



47+1(2020)R6

22 October 2020

**6<sup>TH</sup> MEETING OF THE CDDH AD HOC NEGOTIATION  
GROUP (“47+1”) ON THE ACCESSION OF THE  
EUROPEAN UNION TO THE EUROPEAN  
CONVENTION ON HUMAN RIGHTS**

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**Meeting Report**

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Strasbourg, Tuesday 29 September (10:00 am) – Thursday, 1 October 2020 (4:30 pm)

Palais de l'Europe (Room 9), with the possibility to also attend the meeting via the  
KUDO videoconferencing system  
Council of Europe

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1. The CDDH ad hoc negotiation group (“47+1 Group”) on the accession of the European Union (EU) to the European Convention on Human Rights (ECHR) held its 6<sup>th</sup> meeting from 29 September – 1 October 2020. Due to the COVID-pandemic, the meeting was held as a hybrid meeting (i.e. with delegates participating both in the meeting room and via videoconference). The list of participants is attached as Appendix II.

### **Item 1: Opening of the meeting and adoption of the agenda**

2. The Chair of the “47+1 Group”, Ms Tonje MEINICH (Norway), opened the meeting and asked delegates about the adoption of the agenda.

3. Three delegations made opening statements of a general nature. One delegation underlined the importance that the negotiations would look at the accession instruments as a whole and are not limited to those areas which the EU has identified in its position paper. It would therefore be important that sufficient time was found to address those issues. Moreover, the delegation stressed the need to ensure that the accession instruments protect the effectiveness of the European Court of Human Rights (ECtHR) and the functioning of the Convention system. The final accession instruments should reflect the balance that was already recognised in the accession instruments adopted by the “47+1 Group” in April 2013. A second delegation underlined the need that EU accession must keep intact and enhance the Convention system and make the Council of Europe stronger. That delegation also referred to the importance of the principles on the accession negotiations as outlined in paragraph 7 of the explanatory report to the draft Accession Agreement, and stated that some of the concerns raised in Opinion 2/13 by the Court of Justice of the European Union (CJEU) would be better addressed by the EU internally. It also noted that the agenda was primarily focused on requests by the EU for reopening the accession instruments, while that delegation wished to also address other issues not contained in the Chair’s paper to structure the discussion at the present meeting (document 47+1(2020)2). While recalling its commitment to have an open and constructive discussion, a third delegation also stressed the importance of the principles on the accession negotiations, notably that the EU should accede as a matter of principle on an equal footing with the other High Contracting Parties. The accession instruments of 2013 would represent a carefully elaborated package and it would be important not to draft an entirely new agreement but restrict any amendments to what is strictly necessary.

4. The Chair clarified that she had invited delegations at the informal meeting on 22 June 2020 to communicate to the Secretariat whether they wished to discuss any issue which was not contained in the European Commission’s paper of 20 March 2020 (document 47+1(2020))1). In the absence of any such communications to the Secretariat, the Chair had prepared her above-mentioned paper on the basis of the issues which were known to be raised. However, the Chair recalled that all delegations had the possibility to raise any additional issues which they would like to discuss. To that effect, an additional agenda item 11 (“Other issues delegations wish to discuss in relation to the draft revised agreement on the accession of the EU to the ECHR (and its appendixes)”) had been included in the agenda. Since several delegations had announced that they wished to raise issues under this agenda item, the Chair confirmed that sufficient time should be devoted to this agenda item in order for all issues to be sufficiently treated at the present meeting.

5. After these clarifications, the Group adopted the agenda without further changes (Appendix I). The “47+1 Group” recalled the importance of the general principles for the accession negotiations as they are laid out in paragraph 7 of the explanatory report.

**Item 2: Opening address by Mr Christos Giakoumopoulos, Director General Human Rights and Rule of Law**

6. Mr GIAKOUMOPOULOS, Director General Human Rights and Rule of Law, welcomed all participants to the meeting. He noted that this meeting was the first technical negotiation since the “47+1 Group” adopted the draft accession instruments in April 2013. This consensus achieved should be the departure point from which the Group should discuss amendments to the draft accession instruments. But participants also needed to be mindful of the reality that without some changes, EU accession to the Convention will not be possible. Mr Giakoumopoulos also added that experts should be realistic enough to assume that the resumed negotiations may well be the last chance to seize to succeed in this important mission. Finally, he referred to the fact that the EU had been evolving since 2013 and that one should be mindful that the gaps EU accession were meant to fill may be widening. At this point it could not be safely assumed that “hybrid” actions such as the establishment of the European Public Prosecutor’s Office would always and entirely be attributed to the member state involved. EU accession would then constitute the piece in the puzzle to ensure that the way to the ECtHR remains open, regardless of who acted vis-à-vis the citizens. EU accession should therefore be seen as the means to preserve the Convention’s effectiveness and sustainability in the future.

