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**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**

TEXT PROPOSALS AND AMENDMENTS

SUBMITTED BY THE EU DELEGATION TO THE OTHER DELEGATIONS OF THE CDDH
AD HOC NEGOTIATING GROUP ('47+1') ON THE ACCESSION OF THE EUROPEAN
UNION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Regarding the procedure for initiating the co-respondent mechanism

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)

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Regarding the procedure for initiating the co-respondent mechanism

General context

1. The co-respondent mechanism allows the EU to become involved when a case concerning EU law is brought against an EU Member State. By becoming a co-respondent, the EU participates in the court proceedings and accepts that, in case the European Court of Human Rights finds a violation, it stands ready to be convicted and to help remedy the situation. The mechanism also allows the Member States to become co-respondent in cases brought against the EU that call into question the compatibility of primary EU law with the rights and freedoms guaranteed under the Convention.
2. The material conditions for applying the co-respondent mechanism are set out in Article 3(2) and (3) of the draft accession agreement of 2013. The co-respondent mechanism is not a procedural privilege for the EU or its Member States, but a way to avoid gaps in participation, accountability and enforceability in the Convention system. This corresponds to the very purpose of EU accession and serves the proper administration of justice (see paragraph 39 of the 2013 Explanatory Report).
3. In order for its conclusion by the EU and its Member States to be compatible with the EU Treaties, the final accession agreement must ensure that decisions of the European Court of Human Rights are not liable to interfere with the division of competences between the Union and the Member States. For the co-respondent mechanism this implies, notably, that 'the EU and [its] Member States must remain free to assess whether the material conditions for applying the co-respondent mechanism are met' (Opinion 2/13, paragraph 220).

Aim of this paper

4. This paper focuses on the procedure for initiating the co-respondent mechanism. During the 11th negotiating meeting, the Secretariat presented a revised text proposal regarding the procedure for initiating the co-respondent mechanism. The EU tabled a number of amendments to the Secretariat's proposal, as well as alternative wording for Article 3(5). The ensuing discussion revealed that there were a number of issues of substance that had to be addressed before it would be possible to settle on a text for Article 3(5). The aim of this paper is to identify these matters and, taking into consideration the views expressed by other delegates in the 47+1 Group, to propose concrete compromise solutions.

Possibility for the applicant to state its views

5. The co-respondent mechanism ultimately benefits the applicant and imposes obligations on the co-respondent (see point 2 above). Nevertheless, there is a clear wish from various delegations, first, that the EU and its Member States should give reasons as to why they consider that the material conditions set out in Article 3(2) and (3) are met and, second,

that applicants be given an opportunity to state their views on those reasons before the European Court of Human Rights admits a High Contracting Party as co-respondent. Several delegations have accordingly stressed the need for a 'reasoned assessment' and have indicated that the Court should be prompted to seek the views of the applicants on that assessment. Moreover, a number of delegations have expressed the view that these two aspects should be mentioned specifically in Article 3(5).

6. The EU is of course willing to, when the co-respondent mechanism is initiated, explain why it considers that, in the case at hand, the material conditions set out in Article 3(2) or (3) are met. Furthermore, the EU has noted the importance that several delegations as well as civil society organisations attach to allowing for a possible exchange on the matter with the applicant, even though that would add a further procedural step to the process for initiating the co-respondent mechanism.
7. At the same time, in order for the EU and its Member States to be able to conclude the accession agreement, it must be ensured that the EU's assessment of whether the material conditions of paragraphs 2 or 3 of Article 3 are met shall not be subject to review by the European Court of Human Rights.¹ The accession instruments will have to be unambiguous in this respect. This is because, unless those instruments state otherwise, the Court will be able to review the parties' interpretation and application of any provision in the accession agreement. Moreover, the notion of a reasoned assessment and, in particular, of the Court subsequently giving the applicant an opportunity to state its views on that assessment, are features that are normally associated with judicial review. For these reasons, the accession instruments should state clearly that, notwithstanding those procedural features, the question of whether the material conditions in paragraphs 2 or 3 are met shall not be subject to review by the Court.
8. Accordingly, the EU proposes that the first subparagraph of Article 3(5) read as follows:

The European Union or its member States may initiate² the co-respondent mechanism if the conditions in paragraphs 2 or 3 of this article are met according to a reasoned assessment by the European Union on the basis of the applicable Union law³. The Court shall⁴ grant the applicant an opportunity to state its views on the assessment before admitting the European Union or its Member States to the proceedings as co-respondent.

¹ See, in particular, paragraphs 223-224 of Opinion 2/13 of the Court of Justice.

² The terms 'initiate' and 'admitting' in this text proposal correspond to the terminology used in, respectively, paragraphs 52 and 53 of the Secretariat's proposal for the Explanatory Report.

³ During the 11th negotiating meeting, some delegates expressed a preference for including the wording 'on the basis of the applicable Union law' in the operative provision. See also draft paragraph 53 for the Explanatory Report.

⁴ In the EU's view, Court itself will be best placed to decide, on the basis of the submissions before it, in which cases – and at what moment in the proceedings – it is appropriate to grant the applicant that opportunity. However, it is acknowledged that using the term 'shall' (instead of 'may'), if that were to be the general preference in the Group, would be reconcilable with Opinion 2/13.

And that the following sentence is inserted in paragraph 55 of the Explanatory Report:

However, the European Union's determination of whether the conditions in paragraphs 2 or 3 of this article are met shall not be subject to review by the Court.

