or the powers of its institutions. The provision also clarifies that accession to the Convention imposes on the EU obligations with regard to acts, measures or omissions of its institutions, bodies, offices or agencies, or

4. These are, namely: Article 6 of the Protocol, Article 7 of Protocol No. 4, Articles 7 to 9 of Protocol No. 6, Articles 8 to 10 of Protocol No. 7, Articles 4 to 6 of Protocol No. 12 and Articles 6 to 8 of Protocol No. 13.

of persons acting on their behalf. Likewise, since the Court under the Convention has jurisdiction to settle disputes between individuals and the High Contracting Parties (as well as between High Contracting Parties) and therefore to interpret the provisions of the Convention, the decisions of the Court in cases to which the EU is party will be binding on the EU's institutions, including the CJEU.[5]

Technical amendments to the Convention

22. An interpretation clause is added to Article 59 of the Convention with regard to terms such as "State", "State Party" and other State-specific concepts (paragraph 2.*d* and *e*); this avoids amending the substantive provisions of the Convention and the Protocols, thereby maintaining their readability. All of the Protocols provide that their substantive provisions shall be regarded as additional articles to the Convention, and that all the provisions of the latter shall apply accordingly; this clarifies the accessory nature of the Protocols to the Convention. It follows that the general interpretation clause added to the Convention will also apply to the Protocols without their needing to be amended to that effect.

23. By virtue of paragraph 2.*d*, various terms that explicitly refer to "States" as High Contracting Parties to the Convention (that is, "State", "State Party", "States" or "States Parties"[6]) will, after the accession, be understood as referring also to the EU as a High Contracting Party.

24. Paragraph 2.*e* then addresses other terms in the Convention and the Protocols that refer more generally to the concept of a State, or to certain elements thereof ("national security",[7] "national law",[8] "national laws",[9] "national authority",[10] "life of the nation",[11] "country",[12] "administration of the State",[13] "territorial integrity",[14] "domestic",[15] "territory of a State"[16]); after the accession, these will be understood as relating also, *mutatis mutandis*, to the EU. As regards the application to the EU of the expression "life of the nation", it was noted that it may be interpreted as allowing the EU to take measures derogating from its obligations under the Convention in relation to measures taken by one if its member States in time of emergency in accordance with Article 15 of the Convention. The term "domestic" should be understood as "internal" to the legal order of a High Contracting Party, as confirmed by the French wording of Article 35 of the Convention.

25. An interpretation clause was not considered necessary for the expression "internal law" appearing in Articles 41 and 52 of the Convention, since this expression would be equally applicable to the EU as a High Contracting Party. There are some expressions in the Convention like those covered by Article 59, paragraph 2.*d* and *e*, that have not been included in that interpretation clause. In particular, for reasons pertaining to the specific legal order of the EU, EU citizenship is not analogous to the concept of nationality that appears in Articles 14 and 36 of the Convention, Article 3 of Protocol

5. See also, in this respect Court of Justice of the European Communities, opinion 1/91 of the of 14 December 1991 and opinion 1/92 of 10 April 1992.
6. Appearing in: Article 10, paragraph 1, and Article 17 of the Convention; Articles 1 and 2 of the Protocol; Article 2 of Protocol No. 4; Articles 2 and 6 of Protocol No. 6; Articles 3, 4, 5 and 7 of Protocol No. 7; Article 3 of Protocol No. 12; and Article 5 of Protocol No. 13 to the Convention.
7. Appearing in: Article 6, paragraph 1, Article 8, paragraph 2, Article 10, paragraph 2, and Article 11, paragraph 2, of the Convention; Article 2, paragraph 3, of Protocol No. 4; and Article 1, paragraph 2, of Protocol No. 7 to the Convention.
8. Appearing in Article 7 of the Convention.
9. Appearing in Article 12 of the Convention.
10. Appearing in Article 13 of the Convention.
11. Appearing in Article 15 of the Convention.
12. Appearing in: Article 5, paragraph 1.*f*, and Article 8, paragraph 2, of the Convention and Article 2, paragraph 2, of Protocol No. 4 to the Convention.
13. Appearing in Article 11, paragraph 2, of the Convention.
14. Appearing in Article 10, paragraph 2, of the Convention.
15. Appearing in Article 35 of the Convention.
16. Appearing in Article 1, paragraph 1, of Protocol No. 7 to the Convention.

No. 4 and Article 1 of Protocol No. 12. Likewise, the terms "countries" appearing in Article 4, paragraph 3.*b*, of the Convention, "civilised nations" appearing in Article 7 of the Convention, and "State", "territorial" and "territory/territories" appearing in Articles 56 and 58 of the Convention and in the corresponding provisions of the Protocols,[17] do not require any adaptation as a result of the EU's accession. A complete table of all State-related expressions and their interpretation following the EU's accession appears in the appendix to this explanatory report.

26. Finally, a technical amendment to Article 59, paragraph 5, of the Convention takes into account EU accession for the purposes of notification by the Secretary General.

Article 2 – Reservations to the Convention and its Protocols

27. 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 (Article 2, paragraph 1) 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. Any reservation should be consistent with the relevant rules of international law.

