

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

46+1(2023)R17

2 February 2023

**17TH 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 31 January 2023 – Thursday 2 February 2023

Agora, Room G02

Council of Europe

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

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 (the Convention) held its 17th meeting on 31 January – 2 February 2023 with Tonje MEINICH (Norway) in the chair. The list of participants appears in [Appendix I](#).
2. The Group adopted the agenda as it appears in [Appendix II](#).

Item 2: Issues relating to Article 7 of the Accession Agreement (including the relevant parts of the other accession instruments)

3. The Secretariat presented the document entitled “Analysis and drafting proposals for possible further development of various options in relation to voting by the Committee of Ministers under Article 7, paragraph 4 of the Accession Agreement” (document 46+1(2022)29). The Group welcomed this document as a positive contribution to its work.
4. One delegation stated that the solution to the issue addressed in the document must respect two principles: no displacement of the rights of the non-EU member States; and minimal displacement of the existing rules, whilst allowing all Parties to be able to make full use of the rules to their own advantage, with no Party being expected to exercise self-restraint. This delegation felt that neither Options A nor B satisfied these principles, and were too complex. This delegation presented a proposal for a new “0+ vote” option, under which neither the EU nor its member States would vote on decisions concerning cases to which the EU was a Party. It queried whether the 1-vote approach examined at the previous meeting was still on the table.
5. Several delegations recalled discussions at previous meetings and underlined the need for flexibility in pursuit of a consensus solution to this issue. Several delegations considered that Options A, B and C would all achieve the desired results. Several delegations recalled that they had expressed a preference for the 0- and 1-vote approaches examined at the previous meeting, or retained a preference for Option C (“1+1 vote”), but in the interests of compromise were willing to consider Options A or B.
6. Following further discussions, all delegations but one were willing to consider Option B. One delegation was only willing to consider Option B if it included the proposal to revise Rule 18, paragraph 1 by requiring the support of a simple majority of the non-EU member States casting a vote for the adoption of final resolutions in cases concerning the EU. Other delegations were willing to consider this addition, as set out in [Appendix III](#). Several delegations maintained an interest in Option C. No delegation insisted on retaining Option A. Several delegations stated that they were unable to support the newly presented “0+ vote” option. In particular, they felt that there was no clear justification for the EU and its member States alone losing their votes.
7. Recalling the opposition by several delegations to the earlier 0- and 1-vote approaches,¹ all delegations, with one exception, considered that only Options B, with or without the addition set out in [Appendix III](#), and C should be retained for further consideration.

¹ See the report of the 16th meeting, document CDDH46+1(2022)R16.

8. One delegation proposed to add a review clause in Rule 18. Several delegations expressed their support for this proposal. The Group examined and refined a drafting proposal made by the Secretariat, whilst leaving open for the time being the question of when the review should take place. The resulting text is set out in [Appendix IV](#). One delegation feared that a review process may be ineffective should the EU member States be obliged to coordinate their position on any proposal to revise the rules.

Item 3: Article 6, paragraph 1 of the Accession Agreement (including relevant parts of the other accession instruments)

9. The Group tentatively agreed to the proposal to amend Article 6 of the draft Accession Agreement, as set out in Appendix III to the report of the 15th meeting (CDDH46+1(2022)R15 Appendix III). One delegation notified a reservation to Article 6, not specific to this proposal.

Item 4: Proposed Article 5a of the draft Accession Agreement

10. The Secretariat presented a proposal to delete Article 5a of the draft Accession Agreement and move its contents into a new paragraph of Article 1, and to do likewise with Article 5. The Group tentatively agreed to this proposal, as it appears in [Appendix V](#).

Item 5: Proposals submitted on Article 3 of the Accession Agreement

11. One delegation presented its position on Article 3 of the draft Accession Agreement, focusing on three areas: joint responsibility, in paragraph 7; the co-respondent mechanism, in paragraphs 5 and 5a; and the prior involvement procedure, in paragraph 6.

12. As regards joint responsibility, the delegation in question sought to clarify that the joint responsibility of a respondent and co-respondent would be decided by the Court and communicated by it to the parties. It did not seek to suggest that the Court have any discretion in the matter but intended only that the Court's role be clearly described in the text of the Accession Agreement.

