

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

46+1(2022)25
13 September 2022

**15TH MEETING OF THE CDDH AD HOC NEGOTIATION GROUP
ON THE ACCESSION OF THE EUROPEAN UNION TO THE
EUROPEAN CONVENTION ON HUMAN RIGHTS**

Background Paper by the Secretariat on issues relating to Article 7 of the Accession Agreement and relevant parts of the other accession instruments

Strasbourg, Wednesday 5 October 2022 (10:00 am) – Friday 7 October 2022 (4:30 pm)

(Hybrid meeting through the KUDO videoconferencing system and Room G.02 in Agora)

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Introduction

1. At its 14th meeting (5-7 July 2022), following discussion of issues relating to Article 7 of the draft Accession Agreement, 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 suggested by the discussions. In response, the Secretariat has prepared the present document.

2. This document focuses on the question of the content of the rules that would apply to adoption by the Committee of Ministers, acting under Articles 39 (4) and 46 (2) – (5) of the European Convention on Human Rights (the Convention), of decisions relating to its supervision of the execution of judgments of the European Court of Human Rights (the Court) by High Contracting Parties. These rules would apply in particular at the Committee of Ministers 'human rights' meetings (CM/DH meetings).

3. Article 7, paragraph 4(a) of the draft Accession Agreement, and the special voting rules set out in its Appendix 3, were intended to address the fact that the EU and its member States would be obliged by EU law to coordinate their positions and vote as a bloc on decisions concerning the implementation of judgments in cases to which the EU is a respondent or co-respondent. The size of this bloc – 28 votes in total – would determine the outcome of a vote, either preventing adoption of the decision or, with relatively few additional votes, ensuring its adoption.

4. It should be recalled that application of the special voting rules discussed in this document – which allow for decisions to be “considered as adopted” – would require the tacit agreement of the Parties. The legal status of CM/DH voting rules will be examined in detail in a separate note to be prepared by the Directorate of Legal Advice and Public International Law (DLAPIL).

5. This document has sections on the situation under the 2013 draft accession instruments, discussions since the resumption of negotiations in 2020, and proposals and further ideas for addressing these issues. At the end of each section there is a summary of its content, and some preliminary conclusions are set out at the end of the document as a whole. The proposals and further ideas set out below include (i) modifying the rules on voting majorities set out in the 2013 draft accession instruments, (ii) giving the EU and its member States no vote on decisions concerning cases to which the EU is a (co-)respondent, with all other Parties having no vote on cases concerning themselves, and (iii) giving the EU and its member States collectively a single vote on decisions relating to cases concerning the EU.

II. The situation under the 2013 draft accession instruments

6. The full text of the relevant provisions of the 2013 draft accession instruments is set out in [Appendix I](#).

7. To summarise the position under these instruments:

- Article 7(4) of the draft Accession Agreement recognises that measures are needed to ensure that the Committee of Ministers is able to supervise effectively the execution of

the Court's judgments by High Contracting Parties in cases to which the EU is a (co-) respondent party, given that in such cases the EU and its member States are obliged by EU law to co-ordinate their positions and vote as a bloc.

- This would be achieved by adding a new Rule 18 to the rules that apply when the Committee of Ministers supervises the execution of Court judgments.
- The proposed Rule 18, which appears in Appendix 3 to the Accession Agreement, would introduce special voting rules for the adoption of certain decisions relating to the EU's implementation of a judgment:
 - o Final resolutions shall be considered as adopted if a majority of four fifths of the representatives casting a vote and a majority of two thirds of the representatives entitled to sit on the Committee of Ministers are in favour;
 - o Decisions to refer a case to the Court for interpretation of a judgment or to open infringement proceedings shall be considered as adopted if one fourth of the representatives entitled to sit on the Committee of Ministers is in favour;¹
 - o Decisions on procedural issues or merely requesting information shall be considered as adopted if one fifth of the representatives entitled to sit on the Committee of Ministers is in favour.
- For the adoption of all other decisions, including on interim resolutions or decisions expressing a position on the EU's implementation of a judgment, the majority indicated under Article 20.d. of the Statute would be required (a two-thirds majority of the representatives casting a vote and a majority of the representatives entitled to sit on the Committee). In principle, should the EU and its member States be obliged to vote as a bloc on such a decision, they would be able to prevent its adoption; conversely, they would require relatively few additional votes in order to ensure the adoption of such a decision.²
- The explanatory report states, that it would be "politically highly unlikely" for the EU to "use" the bloc of votes to prevent the adoption of interim resolutions and decisions. The explanatory report continues by stating that "moreover, the effective exercise by the Committee of Ministers of its supervisory functions will nevertheless be ensured."

