

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

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**14<sup>TH</sup> MEETING OF THE CDDH AD HOC NEGOTIATION GROUP  
ON THE ACCESSION OF THE EUROPEAN UNION TO THE  
EUROPEAN CONVENTION ON HUMAN RIGHTS**

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**Revised proposal by the Secretariat on “Inter-Party applications under Article 33 of the  
European Convention of Human Rights”**

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Strasbourg, Tuesday 5 July 2022 (10:00 am) – Thursday 7 July 2022 (4:30 pm)

(The meeting will be held as a hybrid meeting through the KUDO videoconferencing system  
and Room 9 of the Palais de l'Europe)

Council of Europe

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## Revised proposal by the Secretariat on “Inter-Party applications under Article 33 of the European Convention of Human Rights”

### I. Introduction:

1. At its 13th meeting (10-13 May 2022, the “46+1 Group” resumed its consideration of proposals on Basket 2, on the basis of a Secretariat document setting out the ‘state of play’.<sup>1</sup> As regards inter-party applications under Article 33 ECHR, this document included a proposal that had been tabled by Norway and the Secretariat at the 11th meeting in October 2021, along with the European Union’s proposed amendments to this proposal.<sup>2</sup>

2. Discussions at the 13th meeting suggested that the proposal tabled by Norway and the Secretariat for Article 4, paragraph 3 of the Accession Agreement could be further developed by including an acknowledgement of the fact that certain cases between EU member States should be brought before the CJEU and not the Court. The approach could involve two elements: first, a provision ensuring respect for the obligation under Article 344 TFEU; and second, a procedural provision for determining whether an application under article 33 of the Convention concerns the interpretation or application of EU law.<sup>3</sup> By following this approach, it would no longer be necessary to make express reference to inadmissibility<sup>4</sup> or striking out<sup>5</sup>.

3. On this basis, the Group asked the Secretariat to prepare a new revised proposal for presentation to the 14<sup>th</sup> meeting (5-7 July 2022).

### II. Revised proposal for Article 4, paragraph 3 of the Accession Agreement

4. Taking as its starting point the previous proposal tabled by Norway and the Secretariat, the new proposal for additional paragraphs in Article 4 of the Accession Agreement, on inter-party cases, would thus read as follows:

#### Article 4 – Inter-Party Cases

[...]

3a (new) **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 (former paragraph 3) 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. ~~Insofar as such an~~

<sup>1</sup> See doc. 47+1(2022)19.

<sup>2</sup> Document 47+1(2022)19 also sets out earlier proposals concerning requests for advisory opinions under Protocol no. 16 ECHR.

<sup>3</sup> See the report of the 13<sup>th</sup> meeting, doc. CDDH46+1(2022)R13.

<sup>4</sup> As in the EU’s proposed amendment to the proposal tabled by Norway and the Secretariat for Article 4, paragraph 3 of the Accession Agreement.

<sup>5</sup> As in the proposal tabled by Norway and the Secretariat for the explanatory report, and in the EU’s proposed amendment to Article 4, paragraph 3.

~~application concerns the interpretation or application of European Union law, the applicant High Contracting Party shall notify the Court that it no longer intends to pursue the application.~~

5. Article 4, paragraph 3a contains a statement of principle that EU member States should not bring inter-party cases under Article 33 of the Convention. This principle results from article 344 TFEU, which obliges EU member States to refer disputes involving EU law to the CJEU.

6. Article 4, paragraph 3b establishes a procedure whereby the EU can give its assessment of whether an application under Article 33 involves EU law, and if so, to what extent.

### III. Revised proposal for the corresponding paragraphs of the Explanatory Report

7. Taking again as its starting point the previous proposal tabled by Norway and the Secretariat, the new proposal for additional paragraphs of the Explanatory Report, on inter-party cases, would thus read as follows:

#### Article 4 – Inter-Party Cases

[...]

~~72. With the EU's accession to the Convention, it will be possible that inter-party disputes arise under Article 33 of the Convention between the EU and one or more of its member States, in addition to the already existing possibility of such disputes between two or more EU member States. 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 of 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”.

**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, 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.** ~~In order not to delay~~

~~unduly the proceedings before the Court, the EU shall ensure that the conclusion of the assessment is duly reasoned and communicated quickly in writing. Where the assessment concludes that an application falls within the scope of Article 344 of the TFEU, Article 4, paragraph 3 establishes an obligation for the applicant High Contracting Party to withdraw the inter-party application. Where it is established that only a part of the application falls within the scope of Article 344 TFEU (“mixed applications”), the obligation to withdraw is limited to this part, as captured by the wording “insofar as”.~~

~~72b.— In light of its previous case-law<sup>1</sup>, it can be expected that the Court would, following such withdrawal, strike out the application to the extent necessary by applying Article 37 of the Convention in a spirit of cooperation having due regard to the nature of the EU legal system. In the unlikely event that a High Contracting Party fails to comply with its obligation to withdraw its application, it is understood that it would no longer be justified to continue the examination of the application and that the Court can be expected to make the necessary arrangements to that effect under Article 37, paragraph 1.c of the Convention.~~

~~**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.~~

8. Paragraph 72 restates the principle set out in Article 4, paragraph 3a of the Accession Agreement. It further explains that the Convention becoming an integral part of EU law after accession does not mean that every allegation of a breach of Convention provisions brought by one EU member State against another necessarily involves EU law.

9. Paragraph 72a explains the purpose and legal basis of the principle in Article 4, paragraph 3a.

10. Paragraph 72b explains the reason for the assessment procedure under Article 4, paragraph 3b. It then describes how the assessment procedure would work, including an explanation of how the EU and its member States would become aware of relevant applications, and a provision reflecting the need for the assessment procedure to be conducted expeditiously. This provision uses language similar to that of paragraph 17 of the explanatory report to Protocol no. 16: “... the nature of the question on which it would be appropriate for the Court to give its advisory opinion suggests that such proceedings would have high priority.”

11. Paragraph 72c clarifies that Article 4, paragraphs 3a and 3b do not apply to inter-party cases to which one of the parties is not a member State of the EU, and that paragraph 3a does not apply to inter-party applications between EU member States where EU law is not involved. Paragraph 3b would still apply to this latter category of cases, since the assessment under paragraph 3b is necessary to determine whether or not EU law is in fact involved, and thus to whether or not paragraph 3a applies.