

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

46+1(2022)R13

13 May 2022

**13TH 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 10 May 2022 (10:00 a.m.) – Friday 13 May 2022 (4:30 p.m.)

Palais, Room 9 (with the possibility to attend the meeting also externally through the KUDO videoconferencing system)

Council of Europe

1. The CDDH ad hoc negotiation group (“46+1 Group”) on the accession of the European Union (EU) to the European Convention on Human Rights (ECHR) held its 13th meeting from 10 – 13 May 2022. Due to the COVID-pandemic, the meeting was held as a hybrid meeting. The list of participants is attached as Appendix II. The meeting was chaired from Strasbourg by Ms Tonje MEINICH (Norway).

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

2. The Chairperson opened the meeting. She thanked the former Secretary of the Group, Mr Matthias KLOTH, and its former assistant, Ms Evangelia VRATSIDA, who had recently taken up new functions, for their invaluable contributions to its work, and welcomed their respective successors, Mr David MILNER and Ms Sorina LECLER. The Group adopted the agenda without further changes (Appendix I).

3. The Chairperson recalled that the Russian Federation had tabled proposals at the 12th meeting. She recalled that the Russian Federation had ceased to be a member of the Council of Europe on 16 March 2022 and no longer participated in the Group’s work. The Group agreed that whilst these proposals remained, they would only be taken into consideration if a delegation wished to take inspiration from them.

Item 2: Discussion of proposals for the remaining issues in Basket 1 (the EU’s specific mechanisms of the procedure before the European Court of Human Rights)

4. The Secretariat presented revised proposals for the remaining issues in Basket 1 (see document 47+1(2022)18).

5. The Group examined and provisionally agreed on the proposal concerning article 3, paragraph 5a of the accession agreement concerning the termination of the co-respondent mechanism and on the corresponding paragraphs 58-59 of the explanatory report.

6. The Group examined the proposal concerning paragraphs 65-69 of the explanatory report, corresponding to article 3, paragraph 6 of the accession agreement concerning the prior involvement procedure.

7. One delegation reiterated its reservation concerning the prior involvement procedure, which was related to the risk that it would unduly delay the proceedings. The representative of the European Union recalled paragraph 69 of the explanatory report, which made clear that prior involvement should involve an accelerated procedure, allowing the CJEU to deliver its ruling quickly. He also explained that the need for the prior involvement procedure only arose where a domestic court had not previously made a preliminary reference to the CJEU, so, on balance, the overall length of the proceedings should not be affected by involving the CJEU at a later stage instead. When applying EU law, domestic courts formed part of the EU legal order, of which the highest court was the CJEU. The principle of subsidiarity in the Convention system implied that the highest court of the relevant legal order should have the opportunity to express itself before an issue is examined by the Court. One delegation proposed adding a sentence stating that “Insofar as possible, the EU will examine the need to initiate the prior involvement procedure at the same time as examining the need to trigger the co-respondent mechanism”, which would also help to expedite proceedings.

8. The Group considered whether the proposal might more clearly distinguish between the triggering of the prior involvement procedure, and the prior involvement procedure as such.

9. Following the exchange of views with representatives of civil society (see below), the Group provisionally agreed to replace the words “the parties” with the words “all parties” in the final sentence of paragraph 66b of the explanatory report, concerning the opportunity to make observations to the CJEU under the prior involvement procedure.

10. On the basis of these discussions, the Group asked the Secretariat and any interested members of the Group to prepare a revised proposal for paragraphs 65-69 of the explanatory report corresponding to article 3, paragraph 6 of the accession agreement. The Group provisionally agreed on this revised proposal, as it appears in Appendix III.

11. The representative of the EU withdrew its proposal regarding article 3, paragraph 6, considering that the issue was now satisfactorily addressed through revised paragraphs 65-69 of the explanatory report.

12. The Group examined the proposal to delete the second limb of article 3, paragraph 7 on the joint responsibility of co-respondents for a violation established by a judgment of the Court, along with the corresponding text in paragraph 62 of the explanatory report. One delegation expressed a reservation, asking whether, if it was necessary to have provisions for both triggering and terminating the co-respondent mechanism, there should not be a similar approach to joint responsibility. Several delegations explained that joint responsibility described the situation of co-respondents with respect to a violation established by the Court. If at any stage of the proceedings the EU had given a reasoned assessment that the conditions for application of the co-respondent mechanism were no longer met, the Court would have terminated the mechanism under article 3, paragraph 5a. It was also recalled that this provision reflected the approach that had been taken to the co-respondent mechanism in the 2012 accession agreement, and that the approach has since changed significantly in response to Opinion 2/13, as reflected in the provisionally agreed text for article 3, paragraphs 5 and 5a. One delegation pointed out that if problems arose in relation to the responsibilities of co-respondents to execute a judgment, these would be a matter for the EU, the member State(s) concerned, and possibly the Committee of Ministers to address through the supervision process.

