



EU Accession to the European Convention on Human Rights

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Political initiatives by the EU institutions to introduce human rights protection into the EC/EU have centred on two methods: accession to the Council of Europe's *European Convention on Human Rights* or the adoption of a separate EC/EU bill of rights. The EU has already given legal status to the European Charter of Fundamental Rights in the *Treaty of Lisbon* and is now heading towards acceding to the European Convention, as provided for in Article 6(2) of the *Treaty on European Union*.

This Note looks at the background to and issues surrounding EU accession to the European Convention, UK Government views and Parliamentary scrutiny of the draft Council decision on the negotiation of an EU accession agreement.

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1 The Origins of EU accession to European Convention on Human Rights

The European Court of Justice (ECJ) has acknowledged in various rulings that human rights are among the fundamental principles of the EU's legal order. In [Case C-36/75, Rutili v. Ministre de l'Intérieur](#), 28 October 1975, for example, the ECJ confirmed that the rights guaranteed by the European Convention on Human Rights (the 'European Convention') were protected in EC law. Treaties and amending instruments since the Treaty of Rome have made explicit references to the basis of democratic principles for all Community action. The preamble to the *Single European Act* (SEA) of 1986 expressed the determination of the European Community Member States:

to work together to promote democracy on the basis of the fundamental rights recognised in the constitutions and laws of the member states, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice.

The Maastricht Treaty (*Treaty on European Union* or TEU) introduced what is now Article 6(2)TEU on respect for fundamental rights as guaranteed by the European Convention as "general principles of Community law". The *Treaty of Amsterdam* gave the ECJ jurisdiction to ensure that Article 6(2)TEU was observed by the EC/EU institutions (Article 46(d)TEU). The *Treaty of Lisbon* gave the European Union legal personality and provided specifically for EU accession to the Convention.

The European Parliament adopted a Resolution in 1973 "concerning the protection of the fundamental rights of Member States' citizens when Community law is drafted"¹ and another in 1977 "on the granting of special rights to the citizens of the European Community".² The EP issued a declaration of political principle on the definition of fundamental rights on 10 February 1977, which was subsequently adopted by the Council and Commission. At the Copenhagen European Council in 1978 the Heads of State and Government issued the "Declaration on Democracy" which confirmed their will:

... to ensure that the cherished values of their legal, political and moral order are respected and to safeguard the principles of representative democracy, of the rule of law, of social justice and of respect for human rights.³

In a 1979 Resolution the EP urged EC accession to the European Convention and envisaged the drafting of a European Charter of Civil Rights. Further Resolutions in 1983 and 1984 emphasised the need to incorporate fundamental human rights in the EC in a constitutional manner and in 1989 the EP proposed the adoption of a declaration of fundamental rights as part of a 'Constitution' for the EU⁴. The European Commission issued a Memorandum in April 1979 on "the Communities becoming a signatory of the European Convention on Human Rights" as an initial step towards consolidating human rights protection in the Community.⁵ The House of Lords Select Committee on the European Communities reported on the Memorandum and took the view that the "immediate practical gains of accession are

¹ OJC 26, 4 April 1973.

² OJC 299, 16 November 1977.

³ Summit Conclusions, 7-8 April 1978.

⁴ See: OJC 120, 16 May 1989, p.51; OJC 324, 24 December 1990, p.219; OJC 61, 28 February 1994, p.155.

⁵ *Bulletin of the European Communities*, supplement. 2/79.

likely to be limited, the benefits being largely indirect and to some extent symbolic”.⁶ The report concluded that there were more pressing demands on the EC’s resources.

The Commission renewed the proposal in a Communication of November 1990,⁷ which pointed to a “conspicuous gap in the Community legal system” that could be filled by Community accession to the European Convention. The Commission argued that Community accession would promote the uniform protection of human rights in the Member States and also present the Community legal order as a comprehensive legal order with constitutional guarantees equivalent to those in the Member States. It would be a complementary rather than an alternative measure for review and enforcement.

