

Brussels, 6 September 2013

## **European Union Accession to the European Convention on Human Rights**

### **NGO Briefing Note on the Accession Agreement and next steps to the attention of the Council Working Party on Fundamental Rights and Free Movement of Persons (FREMP)**

The AIRE centre, Amnesty International and the International Commission of Jurists welcome the opportunity to provide a summary of their views on the development of the internal rules of the European Union on accession to the European Convention on Human Rights (ECHR). All three organizations have followed the negotiations on the Accession Agreement closely from the outset, and have regularly contributed to NGO hearings of the Council of Europe Steering Committee on Human Rights (CDDH) and the negotiating group (“7+7” and “47+1”) in Strasbourg. Our organizations look forward to continuing our involvement in the process, in regard to the development of the EU’s internal rules on accession, in accordance with the principle of transparency affirmed in the Treaty on the European Union (TEU) and Treaty on the Functioning of the European Union (TFEU).<sup>1</sup> This paper summarizes the principles which must be respected, and the key issues which we consider need to be addressed, in the development of the internal rules.

#### ***1. General principles – accession and effective human rights protection***

Our organizations welcome the Draft Accession Agreement as approved by the 47+1 group at its meeting on 3-5 April 2013. We consider that EU accession to the European Convention on Human Rights, in a manner that provides accessible and effective protection of the human rights of persons within the jurisdiction of the EU and of its Member States, is crucial to the full effectiveness of the European human rights system. The Draft Accession Agreement has the potential to provide a workable framework for ensuring such protection. However, the effectiveness of the mechanisms and systems it establishes will to a large extent depend on the internal rules adopted by the European Union. It is therefore important that there be full and inclusive discussion and consultation on the draft internal rules, through a transparent process that involves not only the concerned EU institutions, but also NGOs and representatives of applicants in human rights cases before the CJEU and European Court of Human Rights (ECtHR).

As with the accession agreement itself, the central concern in the drafting of the EU’s internal rules on accession must be ensuring that the people of Europe enjoy more complete recognition and protection of their human rights. The key principles in the development of the internal rules should be the effectiveness of human rights protection and the principle of accession on an equal footing to States Party to the ECHR, to the greatest extent possible.

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<sup>1</sup>Article 15.1 TFEU; Articles 1 and 10 TEU.

Most crucially, as regards the effectiveness of the protection of human rights for those affected by EU legislation or the action or omissions of EU institutions, it must be ensured that the accession mechanism and the rules that govern it enable such persons to enjoy effective remedies for violations of their Convention rights, both within the EU system and before the ECtHR. Taken together, the accession documents and internal rules must enable the ECtHR to fulfil its supervisory role under Article 19 of the Convention in ensuring the observance of Convention obligations by the EU, on equal terms to other High Contracting Parties to the Convention.

In this context, it should be noted that some constitutional and procedural aspects of EU law render compliance with the Convention problematic - not least, and notwithstanding the prescriptions contained in Article 47 of the EU Charter of Fundamental Rights, with regard to compliance with Article 13 ECHR, the right to an effective remedy. This is largely as a consequence of the limited possibility for individuals to bring legal actions under Article 265 TFEU against the EU institutions for failure to act under Article 263 TFEU. This EU approach contrasts markedly with the concept of positive obligations on contracting parties developed by the ECtHR. While the Strasbourg court will require that “the respondent [state] take all the steps it could reasonably have been expected to take to prevent a harm of which it knew or ought to have known”, EU institutions have not always been willing to take all the steps they could reasonably have been expected to take in this context. The possibility of commencing infringement proceedings is recognized in Article 258 TFEU, but there is no legal means of compelling the Commission to take action against Member States.<sup>2</sup> Once the EU has acceded to the ECHR, the Commission may be held accountable before the Strasbourg Court for its failures to act and in particular the failure to commence infringement proceedings in circumstances where this failure to act may prolong breaches of obligations equivalent to those under the ECHR.

Furthermore, it appears unlikely that the prior reference procedure to be established under the Accession Agreement could provide for an effective remedy at EU level for violations of the Convention rights attributable to the EU. The procedure is designed only to provide the CJEU with an opportunity to make an assessment of the case, and is not intended to be a domestic remedy which must be exhausted prior to application to the ECtHR; the reference is made only after the EU is designated a co-respondent in a case. In the explanatory report to the Accession Agreement, the scope of such review is said to be to rule on the validity of an EU legal provision or on the interpretation of such a provision.<sup>3</sup> It does not appear that such a ruling would have any consequences for the applicant’s case, so as to provide an effective remedy in accordance with Article 13 ECHR.

## **2. Key concerns to be addressed in the internal rules**

### *2.1. Co-respondent mechanism (Article 3 Draft Accession Agreement)*

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<sup>2</sup>Case 247/87, *Star fruit*; Case T-47/96, *SDDDA v Commission*. Article 258 states “If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union”

<sup>3</sup> Explanatory Report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and fundamental Freedoms, para.66.

