



EUROPEAN COMMISSION

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**TO THE PRESIDENT AND MEMBERS
OF THE COURT OF JUSTICE OF THE EUROPEAN UNION**

REQUEST FOR AN OPINION

made by the European Commission, represented by Luis Romero Requena, Ben Smulders, Clemens Ladenburger and Hannes Kraemer, acting as agents,

under Article 218(11) of the Treaty on the Functioning of the European Union, on the following question:

Is the draft agreement providing for the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms compatible with the Treaties?

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INTRODUCTION

A. **The Convention for the Protection of Human Rights and Fundamental Freedoms**

1. The Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 ('the Convention') is a multilateral international agreement that entered into force on 3 September 1953. All of the Member States of the Union are parties to it, as are the 19 other states that are members of the Council of Europe (Albania, Andorra, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, Iceland, Liechtenstein, Moldova, Monaco, Montenegro, Norway, Russia, San Marino, Serbia, Switzerland, 'the former Yugoslav Republic of Macedonia', Turkey, and Ukraine).
2. The Convention imposes obligations on the contracting parties with regard to fundamental rights: Article 1 states that the contracting parties 'shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I'. The Convention enshrines substantive rights, such as the right to life (Article 2) or the right to respect for private and family life (Article 8), and procedural rights, namely the right to a fair trial (Article 6) and the right to 'an effective remedy before a national authority', a remedy which must be open to '[e]veryone whose rights and freedoms as set forth in this Convention are violated' (Article 13).
3. The Convention also sets up a control machinery aimed at ensuring that the contracting parties comply with the commitments they enter into in Article 1.
4. Article 19 establishes a permanent court, the European Court of Human Rights ('the ECtHR'). The ECtHR consists of a number of judges equal to the number of contracting parties (Article 20). The judges are elected by the Parliamentary Assembly of the Council of Europe, one judge with respect to each contracting party, from a list of three candidates nominated by the contracting party concerned (Article 22). The Parliamentary Assembly consists of representatives of each member of the Council of Europe elected by its parliament from among the members thereof, or appointed from among the members of that parliament, in such manner as it shall decide (Article 25 of the Statute of the Council of Europe). Article 32 of the Convention gives the ECtHR jurisdiction to interpret and apply the Convention in the matters referred to it under Articles 33, 34, 46 and 47 (see

below, paragraphs 5–10, 16 and 17). Article 50 of the Convention states that the expenditure of the ECtHR is to be borne by the Council of Europe.

5. The most important procedural avenue for activating the control machinery is the individual application, made under Article 34 of the Convention: that Article states that the ECtHR ‘may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto.’ The admissibility of individual applications is subject to strict conditions. Four of these conditions of admissibility are of particular importance in the present context.
6. First, under Article 34, the applicant must be able to claim to be a victim of a violation of the rights set forth in the Convention or the Protocols to it. It is the settled case-law of the ECtHR that the word ‘victim’ here denotes a person directly affected by the act or omission at issue (*Brumărescu v Romania*, No 28342/95, § 50, 28 October 1999).
7. Second, Article 35(1) states that the applicant must have exhausted all ‘domestic’ remedies, that is to say the remedies available in the legal system of the contracting party against which the application is directed. But failure to exhaust a domestic remedy can be relied upon against the applicant only if the remedy is adequate, effective and accessible, and consequently only if the existence of the remedy is sufficiently certain in practice as well as in theory (*Kornakovs v Latvia*, No 61005/00, § 142, 5 June 2006). Before approaching the ECtHR, therefore, the applicant is required to give the authorities of the respondent contracting party, and more especially its law courts, the opportunity to redress the situation that is being complained of under the Convention: this reflects the more general principle that the control machinery established by the Convention is subsidiary to the systems safeguarding human rights at the level of the contracting parties (*Burden v UK*, No 13378/05, § 42, 29 April 2008). The ECtHR has emphasised that the courts of the contracting parties should initially have the opportunity to determine questions of the compatibility of domestic law with the Convention, and that if an application is nonetheless subsequently brought before the ECtHR the ECtHR should have the benefit of the views of those courts, as being in direct and continuous contact with the vital forces of their countries (*Burden v UK*, cited above, § 42). In order to

exhaust the domestic remedies, Article 35(1) of the Convention also requires the applicant to submit to the courts of the respondent contracting party the same grievances, at least in substance and in the forms prescribed by domestic law, as the applicant subsequently puts forward before the ECtHR (*Kornakovs v Latvia*, cited above, § 142).

8. Third, Article 35(1) requires that the application be brought within six months from the date on which the final domestic decision was taken.¹
9. Fourth, Article 35(2)(b) of the Convention requires that the application must not be ‘substantially the same as a matter that has already been ... submitted to another procedure of international investigation or settlement’, unless it contains relevant new information.
10. Article 33 of the Convention provides that the ECtHR can also hear cases brought not by individuals but by one or more contracting parties alleging a breach of the Convention on the part of one or more other contracting parties.
11. In deciding whether an application is well founded, the ECtHR has no jurisdiction to deal with errors of fact or law allegedly committed by a domestic court, or to substitute its own assessment for that of the domestic courts or other authorities, unless and in so far as they may have infringed rights and freedoms protected by the Convention. In other words, the ECtHR cannot question the assessment of the domestic authorities unless there is clear evidence of arbitrariness (*Sisojeva and Others v Latvia*, No 60654/00, § 89, 15 January 2007). Where the public authorities in the respondent contracting party have interfered with a right or freedom laid down in the Convention, and the ECtHR has to assess whether that interference is ‘necessary in a democratic society’ for a legitimate aim, a margin of appreciation must be left to the contracting party. But the breadth of the margin of appreciation varies and depends on the circumstances, the nature of the right at issue, and the nature of the interference (*S. and Marper v UK*, Nos 30562/04 and 30566/04, § 102, 4 December 2008; *Mentzen v Latvia* (decision), No 71074/01, assessment, section B(2)(c), 7 December 2004).

¹ Protocol No 15, which was recently opened for signature by the contracting parties to the Convention, would reduce this time-limit to four months.

12. Proceedings before the ECtHR end with a ‘judgment’ or ‘decision’ by which the ECtHR finds that the application is inadmissible, or that the relevant provisions of the Convention have not been violated, or with a ‘judgment’ by which the ECtHR finds that relevant provisions of the Convention have indeed been violated. A judgment of this latter kind is declaratory, in the sense that it does not affect the validity of the acts or measures on the part of the contracting party which the ECtHR finds to have violated the Convention.
13. Article 44(1) of the Convention states that a judgment delivered by the Grand Chamber of the ECtHR is final. Article 44(2) read in conjunction with Article 43 provides that a judgment delivered by a chamber of the ECtHR becomes final when the parties declare that they will not request that the case be referred to the Grand Chamber; or three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or when the panel of the Grand Chamber rejects the request to refer on the grounds that the case does not raise a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance.
14. Article 46(1) of the Convention states that contracting parties undertake to abide by the final judgment of the ECtHR in any case to which they are parties. This provision requires a contracting party to take all individual measures with respect to the applicant that are available under its domestic law to repair the consequences of the violation that the ECtHR’s judgement has found to exist (*restitutio in integrum*). If the internal law of the contracting party concerned allows only partial reparation to be made, Article 41 provides that the ECtHR is to afford ‘just satisfaction’ to the applicant. A contracting party is required to take steps of a general nature to prevent fresh violations similar to those found to exist, or to put an end to continuing violations, for example by amending generally applicable provisions of its domestic law, by varying the interpretation of the law, or by taking other measures.
15. Article 46(2) of the Convention gives the task of supervising the execution of the final judgment of the ECtHR to the Committee of Ministers of the Council of Europe (‘the Committee of Ministers’, ‘the Committee’). Article 14 of the Statute of the Council of Europe states that this body consists of representatives of the governments of the members of the Council of Europe, each representative having

one vote. Article 39(4) of the Convention provides that the Committee of Ministers is also to supervise the execution of the terms of a friendly settlement. In substance the Committee of Ministers here considers whether the contracting party has taken all the measures necessary to comply with a final judgment of the ECtHR or to implement the terms of a friendly settlement. The exercise of these responsibilities is governed by the 'Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements' ('the Rules for Supervision'). Rule 17 in the Rules for Supervision states that the Committee of Ministers is to adopt a 'final resolution' if it establishes that the contracting party has taken all the necessary steps to abide by the final judgment of the ECtHR or that the terms of the friendly settlement have been executed. Rule 16 allows the Committee of Ministers to adopt 'interim resolutions, notably in order to provide information on the state of progress of the execution or, where appropriate, to express concern and/or to make suggestions with respect to the execution'. Under Article 20(d) of the Statute of the Council of Europe, both types of resolution require a two-thirds majority of the votes cast and a majority of the representatives entitled to sit on the Committee.

16. Article 46(3) and (4) of the Convention state that if the Committee of Ministers considers that the execution of a final judgment is being hindered by a problem of interpretation of the judgment, it may refer the matter to the ECtHR for a ruling on the question of interpretation, and if it considers that a contracting party refuses to abide by a final judgment in a case to which it is a party, it may refer to the ECtHR the question whether that party has failed to fulfil its obligation under Article 46(1); decisions of this kind require a two-thirds majority of the representatives entitled to sit on the Committee. Article 46(5) states that if the ECtHR finds that the contracting party has violated its obligation, it is to refer the case to the Committee of Ministers for consideration of the measures to be taken, and if it finds no violation, it is likewise to refer the case to the Committee of Ministers, which is to close its examination of the case.

17. The Convention also gives some other powers to the Committee of Ministers. In particular:

- at the request of the plenary court, the Committee of Ministers may, by a unanimous decision and for a fixed period, reduce to five the number of judges of the Chambers (Article 26(2)),
- the Committee of Ministers may request the ECtHR to give an advisory opinion on legal questions concerning the interpretation of the Convention and the protocols thereto (Article 47).

18. Regarding the powers of the Committee of Ministers, Article 15(a) of the Statute of the Council of Europe provides that

On the recommendation of the [Parliamentary] Assembly or on its own initiative, the Committee of Ministers shall consider the action required to further the aim of the Council of Europe, including the conclusion of conventions or agreements and the adoption by governments of a common policy with regard to particular matters.

Article 15(b) adds that

the conclusions of the Committee may take the form of recommendations to the governments.

On the subject of the quora required for the adoption of decisions by the Committee of Ministers Article 20 of the Statute of the Council of Europe provides:

- a Resolutions of the Committee of Ministers relating to the following important matters, namely:
 - i recommendations under Article 15.b ...
 - v recommendations for the amendment of Articles ... 15 [and] 20;
- and

vi any other question which the Committee may, by a resolution passed under d below, decide should be subject to a unanimous vote on account of its importance,

require the unanimous vote of the representatives casting a vote, and of a majority of the representatives entitled to sit on the Committee ...

d All other resolutions of the Committee, including adoption of the budget, of rules of procedure and of financial and administrative regulations, recommendations for the amendment of articles of this Statute, other than those mentioned in paragraph a.v above, and deciding in case of doubt which paragraph of this article applies, require a two thirds majority of the representatives casting a vote and of a majority of the representatives entitled to sit on the Committee.

19. In Article 55 of the Convention the contracting parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of the Convention to a means of settlement other than those provided for in the Convention.
20. Article 57(1) of the Convention allows a state, when signing the Convention or when depositing its instrument of ratification, to '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', but it excludes 'reservations of a general character'. It is settled case-law of the ECtHR that the ECtHR has jurisdiction to assess the validity of a reservation under Article 57(1), and in particular whether a reservation is 'of a general character'. The ECtHR has held that the term refers to a reservation couched in terms that are too vague or broad for it to be possible to determine their exact meaning and scope (*Belilos v Switzerland*, No 10328/83, §§ 50 and 55, 29 April 1988).
21. Article 15 of the Convention allows the contracting parties to take measures derogating from their obligations under the Convention '[i]n time of war or other public emergency threatening the life of the nation', with the exception of their obligations under Article 2 (right to life, except in respect of deaths resulting from

lawful acts of war), Article 3 (prohibition of torture), Article 4(1) (prohibition of slavery), and Article 7 (no punishment without law), to the extent strictly required by the exigencies of the situation, and provided that such measures are not inconsistent with the contracting party's other obligations under international law. According to the settled case-law of the ECtHR, the phrase 'war or other public emergency threatening the life of the nation' refers to a situation of crisis or emergency, actual or imminent, which affects the whole population, constitutes a threat to the organised life of the community of which the state is composed, and is exceptional in that the normal measures or restrictions permitted by the Convention for the maintenance of public safety, health and order are plainly inadequate (*A. v UK*, No 3455/05, § 176, 19 February 2009).