The ECJ has ruled on whether the then Community (not the Union that we have now) had the power to accede to the European Convention. The Court looked at the competence of the Community to conclude an agreement to accede and at the compatibility of such an agreement with the EC Treaty, with particular regard to the jurisdiction of the Court. The ECJ accepted in an Opinion on the *Agreement Establishing the European Economic Area* that the European Community was competent to submit itself to the jurisdiction of a court established by an international agreement in order to rule on the interpretation and application of its provisions.⁸ However, the Court rejected the proposal that the European Community could accede to the European Convention. The EC could act only within the limits of the powers conferred on it by the EC Treaty. At that time, there were no Treaty provisions conferring on the institutions “any general power to enact rules on human rights or to conclude international conventions in this field” ([Opinion 1/91, para. 27](#)).

In an Opinion in 1996 the ECJ found that the Community was not so empowered; that Article 308 (ex-Article 235)⁹ was not a sufficient basis for granting the EC authority to ratify the Convention. The ECJ needed more information on “the arrangements by which the Community envisaged submitting to the present and future judicial control machinery established by the Convention” in order to decide on the question of compatibility with the Treaty¹⁰. The Opinion stated that: “No treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field”.¹¹ Accession to the ECHR 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.¹²

The Opinion also acknowledged that “respect for human rights is a condition of the lawfulness of Community acts,”¹³ a view affirmed in ECJ case-law for some decades, even

⁶ Lords 71st Report, 1979-80, “Human Rights”, p xvi, para 32.

⁷ CONS DOC 10555/90, 4 December 1990

⁸ [Opinion 1/91, \[1991\] ECRI-6079, para 40.](#)

⁹ “If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.”

¹⁰ [Opinion 2/94, para 20](#), 28 March 1996

¹¹ [Opinion 2/94, \[1996\] ECR I-1759](#), 28 March 1996, para. 27.

¹² [Opinion 2/94, para.27.](#)

¹³ [Opinion 2/94, para 34.](#) 28 March 1996

before respect for human rights was explicitly mentioned in the Treaties.¹⁴ Commenting on the Court's ruling, J.H.H.Weiler and Sybilla C.Fries suspected:

... that it was the 'institutional implications' that caused most trouble and that principal among these was the institutional implication which would submit the Court of Justice, like its constitutional brethren in the Member States, to scrutiny by the Strasbourg Court.¹⁵

2 Legal basis for accession in the Council of Europe and the European Union

On the Council of Europe side, the entry into force of [Protocol 14](#) to the European Convention¹⁶ provides a legal basis for EU accession, although, as the CoE states, "This provision is in itself not sufficient to allow accession because its modalities remain to be negotiated by the EU and all Council of Europe member States".¹⁷

The draft EU Council Decision authorising the European Commission to negotiate the Accession Agreement of the EU to the European Convention of 11 May 2010 is based on Article 6(2) of the *Treaty on European Union* (TEU), Article 218(8) of the *Treaty on the Functioning of the European Union* (TFEU), Protocol 8 and Declaration 2 to the Lisbon Treaty.

Voting in the Council is by unanimity and adoption is subject to approval in the Member States according to their respective constitutional requirements.

3 The draft Council Decision

The negotiating mandate, the *Draft Council Decision authorising the Commission to negotiate the Accession Agreement of the European Union to the European Convention for the protection of Human Rights and Fundamental Freedoms (ECHR)*, has been confidential and therefore was not made available for parliamentary scrutiny. However, the Government deposited a partially [declassified version](#) of the Council Decision authorising the negotiation of the accession agreement.