III. Discussions since the resumption of negotiations in 2020

8. The full text of the relevant extracts of reports of meetings since the resumption of negotiations in 2020 is set out in [Appendix II](#).

9. To summarise the points that have been made:

- Since the draft accession instruments were prepared in 2013, there have been changes in the working methods of CM/DH meetings.
- In particular, it was noted that the CM/DH:
 - o more often adopts decisions by voting;
 - o more often adopts interim resolutions;
 - o has launched infringement proceedings under Article 46(4) of the Convention by a decision described as an 'interim resolution'.³
- It was also noted that final resolutions are often adopted 'in the box' (without discussion or a vote) at 'ordinary' meetings of the Committee of Ministers.⁴

¹ With respect to all other High Contracting Parties, the adoption of such decisions would require a majority vote of two thirds of the representatives entitled to sit on the Committee of Ministers: see respectively Article 46 (3) and (4) of the Convention.

² See further below for a numerical analysis of the consequences of the various provisions on voting.

³ Decisions under Article 46(4) nevertheless always require adoption by a two-thirds majority vote.

⁴ It should be noted that the 'Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements' apply whenever the Committee of Ministers is engaged in this task, by implication including but not only during its 'human rights' meetings (CM/DH).

- It remains essential to ensure that the EU and its member States, when obliged under EU law to vote as a bloc on decisions concerning the execution of judgments in cases to which the EU is a party, cannot by themselves determine the outcome of voting in the Committee of Ministers.
- At least one participant was of the view that the solution found by the negotiation group in 2013, consisting of Article 7(4) and Rule 18, was sufficient to address this legitimate concern.
- The CM/DH rules should emphasise the importance of non-EU member States' participation in voting, notably on final resolutions, even if in practice these are often adopted without a vote at 'ordinary' meetings of the Committee of Ministers.
- The CM/DH rules following EU accession should cover all possible voting by the Committee of Ministers when supervising the execution of Court judgments, including on interim resolutions and "all other decisions".
- Responses to these issues should be "future-proofed".

IV. Proposals and further ideas for addressing issues that have been raised

a. The proposal to revise Article 7 of the Accession Agreement and relevant parts of other accession instruments

10. Discussions to date have focused mainly on an approach that would involve modifying the approach taken in the draft Accession Agreement, namely to introduce a new Rule 18 into the CM/DH rules with provisions on voting on certain decisions about cases concerning the EU.

11. In particular, a document containing text proposals and amendments regarding the revision of Article 7 of the Accession Agreement, including the relevant parts of the other accession instruments, was presented at the 13th meeting. This document contained two proposals to amend draft Rule 18:

- Adoption of final resolutions should require, as part of the majority of four fifths of the representatives casting a vote, a simple majority of representatives of non-EU member States, as well as a majority of two thirds of the representatives entitled to sit on the Committee of Ministers;
- Rule 18(3), which requires a one fifth majority of the representatives entitled to sit on the Committee of Ministers, should be defined as applying to interim measures and "other decisions",⁵ rather than to "decisions on procedural issues or merely requesting information".

12. As to the proposal relating to final resolutions, "Several delegations stated that the proposal raised concerns of principle, notably by introducing into the accession instruments the concept of a bloc of non-EU member States. Some delegations were uncertain how the proposed majorities would work in practice, notably in the case of abstentions by non-EU members."⁶

⁵ In the context of this proposal, "Other decisions" would include all decisions whose substance is not covered by the other categories described in this paper. It would thus include both decisions on procedural issues or merely requesting information (as is the case in current draft Rule 18(3)), and the category of "other decisions" mentioned in current paragraph 89 of the explanatory report: for example, when the Committee of Ministers "urges the authorities of [a High Contracting Party] to intensify their efforts to resolve, definitively and as quickly as possible, the structural problem found by the Court"; or when the Committee of Ministers "invites the authorities to elaborate concrete proposals to comply with the Court's judgment and to explore all possible avenues within their wide margin of appreciation, such as a flexible interpretation of the relevant provision of its domestic law which formed part of the case" (see doc. 47+1(2021)15, para. 14).

⁶ Report of the 13th meeting, 46+1(2022)R13, para. 32.

