

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

47+1(2021)15
15 November 2021

**12TH MEETING OF THE CDDH AD HOC NEGOTIATION GROUP
("47+1") ON THE ACCESSION OF THE EUROPEAN UNION TO
THE EUROPEAN CONVENTION ON HUMAN RIGHTS**

**Background paper by the Secretariat on scenarios in the context of Article 7 of the draft
Accession Agreement**

Strasbourg, Tuesday 7 December 2021 (10:00 am) – Friday 10 December 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 G02 of the Agora building)

Council of Europe

Background paper by the Secretariat on scenarios in the context of Article 7 of the draft Accession Agreement

I. Introduction

1. At the 11th meeting of the “47+1 Group” (5-8 October 2021), the Secretariat was tasked with elaborating a paper with the various scenarios which Article 7 of the draft Accession Agreement sets out for the supervision of the execution of judgments by the Committee of Ministers and in which the latter could potentially vote. The paper should also provide concrete examples in numbers should such votes take place (see paragraph 20 of the 11th meeting report, CDDH47+1(2021)R11). The present background paper lays out such scenarios. It provides references to the explanatory report to the draft Accession Agreement where applicable. Emphasis of those citations have been added by the Secretariat for the mere convenience of delegates.

II. Text of Article 7, paragraph 4 of the draft Accession Agreement

2. The relevant provision in the draft Accession Agreement is Article 7, paragraph 4 which reads as follows:

“The exercise of the right to vote by the European Union and its member States shall not prejudice the effective exercise by the Committee of Ministers of its supervisory functions under Articles 39 and 46 of the Convention. In particular, the following shall apply:

- a. *in relation to cases where the Committee of Ministers supervises the fulfilment of obligations either by the European Union alone, or by the European Union and one or more of its member States jointly, it derives from the European Union treaties that the European Union and its member States express positions and vote in a co-ordinated manner. The Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements shall be adapted to ensure that the Committee of Ministers effectively exercises its functions in those circumstances;*
- b. *where the Committee of Ministers otherwise supervises the fulfilment of obligations by a High Contracting Party other than the European Union, the member States of the European Union are free under the European Union treaties to express their own position and exercise their right to vote.”*

III. Judgments¹ in cases to which the EU is not a party (i.e. neither as respondent or co-respondent)

3. Article 7, paragraph 4b states that *“where the Committee of Ministers otherwise supervises the fulfilment of obligations by a High Contracting Party other than the European Union, the member States of the European Union are free under the European Union treaties to express their own position and exercise their right to vote.”*

Judgments against EU member states

4. Paragraph 91 of the explanatory report states: *“In the context of the supervision of the fulfilment of obligations under the Convention by one or more of the member States of the EU,*

¹ To facilitate this overview, reference is only made to “judgments”. For the terms of execution of “friendly settlements”, the same provisions which are quoted in this document apply.

the latter is precluded under the EU treaties, either for lack of competence in the area to which the case relates or as a result of the prohibition on circumventing internal procedures, from expressing a position or exercising its right to vote. In such circumstances, the EU member States have no obligation under the EU treaties to act in a co-ordinated manner, and therefore they can each express their own position and vote.”

Judgments against states which are not members of the EU

5. Paragraph 91 of the explanatory report states: *“In the context of the supervision of the fulfilment of obligations under the Convention by a State which is not a member of the EU, the EU and its member States have no obligation under the EU treaties to express a position or vote in a co-ordinated manner. The EU member States can therefore each express their own position and vote, also where the EU expresses a position or exercises its right to vote.”*

Relevant numbers in case of a vote for both categories

6. Hence the adoption of decisions by the Committee of Ministers (in the context of the supervision of the execution of judgments in cases in which the EU is neither respondent or co-respondent) would require the necessary majorities stated in Article 20d. of the Statute of the Council of Europe (two-thirds majority of the representatives casting a vote and of a majority of the representatives entitled to sit on the Committee) or Article 46, paragraphs 3 and 4 of the Convention (a majority vote of two-thirds of the representatives entitled to sit on the Committee), as applicable. In the case of a decision which requires the majority stated in Article 20d. of the Statute of the Council of Europe, this would require in a system with 48 High Contracting Parties between 25 and 32 votes, depending on the number of representatives casting a vote. In the case of Article 46, paragraphs 3 and 4 of the Convention, a decision would at least require a majority of 32 votes.