13. The Group agreed to one delegation’s proposal to add at the end of paragraph 62 of the explanatory report, after the words “This is without prejudice to Article 2, paragraph 3 of this Agreement”, the words “on reservations made by High Contracting Parties in accordance with article 57 of the Convention”.

14. On this basis, the Group provisionally agreed on article 3, paragraph 7 of the accession agreement and on the corresponding paragraph 62 of the explanatory report.

15. The Group discussed one delegation’s proposal to delete article 3, paragraph 4a of the accession agreement concerning the making available of information on communicated cases, whilst preserving the relevant explanations in the explanatory report. Given that there was no disagreement in substance, the Group provisionally agreed on a proposal by the Secretariat (see Appendix III) to transfer the elements of this provision into paragraphs 2 and 3 of article 3, as appropriate.

16. The Chairperson concluded that the Group had reached a provisional agreement on all issues arising under Basket 1 (both those on which tentative agreement had been reached at the 12th meeting and those that were examined at the present meeting), subject to one delegation maintaining its

reservation on the provisions concerning the prior involvement procedure and the joint responsibility of co-respondents. Another delegation stated that it would consult its national authorities on the proposal concerning the making available of information on communicated cases before a final agreement was reached.

Item 3: Discussion of proposals submitted on Basket 2 (inter-party applications under Article 33 ECHR; requests for advisory opinion under Protocol No.16)

17. The Group resumed its discussion of proposals concerning Basket 2 (see document 47+1(2022)19). A number of delegations expressed concerns about various elements of these proposals.

18. The representative of the EU recalled that if there was a dispute between EU member States over the interpretation or application of an issue of EU law, those states were prohibited, under article 344 of the Treaty on the Functioning of the European Union (TFEU), from submitting this dispute to any court other than the CJEU. This was the case even if the dispute also involved a human rights issue under the Convention, over which the Court would have the ultimate jurisdiction. Under Article 216 TFEU, the Convention would become part of EU law following accession. The CJEU could not accept that accession would introduce into EU law a provision – article 33 of the Convention – that established a procedure whereby another court could resolve disputes between EU member States involving EU law issues, since this would be incompatible with article 344 TFEU.

19. The Group examined the first sentence of the proposal by the Norwegian delegation and the Secretariat for article 4, paragraph 3 of the accession agreement, along with the amendments proposed by the EU. The Chair recalled that at the 11th meeting, there had been no disagreements in principle with the proposal. The representative of the EU explained that one must distinguish between ‘vertical’ cases, involving the EU and an EU member State, and ‘horizontal’ cases, involving two EU member States. EU law would necessarily be involved in ‘vertical’ cases, which should therefore clearly not be brought before the Court. For ‘horizontal’ cases, however, it would be necessary to assess whether or not EU law was involved, and – as for the co-respondent mechanism – this question fell within the competence of the EU. The Chairperson recalled that delegations had previously expressed an interest in addressing ‘mixed’ applications, of which one part involved EU law and another part did not, by requiring an assessment of the extent to which an application under article 33 of the Convention involved EU law.

20. The Group then examined the second sentence of the proposal for article 4, paragraph 3, along with the amendments proposed by the EU. The Chairperson recalled that the proposal also included text for the explanatory report expressing an expectation that the Court would strike out cases that the applicant State had withdrawn.

21. Several delegations could not accept the proposed amendment whereby the accession agreement would stipulate that inter-party applications found to involve EU law would be inadmissible. The representative of the EU recognised these objections but stated that the accession agreement must acknowledge the fact that certain cases between EU member States should be brought before the CJEU and not the Court. A simple mention of the obligation under article 344 TFEU may be enough, without reference to inadmissibility or striking out. Several delegations agreed that if sufficient, such a ‘soft’ approach would be preferable. One delegation suggested adding the sentence “Article 33 of the Convention shall not affect the obligations of EU member States under the founding

treaties of the European Union” to the beginning of the proposal for article 4, paragraph 3. Some delegations expressed interest in combining a statement of principle with a procedural provision.

22. The Group agreed to return to both issues at the next meeting on the basis of a revised proposal to be prepared by the secretariat in consultation with interested delegations.

23. The Secretariat presented the proposal concerning requests for advisory opinions under Protocol no. 16 to the Convention. The representative of the EU recalled that a designated ‘highest court or tribunal’ in the domestic legal order could optionally request an advisory opinion under Protocol no. 16 on the interpretation or application of Convention rights. If the case also involved EU law, that court would be obliged under article 267 TFEU to make a preliminary reference of the matter of EU law to the CJEU. In the opinion of the representative of the EU, where there was an issue of EU law, the highest court under the EU legal order was the CJEU rather than the domestic court that had been declared competent to request an advisory opinion under Protocol no. 16. In this connection, the representative of the Registry indicated that EU law issues do not come within the scope of Protocol no. 16.