22. In addition to the fundamental rights guaranteed by the Convention itself, there are other fundamental rights protected by six protocols additional to the Convention, namely the first Protocol, Protocol No 4, Protocol No 6, Protocol No 7, Protocol No 12 and Protocol No 13 (hereinafter referred to as 'the existing protocols').² These instruments are accessory to the Convention, but their scope *ratione personae* is potentially narrower: one of the final clauses in each of the protocols states that as between the contracting parties to that protocol the substantive articles of the protocol are to be regarded as additional articles to the Convention, and all the provisions of the Convention are to apply accordingly.³ All of the Member States of the Union are contracting parties to the first Protocol and to Protocol No 6. But each of the other existing protocols has only a limited number of Member States among its contracting parties.

² Protocols Nos 2, 3, 5, 8 to 11 and 14 confined themselves to amending the wording of the Convention, and thus no longer have any separate legal effect of their own. Of these, Protocol No 3 entered into force on 21 September 1970, Protocol No 5 entered into force on 20 December 1971, and Protocol No 8 entered into force on 1 January 1990; Protocol No 8 itself incorporated the wording of Protocol No 2, which in accordance with Article 5(2) of the same Protocol No 2 had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these protocols were replaced by Protocol No 11, with effect from its entry into force on 1 November 1998. On that date Protocol No 9, which had entered into force on 1 October 1994, was repealed, and Protocol No 10 lost its purpose. Protocol No 14, which entered into force on 1 June 2010, amended the wording of the Convention as amended by Protocol No 11.

³ Article 5 of the first Protocol, Article 6 of Protocol No 4, Article 6 of Protocol No 6, Article 7 of Protocol No 7, Article 3 of Protocol No 12, and Article 5 of Protocol No 13.

B. Legal relationship between the Union and the Convention

23. The Court of Justice of the European Union ('the Court of Justice', 'the Court') has consistently held that fundamental rights form an integral part of the general principles of law the observance of which the Court ensures (early judgments in this line of cases are those in *Case 29/69 Stauder* [1969] ECR 419, *Case 11/70 Internationale Handelsgesellschaft* [1970] ECR 1125, and *Case 4/73 Nold v Commission* [1974] ECR 491). For this purpose the Court draws inspiration from the constitutional traditions common to the Member States, and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard the Court has stated that the European Convention on Human Rights has special significance (see in particular *Case C-260/89 ERT* [1991] ECR I-2925, paragraph 41). Article 6(3) of the Treaty on European Union ('the TEU'), which was introduced by the Maastricht Treaty in substantially the same terms as those now in force, provides a codification of this case-law in primary legislation.
24. In paragraphs 34–36 of its *Opinion 2/94* [1996] ECR I-1759, the Court found that accession to the Convention would entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order. The Court said that such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance. It would therefore be such as to go beyond the scope of Article 235 of the EC Treaty, and consequently could be brought about only by way of Treaty amendment. The Court accordingly held that as Community law then stood the Community had no competence to accede to the Convention.
25. The Lisbon Treaty, which entered into force on 1 December 2009, replaced the version of Article 6 TEU in force up to that time by the following:

Article 6

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of

7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

26. Article 52(3) of the Charter of Fundamental Rights provides that

In so far as this Charter contains rights which correspond to rights guaranteed by the Convention ... the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

The explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter, and updated under the responsibility of the Praesidium of the European Convention, comment that this Article 52(3)

is intended to ensure the necessary consistency between the Charter and the [Convention] by establishing the rule that, in so far as the rights in the ... Charter also correspond to rights guaranteed by the [Convention], the meaning and scope of those rights, including

authorised limitations, are the same as those laid down by the [Convention]. This means in particular that the legislator, in laying down limitations to those rights, must comply with the same standards as are fixed by the detailed limitation arrangements laid down in the [Convention], which are thus made applicable for the rights covered by this paragraph, without thereby adversely affecting the autonomy of Union law and of that of the Court of Justice of the European Union.

The explanations continue:

The reference to the [Convention] covers both the Convention and the Protocols to it. The meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the European Court of Human Rights and by the Court of Justice of the European Union. The last sentence of the paragraph is designed to allow the Union to guarantee more extensive protection. In any event, the level of protection afforded by the Charter may never be lower than that guaranteed by the [Convention].

27. Protocol No 14 to the Convention, which was adopted on 13 May 2004 and entered into force on 1 June 2010, amended Article 59(2) of the Convention. The new Article 59(2) reads, ‘The European Union may accede to this Convention’.

C. The process of accession to date

28. On 17 March 2010 the Commission submitted a recommendation to the Council for a decision authorising it to negotiate an agreement for the accession of the Union to the Convention.
29. On 4 June 2010 the Council adopted a decision authorising the opening of negotiations, and designated the Commission as negotiator.
30. Between July 2010 and April 2013 there were 13 negotiation meetings between the Commission and two successive negotiating teams mandated by the Committee of Ministers. On 17 January 2011, as part of the regular meetings between the two courts, the delegations of the Court of Justice and of the ECtHR discussed the

question of the accession of the Union to the Convention, and in particular the question of the prior involvement of the Court of Justice in cases in which the Union was a co-respondent. A joint statement by the presidents of the two courts, which summarised the results of the discussions, provided an important point of reference and guidance for the negotiations.

31. On 5 April 2013 an agreement at negotiators' level was reached on five draft legal instruments for the accession of the Union to the Convention, namely a 'draft agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms' ('the draft agreement'), a 'draft declaration by the European Union to be made at the time of signature of the Accession Agreement', a '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 in cases to which the European Union is a party', a 'draft model of memorandum of understanding between the European Union and X' and a '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' ('the explanatory report'). The negotiators agreed that the instruments formed a package and were equally necessary for the accession of the Union to the Convention.

D. The substance of the accession agreement envisaged

I. Structural provisions

32. By Article 1(1) of the draft agreement, the Union accedes *ipso iure* to the Convention, to the first Protocol, and to Protocol No 6. Article 10(4) of the draft agreement specifies that the Union will become a party to these instruments at the date of entry into force of the accession agreement.
33. Article 1(2) of the draft agreement amends Article 59(2) of the Convention: a new subparagraph 2(a) will expressly refer to accession by the Union to the protocols, which is to be governed, *mutatis mutandis*, by the accession provisions in each protocol. Paragraph 17 of the explanatory report makes it clear that subsequent accession by the Union to the protocols other than the first Protocol and Protocol No 6 will require the deposit of separate accession instruments.

34. Article 1(2) of the draft agreement also adds a new subparagraph (b) to the same Article 59(2), stating that the accession agreement ‘constitutes an integral part of’ the Convention. Paragraph 21 of the explanatory report comments that this makes it possible to limit the number of amendments made to the Convention, and that in so far as the accession agreement will still have legal effect after the Union has acceded, its provisions will be subject to interpretation by the ECtHR. Under Article 32 of the Convention, therefore, the ECtHR will have jurisdiction to interpret and apply the accession agreement in the matters referred to it (see above, paragraph 4). In addition, as explained in paragraph 104 of the explanatory report, should any state become a contracting party to the Convention after the entry into force of the accession agreement, it will be bound by those provisions of the agreement which have legal effects beyond the mere amendment of the Convention.

35. Article 2 of the draft agreement states that

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.

Article 57 of the Convention is amended by Article 2(2) of the draft agreement, which adds a new sentence:

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.

Article 11 of the agreement (reservations) specifies that no reservation may be made in respect of the provisions of the agreement itself.

36. Articles 10 (signature and entry into force) and 12 (notifications) contain the usual final clauses.

II. Provisions changing the Convention system to allow for the accession of the Union

37. The principle underlying the draft agreement is that the Union is to submit to the substantive obligations of the Convention and the control machinery it establishes, and to participate in that control machinery, on an equal footing with the other contracting parties. To allow for the accession of the Union, the draft agreement confines itself to making the amendments strictly necessary in order to achieve the four objectives explained in paragraphs 38–52 below.

1. Amendments arising out of the submission of the Union, in parallel with the Member States, to the substantive obligations imposed by the Convention and to the control machinery it establishes

38. First, Article 1(3) states that ‘Accession to the Convention and to 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.’

39. Second, the first sentence of the new Article 36(4) of the Convention, which is inserted by Article 3(1) of the draft agreement, provides that the Union or a Member State may become a ‘co-respondent to proceedings’. The essential features of this procedural mechanism are as follows:

- The substantive conditions for the Union to become a co-respondent (when an application is directed against one or more Member States) or for a Member State to become a co-respondent (when the application is directed against the Union) are set out in Article 3(2) and (3) of the draft agreement. The Union may become a co-respondent where an alleged violation notified by the ECtHR calls into question the compatibility with the rights at issue, defined in the Convention, of a provision of Union law, including decisions taken under the TEU and the TFEU, notably where the violation could have been avoided only by disregarding an obligation under Union law. The Member States may become co-respondents where an alleged violation notified by the ECtHR calls into question the compatibility with the rights at issue, defined in the Convention, of a provision of the TEU, the TFEU, or any other provision having the same legal value pursuant to those

instruments, notably where the violation could have been avoided only by disregarding an obligation under those instruments.

- The procedure by which a contracting party becomes a co-respondent is regulated by Article 3(5) of the draft agreement, which provides that a contracting party is to become a co-respondent either by accepting an invitation from the ECtHR or by decision of the ECtHR upon the request of that contracting party. In either case the ECtHR is to seek the views of all parties to the proceedings. When deciding upon a request made by a contracting party, the ECtHR is to assess whether, in the light of the reasons given by the contracting party, it is plausible that the conditions in Article 3(2) or (3) of the draft agreement are met. Where an application is directed against and notified to both the Union and one or more Member States, Article 3(4) of the draft agreement allows the status of any respondent to be changed to that of a co-respondent if the conditions in Article 3(2) or (3) are met.
 - The legal effects of the status of co-respondent are spelt out in the second sentence of the new Article 36(4) of the Convention, inserted by Article 3(1) of the draft agreement, which provides that a co-respondent is a party to the case. Article 3(2) and (3) of the draft agreement make it clear that the status of co-respondent to the proceedings is ‘in respect of’ a violation the allegation of which calls into question the compatibility of a provision of Union law with the rights defined in the Convention. Article 3(7) of the draft agreement provides that if the violation in respect of which a contracting party is a co-respondent to the proceedings is established, the respondent and the co-respondent will be jointly responsible for that violation, unless the ECtHR, on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, decides that only one of them is to be held responsible.
40. With regard to proceedings to which the Union is a co-respondent, Article 3(6) of the draft agreement provides that

if the Court of Justice of the European Union has not yet assessed the compatibility with the rights at issue defined in the Convention ... of

the provision of European Union law as under paragraph 2 [of Article 3 of the draft agreement], 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 [ECtHR]. The European Union shall ensure that such assessment is made quickly so that the proceedings before the [ECtHR] are not unduly delayed. The provisions of this paragraph shall not affect the powers of the [ECtHR].

41. Third, mention should be made of Article 1(4) of the draft agreement, the first sentence of which provides that for the purposes of the Convention, of the protocols and the agreement, an act, measure or omission of organs of a Member State of the Union, or of persons acting on its behalf, are to be attributed to that state, even if such act, measure or omission occurs when the state is implementing the law of the Union, including decisions taken under the TEU and the TFEU. The second sentence of the same paragraph specifies that this does not preclude the Union from being responsible as a co-respondent for a violation resulting from such an act, measure or omission, in accordance with Article 36(4) of the Convention and Article 3 of the agreement.
42. Last, Article 5 of the draft agreement (interpretation of Articles 35 and 55 of the Convention) states that proceedings before the Court of Justice are to be understood as constituting neither procedures of international investigation or settlement within the meaning of Article 35(2)(b) of the Convention, nor means of dispute settlement within the meaning of Article 55 of the Convention.

2. Amendments to reflect the fact that the Union is not a state but a regional integration organisation

43. Given the principle of conferral in Article 5(2) TEU, under which the Union acts only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives that the Treaties set out, the second sentence of Article 1(3) of the draft agreement provides that nothing in the Convention or the protocols requires the Union to perform an act or adopt a measure for which it has no competence under Union law.

44. The draft agreement goes on to make a number of technical adjustments to the wording of the Convention, which was originally designed and drafted in the expectation that the parties to it would be states.
45. The first group of technical adjustments concerns provisions that refer to the contracting parties to the Convention and the protocols:
- The first indent in Article 1(5) of the draft agreement is an interpretation clause, specifying that after accession the terms ‘State’, ‘States’ or ‘States Parties’ in various provisions of the Convention and some of the protocols are to be understood as referring also to the Union as a contracting party.
 - Article 1(8) of the draft agreement amends Article 59(5) of the Convention: the Secretary General of the Council of Europe is now also to notify the Union of the entry into force of the Convention, the names of the 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 4 of the draft agreement amends the first sentence of Article 29(2) of the Convention and the title of Article 33 of the Convention to replace the expressions ‘inter-State applications’ and ‘inter-State cases’ by the expressions ‘inter-Party applications’ and ‘inter-Party cases’.
46. A second group of technical adjustments concerns terms in various provisions of the Convention or the protocols that refer more generally to the concept of a state or some aspect of it:
- The second indent in Article 1(5) of the draft agreement is an interpretation clause stipulating that the terms ‘national law’, ‘administration of the State’, ‘national laws’, ‘national authority’, or ‘domestic’ appearing in various provisions of the Convention are to be understood as relating also, *mutatis mutandis*, to the internal legal order of the Union and to its institutions, bodies, offices or agencies.
 - With reference specifically to the territorial aspects:
 - Under Article 1(6) of the draft agreement, the expression ‘everyone within their jurisdiction’ appearing in Article 1 of the Convention,

where it refers to persons within the territory of a contracting party, is to be understood, with regard to the Union, as referring to persons within the territories of the Member States to which the TEU and the TFEU apply; and where it refers to persons outside the territory of a contracting party, it is to be understood, with regard to the Union, as referring to persons who, if the alleged violation in question had been attributable to a contracting party which is a state, would have been within the jurisdiction of that contracting party.

