

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

47+1(2021)R12

10 December 2021

**12TH 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 7 December 2021 (10:00 a.m.) – Friday 10 December 2021 (4:30 p.m.)

Agora, Room G02 (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 12th meeting from 7 – 10 December 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).

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 an informal paper submitted by the Russian Federation

3. The Russian delegation presented an informal paper, which it had circulated prior to the last meeting, entitled “Preliminary considerations on the subject of possible solutions to issues raised in Opinion 2/13 of the CJEU consistent with the approach enshrined in the ‘2013 package’ and in the negotiating principles of NEUMS” (attached as [Appendix III](#)). The paper aimed at shifting the paradigm in the accession negotiations by suggesting that the European Convention on Human Rights (“Convention”) and EU law were of an independent and separate nature, an approach which should be possible to reconcile with the jurisprudence of both European courts. As a consequence, a clear and direct provision in the draft Accession Agreement disjoining the two legal systems and protecting each Court’s competence within its own body of law should resolve the problems which the Group is currently considering. At the same time, “softer mechanisms” (e.g. judicial dialogue) could also be used. The coexistence of the Convention system with respective UN treaty bodies in the field of human rights, which had never resulted in precluding the participation of States Parties to the Convention, could provide further guidance. As concrete proposals, the Russian delegation suggested provisions to be added to Article 1, paragraph 3 (“Scope of the accession and amendments to Article 59 of the Convention”) and Article 4, paragraph 3 (“Inter-party cases”).

4. Delegations thanked the Russian delegation for the informal paper, which also allowed to take a step back in the discussion, and sought further clarifications on various matters. Several delegations expressed support for certain elements underlying the proposal and/or separate points in the proposal. Several delegations raised concerns that the objections raised by Opinion 2/13 by the Court of Justice of the European Union would be difficult to reconcile in a legally-sound manner by merely introducing a “disjoining provision” in respect of the Convention and EU law. Moreover, the notion of disjoining the legal systems of the Convention and EU law raised concern. In this regard, the EU pointed to the fact that the Convention would become an integral part of EU law following accession (Article 216 TFEU). However, several delegations were still positive to considering inserting elements of the proposals in the draft accession instruments as an addition to the proposals already under consideration.

Item 3: Discussion of proposals submitted on the EU’s specific mechanisms of the procedure before the European Court of Human Rights (Basket 1)

5. The Secretariat briefly reintroduced a revised proposal for the triggering of the co-respondent mechanism (Article 3, paragraph 5) and corresponding paragraphs for the explanatory report, as considered and discussed by the Group at its last meeting (document CDDH47+1(2021)12). The EU introduced a new proposal on the same matter which is contained in document CDDH47+1(2021)16. Most delegates who took the floor during the subsequent discussion considered that there was wide

agreement on substance, in particular on the manner in which the co-respondent mechanism is triggered, the need for the EU to make the assessment whether the criteria for the mechanism are fulfilled, and the involvement of the applicant before that mechanism is triggered. One delegation noted however that this was still a step back from the 2013 package that would have to be looked at in the context of the new package as a whole.

6. With the discussion focusing mainly on how these elements should be worded in the draft accession instruments, several delegates together with the Secretariat drafted a consolidated version which contained elements of compromise from both proposals mentioned above. The Group continued to work on the basis of this consolidated proposal. Following a number of amendments, the Group tentatively agreed on an operative paragraph (Article 3, paragraph 5) and corresponding paragraphs for the explanatory report. The text is reproduced in [Appendix IV](#).

7. The Group tasked the Secretariat with revising the proposal for the operative provision of Article 3, paragraph 5a (“Termination of the co-respondent mechanism”) to align its language with the wording of Article 3, paragraph 5 as it appears in [Appendix IV](#). It also tasked the Secretariat with proposing a compromise solution regarding the last remaining bracket in the text of Article 3, paragraph 5a (in the version which appears in Appendix III of the 11th meeting report, CDDH47+1(2021)R11). The Group will revert to this provision at a later meeting.