On 8 February 2010 the Commission published [document 6180/10 on EU accession](#) which outlined the informal discussions and issues being addressed at meetings of Justice and Home Affairs Counsellors, national experts, the Commission and a representative of the Court of Justice. Among the legal and technical issues raised were:

- the question of the scope of the EU accession to the "ECHR system", i.e. whether the EU shall accede not only to the Convention proper, but also to the Additional Protocols to the ECHR; and, if yes, to which of these Protocols (all or only those that all Member States have acceded to);

¹⁴ E.g. Joined cases 60 and 61/84, *Cinéthèque SA v. Fédération Nationale de Cinémas Français* [1985] ECR 2605, para 26.

¹⁵ "A Human Rights Policy for the European Community and Union: The Question of Competences", from *The EU and Human Rights*, edited by Philip Alston, 1999.

¹⁶ The UK Government signed the Protocol on 13 July 2004 and no primary legislation was needed to give effect to it.

¹⁷ 1 June 2010, "[Accession by the European Union to the European Convention on Human Rights. Answers to frequently asked questions](#)"

- the question of the most appropriate manner to ensure that the accession complies with the conditions laid out in the Treaties and their Protocols (in particular Protocol No 8 relating to Article 6 (2) of the TEU), such as the non affectation of individual Member States' situation vis-à-vis the ECHR, the non affectation of the Union's competences, or the preservation of the monopoly of the Court of Justice of the EU in the interpretation of European Union Law; Charter of Rights v European Convention on Human Rights?
- the advisability to devise a "co-defendant" mechanism, ensuring that in certain cases both the EU and the Member State concerned may, where appropriate, be parties in any proceedings before the European Court of Human Rights;
- the representation of the European Union in the Council of Europe bodies which exercise functions related to the ECHR, such as the Parliamentary Assembly for what concerns the appointment of Judges to the European Court of Human Rights, or the Council of Ministers in its functions of supervision on execution of judgements according to Article 46 (2) ECHR; and
- the relations between the Court of Justice of the EU and the European Court of Human Rights.

The Spanish Presidency in the first half of 2010 and the EU's Fundamental Rights Agency organised a seminar in Madrid on 2-3 February 2010 to discuss these issues, as well as the question of the extent of European Parliament (EP) involvement in the initial discussion and the negotiations with the Council of Europe, which would begin after the approval of the negotiating mandate. Under Article 218(10) TFEU, the EP would be "immediately and fully informed at all stages of the procedure" and the Spanish Presidency was in favour of very close EP involvement in the discussions.

4 UK Government views on accession and parliamentary scrutiny of the proposal

When the European Scrutiny Committee (ESC) looked at the incorporation of the EU's Charter of Fundamental Rights into the EC Treaties in May 2000, one of its points concerned the relationship between the Charter of Fundamental Rights (then only 'proclaimed' and not formally adopted) and the European Convention:

132.[...] Various commentators¹⁸ have expressed fears that the Charter and the ECHR could become competing catalogues of rights with different definitions of the rights, leading to confusion amongst the intended beneficiaries, and, quite possibly, to conflicting judgments from the ECJ (on the basis of the Charter) and the European Court of Human Rights (on the basis of the ECHR). Thus, it is felt, far from providing clarification and protection, the Charter might unintentionally create lack of certainty and undermine confidence in human rights protection in Europe. The EP's resolution on the Charter therefore calls upon the IGC:

"to enable the Union to become a party to the ECHR so as to establish close co-operation with the Council of Europe, whilst ensuring that appropriate action is taken to avoid possible conflicts or overlapping between the Court of Justice of the European Communities and the European Court of Human Rights".

¹⁸ Including institutions with such fundamentally different attitudes to the Charter as the European Affairs Committee of the Italian Senate (op.cit.) and the Finnish Government and Parliament (see their position paper). See also the views of Judge Kapteyn of the ECJ: Q 147.

