

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

46+1(2022)R14

7 July 2022

**14TH MEETING OF THE CDDH AD HOC NEGOTIATION
GROUP (“46+1”) ON THE ACCESSION OF THE EUROPEAN
UNION TO THE EUROPEAN CONVENTION ON HUMAN
RIGHTS**

Meeting Report

Tuesday 5 July 2022 (10:00 a.m.) – Thursday 7 July 2022 (4:30 p.m.)

Palais de l'Europe, Room 9 (and online via KUDO)

Council of Europe

1. The CDDH ad hoc negotiation group (“46+1 Group”) on the accession of the European Union (EU) to the European Convention on Human Rights (ECHR) held its 14th meeting on 5 – 7 July 2022 as a hybrid meeting. The list of participants is attached as Appendix II. The meeting was chaired from Strasbourg by 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 proposals submitted on Basket 2 (inter-party applications under Article 33 ECHR; requests for advisory opinion under Protocol No. 16)

3. The Secretariat presented the new proposal on inter-party applications under Article 33 of the Convention (see doc. 46+1(2022)22). The proposal relied on the acceptance by the EU at the 13th meeting that it was not necessary for the provision to refer explicitly to the striking out or inadmissibility of misguided inter-party applications, with the understanding that it would be sufficient, but necessary, for the Accession Agreement to acknowledge the fact that certain cases between EU member States should be brought before the CJEU and not the Court.

4. The Group welcomed this proposal, which it found to be consistent with discussions at the previous meeting. They particularly appreciated the more general nature of this proposal, especially the fact that it did not specify the consequences of an assessment by the EU that an inter-party application involved EU law, and thus did not give directions to the Court. They also welcomed the reference to the EU conducting its assessment as a matter of priority. The representative of the EU confirmed that it was correct for the proposal to refer to the interpretation or application of “EU law”, as this is how the reference to “the Treaties” in Article 344 of the Treaty on the Functioning of the EU (TFEU) should be interpreted.

5. One delegation considered that the proposal seemed to involve non-EU member States taking position on EU law. This delegation asked whether the content of the proposed Article 4, paragraph 3a could be replaced by text from the first sentence of the proposed paragraph 72a of the explanatory report (“as far as Article 33 of the Convention is concerned, European Union accession to the Convention shall not affect the obligations of European Union member States under European Union law”). Other delegations doubted that this would be sufficient to address the concerns raised in Opinion 2/13 by the Court of Justice of the EU (CJEU), which had found existing legal provisions to be insufficient; the representative of the EU confirmed that the new Secretariat proposal was the minimum required to satisfy the CJEU. One delegation stated that by including this provision in the Accession Agreement, non-EU member States, together with EU member States, would be acting to reflect in Convention law the rule under EU law.

6. Turning to the proposed corresponding paragraphs of the explanatory report, one delegation noted that the general statement in paragraph 70 was not entirely consistent with the new proposal. Another delegation asked whether the text could better clarify the situation concerning “mixed applications”. In response, the Secretariat presented a revised proposal for paragraphs 70 and 72a.

7. On this basis, the Group tentatively agreed to the proposal concerning inter-party applications under Article 33 of the Convention (see Appendix III).

8. The representative of the EU then presented the new proposal on requests for advisory opinions under Protocol no. 16, underlining the need to reflect in the accession agreement the requirement under Article 267 TFEU that a court or tribunal against whose decisions there is no judicial remedy under national law refers issues of EU law for a preliminary ruling of the CJEU. This requirement precluded those courts from requesting an advisory opinion under Protocol no. 16 when the question of interpretation or application of Convention rights and freedoms was related to a question falling within the scope of application of EU law covered by Article 267 TFEU.

9. A number of delegations expressed their interest in this proposal, appreciating that it did not limit the jurisdiction of the Court, nor specify how the Court should react to a misguided request for an advisory opinion under Protocol no. 16. One delegation asked how this provision would relate to Article 10 of Protocol no. 16 and declarations already made by EU member States that were party to the protocol, and whether it had implications for possible EU accession to Protocol no. 16.