Item 4: Discussion of proposals submitted on the principle of mutual trust between the EU member states (Basket 3)

8. The Secretariat introduced a revised proposal on the principle of mutual trust between the EU member states as contained in document CDDH47+1(2021)14. The proposal consisted of a revised operative provision (Article 5b) and corresponding paragraphs for the explanatory report, an additional hyphen to Article 1, paragraph 5, as well as a preambular paragraph (which had however remained unchanged since the last meeting in October 2021).

9. A large majority of delegates welcomed the proposal as a good basis for the discussion. With regard to the operative provision, the Group discussed a way to connect the two sentences therein and found the solution to use the words “in this context” at the beginning of the second sentence (while deleting the word “however” from the original proposal). The Group also discussed streamlining the corresponding paragraphs for the explanatory report for Article 5b and the addition of a hyphen to Article 1 (“Scope of the accession and amendments to Article 59 of the Convention”) to the effect that, where the term “the Convention” is mentioned in the draft Accession Agreement, it shall be understood as referring to the Convention as interpreted by the Court. There was no further appetite to pursue the proposal for a preambular paragraph which was no longer considered as necessary. One delegation expressed the opinion that the position of the Court regarding the principle of mutual trust was insufficiently reflected in the proposal, and that limiting the application of the Convention, making it dependent upon the laws and policies of the EU, could lead to unequal treatment of both Parties and applicants (drawing attention to the position of the CDDH regarding the requirement of “manifest deficiency”). This delegation opposed the insertion of provisions on mutual trust in the operative part or the preamble of the draft Accession Agreement, while agreeing that a reference to this principle may be made in the explanatory report in a neutral manner.

10. With the exception of that delegation, delegates tentatively agreed on a text for “Basket 3” which is reproduced in [Appendix V](#).

Item 5: Discussion of proposals submitted by the EU on 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 (Basket 4)

11. The EU introduced a negotiation document with proposals in the area of Basket 4 (“Common Foreign and Security Policy”, CFSP). This document, based on the discussion which the Group had at the 9th meeting in March 2021 on the basis of building blocks submitted by the EU, introduced concrete wording proposals for the draft accession instruments. In particular, the EU proposed a new operative Article 1, paragraph 4a which would allow the EU to designate - in an application before the Court concerning an act, measure or omission which falls in the scope of the CFSP – one or more EU member state(s) to which such act, measure or omission would be attributable for the purposes of the Convention. The CJEU should be given sufficient time to assess, if it had not yet done so, whether it has jurisdiction with regard to such act, measure or omission. On the basis of this decision, the designated EU member state(s) could become respondent(s) and the application should in such case be deemed to be directed against the designated parties. The proposal also contained an element regarding the possible necessity to exhaust domestic remedies within the legal system of the designated EU member state(s). The corresponding paragraphs for the explanatory report which were proposed by the EU contained further details about the implications of the operative provision, in particular regarding: a request by the EU to the Court to afford sufficient time for the CJEU to make its assessment; the final determination of a re-attribution; and the need not to worsen the situation of the applicant through such re-attribution.