24. The Group recalled that this proposal had originally been formulated also in connection with inter-party applications, which were now dealt with separately. The approach now being explored for inter-party applications no longer referred to consequences. Since the CJEU’s objections to advisory opinions were less stringent than those for inter-party applications, a similar approach may be at least equally feasible for the former. Several delegations questioned the necessity of a new special mechanism for assessing whether the case from which the request arose involved EU law. They expressed concern about the delays that such a mechanism would cause. The representative of the EU acknowledged that the question of whether the solution for advisory opinions would need a special mechanism for assessing whether EU law was involved merited closer attention. One delegation suggested that the solution might involve a statement that EU member States that had ratified Protocol no. 16 may avail themselves of the possibility of requesting an advisory opinion under Protocol no. 16 in compliance with their obligations under EU law. Several delegations expressed interest in this suggestion. The representative of the Registry indicated that in any case, the Court could not be expected to check the compliance of the request with obligations under EU law.

25. The representative of the EU offered to present a new proposal for examination at the next meeting.

Item 4: Exchange of views with representatives of civil society and of national human rights institutions

26. The Chairperson welcomed Ms Nuala MOLE of the AIRE Centre, Ms Roisin PILLAY of the International Commission of Jurists, and Mr Sébastien RAMU of Amnesty International.

27. Ms Mole recalled that the three organisations’ overriding concern was to protect the situation of applicants in proceedings involving the EU following its accession to the Convention. The negotiations had focused primarily on balancing institutional interests, without sufficient consideration of the effect on individuals’ practical and effective access to justice. Applicants may find themselves facing multiple respondents whose number and identity changed over the course of proceedings. They may find themselves required to exhaust domestic remedies in unfamiliar jurisdictions. Every provision of the accession agreement should be scrutinised from the perspective of applicants and safeguards introduced to protect their interests. The possibility for third party interventions, which

provided the Court with valuable expertise on issues of international law, should be expressly maintained in the accession agreement.

28. In response to questions from delegations and the representative of the EU, Mr Ramu added that the views of third-party interveners should be heard on whether the co-respondent mechanism should be triggered and during the prior involvement procedure. He underlined the concern that the EU's proposal for a reattribution mechanism for cases concerning the EU's common foreign and security policy (CFSP) should ensure that any additional burden on applicants and any delay in proceedings are clearly minimised. Ms Pillay added that the position of third-party interveners should be ensured through internal rules of the CJEU.

29. Several delegations agreed with the importance of placing applicants' interests at the heart of the accession agreement. The Chairperson invited the representatives of civil society to submit any specific drafting proposals in writing. The Group thanked Ms Mole, Ms Pillay and Mr Ramu for their participation and valuable contributions.

Item 5: Proposals submitted on amendments to Articles 6-8 of the Accession Agreement (including the relevant parts of the other accession documents)

30. The Group examined the proposal to amend Article 6 of the accession agreement concerning the election of judges. Several delegations expressed concern that the accession instruments should neither limit, nor appear to seek to limit, the prerogatives of the Parliamentary Assembly or the European Parliament. The representative of the EU considered that "only when" does not typically have the same meaning as "whenever" and an outside observer might assume that the change of wording was intended to produce a change of meaning. The delegation that had submitted this proposal explained that it was only intended to limit the circumstances in which members of the European Parliament could vote in the Parliamentary Assembly, which was the issue addressed in article 6, paragraph 1. The Secretariat noted that the Assembly had two roles, one under the Convention, to elect the judges of the Court, and one under the Statute of the Council of Europe. The accession agreement could only affect the Assembly's role under the Convention. The Chair noted that the context of the proposal, including the title of article 6, made clear that its scope covered only the involvement of members of the European Parliament in the election of judges. Some delegations considered that on the basis of these explanations, they could accept either version, even if the word "whenever" did not have the same emphasis as the expression "only when".

31. The Group examined the proposal to amend paragraph 76 of the explanatory report. There was support for the proposal, with the representative of the EU indicating that he would have to study it more carefully in the context of surrounding paragraphs before taking a final position.

32. The Group then examined the proposal to amend the proposed Rule 18 of the Rules of the Committee of Ministers on supervision of the execution of judgments of the Court. The delegation that had submitted this proposal 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. This delegation expressed the view that the proposals aimed to make the minimal changes necessary to achieve this goal. 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. The Group exchanged views on the implications for voting majorities of the cessation of the Russian Federation's membership of the Council of Europe. It noted that when one took into account also the UK's departure from the EU, there had been only a marginal change in the balance between EU and non-EU member States, and that the post-accession involvement of the EU would make the total number of parties with the right to vote when the Committee of Ministers was supervising the execution of judgments the same as when the Russian Federation was a member.