13. Several delegations recalled that there had been tentative agreement on Article 3, paragraph 7, but acknowledged that the delegation in question had indicated a reservation. In the interests of achieving consensus on this and other issues, the other members of the Group were willing to show flexibility and consider new proposals. The representative of the Registry of the Court confirmed his understanding that a finding of joint responsibility would be included in the Court's judgment, which would in any case be communicated to the parties. The Group considered and tentatively agreed to a drafting proposal for both the operative provision and the corresponding paragraph 62 of the explanatory report, as set out in [Appendix VI](#). On this basis, the delegation in question stated that it should be able to lift its reservation on Article 3, paragraph 7, subject to confirmation from its authorities.

14. As regards the co-respondent mechanism, the delegation in question stated that it sought a similar modification of the existing text, to clarify the role of the Court.

15. Several delegations were reluctant to reopen this issue, noting that the delegation in question had not indicated a reservation on it and there had been tentative agreement in the Group. Recalling

the principle that “nothing is agreed until everything is agreed”, in a spirit of flexibility, and in pursuit of overall consensus, however, the Group was willing to consider a new proposal. The representative of the Registry of the Court noted that the existing text foresaw that the Court would admit a co-respondent and terminate the co-respondent mechanism by a decision, which would in any case be communicated to the parties. The Group considered and tentatively agreed to a drafting proposal for the operative provision, as set out in Appendix VII. It did not consider it necessary also to amend the corresponding paragraphs of the explanatory report.

16. As regards the prior involvement procedure, the delegation in question noted that it had indicated a reservation on this issue. This delegation sought changes to make clear that, notwithstanding the prior involvement procedure, the Court retained its power to find violations of the Convention, to clarify that the Court retained control over the timescale of proceedings before it, and to protect the rights of the applicant.

17. The Group held a discussion of these proposals, based on the non-paper distributed shortly before the meeting and a supplementary oral presentation made during the meeting.

18. The representative of the Registry of the Court agreed with the principles that the Court would remain the master of its proceedings, that it would be the arbiter of violations even following prior involvement of the Court of Justice, and that it would remain a court of Convention law and not EU law issues. There was precedent for the Court indicating a timeframe to another court, namely when requesting information in advisory opinion proceedings under Protocol No. 16, although this would appear not to be transposable to the context of the prior involvement procedure. To fix a specific time-limit in the Accession Agreement would mean the Court losing some control over its own proceedings, as this would prevent it from having regard to the specific circumstances of each case.

19. The representative of the European Union stated his willingness to consider new proposals if they would lead to the delegation in question lifting its reservation on Article 3, paragraph 6. He underlined that the prior involvement procedure is essential for EU accession to take place and that the current agreement represented a carefully considered and delicate balance. He noted that the new proposals went further than those on joint responsibility and the co-respondent mechanism, with the idea of a fixed time limit being particularly problematic. He recalled that the prior involvement procedure was a necessary stage before the Court could consider a case. It compensated for a domestic court’s earlier failure to make a preliminary reference, such that the overall length of proceedings would not be significantly different and may well be shorter. He considered that the Court and the Court of Justice could be relied upon to act and co-operate in good faith.

20. In the interests of concluding an overall agreement in advance of the Fourth Summit of Council of Europe heads of state and government, the Group considered these proposals but was unable to find an acceptable basis for modifying the existing tentative agreement on the prior involvement procedure, which remained satisfactory for all delegations but one. The delegation in question indicated that it maintained its reservation on this issue and its current proposal, as set out in the non-paper, but may return with further proposals in advance of the next meeting.

Item 6: Article 8, paragraph 1 of the Accession Agreement (including the relevant parts of other accession instruments)

21. The Secretariat informed the Group that the figure of 36% that had been provisionally added to Article 8, paragraph 1 of the draft Accession Agreement and corresponding paragraphs of the

explanatory report in connection with the European Union's contribution to the Council of Europe's budget remained valid in 2023. On this basis, the Group tentatively agreed to the relevant changes.

Item 7: Basket 4 (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)

22. The representative of the European Union informed the Group that an agreement had not yet been reached between the European Union member States on a solution to the issue in Basket 4. The European Union and its member States were well aware of the Fourth Summit deadline and understood the sense of urgency; all concerned were working hard, and he hoped to have more news before the Group's next meeting.

Item 8: Editorial review of the draft revised accession instruments

23. The Group decided to postpone this item to its next meeting.

Item 9: Other business

24. The Group agreed to invite those organisations that had previously been invited to such events to an exchange of views at its next meeting, and to submit written comments in advance.