133. Currently, it is not possible for either the European Community or the European Union to become a party to the ECHR. In Opinion 2/94¹⁹ the ECJ distinguished between the Community's duty to comply with fundamental rights as general principles of Community law and a competence to act internally in the field of fundamental rights which, according to the Court, the Community lacked. It followed that it also lacked the competence to become a party to the ECHR. In the case of the Union there is a more fundamental objection; its founding Treaty did not confer on it a legal personality, and hence the capacity to enter into international relations. Although it could acquire that capacity by practice, it has not yet been recognised to have done so. In either case, then, Treaty amendment is necessary to enable accession to the ECHR. Advocates for EU accession to the ECHR point out that, without it, protection of fundamental rights within the EU remains deficient by comparison with the protection available in respect of acts of Member States, where decisions of domestic courts are subject to an external check by a Court specialised in human rights. Even if the Union were to adopt a legally binding Charter, decisions of the ECJ would escape that supervision unless the *Union* at the same time became party to the ECHR. If only the European *Community* became party to it, Union action under the Third Pillar would not be subject to external supervision: in other words, the sensitive issue of EU actions in the field of police and judicial co-operation in criminal matters would be excluded.²⁰

Although they duplicate each other in some respects, the Charter and the European Convention have different enforcement mechanisms and different jurisdictions. The rights set out in the Charter could not be applied universally, but only in relation to EU law or action taken under the Treaty. The Convention, on the other hand, has no direct relation to EU law, although there may be an overlap in the subject matter of complaints.²¹ The Charter provides that, insofar as it 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 Convention which drew it up. This should help to avoid conflicting interpretations of the two texts. The ECJ would rule in cases of alleged breach of the Charter, including, presumably, in cases where the complaint would also be admissible under the Convention. However, as some commentators have observed, there is scope for duplication and confusion as to which would be the relevant Court.

There has been some friction between the two Courts in recent years. The Council of Europe (CoE) body has been concerned about the expansion of EU activities into areas once in its preserve. A [Memorandum of Understanding](#) signed on 11 and 23 May 2007 by the EU and the CoE sought to mend fences by agreeing common purposes and principles of cooperation, shared priorities, focal areas and arrangements for cooperation, better communication with the public and an evaluation of the implementation of the MoU.

The former Labour Government had some doubts about accession, noting in the July 2007 White Paper that "There are complex legal issues involved in EU accession to the ECHR. These problems would have to be resolved before the Government could support it".²²

¹⁹ 1996 ECR I-1759

²⁰ ESC 17th Report, "The 2000 Inter-Governmental Conference, Part IV, Charter of Rights", 15 May 2000, <http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmselect/cmeuleg/23-xvii/2307.htm#n168>

²¹ There have been conflicts of jurisdiction. In the case of *Matthews v UK*, in which the European Court of Human Rights found the UK in breach of the ECHR, but in remedying this situation the UK found itself in breach of an EC obligation, which it then had to rectify.

²² White Paper on the Reform Treaty, July 2007, at http://www.fco.gov.uk/Files/kfile/CM7174_Reform_Treaty.pdf

The present Lord Chancellor and Justice Secretary, Ken Clarke, wrote to the ESC on 30 June 2010 about the mandate for negotiations with the Council of Europe agreed at the Justice and [Home Affairs Council on 4 June 2010](#). He went on to outline the key benefits of EU accession. It would:

- close the gap in human rights protection as applicants will, for the first time, be able to bring a complaint before the European Court of Human Rights ("the Strasbourg Court") directly against the EU and its institutions for alleged violations of Convention rights;
- enable the EU to defend itself directly before the Strasbourg Court in matters where EU law or actions of the EU have been impugned; and
- reduce the risk of divergence and ensure consistency between human rights case law between the Strasbourg and Luxembourg Courts.²³

Ken Clarke emphasised that as the EU is not a state, “the modalities of accession must reflect this fact”, noting that “there is little precedent from which to work, and it will therefore be legally and technically challenging to come up with an approach that respects the particular characteristics of both the EU and the ECHR”. Clarke explained:

... it will be necessary to translate concepts that are familiar when applied to states for example, the exhaustion of domestic remedies—to this different context. There may also be challenges relating to cases that are brought against both the EU and one of its member states. We will especially want to ensure that the EU's accession does not have an unanticipated impact on the functioning of the Strasbourg and Luxembourg Courts, and that it is practically possible for applicants to bring proceedings to hold the EU to its obligations under the Convention in the same way as they can the existing member states. We will also be alert to ensure that the UK's interests as a member of the EU or as a party to the Convention are not disadvantaged by the EU's accession.