33. The delegation that had submitted the proposal explained that it 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. 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.

34. The Group asked the Secretariat to prepare a numerical analysis of the effects of the different majorities being proposed under the proposal to amend Rule 18, for examination when the proposal is discussed further at a future meeting. The delegation that had submitted the proposals on Rule 18 thanked the Group for the in-depth discussions and proposed to come back to the issue on the basis of the Secretariat's numerical analysis.

35. The Group examined the proposal to amend Article 8 of the accession agreement, on the participation of the EU in expenditure related to the Convention. The delegation that had submitted the proposal noted that the cessation of the Russian Federation's membership of the Council of Europe meant that the organisation's budget for 2022 was not yet determined. The Chairperson noted that the budgetary situation may have changed further by the time the accession agreement is finally adopted and the figures may need to be recalculated at a later stage. The representative of the EU stated that he had no objections of principle to recalculating the figures.

36. The Chairperson concluded that on this basis, the Group had provisionally agreed to the proposal to amend Article 8, and that it would return to the proposals concerning Articles 6 and 7 at a future meeting.

Item 6: Discussion of proposals submitted by the EU on 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)

37. The Chairperson recalled that delegations had asked a number of questions about the EU's proposals concerning Basket 4. The representative of the EU stated that despite their best efforts, he and his colleagues would not be able to provide any new information. The difficulty in answering these

questions had led the EU to reconsider the feasibility of the reattribution mechanism and to reflect on whether there may be potential alternatives, although more time was needed for these reflections.

38. One delegation noted that any new mechanism would have to be practicable for applicants, with a procedure that was transparent and not too complicated. Another delegation thought the problem could more easily be addressed within the EU, by giving the CJEU jurisdiction over CFSP issues. The Director for Legal Advice and Public International Law understood the historical reasons for excluding these issues from the CJEU's jurisdiction, but the reasons for depriving, for example, the victims of military actions of any remedy were no longer convincing. He asked whether the CJEU's jurisdiction could be extended other than by way of treaty amendment to cover acts under the CFSP affecting individuals, recalling the 1971 Luxembourg Protocol on the jurisdiction of the Court of Justice. The representative of the Registry recalled that it may be foreseen also for the Court to give its opinion on the accession instruments. Bearing in mind that caselaw showed that the Court was wary of 'legal fictions', preferring instead to look at factual situations, any reattribution mechanism would in principle have to produce results that corresponded to reality. If that was not the case, a proposal to that effect should at the very least be convincing and watertight, technically thought-through, and with no loose ends. This was not yet the case and the Court may therefore find it difficult to accept this proposal in its current state.

39. The representative of the EU replied that he had taken good note of these arguments, which would be carefully considered.

Item 7: Any other business

40. None.

Item 8: Adoption of the meeting report

41. The Group adopted the present meeting report before the closure of the meeting.

APPENDIX I**Agenda**

1. **Opening of the meeting and adoption of the agenda**
2. **Discussion of proposals for the remaining issues in Basket 1 (the EU's specific mechanisms of the procedure before the European Court of Human Rights)**
3. **Discussion of proposals submitted on Basket 2 (inter-party applications under Article 33 ECHR; requests for advisory opinion under Protocol No.16)**
4. **Exchange of views with representatives of civil society and of national human rights institutions** (*Note that this item is provisionally scheduled for Wednesday 11 May from 10 a.m. to noon*)
5. **Proposals submitted on amendments to Articles 6-8 of the Accession Agreement (including the relevant parts of the other accession documents)** (*Note that this item is provisionally scheduled for Thursday 12 May from 10 a.m. to 12.30 p.m.*)
6. **Discussion of proposals submitted by the EU on 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. **Any other business**
8. **Adoption of the meeting report**

Working documents

Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms	CM(2013)93 add1, Appendix 1, pp. 3-9
Draft declaration by the European Union to be made at the time of signature of the Accession Agreement	CM(2013)93 add1, Appendix 2, p. 10
Draft rule to be added to the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements in cases to which the European Union is a party	CM(2013)93 add1, Appendix 3, p. 11
Draft model of memorandum of understanding between the European Union and X [State which is not a member of the European Union]	CM(2013)93 add1, Appendix 4, p. 12