28. As Article 57 of the Convention currently only refers to "States", technical adaptations to paragraph 1 of that provision are necessary to allow the EU to make reservations under it (see Article 2, paragraph 2, of the Accession Agreement). The expression "law of the European Union" is meant to cover the Treaty on European Union, the Treaty on the Functioning of the European Union, or any other provision having the same legal value pursuant to those instruments (the EU "primary law") as well as legal provisions contained in acts of the EU institutions (the EU "secondary law").

29. In accordance with Article 1, paragraph 1, of the Accession Agreement, the EU accedes to the Convention, to the Protocol to the Convention and to Protocol No. 6 to the Convention. The EU may make reservations to the Convention and to the Protocol; no reservations are permitted to Protocol No. 6, pursuant to its Article 4. In the event of EU accession to other Protocols, the possibility to make reservations is governed by Article 57 of the Convention and the relevant provisions of such Protocols.

30. Article 2, paragraph 1, of the Accession Agreement gives the EU the possibility to make reservations to the Convention either when signing or when expressing its consent to be bound by the provisions of the Accession Agreement. In accordance with Article 23 of the 1969 Vienna Convention on the Law of Treaties, reservations to the Convention made at the moment of the signature of the Accession Agreement shall be confirmed, in order to be valid, at the moment of expression of consent to be bound by the provisions of the Accession Agreement.

Article 3 – Co-respondent mechanism

31. A new mechanism is being introduced to allow the EU to become a co-respondent to proceedings instituted against one or more of its member States and, similarly, to allow the EU member States to become co-respondents to proceedings instituted against the EU.

17. These are, namely: Article 4 of the Protocol, Article 5 of Protocol No. 4, Article 5 of Protocol No. 6, Article 6 of Protocol No. 7, Article 2 of Protocol No. 12 and Article 4 of Protocol No. 13.

Reasons for the introduction of the mechanism

32. This mechanism was considered necessary to accommodate the specific situation of the EU as a non-State entity with an autonomous legal system that is becoming a Party to the Convention alongside its own member States. It is a special feature of the EU legal system that acts adopted by its institutions may be implemented by its member States and, conversely, that provisions of the EU founding treaties agreed upon by its member States may be implemented by institutions, bodies, offices or agencies of the EU. With the accession of the EU, there could arise the unique situation in the Convention system in which a legal act is enacted by one High Contracting Party and implemented by another.

33. The newly introduced Article 36, paragraph 4, of the Convention provides that a co-respondent has the status of a party to the case. If the Court finds a violation of the Convention, the co-respondent will be bound by the obligations under Article 46 of the Convention. The co-respondent mechanism is therefore not a procedural privilege for the EU or its member States, but a way to avoid gaps in participation, accountability and enforceability in the Convention system. This corresponds to the very purpose of EU accession and serves the proper administration of justice.

34. As regards the position of the applicant, the newly introduced Article 36, paragraph 4, of the Convention states that the admissibility of an application shall be assessed without regard to the participation of the co-respondent in the proceedings. This provision thus ensures that an application will not be considered inadmissible as a result of the participation of the co-respondent, notably with regard to the exhaustion of domestic remedies within the meaning of Article 35, paragraph 1, of the Convention. Moreover, applicants will be able to make submissions to the Court in each case before a decision on joining a co-respondent is taken (see below, paragraphs 46 to 50).

35. The introduction of the co-respondent mechanism is also fully in line with Article 1.*b* of Protocol No. 8 to the Treaty of Lisbon, 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 the following two ways.

Situations in which the co-respondent mechanism may be applied

36. The mechanism would allow the EU to become a co-respondent to cases in which the applicant has directed an application only against one or more EU member States. Likewise, the mechanism would allow the EU member States to become co-respondents to cases in which the applicant has directed an application only against the EU.

37. Where an application is directed against both the EU and an EU member State, the mechanism would also be applied if the EU or its member State was not the party that acted or omitted to act in respect of the applicant, but was instead the party that provided the legal basis for that act or omission. In this case, the co-respondent mechanism would allow the application not to be declared inadmissible in respect of that party on the basis that it is incompatible *ratione personae*.

38. In cases in which the applicant alleges different violations by the EU and one or more of its member States separately, the co-respondent mechanism will not apply.

Third party intervention and the co-respondent mechanism

39. The co-respondent mechanism differs from third party interventions under Article 36, paragraph 2, of the Convention. The latter only gives the third party (be it a High Contracting Party to the Convention or, for example, another subject of international law or a non-governmental organisation) the opportunity to submit written comments and participate in the hearing in a case before the Court, but it does not become a party to the case and is not bound by the judgment. A co-

respondent becomes, on the contrary, a full party to the case and will therefore be bound by the judgment.

40. It is understood that a third party intervention may often be the most appropriate way to involve the EU in a case. For instance, if an application is directed against a State associated to parts of the EU legal order through separate international agreements (for example, the "Schengen" and "Dublin" agreements and the agreement on the European Economic Area) concerning obligations arising from such agreements, third party intervention would be the only way for the EU to participate in the proceedings. The introduction of the co-respondent mechanism should thus not be seen as precluding the EU from participating in the proceedings as a third party intervener, where the conditions for becoming a co-respondent are not met.

