

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

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**10TH MEETING OF THE CDDH AD HOC NEGOTIATION
GROUP (“47+1”) ON THE ACCESSION OF THE EUROPEAN
UNION TO THE EUROPEAN CONVENTION ON HUMAN
RIGHTS**

Meeting Report

Tuesday 29 June 2021 (10:00 a.m.) – Friday 2 July 2021 (4:30 p.m.)

Palais de l'Europe, Room 7 (with the possibility to attend the meeting also externally
through the KUDO videoconferencing system)

Council of Europe

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 10th meeting from 29 June – 2 July 2021. Due to the COVID-pandemic, the meeting was held as a hybrid meeting. The list of participants is attached as Appendix II. The meeting was held under the Chair of the “47+1 Group”, Ms Tonje MEINICH (Norway), who was replaced by the Vice-Chair, Mr Alain CHABLAIS (Switzerland), on 30 June and 1 July 2021 (morning).

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

2. The Group adopted the agenda without further changes (Appendix I).

Item 2: Discussion of proposals submitted on Basket 1 (“The EU’s specific mechanisms of the procedure before the European Court of Human Rights”)

3. The Secretariat introduced its paper (CDDH47+1(2021)7) with proposals on certain issues contained in Basket 1 (“The EU’s specific mechanisms of the procedure before the European Court of Human Rights”). The Group decided to discuss the paper issue by issue.

4. With regard to Article 2, paragraph 3¹ concerning reservations made under Article 57 of the Convention in respect of the High Contracting Party which is a co-respondent (the language of which the Group had already reached agreement on at its 8th meeting in February 2021), the Group agreed on a corresponding paragraph 36a. for the explanatory report as well as on the necessity to make some linguistic changes to the French version of the latter. Both the provision and the corresponding paragraph for the explanatory report are reproduced in Appendix III.

5. The Group resumed its discussion of a new paragraph 4a to Article 3 regarding information concerning potential co-respondent cases, on the basis of a work proposal from its 8th meeting in February 2021. Most delegations expressed their support for the provision following certain amendments made at the meeting, together with a corresponding paragraph for the explanatory report (both are reproduced in Appendix III). Some delegations stated that they would prefer the matter to be entirely laid down in the explanatory report, i.e. without an operative provision in the draft Accession Agreement. One of these delegations reserved its general position on the prior involvement procedure (to which the paragraph in the explanatory report refers), while another delegation made a proposal for an integrated paragraph for the explanatory report which is likewise reproduced in Appendix III.

6. The Group considered a Secretariat proposal for new paragraphs 52-55b of the explanatory report which would outline the procedure for triggering the co-respondent mechanism in an operative provision of Article 3, paragraph 5 (a work proposal which originates from the 8th meeting in February 2021). Delegations generally welcomed the proposal as a better clarification of the procedure. Several delegations raised issues for further clarification or proposed further amendments to that effect. These related, *inter alia*, to the triggering of the co-respondent mechanism in a timely manner once the EU has received the relevant information; whether the expression “final” in paragraph 53 should be maintained in light of a possible termination of the mechanism at a later stage; the matter of consistency with other provisions in Article 3, particularly paragraphs 2 and 3, including whether the language “shall” or “may” should be used in these paragraphs in order to ensure consistency and maintain overall balance between the prerogatives of the European Court of Human Rights (hereinafter: “the Court”) and the rights of the EU; that the conclusion of the assessment of the EU of the material conditions for the mechanism should be made in writing through a reasoned declaration as a reflection of the provision; whether the footnote at the end of paragraph 53 should be maintained;

¹ Any provisions in this meeting report without further reference are those of the draft Accession Agreement.

whether the examples provided in paragraph 54 should be revised; whether the involvement of the applicant as outlined in paragraph 55a was sufficiently clear and meaningful; and whether the footnote in paragraph 55a should be integrated into the text of that paragraph. Paragraph 55b was not yet discussed. The EU provided a number of proposals on the text which will be distributed to the Group in writing after the meeting. On the basis of these comments and suggestions, the Secretariat was tasked with providing a revised version of this proposal for discussion at a future meeting, at which stage the Group would then also discuss the operative provision of Article 3, paragraph 5 for which the Secretariat was also tasked to provide a revised proposal. All delegations were invited to submit further proposals in writing.