13. The delegation presenting the proposal noted that it “would also bring interim resolutions ... within the scope of the provision establishing special majorities for the adoption of decisions on procedural issues or merely requesting information. This was because interim resolutions often also contained requests for the State to take action or provide information, and so the same majority should apply... Several delegations agreed that the proposal to deal specifically also with interim resolutions is pertinent and there may be a need for clarity on the specific majority required for the adoption of interim resolutions in such cases. Some delegations questioned whether a low threshold for adoption of interim resolutions, simply because the decision included also other elements, was appropriate. Some delegations considered that there should be a separate paragraph of Rule 18 dealing with interim resolutions. The question of the appropriate majority for adopting decisions dealing with matters not otherwise covered by the existing Rules or the proposed Rule 18 was also discussed.”⁷

14. At the 14th meeting, the Group examined a numerical analysis by the Secretariat of the effects of the above proposal to amend Rule 18.⁸ This showed the following effects as compared to the draft Rule 18 set out in the 2013 accession package:⁹

- For final resolutions, the additional requirement of “a simple majority of non-EU members of the Council of Europe” would mean up to three additional votes would be required if a total of between 36 and 46 parties voted, but the same number of votes would be required if a total of 47 or between 32 and 35 parties voted.¹⁰
- For interim resolutions and “other decisions”, the current rules, namely application of Article 20.d. of the Statute, would require between 24 and 32 votes, depending on how many parties voted. Under the ‘one fifth’ proposal, 10 votes would be required.

15. **Preliminary observations:** this proposal would address many of the problems that were raised by the delegation that made it and recognised by several other delegations. The importance of participation of non-EU member States in the adoption of a final resolution to close supervision of execution of judgment of a case to which the EU is a (co-)respondent party would be recognised. Also, a specific rule for interim resolutions would be introduced, and this rule would cover any other type of decision for which a specific rule was not already foreseen.

16. As regards the proposal relating to final resolutions, concerns of principle were raised over the prospect of introducing the concept of a category of non-EU member States into the accession instruments. Although such a category is not specified in the proposal concerning interim resolutions, the requirement of 10 votes would in effect allow for adoption by a simple majority of the 19 non-EU members of the Council of Europe, even if the EU and its member States as a block voted against.¹¹ The introduction of a third voting threshold would also increase the complexity of the rule, which may lead to misunderstandings and difficulty in application.

⁷ Report of the 13th meeting, 46+1(2022)R13, para. 33. The Group also discussed the implications of the then-recent expulsion of the Russian Federation from the Council of Europe.

⁸ Document 46+1(2022)21; this document is restricted.

⁹ Calculations based on 47 High Contracting Parties, i.e. including the EU but excluding Russia.

¹⁰ This assumes that the EU and all of its member States vote in favour of the final resolution. If fewer than 32 member States voted, it would be impossible to satisfy the requirement of a “two-thirds majority of the representatives entitled to sit on the Committee of Ministers”.

¹¹ This calculation depends on EU member States making up the same proportion of Council of Europe member States as at present. It should be noted, however, that the membership of the EU is not fixed. This may be relevant to the need to “future-proof” any new rules on CM/DH voting.

17. The proposal for interim resolutions seems to be based on an assumption that (i) interim resolutions are generally perceived to be critical of the Party concerned (it is certainly true that they tend to be adopted when progress on implementation of a judgment is considered inadequate),¹² and (ii) the Party may therefore be motivated to vote against the interim resolution. The proposal therefore aims at ensuring that the EU and its member States could not prevent the adoption of an interim resolution by voting as a bloc. Although the draft explanatory report considered that it was “politically highly unlikely” that the EU and its member States would do this, the legal right and procedural possibility to do so would remain. (See further under IV.b. below.)

18. An approach that involves hyper-minorities for adoption of interim resolutions does not, however, seem to envisage the possibility that the EU may itself propose an interim resolution (as other Parties have done in the past), or that the EU may propose amendments to an interim resolution. Assuming that the same voting rules would apply in such scenarios, the EU and its member States as a bloc would be able to determine the outcome of the vote even if all other Parties voted against. The Group may wish to consider whether this proposal could be further refined so as to avoid this counter-productive outcome.

b. The practice under other Council of Europe treaties to which the European Union is a party

19. At the 12th meeting, DLAPIL presented a paper setting out the voting rights of the European Union in Council of Europe treaties.¹³ In most cases, the basic rule is that the EU shall exercise its right to vote with a number of votes equal to the number of its member States that are party to the treaty in question. This is, in effect, comparable to the EU and its member States voting as a bloc when the CM/DH supervises execution of a Court judgment to which the EU is a (co-)respondent party.