**Item 3: Election of a Vice-Chair of the CDDH ad hoc negotiation group**

7. The Group elected Mr Alain CHABLAIS (Switzerland) as Vice-Chair. On behalf of the Group, the Chair warmly congratulated Mr Chablais to his election.

**Item 4: Request for observer status in the CDDH ad hoc negotiation group by the International Commission of Jurists, Amnesty International and the AIRE (Advice on individual Rights in Europe) Centre**

8. The Chair referred to the letter by the International Commission of Jurists, Amnesty International and the AIRE (Advice on Individual Rights in Europe) Centre of 11 February 2020, asking for observer status in the “47+1 Group”. The Secretariat explained the background to the request as well as the legal basis for the decision to be taken by the Group. In the following discussion, there was consensus within the “47+1 Group” that it was preferable to continue the previous practice to hold consultation meetings at regular intervals with these NGOs (rather than providing them with full observer status).

9. The Group however also agreed that more regular consultations than during the previous round were desirable and that a first consultation should be arranged for a half-day at the forthcoming 7<sup>th</sup> negotiation meeting. The Group agreed that consultations should take place with a wider group of representatives from civil society. In addition to the three NGOs which had signed the joint letter of 11 February 2020, other organisations which had participated in the past consultations should also be invited. If any other NGOs would ask to participate in future consultations, their request should be circulated to all delegations for consideration.

### **Item 5: Presentation by the Chair of the “Paper to structure the discussion at the 6<sup>th</sup> negotiation meeting”**

10. The Chair provided a general overview of her paper to structure the discussion at the present meeting and explained the reasons for it. She considered it useful to produce for the Group some guidance and take stock of the issues which should be discussed in order to fulfil its mandate, which is to present revised draft accession instruments to the CDDH. The paper commenced with a short overview of the previous accession negotiations, followed by a recollection of the basic principles of the negotiation process and an overview of the possible instruments for addressing the issues. The Chair recalled the “tools” identified in the paper for revising the accession instruments. In this respect, she reminded delegates that the appendices to the Accession Agreement form an integral part of the accession instruments which are expected to be adopted by the Committee of Ministers as a “package”. In the decision where to place certain amendments, the Chair recommended that the “47+1 Group” should be guided by the principle that any solution must be legally sound.

### **Items 6 and 7: Discussion on the EU’s specific mechanisms of the procedure before the European Court of Human Rights**

11. The Chair and the Secretariat introduced the discussion on the EU’s specific mechanisms of the procedure before the ECtHR, notably the co-respondent mechanism and the *prior involvement*-procedure. In total, six issues could be identified in this area.

12. The EU recalled that it would not seek privileges and that it would limit itself in its proposals to the changes that are strictly necessary in light of the specific characteristics of EU law as interpreted by the CJEU in Opinion 2/13. The issues would be complex, but not insurmountable. Some of these questions had in common that they relate to the fact that in some instances the ECtHR would be required - when applying the procedural mechanisms – to incidentally interpret the internal division of competences within the EU. This was an important difference to the other High Contracting Parties, none of which had handed to the ECtHR or to any other international court the power to rule on their internal division of powers. Hence this was not an issue of restricting a competency that the ECtHR was otherwise exercising. It was also not an issue of limiting the possibilities for individuals to bring cases before the ECtHR or granting a privilege to the EU that other High Contracting Parties do not have. The co-respondent mechanism would allow the EU to take responsibility for compliance of its acts with the ECHR, which was the very point of EU accession. While the *prior involvement*-procedure was an expression of the principle of subsidiarity, its applicability would hinge on the preliminary question of an interpretation of EU law which should be resolved by the competent EU institutions.

