



**Council of the  
European Union**

**Brussels, 27 November 2017  
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**LIMITE**

**JAI 1117  
FREMP 136**

**NOTE**

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<b>From:</b>	<b>Presidency</b>
<b>To:</b>	<b>Council</b>
<b>Subject:</b>	<b>Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) - State of play</b>

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**I. INTRODUCTION**

1. The Lisbon Treaty committed the European Union (EU) to accede to the European Convention on Human Rights and Fundamental Freedoms (ECHR). The Lisbon Treaty added Protocol 8 to the Treaties, providing that the accession agreement should make provision for preserving the specific characteristics of the Union and Union law.
2. On the Council of Europe side, the legal basis for the accession of the EU is provided for by Article 59 (2) ECHR (“the European Union may accede to this Convention”), as amended by Protocol No. 14 to the Convention, which entered into force on 1 June 2010.

## II. STATE OF PLAY

3. In 2010 the EU started negotiations started with the Council of Europe.<sup>1</sup> In 2013, provisional agreement was reached on the text of the draft accession agreement. On 4 July 2013, the envisaged draft Accession Agreement was submitted by the Commission to the Court of Justice of the EU (CJEU) for an opinion on its compatibility with the Treaties (Article 218(11) TFEU).
4. In Opinion 2/13, issued on 18 December 2014 the CJEU (in 'Full Court' formation) held that the draft Accession Agreement was incompatible with the EU Treaties on a number of grounds, which the opinion summarised as follows:
  - a) it is liable to adversely affect the specific characteristics and the autonomy of EU law in so far it does not ensure coordination between Article 53 of the ECHR and Article 53 of the Charter, does not avert the risk that the principle of Member States' mutual trust under EU law may be undermined, and makes no provision in respect of the relationship between the mechanism established by Protocol No 16 and the preliminary ruling procedure provided for in Article 267 TFEU;
  - b) it is liable to affect Article 344 TFEU in so far as it does not preclude the possibility of disputes between Member States or between Member States and the EU concerning the application of the ECHR within the scope *ratione materiae* of EU law being brought before the ECtHR;
  - c) it does not lay down arrangements for the operation of the co-respondent mechanism and the procedure for the prior involvement of the Court of Justice that enable the specific characteristics of the EU and EU law to be preserved; and
  - d) it fails to have regard to the specific characteristics of EU law with regard to the judicial review of acts, actions or omissions on the part of the EU in CFSP matters in that it entrusts the judicial review of some of those acts, actions or omissions exclusively to a non-EU body.

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<sup>1</sup> 10817/10

5. On 28 January 2015, Coreper had a first informal exchange of views and acknowledged that a period of reflection was needed on the next steps to be taken before returning to the negotiations.
6. A second informal exchange in Coreper on 25 March 2015 resulted in defining the procedural outline for further examination.
7. Following that discussion, two half-day meetings of the Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons (FREMP) were held on 9 and 21 April 2015 and a first technical written contribution from the Commission services on the co-respondent mechanism and the prior involvement of the CJEU was discussed.<sup>2</sup>
8. On 8 October 2015, the Council took note of the state of play and invited the Commission to present a detailed analysis responding to the issues raised by the CJEU in its opinion of 18 December 2014.<sup>3</sup>
9. The Commission presented in November 2015 one part of their analysis concerning Article 344 TFEU, Protocol 16 to the ECHR and Article 53 of the ECHR.<sup>4</sup> FREMP met on 4 November 2015 to discuss it.
10. Another part was discussed at the FREMP meeting on 26 April 2016. It concerned the co-respondent mechanism, prior involvement of the CJEU, Article 344 TFEU, Protocol 16 to the ECHR and Article 53 of the ECHR.<sup>5</sup>
11. On 1 December 2016 FREMP analysed a technical contribution from the Commission services on mutual trust.<sup>6</sup>
12. The last remaining issue to be addressed is the Common Foreign and Security Policy (CFSP) issue.

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<sup>2</sup> DS 1216/15

<sup>3</sup> 12528/15

<sup>4</sup> WK 116/15

<sup>5</sup> WK 249/16

<sup>6</sup> WK 746/16

### III. WAY FORWARD

13. On 12 October 2017, the Council adopted conclusions on the application of the Charter of Fundamental Rights in 2016, recalling its commitment to the accession of the EU to the ECHR.<sup>7</sup> The Council recognised that the EU accession to the ECHR would reinforce the common values of the Union, improve the effectiveness of EU law and enhance the coherence of fundamental rights protection in Europe. The Council invited the Commission to swiftly complete its analysis of the legal issues raised by the European Court of Justice.
14. The Presidency considers that EU accession would also mean that any person claiming to be a victim of a violation of the ECHR by an institution or body of the EU is able to bring a complaint against the EU. This would enhance the credibility and accountability of the EU both internally and externally in terms of fundamental rights protection.
15. In its 2016 work programme, the Commission announced that it will continue its work on accession, taking ‘full account’ of the Court’s opinion.<sup>8</sup> This statement was repeated in the 2017 work programme.<sup>9</sup>
16. Against this background, the Presidency invites the Commission to provide information about next steps in this process and about when we can expect the next discussion.

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<sup>7</sup> 12913/17  
<sup>8</sup> COM(2015) 610 final  
<sup>9</sup> COM(2016) 710