COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

47+1(2021)10
10 September 2021

11TH MEETING OF THE CDDH AD HOC NEGOTIATION GROUP ("47+1") ON THE ACCESSION OF THE EUROPEAN UNION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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Revised proposal on "Inter-Party applications under Article 33 of the European Convention of Human Rights" by the Norwegian delegation and the Secretariat

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Strasbourg, Tuesday 5 October 2021 (10:00 am) – Friday 8 October 2021 (4:30 pm)

(Due to the COVID-19 situation, the meeting will be held as a hybrid meeting through the KUDO videoconferencing system and Room G03 of the Agora building)

Council of Europe

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Revised proposal on
"Inter-Party applications under Article 33 of the European Convention of Human Rights" by the Norwegian delegation and the Secretariat

I. Introduction

1. At its 10th meeting (29 June – 2 July 2021), the "47+1 Group" considered a proposal by the Norwegian delegation on a possible path forward to address inter-party applications under Article 33 ECHR regarding the EU's envisaged accession to the Convention. The proposal was laid out in detail in document CDDH47+1(2021)9. In the light of the discussion of the proposal at the 10th meeting, the Secretariat was invited - together with the Norwegian delegation - to revise the proposal for a future meeting and to spell out its different elements in more specific language. The present document presents such a revised proposal.

II. Proposal for a substantive provision in the draft Accession Agreement

2. The following provision is proposed to be inserted as paragraph 3 of Article 4 ("Inter-party cases") in the draft Accession Agreement:

Article 4 - Inter-Party cases

(…)

3. The Court shall provide the European Union upon request with sufficient time to assess whether – and if so, to what extent – an inter-party dispute under Article 33 of the Convention between two or more member States of the European Union, or between the European Union and one or more of its member States, concerns the interpretation or application of European Union law. Insofar as such an application concerns the interpretation or application of European Union law, the applicant High Contracting Party shall notify the Court that it no longer intends to pursue the application.

3. The following corresponding paragraphs are proposed for the explanatory report, to replace the current paragraph 72 (the footnote is part of the proposal):

72. With the EU's accession to the Convention, it will be possible that inter-party disputes arise under Article 33 of the Convention between the EU and one or more of its member States, in addition to the already existing possibility of such disputes between two or more EU member States. Insofar as such inter-party disputes concern the interpretation and application of EU law it follows from Article 344 of the TFEU (to which Article 3 of Protocol No. 8 to the Treaty of Lisbon refers) that EU member States "undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein".

72a. Although the High Contracting Parties concerned can be expected to act in accordance with Article 344 of the TFEU, Article 4, paragraph 3 contains a safeguard clause which would provide the opportunity for the EU, having received information about any such communicated inter-party dispute in accordance with Article 3, paragraph 4a., to request sufficient time to assess whether – and if so, to what extent – that dispute concerns the interpretation or application of EU law. In order not to delay unduly the proceedings before the Court, the EU shall ensure that the conclusion of the assessment is duly reasoned and communicated quickly in writing. Where the assessment concludes that an application falls within the scope of Article 344 of the TFEU, Article 4, paragraph 3 establishes an obligation for the applicant High Contracting Party to withdraw the inter-party application. Where it is established that only

a part of the application falls within the scope of Article 344 TFEU ("mixed applications"), the obligation to withdraw is limited to this part, as captured by the wording "insofar as".

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

72c. Article 4, paragraph 3 does not concern inter-party applications between High Contracting Parties which are not members of the EU and EU member States or the EU, or *vice versa*. Moreover, inter-party applications between EU member States which do not concern EU law are likewise not affected by the provision.

[1] *Georgia v. Russian Federation (III)*, *Application No*. 61186/09, decision by the ECtHR of 16 March 2010; *Ukraine v. Russian Federation (III)*, *Application No*. 49537/14, decision by the ECtHR of 1 September 2015; *Latvia v. Denmark*, *Application No.* 9717/20, decision by the ECtHR of 16 June 2020; see also *Ireland v. United-Kingdom (II), Application No.* 5451/72, decision by the European Commission of Human Rights of 1 October 1972.