13. As to the possibility for the EU and its member states to become co-respondent in a particular case, delegations recalled the ECtHR’s caution to interpret domestic law, including when domestic authorities apply EU law. One delegation stated that the issue could either be solved by amendments to the co-respondent mechanism in substance or procedure. Two delegations expressed concern to further hand over control to the EU of the ECtHR’s procedural mechanisms which could risk creating gaps in accountability. In the view of one of these delegations, the draft accession instruments had already sufficiently addressed the issue. The representative of the Registry of the ECtHR stated that the issue of whether the co-respondent mechanism should apply in a given case was purely a matter of EU law. In this connection, he recalled the current approach by the ECtHR to respect the interpretation of domestic law (including EU law) by the domestic authorities (save in cases of obvious arbitrariness). This approach would also apply in respect of any conclusion based on an EU law assessment by the competent EU authorities that the co-respondent mechanism is called for in a given case, the ECtHR being grateful for a reliable and authoritative assessment of the distribution of powers within the EU. It would have no interest making its own assessment in this respect.

Conversely, the concept of plausibility (as laid down in Article 3, paragraph 5 of the draft Accession Agreement) was entirely alien to the Convention case-law. It was then suggested by one delegation whether the plausibility-test could be replaced by a mere control of the absence of arbitrariness. In response to that, the EU considered it risky to replace one substantive criterion with another, albeit lighter one. One delegation expressed concern about removing the plausibility-test altogether, which could undermine the criteria for applying the co-respondent mechanism.

14. Some delegations suggested to take inspiration from Article 36, paragraph 1 of the Convention which provides for the possibility of High Contracting Parties to join a case as third parties as of right. Both concepts had in common that they related to a participation of an additional party in the interest of a proper administration of justice. Other delegations pointed to the difference between the two concepts (in particular that the co-respondent would be fully bound as a party by the judgment). Two delegations stated that the issue could be solved by making explanations to the explanatory report, while another considered that an amendment of the draft Accession Agreement was probably required. That delegation suggested to make an express reference to the distribution of powers which was currently not mentioned in Article 3, paragraph 5 of the draft Accession Agreement. The Chair recalled that some amendments to the draft Accession Agreement would be necessary if the EU were to accede to the Convention, while for other issues it may be sufficient to add clarifications to the explanatory report.

15. There was an understanding within the “47+1 Group” that if a High Contracting Party has made a reservation under Article 57 ECHR, such reservation would remain valid in any case in which the co-respondent mechanism applies (irrespective of whether that party acted as respondent or co-respondent). One delegation reserved its position on this question to look further into it. The “47+1 Group” would discuss at the next meeting in what manner the above understanding could be reflected in the accession instruments. The representative of the Registry of the ECtHR reminded that the case should also be considered in which all EU member states are collectively acting as co-respondents and one of them has made a reservation.

16. The “47+1 Group” considered whether the exception to the principle of joint responsibility under Article 3, paragraph 7 of the draft Accession Agreement could be deleted. This proposal received support from the EU. The representative of the Registry of the ECtHR confirmed that this exception was not considered necessary because the ECtHR had no interest in having to deal with the division of powers between the EU and its member states. One delegation expressed concern as a point of principle about the ability for any participant before the ECtHR to set the rules for how it will participate and be in a privileged position in this regard. Two delegations considered that paragraph 62 of the explanatory report sufficiently addressed the concerns of Opinion 2/13 in this respect. One delegation supported the proposal and considered that a general rule of joint responsibility could be an advantage for the applicant to ensure that a judgment by the ECtHR could be fully executed. Another delegation noted that the principle of “accession on equal footing” would reach as far as there was no fundamental difference of the EU as an international organisation. The principle of joint responsibility was a prime example for such difference. The Chair concluded that a concrete drafting proposal should be considered by the Group at its next meeting to discuss the matter further.

17. The “47+1 Group” discussed several questions in relation to the *prior involvement*-procedure. One delegation reserved its general position on the necessity of the *prior involvement*-procedure. It also expressed concern that an unconditional right of the EU to trigger the *prior involvement*-procedure would have implications on the functioning of the ECtHR and the likely delay it would have on the ability of applicants to get a judgment from the ECtHR. Several delegations expressed their general support for the *prior involvement*-procedure in the draft Accession Agreement as an expression of the principle of subsidiarity. The Chair recalled that the procedure had been agreed upon in 2013 by ensuring that any additional time the procedure would take was kept to a minimum.

The representative of the Registry of the ECtHR noted that the prior involvement of the CJEU could also speed up the remedy for a violation if the latter could be established earlier in such proceedings. The Chair concluded that concrete drafting proposals should be considered at the next meeting.