12. Delegates thanked the EU for the concrete wording proposals. Some delegations welcomed at the outset that the EU’s proposal did not ask for a carve-out from the jurisdiction of the Court with regard to the CFSP, that it confirmed that there would always remain a respondent party to any application lodged to the Court concerning the CFSP, that the situation of the applicant should not deteriorate, and that it eventually aimed for finding a procedural solution. Delegations however expressed concerns, posed numerous requests for clarification to the EU regarding this proposal and raised issues which related, *inter alia*, to the following: the difference between attribution of an act and responsibility for it; concerns on the proposal expressed with a view to the “Draft Articles on the Responsibility of International Organisations” by the International Law Commission; issues related to the exhaustion of domestic remedies in the designated EU member state(s), including the need to avoid a “double exhaustion”; whether a designation could be made *ex ante* upon adoption of respective CFSP legislation, and how this could then be achieved for already existing legislation; what the criteria for re-attribution should be, and how these would ensure a factual link between the act, action or omission in question and the designated respondent(s); whether a request for a preliminary ruling under Article 267 TFEU would be considered as a domestic remedy for the purposes of this proposal; whether the question of domestic remedies could be linked to the moment of designation of a respondent party in the case of re-attribution; to ensure that a domestic remedy is always available; what the exact subject matter would be before the court of the designated State(s); possible problems arising for the execution of a judgment by a Court on a CFSP-related matter in the absence of the EU as a respondent party; general concerns that a respondent party could on its own motion designate another High Contracting Party as a respondent; to which extent the EU and its member states have already agreed on internal rules regarding the designation of a respondent party in the case of re-attribution; whether a default provision could be feasible which would determine that all EU member states would be respondents if no specific EU member state could be designated; the legal basis, calendar and modalities for the adoption of the internal rules in the EU; and what the exact relation was between the newly proposed paragraph 4a and the existing paragraphs 3 and 4 of Article 1. The question was also raised whether the option of adopting minimal changes to the EU treaties had been

considered as an alternative approach to this matter. One delegation in particular expressed concern that the proposal could lead to the EU, instead of the Court, effectively designating the responsible Party, while excluding the possibility for the EU itself being found responsible under the Convention for matters concerning CFSP; this, along with additional proceedings in the CJEU and the uncertainty regarding domestic remedies, could, in the view of this delegation, significantly reduce the agency of the Court, the level of protection of applicants, and the efficiency of the procedure of the Court.

13. The Chair thanked the Group for a fruitful and constructive discussion. Given the many issues raised both regarding substantive and procedural aspects, she suggested that the EU provides more elaborated answers to these issues. She invited the EU to put such additional information in writing to the Group ahead of the next discussion of this agenda item. The EU took note of this invitation and acknowledged that the onus would be on the EU and its member states to further reflect internally on the issues raised during the discussion, and to provide the Group with more detailed replies.

Item 6: Proposals submitted on amendments to Articles 6-8 of the Accession Agreement (including the relevant parts of the other accession instruments)

14. The Secretariat presented a background paper (document CDDH47+1(2021)15) with the various scenarios in which the Committee of Ministers could potentially vote and provide concrete examples in numbers for them. The Directorate of Legal Advice and Public International Law (DLAPIL) presented a paper on the voting rights of the EU in Council of Europe treaties (document DLAPIL 16/2021). Both documents are available on the website of the 47+1 Group.

15. Delegates thanked the Secretariat and the representatives of DLAPIL for the presentation of the documents which they considered as useful and which they will carefully study. Attention was drawn by some delegations to possible unwanted consequences of the EU and its member states voting as a block in the Committee of Ministers. One delegation stated its intention to submit to the Group concrete wording proposals on these topics in the future. Delegates also thanked the Secretariat of the Parliamentary Assembly (PACE) for additional information regarding the election of judges to the Court which had been circulated in response to the discussion held at the last meeting.

Item 7: Any other business

16. The tentative dates of the next meetings of the Group for the first semester of 2022 are as follows: 13th meeting: 1-4 March 2022; 14th meeting: 10-13 May 2022; and 15th meeting: 5-8 July 2022. The Group decided to invite the representatives of civil society and national human rights institutions for an exchange of views for the 13th meeting regarding the issues contained in Baskets 2 and 4. Delegates recalled the importance of the practice to attach the text of issues upon which the Group had tentatively agreed in both official languages to the draft meeting report.

Item 8: Adoption of the meeting report

17. 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 an informal paper submitted by the Russian Federation¹**
3. **Discussion of proposals submitted on the EU's specific mechanisms of the procedure before the European Court of Human Rights (Basket 1)**
4. **Discussion of proposals submitted on the principle of mutual trust between the EU member states (Basket 3)**
5. **Discussion of proposals submitted by the EU on 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 (Basket 4)**
6. **Proposals submitted on amendments to Articles 6-8 of the Accession Agreement (including the relevant parts of the other accession instruments)**
7. **Any other business**
8. **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

¹ "Preliminary considerations on the subject of possible solutions to issue raised in Opinion 2/13 of the CJEU consistent with the approach enshrined in the '2013 package' and in the negotiating principles of NEUMS", informal paper submitted by the Russian Federation in September 2021.