7. The Group considered a Secretariat proposal for a new paragraph 5a of Article 3 on the termination of the co-respondent mechanism, together with corresponding paragraphs for the explanatory report. Most delegations supported the proposal, but some made additional comments or sought clarifications. These related, *inter alia*, to the proper sequencing in involving the other parties to the case (before or after) a reassessment of the material conditions for the mechanism has been made by the EU; and that the conclusion of such reassessment should be communicated in writing through a reasoned declaration. One delegation reserved its position on the proposal because it was considered to contain contradictory language which may be interpreted as obliging the Court to terminate the co-respondent mechanism based on a decision of the EU, while the Court should retain the “last word” on the decision to terminate the co-respondent mechanism. There was general agreement that the proposal is closely related to the triggering of the co-respondent mechanism (Article 3, paragraph 5) and would consequently have to be made consistent with any future changes to that provision and its corresponding paragraphs in the explanatory report. The EU provided a number of proposals on the text which will be distributed to the Group in writing after the meeting. On the basis of the comments and suggestions, the Secretariat was tasked with revising the proposal for discussion at a future meeting. All delegations were invited to submit further proposals in writing.

Item 3: Discussion of proposals submitted on Basket 2 (in particular the operation of inter-party applications, Article 33 of the Convention)

8. The Norwegian delegation introduced a proposal which it had submitted regarding the issue of inter-party applications under Article 33 of the Convention between the EU member states (CDDH47+1(2021)9). The aim of the proposal is to find an appropriate way to ensure that the competences of the Court remain unaffected while allowing the EU to determine whether a case (or part of a case) falls within the material scope of EU law. To that end, the proposal is largely based on existing procedural tools under the Convention system. The proposal consists of four steps: a mechanism to inform the EU of inter-party cases between EU member states; the possibility for the EU to assess whether the case (or part of the case) falls within the scope of Article 344 TFEU; an obligation for the applicant state to withdraw the application (wholly or partly) if the application in the view of the EU does fall within the scope of Article 344 TFEU; and, finally, an assessment of how the existing procedural tools would presumably be applied if the applicant High Contracting Party does not withdraw the application.

9. Delegations thanked the Norwegian delegation for the proposal. Most delegations expressed support for the proposal in general and considered that it would serve as a very good basis for further discussion. One delegation considered that the proposal did not sufficiently seek to protect the integrity of the Convention system, the rights under the Convention and the equality of the parties because it obliged the Court to dismiss cases and EU member states to withdraw their applications on grounds that were not envisaged in the Convention. Delegations made several comments and suggestions to the proposal which concerned, *inter alia*, the following: the manner in which the proposal would deal with “mixed applications”, notably whether a pragmatic or a legal distinction could

be introduced, on the basis of which inter-party applications with a clear focus on EU law would be dealt with by the Court of Justice of the European Union (hereinafter: "CJEU"), whereas other inter-party applications would be dealt with by the Court; the effect the proposal would have on interim measures under Rule 39 of the Rules of Court and the capacity of the EU to respond to an immediate need for an assessment through a possible fast track procedure; in what form the EU would make and communicate to the Court its assessment of the material scope of EU law; the manner in which the proposal would fit in with the powers vested in the Court in the second sub-paragraph of the first paragraph as well as the second paragraph of Article 37 of the Convention; whether mandatory language can be used in respect of the procedural decision of the Court to strike out an application; whether the Court can be expected to strike out an inter-party application in the event that the applicant High Contracting Party had not declared its intention to withdraw such application; the exact placement of the different steps of the proposal within the accession instruments; and the need for a further general discussion addressing Article 344 TFEU to see if such a procedural proposal will suffice. In view of the comments and suggestions, the Secretariat was invited - together with the Norwegian delegation - to revise the proposal for a future meeting and to spell out its different elements in more specific language.

Item 4: Exchange of views with representatives of civil society and of national human rights institutions

10. In accordance with the decisions taken at the last meeting, delegations held another exchange of views with representatives of civil society and national human rights institutions, namely the Advice on Individual Rights in Europe (AIRE) Centre, Amnesty International, the International Commission of Jurists, the Council of Bars and Law Societies of Europe (CCBE), as well as the European Network of National Human Rights Institutions (ENNHRI). The present exchange focused in particular on the principle of mutual trust between the EU member states (Basket 3) and the acts within the Common Foreign and Security Policy for which the CJEU does not have jurisdiction (Basket 4). However, the Group also held an exchange with the representatives in light of the latter's comments on certain issues of Basket 1 ("The EU's specific mechanisms of the procedure before the European Court of Human Rights"). The joint intervention by the Advice on Individual Rights in Europe (AIRE) Centre, Amnesty International and the International Commission of Jurists will be distributed to delegates in writing after the meeting.