We are concerned that the language in paragraph (a) of the proposed Draft Declaration by the European Union, to be made at the time of signature of the Accession Agreement, read in conjunction with Article 3 of the Draft Accession Agreement, leaves open the question as to whether it is for the EU or for the Court to decide when and whether the requirements to trigger the co-respondent mechanism have been met.<sup>4</sup>

In the view of our organizations, it is important that the Draft Declaration is backed up by clear internal rules and guidelines that ensure that the EU does not find itself in conflict with the European Court of Human Rights, in regard to its joinder as a co-respondent. Any failure of the EU to accept an invitation of the Court to join the proceedings, in a case where the Court has determined that the conditions for joinder are met, could undermine the integrity of the Court's jurisdiction in these cases.

The internal rules will need to provide in detail for procedures through which the EU decides to request to become a co-respondent in a case, or respond to a request by the Court to become a co-respondent. We consider that where the European Court makes an assessment that the requirements for joining the EU as a co-respondent are met, and issues an invitation to the EU to join a case as a co-respondent, in accordance with Article 3.5 of the Accession Agreement, the EU's internal rules should provide that it should accept the determination of the Court that the conditions for joinder as a co-respondent have been met, and should therefore accept the invitation of the Court to join as a co-respondent.

### *2.2. Allocation of responsibility between co-respondents (Article 3(7) Draft Accession Agreement)*

It is clear from Article 3(7) of the Draft Accession Agreement that in co-respondent proceedings, it is the European Court of Human Rights alone that decides on the attribution of responsibility between the EU and one or more Member States, on the basis of the submissions of all of the parties. The internal rules must not undermine this important principle, which is essential to preserving the jurisdiction of the ECtHR and to ensuring the effective protection of the Convention rights through the Convention system in cases involving the EU. It will be important, however, that the Court's decisions on allocation of responsibility are fully informed by representations from the EU that clarify the scope and content of the EU laws at issue, and the internal rules should make provision in this regard.

### *2.3. Prior reference mechanism: maintaining effective access to justice (Article 3(6) Draft Accession Agreement)*

Regarding the prior reference mechanism to be established under Article 3.6 of the Accession Agreement, we note that many aspects of this procedure remain unclear from the Draft Accession Agreement and accompanying documents. Detailed provision for this procedure under the internal rules will be necessary to ensure that the procedure does not impede the access to justice of applicants for a violation of the

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<sup>4</sup> The draft declaration states that "Upon its accession to the Convention, the European Union will ensure that (a) it will request to become a co-respondent to the proceedings before the European Court of Human Rights or accept an invitation by the Court to that effect, where the conditions set out in Article 3, paragraph 2, of the Accession Agreement are met."

Convention rights. In particular, the rules must ensure the speedy conduct of the proceedings, to ensure that the mechanism does not impede effective access to justice for applicants.

Furthermore, where the prior involvement of the CJEU is foreseen, it is essential that the EU's internal rules ensure that the voice of applicants in the ECtHR proceedings is also heard in the CJEU proceedings. The CJEU's rules on legal aid will need to be adapted in order to ensure that the proceedings before it comply with its own case law on the provision of legal aid, in particular as set out in the case of *DEB*.<sup>5</sup> The need to make provision for legal aid in the co-respondent process is acknowledged in the Explanatory Report to the Draft Accession Agreement.<sup>6</sup> We emphasize that rules on legal aid must take into account the possibility that an applicant may need additional specialized representation on questions of EU law, which may be beyond the expertise of his or her representatives before the ECtHR, and that this additional representation may involve substantial costs. Our organizations consider that it is particularly important that there be open consultation with NGOs and applicants' legal representatives in the development of the internal rules relating to legal aid.

#### *2.4. Prior reference procedure: third party interventions*

We note that, under the present CJEU rules, only EU Member States have a general right to intervene in cases sent by national courts under Art 267 TFEU. If other interested parties (such as UNHCR or NGOs) have not been accepted as interveners in the national proceedings, no mechanism exists for them to be part of the proceedings in the CJEU. This contrasts with the situation before the ECtHR, where NGOs (including the undersigned organizations) and IGO agencies such as UNHCR are regular third party interveners. The possibility of such interventions gives the court an opportunity to receive highly valuable input, especially on points of law, in respect of key areas not covered fully by the contending parties. The organizations consider that, in the development of the internal rules, and in consultation with the CJEU, consideration should be given to amending the Rules of the CJEU to allow for third party interventions before the CJEU, in cases of prior reference in accordance with the Accession Agreement, at least in regard to organizations or individuals who are already recognized as third parties in the case before the ECtHR.

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<sup>5</sup> In Case C-279 /09, *DEB v. Germany*, Judgment of the Court of Justice (Second Chamber) of 22 December 2010 - the court held that legal aid must be available to those who wish to assert a claim in national courts that their rights under EU law have not been respected or properly implemented

<sup>6</sup>Explanatory Report, para.66