

47+1(2020)R7

26 November 2020

**7TH MEETING OF THE CDDH AD HOC NEGOTIATION
GROUP (“47+1”) ON THE ACCESSION OF THE
EUROPEAN UNION TO THE EUROPEAN
CONVENTION ON HUMAN RIGHTS**

Meeting Report

Tuesday 24 November 2020 (10:00 a.m.) – Thursday 26 November 2020 (4:30 p.m.)

(Due to the COVID-19 situation, the meeting was held through the KUDO
videoconferencing system)

Council of Europe

1. The CDDH ad hoc negotiation group (“47+1 Group”) on the accession of the European Union (EU) to the European Convention on Human Rights (ECHR) held its 7th meeting from 24-26 November 2020. Due to the COVID-pandemic, the meeting was held via videoconference. The list of participants is attached as Appendix II.

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

2. The Chair of the “47+1 Group”, Ms Tonje MEINICH (Norway), opened the meeting and asked delegates about the adoption of the agenda.

3. Several delegations made statements of a general nature in which they recalled their commitment to the EU’s accession to the ECHR, but in which they also underlined the need to preserve the Convention system, to find the right balance in the negotiations and to adhere to the general principles which the Group had agreed upon at the outset of its work (as listed in paragraph 7 of the explanatory report to the draft Accession Agreement). Those delegations also referred to the joint statement made by the Council of Europe member states which are not EU members (Appendix III to the meeting report of the 6th meeting, document CDDH47+1(2020)R6). One delegation drew attention to the need to identifying all issues for discussion at this early stage, thus recognising the need to look at all elements of the draft accession instruments. The delegations thanked the EU for having submitted concrete proposals to the present meeting and stated that they looked forward to the discussion.

4. The Group adopted the agenda without further changes (Appendix I).

Item 2: Discussion of proposals submitted on the EU’s specific mechanisms of the procedure before the European Court of Human Rights

5. The EU provided a general introduction of its proposals, which at this stage concerned those areas which it considered to have sufficiently advanced in the discussion to merit the submission of concrete proposals. This concerned notably the EU’s specific mechanisms of the procedure before the European Court of Human Rights (ECtHR) (“Basket 1”), the operation of inter-party applications (Article 33 ECHR) and of references for an advisory opinion under Protocol No. 16 (“Basket 2”), as well as proposals submitted in respect of Article 53 ECHR. The EU stated its understanding that, even though proposals for the remaining areas would be submitted at a later stage, all proposals would have to be eventually considered as a whole by the Group. The rationale behind the proposals were to maintain the original draft accession instrument as much as possible, while fully addressing the concerns expressed by the Court of Justice of the European Union (CJEU) in Opinion 2/13 and remaining to the greatest extent possible in line with the joint statement made by the Council of Europe member states which are not EU members.

6. The EU elaborated on a proposal which would allow the EU to join as co-respondent in applications directed against one or more of its member states (or *vice versa*) by making a declaration to the ECtHR to that effect. The EU explained that the determination whether the co-respondent mechanism should apply in a given case was purely a matter of EU law, and that the authoritative assessment of the distribution of powers within the EU should be made by the latter. The Chair noted that no delegation questioned the criteria for the application of the co-respondent mechanism as such and that the CJEU in Opinion 2/13 had not raised any objections with regard to them. The Group discussed where they should appear in the draft accession instruments. The EU stated that maintaining the criteria in Article 3 of the draft Accession Agreement would carry the legal consequences that the ECtHR retained the final authority on the application of the criteria for the triggering of the co-respondent mechanism, and therefore would rule incidentally on the internal

distribution of powers, which had triggered the concern raised by the CJEU in Opinion 2/13. Some delegations suggested that the criteria could be removed to other places in the draft accession instruments, such as the draft declaration by the EU in Appendix II or the explanatory report. The EU indicated openness to this proposal, while some delegations preferred to keep it in the draft Accession Agreement. A proposal that the EU should be bound to submit a reasoned declaration to the ECtHR to become co-respondent in which it had to outline the reasons for considering that the substantive criteria for applying the mechanism are met received support from several delegations, and the Group will look further into this proposal at its next meeting. The Group also discussed the difference of the two alternatives with which the co-respondent mechanism could be triggered according to the EU proposal, i.e. an invitation by the ECtHR or a unilateral declaration, including with regard to the involvement of all parties (including the applicant) before a decision is taken.