11. The representatives of civil society and national human rights institutions raised a number of issues on the ongoing work of the Group. With regard to the principle of mutual trust, they provided a concrete drafting proposal together with comments on the explanatory report which will be distributed to the Group in the context of the above-mentioned intervention. They also underlined the importance that all acts within the Common Foreign and Security Policy could be challenged before the Court as a potential violation of the Convention. With regard to Basket 1, they stressed, *inter alia*, the importance that applicants are notified if information on their applications against EU member states are shared with the EU, that applicants can provide their views on the material conditions for applying the co-respondent mechanism and that the reconsideration of the EU's assessment in light of their submissions is communicated to them. At the end of the exchange of views, the participants thanked the representatives of civil society and national human rights institutions for their very valuable presentations and contributions. The Group expressed the view that more consultations would be desirable at future meetings.

Item 5: Discussion of proposals submitted on the principle of mutual trust between the EU member states (Basket 3)

12. The Secretariat introduced a proposal for the principle of mutual trust between EU member states (Basket 3) which contained a preambular paragraph, a substantive provision and corresponding paragraphs for the explanatory report (CDDH47+1(2021)8).

13. Many delegations considered the proposal as a very good working basis for further discussion, in particular because it contained numerous aspects which the Group had discussed at its 9th meeting in March 2021. They made additional comments and suggestions which concerned, *inter alia*: reference to bilateral agreements between the EU and non-EU member states which entail the application of the principle of mutual trust; the need to remain open to further developments of the case-law of the Court and the CJEU; whether the notion “automatic and mechanical” should be included in the proposal; whether the proposal could be made shorter (in particular regarding the explanatory report); and how the rationale of the principle of mutual trust could be better reflected. One delegation expressed concerns that the insertion of the principle of mutual trust in the draft Accession Agreement, effectively encapsulating the so-called *Bosphorus* presumption, could lead to a discriminatory treatment of High Contracting Parties and applicants. Some delegations expressed hesitation for a preambular paragraph or objected to the need to have a substantive provision in the draft Accession Agreement, or both. Some delegations, notably the European Union, provided some additional comments to the draft which are reproduced in Appendix III. On the basis of the comments and suggestions, the Secretariat was tasked to revise the proposal for a future meeting. All delegations were invited to submit further proposals in writing.

Item 6: Any other business

14. The Group will hold its 11th negotiation meeting from 5-8 October 2021 and the 12th meeting from 7-10 December 2021.

Item 7: Adoption of the meeting report

15. The Group adopted the present meeting report before the closure of the meeting.

APPENDIX I

Agenda

- 1. Opening of the meeting and adoption of the agenda**
- 2. Discussion of proposals submitted on Basket 1 (the EU's specific mechanisms of the procedure before the European Court of Human Rights)**
- 3. Discussion of proposals submitted on Basket 2 (in particular the operation of inter-party applications, Article 33 ECHR)**
- 4. Exchange of views with representatives of civil society and of national human rights institutions**
- 5. Discussion of proposals submitted on Basket 3 (the principle of mutual trust between the EU member states)**
- 6. Any other business**
- 7. Adoption of the meeting report**