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	Non-paper
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 [<i>refers to the 8th meeting</i>]	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") [<i>for the 10th meeting</i>]	47+1(2021)7
Proposals by the Secretariat for the discussion on Basket 3 ("The principle of mutual trust between the EU member states") [<i>for the 10th meeting</i>]	47+1(2021)8
Proposal prepared by the Norwegian delegation on "Inter-Party applications under Article 33 of the European Convention of Human Rights" [<i>for the 10th meeting</i>]	47+1(2021)9
Revised proposal on "Inter-Party applications under Article 33 of the European Convention of Human Rights" by the Norwegian delegation and the Secretariat [<i>for the 11th meeting</i>]	47+1(2021)10
Revised proposals by the Secretariat on issues contained in Basket 3 ("The principle of mutual trust between the EU member states") [<i>for the 11th meeting</i>]	47+1(2021)11
Revised proposals by the Secretariat on certain issues contained in Basket 1 ("The EU's specific mechanisms of the procedure before the European Court of Human Rights") [<i>for the 11th meeting</i>]	47+1(2021)12
Consolidated version of the draft Accession Instruments (as of 31 October 2021)	47+1(2021)13
Revised proposals by the Secretariat on issues contained in Basket 3 ("The principle of mutual trust between the EU member states") [<i>for the 12th meeting</i>]	47+1(2021)14

Background paper by the Secretariat on scenarios in the context of Article 7 of the draft Accession Agreement	47+1(2021)15
Overview of treaty clauses on EU voting rights in Council of Europe treaties – background paper prepared by DLAPIL	Non-paper
Proposals by the European Union on 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 (Basket 4) [<i>for the 12th meeting</i>]	Non-paper
Proposals and Amendments submitted by the EU Delegation regarding the procedure for initiating the co-respondent mechanism [<i>for the 12th meeting</i>]	47+1(2021)16

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**

ALBANIA / ALBANIE	Ms Migena MAKISHTI, Department of International and European Law, Ministry for Europe and Foreign Affairs of Albania
ANDORRA / ANDORRE	Mr Joan FORNER ROVIRA, Permanent Representative of Andorra to the Council of Europe
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UKRAINE	<p>Mr Viktor NIKITIUK, Deputy Permanent Representative</p>
UNITED KINGDOM / ROYAUME-UNI	<p>Ms Debra GERSTEIN, Assistant Legal Adviser, Legal Directorate; Foreign, Commonwealth & Development Office</p> <p>Ms Patricia ZIMMERMANN, Head, Domestic and United Nations Human Rights, Ministry of Justice</p> <p>Ms Claire DEMARET, Deputy Head, Human Rights, Open Societies & Human Rights Directorate, Foreign, Commonwealth & Development Office</p>
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OBSERVERS / OBSERVATEURS

REGISTRY OF THE EUROPEAN COURT OF	<p>Mr Johan CALLEWAERT, Deputy Grand Chamber Registrar / Greffier Adjoint de la Grande Chambre</p>
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HUMAN RIGHTS / GREFFE DE LA COUR EUROPEENNE DES DROITS DE L'HOMME	
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INTERPRETERS / INTERPRÈTES

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APPENDIX III

Non-paper of the Russian Federation

Preliminary considerations on the subject of possible solutions to issues raised in Opinion 2/13 of the CJEU consistent with the approach enshrined in the “2013 package” and in the negotiating principles of NEUMS

Overall considerations

The European Convention on Human Rights and its Protocols form a body of international law that is independent and separate from the body of EU law. The difficulties that arise in implementing concurrently both ECHR law and EU law in cases where they overlap (concern the same subject matter, i.e. human rights) are primarily due to attempts of treating them as belonging to the same legal space, and consequently requiring that one be given priority over the other. Naturally, this approach is very hard to reconcile with the positions that the ECtHR should be considered the final authority on matters of ECHR law and the CJEU – the same on EU law.