18. The “47+1 Group” discussed the possibility of a procedure through which the EU would be systematically informed of cases notified to the EU member states (and vice versa), in order to identify potential cases where the co-respondent mechanism and the *prior involvement*-procedure may apply. Several delegations opined that a solution should take into consideration the limited resources of the ECtHR and the criteria through which potential cases were to be selected. The question was also raised whether the responsibility of such communication should lie with the ECtHR and not rather with the EU member states which may have an interest to communicate potential co-respondent cases to the EU themselves. In this context, one delegation noted that the facts which may point to the possibility that a case may be suitable for the co-respondent mechanism may sometimes lie within the sphere of the EU member states and may only arise once the case was already communicated to them by the ECtHR. The Chair concluded that there might be mechanisms, either “hybrid” or within the EU, which would secure that all involved High Contracting Parties would be sufficiently informed of the existence of relevant cases, without putting too much pressure on the ECtHR. The Group would come back to this issue at the next meeting.

19. The “47+1 Group” discussed a clarification to paragraph 66 of the draft explanatory report that the term “assessing the compatibility of the provision” should also include the interpretation of secondary EU law. There was widespread support that such a clarification was feasible and that the “47+1 Group” would come back to a concrete proposal at the next meeting.

**Item 8: Discussion of the operation of inter-party applications (Article 33 ECHR) and of references for an advisory opinion (Protocol No. 16) in relation to EU member states**

20. The Chair and the Secretariat presented the two issues related to inter-party applications (Article 33 ECHR) and requests for advisory opinions (Protocol No. 16 to the ECHR), in particular the concerns expressed by the CJEU in Opinion 2/13. Both mechanisms had in common that they could, under particular factual circumstances, be used by the EU member states to violate respective provisions of the Treaty on the Functioning of the European Union (TFEU).

*a. Inter-party applications (Article 33 ECHR)*

21. With regard to inter-party applications (Article 33 ECHR), the Chair and the Secretariat recalled that the introduction of an inter-party application by one EU member state against another EU member state on matters involving EU law would be a violation of Article 344 TFEU. In order to address this concern, the delegates were invited to pronounce themselves on two preliminary questions: 1. How should it be established whether or not an inter-party application does relate to EU law, and 2. What should be the consequences if the case in question does relate to EU law?

22. Some delegations expressed concerns of a general nature about amending the accession instruments to solve this issue. The problem of EU member states potentially violating EU law when introducing an inter-party application was primarily an internal issue for the EU and should be solved as such. Some of these delegations (which are not members of the EU) stated that any exclusion within the Convention system of the possibility to bring such applications would in their view go against the principle of the equality of High Contracting Parties, limit the jurisdiction of the ECtHR and negatively affect the rights and obligations of the EU member states under the Convention. Given the limited practical application of this scenario since the establishing of the Convention system, any amendments of the ECHR in this respect were considered undesirable.

23. Other delegations pointed to the necessity to address this issue in some form within the accession instruments in order to meet the concerns of Opinion 2/13 and achieve EU accession as the ultimate aim. While the question of establishing whether the institution of an inter-party application was in violation of EU law should be primarily for the EU itself, the matter could in principle be solved by the EU member state concerned to remedy a violation of Article 344 TFEU by withdrawing the inter-party application. Should however the respective EU member state refuse to withdraw the application, the question would arise how the issue could be solved.

24. The representative of the Registry of the ECtHR stated that an inter-party application brought in violation of EU law would have potential consequences for the execution of the respective judgment of the ECtHR and thus was not entirely an internal EU issue. He also recalled the case-law of the ECtHR ever since the *Bosphorus*-judgment that the application of EU law by the EU member states has to comply with the Convention, it being clear that the *Bosphorus*-presumption of equivalent protection can apply if the requirements are met. Therefore, the very premise underlying the requirement stated by the CJEU in Opinion 2/13 that the use of Article 33 ECHR be expressly ruled out in respect of disputes between EU member states and/or the EU (paragraph 213) - the premise according to which EU law can require that relations between the member states be governed by EU law to the exclusion of any other law (paragraph 212) - would not be compatible with Convention case-law and should perhaps be revisited.

25. The EU elaborated on the legal remedies currently available to the European Commission should a violation of Article 344 TFEU occur through the institution of an inter-party application, namely infringement proceedings. Such proceedings could have a number of potential consequences (e.g. penalties) but would ultimately rely on the EU member state in question withdrawing the case from the international tribunal or court before which it was brought. It also pointed to the fact that Opinion 2/13 was very clear on the necessity to expressly exclude the possibility to bring inter-party applications in violation of EU law. Hence some explanatory additions to the accession instruments would not be sufficient to solve the issue.