The tests for triggering the co-respondent mechanism

41. In order to identify cases involving EU law suitable for applying the co-respondent mechanism, two tests are set out Article 3, paragraphs 2 and 3, of the Accession Agreement.

42. In the case of applications notified to one or more member States of the EU, but not to the EU itself (paragraph 2), the test is fulfilled if it appears that the alleged violation notified by the Court calls into question the compatibility of a provision of (primary or secondary) EU law with the Convention rights at issue. This would be the case, for instance, if an alleged violation could only have been avoided by a member State disregarding an obligation under EU law (for example, when an EU law provision leaves no discretion to a member State as to its implementation at the national level).

43. In the case of applications notified to the EU, but not to one or more of its member States (paragraph 3), the EU member States may become co-respondents if it appears that the alleged violation as notified by the Court calls into question the compatibility of a provision of the primary law of the EU with the Convention rights at issue. These tests would apply taking account of provisions of EU law as interpreted by the competent courts. The fact that the alleged violation may arise from a positive obligation deriving from the Convention would not affect the application of these tests. They would also cover cases in which the applications were directed from the outset against both the EU and one or more of its member States (Article 3, paragraph 4, of the Accession Agreement).

44. On the basis of the relevant case law of the Court, it can be expected that such a mechanism may be applied only in a limited number of cases.[18]

Outline of the procedure under the co-respondent mechanism

45. The co-respondent mechanism will not alter the current practice under which the Court 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. Article 3, paragraph 5, of the Accession Agreement outlines the procedure and the conditions for applying the co-respondent mechanism, whereby a High Contracting Party becomes a co-respondent by decision of the Court. The following paragraphs are understood as merely illustrating this provision. For those cases selected by the Court for notification, the procedure initially follows the information indicated by the applicant in the application form.

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

18. During the negotiations, the view was expressed that in recent years, the only cases which might have certainly required the application of the co-respondent mechanism would have been *Matthews v. United Kingdom*, *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland* and *Cooperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij U.A. v. the Netherlands*.

46. In cases in which the application is directed against one (or more) member State(s) of the EU, but not against the EU itself, the latter may, if it considers that the criteria set out in Article 3, paragraph 2, of the Accession Agreement are fulfilled, request to join the proceedings as co-respondent. Where the application is directed against the EU, but not against one (or more) of its member States, the EU member States may, if they consider that the criteria set out in Article 3, paragraph 3, of the Accession Agreement are fulfilled, request to join the proceedings as co-respondents. Any such request should be reasoned. In order to enable the potential co-respondent to make such requests, it is important that the relevant information on applications, including the date of their notification to the respondent, is rapidly made public. The Court's system of publication of communicated cases should ensure the dissemination of such information.

47. If appropriate, the Court may, when notifying an alleged violation or at a later stage of the proceedings, indicate that a High Contracting Party might participate in the proceedings as a co-respondent, but a request by that High Contracting Party would be a necessary precondition for the latter to become co-respondent. No High Contracting Party may be compelled against its will to become a co-respondent. This reflects the fact that the initial application was not addressed against the potential co-respondent, and that no High Contracting Party can be forced to become a party to a case where it was not named in the original application.

48. The Court will inform both the applicant and the respondent about the request, and set a short time limit for comments. Having considered the reasons stated by the potential co-respondent in its request as well as any submissions by the applicant and the respondent, the Court will decide whether to admit the co-respondent to the proceedings, and will inform the requester and the parties to the case of its decision. When taking such a decision, the Court will limit itself to assessing whether the reasons stated by the High Contracting Party (or Parties) making the request are plausible in the light of the criteria set out in Article 3, paragraphs 2 or 3, as appropriate, without prejudice to its assessment of the merits of the case. The decision of the Court to join a High Contracting Party to a case as a co-respondent may include specific conditions (for example, the provision of legal aid in order to protect the interest of the applicant) if considered necessary in the interests of the proper administration of justice.

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

49. In a case which has been directed against and notified to both the EU and one (or more) of its member States in respect of at least one alleged violation, either of these respondents may, if it considers that the conditions relating to the nature of the alleged violation set out in paragraphs 2 or 3 are met, ask the Court to change its status into that of a co-respondent. As in the case described under A. above, the Court may indicate the possibility of a change of status, but a request by the concerned respondent would be a necessary precondition for such a change. The High Contracting Party (or Parties) becoming co-respondent(s) would be the Party (or Parties) which is (or are) not responsible for the act or omission which allegedly caused the violation, but only for the legal basis of such an act or omission.

50. The Court will inform both the applicant and the other respondent about the request, and set a short time limit for comments. Having considered the reasons stated in the request, as well as any submissions by the applicant and the other respondent, the Court will decide whether to make the change of status, and will inform the parties to the case of its decision. When taking such a decision at this stage of the procedure, the Court will limit itself to assessing whether the reasons stated by the High Contracting Party (or Parties) making the request are plausible in the light of the criteria set out in Article 3, paragraphs 2 or 3, as appropriate, of the Accession Agreement, without prejudice to its assessment of the merits of the case.