The answer, in our view, lies in shifting the paradigm: rather than treating both bodies of law as part of the same legal space, we should proceed from their independent and separate nature. Both ECtHR and CJEU should be the master of *its own* domain, each capable of issuing judgments that govern the implementation of its own body of law, without infringing upon the other Court’s sphere of competence.

This approach should be possible to reconcile with either of the two Courts, as it would correspond to the positions they have already upheld.

As regards the ECtHR, Article 53 on “Safeguard for existing human rights” of the Convention states, “[n]othing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party”.

According to the CJEU, “the founding treaties of the EU, unlike ordinary international treaties, established a new legal order, possessing its own institutions” (Opinion 2/13, para.157). Furthermore, “having provided that the EU is to accede to the ECHR, Article 6(2) TEU makes clear at the outset, in the second sentence, that ‘[s]uch accession shall not affect the Union’s competences as defined in the Treaties’” (ibid., para.160). Finally, “Protocol No 8 EU, which has the same legal value as the Treaties, provides in particular that the accession agreement is to make provision for preserving the specific characteristics of the EU and EU law and ensure that accession does not affect the competences of the EU or the powers of its institutions, or the situation of Member States in relation to the ECHR, or indeed Article 344 TFEU” (ibid., para. 161).

The CJEU is interested, first and foremost, in “preserving the autonomy of the EU legal order” (cf. para. 174, 178 etc.). It has repeatedly stated “that an international agreement providing for the creation of a court responsible for the interpretation of its provisions and whose decisions are binding on the institutions, including the Court of Justice, is not, in principle, incompatible with EU law; that is particularly the case where, as in this instance, the conclusion of such an agreement is provided for by the Treaties themselves”; however, it “has also declared that an international agreement may affect its own powers only if the indispensable conditions for safeguarding the essential character of those powers are satisfied and, consequently, there is no adverse effect on the autonomy of the EU legal

order” (ibid., para.182, 183). Likewise, when dealing with the principle of mutual trust, the CJEU describes it as requiring EU Member States, “save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law” (NB: not the law of the ECHR).

Indeed, up to this point the CJEU’s position is perfectly compatible with the above-mentioned approach. It is when the CJEU begins to conflate rights and obligations under EU law (the Charter, TFEU etc.) with rights and obligations under the ECHR, that problems predictably arise.

A clear and direct provision in the Agreement disjoining the two legal systems and protecting each Court’s competences within its own body of law should resolve this problem on an equal basis.

At the same time, to avoid fragmentation of the human rights law in Europe, softer mechanisms, such as judicial dialogue, the involvement of the EU institutions, as well as the efforts by the Council of Europe member States that are also EU member States, may be used, as suggested by the CDDH (Report of the Steering Committee for Human Rights (CDDH) “The place of the European Convention on Human Rights in the European and International Legal Order”, Part III, p.174).

For further guidance, it may be useful to look at relationships between these two Courts and other international judicial or monitoring bodies. For example, the ECHR system has long been coexisting with the UN human rights legal space – and although there are obvious discrepancies, they have never been considered as precluding the participation of States Parties to the ECHR in other human rights treaties (cf. ibid., Part II).

Specific principles to be upheld in the draft Agreement

Article 1 – Scope of the accession and amendments to Article 59 of the Convention

This is the suggested formulation of the disjoinder provision:

3. Accession to the Convention and the protocols thereto shall impose on the European Union obligations with regard only to acts, measures or omissions of its institutions, bodies, offices or agencies, or of persons acting on their behalf. Nothing in the Convention or the protocols thereto shall require the European Union to perform an act or adopt a measure for which it has no competence under European Union law. **Without prejudice to Article 46, paragraph 1, of the Convention decisions of the European Court of Human Rights in relation to the European Union or its Member States shall not affect the division of competence between the European Union and its Member States or the interpretation of European Union law by the European Court of Justice for the internal purposes of the EU.**

Article 3 – Co-respondent mechanism

1. The European Court of Human Rights is the master of its own proceedings. The final decision to admit or dismiss a co-respondent rests with the Court. Opinions of the EU and its bodies, including the CJEU, may (and are expected to) be taken into consideration, but are not “final and authoritative” for the Court.