26. Delegates discussed the proposal of some form of a suspension of the proceedings before the ECtHR to give the EU the possibility to determine whether a violation of Article 344 TFEU had occurred in bringing the application in the first place. It was stated that this was in principle possible in light of the very long period the ECtHR would take to rule on inter-party applications. The issue of possible “mixed applications” (i.e. containing some but not exclusively EU-related elements in the applications) was raised as well as the issue whether such suspension could affect interim measures which also apply under Article 33 ECHR. The idea of an internal EU-procedure prior to instituting an inter-party application was suggested, requiring the respective EU member state to “seek clearance” from the competent EU institutions for such application. Some coordination with the applicable six months-rule to institute inter-party applications would however be needed. It was also suggested whether this could possibly be included as an inadmissibility-criterion in the accession instruments.

27. The Chair concluded that no delegation had spoken against the general principle that inter-party-applications brought before the ECtHR in violation of EU law were undesirable and should be avoided. There had been sufficient appetite expressed by delegations – albeit no consensus - to further explore the issue of a suspension of the proceedings before the ECtHR to determine whether an inter-party application was brought in violation of EU law. The more problematic issue of the consequences once this was established remained to be discussed. The Secretariat suggested that, in finding an appropriate solution which was watertight and thereby seeking to avoid any amendments to the Convention system could perhaps be developed by considering making use of all instruments available to the “47+1 Group”, including appendices to the draft Accession Agreement.

*b. Requests for advisory opinions (Protocol No. 16 to the ECHR)*

28. With regard to the possibility for designated highest courts and tribunals of High Contracting Parties to ask the ECtHR for an advisory opinion under Protocol No. 16 to the ECHR, the Chair and the Secretariat briefly outlined the concern raised in Opinion 2/13 that under particular circumstances this procedure could be used by domestic courts of EU member states to circumvent the preliminary reference procedure under Article 267 TFEU. The main features of Protocol No. 16 were briefly recalled.

29. The representative of the Registry of the ECtHR underlined that the competences of the ECtHR under Protocol No. 16 (expressing itself on the minimum level of protection by the ECHR) and the CJEU under Article 267 TFEU (expressing itself on a uniform and harmonised protection under the EU Fundamental Rights Charter) are different in nature, which would not make it decisive which of the two European courts would be called upon first. It also pointed to the procedural aspect that the ECtHR has discretion to accept a request. As with inter-party applications under Article 33 ECHR, it was in the ECtHR's interest to have at the earliest possible stage of the proceedings sufficient evidence of the extent to which EU law applies to a request. The issue of "mixed cases" (i.e. relating only partly to EU law) would have to be clarified.

30. The EU pointed out that solutions could be similar to the ones discussed with regard to inter-party applications, despite the differences between Article 33 ECHR and Protocol No. 16. Upon request from one delegation, the EU confirmed that the demands for revising the accession instruments with regard to Protocol No. 16 were less strongly formulated by Opinion 2/13 than with regard to Article 33 ECHR. The Legal Adviser of the Council of Europe recalled that the EU was not planning to accede to Protocol No. 16, but that in the meantime nine EU member states had ratified that optional protocol.

31. The Group also discussed whether an amendment could be envisaged to paragraph 66 of the explanatory report, in light of the fact that paragraph 198 of Opinion 2/13 stated that it could not be ruled out that a request for an advisory opinion made pursuant to Protocol No. 16 by a court or tribunal of an EU member state that has acceded to that protocol could trigger the procedure for the prior involvement of the CJEU. There was agreement amongst the Group that the current wording would state that the application of the *prior involvement*-procedure would presuppose an application for which the co-respondent mechanism applies. The Group will come back at its next meeting to the issue..

**Item 9: Discussion of the principle of mutual trust between the EU member states**

32. The Chair and the Secretariat provided a short introduction to the principle of mutual trust between the EU member states and the objections raised by the CJEU in Opinion 2/13 on the issue that this principle had not been addressed in the draft accession instruments. The Secretariat stated that this area had undergone multiple changes since the adoption of that opinion. It also mentioned the relevant case-law of the ECtHR, most notably the Grand Chamber judgment in the case of *Avotins v. Latvia* of 2016 which had since then be applied by the ECtHR to other areas of mutual recognition. The EU added to this overview the most recent developments in the jurisprudence of the CJEU.