Termination of the co-respondent mechanism

51. The Court may, at any stage of the proceedings, decide to terminate the participation of the co-respondent, particularly if it should receive a joint representation by the respondent and the co-respondent that the criteria for becoming a co-respondent are not (or no longer) met. In the absence of any such decision, the respondent and the co-respondent continue to participate jointly in the case until the proceedings end.

Friendly settlements

52. Both the respondent and the co-respondent will need to agree to a friendly settlement under Article 39 of the Convention.

Unilateral declarations

53. Both the respondent and the co-respondent will need to agree to make a unilateral declaration of a violation for which they are both responsible.

Effects of the co-respondent mechanism

54. As noted above, it is a special feature of the EU legal system that acts adopted by its institutions may be implemented by its member States and, conversely, that provisions of the EU founding treaties agreed upon by its member States may be implemented by institutions, bodies, offices or agencies of the EU. Therefore, the respondent and the co-respondent(s) may be jointly responsible for the alleged violation in respect of which a High Contracting Party has become a co-respondent. Should the Court find this violation, it is expected that it would ordinarily do so jointly against the respondent and the co-respondent(s); there would otherwise be a risk that the Court would assess the distribution of competences between the EU and its member States. The respondent and the co-respondent(s) may, however, in any given case make joint submissions to the Court that responsibility for any given alleged violation should be attributed only to one of them. In this respect, it should also be recalled that the Court in its judgments rules on whether there has been a violation of the Convention and not on the validity of an act of a High Contracting Party or of the legal provisions underlying the act or omission that was the subject of the complaint.

Referral to the Grand Chamber

55. Any Party may request the referral of a case to the Grand Chamber under Article 43 of the Convention; the respondent or co-respondent could therefore make such a request without the agreement of the other. Internal EU rules may, however, set out the conditions for such a request. Should a request be accepted, the Grand Chamber would re-examine the case as a whole, in respect of all alleged violations considered by the Chamber and with regard to all Parties.

Exclusion of retroactivity

56. Article 3, paragraph 8, of the Accession Agreement provides that the co-respondent mechanism applies only to applications made to the Court from the date on which the EU accedes to the Convention (that is, the date upon which the Accession Agreement comes into force). This includes applications concerning acts by EU member States based on EU law adopted before the EU became a Party to the Convention.

Prior involvement of the CJEU in cases in which the EU is a co-respondent

57. Cases in which the EU may be a co-respondent arise from individual applications concerning acts or omissions of EU member States. The applicant will first have to exhaust domestic remedies available in the national courts of the respondent member State. 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 an EU act at issue (Article 267 of the Treaty on the Functioning of the European Union). Since the parties to the proceedings before the national courts may only suggest such a reference, this procedure cannot be considered as a legal remedy that an applicant must exhaust before making an application to the Court. However, without such a preliminary ruling, the Court would be required to adjudicate on the conformity of an EU act with human rights, without the CJEU having had the opportunity to do so.

58. Even though this situation is expected to arise rarely, it was considered desirable that an internal EU procedure be put in place to ensure that the CJEU has the opportunity to review the compatibility with the Convention rights at issue of the provision of EU law which has triggered the participation of the EU as a co-respondent. Such review should take place before the Court decides on the merits of the application. This procedure, which is inspired by the principle of subsidiarity, only applies in cases in which the EU has the status of a co-respondent. It is understood that the parties involved – including the applicant, who will be given the possibility to obtain legal aid – will have the opportunity to make observations in the procedure before the CJEU.

59. The CJEU will not assess the act or omission complained of by the applicant, but the EU legal basis for it.

60. The prior involvement of the CJEU will not affect the powers and jurisdiction of the Court. The assessment of the CJEU will not bind the Court.

61. The examination of the merits of the application by the Court should not resume before the parties and any third party interveners have had the opportunity to assess properly the consequences of the ruling of the CJEU. In order not to delay unduly the proceedings before the Court, the EU shall ensure that the ruling is delivered quickly. In this regard, it is noted 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 4 – Inter-Party cases

62. Once the EU is a Party to the Convention, all States Parties to the Convention will be able to bring a case against the EU and *vice versa* under Article 33 of the Convention.

63. The term “High Contracting Party” is used in the text of Article 33 of the Convention. Changing the heading to “Inter-Party cases” makes that heading correspond to the substance of Article 33 after the EU’s accession. For the sake of consistency, the reference to “inter-State applications” in Article 29, paragraph 2, of the Convention is likewise adjusted.

64. An issue not governed by the Accession Agreement is whether EU law permits inter-Party applications to the Court involving issues of EU law between EU member States, or between the EU and one of its member States. In particular, Article 344 of the Treaty on the Functioning of the European Union (to which Article 3 of Protocol No. 8 to the Treaty of Lisbon refers) states that EU member States “undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein”.