20. The Protocol amending the data protection convention (CETS 223, amending CETS 108), however, provides for special rules of procedure of the Convention Committee, which is composed of representatives of the Parties. These rules state *inter alia* that “Whenever [a decision concerning the implementation of this convention by a Party] concerns a matter falling within the competence of a regional integration organisation, neither the organisation nor its member States shall vote.”¹⁴

21. It should be noted that the Protocol also sets out a general rule that “Where the Convention Committee takes decisions [on implementation of the convention by a Party], the Party concerned by the review shall not vote.”

22. The provision on “regional integration organisations” is intended to apply to the EU, which participated in the negotiation of the Protocol.¹⁵ Its effect would be that when the Convention Committee takes decisions concerning the EU’s implementation of the modernised data protection convention, only non-EU member States would vote. The situation is different for decisions concerning all other Parties to this convention, on which only the Party concerned would not vote. This means that an EU member State would not vote on decisions

¹² It may be noted that the intended scope of interim measures is not limited to this: Rule 16 states that they may be adopted “notably in order to provide information on the state of progress of the execution or, where appropriate, to express concern and/or to make suggestions with respect to the execution”.

¹³ Document DLAPIL 16/2021.

¹⁴ Appendix to the Protocol, para. 4.

¹⁵ It should be noted that this protocol has not yet come into effect, and the EU has not yet ratified it. Nevertheless, the EU was involved in its negotiation, along with all Council of Europe member States, and the Committee of Ministers adopted the protocol by consensus, including the support of all EU member States.

concerning implementation of the convention either by itself or by the EU, whereas a non-EU member State would only not vote on such decisions concerning itself.

23. A similar rule could be envisaged for voting on issues under Article 46 of the Convention. No Party would have a vote on decisions concerning cases to which it is a (co-) respondent party; and for cases to which the EU is a respondent party, neither the EU nor its member States would have a vote.¹⁶

24. **Preliminary observations:** this approach could be seen as establishing a legal rule to affirm the expectation, stated in the draft explanatory report, that it was “highly unlikely” that the EU and its member States would vote to block the adoption of an interim resolution. (See further under IV.a. above.) By having no vote, it would be impossible for them to do so. It would also be impossible for the EU and its member States alone to be able to ensure adoption of a draft interim resolution, or an amendment to one, proposed by the EU itself.

25. As regards final resolutions, the effect of this approach would be the same as the proposal under IV.a. above: the outcome of a vote would depend on whether a majority of those Parties that retained the right to vote were in favour or against. Even though all of these would in fact be non-EU member States, the outcome would be achieved without explicitly introducing a formal category of “non-EU member States” into the accession instruments.

26. It can be noted that, since final resolutions conclude that a judgment has been fully executed and bring the Committee of Ministers’ supervision to a close, it is difficult to conceive of circumstances in which the respondent party would be motivated to vote against.

27. As regards “decisions on procedural issues or merely requesting information”, the effect of this approach would be similar to that of the current draft Rule 18, insofar as “one fifth of the representatives entitled to sit on the Committee of Ministers” is currently numerically equivalent to a simple majority of those Parties that would have retained the right to vote.

28. Under this approach, it would not be possible to attain the majorities required by Article 20.d. of the Statute or Article 46 (3) or (4) of the Convention when voting on decisions relating to the implementation of judgments concerning the EU. Article 20.d. of the Statute requires *inter alia* a majority of representatives entitled to sit on the Committee of Ministers, i.e. 24 votes; and Article 46 (3) and (4) of the Convention both require a two-thirds majority of representatives entitled to sit on the Committee of Ministers, i.e. 32 votes. If 28 Parties (the EU and its member States) were to have no vote, whilst still being entitled to sit on the Committee of Ministers, it would not be possible for the remaining 19 Parties to attain the required majorities, even if they voted unanimously in favour.

29. A new rule would therefore be required for these situations. This could, for example, be to require the same majorities as are currently indicated by the Statute and the Convention, but of the “representatives entitled to vote” on the particular decision (as opposed to the “representatives entitled to sit on the Committee of Ministers”, as is currently the case). Thus a procedural decision would require a simple majority of those entitled to vote, a decision to refer a case to the Court for interpretation of the judgment or to launch infringement proceedings would require a two thirds majority of those entitled to vote, and all other decisions (including to adopt an interim or final resolution) would require a two-thirds majority of the representatives casting a vote and a majority of the representatives entitled to vote.