25. The Chair clarified that the Group was expected to submit an interim report to the CDDH in advance of the Fourth Summit.

26. The Chair invited any delegation wishing to submit further proposals to do so in writing at the latest one week before the next meeting.

Item 10: Adoption of the meeting report

27. The Group adopted the present meeting report.

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

ALBANIA / ALBANIE	Migena MAKISHTI Department of International and European Law, Ministry for Europe and Foreign Affairs of Albania
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AZERBAIJAN / AZERBAIDJAN	Saadat NOVRUZOVA Head of the Human Rights Protection Unit of the Law Enforcement Bodies Department of the Administration of the President of the Republic of Azerbaijan
BELGIUM / BELGIQUE	Marie SNEYERS Attaché Legal Adviser – EU Coordination, Permanent Representation of Belgium to the European Union Olivier SACALIS Attaché, Service Privacy et égalité des chances Julie AUQUIER Attaché juriste
BOSNIA AND HERZEGOVINA / BOSNIE-HERZEGOVINE	Monika MIJIC Acting Agent of the Council of Ministers of Bosnia and Herzegovina before the European Court of Human Rights Jelena CVIJETIC Acting Agent of the Council of Ministers of Bosnia and Herzegovina before the European Court of Human Rights Harisa BACVIC Acting Agent of the Council of Ministers of Bosnia and Herzegovina before the European Court of Human Rights

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CYPRUS / CHYPRE	Demetris LYSANDROU Senior Counsel of the Republic Law Office of the Republic of Cyprus
CZECH REPUBLIC / REPUBLIQUE TCHÈQUE	Vladimír JANOUŠEK PYSK Senior Ministerial Counsellor – Head of the Department Department for the Proceedings before the UN Treaty Bodies Office of the Government Agent before the European Court of Human Rights Dominika CZECHOVÁ Lawyer, Permanent Representation of the Czech Republic to the EU
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GEORGIA / GEORGIE	Nino MICHIDZE First category chief specialist in EU law department, Ministry of Justice of Georgia

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SAN MARINO / SAINT-MARIN	excused

SERBIA / SERBIE	excused
SLOVAK REPUBLIC / REPUBLIQUE SLOVAQUE	Marián FILČÍK Head of Human Rights Division, Secretary of the Governmental Council for Human Rights, National Minorities and Equal Treatment, Ministry of Justice of the Slovak Republic
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SWEDEN / SUEDE	Victor HAGSTEDT Deputy Director, Ministry for Foreign Affairs Golshanak FATAHIAN Legal adviser, Ministry of Justice
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OBSERVERS / OBSERVATEURS	
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SECRETARIAT / SECRETARIAT

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INTERPRETERS / INTERPRÈTES

Pascale MICHLIN
Michael HILL
Chloé CHENETIER-KIPPING
Grégoire DEVICTOR

APPENDIX II**Agenda / Ordre du jour**

1. Opening of the meeting and adoption of the agenda	1. Ouverture de la réunion et adoption de l'ordre du jour
2. Issues relating to Article 7 of the Accession Agreement (including the relevant parts of the other accession instruments)	2. Questions relatives à l'article 7 de l'accord d'adhésion (y compris les parties pertinentes des autres instruments d'adhésion)
3. Article 6, paragraph 1 of the Accession Agreement (including the relevant parts of other accession instruments)	3. L'article 6, paragraphe 1 de l'accord d'adhésion (y compris les parties pertinentes d'autres instruments d'adhésion)
4. Proposed Article 5a of the draft Accession Agreement	4. Proposition de l'Article 5a du projet d'accord d'adhésion
5. Proposals submitted on Article 3 of the Accession Agreement	5. Propositions soumises sur l'article 3 de l'accord d'adhésion
6. Article 8, paragraph 1 of the Accession Agreement (including the relevant parts of other accession instruments)	6. L'article 8, paragraphe 1 de l'accord d'adhésion (y compris les parties pertinentes d'autres instruments d'adhésion)
7. Basket 4 (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)	7. Panier 4 (la situation des actes de l'UE dans le domaine de la politique étrangère et de sécurité commune qui sont exclus de la juridiction de la Cour de justice de l'Union européenne)
8. Editorial review of the draft revised accession instruments	8. Révision éditoriale des projets d'instruments d'adhésion révisés
9. Other business	9. Questions diverses
10. Adoption of the meeting report	10. Adoption du rapport de réunion

APPENDIX III

Proposal showing addition of the proposal on paragraph 1 into Rule 18 as included in Option B presented at the 17th meeting

Rule 18 – Judgments and friendly settlements in cases to which the European Union is a party

1. Decisions by the Committee of Ministers under Rule 17 (Final Resolution) of the present rules shall be considered as adopted if a majority of four fifths of the representatives casting a vote, **a simple majority of votes cast by representatives of Parties other than the EU and its member States**, and a majority of two thirds of the representatives entitled to sit on the Committee of Ministers are in favour.