Article 5 – Interpretation of Articles 35 and 55 of the Convention

65. This provision clarifies that, as a necessary consequence of the EU accession to the Convention, proceedings before the CJEU (currently consisting of the Court of Justice, the General Court and the Civil Service Tribunal) shall not be understood as constituting procedures of international investigation or settlement, submission to which would make an application inadmissible under Article 35, paragraph 2.*b*, of the Convention. In this respect, it should also be noted that in the recent judgment in the case of *Karoussiotis v. Portugal* (No. 23205/08; judgment of 1 February 2011) the Court specified that proceedings before the European Commission pursuant to Article 258 of the Treaty on the Functioning of the European Union shall not be understood as constituting procedures of international investigation or settlement pursuant to Article 35, paragraph 2.*b* of the Convention.

66. As regards Article 55 of the Convention, which excludes other means of dispute settlement concerning the interpretation or application of the Convention, it is the understanding of the Parties that, with respect to EU member States, proceedings before the CJEU do not constitute a "means of dispute settlement" within the meaning of Article 55 of the Convention. Therefore, Article 55 of the Convention does not prevent the operation of the rule set out in Article 344 of the Treaty on the Functioning of the European Union.

Article 6 – Election of judges

67. 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. It was considered appropriate that the European Parliament should be entitled to the same number of representatives in the Parliamentary Assembly as the State(s) entitled to the highest number of representatives under Article 26 of the Statute of the Council of Europe.

68. Modalities for the participation of the European Parliament in the work of the Parliamentary Assembly and its relevant bodies will be defined by the Parliamentary Assembly in co-operation with the European Parliament. These modalities will be reflected in the Parliamentary Assembly's internal rules. Discussions between the Parliamentary Assembly and the European Parliament to that effect already took place during the drafting of the Accession Agreement. It is also understood that internal EU rules will define the modalities for the selection of the list of candidates in respect of the EU to be submitted to the Parliamentary Assembly.

69. It is not necessary to amend the Convention in order to allow for the election of a judge in respect of the EU since Article 22 provides that a judge shall be elected with respect to each High Contracting Party. As laid down in Article 21, paragraphs 2 and 3, of the Convention, the judges of the Court are independent and act in their individual capacity. The judge elected in respect of the EU shall participate equally with the other judges in the work of the Court and have the same status and duties.

Article 7 – Participation of the European Union in the Committee of Ministers of the Council of Europe

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

71. A number of questions directly linked with the functioning of the Convention system and its implementation are, however, not explicitly dealt with in the Convention itself. The Convention does

not contain, for instance, provisions regarding its amendment and the adoption of additional protocols, nor does it specify all details regarding the exercise of some of the Convention-based functions indicated in the previous paragraph.[19] It also does not 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 functions exercised by virtue of the Convention by the Committee of Ministers or the Parliamentary Assembly of the Council of Europe. 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 itself,[20] to the Court[21] or, where appropriate, to other relevant bodies.

72. After its accession, the EU will be allowed to participate in the Committee of Ministers, with the right to vote, when decisions on the issues mentioned above are taken. This principle is set out in Article 7, paragraph 1, of the Accession Agreement.

73. General rules for the majorities required for the decisions of the Committee of Ministers also apply, *mutatis mutandis,* to decisions mentioned under paragraph 1.*b* and *c* of Article 7. Under EU law, the EU and its member States (in total amounting to 28 out of 48 High Contracting Parties after accession) under certain circumstances are obliged to act in a co-ordinated manner when expressing positions and voting. This obligation to co-ordinate refers only to decisions to be taken under Articles 39 and 46 of the Convention. Therefore it is considered necessary to make specific provision about the participation of the EU in the Committee of Ministers' supervision process under Articles 39 and 46 of the Convention. Appropriate guarantees are therefore required to ensure that the combined votes of the EU and its member States will not prejudice the effective exercise by the Committee of Ministers of its supervisory functions under Articles 39 and 46 of the Convention. A general obligation to that effect appears in Article 7, paragraph 2, which also contains a number of specific provisions.

74. The introduction of these specific provisions should not be seen as a departure from the established practice that decisions in the Committee of Ministers are adopted by consensus, with formal votes only exceptionally being taken.

Supervision of obligations in cases where the EU is respondent or co-respondent

75. In the context of the supervision of the fulfilment of obligations either by the EU alone, or by the EU and one or more of its member States jointly (that is, arising from cases to which the EU has been respondent or co-respondent), it derives from the EU treaties that the EU and its member States are obliged to express positions and to vote in a co-ordinated manner. In order to ensure that such co-ordination will not prejudice the effective exercise of supervisory functions by the Committee of Ministers, it was considered necessary to introduce special voting rules. They will appear in a new rule to be included in the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.[22] The new voting rules will apply to all decisions in respect of obligations upon the EU alone or upon the EU and one or more of its member States jointly. As regards obligations upon only a member State of the EU, normal voting rules will continue to apply.