2. At the same time, through a clear disjoining of the Agreement and EU law, and a direct legal provision in the Agreement to the effect that decisions of the ECtHR will not affect the distribution of

competence between the EU and its Member States, the decisions of the Court will only take effect within the legal space of the Convention. The CJEU will still hold authority on interpretation and application of EU law, including the division of competence, when it concerns the legal system of the EU. Areas not under CJEU purview (such as CFSP) may be an exception to this rule, insofar as they are not subject to proper review within the EU legal system.

Article 4 – Inter-Party cases

1. 1. No discrimination among States Parties to the Convention – and by extension, persons whose rights are protected under their jurisdictions – may arise from application of EU rules concerning relations between the EU and its Member States, or between its Member States. Specifically, an EU Member State may not be prevented, under the Agreement, to submit an inter-Party application against the EU or another EU Member State. Likewise, when dealing with such an application, the Court may not be bound by any of EU-specific rules, such as the “principle of mutual trust”¹. In short, no privilege or derogation may arise from EU membership status. Any deviation from this principle would amount to a violation of negotiating principles related to equality of all Parties to the Convention and equal protection of all persons within the Convention legal space, as well as a violation of the *erga omnes partes* principle that lies at the core of the Convention system.

2. However, through a clear disjoining of the Agreement and EU law, the EU Member State will remain to be bound by the relevant EU obligations (Article 344 TFEU etc.). This may be achieved by including in the Agreement a concrete provision stipulating that ECtHR decisions adopted within the framework of this procedure do not affect the interpretation of EU law, and only concern interpretation and application of the ECHR. Thus, exercising its right under the Convention to submit an application against another EU Member might still be considered as a violation of EU norms. It will not be relevant to the proceedings in the ECtHR, and will not affect the Member State’s rights under the Convention; but it may lead to responsibility under EU law.

This is the suggested location of the relevant provision:

3. Without prejudice to Article 46, paragraph 1, of the Convention decisions of the European Court of Human Rights regarding inter-Party applications submitted under Article 33 of the Convention shall not affect the obligations of EU Member States under the founding Treaties of the European Union.

¹ According to CDDH, “The application of the presumption of equivalent protection that allows the ECtHR in somecases to “reduce the intensity of its supervisory role” and the need for the applicant to prove manifest deficiency constitute additional difficulties and could lead to a non-uniform level of protection of the rights of persons in different member States of the Council of Europe» (Report of the Steering Committee for Human Rights (CDDH) “The place of the European Convention on Human Rights in the European and International Legal Order”, Part III,p.171).

APPENDIX IV

Article 3, paragraph 5:

The European Union or its member States may become a co-respondent, either by accepting an invitation from the Court or upon their initiative. The Court admits a co-respondent by decision if the conditions in paragraphs 2 or 3 of this article are met according to a reasoned assessment by the European Union. Before a High Contracting Party becomes co-respondent, the Court shall grant the applicant an opportunity to state its views on the matter.

The admission of the co-respondent does not prejudice the Court's decision on the case.

Corresponding paragraphs to the explanatory report:

A. Applications directed against one or more member States of the European Union, but not against the European Union itself (or vice versa)

52. In cases in which the application is directed against one (or more) member State(s) of the EU, but not against the EU itself, the latter may, if the criteria set out in Article 3, paragraph 2, of the Accession Agreement are fulfilled, initiate the co-respondent mechanism with a request to join the proceedings as co-respondent. Where the application is directed against the EU, but not against one (or more) of its member State(s), the EU member States may, if the criteria set out in Article 3, paragraph 3, of the Accession Agreement are fulfilled, initiate the co-respondent mechanism with a request to join the proceedings as co-respondents. This should happen in a timely manner once the EU has received the relevant information.