Draft explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms	CM(2013)93 add1, Appendix 5, pp. 13-28
Position paper for the negotiation on the European Union's accession to the European Convention for the protection of Human Rights and Fundamental Freedoms	47+1(2020)1
Paper by the Chair to structure the discussion at the 6 th negotiation meeting	47+1(2020)2
Compilation by the Secretariat of recent cases in the area of Basket 3 ("The principle of mutual trust between the EU member states")	47+1(2020)4rev
Negotiation Document submitted by the European Union on 2 November 2020	Restricted
Compilation by the European Commission of recent and currently pending cases before the Court of Justice of the European Union in the area of Basket 4 ("Common Foreign and Security Policy")	Non-paper
Proposals by the Secretariat for discussion of agenda items 4 and 5 [<i>refers to the 8th meeting</i>]	47+1(2021)5
Non-paper prepared by the Secretariat regarding the estimated expenditure related to the Convention regarding Article 8 of the draft Accession Agreement	47+1(2021)6
Proposals by the Secretariat for the discussion on Basket 1 ("The EU's specific mechanisms of the procedure before the European Court of Human Rights") [<i>for the 10th meeting</i>]	47+1(2021)7
Proposals by the Secretariat for the discussion on Basket 3 ("The principle of mutual trust between the EU member states") [<i>for the 10th meeting</i>]	47+1(2021)8
Proposal prepared by the Norwegian delegation on "Inter-Party applications under Article 33 of the European Convention of Human Rights" [<i>for the 10th meeting</i>]	47+1(2021)9
Revised proposal on "Inter-Party applications under Article 33 of the European Convention of Human Rights" by the Norwegian delegation and the Secretariat (<i>for the 11th meeting</i>)	47+1(2021)10
Revised proposals by the Secretariat on issues contained in Basket 3 ("The principle of mutual trust between the EU member states") (<i>for the 11th meeting</i>)	47+1(2021)11
Revised proposals by the Secretariat on certain issues contained in Basket 1 ("The EU's specific mechanisms of the procedure before the European Court of Human Rights") (<i>for the 11th meeting</i>)	47+1(2021)12
Consolidated version of the draft Accession Instruments (as of 31 October 2021) (<i>for the 12th meeting</i>)	47+1(2021)13
Revised proposals by the Secretariat on issues contained in Basket 3 ("The principle of mutual trust between the EU member states") (<i>for the 12th meeting</i>)	47+1(2021)14

Background paper by the Secretariat on scenarios in the context of Article 7 of the draft Accession Agreement (<i>for the 12th meeting</i>)	47+1(2021)15
Overview of treaty clauses on EU voting rights in Council of Europe treaties – background paper prepared by DLAPIL (<i>for the 12th meeting</i>)	Non-paper
Proposals by the European Union on the situation of EU acts in the area of the Common Foreign and Security Policy that are excluded from the jurisdiction of the Court of Justice of the European Union (Basket 4) (<i>for the 12th meeting</i>)	Restricted
Proposals and Amendments submitted by the EU Delegation regarding the procedure for initiating the co-respondent mechanism (<i>for the 12th meeting</i>)	47+1(2021)16
Consolidated version of the draft Accession Instruments (as of 16 December 2021)	47+1(2021)17
Revised proposals by the Secretariat for the termination of the co-respondent mechanism (Article 3, paragraph 5a. of the draft Accession Agreement) and other remaining issues in Basket 1 [<i>for the 13th meeting</i>]	47+1(2021)18
Document by the Secretariat on the state of play of the proposals for Basket 2 [<i>for the 13th meeting</i>]	47+1(2021)19
Text proposals and amendments submitted by Turkey regarding the revision of Articles 6, 7 and 8 of the Accession Agreement including the relevant parts of the other accession instruments [<i>for the 13th meeting</i>]	Restricted

Reference documents

Ad hoc terms of reference concerning accession of the EU to the Convention given to the CDDH by the Ministers' Deputies during their 1085 th meeting (26 May 2010)	CDDH(2010)008
Decision by the Minister's Deputies Committee of Ministers at its 1364 th meeting (15 January 2020) on the continuation of the ad hoc terms of reference for the CDDH to finalise the legal instruments setting out the modalities of accession of the European union to the European Convention on Human Rights	CM/Del/JAN(2020)1364/4.3
Letter of 31 October 2019 by the President and the First Vice-President of the European Commission to the Secretary General of the Council of Europe	DD(2019)1301
Opinion 2/13 of 18 December 2014 of the Court of Justice of the European Union	A-2/13 ; EC LI: EU: C : 2014: 2454

Protocol No. 16 to the European Convention on Human Rights and its [explanatory memorandum](#)

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214](#)

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

ALBANIA / ALBANIE	Ms Migena MAKISHTI, Department of International and European Law, Ministry for Europe and Foreign Affairs of Albania
ANDORRA / ANDORRE	Mr Joan FORNER ROVIRA, Permanent Representative of Andorra to the Council of Europe
ARMENIA / ARMÉNIE	Dr. Vahagn PILIPOSYAN, Head of International Treaties and Law Department of the Ministry of Foreign Affairs of the Republic of Armenia
AUSTRIA / AUTRICHE	Mr Martin MEISEL, Head of Department for EU Law, Federal Ministry for Foreign Affairs Ms Brigitte OHMS, Deputy Government Agent of Austria, Deputy Head of Department, European and International Law, Human Rights, Federal Chancellery
AZERBAIJAN / AZERBAIDJAN	Mr Şahin ABBASOV, Lead Consultant, Human Rights Unit, Law Enforcement Bodies Department, Administration of the President of the Republic of Azerbaijan Ms Zhala IBRAHIMOVA, Deputy to the Permanent Representative of the Republic of Azerbaijan to the Council of Europe Ms 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	Ms Isabelle NIEDLISPACHER, Co-Agent du Gouvernement de la Belgique auprès de la Cour européenne des droits de l'homme Mr Olivier SACALIS, Attaché, Service Privacy et égalité des chances