The ESC commented that the EU's accession was “potentially, a very significant development both in its internal legal order” because “it would amount to submitting the acts of EU institutions to independent external control by the European Court of Human Rights

“The Government supports “the principle that individuals should be able to hold the European Union itself to account for breaches of human rights in the same way as its member states”

Jonathan Djanogly, Parliamentary Under-Secretary of State at Ministry of Justice, [HC Deb 4 March 2011 c725W](#)

(ECtHR); and in the way in which EU citizens' human rights are protected”. It was not clear to the Committee “how much the EU's accession to the ECHR would be a symbolic gesture, and how much it would lead to practical changes for UK citizens”.

The ESC asked the Government for answers to the following questions, which Mr Clarke answered in a letter on 21 September 2010 (Government answers in italics):

- What is the current 'gap' in human rights protection that will be closed by accession?

²³ [EU Scrutiny Committee 13th Report 26 January 2011](#)

"Broadly speaking, the reference to a 'gap' denotes the fact that, currently, the EU is not directly accountable to the ECtHR. There are two respects in which the EU's accession to the ECHR will address this issue.

"First, at present, individuals who consider that the actions of the EU have breached their fundamental rights cannot bring proceedings against the EU in the European Court of Human Rights. Following the EU's accession to the ECHR, they will be able to do so. This will in itself be a significant step, because the EU will be directly answerable to the Strasbourg Court for its own actions.

"Second, the EU's accession to the ECHR will resolve an uncertainty about the extent to which Member States are answerable to the Strasbourg Court for the actions of the EU.

*"As the law stands, when individuals consider that the actions of the EU have breached their fundamental rights, they may in some circumstances bring a claim in the Strasbourg Court against one or more Member States. The ECtHR has held that when EU law results in a breach of the ECHR, the Member States can be held responsible for that breach, because they enabled the EU to act in the way that it did. For example, in *Matthews v UK* (1999) 28 EHRR 361, the UK was held responsible for a violation arising from the EU's primary legislation on the grounds that the UK had freely entered into the relevant EU obligations.*

*"However, it is open to question whether the Member States can be held responsible in the Strasbourg Court for violations resulting from the actions of individual EU institutions, such as the Commission. The point arose in *Senator Lines v 15 States* (2004) 39 EHRR SE3, but it was not resolved because the Court found that the claim was inadmissible on other grounds.*

"The EU's accession to the ECHR will resolve this uncertainty. Once the EU is a party to the ECHR, there will be no doubt that individuals will be able to bring proceedings against the EU in the Strasbourg Court on the grounds that the acts of the EU institutions have breached their Convention rights."

- What was meant by 'directly' when saying "applicants will, for the first time, be able to bring a complaint before the European Court of Human Rights ("the Strasbourg Court") directly against the EU and its institutions for alleged violations of Convention rights"?

"At present, as described above, the only way for individuals to argue in the Strasbourg Court that the EU has breached their ECHR rights is for them to bring proceedings against one or more Member States. Once the EU has acceded to the ECHR, it will be possible for the EU itself to be the respondent in proceedings in the Strasbourg Court, and to defend claims in its own name."

- How will accession "reduce the risk of divergence and ensure consistency between human rights case law between the Strasbourg and Luxembourg Courts" when Article 52(3) of the Charter on Fundamental Rights specifically allows for EU human rights law to provide "more extensive protection" than the ECHR?