53. Determining whether the material conditions for applying the co-respondent mechanism in both scenarios (Article 3, paragraphs 2 and 3) are met presupposes an assessment of the applicable rules of EU law governing the division of powers between the EU and its member States. Therefore, in the event of a request by a High Contracting Party to join the proceedings as a co-respondent, the Court will admit the co-respondent by decision if, according to an assessment by the EU of the material conditions for applying the co-respondent mechanism on the basis of the applicable EU law, those conditions are met. The conclusion of this assessment by the EU will be considered as determinative and authoritative. When admitting a co-respondent, the Court retains however a discretion for all other aspects of the procedure, for example with regard to the Court's decision to grant legal aid to the applicant in light of the triggering of the co-respondent mechanism.

54. Moreover, the Court may, when notifying an alleged violation or at a later stage of the proceedings, invite a High Contracting Party to participate in the proceedings as a co-respondent. In such case, the acceptance of the invitation by that High Contracting Party within a time-limit set by the Court would be a necessary condition for the latter to become co-respondent. No High Contracting Party may be compelled to become a co-respondent. This reflects the fact that the initial application was not addressed against the potential co-respondent, and that no High Contracting Party can be forced to become a party to a case where it was not named in the application. The EU or its member State(s), as the case may be, will however accept to become co-respondent if the reasoned assessment by the EU concludes that the material conditions for applying the co-respondent mechanism are met.

55. The EU's assessment should be provided to the Court in writing through a reasoned declaration, irrespective of whether such assessment is made following an invitation or as the basis

for a request. In the event of an invitation, it should be provided regardless of whether that invitation is accepted or declined. It is understood that the Court would issue such an invitation only in cases that it considers appropriate in light of the particular circumstances of the case. The Court will inform the applicant and set a short time limit for possible comments. Where the applicant has commented on the material conditions for the application of the co-respondent mechanism, the Court will communicate this to the EU and set a short time limit to provide the EU with the possibility to reconsider its assessment in light of these comments. The principles set out in paragraph 53 remain applicable.

56. The admission of the co-respondent is a prior procedural question and is thus to be distinguished from the Court's decision on the merits of the application, on which the assessment referred to above will have no bearing.

B. Applications directed both against the EU and one or more of its member States

57. In a case which has been directed against and notified to both the EU and one (or more) of its member States in respect of at least one alleged violation, the status of any respondent may be changed to that of a co-respondent if the conditions in paragraph 2 or paragraph 3 of this provision are met (Article 3, paragraph 4). The procedure outlined in the above paragraphs would apply *mutatis mutandis*.

APPENDIX V

Article 5b – Mutual trust under European Union law

Accession of the European Union to the Convention shall not affect the application of the principle of mutual trust within the European Union. In this context, the protection of human rights guaranteed by the Convention shall be ensured.

Amendment to Article 1, paragraph 5:

“5. Where any of the terms:

...

- ‘the Convention’ is mentioned in the present Agreement, it shall be understood as referring to the Convention as interpreted by the Court.”

Corresponding paragraphs to the explanatory report

Article 5b – Mutual trust under European Union law

74b. The EU law principle of mutual trust allows an area without internal borders to be created and maintained within the EU. According to the case-law of the CJEU, this principle 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). Mutual trust can also be relevant to non-EU member states in the context of bilateral agreements concluded with the EU.

74c. For its part, the Court has been mindful in its case-law of the importance of the mutual-recognition mechanisms within the EU and of the mutual trust which they require (see *Avotins v. Latvia*, no. 17502/07, Grand Chamber judgment of 23 May 2016, paragraphs 113-116). The Court has noted the increased convergence between its own case-law and the case-law of the CJEU with regard to the limits to the operation 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, the Court also 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 100-101).¹

¹ In these judgments, the Court dealt with the European arrest warrant (*Bivolaru and Moldovan*) and the recognition and enforcement of judgments in civil and commercial matters (*Avotins*).