7. Concerning a proposal for a provision to deal with the possibility for a co-respondent to terminate its participation in the proceedings, the Group could not come to an agreement of the issue. The EU elaborated on the rationale for such possibility, notably for scenarios where the co-respondent mechanism had been applied, but in the meantime - e.g. through a clarifying decision by the CJEU in the course of the *prior involvement*-procedure - it had become clear that the necessary remedy would have to come solely from the respondent EU member state. Some delegations expressed concerns about the possibility of a High Contracting Party to leave the proceedings before the ECtHR via unilateral declaration. Any solution would have to be carefully elaborated, in order to avoid such appearance. It was also pointed out that the termination of the co-respondent mechanism could be seen as an *actus contrarius* to the joining as co-respondent through a unilateral declaration, in which case the question would arise whether the two alternatives for triggering the mechanism (i.e. by invitation or by request/declaration) would require a difference in treatment. The Group will come back to this issue. Some delegations pointed to possible modifications of the already existing possibility to terminate the co-respondent mechanism as outlined in paragraph 59 of the explanatory report.

8. The Group discussed a proposal by the EU which would, in order to identify appropriate cases for which the co-respondent mechanism would apply, require the ECtHR to inform the EU of cases notified to its member states and *vice versa*. Some delegations stated that this would add an undue burden on the resources of the ECtHR and considered this to be an issue which could equally be solved between the EU and its member states internally. Other delegations pointed to the fact that the EU and its member states should not be considered as a single entity and that such a mechanism would ensure that no case for which the co-respondent mechanism applies would “slip through the net”. The representative of the Registry of the ECtHR expressed its readiness for looking into possible modalities to have an automated and resource-efficient way of informing about such cases, if that would further the purpose of achieving EU accession.

9. The Group considered a proposal in Article 3, paragraph 7 of the draft Accession Agreement, according to which a High Contracting Party which is a co-respondent would not be held responsible for a violation if it had made a reservation which would preclude it from such responsibility. Some delegations expressed support for this proposal, while others questioned the need for such inclusion in view of the presumably rare occurrence of such cases and the fact that this would already follow from general principles. The Group will look further into the issue, including whether the underlying principle could be addressed at an earlier stage in the proceedings than as part of the provision which deals with the ultimate responsibility for a violation (Article 3, paragraph 7), and whether additional clarifications in the explanatory report could facilitate a solution. This could include a reference to the fact that reservations concerned were those within the meaning of Article 57 ECHR.

10. With regard to a proposal from the EU to delete the possibility for an exemption from the principle of joint responsibility for a violation in co-respondent cases (Article 3, paragraph 7 of the draft Accession Agreement), there was no agreement within the Group in view of such a single form of joint responsibility. While some delegations supported the proposal as it would strengthen the position of

the applicant, not least with regard to the execution of a judgment which had found a violation, others suggested that this could predetermine unduly the outcome of the proceedings and that paragraph 62 of the explanatory report allowed the ECtHR already sufficient flexibility in this respect.

11. The Group considered a proposal under Article 3, paragraph 6 of the draft Accession Agreement which would enable the EU to determine whether a case would be suitable for the *prior involvement*-procedure, on the basis of the interpretation of the applicable EU law and its internal distribution of powers. The EU presented its proposal and explained the link between this paragraph and paragraph 2 on the co-respondent mechanism. The representative of the Registry of the ECtHR underlined that the ECtHR would have no interest in making this assessment itself, since it related to EU law only. Regarding the burden on the ECtHR which the prior involvement procedure would represent, he indicated that those cases were likely to arise very rarely. The Group also considered a clarification in paragraphs 65 and 66 of the explanatory report with regard to the interpretation of a provision EU secondary law in the course of the *prior involvement*-procedure. If the question on the criteria could be solved in a satisfactory manner, only one delegation had objections to these proposals from the EU and expressed its general concerns about the necessity of the *prior involvement*-procedure.

Item 3: Discussion of proposals submitted on the operation of inter-party applications (Article 33 ECHR) and of references for an advisory opinion (Protocol No. 16) in relation to EU member states, and of proposals submitted in respect of Article 53 ECHR

12. With regard to the issues contained in Basket 2, the Group discussed proposals by the EU relating to the issue of inter-party cases under Article 33 ECHR and requests for advisory opinions under Protocol No. 16.