- Article 1(7) of the draft agreement provides that with regard to the Union, the terms ‘country’ and ‘territory of a State’ appearing in various provisions of the Convention and some of the protocols mean each of the territories of the Member States to which the TEU and the TFEU apply.

47. A final group of technical adjustments concerns terms appearing in the Convention and some of the protocols regarding the justification for restrictions on some of the rights that those instruments safeguard: ‘national security’, ‘economic well-being of the country’, ‘territorial integrity’, or ‘life of the nation’. The last indent in Article 1(5) of the draft agreement is an interpretation clause stipulating that in proceedings brought against the Union, or to which the Union is a co-respondent, these terms are to be considered with regard to situations relating to the Member States of the Union individually or collectively, as the case may be.

3. Amendments to allow for the fact that the Union is not a member of the Council of Europe

48. First, Article 6 of the draft agreement provides that a delegation of the European Parliament is to 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 of the ECtHR in accordance with Article 22 of the Convention; this delegation is to have the same number of representatives as the delegation of the Member State of the Council of Europe with the highest number of representatives.

49. Second, there are a number of provisions regulating the participation of the Union in the meetings of the Committee of Ministers:
- Article 7(1) of the draft agreement amends Article 54 of the Convention (powers of the Committee of Ministers), adding a new paragraph 1 stating that ‘Protocols to this Convention are adopted by the Committee of Ministers’. Hitherto protocols to the Convention have been adopted by the Committee of Ministers on the basis of the Statute of the Council of Europe.
 - Article 7(2) of the draft agreement entitles the Union to participate in the meetings of the Committee of Ministers, with the right to vote, when the latter takes decisions under Articles 26(2), 39(4), 46(2)–(5), 47 or 54(1) of the Convention.
 - Article 7(3) of the draft agreement provides that the Union is to be consulted within the Committee of Ministers, which must take due account of the position expressed by the Union, before the adoption of any other instrument or text relating to the Convention or to any of the protocols to which the Union is a party, and addressed to the ECtHR or to all the contracting parties to the Convention or the protocol concerned; or relating to decisions by the Committee of Ministers under the provisions listed in the preceding indent; or relating to the selection of candidates for election of judges by the Parliamentary Assembly of the Council of Europe under Article 22 of the Convention.
50. Third, Article 8 of the draft agreement provides that the Union is to participate in the expenditure related to the Convention by paying an annual contribution to the Council of Europe budget dedicated to the expenditure related to the functioning of the Convention; this contribution is to be in addition to the contributions made by the other contracting parties, and is to be equal to 34 % of the highest amount contributed by any state in the previous year to the ordinary budget of the Council of Europe.
51. Fourth, in Article 9(1) of the draft agreement (relations with other agreements) the Union undertakes, within the limits of its competences, to respect certain provisions of agreements ‘ancillary’ to the Convention, namely Article 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); 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 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). In return, paragraph 2 of the same Article provides that for the purpose of the application of these instruments the contracting parties to each of them are to treat the Union as if it were a contracting party. Paragraphs 3 and 4 of the same Article provide respectively that the Union is to be consulted regarding any amendment of these instruments, and that the Union is to be notified of subsequent developments concerning them.

4. Amendments intended to preserve the effectiveness of the control machinery established by the Convention with respect to the Union

52. The first sentence of Article 7(4) of the draft agreement formulates the principle that the exercise of the right to vote by the Union and its Member States must not prejudice the effective exercise by the Committee of Ministers of its supervisory functions under Articles 39 and 46 of the Convention. The principle is spelt out in points (a) and (b) of the paragraph. Point (a) concerns

cases 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 first sentence of point (a) contains a declaratory clause stating that

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 second sentence indicates that the Rules for Supervision are to be adapted to ensure that the Committee of Ministers exercises its functions effectively in those circumstances. Finally, point (b) contains a declaratory clause stating that

where the Committee of Ministers otherwise supervises the fulfilment of obligations by a High Contracting Party other than the European Union, the member States of the European Union are free under the European Union treaties to express their own position and exercise their right to vote.

53. In order to give effect to this point (a) in Article 7(4) of the draft agreement, the negotiators have agreed to add to the Rules for Supervision a new Rule 18, entitled ‘Judgments and friendly settlements in cases to which the European Union is a party’. The new rule reads as follows:

1. Decisions by the Committee of Ministers under Rule 17 (Final Resolution) of the present rules shall be considered as adopted if a majority of four fifths of the representatives casting a vote and a majority of two thirds of the representatives entitled to sit on the Committee of Ministers are in favour.

2. Decisions by the Committee of Ministers under Rule 10 (Referral to the Court for interpretation of a judgment) and under Rule 11 (Infringement proceedings) of the present rules shall be considered as adopted if one fourth of the representatives entitled to sit on the Committee of Ministers is in favour.

3. Decisions on procedural issues or merely requesting information shall be considered as adopted if one fifth of the representatives entitled to sit on the Committee of Ministers is in favour.

4. Amendments to the provisions of this rule shall require consensus by all High Contracting Parties to the Convention.

E. Desirability of a request for an opinion

54. In paragraph 35 of Opinion 2/94, cited above, the Court said that accession to the Convention would be of constitutional significance. The Commission believes that the draft agreement satisfies all the requirements of primary law (see below, paragraphs 65–71), but nevertheless considers that in the interest of legal certainty it would be appropriate to seek the opinion of the Court on the compatibility of the draft agreement with the Treaties.

ASSESSMENT

A. Admissibility

55. The Court has held that a request for an opinion on the compatibility of a proposed agreement with the Treaties is admissible only if the Court has sufficient information to enable it to consider the question. In the case of the accession of the Union to the Convention, the Court must have sufficient information regarding the arrangements by which the Union envisages submitting to the present and future judicial control machinery established by the Convention (Opinion 2/94, cited above, paragraphs 20 and 21).
56. With the present request for an opinion the Commission is submitting to the Court the full text of a draft agreement with a number of accompanying instruments that have been agreed by the negotiators. The Commission believes, therefore, that the Court has sufficient information to enable it to consider whether the draft agreement is compatible with the Treaties.
57. Similarly, the Court may be called upon to state its opinion pursuant to Article 218(11) TFEU at any time before the Union's consent to be bound by the agreement is finally expressed; unless and until that consent is given, the agreement remains an 'agreement envisaged' within the meaning of that provision (Opinion 1/94 [1994] ECR I-5267). The Union has not yet expressed its consent to be bound by the accession agreement, and the draft agreement is therefore an 'agreement envisaged' within the meaning of Article 218(11) TFEU.
58. It is true that actual participation by the Union in the judicial control machinery established by the Convention will require not just the entry into force of the

accession agreement, but also the enactment of a number of provisions internal to the Union ('the internal provisions'), dealing for example with the drawing up of the list of three candidates for the office of judge at the ECtHR to be elected in respect of the Union, or the procedure for the prior involvement of the Court of Justice. These internal provisions have not been adopted yet, although the Commission departments are in the process of consulting the Member States' experts informally in the appropriate Council working party (FREMP).

59. But that fact does not justify the conclusion that the draft agreement is not 'envisaged' within the meaning of Article 218(11) TFEU, and consequently that the request for an opinion is inadmissible.
60. From the case-law of the Court it is clear that the purpose of a request for an opinion under Article 218(11) is to forestall complications which would result from legal disputes concerning the compatibility with the Treaty of international agreements binding upon the Union. As the Court has stated, a possible decision of the Court to the effect that such an agreement is incompatible with the provisions of the Treaty, by reason either of its content or of the procedure adopted for its conclusion, could not fail to provoke serious difficulties, not only in a Community context but also in that of international relations, and might give rise to adverse consequences for all interested parties, including third countries (Opinion 2/94, paragraphs 3 and 4). Whether or not an agreement that has not yet been concluded by the Union is 'envisaged' has to be decided by reference to the prospect that the Union and other contracting parties will express their consent to be bound by the agreement. But in assessing whether an agreement that has not yet been concluded by the Union is 'envisaged' there is no reason to consider the stage reached in enacting whatever provisions may be necessary at Union level in order to regulate questions relating to the legal position of the Union as a future party to the agreement.
61. This interpretation is supported by the consideration that such internal provisions will necessarily be grafted onto the content of the agreement that they seek to implement at Union level. Before pursuing the formal process leading to the adoption of the legal act laying down the internal provisions, therefore, it is appropriate that the responsible institutions of the Union should have the certainty that the Treaties do not stand in the way of the conclusion of an agreement with

that content. The institutions can obtain that certainty through the procedure laid down in Article 218(11). It is also possible that the Court might take the view that an agreement not yet concluded by the Union was compatible with the Treaties only provided internal provisions were enacted that had a specified content.

62. For these reasons the Commission believes that the request for an opinion is admissible.

B. Substance

I. The legal framework

63. The first sentence of Article 6(2) of the TEU provides that the Union is to accede to the Convention. The Protocol relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms ('Protocol No 8') makes it clear that accession is to take place by means of an international agreement (hereinafter referred to as 'the accession agreement'). The accession agreement is to be concluded between the Union and the existing parties to the Convention, which are the 47 Member States of the Council of Europe.
64. This first sentence of Article 6(2) TEU does not merely create a substantive legal basis for the accession of the Union to the Convention and its protocols ('the protocols', see above, paragraph 22), but also imposes a legal obligation on the institutions of the Union to seek to conclude an accession agreement. By virtue of the principle of sincere cooperation (Article 4(3) TEU, third sentence), the Member States have an obligation to facilitate the conclusion of an accession agreement in their capacity as existing parties to the Convention.
65. The second sentence of Article 6(2) TEU and Protocol No 8 lay down a series of requirements regarding the content of the accession agreement.
66. First, the Union's accession to the Convention is not to affect the Union's competences (Article 6(2) TEU, second sentence, and Article 2 of Protocol No 8, first sentence).

67. Second, the Union's accession to the Convention is not to affect the powers of the Union's institutions (Article 2 of Protocol No 8, first sentence).
68. Third, the accession agreement must reflect the need to preserve the specific characteristics of the Union and Union law, in particular with regard to the specific arrangements for the Union's possible participation in the control bodies of the Convention (Article 1(a) of Protocol No 8) and to the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate (Article 1(b) of Protocol No 8). The need to preserve the specific characteristics of the Union's legal order is also emphasised in Declaration No 2 annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007.
69. Fourth, the Union's accession to the Convention is not to affect the situation of Member States in relation to the Convention, measures taken by Member States derogating from the Convention in accordance with Article 15 thereof, or reservations to the Convention made by Member States in accordance with Article 57 thereof (Article 2 of Protocol No 8, second sentence).
70. Fifth, the accession agreement is not to affect Article 344 of the Treaty (Article 3 of Protocol No 8).
71. Last, in addition to the requirements set out above, which are expressly included in the letter of the Treaties, the accession agreement has to respect the autonomy of the legal order of the Union in pursuing its own particular objectives. A situation must be avoided in which the ECtHR or the Committee of Ministers, when a dispute relating to the interpretation or application of one or more provisions of the Convention or of the accession agreement is brought before them, may in the exercise of their jurisdiction under the Convention be called upon to interpret concepts in those instruments in a manner that might require them to rule on the respective competences of the Union and the Member States. In other words, acts done by the bodies with authority to take decisions under the Convention must not have the effect of binding the Union and its institutions, in the exercise of their internal powers, to a particular interpretation of the rules of Union law

(Opinion 1/91 [1991] ECR I-6079, paragraphs 30–34, and Opinion 1/00 [2002] ECR I-3493, paragraph 13).

II. Assessment of the draft agreement in the light of the requirements of the Treaties

1. No effect on the competences of the Union (Article 2 of Protocol No 8, first sentence)

72. Accession to the Convention will impose an obligation on the Union in international law requiring its institutions, bodies, offices or agencies, or persons acting on their behalf, to respect the rights guaranteed by the Convention.