*"The EU will be bound by the Strasbourg Court's judgments in cases in which it is a respondent. Furthermore, like other contracting parties to the ECHR, the EU will need to have regard to the Strasbourg jurisprudence (reflecting the ECtHR's own longstanding practice, in cases such as *Case C-465/07 Elgafaji* [2009] ECR I-921, paragraph 28).*

"Article 52(3) of the Charter confirms that the rights in the ECHR have precisely the same meaning in EU law. It provides that insofar as Charter rights correspond to rights in the ECHR, 'the meaning and scope of those rights shall be the same as those laid down by the said Convention'. The explanation of Article 52(3), to which Article 6(1) TEU requires courts to

have regard, makes it clear that the purpose of this provision is 'to ensure the necessary consistency between the Charter and the ECHR by establishing the rule that, in so far as the rights in the present Charter also correspond to rights guaranteed by the ECHR, the meaning and scope of those Draft for the Committee's Report rights, including authorised limitations, are the same as those laid down by the ECHR.' The explanation then lists those provisions in the Charter that correspond to provisions in the ECHR, as well as those where the right under EU law goes further than the right under the Convention. There is therefore no doubt about which rights in the Charter correspond to rights in the ECHR, and it is clear that to the extent that they correspond, they must be interpreted in the same way.

"Furthermore, once the EU has acceded to the ECHR, individuals who argue unsuccessfully in the ECJ that the EU has breached their Convention rights will be able to make the same arguments before the Strasbourg Court, whose decision will be binding on the EU. Through this mechanism, the Strasbourg Court will have the final say about whether the EU has interpreted Convention rights correctly, which will ensure that the Convention is applied consistently."

- How would the EU's autonomous legal order be preserved, particularly in the light of the Court of Justice's Opinions 1/91 and 1/00.

"In Opinion 1/91 [1991] ECR 1-6079 and Opinion 1/00 [2002] ECR 1-3493, the ECJ held that the EU had no competence to enter into international agreements that would permit a court other than the European Union's Court of Justice (ECJ) to make binding determinations about the content or validity of EU law.

"There is no reason to suppose that the agreement by which the EU accedes to the ECHR will fall foul of this principle. Article 6(2) TEU expressly provides that the EU 'shall accede' to the ECHR. It follows that there can be no suggestion that the EU's accession is incompatible with the Treaties. Indeed, as mentioned above, the ECJ has always considered the case law of the Strasbourg Court when interpreting the scope of Convention rights as they apply in the EU's own legal order.

"Furthermore, the Treaties expressly require that the accession agreement should be drafted in such a way that the autonomy of EU law is not undermined, and the EU is therefore under a legal obligation to ensure that the accession agreement respects these constraints. In particular, Article 6(2) TEU provides that accession 'shall not affect the Union's competences as defined in the Treaties'; Article 1 of Protocol No 8 provides that the accession agreement must 'make provision for preserving the specific characteristics of the Union and Union law'; Article 2 of the Protocol provides that accession 'shall not affect the competences of the Union or the powers of its institutions'; and Article 3 of the Protocol provides that the accession agreement must not affect Article 344 TFEU, which requires that disputes concerning the interpretation or application of the EU Treaties must be settled only in accordance with the provisions of the Treaties."

The Committee also noted concern among academics "that the Charter will lead to legal uncertainty in how human rights are applied in Europe by introducing an additional standard of 'fundamental' right".²⁴

The Government's views on the negotiating mandate are set out in the following Explanatory Memorandum extract of November 2010:

²⁴ ESC 13th Report, 26 January 2011

SCRUTINY HISTORY

4. The negotiating mandate, as a confidential document, has not been subject to Parliamentary Scrutiny. However, on 30 June 2010 the House of Commons and House of Lords committees were informed that a negotiating mandate for the EU had been agreed. Both Parliamentary committees subsequently wrote to the Secretary of State for Justice to seek further information. The House of Lords European Select Committee wrote on 15 July 2010 while the House of Commons European Scrutiny Committee wrote on 8 September. Lord McNally replied to the Lords committee on 29 July, and the Secretary of State for Justice replied to the Commons committee on 21 September - explaining that the mandate was not a public document, responding to the specific questions raised and setting out the list of issues that has been produced to structure discussions during the negotiations.
5. The House of Commons European Scrutiny Committee subsequently requested the deposit of a document in order to allow it to report to the House.