33. The Group took note of the fact that there had been increased convergence between the case-law of the ECtHR and the CJEU in the past years in this area. As a next step, it decided to establish in more detail this convergence which would facilitate the finding of any necessary solution. To that effect, it tasked the Secretariat to prepare a respective compilation for the next negotiation meeting. The EU agreed to support the Secretariat regarding the developments at EU level.

**Item 10: Discussion of the situation of EU acts in the area of the Common Foreign and Security Policy that are excluded from the jurisdiction of the Court of Justice of the European Union**

34. The Chair and the Secretariat gave a brief overview of the issue of EU acts in the area of the common foreign and security policy (CFSP) and the objections raised by the CJEU in Opinion 2/13. These objections derived in particular from the fact that the jurisdiction of the CJEU is excluded in this area with two exceptions laid down in Article 275, paragraph 2 TFEU.

35. The EU stated that the case-law on this issue was not static but constantly evolving. Case-law since 2014 had steadily widened the scope of the counter-exceptions which granted jurisdiction to the CJEU in this area and established that the exclusions from the general jurisdiction of the CJEU must be given a narrow interpretation. Additional cases which could further widen the CJEU's jurisdiction were currently pending. The EU stressed the need to think about a solution which would allow the case-law to evolve and agreed to provide a brief compilation of recent and currently pending cases for consideration at the Group's next meeting. It also informed about the role of domestic courts of EU member states in the area of CFSP.

36. Several delegates underlined the increasing complexity of the issue due to developments in this area since Opinion 2/13 had been delivered in 2014. The principle issue here would be the notion of accountability and attributability. Two delegations expressed caution in light of the principle of "equal footing" and the overall aim of achieving full human rights protection in Europe without creating "black holes". However, other delegations stated that the very aim of the exercise was to achieve a complete and coherent human rights protection through EU accession and thus to avoid such "black holes". One delegation drew attention to the fact that the ECtHR already deals with CFSP issues on the basis of cases that come before it.

37. The representative of the Registry of the ECtHR noted the widening scope of the counter-exceptions for the CJEU's jurisdictions but stated that beyond that there was a whole scope of CFSP actions which as a rule do not belong to the jurisdiction of the CJEU. In the absence of accession, this would raise an issue under the ECHR as long as these would be acts by the EU itself. The concern would be that certain important action in this area could escape the application of the ECHR if attributed to the EU without its accession. A possible avenue to accommodate the concerns by the CJEU could then perhaps be to solve the problem for those acts which are outside the CJEU's jurisdiction through adjusting the already existing attribution clause in the draft Accession Agreement. The Chair and several delegations welcomed the proposal as a possibility to be further considered.

38. The Legal Adviser of the Council of Europe underlined that it did not matter so much to whom CFSP acts were attributable, as long as applicants could raise before the ECtHR their compatibility with the Convention. He stated that a clear attribution clause in the draft Accession Agreement for the relevant CFSP situations could be an avenue to pursue. This could facilitate the handling of such cases by the ECtHR, which could also be a welcome side-effect in light of its heavy workload. This would be fully in accordance with international law, including the draft articles by the International Law Commission on the responsibility of international organisations which recognise the possibility of specific attribution clauses to clarify responsibility between international organisations and its member states.

39. The Chair concluded that there was a common goal by delegations which had spoken that, in order to avoid "black holes" in the European human rights protection, the Convention system should be enabled to accommodate all acts in the CFSP area. The question was ultimately to find the appropriate way how to get there.

**Item 11: Other issues delegations wish to discuss in relation to the draft revised agreement on the accession of the EU to the ECHR (and its appendixes)**

40. The Chair and the Secretariat provided a brief overview of the issue of the relationship between Article 53 ECHR and Article 53 of the EU Fundamental Rights Charter, in particular the objections raised by the CJEU in Opinion 2/13 to coordinate the two provisions. The EU underlined that the objection in Opinion 2/13 was that there should be an assurance that there is no conflict between the two provisions. On substance, this should not be a problem as the EU was of the opinion that there is no such conflict. But the question was in what manner a respective clarification could be included in the accession instruments. The representative of the Registry of the ECtHR stated that the Convention system only provided for a minimum level of protection, but would neither hinder High Contracting Parties to have higher levels nor for EU law to set a cap on such higher protection, provided that the common EU protection level was not falling below the Convention protection level (Article 52, paragraph 3 of the EU Fundamental Rights Charter). What Opinion 2/13 asked was a mere coordination of the two provisions which was feasible. One delegation stressed the importance that the exercise should be limited to coordination and should not put some limitation on the level of protection which the Convention can provide. The Chair concluded that no delegation had argued that there was a substantive problem between the two provisions. The problem could then be sorted out by drafting appropriate clarifications about the coordination of the two provisions which could be added to the explanatory report.