13. A proposal by the EU, according to which an additional sentence in Article 33 ECHR would expressly state that this provision should not apply to applications brought by the EU against one or more of its member states (or *vice versa*) was considered with concern by several delegations. They stated that this could limit the jurisdiction of the ECtHR and raise issues with regard to the equality of High Contracting Parties. Some delegations suggested that this was rather a matter related to internal EU matters. The EU reiterated the importance of finding a legally sound solution to address the concerns raised in Opinion 2/13 by the CJEU in this respect. The Group will resume the discussion of this issue at its next meeting, also in light of suggestions whether alternative means would be available to solve it within the accession instruments which would not require an amendment to the ECHR itself.

14. As part of this Basket, a proposal by the EU concerned the introduction of an additional provision in the draft Accession Agreement which would provide for a procedure in which the EU could ask the ECtHR to suspend inter-party applications between EU member states under Article 33 ECHR or a request for an advisory opinion by a court of an EU member state under Protocol No. 16, pending internal EU proceedings on the question whether the institution of such application/request was in violation of EU law, and eventually discontinue the proceedings before the ECtHR if that was the case. Some delegations expressed concern about this proposal in terms of it being in line with the general principles of the negotiation process, as well as whether the proposed provision should relate to both Article 33 ECHR and Protocol No. 16 simultaneously. The Group also held a discussion on the relationship between the draft Accession Agreement and Protocol No. 16 (about which some delegations drew attention to the fact that the EU would not accede for the time being), and the difference in nature between the procedure for requests for advisory opinions and the preliminary reference procedure under Article 267 of the Treaty on the Functioning of the European Union. Some suggestions were made whether a solution could be found by having regard to all tools at the disposal of the Group to amend the draft accession instruments, and to the fact that the ECtHR – unlike in the

case of inter-party applications – has a discretion under Protocol No. 16 on whether or not to entertain a request for an advisory opinion. The EU explained the rationale behind its proposal and behind the concerns of the CJEU, and emphasised the importance of reflecting this in a manner that takes fully into account these concerns. The Group will revert to these suggestions at its next meeting.

15. Finally, the Group considered a proposal by the EU on the coordination of Article 53 ECHR and Article 53 of the EU Fundamental Rights Charter. There was some support on the substance of the proposal if it was amended with a clarification that the minimum protection as enshrined in the ECHR was maintained, and the proposal would not be included in Article 5 of the draft Accession Agreement. Other delegations objected to the inclusion of the proposal in the draft Accession Agreement and stated that the matter was better resolved in a separate declaration by the EU member states as an appendix to the draft Accession Agreement, or they raised concerns with regard to the wording of the draft proposal for a paragraph 74b. in the explanatory report. One delegation stated that the proposal might limit the jurisdiction of the ECtHR and could be problematic for the implementation of the mutual trust. The Chair concluded that, while there appeared to be some understanding on the substance underlying the proposal, its wording should be refined to serve as a basis for continuing the discussion on this point at the next meeting, which would also include the placement of the proposal.

Item 4: Discussion of other issues which are not contained in the Chair’s “Paper to structure the discussion at the 6th negotiation meeting” (including issues regarding Articles 6-8 of the draft Accession Agreement, and its appendices)

16. The Group held a preliminary discussion on other issues which were not contained in the Chair’s “Paper to structure the discussion at the 6th negotiation meeting” (document CDDH47+1(2020)2) but which delegations wished to raise, with the Chair underlining that any such issues should be submitted in writing to the Group before it would enter into a full discussion on them. The Chair noted that such issues could in particular have merits where they related to developments within the Council of Europe since the adoption of the draft accession instruments in 2013, in order to ensure that the latter is consistent with the current practice. The Group heard in this respect an intervention in particular with regard to Articles 6-8 of the draft Accession Agreement, and the relevant parts of the explanatory report as well as the Appendices concerned.