BOSNIA AND HERZEGOVINA <i>/ BOSNIE-HERZEGOVINE</i>	<p>Ms Monika MIJIC, Acting Agent of the Council of Ministers of Bosnia and Herzegovina before the European Court of Human Rights</p> <p>Ms Jelena CVIJETIC, Acting Agent of the Council of Ministers of Bosnia and Herzegovina before the European Court of Human Rights</p> <p>Ms Harisa BACVIC, Acting Agent of the Council of Ministers of Bosnia and Herzegovina before the European Court of Human Rights</p>
BULGARIA / <i>BULGARIE</i>	excused
CROATIA / <i>CROATIE</i>	<p>Ms Romana KUZMANIĆ OLUIĆ, Counsellor, Ministry of Foreign and European Affairs, Directorate General for Multilateral Affairs and Global Issues, Division for Human Rights and Regional International Organisations and Initiatives</p> <p>Ms Narcisa BEĆIREVIĆ, Minister Plenipotentiary and Deputy to the Permanent Representative of Croatia to the Council of Europe</p> <p>Ms Petra JURINA, JHA Counsellor at the Permanent Representation of the Republic of Croatia to the EU</p> <p>Ms Ana FRANGES, Head of Unit, Directorate for European Affairs, International and Judicial Cooperation</p>
CYPRUS / <i>CHYPRE</i>	Mr Demetris LYSANDROU, Senior Counsel, Law Office of the Republic of Cyprus
CZECH REPUBLIC / <i>REPUBLIQUE TCHÈQUE</i>	<p>Mr Vít Alexander SCHORM, Agent of the Czech Government before the European Court of Human Rights / Agent du Gouvernement tchèque devant la Cour européenne des Droits de l'Homme</p> <p>Ms Dominika CZECHOVÁ, Lawyer, Permanent Representation of the Czech Republic to the EU</p>
DENMARK / <i>DANEMARK</i>	Ms Lea Elkjær TARP GARD, Danish Ministry of Justice

	Mr Afshin BERAHMAND, Head of section / EU law and international litigation (ITEU), Ministry of foreign affairs of Denmark
ESTONIA / ESTONIE	Ms Helen-Brigita SILLAR, Lawyer, Legal Department, Ministry of Foreign Affairs
FINLAND / FINLANDE	Ms Krista OINONEN, Director, Unit for Human Rights Courts and Conventions, Agent of the Government of Finland before the European Court of Human Rights, Legal Service, Ministry for Foreign Affairs Ms Maria GUSEFF, Director, Unit for EU and Treaty Law, Legal Service, Ministry for Foreign Affairs Ms Satu SISTONEN, Legal Counsellor, Unit for Human Rights Courts and Conventions, Legal Service, Ministry for Foreign Affairs
FRANCE	Ms Bathilde RICHOUX, Consultante juridique pour la Direction des Affaires Juridiques du ministère de l'Europe et des Affaires Etrangères. Mr Emmanuel LECLERC, ministère de l'Europe et des Affaires étrangères, Direction des affaires juridiques, Sous-direction du droit de l'Union européenne et du droit international économique
GEORGIA / GEORGIE	Ms Nino MICHIDZE, First category chief specialist in EU law department, Ministry of Justice of Georgia
GERMANY / ALLEMAGNE	Mr Hans-Jörg BEHRENS, Head of Unit IVC1, Human Rights Protection, Government Agent before the ECtHR, Federal Ministry of Justice Dr Kathrin MELLECH, Legal Advisor, Federal Ministry of Justice
GREECE / GRÈCE	Ms Athina CHANAKI, Legal Counsellor, Legal Department/Public International Law Section, Ministry of Foreign Affairs of the Hellenic Republic
HUNGARY / HONGRIE	Ms Monika WELLER, Co-agent before European Court of Human Rights, Ministry of Justice Mr Péter CSUHAN, Senior legal adviser