IV. Judgments in cases to which the EU is a party (i.e. either as respondent or co-respondent)

7. For judgments in cases to which the EU is a party, either as respondent or co-respondent, the accession instruments provided for a draft Rule 18 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. This draft rule was attached as Appendix 3 and read as follows:

Appendix 3

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

Rule 18 – Judgments and friendly settlements in cases to which the European Union is a party

1. *Decisions by the Committee of Ministers under Rule 17 (Final Resolution) of the present rules shall be considered as adopted if a majority of four fifths of the representatives casting a vote and a majority of two thirds of the representatives entitled to sit on the Committee of Ministers are in favour.*

2. *Decisions by the Committee of Ministers under Rule 10 (Referral to the Court for interpretation of a judgment) and under Rule 11 (Infringement proceedings) of the present rules shall be considered as adopted if one fourth of the representatives entitled to sit on the Committee of Ministers is in favour.*

3. Decisions on procedural issues or merely requesting information shall be considered as adopted if one fifth of the representatives entitled to sit on the Committee of Ministers is in favour.

4. Amendments to the provisions of this rule shall require consensus by all High Contracting Parties to the Convention.

8. On the basis of this rule, the following decisions by the Committee of Ministers would be conceivable:

A. Final resolutions

Current treatment under the draft Accession Instruments:

According to Rule 18(1), a majority of four fifths of the representatives casting a vote and a majority of two thirds of the representatives entitled to sit on the Committee of Ministers is required. Paragraph 85 of the explanatory report provides the following example:

“In a system with 48 High Contracting Parties, this means that at least 32 votes would be required, but according to the number of members actually casting a vote the number of votes required for the adoption of a final resolution may vary between 32 and 39.”

In order to satisfy the second requirement (“a majority of two thirds of the representatives entitled to sit on the Committee of Ministers is required”), at least 32 High Contracting Parties need to vote in favour. If all 48 High Contracting Parties are casting a vote, a majority of four fifths is reached if 39 Parties vote in favour. Hence the number of votes required may vary between 32 and 39 votes, depending on the number of delegates which are casting a vote.

B. Interim resolutions

Current treatment under the draft Accession Instruments:

No specific rule is currently provided for by the draft Accession Instruments.

Paragraph 89 of the explanatory report states:

*“In the absence of specific provisions in the new rule, the majority rule set out in Article 20.d of the Statute of the Council of Europe applies to all other types of decisions, **including the adoption of interim resolutions** and of any other decisions expressing a position on compliance by the EU with the obligation under Article 46, paragraph 1, of the Convention. The EU could, by using its block of votes, impede the adoption of such interim resolutions and decisions. However, it was considered by the negotiating parties that it was politically highly unlikely that the EU would use the block of votes to this effect. In the current practice such interim resolutions and decisions are normally adopted by consensus. Moreover, the effective exercise by the Committee of Ministers of its supervisory functions will nevertheless be ensured. In fact, pursuant to paragraph 2 of the new rule, the adoption of decisions requesting second referral for infringement to the Court has been considerably facilitated by reducing the threshold required from two thirds to one fourth of the representatives entitled to sit on the Committee of Ministers.”*

Hence the adoption of interim resolutions would require the majority stated in Article 20.d of the Statute of the Council of Europe (two-thirds majority of the representatives casting a vote and of a majority of the representatives entitled to sit on the Committee). In a system with 48 High Contracting Parties, this would require between 25 and 32 votes, depending on the number of representatives casting a vote.

C. Referral to the Court for interpretation of a judgment

Current treatment under the draft Accession Instruments:

According to Rule 18(2), a decision on a referral to the Court for interpretation of a judgment under Article 46, paragraph 3 of the Convention shall be considered as adopted if one fourth of the representatives entitled to sit on the Committee of Ministers is in favour.

Paragraph 86 of the explanatory report provides the following example: *“In a system with 48 High Contracting Parties, this means that 12 votes would be required to consider such decisions as adopted.”*

D. Infringement proceedings

Current treatment under the draft Accession Instruments:

According to Rule 18(2), a decision to initiate infringement proceedings under Article 46 paragraph 4 of the Convention shall be considered as adopted if one fourth of the representatives entitled to sit on the Committee of Ministers is in favour.