41. Two delegations announced their intention to raise other issues which were not contained in the Chair's "Paper to structure the discussion at the 6<sup>th</sup> negotiation meeting". This concerned notably Articles 6, 7 and 8 of the draft Accession Agreement and its appendixes. These delegations stressed that there had been changes in the Council of Europe since the adoption of the accession instruments which a revision of the latter should properly reflect. This concerned in particular the working methods of the Committee of Ministers when overseeing the execution of the ECtHR's judgments (including the use of interim resolutions). These delegations noted that the entirety of the provisions of the accession instruments already raised in the Chair's paper should also be looked at by the Group. They also highlighted the need to ensure the accession instruments reflect the overall balance of the Council of Europe. One of these delegations also asked for additional clarifications on the need for including Appendixes 2 and 4 in the accession instruments. Several delegations which are not members of the EU explained the background for the inclusion of Appendix 4, notably that the model memorandum of understanding by the EU contained therein had been an essential requirement for them to agree to the current wording of Article 3. The Chair clarified that the draft model of memorandum of understanding in Appendix 4 was merely a model which would facilitate to reach agreement should the EU seek leave to intervene pursuant to Article 36, paragraph 2 ECHR at the request of a High Contracting Party which is not a member of the EU. Its text would not be mandatory should this situation arise in practice. The EU confirmed the above. The Chair also stressed the importance to ensure consistency between any changes agreed to the accession instruments and the other provisions therein.

42. Furthermore, two delegations noted that it would be necessary to go through the whole explanatory report so that it correctly reflects any changes which occurred since the adoption of the draft Accession Agreement in April 2013.

43. One delegation inquired about the possibility for an opinion by the ECtHR on the draft Accession Agreement. The Legal Adviser of the Council of Europe explained that - in line with the general practice within the Council of Europe on elaborating international treaties - this would be possible once the revised Accession Agreement had been officially submitted for adoption to the Committee of Ministers.

**Item 12: Any other business**

44. Delegations, in particular the EU, were invited to submit concrete proposals in writing for the revision of the draft accession instruments on those issues contained in the Chair's "Paper to structure the discussion at the 6<sup>th</sup> negotiation meeting" for which they considered that the exchange of views had already sufficiently advanced to make such proposals. It was understood that this was a possibility for preliminary proposals to serve as a basis for discussion at the next negotiation meeting and would not exclude the possibility for all delegations to provide additional proposals at a later stage. Proposals should be sent to the Secretariat (Matthias.Kloth@coe.int; in copy: CDDH-47plus1@coe.int) by **2 November 2020** and would then be circulated to all delegations for their preparation of the next negotiation meeting.

45. The delegations which intend to raise additional issues were invited to provide more explanations in writing by **2 November 2020** (Matthias.Kloth@coe.int; in copy: CDDH-47plus1@coe.int). At the same time, it was understood that concrete proposals for amendments could be made at a later stage.

46. One delegation informed the "47+1 Group" that an informal meeting amongst the delegations which are not EU members took place with the aim, among others, to send at a later stage a common statement to be attached to the full meeting report. This statement is attached as Appendix III.

47. The Group will hold its 7<sup>th</sup> negotiation meeting from 24-27 November 2020. In light of developments with regard to the COVID-pandemic, the Secretariat will provide the Group at the time of the convocation with more information about the nature of the meeting (including the possibility to also participate via videoconference). The exact length of the meeting may be adjusted to the actual quantity of written proposals received by the deadline of 2 November 2020. The Secretariat will inquire about the possibility for delegations to hold informal side-meetings using videoconference technology with those delegates who do not attend the meeting in person.

**APPENDIX I****Agenda**

- 1. Opening of the meeting and adoption of the agenda**
- 2. Opening address by Mr Christos Giakoumopoulos, Director General Human Rights and Rule of Law**
- 3. Election of a Vice-Chair of the CDDH ad hoc negotiation group**
- 4. Request for observer status in the CDDH ad hoc negotiation group by the International Commission of Jurists, Amnesty International and the AIRE (Advice on Individual Rights in Europe) Centre**
- 5. Presentation by the Chair of the “Paper to structure the discussion at the 6<sup>th</sup> negotiation meeting” of the CDDH ad hoc negotiation group (“47+1”) on the accession of the European Union to the European Convention on Human Rights**
- 6. and 7. Discussion on the EU’s specific mechanisms of the procedure before the European Court of Human Rights**
- 8. Discussion of the operation of inter-party applications (Article 33 ECHR) and of references for an advisory opinion (Protocol No. 16) in relation to EU member states**
- 9. Discussion of the principle of mutual trust between the EU member states**
- 10. Discussion of the situation of EU acts in the area of the Common Foreign and Security Policy that are excluded from the jurisdiction of the Court of Justice of the European Union**
- 11. Other issues delegations wish to discuss in relation to the draft revised agreement on the accession of the EU to the ECHR (and its appendixes)**
- 12. Any other business**

