

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

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**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**

**Revised proposals by the Secretariat on issues contained in Basket 3
("The principle of mutual trust between the EU member states")**

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 7 of the Palais de l'Europe)

Council of Europe

Revised proposals by the Secretariat on issues contained in Basket 3 ("The principle of mutual trust between the EU member states")

I. Introduction:

1. For the 10th meeting (29 June – 2 July 2021), the Secretariat prepared a document (CDDH47+1(2021)8) with proposals for discussion on the principle of mutual trust between the EU member states which comprised three elements: firstly, a new paragraph to the preamble of the draft Accession Agreement; secondly, a new substantive provision for the draft Accession Agreement; and, thirdly, corresponding paragraphs for the explanatory report, which related to the first two proposals.

2. During the discussion at the 10th meeting, some delegations, notably the European Union, provided additional comments to the draft which were reproduced in Appendix III of the meeting report (CDDH47+1(2021)R10). On the basis of the discussion, the Secretariat was tasked to revise the proposals for a future meeting.

3. The present paper presents such revised proposals. As far as they are not included in the present paper, the text proposals contained in the above-mentioned Appendix III are still tabled for discussion at the forthcoming 11th meeting of the "47+1 Group" (5-8 October 2021). Therefore, the present paper should be read together with these concrete text proposals.

II. Element for the preamble of the draft Accession Agreement:

4. The first part of the revised proposal is an additional element for the preamble of the draft Accession Agreement, which has not been revised:

Preamble

Recalling that the Court is mindful in its case-law of the importance of the mutual-recognition mechanisms within the European Union and of the mutual trust which they require,

III. Revised provision for the draft Accession Agreement:

5. A revised substantive provision for the draft Accession Agreement is proposed (with its exact placement to be determined) which reads as follows:

Article X – Mutual trust under European Union law

Accession of the European Union to the Convention shall not affect the application of the principle of mutual trust within the European Union, which allows for the creation and maintenance of an area without internal borders, to the extent that such application also ensures the protection of human rights guaranteed by the Convention as interpreted by the Court.

IV. Corresponding paragraphs for the explanatory report:

6. Corresponding to the first two proposals above, the following revised paragraphs for the explanatory report are being proposed:

Article X – Mutual trust under European Union law

1. In the preamble to the Accession Agreement, it is recalled that the Court is mindful in its case-law of the importance of the mutual-recognition mechanisms within the European Union and of the mutual trust which they require. The Court has had the opportunity to consider the importance of this principle in particular for the construction of the area of freedom, security and justice referred to in Article 67 of the Treaty on the Functioning of the European Union (TFEU) (see *Avotins v. Latvia*, no. 17502/07, Grand Chamber judgment of 23 May 2016, paragraph 113). It regarded the creation of an area of freedom, security and justice in Europe, and the adoption of the means necessary to achieve it, to be wholly legitimate in principle from the standpoint of the Convention (*ibid.*).

2. The principle of mutual trust allows an area without internal borders to be created and maintained. According to the case-law of the CJEU, this principle means that, when implementing EU law, the EU member States are required to consider, save in exceptional circumstances, that fundamental rights have been observed by other EU member States (see Court of Justice of the European Union, *Aranyosi (C-404/15) and Căldăraru (C-659/15 PPU)*, judgment of 5 April 2016, paragraph 78). The principle of mutual trust can also be relevant to non-EU member states in the context of bilateral agreements concluded with the EU.

3. The Court, for its part, has noted the increased convergence between its own case-law and the case-law of the CJEU with regard to the limits to the operation of mutual recognition-mechanisms in light of a real and individual risk of a violation of Article 3 of the Convention (*Bivolaru and Moldovan v. France*, nos. 40324/16 and 12623/17, judgment of 25 March 2021, paragraph 114). With regard to the mutual-recognition mechanisms under EU law, the Court held that it must verify that the principle of mutual trust is not applied automatically and mechanically to the detriment of human rights (*Avotins v. Latvia*, cited above, paragraph 116; *Bivolaru and Moldovan v. France*, cited above, paragraph 100-101).¹

¹ In these judgments, the Court dealt with the European arrest warrant (*Bivolaru and Moldovan*) and the recognition and enforcement of judgments in civil and commercial matters (*Avotins*).