MINISTERIAL RESPONSIBILITY

6. Kenneth Clarke, Secretary of State for Justice is responsible for Human Rights policy.

INTEREST OF THE DEVOLVED ADMINISTRATIONS

7. Human Rights and Fundamental Rights are reserved matters under the UK's devolution settlements and no devolved administration issues arise. However, following accession, it is possible that an adverse judgment against the EU in the European Court of Human Rights may require amendment to EU legislation, directives, policies or programmes in a way which has implications for a devolved matter. The devolved administrations have been consulted in the preparation of this Explanatory Memorandum.

LEGAL AND PROCEDURAL ISSUES

- i. Legal basis
8. The legal basis for the EU to accede to the ECHR is Article 6(2) Treaty on European Union. Protocol No 8 to the Treaties sets out further safeguards which must be included in the accession agreement between the EU and the Council of Europe.

ii. Legislative procedure

9. Under Article 218(8) of the Treaty on the Functioning of the European Union, the Council must unanimously approve the decision for the EU to conclude the EU accession agreement; this is subject to approval by Member States in accordance with their respective constitutional requirements.
10. The process for agreement and ratification of the EU accession agreement for the UK as a member of the Council of Europe will depend on the exact form the accession agreement takes.

iii. Voting procedure

11. The accession agreement will be subject to unanimous agreement by the European Union Member States.

iv. Impact on United Kingdom Law (including implementation issues)

12. The Government does not expect the EU's accession to the ECHR to have any direct impact on UK law: as Article 6(3) of the Treaty on European Union confirms, the fundamental rights guaranteed by the ECHR already constitute general principles of EU law. It is possible that an adverse judgment against the EU by the European Court of Human Rights may require the EU to amend its legislation in order to protect individuals' fundamental rights in a way that will have consequential implications for UK law.

v. Application to Gibraltar

13. Accession by the EU to the ECHR will not directly affect Gibraltar. However, it is possible that an adverse judgment against the EU in the European Court of Human Rights may require amendment to EU legislation, policies or programmes that have effect in Gibraltar.

vi. Fundamental Rights Analysis

14. Accession by the EU to the ECHR will make it possible for individuals to directly challenge the actions of the EU before the European Court of Human Rights if they consider that the EU has breached their rights under the Convention.

APPLICATION TO THE EUROPEAN ECONOMIC AREA

15. Accession of the EU to the ECHR is specific to the EU and does not directly affect the European Economic Area.

SUBSIDIARITY

16. EU accession to the Convention cannot be effected at Member State level.

POLICY IMPLICATIONS

17. The process of Accession has been considered against the commitments in the Government's *'Programme for Government'*. Accession by the EU to the ECHR will not transfer any powers to the EU. Protocol 8 to the Treaties (Relating to Article 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms) clearly states that accession "shall not affect the competences of the Union or the powers of its institutions". Protocol 8 further states that the EU's accession will not impact on the UK's rights or obligations under the ECHR. Accession also reflects the Coalition Government's commitments on civil liberties, bringing the actions of the European Union directly within the jurisdiction of the European Court of Human Rights.
18. The Government supports accession by the EU to the ECHR. Accession will close the gap in human rights protection as applicants will, for the first time, be able to bring a complaint before the European Court of Human Rights directly against the EU and its institutions for alleged violations of ECHR rights. It will enable the EU to defend itself directly before the European Court of Human Rights in matters where EU law or actions of the EU have been impugned. Further it will reduce the risk of divergence and ensure consistency between human rights case law between the European Court of Human Rights and EU's Court of Justice (ECJ) in Luxembourg; the EU will be bound