73. In so far as that obligation entails an obligation to refrain from performing any act or adopting any measure that might violate those rights (a ‘negative obligation’), the Union, in acceding to the Convention, is merely accepting limits imposed by international law on the exercise of the competences conferred on it by the Member States in the Treaties to attain the objectives set out in the Treaties, in accordance with the principle of conferral stated in Article 5(2) TEU. It is obvious, after all, that the institutions must exercise any Union competence in full compliance with fundamental rights.

74. In so far as the obligation on the Union requiring respect for the rights guaranteed by the Convention on the part of the Union’s institutions, bodies, offices or agencies entails an obligation to take the measures necessary to protect persons ‘within the jurisdiction’ of the Union for purposes of Article 1 of the Convention against interference by other parties in any of those rights (a ‘positive obligation’), it should be pointed out that the second sentence of Article 1(3) of the draft agreement stipulates that nothing in the Convention or the protocols can require the Union to perform an act or adopt a measure for which it has no competence under Union law.

75. A specific aspect of the absence of any effect on the competences of the Union is the question of the joint responsibility of the Union and of a Member State, or of the Member States together, under Article 3(7) of the draft agreement, as respondent and co-respondent to proceedings before the ECtHR. This aspect will be considered in paragraph 103 below.

76. It follows that the draft agreement does not have the effect of imposing obligations on the Union that are beyond the scope of the competences conferred on it in the Treaties, or of reducing the Union's competences.
77. Similarly, the competences of the Union are not affected by Article 1(1) of the draft agreement, under which the Union accedes not only to the Convention but also to the first Protocol and to Protocol No 6, or by Article 1(2) of the draft agreement, which amends Article 59(2) of the Convention to allow the Union to accede to the other existing protocols.
78. In the first place, the Commission takes the view that under the law as it stands Article 6(2) TEU confers the competence on the Union to accede to all the existing protocols, irrespective of whether all the Member States are parties to a particular protocol at the time the Union accedes to it (or indeed were parties to it at the time of the signature of the Treaty of Lisbon). If it were otherwise, the rule in the second sentence of Article 2 of Protocol No 8, according to which the accession agreement must ensure that the Union's accession does not affect the situation of the Member States in relation to the protocols, would be meaningless. In addition, the protocols are merely accessory to the Convention (see above, paragraph 22). For the same reasons, Article 6(2) TEU must be interpreted to mean that it also confers on the Union the competence to enter into any new protocols or to accede to them at a later stage, provided they are accessory to the Convention in the same way as the existing protocols. But in the Commission's view any accession of the Union to any of the existing protocols or to any new protocol should follow the procedure in paragraphs (6)(a)(ii) and (8) of Article 218 TFEU, applying by analogy.
79. In the alternative, if it should be considered that under the law as it stands Article 6(2) TEU does not confer the competence on the Union to accede to any existing protocol to which not all the Member States are parties at the time of the Union's accession (or indeed to which not all were parties at the time of the signature of the Treaty of Lisbon), Article 1(2) of the draft agreement would not affect the competences of the Union in any event. The scope of Article 1(2) is confined to creating the possibility in international law for the Union to accede to these existing protocols, after the entry into force of the accession agreement, by means of the international-law instruments that the protocols provide for. Article 1(2) does not in any way prejudice the question whether under the law as it

stands Article 6(2) TEU does indeed confer on the Union the competence to accede to the protocols.

80. For these reasons the Commission takes the view that the draft agreement ensures that the competences of the Union are not affected.

2. No effect on the situation of Member States in relation to the Convention (Article 2 of Protocol No 8, second sentence)

81. It is necessary to preserve the situation of Member States in relation to the Convention. Not all of the Member States are bound to the same extent by the various instruments making up the ‘Convention corpus’, comprising the Convention itself and the protocols to it, because not all of them are contracting parties to Protocols Nos 4, 7, 12 and 13.⁴ Some Member States have made reservations under Article 57 of the Convention in respect of some provisions of the Convention or of one or more of the protocols. And in certain circumstances (‘in time of war or other public emergency threatening the life of the nation’) Member States may claim entitlement under Article 15 of the Convention to derogate from their obligations under the Convention or one of the protocols to which they are parties.

82. In order to take account of this requirement, Article 1(3) of the draft agreement provides that accession ‘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’. In international law, therefore, the scope of the Union’s commitments is limited *ratione personae* to the Union alone, as a party governed by public international law which is distinct from the Member States. Thus the Union’s accession to the Convention does not affect the legal situation in public international law of a Member State which under Article 57 of the Convention has made a reservation in respect of a provision of the Convention or of one of the protocols to which the Union is acceding, or which has taken measures derogating from the Convention under Article 15 of the Convention, or which is not a party to one of the protocols to which the Union

⁴ A chart of ratifications of the protocols and a list of reservations and derogations can be consulted on the internet site of the Treaty Office of the Council of Europe (http://www.conventions.coe.int/?pg=/treaty/default_fr.asp&nd=&lg=en).

might accede in the future. It may also be pointed out here that the first sentence of Article 1(4) of the draft agreement provides that for the purposes of the Convention, of the protocols and of the agreement, an act, measure or omission of organs of a Member State or of persons acting on its behalf is to be attributed to that state, even if such act, measure or omission occurs when the state is implementing the law of the Union, including decisions taken under the TEU and the TFEU. This prevents acts from being attributed to the Union when under the law of the Union they are acts or measures of a Member State.

83. By reason of this limitation *ratione personae* of the Union's commitments in international law, and even though under Article 216(2) TFEU agreements concluded by the Union are binding upon the institutions of the Union and on its Member States, the draft agreement does not impose any obligation on the Member States, under the law of the Union, in respect of the Convention and its protocols. *A fortiori*, no obligation is created under Union law that goes beyond the scope of the pre-existing individual legal situations of the Member States in relation to the Convention and its protocols.
84. It follows that the draft agreement does not affect the situation of Member States in relation to the Convention.

3. Preserving the specific characteristics of the Union and Union law with regard to the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate (Article 1(b) of Protocol No 8)

85. One of the specific characteristics of the Union and its legal order is that as a general rule it is the Member States who apply Union law. In most cases this means that Member States are under an obligation to perform certain individual acts or take certain individual measures, or to refrain from doing so. As has just been pointed out, the first sentence of Article 1(4) of the draft agreement provides that for the purposes of the Convention, of the protocols and of the agreement, an act, measure or omission of organs of a Member State or of persons acting on its behalf is to be attributed to that state, even if such act, measure or omission occurs when the state is implementing the law of the Union. This provision prevents acts which

under Union law are not acts or measures of institutions, bodies, offices or agencies of the Union from being attributed to it nonetheless.

86. Conversely, the institutions, bodies, offices or agencies of the Union may be called upon to perform acts or take measures with respect to individuals that apply provisions of Union law laid down directly in the Treaties.

87. According to paragraph 38 of the explanatory report,

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.

88. It is the settled case-law of the ECtHR that a contracting party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations. Article 1 does not exclude any part of a contracting party's 'jurisdiction' from scrutiny under the Convention.

89. Where a violation of the Convention alleged before the ECtHR in relation to an act or omission rests on a provision of law, so that the compatibility of that provision with the Convention is called into question by the allegation, the review exercised by the Convention bodies will necessarily be concerned in substance with the particular provision. This will happen notably where the violation could have been avoided only by disregarding a provision that is of general application.

90. In a situation of the kind refer to in the previous paragraph, first, the legal debate before the ECtHR will in essence relate to the compatibility of the provision with the Convention. And second, if the judgment of the ECtHR that concludes the proceedings finds that the violation that calls the provision into question did indeed take place, among the obligations imposed by Article 46(1) of the Convention particular importance will attach to that to take measures of a general nature, and if necessary to amend or repeal the provision in question (see above, paragraph 14). Amendment or repeal may also be necessary in order to restore the individual position of the person who brought the application before the ECtHR (*restitutio in integrum*).

91. In the ‘typical’ situation — leaving aside for a moment the specific position of a Member State applying a provision of Union law — of proceedings brought before the ECtHR against a contracting party that is a state the contracting party that is the author of the act or omission that allegedly violates the Convention will also be the contracting party that enacted the provision on which the alleged violation rests. The contracting state will be the respondent, and will thus be able to play a full part in the legal debate before the ECtHR, with regard to the compatibility of the provision with the Convention as well as any other aspects. In the event of a judgment against it, it will be subject to the obligations imposed by Article 46(1) of the Convention, including the obligation to take measures of a general nature with respect to the provision in question, such as amending or repealing it.
92. Conversely, where a violation of the Convention alleged before the ECtHR - in relation to an act or omission on the part of a Member State - rests on a provision of Union law, so that the compatibility of that provision with the Convention is called into question by the allegation, the contracting party to which pertains the provision will be the Union, and unless specific procedural rules are enacted the Union will not be a party to the proceedings before the ECtHR. The same applies to the Member States, taken together, where a violation of the Convention alleged before the ECtHR in relation to an act or omission on the part of an institution, body, office or agency of the Union rests on a provision of general application laid down directly in the Treaties, since the masters of the Treaty are the Member States. In either situation the contracting party that enacted the provision would not be able to take part in the legal debate before the ECtHR, and would not be bound by the obligations to take general measures imposed, as the case may be, by Article 46(1) of the Convention. Those obligations are binding only on the contracting party that committed the act or omission that is alleged to violate the Convention, namely the Member State that applied a provision of Union law, or the Union if it has applied a provision laid down directly in the Treaties.
93. A situation of that kind would not be in the interests of the Union, or in the interests of the Member States, or in the interests of the proper operation of the control machinery established by the Convention.
94. It was therefore necessary for the draft agreement to lay down specific procedural rules allowing the Union to be a party to proceedings before the ECtHR in respect

of a violation of the Convention alleged before the ECtHR - in relation to an act or omission on the part of a Member State - that rests on a provision of Union law, so that the allegation called into question the compatibility of that provision with the Convention. Conversely, it must be possible for the Member States, taken together, to be parties to proceedings before the ECtHR in respect of a violation of the Convention alleged before the ECtHR - in relation to an act or omission on the part of an institution, body, office or agency of the Union - that rests on a provision of general application laid down directly in the Treaties. That, in substance, is the content of the obligation under Article 1(b) of Protocol No 8, according to which the accession agreement must provide for 'the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate'. In the state of the law under the Convention described in paragraphs 88–90 above, this is the only way to preserve the specific characteristics of the Union and Union law referred to in paragraphs 85 and 86.

95. Article 3 of the draft agreement satisfies that requirement by allowing the Union to be a co-respondent to the proceedings in respect of an alleged violation where the allegation calls into question the compatibility with the Convention of a provision of Union law, and allowing Member States to be co-respondents to the proceedings in respect of an alleged violation where the allegation calls into question the compatibility with the Convention of a provision laid down directly in the Treaties. The new Article 36(4) of the Convention, added by Article 3(1) of the draft agreement, states that a co-respondent is a party to the case.
96. As a party to the case, a co-respondent enjoys full procedural rights to conduct an effective defence of the provision of Union law whose compatibility with the Convention is called into question by the allegation of a violation of the Convention. A co-respondent is not confined to the limited rights of a third-party intervener under Article 36(2) of the Convention, who is entitled only to submit written comments or to take part in hearings before the ECtHR. More especially, as explained in paragraphs 60, 61 and 63 of the explanatory report, friendly settlements under Article 39 of the Convention require the agreement of the respondent and of the co-respondent; unilateral declarations acknowledging a violation for which the respondent and the co-respondent are both responsible

require the agreement of both of them; and a co-respondent may request the referral of a case to the Grand Chamber under Article 43 of the Convention.

97. In addition, if the judgment of the ECtHR that concludes the proceedings should find that the violation at issue has indeed taken place, and thus also call into question the provision of Union law in question, the co-respondent will have an obligation under Article 46(1) of the Convention to remedy the violation so as to abide by the judgment. In particular, where the provision is laid down in a legal act enacted by one or more institutions, the Union will be obliged to repeal or amend that act.
98. The Commission would like to emphasise that in its view the rules in the draft agreement allowing the Union to participate as co-respondent to proceedings before the ECtHR, and allowing the Member States to do likewise, do preserve the autonomy of the Union's legal order with regard to the decisions that the ECtHR may be called upon to take in respect of the Union and the Member States.
99. In the first place, Article 3(5) of the draft agreement provides that a contracting party may become a co-respondent either by accepting an invitation from the ECtHR or by decision of the ECtHR upon the request of that contracting party. The third sentence of paragraph 53 of the explanatory report makes it clear that 'No High Contracting Party may be compelled to become a co-respondent.' This means that the ECtHR will not incidentally have to interpret Union law in order to establish whether an allegation of a violation of the Convention calls into question the compatibility with the Convention of a provision of Union law.
100. In the second place, Article 3(7) of the draft agreement lays down the rule that if the ECtHR finds that a violation in respect of which the Union is a co-respondent to the proceedings did indeed take place, the Union and the Member State concerned are jointly responsible for that violation. In such a case the ECtHR will confine itself to finding that the violation has taken place. It will not rule on the nature of the parts played in the violation by the Union and the Member State, or their shares in it, and thus indirectly on their respective obligations with regard to the execution of the judgment and in particular any individual or general measures that have to be taken.