Working documents

Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms	CM(2013)93 add1, Appendix 1, pp. 3-9
Draft declaration by the European Union to be made at the time of signature of the Accession Agreement	CM(2013)93 add1, Appendix 2, p. 10
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	CM(2013)93 add1, Appendix 3, p. 11
Draft model of memorandum of understanding between the European Union and X [State which is not a member of the European Union]	CM(2013)93 add1, Appendix 4, p. 12
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	CM(2013)93 add1, Appendix 5, pp. 13-28
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 th negotiation meeting	47+1(2020)2
Compilation by the Secretariat of recent cases in the area of Basket 3 ("The principle of mutual trust between the EU member states")	47+1(2020)4rev
Negotiation Document submitted by the European Union on 2 November 2020	Restricted
Compilation by the European Commission of recent and currently pending cases before the Court of Justice of the European Union in the area of Basket 4 ("Common Foreign and Security Policy")	Non-paper
Proposals by the Secretariat for discussion of agenda items 4 and 5 (refers to the 8 th meeting)	47+1(2021)5
Non-paper prepared by the Secretariat regarding the estimated expenditure related to the Convention regarding Article 8 of the draft Accession Agreement	47+1(2021)6
Proposals by the Secretariat for the discussion on Basket 1 ("The EU's specific mechanisms of the procedure before the European Court of Human Rights")	47+1(2021)7
Proposals by the Secretariat for the discussion on Basket 3 ("The principle of mutual trust between the EU member states")	47+1(2021)8
Proposal prepared by the Norwegian delegation on "Inter-Party applications under Article 33 of the European Convention of Human Rights"	47+1(2021)9

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 th meeting (26 May 2010)	CDDH(2010)008
Decision by the Minister's Deputies Committee of Ministers at its 1364 th 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	CM/Del/JAN(2020)1364/4.3
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	DD(2019)1301
Opinion 2/13 of 18 December 2014 of the Court of Justice of the European Union	A-2/13 ; EC LI: EU: C : 2014: 2454
Protocol No. 16 to the European Convention on Human Rights and its explanatory memorandum	Council of Europe Treaty Series No. 214

APPENDIX II**List of participants****MEMBERS / MEMBRES**

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OBSERVERS / OBSERVATEURS

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PARTICIPANTS IN THE EXCHANGE OF VIEWS UNDER AGENDA ITEM 4 / PARTICIPANTS À L'ÉCHANGE DE VUES AU TITRE DU POINT 4 DE L'ORDRE DU JOUR

AIRE (Advice on Individual Rights in Europe) Centre	Ms Nuala MOLE, Founder and senior lawyer of the AIRE Centre
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INTERPRETERS / INTERPRÈTES

Sylvie BOUX
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APPENDIX III

A. Article 2, paragraph 3:

Reservations made by High Contracting Parties in accordance with Article 57 of the Convention shall retain their effects in respect of any such High Contracting Party which is a co-respondent to the proceedings.

Paragraph for the explanatory report (footnotes are part of the paragraph):

36a. The co-respondent mechanism as provided under Article 3 of the Accession Agreement is a newly introduced feature of the Convention system. Therefore, Article 2, paragraph 3 of the Accession Agreement clarifies that reservations made under Article 57 of the Convention by a High Contracting Party which is a co-respondent to the proceeding retain their effects under this mechanism. In this respect, it should be recalled that applications concerning a provision of the Convention in respect of which a High Contracting Party has made a reservation are declared incompatible *ratione materiae* with the Convention with regard to that Party², provided that the issue falls within the scope of the reservation³ and that the reservation is deemed valid by the Court for the purposes of Article 57 of the Convention⁴. A reservation made by a co-respondent High Contracting Party under Article 57 of the Convention may consequently preclude the possibility to find that the latter is jointly responsible with the respondent High Contracting Party under Article 3, paragraph 7 of the Accession Agreement. However, the responsibility of the respondent Party which has not made a reservation remains.

B. Article 3, paragraph 4a:

The Court shall make available to the European Union information concerning all cases communicated to its member States and make available to the latter information concerning all cases communicated to the European Union.

Paragraph for the explanatory report:

Information concerning potential co-respondent cases

Article 3, paragraph 4a. of the Accession Agreement states that the Court shall make available information to the EU concerning all cases communicated to its member States and make available to the latter information concerning all cases communicated to the EU. The aim of this provision is to ensure that the EU and its member States will be in a position to determine in which cases to initiate the co-respondent mechanism, as well as – in proceedings to which the EU would become co-respondent – to identify in which of these cases to initiate the *prior involvement*-procedure under Article 3, paragraph 6.

Proposal by one delegation for an integrated paragraph for the explanatory report which would not be accompanied by the introduction of a new Article 3, paragraph 4a:

The Court shall make available information to the EU concerning all cases communicated to its member States and make available to the latter information concerning all cases communicated to

² *Benavent Díaz v. Spain*, Application No. 46479/10, decision of 31 January 2027, paragraphs 53 and 64; *Kozlova and Smirnova v. Latvia*, Application No. 57381/00, decision of 23 October 2001.