by the European Court of Human Rights' judgments in cases in which it is a respondent and, like other contracting parties to the ECHR, the EU will need to have regard to the Strasbourg jurisprudence. Additionally, EU accession will mean that individuals who argue unsuccessfully in the ECJ that the EU has breached their fundamental rights can, subject to the usual admissibility requirements, complain to the European Court of Human Rights that the EU has violated one or more Convention rights. The European Court of Human Rights' judgment will be binding on the EU as a respondent to the proceedings.

19. Accession to the ECHR will ensure that there is an effective and binding remedy available when people's human rights have been breached by the EU.

IMPACT ASSESSMENT

20. There is no impact on business, charities or the voluntary sector in the United Kingdom.

FINANCIAL IMPLICATIONS

21. There are no current financial implications for the United Kingdom or other Member States.

CONSULTATION

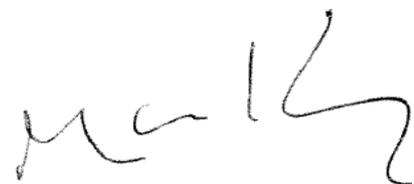
22. No consultation is currently envisaged.

TIMETABLE

23. Negotiations are ongoing. The Government will keep Parliament informed on the progress of these discussions.

OTHER OBSERVATIONS

24. No other observations



Lord McNally

Minister of State for Justice

Ministry of Justice

15/11/12



5 Timetable for ratification of an accession agreement

On 7 July 2010 Thorbjørn Jagland, the CoE Secretary General, and Viviane Reding, Commission Vice-President, started official talks on EU accession to the Convention. An informal working group is in the process of preparing a draft accession treaty and the Council of Europe's Steering Committee on Human Rights (CDDH) expects a final draft to be finalised by 30 June 2011.

The Government said in March 2011, in reply to a question about discussions with other EU Member States about the timetable for the proposed accession:

No such discussions have taken place to date with EU ministerial counterparts. Discussions are continuing in official working groups to agree the details for accession. The Government will need to be sure that any accession agreement neither enlarges the competences of the Union nor negatively affects the position of the United Kingdom and other member states in relation to the ECHR. The Government will continue to participate fully in discussions about accession with these principles in mind.²⁵

There has been a great deal of secrecy surrounding the negotiations so far.²⁶ The Government said last June that the UK procedures for ratification would depend on the "exact form the accession agreement takes". Current legislation on the approval of EU decisions (*European Union (Amendment) Act 2008*) does not automatically require an Act of Parliament for decisions made under the Treaty Articles that are the basis for EU accession to the European Convention. Assuming the European Union Bill 2010-11 comes into force, new procedures will apply. David Lidington said in January 2011:

As with any other treaty to which the UK is party, the final accession agreement will be subject to the procedures under part 2 of the Constitutional Reform and Governance Act 2010—the codification of the Ponsonby procedures. That requires the agreement to be laid before Parliament for 21 sitting days, during which time either House may resolve that it should not be ratified. On top of those two levels of control, clause 10 of the Bill will add an additional layer of accountability by requiring a positive vote in favour of the agreement in each House before the UK could approve the EU's decision to conclude such an agreement.²⁷

Clause 10(4) of the EU Bill as amended states that the Government may not confirm approval of the EU accession decision unless each House approves a motion without amendment supporting the Government's intention to support the adoption of the draft accession decision.

²⁵ [HC Deb 8 March 2011 c1049W](#)

²⁶ There is an interesting blog on the secrecy surrounding the negotiations at <http://julienfrisch.blogspot.com/2010/05/eus-accession-to-european-convention-on.html>

²⁷ HC Deb 26 January 2011 c