101. Furthermore, in accordance with the second part of Article 3(7) of the draft agreement, the ECtHR may depart from the principle of joint responsibility of the respondent and the co-respondent, and decide that only one of them is to be held responsible, but it can do this only on the basis of reasons given by the respondent and the co-respondent. It follows that in the absence of a joint request, made by the respondent and the co-respondent and supported by legal argument, the ECtHR cannot hold only one of them responsible. Thus the ECtHR will not indirectly have to interpret Union law on issues such as the distribution of competences between the Union and the Member States. According to the fourth sentence of paragraph 62 of the explanatory report, ‘Apportioning responsibility separately to the respondent and the co-respondent(s) on any other basis would entail the risk that the Court would assess the distribution of competences between the EU and its member States’.
102. There is therefore no danger that when admitting the Union as a co-respondent to proceedings against a Member State or when establishing a violation in respect of which the Union is a co-respondent the ECtHR might have to apply or interpret legal concepts in the draft agreement in a manner that would have the effect of determining the respective competences of the Member States and of the Union (on this point, with a different outcome, see Opinion 1/91 [1991] ECR I-6079, paragraphs 31 to 36). Quite the reverse, the co-respondent mechanism is a procedural means designed to prevent the ECtHR from having to interpret Union law.
103. The draft agreement also ensures that a judgment of the ECtHR in proceedings to which the Union is a co-respondent cannot affect the competences of the Union. Such a judgment cannot impose on the Union obligations under Article 46(1) of the Convention that are beyond the scope of the competences conferred on it in the Treaties.
104. First, under Article 3(7) of the draft agreement, the joint responsibility of the Union and the Member State is confined to violations in respect of which a contracting party is a co-respondent to proceedings. By hypothesis any such violation must rest on a provision of Union law. In respect of any other violations of the Convention that the ECtHR might establish, its judgment will not impose any obligation under Article 46(1) of the Convention on the Union.

105. Second, the rule in the second sentence of Article 1(3) of the draft agreement, which states that nothing in the Convention or the protocols requires the Union to perform an act or adopt a measure for which it has no competence under Union law, also applies to obligations under Article 46(1) of the Convention. In particular, if the provision of Union law called into question by a finding that the Convention has been violated is a provision of primary law, and has to be amended in order to give effect to the judgment of the ECtHR, the Union would not be infringing Article 46(1) of the Convention by the mere fact that its institutions cannot themselves amend primary law but can only take the procedural steps provided for in Article 46(2)–(6) TEU. The fact that the Member States are responsible for the violation jointly with the Union ensures that the judgment can be invoked against the contracting parties that are in a position to execute it.

106. The Commission takes the view that in order to preserve the specific characteristics of the Union and Union law described in paragraphs 85 and 86 above, in the light of the state of the law of the Convention described in paragraphs 88–90, the Union ought to join the proceedings as a co-respondent whenever it is alleged that the Convention (or one of the protocols to which the Union has acceded) is violated by an act or omission on the part of a Member States that is applying a provision of Union law in such a way that the allegation calls into question the compatibility of that provision with the Convention. The draft agreement makes it possible to achieve this result. Article 3(5) of the draft agreement states that when the ECtHR is deciding upon a request by a contracting party asking to become a co-respondent, it is to assess whether, in the light of the reasons given by the contracting party, it is plausible that the conditions in Article 3(2) or (3) of the Convention are met. The second sentence of paragraph 55 of the explanatory report comments that

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.

107. Nevertheless, under the Convention, the Union would become a co-respondent only if it chose to do so. This is necessary in order to preserve the autonomy of the Union's legal order, as explained in paragraphs 98 to 102 above.

108. Under Union law, however, this choice cannot be a matter of political discretion, but must be an automatic consequence of the fact that a violation of the Convention is alleged before the ECtHR - in relation to an act or omission on the part of a Member State - that rests on a provision of Union law, so that the allegation calls into question the compatibility of that provision with the Convention (or one of the protocols to which the Union has acceded). The Commission, as representative of the Union before the ECtHR (see below, paragraph 171), will in each case have to verify whether this condition is met, subject to review by the Union courts, and if so to ask the ECtHR that the Union be admitted to the proceedings as a co-respondent. Consequently, in order to preserve the specific characteristics of the Union and Union law described above in paragraphs 85 and 86, in the light of the state of the law of the Convention described in paragraphs 88–90, it is essential that the internal provisions to be adopted at the level of the Union should be consistent with the principle of automatic participation of the Union as a co-respondent.
109. The considerations outlined in paragraph 108 above also apply *mutatis mutandis* to the admission as co-respondent of the Member States together, when a violation of the Convention is alleged before the ECtHR - in relation to an act or omission on the part of the Union - that rests on a provision laid down directly in the Treaties. In order to ensure that the primary law of the Union is defended effectively, the Member States must be represented by a single agent. A rule to that effect would give practical expression to the obligation of sincere cooperation in Article 4(3) TEU, and should therefore be included in the internal provisions to be adopted by the Union.
110. The obligation of sincere cooperation in Article 4(3) TEU could also be given practical expression in the internal provisions by providing where necessary for the coordination of the conduct of proceedings before the ECtHR by the respondent and the co-respondent.
111. It follows that the draft agreement reflects the need to preserve the specific characteristics of the Union and of Union law with regard to the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate.

4. Preservation of the specific characteristics of the Union and of Union law with regard to the system of judicial protection, and lack of any effect on the jurisdiction of the Court or on Article 344 TFEU (Article 1, Article 2 first sentence, and Article 3 of Protocol No 8)

a) Imputation of acts and omissions to the Union and to the Member States

112. One of the specific characteristics of the Union and its legal order is that as a general rule it is the Member States who apply Union law. In the same way, judicial protection with regard to acts or omissions on the part of a Member State is provided by the courts of that state, even when the act or omission is applying a provision of Union law (see the second subparagraph of Article 19(1) TEU). Under Articles 263, 265, 267, 268 and 270 TFEU, the Union courts have jurisdiction to provide judicial protection to individuals only in respect of acts or omissions on the part of the institutions, bodies, offices or agencies of the Union. In other words, whether it is the Union or the Member State that is responsible for providing judicial protection to an individual in respect of an act or measure applying Union law will depend, as a general rule, on whether it is the Union or the Member State that is competent to perform that act or to take that measure.

113. The combined effect of Articles 6, 13 and 35(1) of the Convention is that there must be an effective remedy before a domestic authority against any act or measure on the part of a contracting party, and that an application brought before the ECtHR is admissible only after all domestic remedies have been exhausted without success.

114. So as to preserve the specific characteristics of the Union and of Union law with regard to the system of judicial protection, given the state of law under the Convention, it is important that when an act or measure has to be attributed to either the Union or one or more Member States in order to determine responsibility under the Convention this should be done in accordance with the same criteria that govern within the Union the attribution of the same act or measure to either the Union or one or more Member States in order to identify the contracting party in whose legal order 'domestic' judicial protection is to be sought and granted.

115. This requirement is met by the first sentence in Article 1(4) of the draft agreement, which provides that

For the purposes of the Convention, of the protocols thereto and of this Agreement, an act, measure or omission of organs of a member State of the European Union or of persons acting on its behalf shall be attributed to that State, even if such act, measure or omission occurs when the State implements the law of the European Union, including decisions taken under the Treaty on European Union and under the Treaty on the Functioning of the European Union.

The first sentence of paragraph 23 of the explanatory report comments that

Under EU law, the acts of one or more Member States or of persons acting on their behalf implementing EU law, including decisions taken by the EU institutions under the TEU and the ... TFEU ... are attributed to the member State or member States concerned.

The fourth sentence of paragraph 23 of the explanatory report states that

under EU law, acts, measures and omissions of the EU institutions, bodies, offices or agencies, or of persons acting on their behalf, are attributed to the EU.

The last sentence of paragraph 23 states that

For the sake of consistency, parallel rules should apply for the purposes of the Convention system as laid down in Article 1, paragraph 4, of the Accession Agreement.

b) In particular: judicial protection in the area of common foreign and security policy

116. It should be recalled at the outset that in the area of common foreign and security policy ('the CFSP'), as in every other area, acts performed and measures taken by the institutions, bodies, offices and agencies of the Union, or by its servants in the performance of their duties, are attributed to the Union. The same criteria apply in the context of the Convention. This is confirmed by the fourth sentence of

paragraph 23 of the explanatory report, read in conjunction with the second-last sentence, according to which

The foregoing applies to acts, measures or omissions, regardless of the context in which they occur, including with regard to matters relating to the EU common foreign and security policy.

117. With regard to the CFSP, the law of the Union has two specific characteristics.
118. First, military operations in application of the CFSP are conducted by the Member States. According to the fourth sentence of the second subparagraph of Article 24(1) TEU,

The common foreign and security policy shall be put into effect by the High Representative of the Union for Foreign Affairs and Security Policy and by Member States, in accordance with the Treaties.

In addition, under Article 28(1) TEU,

Where the international situation requires operational action by the Union, the Council shall adopt the necessary decisions. They shall lay down their objectives, scope, the means to be made available to the Union, if necessary their duration, and the conditions for their implementation.

Article 29 TEU provides that

The Council shall adopt decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the Union positions.

Finally, Article 42(3) TEU provides that

Member States shall make civilian and military capabilities available to the Union for the implementation of the common security and defence policy, to contribute to the objectives defined by the Council.

119. For operations conducted on the basis of the Treaty provisions governing the CFSP, the parallelism in the rules of attribution described in paragraphs 115 and 116 above is of particular importance. The second sentence of paragraph 23 of the explanatory report, relating to Article 1(4) of the draft agreement, comments that

In particular, where persons employed or appointed by a member State act in the framework of an operation pursuant to a decision of the EU institutions, their acts, measures and omissions are attributed to the member State concerned.

This sentence spells out the implications of the preceding one, which states that

the acts of one or more Member States or of persons acting on their behalf implementing EU law, including decisions taken by the EU institutions under the TEU and the ... TFEU ... are attributed to the member State or member States concerned.

120. It is true that the ECtHR has ruled that certain measures taken in Kosovo by members of the armed forces of contracting parties to the Convention, in the context of contributions to implement a resolution of the United Nations Security Council adopted under Chapter VII of the UN Charter, a resolution which provided for the deployment of an international security force and the establishment of a civil administration, were attributable to the United Nations and not to the contracting parties concerned (ECtHR decision in *Behrami and Behrami v France and Saramati v France, Germany and Norway*, No 71412/01, § 122, 2 May 2007; for a contrary finding in another case, see the judgment of the ECtHR in *Al-Jedda v UK*, No 27021/08, § 76, 7 July 2011). The ECtHR took the view that to attribute those measures to the contracting party to the Convention by whose armed forces they were taken would be to interfere with the fulfilment of the UN's key mission in this field and with the effective conduct of its operations, and would also be tantamount to imposing conditions on the implementation of a Security Council resolution which were not provided for in the text of the resolution itself.

121. The explanatory report mentions, and at once rejects, the possibility that the case-law cited in the preceding paragraph might be transposed to relations between the Union and the Member States with respect to the conduct of military operations

on the basis of a Council decision. Paragraph 24 of the explanatory report states the following:

More specifically, as regards the attributability of a certain action to either a Contracting Party or an international organisation under the umbrella of which that action was taken, in none of the cases in which the Court has decided on the attribution of extra-territorial acts or measures by Contracting Parties operating in the framework of an international organisation [here a footnote makes reference to the cases of *Behrami* and *Saramati*, cited above] was there a specific rule on attribution, for the purposes of the Convention, of such acts or measures to either the international organisation concerned or its members.

122. Interpreted in the light of the relevant passages of the explanatory report, therefore, Article 1(4) of the draft agreement does not allow an act performed or a measure taken in the framework of the CFSP to be attributed to the Union under the Convention if under Union law it is attributable to one or more Member States.
123. Second, there are specific provisions governing review by the Union courts in the area of the CFSP. The sixth sentence of the second subparagraph of Article 24(1) TEU provides that:

The Court of Justice of the European Union shall not have jurisdiction with respect to these provisions, with the exception of its jurisdiction to monitor compliance with Article 40 of this Treaty and to review the legality of certain decisions as provided for by the second paragraph of Article 275 of the Treaty on the Functioning of the European Union.

The Article 275 referred to there reads as follows:

The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.

However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.