¹⁶ It may be recalled that at the 7th meeting, “One delegation raised the question about whether the EU should have a vote on any matters in the Committee of Ministers, bearing in mind that the EU will not become a member of the Council of Europe.” This would go far beyond the approach under discussion, since it would mean the EU participating in no CM/DH votes at all, not merely those on decisions concerning cases involving the EU.

30. It can be recalled that some judgments are against multiple respondent Parties. If a decision concerned more than one of those Parties, then multiple Parties would have no vote on the decision. This would presumably be the case for judgments against both the EU and one or more of its member States, since Article 7 of the Accession Agreement (as at present provisionally agreed) states that they shall be “jointly responsible” – although there may be a question as to whether this implies that all Parties to the case would be jointly responsible for taking the action necessary to implement the judgment, as opposed to being jointly responsible for the violation. (If the implementation obligations of different respondent Parties were distinct, then decisions would presumably each concern only one Party, and only that Party would have no vote on the decision.) Further reflection may be needed on the implications of this.

31. The impact of this approach on decisions concerning the implementation of judgments by all Parties other than the EU may be considered to have less significant impact in practice. In these cases, only the Party concerned would not vote. The effect of having only one fewer Party voting would be negligible.¹⁷

c. Variant on the approach under IV.b.

32. An alternative to the ‘zero vote’ approach under IV.b. would be to give the EU and its member States a collective single vote on decisions concerning judgments to which the EU is a (co-)respondent party. This would apply to any decision on which the EU and its member States would be obliged to coordinate their positions, including those covered by current draft Rule 18, along with the adoption of interim resolutions.

33. **Preliminary observations:** the effect of this alternative approach at first sight appears roughly the same as the approach under IV.b, with one exception.

34. It would not have the same effect as the proposal under IV.a., requiring a simple majority of non-EU member States to adopt final resolutions, i.e. 10 out of a total of 19. The approach under IV.b. would leave only the 19 non-EU member States entitled to vote, and if 10 of these voted in favour, the final resolution would be adopted. If the EU and its member States had one vote, the total number of Parties entitled to vote would be 20, of which a simple majority would be 11 – equivalent to a qualified majority of non-EU member States. However, assuming that the EU would always be motivated to vote in favour of a final resolution (for the reasons mentioned above), then adoption of the final resolution would depend on the additional votes of a simple majority of non-EU member States.

35. Another difference is that this approach would apply only to decisions relating to the implementation of judgments to which the EU is a (co-)respondent party. In other words, whilst the EU (and its member States) would not vote on decisions relating to the implementation of a judgment concerning the EU, each Party other than the EU would vote on decisions relating to the implementation of a judgment concerning itself. This difference in treatment may or may not be considered to be technically justified and/ or politically significant. On the other hand, this approach would have a more limited scope, since there would be no change to the situation regarding any Party other than the EU.

¹⁷ On extremely rare occasions, there may be more than one respondent State; and in a couple of occasions in the Court’s history, a case has been brought against a large number of States.

V. Preliminary conclusions

36. The 2013 accession instruments recognised the potential problem of bloc voting by the EU and its member States on decisions concerning the implementation of Court judgments to which the EU is a respondent party.

37. The solutions that were proposed, however, do not cover all types of decision. In particular, there is no specific rule for interim resolutions, which the Committee of Ministers has adopted more frequently since 2013. Instead, the default majority required under Article 20.d. of the Statute could not be met by non-EU member States alone. The explanatory report to the draft Accession Agreement explains this omission by suggesting that it would be “politically highly unlikely” that the EU would prevent adoption of an interim resolution in a case concerning the EU (despite the legal obligation for the EU and its member States to coordinate their positions, should there be a vote).

38. The solution for final resolutions on implementation of judgments concerning the EU has been criticised for inadequately recognising the importance of the participation of non-EU member States in adoption of such decisions.

39. One delegation has proposed amendments to the 2013 instruments that seek to resolve these problems. It may be, however, that this proposal raises new issues, including the introduction of a concept of ‘non-EU member State’ into the text of the accession instruments, and counter-productive effects should the EU itself propose a draft interim resolution or an amendment to one.

40. The protocol to the data protection convention could provide a possible alternative to the above proposal. Under this alternative, no Party would vote on decisions concerning its own implementation of a judgment; and in the case of implementation of a judgment by the EU, neither the EU nor its member States would vote. A variant on this alternative approach would involve the EU and its member States exercising a single vote on decisions concerning the EU’s implementation of a judgment, with all other Parties retaining the right to vote on decisions concerning their own implementation of a judgment.