Invitation to initiate the co-respondent mechanism

9. It is generally accepted that the European Court of Human Rights should be able to invite the EU or its Member States to initiate the co-respondent mechanism.
10. During the 11th negotiating meeting, a number of delegations indicated that they wanted Article 3(5) to provide expressly for the possibility of such an invitation. A number of delegations also emphasised that it should be clear from the wording of Article 3(5) that the requirement of a reasoned assessment applies equally in the framework of an invitation. Finally, a number of delegations suggested that, also in the context of an invitation, the Court should have the possibility to seek the views of the applicant on the reasoned assessment – in that sense, the process with an invitation should match the process without an invitation, and Article 3(5) should make this clear. The EU can accept these suggestions and accordingly proposes that the second subparagraph of Article 3(5) read as follows:

The Court may also invite the Union European Union or its member States to initiate the co-respondent mechanism in accordance with the previous subparagraph.

11. The corresponding paragraph in the Explanatory Report appears as paragraph 54 in the Secretariat's proposal. The EU notes that the following wording is missing from that paragraph: '*No High Contracting Party may be compelled to become a co-respondent. This reflects the fact that the initial application was not addressed against the potential co-respondent, and that no High Contracting Party can be forced to become a party to a case where it was not named in the original application.*' This wording currently appears in paragraph 53 of the 2013 Explanatory Report. Opinion 2/13 of the Court of Justice specifically referred to it to support its finding that the invitation-mechanism was compatible with the EU Treaties.⁵ The EU therefore proposes that the passage be maintained in the text. For the avoidance of doubt, it can be mentioned in paragraph 54 of the Explanatory Report that the EU or its Member States will accept the invitation if the reasoned assessment concludes that the material conditions for initiating the co-respondent mechanism are met. The EU accordingly proposes the following amendments to the Secretariat's proposal for paragraph 54 of the Explanatory Report:

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. **No High Contracting Party may be compelled to become a co-respondent. This reflects the fact that the initial application was not addressed against the potential co-respondent, and that no High Contracting Party can be forced to become a party to a case where it was not named in the original application.**⁶ The EU or ~~one (or more) of~~ its member State(s), as the case may

⁵ Paragraphs 219-220 of Opinion 2/13 of the Court of Justice

⁶ From current paragraph 53 of the Explanatory Report.

be, will however accept the invitation if the reasoned assessment **referred to in the first subparagraph of Article 3(5) has led to the result concludes** that the material conditions for applying the co-respondent mechanism are met ~~(see Appendix 2, letter a. to the present Agreement).~~

12. The Secretariat's proposal for paragraph 55 of the Explanatory Report provides – in essence – that reasons must be given where the invitation to initiate the co-respondent mechanism is declined. The EU can agree to language in the Explanatory Report to the effect that rejections of an invitation should be reasoned. However, this is with the understanding that such invitations remain the exception and that the Court will not extend them routinely in cases brought against the Union or its Member States.⁷ The EU suggests clarifying this point in the Explanatory Report:

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, **considering that such invitations can be expected to remain the exception in cases brought against the EU or its Member States**. 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. **However, the European Union's determination of whether the conditions in paragraphs 2 or 3 of this article are met shall not be subject to review by the Court.**

⁷ This is for reasons of practical feasibility: if invitations become were to become a routine practice, it will be difficult for the EU to provide, where applicable, 'negative' reasoned declarations on a systematic or quasi-systematic basis.

Overview of proposals

Revised proposal from the EU for Article 3(5) of the Accession Agreement:

The European Union or its member States may initiate⁸ the co-respondent mechanism if the conditions in paragraphs 2 or 3 of this article are met according to a reasoned assessment by the European Union on the basis of the applicable Union law⁹. The Court shall¹⁰ grant the applicant an opportunity to state its views on the assessment before admitting the European Union or its Member States to the proceedings as co-respondent. The Court may also invite the Union European Union or its member States to initiate the co-respondent mechanism in accordance with the previous subparagraph.

Proposed amendments to the Secretariat's proposal for paragraphs 54-55 of the Explanatory Report:

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. **No High Contracting Party may be compelled to become a co-respondent. This reflects the fact that the initial application was not addressed against the potential co-respondent, and that no High Contracting Party can be forced to become a party to a case where it was not named in the original application.**¹¹ The EU or ~~one (or more)~~ of its member State(s), as the case may be, will however accept the invitation if the reasoned assessment **referred to in the first subparagraph of Article 3(5) has led to the result concludes** 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, **considering that such invitations can be expected to remain the exception in cases brought against the EU or its Member States.** 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. **However, the European Union's determination of whether the conditions in paragraphs 2 or 3 of this article are met shall not be subject to review by the Court.**

⁸ The terms 'initiate' and 'admitting' in this text proposal correspond to the terminology used in, respectively, paragraphs 52 and 53 of the Secretariat's proposal for the Explanatory Report.

⁹ During the 11th negotiating meeting, some delegates expressed a preference for including the wording 'on the basis of the applicable Union law' in the operative provision. See also draft paragraph 53 for the Explanatory Report.

¹⁰ In the EU's view, Court itself will be best placed to decide, on the basis of the submissions before it, in which cases – and at what moment in the proceedings – it is appropriate to grant the applicant that opportunity. However, it is acknowledged that using the term 'shall' (instead of 'may'), if that were to be the general preference in the Group, would be reconcilable with Opinion 2/13.

¹¹ From current paragraph 53 of the Explanatory Report.