124. It should be pointed out that for an application to the ECtHR to be admissible the applicant must be able to claim to be a victim of a violation of the rights set forth in the Convention or the protocols to it, and must therefore be directly affected by the act or omission at issue (see above, paragraph 6).
125. In the first place, when an act or measure on the part of one or more Member States in the framework of the CFSP affects a person directly, within the meaning of the case-law of the ECtHR, and may therefore be the subject of a valid application before the ECtHR, judicial protection with regard to the act or measure is not affected by the first subparagraph of Article 24(1) TEU or by Article 275 TFEU, because judicial protection of that kind is provided by the courts of the Member States.
126. It cannot be ruled out that in exceptional cases an act or measure of the kind referred to in the preceding paragraph may have a legal basis in a provision of a Council decision adopted under Article 28(1) TEU, so that an allegation that the act or measure violates the Convention will call into question the compatibility of such provision with the Convention. The Commission considers that in such a case the Council decision would be a ‘restrictive measure’ caught by the second paragraph of Article 275 TEU. In the Commission’s view this term must be interpreted as referring to all acts which of themselves restrict rights — and in particular the fundamental rights of a natural or legal person — or which necessarily entail subsequent acts or measures having that effect. The case-law of the Court of Justice has always espoused the principle of effective judicial protection, in acknowledging, for example, that in a Community of law acts done by the European Parliament can be reviewed by the courts (Case 190/84 *Les Verts v Parliament* [1988] ECR 1017), or affirming the indefeasible character of the right to review by the Union courts, in the light of fundamental rights, of the legality of

acts done by the Union (Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council* [2008] ECR I-6351). Although the second paragraph of Article 275 TFEU speaks only of ‘proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty’, the Commission believes that such provisions may be the subject of a request by a national court under Article 267 TFEU asking the Court of Justice to give a preliminary ruling on their validity or interpretation. The Court has indeed already held that given that the procedure enabling it to give preliminary rulings is designed to guarantee observance of the law in the interpretation and application of the Treaty, the right to make a reference to the Court for a preliminary ruling must exist in respect of all measures adopted by the Council, whatever their nature or form, which are intended to have legal effects in relation to third parties. Despite the fact that Article 35(1) of the EU Treaty (as amended by the Treaty of Nice) excluded ‘common positions’ from the Court’s jurisdiction to give preliminary rulings, therefore, the Court has held that national courts can ask it to deliver preliminary rulings on questions relating to a common position which, because of its content, of itself produces legal effects in relation to third parties, and consequently has a scope going beyond that assigned by the EU Treaty to that kind of act (Case C-355/04 P *Segi and Others v Council* [2007] ECR I-1657, paragraphs 51–54).

127. The Commission believes that the procedure for prior involvement of the Court of Justice (for detail see paragraphs 134–152 below) should also apply, in cases where the requirements of Article 3(6) of the draft agreement are satisfied, to a Council decision under Article 28(1) TEU in the exceptional case that the content of such Council decision is of the kind described in the preceding paragraph.
128. In the second place, where acts performed and measures taken under the CFSP by institutions, bodies, offices or agencies of the Union, or persons acting on its behalf in the performance of their duties, affect a person directly within the meaning of the case-law of the ECtHR, and may therefore be the subject of an application to the ECtHR, a distinction has to be made between acts and measures that have binding legal effects and those that have no such effect (‘material acts’, *actes matériels, Realakte*).

129. Acts and measures of the first kind are ‘restrictive measures’ within the meaning of the second paragraph of Article 275 TFEU, and may be the subject of an action for annulment brought in the Union courts.
130. Measures that do not produce binding legal effects, which might be taken, for example, in the context of non-military operations, cannot by their nature be the subject of an action for annulment before the Union courts, or of an assessment of their validity or of interpretation by those courts. The only remedy available within the Union, therefore, is an action for compensation of damage caused by the Union’s institutions or servants.
131. In the Commission’s view an action for damages based on non-contractual liability pursuant to Article 268 TFEU is not excluded by Article 275 TFEU. In the first place, Article 275 uses the words ‘acts adopted on the basis of’ the provisions relating to the CFSP, which clearly shows that Article 275 is speaking only of acts that have binding legal effects. In the second place, the measures without binding legal effects that the institutions, bodies, offices or agencies of the Union may take in the CFSP area are directly founded, not on the Treaty provisions dealing with the CFSP, but on an act adopted on the basis of those provisions, namely a Council decision adopted on the basis of Article 28(1) TEU.
132. Thus the combined effect of Article 1(4) of the draft agreement (interpreted in the light of the relevant passages of the explanatory report), the first subparagraph of Article 19(1) TEU, and Articles 275 and 340 TFEU, is that all acts and measures on the part of the Union and of the Member States in the CFSP area in respect of which a person may claim to be a victim of a violation of the rights recognised by the Convention have an effective remedy before the courts either of the Union or of the Member States.

c) Exhaustion of domestic remedies and applications to the ECtHR that are directed against the Union

133. The draft agreement guarantees that remedies before the Union courts must be exhausted before an application against an act on the part of the Union can be brought before the ECtHR. The second indent in Article 1(5) of the draft agreement states, among other things, that the term ‘domestic’ in Article 35(1) of the

Convention is to be understood as relating also, *mutatis mutandis*, to the internal legal order of the Union. Moreover, Article 5 of the draft agreement makes it clear that proceedings before the Union courts are not to be understood as constituting ‘procedures of international investigation or settlement’. Therefore, the fact that a matter had been submitted to these courts does not make an application before the ECtHR inadmissible under Article 35(2)(b) of the Convention.

d) Prior involvement of the Court of Justice in an application to the ECtHR directed against a Member State

134. As explained in paragraph 112 above, one of the specific characteristics of the Union and its legal order is that as a general rule it is the Member States who apply Union law. In the same way, judicial protection with regard to acts or omissions on the part of a Member State is provided by the courts of that state, even when the act or omission is applying a provision of Union law (see Article 19(1) TEU, second subparagraph). Under Articles 263, 265, 267, 268 and 270 TFEU, the Union courts have jurisdiction to provide judicial protection to individuals only in respect of acts or omissions on the part of the institutions, bodies, offices or agencies of the Union.

135. In proceedings before the courts of a Member State, it may be alleged that an act or omission on the part of that Member State violates a fundamental right guaranteed by the Union, corresponding to a right guaranteed by the Convention, but the alleged violation may rest on a provision laid down in a legal act of the Union. In such a case the national court is not entitled to decline to apply the provision at issue, and thereby, incidentally, to find that the legal act of the Union containing the provision is invalid. It can decline to apply the provision only if the Court of Justice, on a request for a preliminary ruling under point (b) in the first paragraph of Article 267 TFEU, has held that the act of the Union in question is invalid (Court of Justice in Case 314/85 *Foto-Frost* [1987] ECR 4199). If, however, the national court finds that an act of the Union does not conflict with a fundamental right guaranteed at Union level, on the basis of an interpretation of that right which is so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved (Court of Justice in Case 283/81 *CILFIT* [1982] ECR 3415, paragraphs 16–20), it may apply the provision without making a request to the Court of Justice for a preliminary ruling on the validity of the act.

136. It may subsequently be alleged before the ECtHR that the same act or omission on the part of a Member State violates the same fundamental right, guaranteed this time by the Convention, so that the allegation calls into question the compatibility of the provision in question with the Convention: in that case the Union will become a co-respondent to the proceedings before the ECtHR. If the ECtHR establishes the violation in respect of which the Union is a co-respondent to the proceedings, the Union as a co-respondent will be under an obligation to take steps with regard to the provision in question under Article 46(1) of the Convention.
137. It should be pointed out that the Court of Justice has consistently held that where an international agreement provides for its own system of courts, including a court with jurisdiction to settle disputes between the contracting parties to the agreement, and, as a result, to interpret its provisions, the decisions of that court will be binding on the Union's institutions, including the Court of Justice (Opinion 1/91 [1991] ECR I-6079, paragraph 39). Thus a judgment of the ECtHR in a case to which the Union is a party is binding on the institutions of the Union, including the Court.
138. The situation described in paragraphs 135 and 136 above may arise even though no proceedings under Articles 263 or 267 TFEU have yet come before the Court of Justice in which it had to consider the validity of the Union act containing the provision at issue in the light of a fundamental right which is guaranteed at Union level and the violation of which is now being alleged before the ECtHR.
139. Here it has to be emphasised that a reference to the Court for a preliminary ruling under point (b) in the first paragraph of Article 267 TFEU cannot be regarded as a 'domestic remedy', within the meaning of Article 35(1) of the Convention, that is to say a remedy that the applicant must have exhausted before bringing an application before the ECtHR in respect of the act or omission on the part of the Member State concerned. The parties to the proceedings before a national court can indeed suggest that that court make such a reference. The view may in fact be taken that a party must have made such a suggestion before being entitled to bring an application before the ECtHR against the Member State concerned in respect of the act or omission which was at issue before the national court. But the parties have no control over whether or not a reference is actually made to the Court of Justice, so that the absence of such a reference, even if it is contrary to the obligations

imposed by the third paragraph of Article 267 TFEU, or indeed illegal under Article 6 of the Convention or under the domestic law of the Member State, does not mean that an application to the ECtHR against the Member State is inadmissible under Article 35(1) of the Convention.

140. The Court's prerogative to declare an act of the Union invalid is an integral part of the competence of the Court, and hence of the powers of the Union's institutions, which, in accordance with Protocol No 8, must not be affected by the accession of the Union to the Convention.
141. But if the ECtHR were able to establish a violation in respect of which the Union was a co-respondent to the proceedings, when the Court of Justice had not yet considered the validity of the act of the Union containing the provision in question in proceedings under Articles 263 or 267 TFEU, in the light of the fundamental right, as guaranteed in the Union, whose violation was now alleged before the ECtHR, and if there were no way in which the Court of Justice could make such an assessment, then the Court of Justice's prerogative to declare an act of the Union invalid might be voided of substance. This conclusion is not altered by the fact that a judgment of the ECtHR establishing a violation of the Convention is of a declaratory nature. The grounds of a judgment establishing a violation in respect of which the Union is a co-respondent to the proceedings, a violation which by hypothesis rests on a provision of Union law, may indirectly involve an assessment of the compatibility of that provision with the fundamental right that the ECtHR finds has been violated by the act or omission on part of the respondent Member State.
142. A similar problem would arise where the provision at issue is a provision of general application laid down directly in the Treaties, and the Court of Justice has not yet interpreted this provision in a case brought under Article 267 TFEU with regard to the question raised by the allegation before the ECtHR of the violation of the Convention in respect of which the Union is a co-respondent to the proceedings.
143. In order to preserve the prerogatives of the Court of Justice, therefore, and the specific characteristics of the system of judicial protection in the Union, the Court of Justice must be enabled to consider the compatibility of a provision of Union

law with the rights guaranteed by the Convention, in relation to the alleged violation in respect of which the Union is a co-respondent to the proceedings before the ECtHR, before the ECtHR rules on the substance of the allegation, and thus indirectly on the compatibility of the provision with the fundamental right which it is alleged has been violated by the act or omission on the part of the respondent Member State.

144. The same necessity arises with regard to the principles underlying the control machinery established by the Convention, and in particular the principle that that control machinery is subsidiary to the mechanisms that safeguard human rights at the level of the contracting parties: this means that questions of the compatibility of domestic law with the Convention ought in the first place to be a matter for the courts of the contracting parties, and if an application is nonetheless subsequently brought before the ECtHR the ECtHR should have the benefit of the views of those courts, as being in direct and continuous contact with the vital forces of their countries (*Burden v UK*, cited above, § 42). This principle of ‘substantive’ subsidiarity would not be respected if the Court of Justice had no opportunity to consider the compatibility of a provision of Union law with the rights guaranteed by the Convention, in relation to the alleged violation in respect of which the Union is a co-respondent to the proceedings in the ECtHR, before the ECtHR rules, indirectly, on the compatibility of the provision with the fundamental right which it is alleged has been violated by the act or omission on the part of the respondent Member State. In other words, the requirement that an applicant exhaust the domestic remedies before bringing an application in the ECtHR which is laid down in Article 35(1) of the Convention — ‘formal’ subsidiarity — is not enough to ensure compliance with the principle of ‘substantive’ subsidiarity. This is because, as explained in paragraph 7 above, applications brought in the ECtHR against a Member State do not become inadmissible, on the ground that the domestic remedies have not been exhausted, if the Union courts have not considered the compatibility with the Convention of a provision of Union law called into question by an allegation in the application. In addition, a rule that the external review by the Convention bodies should be preceded by an effective internal review by the Union courts will also preserve the substantive equality between the contracting parties to the Convention, since only contracting parties that are states, and not the Union, are in a position to ensure that as part of the internal remedies to be

exhausted by the applicant a case must be brought before the domestic court with jurisdiction to rule on the compatibility, called into question by an allegation made in the application, of a provision of their domestic law with a right guaranteed by the Convention.

145. To meet these needs the first sentence of Article 3(6) of the draft agreement provides that

if the Court of Justice of the European Union has not yet assessed the compatibility with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded of the provision of European Union law as under paragraph 2 of this article, 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 [ECtHR].