41. Solutions that involve either hyper-minorities or the EU and its member States having no vote on decisions that concern implementation of judgments by the EU would lead to decisions with serious consequences being adopted by a relatively small number of Parties. This consideration may need to be balanced against any persistent risk that other solutions would continue to allow for the EU and its member States to obstruct decisions when voting as a bloc.

Appendix I

1. The relevant paragraph 4 of Article 7 of the draft Accession Agreement reads as follows:

“4. The exercise of the right to vote by the European Union and its member States shall not prejudice the effective exercise by the Committee of Ministers of its supervisory functions under Articles 39 and 46 of the Convention. In particular, the following shall apply:

a. in relation to cases where the Committee of Ministers supervises the fulfilment of obligations either by the European Union alone, or by the European Union and one or more of its member States jointly, it derives from the European Union treaties that the European Union and its member States express positions and vote in a co-ordinated manner. The Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements shall be adapted to ensure that the Committee of Ministers effectively exercises its functions in those circumstances;

b. where the Committee of Ministers otherwise supervises the fulfilment of obligations by a High Contracting Party other than the European Union, the member States of the European Union are free under the European Union treaties to express their own position and exercise their right to vote.”

2. The adaptation mentioned in Article 7, paragraph 4.a. is found in Appendix 3 to the draft Accession Agreement (“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”). The proposed Rule 18 reads as follows:

“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 and a majority of two thirds of the representatives entitled to sit on the Committee of Ministers are in favour.

2. Decisions by the Committee of Ministers under Rule 10 (Referral to the Court for interpretation of a judgment) and under Rule 11 (Infringement proceedings) of the present rules shall be considered as adopted if one fourth of the representatives entitled to sit on the Committee of Ministers is in favour.

3. Decisions on procedural issues or merely requesting information shall be considered as adopted if one fifth of the representatives entitled to sit on the Committee of Ministers is in favour.

4. Amendments to the provisions of this rule shall require consensus by all High Contracting Parties to the Convention.”

3. These provisions are covered by the explanatory report as follows:

“84. In the context of the supervision of the fulfilment of obligations either by the EU alone, or by the EU and one or more of its member States jointly (that is, arising from cases to which the EU has been respondent or co-respondent), it derives from the EU treaties that the EU and its member States are obliged to express positions and to vote in a co-ordinated manner. In order to ensure that such co-ordination will not prejudice the effective exercise of supervisory functions by the Committee of Ministers, it was considered necessary to introduce special voting rules. They will appear in a new rule to be included in the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly

settlements. The new voting rules will apply to all decisions in respect of obligations upon the EU alone or upon the EU and one or more of its member States jointly.

85. The specific rule applicable to decisions by the Committee of Ministers under Rule 17 (Final resolutions) of 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 EU is a party appears under paragraph 1 of the new rule. In the case of the adoption of final resolutions, it must be ensured that the decision has sufficient support from all High Contracting Parties, be they members of the EU or not. Therefore, instead of the majority set out in Article 20.d of the Statute of the Council of Europe, a majority of four fifths of the representatives casting a vote and a majority of two thirds of the representatives entitled to sit on the Committee are required for the adoption of final resolutions. In a system with 48 High Contracting Parties, this means that at least 32 votes would be required, but according to the number of members actually casting a vote the number of votes required for the adoption of a final resolution may vary between 32 and 39.¹⁸

86. The specific rule applicable to decisions by the Committee of Ministers under Rules 10 (Referral to the Court for interpretation of a judgment) and 11 (Infringement proceedings) of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements in cases in which the EU is a party appears under paragraph 2 of the new rule. It is based on the principle that in order to preserve the integrity of the system, it should be possible in all circumstances, including in the event of a contrary position by the EU and its member States, to adopt decisions under Rules 10 and 11 in cases involving the EU. The solution proposed is that a relatively high “hyper-minority” of one quarter of the members entitled to sit on the Committee of Ministers shall be required to consider as adopted a decision under such rules. In a system with 48 High Contracting Parties, this means that 12 votes would be required to consider such decisions as adopted.