³ *Göktan v. France*, Application No. 33402/96, judgment of 2 July 2022, paragraph 51.

⁴ *Grande Stevens and Others v. Italy*, Application No. 18640/10, judgment of 4 March 2014, paragraphs 206-211.

the EU. This will ensure that the EU and its member States are in a position to determine which cases qualify for the co-respondent mechanism, as well as – in proceedings to which the EU would become co-respondent – to identify in which of these cases the *prior involvement*-procedure under Article 3, paragraph 6 would apply.

C. Current work proposal on Basket 3:

1. Proposal for the Preamble:

Recalling that the Court is mindful in its case-law of the importance of the mutual-recognition mechanisms within the European Union and of the mutual trust which they require,

2. Operative provision in the draft Accession Agreement:

Article X – Mutual [recognition / trust] under European Union law

Accession of the European Union to the Convention shall not affect the application of the principle of mutual trust [in the context of mutual-recognition mechanisms] within the European Union [provided that such application is not automatic and mechanical to the detriment of human rights in an individual case / inasmuch as that principle allows for the creation and maintenance of an area without borders while ensuring the protection of human rights guaranteed by the Convention].

3. Corresponding paragraphs for the explanatory report:

Article X – Mutual [recognition / trust] under European Union law

1. In the preamble to the Accession Agreement, it is recalled that the Court is mindful in its case-law of the importance of the mutual-recognition mechanisms within the European Union and of the mutual trust which they require. The Court has had the opportunity to consider this principle in particular for the construction of the area of freedom, security and justice referred to in Article 67 of the Treaty on the Functioning of the European Union (TFEU) (see *Avotins v. Latvia*, no. 17502/07, Grand Chamber judgment of 23 May 2016, paragraph 113). The Court regarded the creation of an area of freedom, security and justice in Europe, and the adoption of the means necessary to achieve it, to be wholly legitimate in principle from the standpoint of the Convention (*ibid.*).

2. [The principle of mutual trust allows an area without internal borders to be created and maintained.] According to the case-law of the CJEU, the principle of mutual trust means that, when implementing EU law, the EU member States are required to consider, save in exceptional circumstances, that fundamental rights have been observed by other EU member States (see Court of Justice of the European Union, *Aranyosi (C-404/15) and Căldăraru (C-659/15 PPU)*, judgment of 5 April 2016, paragraph 78). [The principle of mutual trust can also be relevant to non-EU member states in the context of bilateral agreements concluded with the EU.]

3. The Court has noted the increased convergence between its own case-law and the case-law of the CJEU with regard to the limits of mutual recognition-mechanisms in light of a real and individual risk of a violation of Article 3 of the Convention (*Bivolaru and Moldovan v. France*, nos. 40324/16 and 12623/17, judgment of 25 March 2021, paragraph 114). With regard to the mutual-recognition mechanisms under EU law, [in the context of the European arrest warrant and of the recognition and enforcement of judgments in civil and commercial matters,] the Court held that it must verify that the principle of mutual trust is not applied automatically and mechanically to the detriment of human rights (*Avotins v. Latvia*, cited above, paragraph 116; *Bivolaru and Moldovan v. France*, cited above,

paragraph 101). [In line with this jurisprudence, Article X clarifies that accession of the EU to the Convention shall not affect the principle of mutual trust by requiring member States, in situations where EU law imposes an obligation of such mutual trust between them, to check in each case whether another member State has observed human rights, unless there is a serious and substantiated complaint of a Convention violation (see *Avotins v. Latvia*, cited above, paragraph 116) requiring that it be properly examined. // More specifically, the Court held “where the courts of a State which is both a Contracting Party to the Convention and a member State of the European Union are called upon to apply a mutual recognition mechanism established by EU law, they must give full effect to that mechanism where the protection of Convention rights cannot be considered manifestly deficient. However, if a serious and substantiated complaint is raised before them to the effect that the protection of a Convention right has been manifestly deficient and that this situation cannot be remedied by EU law, they cannot refrain from examining that complaint on the sole ground that they are applying EU law” (*Avotins v. Latvia*, cited above, paragraph 116).] [This is without prejudice to future case-law of the Court.]