ICELAND / ISLANDE	<p>Ms Ragnhildur ARNLJÓTSÐÓTTIR, Ambassador and Permanent Representative of Iceland to the Council of Europe</p> <p>Ms Elísabet GISLADOTTIR, specialist at the Icelandic Ministry of Justice</p> <p>Ms Sandra LYNGDORF, Deputy to the Permanent Representative, Legal Advisor</p>
IRELAND / IRLANDE	Mr Barra LYSAGHT, Assistant Legal Adviser, Department of Foreign Affairs, Dublin 2
ITALY / ITALIE	<p>Mr Arturo ARCANO, Deputy Permanent Representative of Italy to the Council of Europe</p> <p>Ms Maria Laura AVERSANO, Attachée Juridique</p>
LATVIA / LETTONIE	<p>Ms Kristīne LĪCIS (Representative of Latvia before the European Court of Human Rights and Acting Director of Legal Department of the Ministry of Foreign Affairs of the Republic of Latvia)</p> <p>Ms Elīna Luīze VĪTOLA (Head of Office of the Representative of Latvia before the European Court of Human Rights)</p>
LIECHTENSTEIN	excused
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LUXEMBOURG	<p>Ms Brigitte KONZ, Présidente du Tribunal, Tribunal d'Arrondissement de Diekirch</p> <p>Mr Robert BEVER, Conseiller – Coordination Justice et Affaires intérieures</p>
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SERBIA / SERBIE	excused
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SECRETARIAT / SECRETARIAT

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<p>DG I – Human Rights and Rule of Law / Droits de l'Homme et État de droit</p> <p><i>Council of Europe</i></p>	<p>Ms Sorina LECLER, Department for Human Rights, Justice and Legal Cooperation Standard Setting Activities/ Assistante, Service des activités normatives en matière de droits de l'homme, justice et coopération juridique</p>

INTERPRETERS / INTERPRÈTES

DEVICTOR Grégoire

DEBURLET-SUTER Lucie

PEDUSSAUD Jean-Jacques

APPENDIX III

Provisionally agreed text for Article 3 of the Accession Agreement and corresponding paragraphs of the Explanatory Report

Article 3 – Co-respondent mechanism

1. Article 36 of the Convention shall be amended as follows:
 - a. the heading of Article 36 of the Convention shall be amended to read as follows: “Third party intervention and co-respondent”;
 - b. a new paragraph 4 shall be added at the end of Article 36 of the Convention, which shall read as follows:

“4. The European Union or a member State of the European Union may become a co-respondent to proceedings by decision of the Court in the circumstances set out in the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms. A co-respondent is a party to the case. The admissibility of an application shall be assessed without regard to the participation of a co-respondent in the proceedings.”
2. Where an application is directed against one or more member States of the European Union, the European Union may become a co-respondent to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded of a provision of European Union law, including decisions taken under the Treaty on European Union and under the Treaty on the Functioning of the European Union, notably where that violation could have been avoided only by disregarding an obligation under European Union law. **The Court shall make available to the European Union information concerning all such applications that are communicated to its member States.**
3. Where an application is directed against the European Union, the European Union member States may become co-respondents to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded of a provision of the Treaty on European Union, the Treaty on the Functioning of the European Union or any other provision having the same legal value pursuant to those instruments, notably where that violation could have been avoided only by disregarding an obligation under those instruments. **The Court shall make available to the member States of the European Union information concerning all such applications that are communicated to the European Union.**
4. Where an application is directed against and notified to both the European Union and one or more of its member States, the status of any respondent may be changed to that of a co-respondent if the conditions in paragraph 2 or paragraph 3 of this article are met.

~~4a. The Court shall make available to the European Union information concerning all cases communicated to its member States and make available to the latter information concerning all cases communicated to the European Union.~~

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. 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. Before the co-respondent mechanism is terminated, the Court shall grant the applicant an opportunity to state its views on the matter.

6. In proceedings to which the European Union is a co-respondent, if the Court of Justice of the European Union has not yet assessed the compatibility with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded of the provision of European Union law as under paragraph 2 of this article, sufficient time shall be afforded for the Court of Justice of the European Union to make such an assessment, and thereafter for ~~the~~ **all** parties to make observations to the Court. The European Union shall ensure that such assessment is made quickly so that the proceedings before the Court are not unduly delayed. The provisions of this paragraph shall not affect the powers of the Court.

7. If the violation in respect of which a High Contracting Party is a co-respondent to the proceedings is established, 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].~~

8. This article shall apply to applications submitted from the date of entry into force of this Agreement.

Corresponding paragraphs of the explanatory report

Termination of the co-respondent mechanism

58. In the course of the proceedings, it may become apparent that the material conditions for the application of the co-respondent mechanism in Article 3, paragraph 2 or 3, as the case may be, no longer apply. In those circumstances, there would be no longer a legitimate reason to continue the application of the co-respondent mechanism, as the proper administration of justice would not require that a High Contracting Party is maintained as co-respondent if it is neither responsible for a violation nor capable of remedying it. On that basis, Article 3, paragraph 5a. provides for a possibility to terminate the co-respondent mechanism. Such termination shall in principle represent the *actus contrarius* to that mechanism's original application. Therefore, the Court will decide according to a renewed assessment by the EU - to be provided through a reasoned declaration in writing - of the material conditions for applying the co-respondent mechanism on the basis of the applicable EU law, the conclusion of which will be considered as determinative and authoritative