76. The general rule applicable to decisions by the Committee of Ministers in the supervision of the execution of judgments and of the terms of friendly settlements in cases in which the EU is a party appears under sub-paragraph *a* of the new rule. The new rule does not require the application of the

19. 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.
20. See, for instance, Resolution CM/Res(2010)26 on the establishment of an Advisory Panel of Experts on Candidates for 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.
21. See, for instance, Resolution Res(2004)3 on judgments revealing an underlying systemic problem.
22. Adopted by the Committee of Ministers at the 964th meeting of the Deputies, on 10 May 2006.

majority rule set out in Article 20.*d* of the Statute of the Council of Europe.[23] Provided that a decision appears (for instance, by an indicative vote) to be supported by a majority of the representatives entitled to sit on the Committee of Ministers on behalf of those High Contracting Parties that are not member States of the EU, the decision would be adopted without a formal vote. Such procedure would be consistent with other procedures already in place in the Council of Europe, whereby delegations do not request the application of the voting rule prescribed by the Statute of the Council of Europe to block the adoption of a decision if it appears that a lower majority than the one prescribed in the Statute is attained.[24] The EU and its member States will fully participate in discussions leading to the adoption of decisions.

77. The specific rule applicable to decisions by the Committee of Ministers under Rules 10 (Referral to the Court for interpretation of a judgment) and 11 (Infringement proceedings) of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements in cases in which the EU is a party appears under sub-paragraph *b* of the new rule. It is based on the same approach set out in the preceding paragraph. However, in so far as the majority required for the adoption of decisions under Article 46, paragraphs 3 and 4, of the Convention, as reflected in Rules 10 and 11, is higher than the majority required by the Statute of the Council of Europe, the new rule also requires a higher majority. Therefore, a decision under Rules 10 and 11 shall be considered as adopted if it appears that two thirds of the representatives entitled to sit on the Committee of Ministers on behalf of those High Contracting Parties that are not member States of the EU are in favour of it.

78. The specific rule applicable to decisions by the Committee of Ministers under Rule 17 (Final resolutions) of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements in cases to which the EU is a party appears under sub-paragraph *c* of the new rule. In the case of the adoption of final resolutions, it must be ensured that the decision has sufficient support also from the High Contracting Parties which are not member States of the EU. Therefore, it is required that in addition to the majority set out in Article 20.*d* of the Statute of the Council of Europe, a simple majority of the representatives casting a vote on behalf of those High Contracting Parties that are not member States of the EU is in favour of the final resolution.

79. These rules do not form part of the Accession Agreement, but will be submitted to the Committee of Ministers for adoption. They may therefore be amended if necessary at a later stage by the Committee of Ministers without requiring a revision of the Accession Agreement or the Convention.

Supervision of obligations in other cases against a member State of the EU

80. In the context of the supervision of the fulfilment of obligations under the Convention by one or more of the member States of the EU, the latter is precluded under the EU treaties, either for lack of competence in the area to which the case relates or as a result of the prohibition on circumventing internal procedures, from expressing a position or exercising its right to vote. In such circumstances, the EU member States have no obligation under the EU treaties to act in a co-ordinated manner, and therefore they can each express their own position and vote.

Supervision of obligations in cases against States which are not members of the EU

81. In the context of the supervision of the fulfilment of obligations under the Convention by a State which is not a member of the EU, the EU and its member States have no obligation under the EU

23. Pursuant to which: "All other resolutions of the Committee … require a two-thirds majority of the representatives casting a vote and of a majority of the representatives entitled to sit on the Committee."
24. See, for instance, the decision taken at the 519bis meeting of the Ministers' Deputies (4 November 1994) – Item 2.2 paragraph C.

treaties to express a position or vote in a co-ordinated manner. The EU member States can therefore each express their own position and vote, even where the EU also expresses a position or exercises its right to vote.

Article 8 – Participation of the European Union in the expenditure related to the Convention

82. According to Article 50 of the Convention, the expenditure on the Court shall be borne by the Council of Europe. After its accession to the Convention, the EU should contribute to the expenditure of the entire Convention system alongside and in addition to the other High Contracting Parties. It is noted that under the current system the amount of the contribution of each High Contracting Party is not linked to the Court'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, in its Resolution Res(94)31. It is also recalled that the budgets of the Court 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 dedicated to the financing of the Convention system.

83. 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 require the participation of the EU in the budgetary procedure of the Council of Europe.

84. The relevant expenditure taken into account is that directly related to the Convention, namely: the expenditure on the Court and on the process of supervision of the execution of its judgments and decisions, as well as on the Parliamentary Assembly, the Committee of Ministers and the Secretary General of the Council of Europe when they exercise functions under the Convention. In addition, administrative overhead costs related to the Convention system are considered (building, logistics, IT, etc.) as requiring an increase of the above expenditure by 15%. The total amount is then compared to the Ordinary Budget of the Council of Europe (including the employer's contributions to pensions), in order to identify the relative weight, in percentage, of such expenditure. On the basis of the relevant figures for the last years and of those foreseen for 2012 and 2013, this percentage is fixed in paragraph 1 of Article 8 of the Accession Agreement at 34 %.