87. A specific rule has also been set out in paragraph 3 to avoid that the use of block votes may paralyse the ordinary functioning of the supervision mechanism. It should apply in particular to decisions on procedural issues and to decisions requesting information. The expression “decisions on procedural issues” shall be interpreted as encompassing all kinds of procedural decisions, including obviously the adoption of agendas and reports, but also – for instance – requests for confidentiality and decisions on whether a case should undergo “enhanced” or “standard” supervision. The expression “decisions requesting information” shall be interpreted as encompassing all requests for information which are addressed to a High Contracting Party in order to assess the state of execution of a judgment or of the terms of a friendly settlement, including action plans and action reports, where no position is taken on compliance by that High Contracting Party with the obligation under Article 46, paragraph 1, of the Convention. This rule is based on the same approach set out in the preceding paragraph. However, in so far as the majority required for the adoption of decisions under Article 46, paragraphs 3 and 4 of the Convention, as reflected in Rules 10 and 11, is higher than the majority required by the Statute of the Council of Europe for other decisions relevant for the exercise of functions under the Convention, the rule in paragraph 3 requires a lower “hyper-minority” than in paragraph 2. Therefore, decisions under paragraph 3 shall be considered as adopted if one fifth of the representatives entitled to sit on the Committee is in favour of it. In a system with 48 High Contracting Parties, it means that 10 votes would be required to consider such decisions as adopted.

88. The “hyper-minorities” set out in paragraphs 2 and 3 for the adoption of decisions are based on the principle that, provided a certain number of the representatives entitled to sit

¹⁸ The consequences of the expulsion of the Russian Federation from the Council of Europe on this and other relevant calculations were set out in a ‘numerical analysis’ presented by the Secretariat at the Group’s 14th meeting (see further below).

on the Committee of Ministers are in favour of it (for instance, by an indicative vote), it shall be considered as adopted, without a formal vote and without referring to the majorities set out in the Convention and in the Statute of the Council of Europe. This procedure would be consistent with other procedures already in place in the Council of Europe, whereby delegations do not request the application of the voting rule prescribed by the Statute of the Council of Europe to block the adoption of a decision if it appears that a lower majority than the one prescribed in the Statute is attained.

89. In the absence of specific provisions in the new rule, the majority rule set out in Article 20.d of the Statute of the Council of Europe applies to all other types of decisions, including the adoption of interim resolutions and of any other decisions expressing a position on compliance by the EU with the obligation under Article 46, paragraph 1, of the Convention. The EU could, by using its block of votes, impede the adoption of such interim resolutions and decisions. However, it was considered by the negotiating parties that it was politically highly unlikely that the EU would use the block of votes to this effect. In the current practice such interim resolutions and decisions are normally adopted by consensus. Moreover, the effective exercise by the Committee of Ministers of its supervisory functions will nevertheless be ensured. In fact, pursuant to paragraph 2 of the new rule, the adoption of decisions requesting second referral for infringement to the Court has been considerably facilitated by reducing the threshold required from two thirds to one fourth of the representatives entitled to sit on the Committee of Ministers.”

Appendix II

1. At the Group's 6th meeting (29 September – 1 October 2020), two delegations “announced their intention to raise other issues which were not contained in the Chair's “Paper to structure the discussion at the 6th negotiation meeting”. This concerned notably Articles 6, 7 and 8 of the draft Accession Agreement and its appendices. These delegations stressed that there had been changes in the Council of Europe since the adoption of the accession instruments which a revision of the latter should properly reflect. This concerned in particular the working methods of the Committee of Ministers when overseeing the execution of the ECtHR's judgments (including the use of interim resolutions).¹⁹

2. Discussions continued at the 7th meeting (24-26 November 2020). “With a view to Article 7 (Participation of the EU in the meetings of the Committee of Ministers of the Council of Europe), the respective parts in the explanatory report and Appendix III, questions were raised with regard to the voting rules within the Committee of Ministers, including the increased voting on interim resolutions. One delegation raised the question about whether the EU should have a vote on any matters in the Committee of Ministers, bearing in mind that the EU will not become a member of the Council of Europe.”²⁰

3. The issue was next on the agenda at the 11th meeting (5-8 October 2021), when one delegation presented its “non-paper regarding the proposal to revisit Articles 6-8 of the Accession Agreement (including the relevant parts of the other accession instruments) in light of developments which have taken place since the adoption of the draft Accession Agreement of 2013”. This non-paper argues that the Committee of Ministers “should not be faced with a situation leading to a superiority in decision-making where EU and EU member States act *de jure* or *de facto* in coordination... When execution of European Court of Human Rights' judgements against the EU and/or against one or more EU member States are on the agenda of the Committee of Ministers, a way should be found so that by coordinating forces, EU and/or EU member States would no [sic] be able to hinder the supervision role of the CM. This requires a very serious look at Article 7 and Appendix 3 and make sure that such new rules cover all possible voting that takes place in the CM at its DH format. A provision should be established that would impede any *de facto* or *de jure* EU joint position is imposed on the whole Committee on the execution of a judgement against any given State Party. This would require a provision to be added under article 7.”²¹