17. Regarding Article 6 (Election of judges), two delegations suggested that the accession instruments could be amended to better clarify that the participation of the representatives from the European Parliament in the Parliamentary Assembly (PACE) is limited to the election of judges to the ECtHR only and that the EU would be bound as any other High Contracting Party by the legal instruments adopted within the Council of Europe for selecting candidates for the post of judge at the ECtHR. One delegation also raised a question whether the European Parliament should have a vote on any matters in PACE. An inquiry was also made as to the number of representatives in the delegation of the European Parliament as contained in Article 6, paragraph 1. The Secretariat will reach out to the PACE Secretariat about modalities that might have been agreed between PACE and the European Parliament. 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. The Group decided to invite to its next meeting representatives of the Committee of Ministers Secretariat and the Department for the Execution of Judgments of the ECtHR for an exchange of views on changes in the practice since 2013 of the supervision of the execution of judgments by the Committee of Ministers. Regarding

Article 8 (Participation of the EU in the expenditure related to the Convention), the question was asked how the contribution from the EU had been estimated and whether this estimation was still valid in 2020. The Group tasked the Secretariat to prepare a non-paper for the next meeting, explaining how the percentage contained in the provision (i.e. the proportion of the ordinary budget of the Council of Europe dedicated to the functioning of the Convention system) is calculated and how it applies to the current budget system. The Secretariat and the Legal Adviser also provided clarifications on the possibility of an agreement between the Council of Europe and the EU as mentioned in paragraph 2a. of Article 8.

Item 5: Exchange of views with representatives of civil society and representatives of national human rights institutions

18. In accordance with the decisions taken at the last meeting, delegations held an exchange of views with representatives of civil society and national human rights institutions, namely the Advice on Individual Rights in Europe (AIRE) Centre, Amnesty International, the International Commission of Jurists, the Council of Bars and Law Societies of Europe (CCBE), as well as the European Network of National Human Rights Institutions (ENNHRI).

19. The representatives of civil society and national human rights institutions underlined the importance of the EU accession to the ECHR in order to fill existing gaps in human rights protection, including from the perspective of the applicants who would mostly benefit from it. They stressed the need for the latter's interests to be adequately represented and that applicants are not confronted with complex legal proceedings without the possibility of legal aid. The resource situation of the ECtHR should also be considered in light of EU accession. The exchange of views had a particular emphasis on the issues contained in Basket 1, in particular the consideration of the views of the applicant with regard to the application of the co-respondent mechanism. On a more general nature, the representatives of civil society and national human rights institutions stressed the unique nature of the draft Accession Agreement in the history of the Council of Europe. The outstanding technical problems could be overcome despite their complexity. If EU accession were to succeed, it would be to the benefit of applicants, the EU and the Council of Europe.

20. At the end of the exchange of views, the participants thanked the representatives of civil society and national human rights institutions for their very valuable presentations and contributions. Both delegates in the Group and the representatives of civil society and national human rights institutions expressed the view that more consultations would be desirable in the course of the ongoing negotiations, in particular with regard to those areas in the draft Accession Agreement on which the present exchange had not focused.

Item 6: Discussion of the principle of mutual trust between the EU member states

21. The Group decided to come back to this agenda item at its next meeting.

Item 7: Discussion of the situation of EU acts in the area of the Common Foreign and Security Policy that are excluded from the jurisdiction of the Court of Justice of the European Union

22. The Group decided to come back to this agenda item at its next meeting.

Item 8: Any other business

23. The Chair concluded that the proposals in Baskets 1 and 2 as well as on Article 53 ECHR could be refined in light of the discussions at the present meeting. As a next step for the forthcoming meeting, the Secretariat was invited to provide input in form of amended proposals or building blocks for further discussion. Any delegation wishing to make additional proposals in this respect was invited to share them with the Secretariat.

24. The Group took note of the tentative dates for the 8th negotiation meeting (2-4 February 2021) and the 9th meeting (23-25 March 2021), which are subject to confirmation in light of the ongoing COVID pandemic.

Item 9: Adoption of the meeting report

25. 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 submitted on the EU's specific mechanisms of the procedure before the European Court of Human Rights**
3. **Discussion of proposals submitted on the operation of inter-party applications (Article 33 ECHR) and of references for an advisory opinion (Protocol No. 16) in relation to EU member states, and of proposals submitted in respect of Article 53 ECHR**
4. **Discussion of other issues which are not contained in the Chair's "Paper to structure the discussion at the 6th negotiation meeting" (including issues regarding Articles 6-8 of the draft Accession Agreement, and its appendices)**
5. **Exchange of views with representatives of civil society and of national human rights institutions** (*Note that this item will take place on Wednesday, 25 November, from 10 a.m. to 12.30 p.m.*)
6. **Discussion of the principle of mutual trust between the EU member states**
7. **Discussion of 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**
8. **Any other business**
9. **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)4
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

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	Council of Europe Treaty Series No. 214

APPENDIX II

List of Participants

MEMBERS / MEMBRES

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