10. The representative of the Registry of the Court noted that whilst this approach appeared to give a “temporary monopoly” on human rights issues to the CJEU, it did not preclude the possibility of later individual applications in the same cases as those which would thus be brought before the CJEU. This would permit the Court to have the “last word” on any Convention issues involved. This kind of sequencing was also in the interest of legal certainty. He noted, however, that the term “highest courts or tribunals” under Protocol no. 16 could refer to a wider range of courts than those covered by the requirement under Article 267 TFEU.

11. Some delegations felt that the proposal amounted to more than just a definition and would better be placed somewhere else than in Article 1 of the Accession Agreement, possibly in a new Article 4a.

12. The representative of the EU responded that the proposal was without prejudice to the EU acceding to Protocol no.16 but was logically consistent with that possibility. He recalled that the requirement under Article 267 TFEU and the “highest courts or tribunals” under Protocol no. 16 were basically intended to relate to the same courts. He accepted that the provision could be placed elsewhere.

13. A number of EU member States that had ratified Protocol no. 16 expressed their support for the EU proposal. They considered that it would not require any modification of their declarations under Article 10 of the Protocol but would provide useful guidance to the courts and tribunals that had been designated as “highest” under Article 10, without creating new obligations.

14. In response to suggestions made during these discussions, the representative of the EU presented a revised version of the proposal (see [Appendix IV](#)). The Group agreed to reflect further on this revised proposal and to return to the matter at its next meeting.

Item 3: Proposals submitted on amendments to Articles 6-8 of the Accession Agreement (including the relevant parts of the other accession instruments)

15. The Secretariat presented the numerical analysis of the effects of the different majorities resulting from the proposal to amend Rule 18 (see document 46+1(2022)21).

16. Commenting on the ‘numerical analysis’, one delegation recalled that in practice, the Committee of Ministers adopted final resolutions also at its ordinary meetings (as well as at its CM/DH

meetings dedicated to the supervision of execution of the Court's judgments) "in the box", meaning without further discussion or a vote. The proposal to add a rule requiring a simple majority of non-EU member States when voting on final resolutions was nevertheless significant as it emphasised the importance of those States' participation. This delegation added that interim resolutions were also used to launch infringement proceedings under Article 46(4) of the Convention. The delegation then noted that the majorities indicated in Rule 18 did not exist in either the Statute or the Convention, asked whether the Committee of Ministers could properly vote according to such a rule, and suggested that the explanatory report to the Accession Agreement should make this clear. The delegation also underlined that, regardless of what might be said in Rule 18, a high contracting party could always insist on a vote requiring the majority stipulated under the Statute or the Convention, as applicable. One delegation noted that paragraph 90 of the explanatory report stated that Rule 18 would not form part of the Accession Agreement and would require adoption by the Committee of Ministers.

17. The Director of Legal Advice and Public International Law explained that the Accession Agreement had not been intended as a derogation from the rules under the Statute or the Convention. Instead, it followed an existing practice in the Committee of Ministers to consider certain decisions as adopted if a particular majority was reached, e.g. under what, in the context of adoption of recommendations, was referred to as 'gentleman's agreement'. If one delegation asked for a formal vote, however, the gentleman's agreement no longer held. In any case, the first course of action was always to seek consensus. Article 7(4a) of the Accession Agreement and Rule 18, however, would not be simply a 'gentleman's agreement' but a rule, although a rule of the Committee of Ministers and not at the same legal level as the Statute or the Convention. This approach had previously been considered sufficient because it would allow the CM/DH meetings to adopt decisions without a formal vote. The question was now whether that approach should be changed. The Group was negotiating an agreement with the status of a treaty, and so it would be possible to include a provision allowing for derogation from the rules under the Statute or the Convention. One delegation recalled that infringement proceedings always require a formal vote, in accordance with Article 46(4) of the Convention.

18. The representative of the Secretariat of the Committee of Ministers added that whilst it is envisaged that the proceedings under Article 46, paragraphs 3 and 4 are triggered by an interim resolution, they remained exceptional and as such, attracted a different majority to that set out under Article 20.d. of the Statute.

19. The Group asked the Directorate of Legal Advice and Public International Law to prepare a note for the next meeting on the possible legal bases, including but not only those found in the Statute or the Convention, for voting rules in CM/DH meetings.

