

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

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**11<sup>TH</sup> 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 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")**

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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 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. Introduction:**

1. At its 10<sup>th</sup> meeting (29 June – 2 July 2021), the "47+1 Group" considered proposals for certain issues contained in Basket 1 ("The EU's specific mechanisms of the procedure before the European Court of Human Rights") on the basis of a paper elaborated by the Secretariat (CDDH47+1(2021)7). The Group tasked the Secretariat to revise the proposals under IV. ("Proposal regarding a new paragraph 5 of Article 3 on the triggering of the co-respondent mechanism") and V. ("Proposal for a new paragraph 5a of Article 3 on the termination of the co-respondent mechanism") in light of comments and suggestions made at the meeting. The present paper presents such proposals.

2. At the 10<sup>th</sup> meeting, several delegations provided concrete text proposals, including two delegations (the European Union and Turkey) whose concrete text proposals in writing were communicated to all delegations (on 2 July and 6 July 2021, respectively). The present paper has sought to incorporate these text proposals as far as possible. As far as they are not included in the present paper, they are still tabled for discussion at the forthcoming 11<sup>th</sup> meeting of the "47+1 Group" (5-8 October 2021).

## **II. Revised proposal regarding a new paragraph 5 of Article 3 on the triggering of the co-respondent mechanism**

3. At its 10<sup>th</sup> meeting, the “47+1 Group” considered a Secretariat proposal for several paragraphs of the explanatory report which would correspond to Article 3, paragraph 5<sup>1</sup> on the triggering of the co-respondent mechanism. On the basis of the discussion, the Secretariat was tasked with providing a revised version of this proposal for discussion at a future meeting, at which stage the Group would then also discuss the operative provision of Article 3, paragraph 5 for which the Secretariat was also tasked to provide a revised proposal (CDDH47+1(2021)R10, paragraph 6). The following proposals respond to this request.<sup>2</sup>

### ***Revised proposal by the Secretariat for a new paragraph 5 of Article 3:***

A High Contracting Party may become a co-respondent, either by accepting an invitation from the Court or by decision of the Court upon the request of that High Contracting Party, if the conditions in paragraphs 2 or 3 of this article are met according to a reasoned declaration by the European Union based on an assessment of the applicable European Union law. Before a High Contracting Party becomes co-respondent, the Court shall ensure that the views of all parties to the proceedings have been heard.

### ***Revised proposal by the Secretariat for corresponding paragraphs to the explanatory report (which would replace its current paragraphs 52-58):***

*A. Applications directed against one or more member States of the European Union, but not against the European Union itself (or vice versa)*

52. In cases in which the application is directed against one (or more) member State(s) of the EU, but not against the EU itself, the latter may, if the criteria set out in Article 3, paragraph 2, of the Accession Agreement are fulfilled, initiate the co-respondent mechanism with a request to join the proceedings as co-respondent. Where the application is directed against the EU, but not against one (or more) of its member States, the EU member States may, if the criteria set out in Article 3, paragraph 3, of the Accession Agreement are fulfilled, initiate the co-respondent mechanism with a request to join the proceedings as co-respondents. This should happen in a timely manner once the EU has received the relevant information.

53. Determining whether the material conditions for applying the co-respondent mechanism in both scenarios (Article 3, paragraphs 2 and 3) are met presupposes an assessment of the applicable rules of EU law governing the division of powers between the EU and its member States. Therefore, in the event of a request by a High Contracting Party to join the proceedings as a co-respondent, the Court will admit the co-respondent if, according to an assessment by the EU of the material conditions for applying the co-respondent mechanism on the basis of the applicable EU law, those conditions are met. The conclusions of the assessment by the EU will be considered as determinative and authoritative. When admitting a co-respondent, the Court retains however a discretion for all other aspects of the procedure, for example with regard to the Court’s decision to grant legal aid to the applicant in light of the triggering of the co-respondent mechanism.

54. Moreover, the Court may, when notifying an alleged violation or at a later stage of the proceedings, invite a High Contracting Party to participate in the proceedings as a co-respondent. In such case, the acceptance of the invitation by that High Contracting Party within a time-limit set by the Court would be a necessary condition for the latter to become co-respondent. The EU or one (or more) of its member State(s), as the case may be, will however

<sup>1</sup> Provisions in the present paper are all those of the draft Accession Agreement.

<sup>2</sup> Please note that the present proposals may require an amendment of Appendix 2 of the draft Accession Agreement to the effect that the declaration in letter a. of this Appendix is also made by the EU member States.

accept the invitation if the EU's assessment has led to the result that the material conditions for applying the co-respondent mechanism are met (see Appendix 2, letter a. to the present Agreement).

55. The EU's assessment should be provided to the Court in writing through a reasoned declaration, irrespective of whether such assessment is made following an invitation or as the basis for a request. In the event of an invitation, it should be provided regardless of whether that invitation is accepted or declined. The Court will inform the other parties and set a short time limit for possible comments. Where a party, notably the applicant, has commented on the material conditions for the application of the co-respondent mechanism, the Court will communicate this 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.

56. The admission of the co-respondent is a prior procedural question and is thus to be distinguished from the Court's decision on the merits of the application, on which the assessment referred to above will naturally have no bearing.

*B. Applications directed both against the EU and one or more of its member States*

57. In a case which has been directed against and notified to both the EU and one (or more) of its member States in respect of at least one alleged violation, 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 provision are met (Article 3, paragraph 4). The procedure outlined in the above paragraphs would apply *mutatis mutandis*.

**III. Revised proposal for a new paragraph 5a of Article 3 on the termination of the co-respondent mechanism**

4. At its 10<sup>th</sup> meeting, the "47+1 Group" considered a revised Secretariat proposal for a new paragraph 5a. of Article 3 on the termination of the co-respondent mechanism. The Secretariat proposal was accompanied by a proposal for corresponding paragraphs for the explanatory report. On the basis of the discussion of both the substantive provision and the corresponding paragraphs of the explanatory report, the Secretariat was tasked with revising both proposals for discussion at a future meeting (CDDH47+1(2021)R10, paragraph 7). The following proposals respond to this request.

***Proposal by the Secretariat for a new paragraph 5a. of Article 3:***

The Court may terminate the co-respondent mechanism at any stage of the proceedings if the conditions in paragraph 2 or 3 of this article are no longer met according to a reasoned declaration by the European Union based on an assessment of the applicable European Union law. The Court shall ensure that the views of all parties to the proceedings have been heard.

***Proposal by the Secretariat for a corresponding paragraph to the explanatory report (which would replace its current paragraph 59):***

*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 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.