85. As to the rate of contribution of the EU to the relevant 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. Accordingly, for each year (A), the amount of the contribution of the EU shall be equal to 34% of the highest amount contributed in the previous year (A-1) by any State to the Ordinary Budget of the Council of Europe (including employer's contribution to pensions).[25]

86. In order to ensure the stability of the calculation method proposed, a safeguard clause is added in paragraph 2 of Article 8 of the Accession Agreement of the Accession Agreement to the effect that, if the actual relative weight of the expenditure related to the Convention system within the Ordinary Budget varies substantially, the percentage indicated in paragraph 1 of Article 8 (to date, 34%) shall be

25. As an example, for the year 2011 the Ordinary Budget, recalculated to include the employer's contributions to pensions, amounted to €235.4 million. The expenditure dedicated within the Ordinary Budget to the functioning of the Convention (including 15% of overhead costs) amounted to €79.8 million, which corresponds to 33.9%. The highest amount contributed by any State in the previous year (2010) to the Ordinary Budget of the Council of Europe corresponded to 11.7% of the budget. This percentage, applied to the amount of €79.8 million, would provide a contribution of €9.34 million.

adapted by agreement between the EU and the Council of Europe. Such adaptation is triggered by the fact that, in each of two consecutive years, the difference between the percentage calculated on the real figures and the percentage in paragraph 1 of Article 8 is more than 2.5 percentage points (that is, if the real figure is below 31.5%, or above 36.5%). This mechanism shall obviously apply also to any new percentage resulting from subsequent agreements between the EU and the Council of Europe.

87. In addition, two clauses are added to avoid any possible unintended effects of the safeguard clause. First, in order to avoid that the EU's accession could lead to a situation in which there would be fewer resources available to the Convention system than before the accession, it is foreseen that no account shall be taken of a change in the percentage indicated in paragraph 1 of Article 8 (34%) that results from a decrease in absolute terms of the amount dedicated within the Ordinary Budget to the functioning of the Convention as compared to the year preceding that in which the EU becomes a Party to the Convention. Second, in order to avoid an unjustified increase in the EU's contribution in the event of a decrease in absolute terms of the Ordinary Budget, combined with no change or a decrease in absolute terms of the amount dedicated within the Ordinary Budget to the functioning of the Convention, it is foreseen that no account shall be taken of a possible increase in the percentage indicated above, resulting from it.

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

Article 9 – Relations with other Agreements

89. 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, for the purpose of their application, 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 for 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, in its accession 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 Court, members of the Parliamentary Assembly and representatives in the Committee of Ministers; these are covered by the General Agreement on Privileges and Immunities of the Council of Europe (ETS No. 2) and its first Protocol (ETS No. 10).

90. 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 Council of Europe. Therefore, the Accession Agreement imposes an obligation on the EU, as a Contracting Party to the Convention, to respect the relevant provisions of these instruments, and a further obligation 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 about the duty to consult the EU when these instruments are amended, and about the duty of the Secretary General, as depositary of these instruments, to notify the EU of relevant events occurring in the life of these instruments (such as any signature, ratification, acceptance, approval or accession, the entry into force with respect to a Party[26] and any other act, notification or communication relating to them).

26. In accordance with the relevant provisions of each Agreement or Protocol, that is, Articles 8 and 9 of the European Agreement relating to Persons Participating in Proceedings of the European Court of Human Rights, Article 22 of the General Agreement on Privileges and Immunities of the Council of Europe, Article 7 of the Protocol to the General Agreement on Privileges and Immunities of the Council of Europe and Articles 8 and 9 of the Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe.

Article 10 – Signature and entry into force

91. This article is one of the usual final clauses included in treaties prepared within the Council of Europe. It has been amended to provide that the Agreement should be open only to the High Contracting Parties to the Convention at the date of its opening for signature and to the EU.

92. Should any State become a member of the Council of Europe, and consequently a High Contracting Party to the Convention, between the opening for signature of this Accession Agreement and the date of its entry into force, that State will be required as part of its commitments for the accession to the Council of Europe to give an unequivocal binding statement of its acceptance of the provisions of this Agreement. The Committee of Ministers' resolution inviting that State to become a member of the Council of Europe shall contain a condition to that effect.

93. Should any State become a member of the Council of Europe and a High Contracting Party to the Convention after the entry into force of this Agreement, it will be bound by those provisions of the Agreement which have legal effects beyond the mere amendment of the Convention; this is ensured by the new Article 59, paragraph 2.*b*, of the Convention, which creates an explicit link between the Convention and the Accession Agreement.

Article 11 – Reservations

94. It is agreed that no reservations to the Agreement itself shall be allowed. This is without prejudice to the possibility for the EU to make reservations to the Convention, as provided for by Article 2.

Article 12 – Notifications

95. This article contains one of the usual final clauses included in treaties prepared within the Council of Europe.

Appendix to the explanatory report

Summary of all State-related provisions in the Convention for the Protection of Human Rights and Fundamental Freedoms and possible effects of the accession of the European Union