20. One delegation recalled that a fundamental principle of the accession negotiations was that all high contracting parties should participate in the Convention system on an equal footing. This delegation underlined that the practical application of the number of votes available to the EU and its member States therefore needs careful and thorough consideration, in order to ensure that the legal text agreed for the EU's accession to the Convention is "future-proofed". Several delegations, including that of the EU, agreed that in principle, it should not be possible for the EU, on account of the coordinated position of the EU and its member States on decisions relating to the supervision of execution of judgments concerning the EU, to determine alone the outcome on such decisions. One participant considered that the existing Rule 18 was sufficient to achieve this. Others thought that a different approach was needed and agreed on the need to consider what the best solution could be.

There was further discussion on different ways of categorising the various decisions taken at CM/DH meetings, and on how different majorities could apply to voting on different categories of decision.

21. The Chair recalled that several possible ideas had arisen, including in the proposals submitted regarding the revision of Article 7 of the Accession Agreement, another delegation's suggestion that the majority for adoption of interim resolutions could be one-quarter of votes cast, and another delegation's question about whether EU member States would be required to coordinate their positions if the EU itself did not exercise its vote.

22. The Group asked the Secretariat to prepare a new document consolidating the information set out in existing documents and the various ideas that had arisen so far, and, if appropriate, indicating other possible ways forward inspired by the Group's discussions. In response to a question from one delegation, the Secretariat of the Committee of Ministers offered to provide information on the means available to the Committee of Ministers when supervising the execution of Court judgments.

23. The Group did not discuss the proposals concerning Articles 6 and 8 of the Accession Agreement.

Item 4: Other business

24. The Chair asked all delegations to submit in writing at the very earliest opportunity any remaining proposals concerning issues not raised in CJEU Opinion 2/13.

25. The Group exchanged views on the state of the negotiations and on the perspectives concerning outstanding issues for further meetings. It then took note of information from the Secretariat concerning budgetary arrangements for the holding of meetings in 2023.

Item 5: Adoption of the meeting report

26. 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 2 (inter-party applications under Article 33 ECHR; requests for advisory opinion under Protocol No. 16)**
3. **Proposals submitted on amendments to Articles 6-8 of the Accession Agreement (including the relevant parts of the other accession instruments)**
4. **Other business**
5. **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 [<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) [<i>for the 12th meeting</i>]	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 [<i>for the 12th meeting</i>]	47+1(2021)15
Overview of treaty clauses on EU voting rights in Council of Europe treaties – background paper prepared by DLAPIL [<i>for the 12th meeting</i>]	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>]	Restricted
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
Revised proposals by the Secretariat for the termination of the co-respondent mechanism (Article 3, paragraph 5a. of the draft Accession Agreement) and other remaining issues in Basket 1 [<i>for the 13th meeting</i>]	47+1(2022)18
Document by the Secretariat on the state of play of the proposals for Basket 2 [<i>for the 13th meeting</i>]	47+1(2022)19
Text proposals and amendments submitted by Turkey regarding the revision of Articles 6, 7 and 8 of the Accession Agreement including the relevant parts of the other accession instruments [<i>for the 13th meeting</i>]	Restricted
Consolidated version of the draft Accession Instruments (as of 13 May 2022)	46+1(2022)20REV
Numerical analysis by the Secretariat of the effects of the different majorities being proposed under the proposal to amend Rule 18 [<i>for the 14th meeting</i>]	46+1(2022)21 (Restricted)
Proposal by the Secretariat on “Inter-Party applications under Article 33 of the European Convention of Human Rights” [<i>for the 14th meeting</i>]	46+1(2022)22
Proposal by the EU Delegation on “Requests for an advisory opinion pursuant to Protocol No. 16” [<i>for the 14th meeting</i>]	46+1(2022)23

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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INTERPRETERS / INTERPRÈTES

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APPENDIX III

Revised Secretariat proposal concerning inter-party applications under Article 33 of the Convention

(Indicating changes made at the 14th meeting to the Secretariat proposal contained in document 46+1(2022)22)

Article 4 – Inter-Party Cases

[...]

3a The European Union and its member States in their relations with each other shall not avail themselves of Article 33 of the Convention. Nor shall the member States of the European Union avail themselves of Article 33 of the Convention insofar as a dispute between them concerns the interpretation or application of European Union law.

