



Strasbourg, 15 October 2012

GT-GDR-B(2012)R2 Addendum II

STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

**DRAFTING GROUP 'B' ON THE REFORM OF THE COURT
(GT-GDR-B)**

Draft explanatory report to Protocol No. 15

I. Introduction

1. The High-level Conference on the Future of the European Court of Human Rights, organised by the Swiss Chairmanship of the Committee of Ministers, took place in Interlaken, Switzerland on 18-19 February 2010. The Conference adopted an Action Plan and invited the Committee of Ministers to issue terms of reference to the competent bodies with a view to preparing, by June 2012, specific proposals for measures requiring amendment of the Convention. On 26-27 April 2011, a second High-level Conference on the Future of the Court was organised by the Turkish Chairmanship at Izmir, Turkey.

2. In the context of work on follow-up to these two Conferences, the Ministers' Deputies gave renewed terms of reference to the Steering Committee for Human Rights (CDDH) and its subordinate bodies for the biennium 2012-2013. These required the CDDH, through its Committee of experts on the reform of the Court (DH-GDR), to prepare a draft report for the Committee of Ministers containing specific proposals requiring amendment of the Convention.

3. Alongside this report, the CDDH presented a Contribution to the High-level Conference on the future of the Court, organised by the United Kingdom Chairmanship of the Committee of Ministers at Brighton, United Kingdom, on 19-20 April 2012. The Court also presented a Preliminary Opinion in preparation for the Brighton Conference containing a number of specific proposals.

4. In order to give effect to certain provisions of the Declaration adopted at the Brighton Conference, the Committee of Ministers subsequently instructed the CDDH to prepare a draft amending protocol to the Convention.¹ This work initially took place during two meetings of a Drafting Group of restricted composition, before being examined by the DH-GDR, following which the draft was further examined and adopted by the CDDH at its ... meeting (... ... 20...) for submission to the Committee of Ministers.

5. The Parliamentary Assembly, at the invitation of the Committee of Ministers, adopted Opinion No. ... on the draft protocol on 20....

6. At its ... meeting, the [Committee of Ministers] / [Ministers' Deputies] examined and decided to adopt the draft as Protocol No. 15 to the Convention (CETS ...). At the same time, it took note of the present Explanatory Report to Protocol No. 15.

II. Comments on the provisions of the Protocol

Article 1 of the amending Protocol

Preamble

7. A new paragraph has been added at the end of the Preamble of the Convention containing a reference to the principle of subsidiarity and the doctrine of the margin of appreciation, as developed in the Court's case-law. The intention is to enhance the transparency and accessibility of these characteristics of the Convention system. In making

¹ Namely those set out in paragraphs 12b, 15a, 15c, 25d and 25f of the Declaration. See the decisions of the 122nd Session of the Committee of Ministers (23 May 2012), item 2 – Securing the long-term effectiveness of the supervisory mechanism of the European Convention on Human Rights.

this proposal, the Brighton Declaration also recalled the High Contracting Parties' commitment to give full effect to their obligation to secure the rights and freedoms defined in the Convention. The High Contracting Parties and the Court share responsibility for realising the effective implementation of the Convention, which is underpinned by the fundamental principle of subsidiarity; the High Contracting Parties enjoying a margin of appreciation in how they apply and implement the Convention, depending on the circumstances of the case and the rights and freedoms engaged, and subject to supervision under the Convention system.²

Entry into force/ application

8. In accordance with Article 8, paragraph 5 of the Protocol, no transitional provision relates to this modification, which will apply as of the entry into force of the Protocol.

Article 2 of the amending Protocol

Article [21 – Criteria for office / 22 – Election of judges]

9. A new paragraph 2 is introduced in order to require that [judges be less than 66 years of age on 1 January in the year during which their term of office commences / candidates be less than 65 years of age at the date by which {the list of three candidates has been requested by the Parliamentary Assembly / the election is expected to take place}].

10. This modification aims at enabling highly qualified judges to serve the full nine-year term of office and thereby reinforce the consistency of the Court. The effect of the age limit applied under the previous system was to prevent some experienced judges from completing a full term of office. The age limit imposed on the judges had become less important now that their terms of office are non-renewable. [The wording finally retained for this provision differs slightly from that proposed in the Brighton Declaration, since it was considered essential that there be a fixed date on which the person concerned should be less than [66 / 65] years of age. This would contribute to legal certainty and thereby avoid a risk of candidates being rejected as having passed the age limit due to unexpected delay at some stage.]