146. This is a binding provision governing a specific aspect of the organisation of the proceedings before the ECtHR. Its effect is to allow proceedings to be brought within the Union in which the Court of Justice will assess the compatibility of a provision of Union law with the rights guaranteed by the Convention in relation to the alleged violation in respect of which the Union is a co-respondent to the proceedings before the ECtHR. This will mean that the ECtHR will not have to establish the violation in respect of which the Union is a co-respondent to the proceedings, and thus indirectly to find that the provision of Union law at issue is incompatible with the Convention, without the Court of Justice carrying out such an assessment beforehand. That the Court of Justice is to assess the compatibility of a provision of Union law with the rights guaranteed in the Convention will mean, depending on the circumstances, that it will have to assess the validity of the act of the Union containing the provision in the light of the fundamental right in question, or that it will have to interpret a provision laid down directly in the Treaties in relation to the question raised by the allegation before the ECtHR of a violation of the Convention in respect of which the Union is a co-respondent to the proceedings. This understanding is supported by the second sentence in paragraph 66 of the explanatory report, according to which

Assessing the compatibility with the Convention shall mean to rule on the validity of a legal provision contained in acts of the EU institutions, bodies, offices or agencies, or on the interpretation of a provision of the TEU, the TFEU or of any other provision having the same legal value pursuant to those instruments

The third sentence of the same paragraph makes it clear that the assessment of the compatibility of a provision of Union law with the rights guaranteed by the Convention, in relation to the alleged violation in respect of which the Union is a co-respondent to the proceedings in the ECtHR, should take place before the ECtHR decides on the merits of the application. The Commission believes it would be appropriate for this assessment to take place before the Union, as co-respondent to the proceedings, and the Member State, as respondent to the proceedings, take a position on the merits of the application brought in the ECtHR. This understanding is corroborated by the first sentence of paragraph 69 of the explanatory report, which comments that

The examination of the merits of the application by the [ECtHR] 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 [Court of Justice].

147. However, Article 3(6) of the draft agreement will have the effect described in the preceding paragraph only in conjunction with rules governing the procedure before the Court of Justice which enable it to consider the compatibility of a provision of Union law with the rights guaranteed by the Convention in relation to whose alleged violation the Union is a co-respondent to the proceedings before the ECtHR (such rules will hereinafter be referred to as ‘the procedure for prior involvement’). The draft agreement does not contain any such procedural rules. They have no place in an international agreement, but must be laid down independently at Union level, without involving the ECtHR or the other contracting parties to the Convention as such, since their purpose is to regulate an internal Union procedure.

148. Nevertheless, in the Commission's view it is not necessary or indeed appropriate to enact these procedural rules by amending the Treaties. The Treaties already impose an obligation on the institutions of the Union and on the Member States to ensure that the Union accedes to the Convention (Articles 6(2) and 4(3) TEU). They also state that the powers of the Court of Justice are not to be affected by that accession (Article 2 of Protocol No 8, first sentence). To meet both these requirements a procedure for prior involvement has to be established concomitantly with the accession of the Union to the Convention.
149. The Commission believes that the proper place for rules laying down the principle of a procedure for prior involvement, designating the bodies with authority to initiate it, and defining the standards governing the examination of compatibility, is the Council decision concluding the accession agreement.
150. Turning now to the content of the internal rules governing the procedure for prior involvement, the power to make applications to the Court of Justice initiating the procedure should be exercised by the Commission, which, under the second sentence of Article 17(1) TEU, has the task of overseeing the application of the Treaties and of measures adopted by the institutions pursuant to them. The internal rules could also provide that the procedure for prior involvement could be initiated by the Member State against which the application to the ECtHR is addressed. The procedure for prior involvement has certain structural similarities with the procedure for preliminary rulings under Article 267 TEU. It seems appropriate, therefore, that the rules governing entitlement to participate in prior involvement proceedings should be similar to those in Article 23 of the Statute of the Court of Justice. This would apply to participation both by the institutions and the Member States and by the parties to the proceedings before the courts of the Member State against which the application to the ECtHR is directed. In the latter case, however, account has to be taken of the fact that by hypothesis the proceedings before those courts will already have been concluded, since otherwise the application would be inadmissible on the ground that the domestic remedies had not been exhausted. Lastly, it is in the interests of the sound administration of justice that non-member countries that are linked to the Union by agreements such as the Agreement on the European Economic Area or the Schengen Agreement should be entitled to submit observations as part of the procedure for prior

involvement if the provision of Union law called into question by an allegation before the ECtHR is contained in one of those agreements.

151. The second sentence of Article 3(6) of the draft agreement states that ‘The European Union shall ensure that such assessment is made quickly so that the proceedings before the [ECtHR] are not unduly delayed.’ The third sentence of paragraph 69 of the explanatory report makes reference to the expedited procedure before the Court of Justice. The Commission would point out, in passing, that while it does believe that prior involvement proceedings should indeed be conducted by an expedited procedure along the lines of that provided for in Article 23a of the Statute of the Court, it does not believe it would be appropriate to make provision for an urgent procedure of the kind provided for in the third paragraph of that Article. In the procedure for prior involvement the Court will have to rule on questions with far-reaching implications, namely the validity of a legal act of the Union in the light of a fundamental right guaranteed at Union level, or a consistent interpretation of such a fundamental right and another provision laid down in primary law. A judgment of that kind needs a procedural foundation, in terms of participation in the written proceedings and time available to prepare statements of case and written observations, that goes beyond what is available under an urgent procedure.
152. Lastly, it goes without saying that when the ECtHR rules on the merits of an application made to it, it cannot be bound by a finding by a court of a contracting party regarding the compatibility of the provision of the internal law of that contracting party on which the alleged violation rests. The third sentence of Article 3(6) of the draft agreement makes the purely declaratory statement that ‘The provisions of this paragraph shall not affect the powers of the [ECtHR]’. The second sentence of paragraph 68 of the explanatory report comments specifically that the assessment of the Court of Justice will not bind the ECtHR.

- e) **No effect on the powers of the Court of Justice under Articles 258, 260 and 263 TFEU**
153. As far as the powers of the Court of Justice under Articles 258, 260 and 263 TFEU are concerned, mention must be made of Article 5 of the draft agreement, which contains an interpretation clause: ‘Proceedings before the Court of Justice of the European Union shall [not] be understood as constituting ... means of dispute settlement within the meaning of Article 55 of the Convention’.
154. With regard to ‘vertical’ relations between the Union and the Member States after the accession of the Union to the Convention, Article 5 of the draft agreement has the effect that Article 55 of the Convention does not prevent the Court of Justice from ruling on disputes regarding the interpretation and application of the Convention, or indeed of fundamental rights defined at Union level and in particular in the Charter of Fundamental Rights. This applies to proceedings brought by a Member State against an institution, body, office or agency of the Union under Article 263 TFEU, and conversely to proceedings brought by the Commission against a Member State under Article 258 TFEU.
155. It may be pointed out that where the Commission brings proceedings against a Member State under Article 258 TFEU, Article 1(3) of the draft agreement states that accession ‘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’, so that the draft agreement does not impose on the Member States any obligation under the law of the Union with regard to the Convention and its protocols. It follows that a dispute regarding the question whether a Member State has failed to fulfil its obligations under the Treaties, within the meaning of Article 258 TFEU, cannot by hypothesis constitute a dispute between the Union and a Member State arising out of the interpretation or application of the Convention as such, within the meaning of Article 55 of the Convention.
156. Nevertheless, the reference to Article 55 of the Convention in Article 5 of the draft agreement serves a purpose with regard to the requirement that there be no effect on the powers of the Court of Justice. When they implement Union law, the Member States are required by Article 51(1) of the Charter of Fundamental Rights to respect the fundamental rights defined at Union level and in particular in the

Charter. Furthermore, it is made plain in Article 52(3) of the Charter that some of the rights defined in the Charter have a meaning and scope identical to those of the rights guaranteed by the Convention. In so far as the ban in Article 55 of the Convention might be understood to refer also to disputes between contracting parties regarding the interpretation or application of provisions of an international instrument which has the same content as the provisions of the Convention (such as, in the case of the Member States, the Treaties and the Charter of Fundamental Rights), Article 5 of the draft agreement has the effect that that interpretation cannot be relied upon against the Union.

157. Be it mentioned in passing that the second sentence in paragraph 73 of the explanatory report points out that in its judgment in *Karoussiotis v Portugal* (No 23205/08, 1 February 2011) the ECtHR specified that the exercise by the Commission of its powers under Article 258 TFEU was not to be understood as constituting procedures of international investigation or settlement pursuant to Article 35(2)(b) of the Convention.
158. It did not seem necessary to make provision in the draft agreement for a specific objection of inadmissibility applying to applications brought before the ECtHR, under Article 33 of the Convention, by the Union against a Member State or by a Member State against the Union in a dispute regarding the interpretation or application of the Convention.
159. Any such application would be manifestly illicit under the law of the Union. In the first place, applications brought by the Union against a Member State before the ECtHR in respect of an act implementing the law of the Union would be a circumvention of the infringement procedure laid down in Article 258 TFEU. In the second place, where a Member State is acting otherwise than by implementing Union law, the Union has no competence to lodge an application to the ECtHR there either since the Treaties do not give the Union any general competence in the field of fundamental rights. To suppose the impossible, however, if the Union were to make such an application, the decision to do so could be challenged by an application for annulment under Article 263 TFEU. Lastly, an application brought by a Member State against the Union would be a circumvention of the procedure for annulment in Article 263 TFEU, or otherwise of the action for failure to act in Article 265 TFEU. Here too Union law provides a proper channel for challenging a

hypothetical application of this kind in the shape of the infringement procedure laid down in Article 258 TFEU.

f) No effect on Article 344 TFEU (Article 3 of Protocol No 8)

160. The jurisdiction of the Court of Justice under Article 259 TFEU is preserved by Article 344 TFEU, which provides that ‘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.’ The Court has held (Case C-459/03 *Commission v Ireland* [2006] ECR I-4635, paragraph 169) that

The obligation devolving on Member States, set out in Article 292 EC [which after amendment has since become Article 344 TFEU], to have recourse to the Community judicial system and to respect the Court’s exclusive jurisdiction, which is a fundamental feature of that system, must be understood as a specific expression of Member States’ more general duty of loyalty resulting from Article 10 EC [which after amendment has since become Article 4(3) TFEU].

161. On Article 5 of the draft agreement (see above, paragraph 153), the closing sentence of Article 74 of the explanatory report comments that ‘Article 55 of the Convention does not prevent the operation of the rule set out in Article 344 of the TFEU.’

162. It should be observed that according to Article 1(3) of the draft agreement, accession ‘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’, so that the draft agreement does not impose on the Member States any obligation under the law of the Union with regard to the Convention and its protocols. It follows that a dispute between Member States regarding the interpretation or application of the Convention is not strictly speaking a dispute regarding the interpretation or application of the Treaties, of the kind referred to by the prohibition in Article 344 TFEU.

163. Nevertheless, the reference in Article 5 of the draft agreement to Article 55 of the Convention serves a purpose with regard to the requirement in Article 3 of Protocol

No 8. When they implement Union law, the Member States are required by Article 51(1) of the Charter of Fundamental Rights to respect the fundamental rights defined at Union level and in particular in the Charter. Furthermore, it is made plain in Article 52(3) of the Charter that some of the rights defined in the Charter have a meaning and scope identical to those of the rights guaranteed by the Convention. In so far as the ban in Article 55 of the Convention might be understood to refer also to disputes between contracting parties regarding the interpretation or application of provisions of an international instrument that has the same content as the provisions of the Convention (such as, in the case of the Member States, the Treaties and the Charter of Fundamental Rights), Article 5 of the draft agreement has the effect that that interpretation cannot be relied upon against the Member States.

164. Thus the draft agreement does not affect Article 344 TFEU, and consequently preserves the powers of the Court of Justice under Article 259 TFEU.
165. The draft agreement does not make provision for a specific objection of inadmissibility where an application in a dispute regarding the interpretation or application of the Convention is brought before the ECtHR by one Member State against another. If Article 344 TFEU is understood to mean that the ban it lays down applies also to disputes regarding the interpretation or application of a provision of an international agreement that has the same content as a provision of Union law — such as, in particular, a provision of the Charter of Fundamental Rights — it would not be appropriate to introduce an objection of inadmissibility of that kind. The Member States are bound by the Charter of Fundamental Rights only when they are implementing the law of the Union. In any event, therefore, an objection of inadmissibility would be possible only where the respondent Member State, when it committed the alleged violation of the Convention, was acting in implementation of Union law. If it had to consider the admissibility of an inter-state action between Member States, therefore, the ECtHR would have to apply Article 51(1) of the Charter, and thus to interpret it. That outcome would be incompatible with the autonomy of the Union's legal order.

166. Paragraph 72 of the explanatory report comments as follows:

An issue not governed by the Accession Agreement is whether EU law permits inter-Party applications to the [ECtHR] 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 TFEU (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’.