3b The Court shall provide the European Union upon request with sufficient time to assess, as a matter of priority, whether and to what extent an inter-party dispute under Article 33 of the Convention between member States of the European Union concerns the interpretation or application of European Union law.

Corresponding paragraphs of the Explanatory Report

[...]

70. Once the EU is a party to the Convention, all States Parties to the Convention will be able to bring a case against the EU and vice versa under Article 33 of the Convention, **subject to the principle in Article 4, paragraph 3a of the Accession Agreement.**

71. The term “High Contracting Party” is used in the text of Article 33 of the Convention. Changing the heading to “Inter-Party cases” makes that heading correspond to the substance of Article 33 after the EU’s accession. For the sake of consistency, the reference to “inter-state applications” in Article 29, paragraph 2, of the Convention is likewise adjusted.

72. Article 4, paragraph 3a provides that the European Union and its member States shall not avail themselves of Article 33 of the Convention in their relations with each other. This provision applies to disputes between European Union member States and the European Union, as well as disputes between European Union member States insofar as the dispute concerns the interpretation or application of European Union law. The fact that the Convention will become an integral part of European Union law after accession does not mean that an inter-party application brought by one European Union member State alleging a violation of the Convention by another will necessarily involve the interpretation or application of European Union law.

72a. The purpose of this provision is to ensure that as far as Article 33 of the Convention is concerned, European Union accession to the Convention shall not affect the obligations of European Union member States under European Union law. Insofar as such inter-party disputes concern the interpretation and application of European Union law, it follows from Article 344 of the TFEU (to which Article 3 of Protocol No. 8 to the Treaty of Lisbon refers) that EU member States “undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of

settlement other than those provided for therein”. **Where only a part of the application falls within the scope of article 344 TFEU and the remainder of the application can be treated as a separate dispute (a “mixed application”), the principle in paragraph 3a does not apply to the latter part of the application.**

72b. Although the High Contracting Parties concerned can be expected to act in accordance with Article 344 of the TFEU, Article 4, paragraph 3b contains a safeguard clause which would provide the opportunity for the EU, to request sufficient time to assess whether – and if so, **for mixed applications**, to what extent – that dispute concerns the interpretation or application of European Union law. It is intended that under Article 3, paragraphs 2 and 3, the Court would provide information on both individual and inter-party applications. The need to avoid undue delay in the proceedings pending before the Court suggests that the European Union would give high priority to the assessment procedure. The European Union should also ensure that the conclusion of the assessment is duly reasoned.

72c. Article 4, paragraphs 3a and 3b does not concern inter-party cases applications between High Contracting Parties which are not members of the European Union and European Union member States or the European Union, ~~or vice versa~~. Moreover, inter-party applications between EU member States which do not concern EU law are likewise not affected by Article 4, paragraph 3a.

APPENDIX IV

Revised proposal by the EU delegation concerning requests for advisory opinions under Protocol No. 16 to the Convention

(Indicating changes made at the 14th meeting to the proposal contained in document 46+1(2022)23)

Article 4a – Advisory Opinions under Protocol No. 16 to the Convention

Where a court or tribunal of a member State of the European Union **that has ratified Protocol No. 16 to the Convention**, in the context of a case pending before it, encounters a question relating to the interpretation or application of **the rights and freedoms defined in** ~~guaranteed by~~ the Convention or the protocols thereto, that court or tribunal shall not be considered as a highest court or tribunal of a High Contracting Party for the purposes of Article 1, paragraph 1, of Protocol No. 16 to the Convention if the question falls within the field of application of European Union law.

Corresponding paragraphs of the Explanatory Report

[...]

72d. Article 4a reconciles the EU judicial system, composed of the courts of the EU member States and the EU judicature, with the advisory opinion mechanism established by Protocol No. 16. The effect of this clause is to preclude recourse to the advisory opinion procedure before the Court where EU law, as interpreted by the CJEU, requires a court or tribunal to instead submit a request to the CJEU for a preliminary ruling under Article 267 of the TFEU. The final decision in the proceedings in which the CJEU has given a preliminary ruling would still be subject to review by the Court should there be an individual application under Article 34 of the Convention. Article 4a does not affect the prerogative of designated highest courts and tribunals of the EU member States that have ratified the Protocol to seek advisory opinions from the Court on any question that falls outside the field of application of EU law.