**Working documents**

Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms	<a href="#">CM(2013)93 add1, Appendix 1, pp. 3-9</a>
Draft declaration by the European Union to be made at the time of signature of the Accession Agreement	<a href="#">CM(2013)93 add1, Appendix 2, p. 10</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 href="#">CM(2013)93 add1, Appendix 3, p. 11</a>
Draft model of memorandum of understanding between the European Union and X [State which is not a member of the European Union]	<a href="#">CM(2013)93 add1, Appendix 4, p. 12</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	<a href="#">CM(2013)93 add1, Appendix 5, pp. 13-28</a>
Position paper for the negotiation on the European Union's accession to the European Convention for the protection of Human Rights and Fundamental Freedoms	47+1(2020)1
Paper by the Chair to structure the discussion at the 6 <sup>th</sup> negotiation meeting	47+1(2020)2
Letter by the International Commission of Jurists, Amnesty International and the AIRE (Advice on Individual Rights in Europe) Centre of 11 February regarding a request for observer status in the CDDH ad hoc negotiation group	47+1(2020)3

**Reference documents**

Ad hoc terms of reference concerning accession of the EU to the Convention given to the CDDH by the Ministers' Deputies during their 1085 <sup>th</sup> meeting (26 May 2010)	CDDH(2010)008
Decision by the Minister's Deputies Committee of Ministers at its 1364 <sup>th</sup> meeting (15 January 2020) on the continuation of the ad hoc terms of reference for the CDDH to finalise the legal instruments setting out the modalities of accession of the European union to the European Convention on Human Rights	<a href="#">CM/Del/JAN(2020)1364/4.3</a>
Letter of 31 October 2019 by the President and the First Vice-President of the European Commission to the Secretary General of the Council of Europe	<a href="#">DD(2019)1301</a>
Opinion 2/13 of 18 December 2014 of the Court of Justice of the European Union	<a href="#">A-2/13 ; EC LI: EU: C : 2014: 2454</a>

Protocol No. 16 to the European Convention on Human Rights and its [explanatory memorandum](#)

[Council of Europe  
Treaty Series No.  
214](#)

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### APPENDIX III

1 October 2020

#### 6TH MEETING OF THE CDDH AD HOC NEGOTIATION GROUP (“47+1”) ON THE ACCESSION OF THE EUROPEAN UNION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

#### **Common Statement of the Informal Group of Non-European Union Member States (NEUMS): Albania, Andorra, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, Iceland, Liechtenstein, Moldova, Monaco, Montenegro, North Macedonia, Norway, Russian Federation, San Marino, Serbia, Switzerland, Turkey, Ukraine and United Kingdom**

The NEUMS reiterates its support for the European Union’s (EU) accession to the European Convention of Human Rights (ECHR) and its willingness to participate in the negotiations. To that end it emphasises the following position without precluding additional national positions:

1. Key Negotiating principles of particular importance to the NEUMS:
  - Equality of all High Contracting Parties
  - Preserve the proper functioning of the Convention system
  - Maintain the rights of applicants in the Convention procedures
  - No exclusion of jurisdiction of the European Court of Human Rights in specific areas
  - Existing rights and obligations of the States Parties to the Convention, whether or not members of the EU, should be unaffected by the accession
  - Taking into account the specific nature of the EU which is not a State
2. Update the 2013 Draft Explanatory Report where necessary in light of today’s situation and the current negotiations.
3. The EU accession to the ECHR should not undermine the Convention system or the effectiveness of the Council of Europe as an organisation. The current negotiations should consider the challenges identified by the CJEU in Opinion 2/13, but at the same time take due consideration of the overall balance reached in the 2013 Accession Instruments. Adaptations should be made to the extent possible within the EU internal legal order.
4. The NEUMS encourages the EU to submit concrete drafting proposals in order to advance the negotiation process.