167. Consequently, if a Member State were to infringe the prohibition in Article 344 TFEU by bringing an application against another Member State in a dispute regarding the interpretation or application of a provision of Union law having the same content as the Convention, and in particular the application of the Charter of Fundamental Rights, the response it would face would come not under the Convention, in the form of a ruling that the application was inadmissible, but at Union level, in the form of proceedings under Articles 258–260 TFEU.

g) Conclusion

168. The draft agreement ensures that accession will preserve the specific characteristics of the Union and of Union law with regard to the system of judicial protection, and will not affect the powers of the Court of Justice or affect Article 344 TFEU.

5. No effect on the powers of the institutions other than the Court (Article 2, first sentence, of Protocol No 8)

169. Once the Union is a party to the Convention, the institutions will have to exercise their powers with regard to the Convention and its control bodies in the same way as they exercise their powers with regard to any other international agreement, and the bodies set up or given decision-making powers by such an agreement. Obviously the accession agreement is not the place to lay down rules governing the institutions’ powers or their exercise.

170. In particular, the Union will have to be represented before the ECtHR by the Commission, in accordance with the general principle that the Commission represents the Union before courts other than the courts of the Union (judgment of the Court of Justice in Case C-131/03 P *R. J. Reynolds Tobacco and Others v Commission* [2006] ECR I-7795, paragraph 94), subject to the powers of the other institutions as regards procedural acts pertaining to their own operation, by virtue of their administrative autonomy, in accordance with Article 335 TFEU.
171. If in proceedings before the ECtHR a provision of Union law laid down in an act of an institution other than the institution representing the Union in those proceedings (see the preceding paragraph) is called into question, the powers of the enacting institution can be preserved if that institution is involved in the preparation of the procedural acts to be addressed to the ECtHR, in accordance with the principle of sincere cooperation between institutions (Article 13(2) TEU, second sentence). This applies both to applications directed against the Union and applications directed against a Member State where the Union is a co-respondent to proceedings.
172. Lastly, when the Committee of Ministers adopts on the basis of the Convention acts having legal effects, the Union will participate and will have the right to vote (Article 7(2) of the draft agreement), and the procedure provided for in Article 218(9) TFEU will apply *ipso iure*.
173. In the Commission's view, therefore, the draft agreement does not affect the powers of the institutions of the Union other than the Court of Justice.

6. Preservation of the specific characteristics of the Union and of Union law with respect to participation by the Union in the control bodies of the Convention (Article 1(a) of Protocol No 8)

174. Regardless of the precise scope of the requirement in Article 1(a) of Protocol No 8, it is in the interests of the Union, and in line with the principle of the equality of the contracting parties to the Convention, that the Union should participate on the same footing as any other contracting party in the control bodies of the Convention, namely the ECtHR and, when they exercise the powers conferred on them by the

Convention, the Parliamentary Assembly of the Council of Europe and the Committee of Ministers.

175. In the case of the ECtHR one of the founding principles of the Convention is that there should be one judge elected in respect of each contracting party. The principle is based on the need to guarantee that each legal system is represented in the ECtHR. It also reflects the system of ‘collective enforcement’ established by the Convention, in which every contracting party is required to participate, and strengthens the legitimacy of the decisions taken by the ECtHR. Since the law of the Union constitutes a legal order that is distinct and autonomous, and has its own specific characteristics by comparison with the legal orders of the states that are contracting parties to the Convention, it is essential that there should be a judge in the ECtHR who is elected in respect of the Union, in order to ensure that the legal system of the Union is properly represented and that the ECtHR has the expertise necessary to be able to take full account of those specific characteristics.
176. There is no need to change the system of the Convention to allow the presence in the ECtHR of a judge elected in respect of the Union, because Article 22 of the Convention provides that a judge is to be elected in respect of each contracting party. According to the third sentence of paragraph 77 of the explanatory report, ‘The judge elected in respect of the EU shall participate equally with the other judges in the work of the [ECtHR] and have the same status and duties.’ Thus the judge will sit not only in cases directed against the Union or concerning Union law, but in other cases too.
177. For the election of a judge in respect of the Union the procedure is to be the ordinary procedure laid down in Article 22 of the Convention. The judge elected in respect of the Union will enjoy the same legitimacy as the others. Under Article 22 of the Convention the Union has to draw up a list of three candidates, and the procedure for doing this will have to be regulated by internal rules that comply with the requirements of the Treaties, and in particular the obligation to preserve an institutional balance.
178. For the election by the Parliamentary Assembly of the Council of Europe of all of the judges of the ECtHR — and not just the judge elected in respect of the Union — Article 6(1) of the draft agreement provides that a delegation of the

European Parliament is to participate, with the right to vote, in the sittings of the Assembly. This provision reflects the nature of the European Parliament as the institution of the Union in which citizens are directly represented in accordance with the first subparagraph of Article 10(2) TEU. In line with the principle of equality of contracting parties to the Convention, the European Parliament will be entitled to the same number of representative in the Parliamentary Assembly as the states that have the highest number of representatives under Article 26 of the Statute of the Council of Europe. The procedures for the participation of the European Parliament in the sittings of the Parliamentary Assembly and its relevant bodies are to be defined by the Parliamentary Assembly in cooperation with the European Parliament.

179. Article 7(2) of the draft agreement provides that the Union will be entitled to participate in the meetings of the Committee of Ministers, with the right to vote, when it takes decisions in the exercise of the powers conferred on it by the Convention, namely under Articles 26(2), 39(4), 46(2)–(5), 47 and 54(1) (see above, paragraphs 15 to 18, and the following paragraph 180). Participation of the Union in this fashion is in line with the principle of the equality of all contracting parties to the Convention. Like the other contracting parties, the Union will have one vote. On the basis of the current number of members of the Council of Europe, and thus of states that are contracting parties to the Convention, the total number of votes on the Committee of Ministers when it takes decisions of this kind after the accession of the Union will be 48 (47 contracting states plus the Union).
180. When protocols to the Convention are to be adopted, the Union is to participate in the taking of decisions by the Committee of Ministers, with the right to vote, under the new Article 54(1) of the Convention inserted by Article 7(1) of the draft agreement, read in conjunction with Article 54(2) of the Convention. This legal rule is in line with the principles of the Vienna Convention on the Law of Treaties, and in particular Article 39, which states that ‘A treaty may be amended by agreement between the parties’.
181. The Committee of Ministers supervises the execution of final judgments of the ECtHR establishing a violation (Article 46(2)–(5) of the Convention) and also supervises the terms of friendly settlements (Article 39(4) of the Convention); that the Union should take part here in the decisions of the Council of Ministers, with

the right to vote, is in line with the principle of collective enforcement that underlies the system of the Convention.

182. Where the Union is a co-respondent to the proceedings, and the ECtHR delivers a final judgment against the Union, or indeed against a Member State, establishing a violation of the Convention, the Committee of Ministers has to supervise the execution of that judgment; but in such cases the obligation of sincere cooperation laid down in Article 4(3) TEU requires that when the Union and the Member States express their views or cast their votes they should act in a coordinated manner. After the accession of the Union, there will be 48 votes in the Committee of Ministers when it takes decisions in the exercise of its powers under Article 46(2)–(5) and 39(4) of the Convention, and the Union and the Member States together will hold 29 of these. The consequence is that by themselves the Union and its Member States would be in a position to impose a final resolution on the Committee of Ministers, or to prevent the Committee of Ministers from referring a matter to the ECtHR for interpretation of a judgment under Article 46(3) of the Convention or a finding of infringement under Article 46(4) (see above, paragraph 16). This would be detrimental to the real effectiveness of the control machinery established by the Convention in cases concerning the Union, and to the substantive equality of the contracting parties to the Convention: no other contracting party is by itself in a position to force the adoption by the Committee of Ministers of a decision in its favour, or to prevent the Committee from taking a decision that is unfavourable to it.

183. In order to ensure that the control machinery established by the Convention works properly with respect to the Union in the same way as it does with respect to other contracting parties, and to preserve the substantive equality of the contracting parties to the Convention, it is provided in the second sentence of Article 7(4)(a) of the draft agreement that the Rules for Supervision are to be adapted to enable the Committee of Ministers to exercise its functions effectively in those circumstances. A corrective mechanism would operate in which special voting rules would apply to decisions of the Committee of Ministers when it was supervising the execution of a final judgment of the ECtHR that was given against the Union or against a Member State and established a violation in respect of which the Union was a co-respondent to the proceedings. The special voting rules are not part of the

accession agreement as such, but are set out in a new Rule 18 to be added to the Rules for Supervision. However, paragraph 4 of the new Rule 18 specifies that any subsequent amendment to these voting rules will require consensus by all the contracting parties to the Convention.

184. The effect of the special voting rules is that the Union and the Member States will not be able by themselves to impose a final resolution on the Committee of Ministers, or to prevent it from adopting a decision referring a matter to the ECtHR under Article 46(3) or (4) of the Convention.
185. The first of these special voting rules, set out in paragraph 1 of the new Rule 18, applies to decisions taken by the Committee of Ministers under Rule 17 (final resolution). In place of the majority provided for in Article 20(d) of the Statute of the Council of Europe, the majority required would be four fifths of the representatives casting a vote and two thirds of the representatives entitled to sit on the Committee of Ministers. The total number of votes in the Committee of Ministers being 48, this means that the number of votes needed for the adoption of a final resolution would never be less than 32, but that depending on the number of members casting a vote the number of votes actually needed would vary from 32 to 39.
186. A second special voting arrangement would apply to decisions taken by the Committee of Ministers under Rule 10 (referral to the ECtHR for interpretation of a judgment) or Rule 11 (infringement proceedings). Paragraph 2 of the new rule 18 provides that such decisions would be considered adopted if they were supported by a 'hyper-minority' of one quarter of the representatives entitled to sit on the Committee of Ministers. The total number of votes in the Committee of Ministers being 48, this means that 12 votes would be needed for such decisions to be considered adopted.
187. The two voting rules described in paragraphs 185 and 186 above, which govern the adoption of decisions on substantive issues, are complemented by a third, which is set out in paragraph 3 of the new rule 18. This applies to decisions on procedural issues or merely requesting information. With regard to requests for information, the fourth sentence in paragraph 87 of the explanatory report comments that these are decisions where no position is taken on compliance by the particular

contracting party with the obligation under Article 46(1) of the Convention. Under this third rule, the decisions to which it applies would be considered adopted if one fifth of the representatives entitled to sit on the Committee of Ministers were in favour. This means that of the total 48 votes in the Committee of Ministers such decisions would require 10 votes in favour. The sixth sentence in paragraph 87 of the explanatory report comments that this ‘hyper-minority’ is lower than the minority required in paragraph 2 of the new Rule 18 (see paragraph 186 above) because the majority required for the adoption of decisions under Article 46(3) and (4) of the Convention is higher than the majority required by the Statute of the Council of Europe for the decisions to which the third voting rule applies.

188. When the Committee of Ministers is supervising the execution of a final judgment of the ECtHR which is not a judgment given against the Union or a Member State establishing a violation of the Convention in respect of which the Union was a co-respondent to the proceedings, the obligation of sincere cooperation in Article 4(3) TEU does not require the Union and the Member States to act in a coordinated manner when they express positions or cast votes. This applies both to judgments against Member States that do not establish a violation of the Convention in respect of which the Union was a co-respondent to the proceedings, and judgments given against a contracting party to the Convention that is not a Member State. Article 7(4)(b) of the draft agreement is a declaratory statement of the situation.
189. The Convention does not give the Committee of Ministers authority to adopt instruments or texts without binding legal effect (such as recommendations, resolutions or declarations) that directly concern the functioning of the Convention system. Since the Committee of Ministers when adopting such instruments or texts acts on the basis of its general competence under Article 15 of the Statute of the Council of Europe, it is not possible for the Union, not being a member of the Council of Europe, to participate in such decisions with the right to vote. Article 7(3) of the draft agreement provides that the Union is to be consulted within the Committee of Ministers before the adoption of any such instrument or text. More specifically, the instruments or texts concerned are stated to be those which relate to the Convention, or to any protocol to the Convention to which the Union is a party, and which are addressed to the ECtHR or to all contracting parties to the

Convention or to the protocol concerned; those relating to decisions taken by the Committee of Ministers in the exercise of powers it holds by virtue of the Convention; and those relating to the selection of candidates for election of judges by the Parliamentary Assembly of the Council of Europe under Article 22 of the Convention. The fifth, sixth and seventh sentences of paragraph 81 of the explanatory report make it clear that the consultation of the Union will take place after the draft instrument or text has been prepared by the competent subordinate body of the Council of Europe and transmitted to the Committee of Ministers; the Committee of Ministers will be required to take due account of the position that the Union may express, but will not be bound by it, and if the Union does not express a position the Committee of Ministers is free to adopt the instrument or text.

190. Thus the draft agreement also makes provision for preserving the specific characteristics of the Union and of Union law with regard to the participation of the Union in the control bodies of the Convention.

III. Conclusion

191. The Commission concludes that the draft agreement is compatible with the Treaties.

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