4. In the ensuing discussion, “As to the rules regarding judgments to which the EU is a party (where the EU and its member States would be obliged to coordinate), several delegations stated that it was important to establish whether developments within the Committee of Ministers since 2013 would require amendments of these provisions to ensure that the latter could effectively exercise its function. However, several delegations expressed caution to revise the situation of the supervision of the execution of judgments in which the EU is not a party since Article 7, paragraph 4b. of the draft Accession Agreement already states that the EU member States are free under the EU treaties to express their own position and exercise their right to vote in such a situation. The EU confirmed that the legal situation had not changed since the adoption of the draft Accession Agreement in 2013.”²²

5. At the 12th meeting (7-10 December 2021), the Group examined a background paper presented by the Secretariat on scenarios in the context of Article 7 of the draft Accession Agreement.²³ In the ensuing discussion, “Attention was drawn by some delegations to possible unwanted consequences of the EU and its member States voting as a block in the Committee

¹⁹ Report of the 6th meeting, 47+1(2020)R6, para. 41.

²⁰ Report of the 7th meeting, 47+1(2020)R7, para. 17.

²¹ Report of the 11th meeting, 47+1(2021)R11, Appendix VI.

²² Report of the 11th meeting, 47+1(2021)R11, paras. 19-20.

²³ Document 47+1(2021)15.

of Ministers. One delegation stated its intention to submit to the Group concrete wording proposals on these topics in the future.”²⁴

6. At the 13th meeting (10-13 May 2022), this delegation submitted a document containing text proposals and amendments regarding the revision of Article 7 (and also Articles 6 and 8) of the Accession Agreement, including the relevant parts of the other accession instruments.²⁵ This delegation explained that “the Committee of Ministers’ practice had evolved since 2012, with decisions being adopted more frequently and of a greater variety. It was important to ensure that the non-EU member States would not be systematically outvoted on important decisions concerning cases involving the EU. [The] proposals aimed to make the minimal changes necessary to achieve this goal.” In response, “Several delegations agreed that these proposals addressed an important point. Several delegations stated that the proposal raised concerns of principle, notably by introducing into the accession instruments the concept of a bloc of non-EU member States. Some delegations were uncertain how the proposed majorities would work in practice, notably in the case of abstentions by non-EU members.”²⁶

7. The delegation that submitted the document also explained that its proposal “would also bring interim resolutions, which the Committee of Ministers nowadays adopted more often, within the scope of the provision establishing special majorities for the adoption of decisions on procedural issues or merely requesting information. This was because interim resolutions often also contained requests for the State to take action or provide information, and so the same majority should apply. It also noted that under the existing majority, the EU and its member States would be able to block the adoption of an interim resolution in a case to which the EU was a party.” In response, “Several delegations agreed that the proposal to deal specifically also with interim resolutions is pertinent and there may be a need for clarity on the specific majority required for the adoption of interim resolutions in such cases. Some delegations questioned whether a low threshold for adoption of interim resolutions, simply because the decision included also other elements, was appropriate. Some delegations considered that there should be a separate paragraph of Rule 18 dealing with interim resolutions. The question of the appropriate majority for adopting decisions dealing with matters not otherwise covered by the existing Rules or the proposed Rule 18 was also discussed.”²⁷

8. Discussions continued at the 14th meeting (5-7 July 2022), when 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 [see further below] 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... [Another] 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

²⁴ Report of the 12th meeting, 47+1(2021)R12, para. 15.

²⁵ This document is restricted.

²⁶ Report of the 13th meeting, 46+1(2022)R13, para. 32.

²⁷ *Ibid*, para, 33.

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.”²⁸

²⁸ Report of the 14th meeting, 46+1(2022)R14, paras. 16 & 20. The Group also discussed the legal status of the rules and practice applied at CM/DH meetings: see doc. 46+1(2022)R14, paras. 16-17. DLAPIL will present a note on the possible legal bases for voting rules in CM/DH meetings at a future meeting of the Group.