Paragraph 86 of the explanatory report provides the following example: *“In a system with 48 High Contracting Parties, this means that 12 votes would be required to consider such decisions as adopted.”*

E. Decisions on procedural issues

9. Paragraph 87 of the explanatory report states: *“The expression ‘decisions on procedural issues’ shall be interpreted as encompassing all kinds of procedural decisions, including obviously the adoption of agendas and reports, but also – for instance – requests for confidentiality and decisions on whether a case should undergo ‘enhanced’ or ‘standard’ supervision.”*

10. The following are possible examples for decisions on procedural issues:

- The Committee of Ministers approves the order of business
- The Committee of Ministers agrees to postpone the consideration of a certain case
- The Committee of Ministers notes that a certain judgment has become final and decides to examine it under the standard procedure or the enhanced procedure
- The Committee of Ministers changes the status of the procedure from “standard” to “enhanced”, or *vice versa*
- The Committee of Ministers decides to examine a case with or without debate

Current treatment under the draft Accession Instruments:

According to Rule 18(3), decisions on procedural issues shall be considered as adopted if one fifth of the representatives entitled to sit on the Committee of Ministers is in favour. Paragraph 87 of the explanatory report states: *“In a system with 48 High Contracting Parties, it means that 10 votes would be required to consider such decisions as adopted.”*

F. Requests for information

11. Paragraph 87 of the explanatory report states: *“The expression ‘decisions requesting information’ shall be interpreted as encompassing all requests for information which are addressed to a High Contracting Party in order to assess the state of execution of a judgment*

or of the terms of a friendly settlement, including action plans and action reports, where no position is taken on compliance by that High Contracting Party with the obligation under Article 46, paragraph 1, of the Convention.”

12. The following are possible examples for requests for information:

- The Committee of Ministers requests a certain High Contracting Party to provide relevant examples of case-law
- The Committee of Ministers requests a certain High Contracting Party to indicate whether the adoption of further specific measures is deemed necessary in order to prevent new violations of a certain provision in the Convention
- The Committee of Ministers asks for updated information in respect of all the points mentioned in the decision by a certain date (i.e. for an upcoming meeting)

13. It may be noted that High Contracting Parties are under a general obligation to provide information to the Committee of Ministers on the measures taken or envisaged in respect of all pending cases (see Rule 6 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements) until the supervision is closed. Accordingly, nearly all decisions adopted by the Committee of Ministers will ask the respondent High Contracting Party to provide information on certain aspects of the execution measures.

Current treatment under the draft Accession Instruments:

According to Rule 18(3), requests for information shall be considered as adopted if one fifth of the representatives entitled to sit on the Committee of Ministers is in favour. Paragraph 87 of the explanatory report states: *“In a system with 48 High Contracting Parties, it means that 10 votes would be required to consider such decisions as adopted.”*

G. Other decisions

14. The following are possible examples for other decisions:

- The Committee of Ministers urges the authorities of a High Contracting Party to intensify their efforts to resolve, definitively and as quickly as possible, the structural problem found by the Court
- The Committee of Ministers invites the authorities to elaborate concrete proposals to comply with the Court’s judgment and to explore all possible avenues within their wide margin of appreciation, such as a flexible interpretation of the relevant provision of its domestic law which formed part of the case

Current treatment under the draft Accession Instruments:

No specific rule is currently provided for by the draft Accession Instruments.

Paragraph 89 of the explanatory report states: *“In the absence of specific provisions in the new rule, the majority rule set out in Article 20.d of the Statute of the Council of Europe applies to all other types of decisions, including the adoption of interim resolutions and of **any other decisions expressing a position on compliance by the EU with the obligation under Article 46, paragraph 1, of the Convention.** The EU could, by using its block of votes, impede the adoption of such interim resolutions and decisions. However, it was considered by the negotiating parties that it was politically highly unlikely that the EU would use the block of votes to this effect. In the current practice such interim resolutions and decisions are normally adopted by consensus. Moreover, the effective exercise by the Committee of Ministers of its supervisory functions will nevertheless be ensured. In fact, pursuant to paragraph 2 of the new rule, the adoption of decisions requesting second referral for infringement to the Court*

has been considerably facilitated by reducing the threshold required from two thirds to one fourth of the representatives entitled to sit on the Committee of Ministers.”

Hence the adoption of “other decisions” would require the majority stated in Article 20d. of the Statute of the Council of Europe (two-thirds majority of the representatives casting a vote and of a majority of the representatives entitled to sit on the Committee). In a system with 48 High Contracting Parties, this would require between 25 and 32 votes, depending on the number of representatives casting a vote.