11. Paragraph 2 of Article 23 has been deleted as it has been superseded by the changes made to Article [21 / 22].

Entry into force/ application

12. In order to take account of the length of the national procedure for the selection of candidates for the post of judge at the Court, paragraphs 1 and 2 of Article 8 foresee that these changes will apply only to judges elected from lists of candidates submitted to the Parliamentary Assembly by High Contracting Parties under Article 22 of the Convention after the entry into force of the Protocol. Candidates appearing on previously submitted lists, and judges in office and judges-elect at the date of entry into force of the Protocol will continue to be subject to the rule applying before the entry into force of the present Protocol, namely the expiry of their term of office when they reach the age of 70.

² See in particular paragraphs 12.b., 3 and 11 of the Brighton Declaration.

Article 3 of the amending Protocol

Article 30 – Relinquishment of jurisdiction to the Grand Chamber

13. Article 30 of the Convention has been amended such that the parties may no longer object to relinquishment of a case by a Chamber in favour of the Grand Chamber. This measure is intended to contribute to consistency in the case-law of the Court, which had indicated that it intended to modify its Rules of Court (Rule 72) so as to make it obligatory for a Chamber to relinquish jurisdiction where it envisages departing from settled case-law.³ Removal of the parties' right to object to relinquishment will reinforce this development.

14. The removal of this right would also aim at accelerating proceedings before the Court in cases which raise a serious question affecting the interpretation of the Convention or the Protocols thereto or a potential departure from existing case-law.

15. In this connection, it would be preferable for the Chamber to narrow down the case as far as possible, including by finding inadmissible any relevant parts of the case before relinquishing it.

16. This change is made in the expectation that the Grand Chamber will in future give more specific indication to the parties of the potential departure from existing case-law or serious question of interpretation of the Convention or the Protocols thereto.

Entry into force/ application

17. A transitional provision is foreseen in Article 8, paragraph 3 of the Protocol. Out of concern for legal certainty and procedural foreseeability, it was considered necessary to specify that removal of the parties' right to object to relinquishment would not apply to pending cases in which one of the parties had already objected, before entry into force of the Protocol, to a Chamber's proposal of relinquishment in favour of the Grand Chamber.

Article 4 of the amending Protocol

Article 35 – Admissibility criteria

18. The text of Article 35 of the Convention has been amended in two respects. First, paragraph 1 of Article 35 has been amended to reduce from six months to four the period following the date of the final domestic decision within which an application must be made to the Court. It was recalled that modern technology permitted swifter communication and that the Court already used and was continuing to develop its use of such tools; in this respect, the Court had taken note of equivalent time-limits in national proceedings.⁴ A reduction in the time limit to four months was considered appropriate.

Entry into force/ application

19. A transitional provision appears at Article 8, paragraph 4 of the Protocol. It was considered that the reduction in the time limit for submitting an application to the Court should apply only after a period of one year following the entry into force of the Protocol, in order to allow potential applicants to become fully aware of the new deadline. Furthermore,

³ See paragraph 16 of the Preliminary Opinion of the Court in preparation for the Brighton Conference.

⁴ See paragraph 37 of the Preliminary Opinion of the Court in preparation for the Brighton Conference.

the new time limit will not have retroactive effect, since it is specified in the final sentence of paragraph 4 that it does not apply to applications in respect of which the final decision within the meaning of Article 35, paragraph 1 of the Convention was taken prior to the date of entry into force of the new rule.

Article 5 of the amending Protocol

20. Article 35, paragraph 3.b. of the Convention, containing the admissibility criterion concerning “significant disadvantage”, has been amended to delete the proviso that the case have been duly considered by a domestic tribunal. The requirement remains of examination of an application on the merits where required by respect for human rights. This amendment is intended to give greater effect to the maxim *de minimis non curat praetor*.⁵

Entry into force/ application

21. As regards the change introduced concerning the admissibility criterion of “significant disadvantage”, no transitional provision is foreseen. In accordance with Article 8, paragraph 5 of the Protocol, this change will apply as of the entry into force of the Protocol, in order not to delay the impact of the resulting enhancement of the effectiveness of the system. It will therefore apply also to applications on which the admissibility decision is pending at the date of entry into force of the Protocol.

Final and transitional provisions

Article 6 of the amending Protocol

22. This article is one of the standard final clauses included in treaties prepared within the Council of Europe. This Protocol does not contain any provision on reservations. By its very nature, this amending Protocol excludes the making of reservations.

Article 7 of the amending Protocol

23. This article is one of the standard final clauses included in treaties prepared within the Council of Europe.

Article 8 of the amending Protocol

24. Paragraphs 1 to 4 of Article 8 of the Protocol contain transitional provisions governing the application of certain other, substantive provisions. The explanation of these transitional provisions appears above, in connection with the relevant substantive provisions.

25. Article 8, paragraph 5 establishes that all other provisions of the Protocol shall enter into force as of the date of entry into force of the Protocol, in accordance with its Article 7.

Article 9 of the amending Protocol

26. This article is one of the standard final clauses included in treaties prepared within the Council of Europe.

⁵ “The Court is not concerned by trivial matters”.