59. Article 3, paragraph 5a. requires that the views of the ~~other parties to the proceedings, notably the applicant,~~ are heard. To that effect, the Court will inform the ~~applicant other parties~~ of the assessment and set a short time limit for possible comments. The Court will submit the comments to the EU and set a short time limit to provide the EU with the possibility to reconsider its assessment in light of these comments. The co-respondent mechanism shall not be terminated for any reasons other than the fact that the material conditions for applying the mechanism no longer apply.

Information concerning potential co-respondent cases

59a. Article 3, paragraphs ~~2 and 3~~ ~~4a.~~ of the Accession Agreement states that the Court shall make available information to the EU concerning all cases communicated to its member States and make available to the latter information concerning all cases communicated to the EU. The aim of ~~these provisions~~ ~~this~~ provisions is to ensure that the EU and its member States will be in a position to determine in which cases to initiate the co-respondent mechanism, as well as – in proceedings to which the EU would become co-respondent – to identify in which of these cases to initiate the *prior involvement*-procedure under Article 3, paragraph 6.

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 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. ~~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.

Prior involvement of the CJEU in cases in which the EU is a co-respondent

65. Cases in which the EU may be a co-respondent arise from individual applications concerning acts or omissions of EU member States. The applicant will first have to exhaust domestic remedies available in the national courts of the respondent member State. These national courts may or, in certain cases, must refer a question to the CJEU for a preliminary ruling on the interpretation and/or validity of the EU act at issue (Article 267 of the TFEU). Since the parties to the proceedings before the national courts may only suggest such a reference, this procedure cannot be considered as a legal remedy that an applicant must exhaust before making an application to the Court. However, without such a preliminary ruling, the Court would be required to adjudicate on the conformity of an EU act with human rights, without the CJEU having had the opportunity to do so, by ruling on, as the case may be, the validity or interpretation of a provision of secondary law **or the interpretation** of a provision of primary law.

66. Even though this situation is expected to arise rarely, it was considered desirable that an internal EU procedure be put in place to ensure that the CJEU has the opportunity to assess the compatibility with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded of the provision of EU law which has triggered the participation of the EU as a co-respondent **(the “prior involvement of the CJEU”). Assessing the compatibility with the Convention shall mean to rule on the validity or the interpretation of a legal provision contained in acts of the EU institutions, bodies, offices or agencies, or on the interpretation of a provision of the TEU, the TFEU or of any other provision having the same legal value pursuant to those instruments. Such assessment should take place before the Court decides on the merits of the application. This procedure, which is inspired by the principle of subsidiarity, only applies in cases in which the EU has the status of a co-respondent. It is understood that the parties involved – including the applicant, who will be given the possibility to obtain legal aid – will have the opportunity to make observations in the procedure before the CJEU.**

66a. Determining whether it is necessary to initiate the prior involvement of the CJEU under Article 3, paragraph 6 **presupposes depends upon a finding by the EU of whether the CJEU has already undertaken the assessment described in paragraph 66**~~the applicable rules of EU law. Therefore, in a similar manner as for the procedure of assessing whether the criteria for triggering the co-respondent mechanism are met (Article 3, paragraph 5), the prior involvement of the CJEU will be initiated according to an assessment by the EU of the applicable EU law.~~ This finding ~~this assessment~~ by the EU will be considered as determinative and authoritative, **as is the case for the conclusion by which the co-respondent mechanism is triggered under Article 3, paragraph 5. Insofar as possible, the EU will examine the need to initiate the prior involvement procedure at the same time as examining the need to trigger the co-respondent mechanism.**

66b. **If the prior involvement of the CJEU applies**, assessing the compatibility with the Convention shall mean to rule on the validity or the interpretation of a legal provision contained in acts of the EU institutions, bodies, offices or agencies, or on the interpretation of a provision of the TEU, the TFEU or of any other provision having the same legal value pursuant to those instruments. **The CJEU will not assess the act or omission complained of by the applicant, but the EU legal basis for it. Such** The assessment should take place before the Court decides on the merits of the application. This procedure, which is inspired by the principle of subsidiarity, only applies in cases in which the EU has the status of a co-respondent. It is understood that ~~the~~ parties involved – including the

applicant, who will be given the possibility to legal aid – will have the opportunity to make observations in the procedure before the CJEU.

~~67. In the course of its prior involvement, the CJEU will not assess the act or omission complained of by the applicant, but the EU legal basis for it.~~

68. The prior involvement of the CJEU will not affect the powers and jurisdiction of the Court. The assessment of the CJEU will not bind the Court.