[...]

APPENDIX IV

Proposal for a new paragraph x containing a review clause to be added to Rule 18
(as tentatively agreed by the Group)

“Rule 18 – Judgments and friendly settlements in cases to which the European Union is a party”

[...]

x. The High Contracting Parties shall examine the application of this rule no later than [five/ seven] years after the date on which the European Union accedes to the Convention.”

APPENDIX V

Proposal to reposition the provisions on interpretation of Articles 35 and 55 and Article 53 of the Convention

(as tentatively agreed by the Group)

a. Draft Accession Agreement

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

1. The European Union hereby accedes to the Convention, to the Protocol to the Convention and to Protocol No. 6 to the Convention.

[...]

7. With regard to the European Union, the term “country” appearing in Article 5 (paragraph 1) of the Convention and in Article 2 (paragraph 2) of Protocol No. 4 and the term “territory of a State” appearing in Article 2 (paragraph 1) of Protocol No. 4 and in Article 1 (paragraph 1) of Protocol No. 7 shall mean each of the territories of the member States of the European Union to which the Treaty on European Union and the Treaty on the Functioning of the European Union apply.

7a. (former Article 5) Proceedings before the Court of Justice of the European Union shall be understood as constituting neither procedures of international investigation or settlement within the meaning of Article 35, paragraph 2.b, of the Convention, nor means of dispute settlement within the meaning of Article 55 of the Convention.

7b. (former Article 5a) Article 53 of the Convention shall not be construed as precluding High Contracting Parties from jointly applying a legally binding common level of protection of human rights and fundamental freedoms, provided that it does not fall short of the level of protection guaranteed by the Convention and, as relevant, its Protocols, as interpreted by the European Court of Human Rights.

8. Article 59, paragraph 5, of the Convention shall be amended to read as follows:

“5. The Secretary General of the Council of Europe shall notify all the Council of Europe member States and the European Union of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it or acceded to it, and the deposit of all instruments of ratification or accession which may be effected subsequently.”

b. Draft Explanatory Report

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

[...]

*Technical amendments to the Convention **and interpretation clauses***

27. Three interpretation clauses are added to the Accession Agreement. This avoids amending the substantive provisions of the Convention and the protocols, thereby maintaining their readability. All of the protocols provide that their substantive provisions shall be regarded as additional articles to the Convention, and that all the provisions of the latter shall apply accordingly; this clarifies the accessory nature of the protocols to the Convention. It follows that these general interpretation clauses will also apply to the protocols without their needing to be amended to that effect.

[...]

31. There are some expressions in the Convention that have not been included in the interpretation clauses. An interpretation clause was not considered necessary for the expression “internal law” appearing in Articles 41 and 52 of the Convention, since this expression would be equally applicable to the EU as a High Contracting Party. For reasons pertaining to the specific legal order of the EU, the concept of EU citizenship is not analogous to the concept of nationality that appears in Articles 14 and 36 of the Convention, Article 3 of Protocol No. 4 and Article 1 of Protocol No. 12. Likewise, the terms “countries” appearing in Article 4, paragraph 3.*b*, of the Convention, “civilised nations” appearing in Article 7 of the Convention, and “State”, “territorial” and “territory/territories” appearing in Articles 56 and 58 of the Convention and in the corresponding provisions of the protocols,¹ do not require any adaptation as a result of the EU’s accession. Finally, the absence of a reference to the word “State” in Article 2 of Protocol No. 6 (concerning death penalty in time of war) is due to the fact that the EU has no competence to avail itself of the option set out in that provision.