Provision in the Convention	***Expression***	***Addressed in the Accession Agreement in…***	***Future corresponding provision in the Convention***
Article 4 (3) (b)	"countries"	Paragraph 25 of the explanatory report. This expression does not need any adaptation or interpretation as a result of the EU's accession.	None
Article 5 (1) (f)	"country"	Article 1 (2)	Article 59 (2) (e)
Article 6 (1)	"national security"	Article 1 (2)	Article 59 (2) (e)
Article 7 (1)	"national law"	Article 1 (2)	Article 59 (2) (e)
Article 7 (2)	"civilised nations"	Para. 25 of the explanatory report. This expression does not need any adaptation or interpretation as a result of the EU's accession.	None
Article 8 (2)	"country" and "national security"	Article 1 (2)	Article 59 (2) (e)
Article 10 (1)	"States"	Article 1 (2)	Article 59 (2) (d)
Article 10 (2)	"national security" and "territorial integrity"	Article 1 (2)	Article 59 (2) (e)
Article 11 (2)	"national security" and "administration of the State"	Article 1 (2)	Article 59 (2) (e)
Article 12	"national laws"	Article 1 (2)	Article 59 (2) (e)
Article 13	"national authority"	Article 1 (2)	Article 59 (2) (e)
Article 14	"national origin" and "national minority"	Paragraph 25 of the explanatory report. These expressions do not need any adaptation or interpretation as a result of the EU's accession.	None
Article 15	"life of the nation"	Article 1 (2)	Article 59 (2) (e)
Article 17	"State"	Article 1 (2)	Article 59 (2) (d)
Article 29	"inter-State applications"	Article 4 (1)	Article 29
Article 33 (title)	"inter-State cases"	Article 4 (2)	Article 33
Article 35	"domestic"	Article 1 (2)	Article 59 (2) (e)
Article 36	"nationals"	Paragraph 25 of the explanatory report. The use of such term in this context does not require any adaptation as a result of the EU's accession, as the concept of EU citizenship is not analogous to the concept of "nationality" of a member State.	None
Articles 41 and 52	"internal law"	Paragraph 25 of the	None

		explanatory report. This expression does not need any adaptation as a result of the EU's accession, as it would apply as it stands to the EU as to any other High Contracting Party.	
Article 56 and Article 58 (4)	"State", "territorial", "territory" and "territories" (territorial application clause)	Paragraph 25 of the explanatory report. The territorial application clauses would not be applicable to the EU.	None
Article 57	"State", "territory"	Article 2 (2)	Article 57 (1), 2nd sentence
Protocol No. 1			
Article 1	"State"	Article 1 (2)	Article 59 (2) (d)
Article 2	"State"	Article 1 (2)	Article 59 (2) (d)
Article 4	territorial application clause (see also Article 56 of the Convention above)	Paragraph 25 of the explanatory report. The territorial application clauses would not be applicable to the EU.	None
Article 6	final clause	Article 1 (2)	Article 59 (2) (a)
Protocol No. 4			
Article 2 (1)	"State" ("territory of a State")	Article 1 (2)	Article 59 (2) (d)
Article 2	"country", "national security"	Article 1 (2)	Article 59 (2) (e)
Article 3	"territory of a State of which he is a national"	Paragraph 25 of the explanatory report. The concept of "territory of a State of which he is a national" is not applicable to the EU, as the concept of EU citizenship is not analogous to the concept of "nationality" of a member State.	None
Article 5	territorial application clause (see also Article 56 of the Convention above)	Paragraph 25 of the explanatory report. The territorial application clauses would not be applicable to the EU.	None
Article 7	final clause	Article 1 (2)	Article 59 (2) (a)
Protocol No. 6			
Article 2	"State"	Article 1 (2)	Article 59 (2) (d)
Article 5	territorial application clause (see also Article 56 of the Convention above)	Paragraph 25 of the explanatory report. The territorial application clauses would not be applicable to the EU.	None
Article 6	"States Parties"	Article 1 (2)	Article 59 (2) (d)
Articles 7-9	final clauses	Article 1 (2)	Article 59 (2) (a)
Protocol No. 7			
Article 1 (1)	"territory of a State"	Article 1(2)	Article 59 (2) (e)

Article 1 (2)	"national security"	Article 1 (2)	Article 59 (2) (e)
Articles 3, 4 and 5	"State", "States"	Article 1 (2)	Article 59 (2) (d)
Article 6	territorial application clause (see also Article 56 of the Convention above)	Paragraph 25 of the explanatory report. The territorial application clauses would not be applicable to the EU.	None
Article 7	"States Parties"	Article 1 (2)	Article 59 (2) (d)
Articles 8-10	final clauses	Article 1 (2)	Article 59 (2) (a)
Protocol No. 12			
Article 1	"national minority" (see also Art. 14 of the Convention)	Paragraph 25 of the explanatory report. The use of the term "national" in this context does not need any adaptation as a result of the EU 's accession.	None
Article 2	territorial application clause (see also Article 56 of the Convention above)	Paragraph 25 of the explanatory report. The territorial application clauses would not be applicable to the EU.	None
Article 3	"States Parties"	Article 1 (2)	Article 59 (2) (d)
Articles 4-6	final clauses	Article 1 (2)	Article 59 (2) (a)
Protocol No. 13			
Article 4	territorial application clause (see also Article 56 of the Convention above)	Paragraph 25 of the explanatory report. The territorial application clauses would not be applicable to the EU.	None
Article 5	"States Parties"	Article 1 (2)	Article 59 (2) (d)
Article 6	final clauses	Article 1 (2)	Article 59 (2) (a)