31a. (former 73.) Article 1, paragraph 8 ~~This provision~~ clarifies that, as a necessary consequence of the EU accession to the Convention, proceedings before the CJEU (currently consisting of the Court of Justice, the General Court and the Civil Service Tribunal) shall not be understood as constituting procedures of international investigation or settlement, submission to which would make an application inadmissible under Article 35, paragraph 2.*b*, of the Convention. In this respect, it should also be noted that in the judgment in the case of *Karoussiotis v. Portugal* (No. 23205/08 of 1 February 2011) the Court specified that proceedings before the European Commission pursuant to Article 258 of the TFEU shall not be understood as constituting procedures of international investigation or settlement pursuant to Article 35, paragraph 2.*b*, of the Convention.

31b. (former 74.) As regards Article 55 of the Convention, which excludes other means of dispute settlement concerning the interpretation or application of the Convention, it is the understanding of the Parties that, with respect to EU member States, proceedings before the CJEU do not constitute a “means of dispute settlement” within the meaning of Article 55 of the Convention. Therefore, Article 55 of the Convention does not prevent the operation of the rule set out in Article 344 of the TFEU.

31c. (former 74a.) It is the understanding of the Parties that Article 53 of the Convention shall not be construed as precluding High Contracting Parties from jointly applying a legally binding common level of protection of human rights and fundamental freedoms, provided that it does not fall short of the level of protection guaranteed by the rights and freedoms defined in the Convention and, as relevant, the Protocols thereto, as interpreted by the European Court of Human Rights. Such agreement may derive from international or European cooperation (such as, for example, European

¹. These are, namely: Article 4 of the Protocol, Article 5 of Protocol No. 4, Article 5 of Protocol No. 6, Article 6 of Protocol No. 7, Article 2 of Protocol No. 12 and Article 4 of Protocol No. 13.

Union law regulating the relationship between the member States of the European Union). In this respect, it is noted that the Convention does not prevent, but also not require the High Contracting Parties to grant more extensive protection in respect of the rights and liberties guaranteed therein than that implemented by it (see the case of *M.N. and others v. Belgium*, no. 3599/18, Grand Chamber decision of 5 May 2020, paragraph 140).

32. Finally, a technical amendment to Article 59, paragraph 5, of the Convention takes into account EU accession for the purposes of notification by the Secretary General.

APPENDIX VI

Proposal on Article 3, paragraph 7 and corresponding paragraph of the explanatory report (joint responsibility)

(as tentatively agreed by the Group – changes made at the 17th meeting are highlighted)

a. Draft Accession Agreement

Article 3 – Co-respondent mechanism

[...]

7. If the violation in respect of which a High Contracting Party is a co-respondent to the proceedings is established, **the Court in its judgment holds** the respondent and the co-respondent **shall be** jointly responsible for that violation, ~~[, unless the Court, on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, decides that only one of them be held responsible].~~ **The Court communicates its judgment to the parties.**

b. Draft Explanatory Report

Effects of the co-respondent mechanism

62. As noted above, it is a special feature of the EU legal system that acts adopted by its institutions may be implemented by its member States and, conversely, that provisions of the EU founding treaties established by its member States may be implemented by institutions, bodies, offices or agencies of the EU. Therefore, **the Court in its judgment holds** the respondent and the co-respondent(s) **are normally held** jointly responsible for any alleged violation in respect of which a High Contracting Party has become a co-respondent **and communicates its judgment to the parties**. The Court may, however, hold only the respondent or the co-respondent(s) responsible for a given violation on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant. ~~Apportioning responsibility separately to the respondent and the co-respondent(s) on any other basis would entail the risk that the Court would assess the distribution of competences between the EU and its member States. It should also be recalled that the Court in its judgments rules on whether there has been a violation of the Convention and not on the validity of an act of a High Contracting Party or of the legal provisions underlying the act or omission that was the subject of the complaint.~~ **This is without prejudice to Article 2, paragraph 3 of this Agreement on reservations made by High Contracting Parties in accordance with Article 57 of the Convention.**

APPENDIX VII

Proposal on Article 3, paragraphs 5 and 5a (co-respondent mechanism) *(as tentatively agreed by the Group)*

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. **The Court communicates its decision to the parties.** 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.

5a. The Court terminates the co-respondent mechanism by decision at any stage of the proceedings only if the conditions in paragraph 2 or 3 of this article are no longer met according to a reasoned assessment by the European Union. **The Court communicates its decision to the parties.** Before the co-respondent mechanism is terminated, the Court shall grant the applicant an opportunity to state its views on the matter.