

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

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**10<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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**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 29 June 2021 (10:00 am) – Friday 2 July 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

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## **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 8<sup>th</sup> meeting (2-4 February 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 discussion paper elaborated by the Secretariat (CDDH47+1(2021)5). The Group decided to revert back to the discussion at a future meeting and to continue to work on the basis of various provisions. It tasked the Secretariat to make specific proposals in preparation for the next discussion. The present paper presents such proposals.

### **II. Proposal regarding reservations under Article 57 ECHR**

2. At its 8<sup>th</sup> meeting, the “47+1 Group” agreed upon a new paragraph 3 of Article 2 of the draft Accession Agreement which reads as follows: “*Reservations made by High Contracting Parties in accordance with Article 57 of the Convention shall retain their effects in respect of any such High Contracting Party which is a co-respondent to the proceedings.*”

3. The Secretariat was tasked to draft a corresponding text for the explanatory report, which would both indicate a link with the principle of joint responsibility under Article 3, paragraph 7 and the fact that any such reservation is without prejudice to an assessment of its validity by the European Court of Human Rights (see paragraph 9 of the 8<sup>th</sup> meeting report, CDDH47+1(2020)R8). On the basis of this request, the following paragraph - to be inserted as paragraph 36a. in the explanatory report - is proposed (the footnotes to the text are part of the proposal):

#### ***Proposal by the Secretariat:***

36a. The co-respondent mechanism as provided under Article 3 of the Accession Agreement is a newly introduced feature of the Convention system. Therefore, Article 2, paragraph 3 of the Accession Agreement clarifies that reservations made under Article 57 of the Convention by co-respondent High Contracting Parties retain their effects under this mechanism. In this respect, it should be recalled that applications concerning a provision of the Convention in respect of which a High Contracting Party has made a reservation are declared incompatible *ratione materiae* with the Convention with regard to that Party<sup>1</sup>, provided that the issue falls within the scope of the reservation<sup>2</sup> and that the reservation is deemed valid by the Court for the purposes of Article 57 of the Convention<sup>3</sup>. A reservation made by a co-respondent High Contracting Party under Article 57 of the Convention may consequently preclude the possibility to find that the latter is jointly responsible with the respondent High Contracting Party under Article 3, paragraph 7 of the Accession Agreement.

### **III. Proposal regarding the information by the European Court of Human Rights of the EU of cases notified to its member states (and *vice versa*)**

4. At its 8<sup>th</sup> meeting, the “47+1 Group” agreed to continue working on the following proposal for a new paragraph 4a of Article 3, including a decision for its ultimate placement in

<sup>1</sup> *Benavent Díaz v. Spain*, Application No. 46479/10, decision of 31 January 2027, paragraphs 53 and 64; *Kozlova and Smirnova v. Latvia*, Application No. 57381/00, decision of 23 October 2001.

<sup>2</sup> *Göktan v. France*, Application No. 33402/96, judgment of 2 July 2022, paragraph 51.

<sup>3</sup> *Grande Stevens and Others v. Italy*, Application No. 18640/10, judgment of 4 March 2014, paragraphs 206-211.

the accession instruments: “*The Court shall provide to the European Union information concerning all cases notified to its member States and provide to the latter information concerning all cases notified to the European Union.*”

5. The Group also tasked the Secretariat to draft a corresponding text for the explanatory report in view of its next discussion on the matter (see paragraph 10 of the 8<sup>th</sup> meeting report, CDDH47+1(2020)R8). On the basis of this request, the following paragraph - to be inserted as paragraph 58a. in the explanatory report - is proposed:

**Proposal by the Secretariat:**

*Information concerning potential co-respondent cases*

58a. Article 3, paragraph 4a. of the Accession Agreement states that the Court shall provide information to the EU concerning all cases notified to its member States and provide to the latter information concerning all cases notified to the EU. The aim of this provision is to ensure that the EU and its member States are in a position to determine which cases qualify for the co-respondent mechanism, as well as – in proceedings to which the EU would become co-respondent – to identify in which of these cases the *prior involvement*-procedure under Article 3, paragraph 6 would apply.

**IV. Proposal regarding a new paragraph 5 of Article 3 on the triggering of the co-respondent mechanism**

6. At its 8<sup>th</sup> meeting, the “47+1 Group” agreed to continue working on the following proposal for a new paragraph 5 of Article 3 (replacing the previous paragraph 5): “*A High Contracting Party shall 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 [on account of / according to] [an assessment / a reasoned declaration] by the European Union [on the basis] of the applicable European Union law. [The European Union shall submit a reasoned declaration to the Court [and all parties to the proceedings] which indicates that the conditions under paragraphs 2 or 3 of this article are met. Before a High Contracting Party becomes co-respondent, the Court shall ensure that the views of all parties to the proceedings have been heard.]*”

7. The Secretariat was invited to draft corresponding paragraphs for the explanatory report for this draft provision (see paragraph 13 of the 8<sup>th</sup> meeting report, CDDH47+1(2020)R8). On the basis of this request, the following paragraphs are proposed which would replace the current paragraphs 52-55 in the explanatory report (the footnotes to the text are part of the proposal):

**Proposal by the Secretariat:**

*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 shall, if it considers that 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 shall, 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.

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 which will be considered as final and authoritative, those conditions are met.<sup>4</sup>

54. When admitting a co-respondent, the Court retains however a discretion for all other aspects of the procedure that are not related to the applicable EU law which determines the material conditions for applying the co-respondent mechanism. This could be the case in situations where the Court finds that the request was premature (and the co-respondent mechanism should thus be applied only at a later stage) or with regard to the Court's decision to grant legal aid to the applicant in light of the triggering of the co-respondent mechanism.

55. 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. It is understood that in such a case the Court would set a time limit for a response. It follows from Article 3, paragraph 5 that the EU or one (or more) of its member State(s), as the case may be, shall accept the invitation in the event that the EU's assessment has led to the result that the material conditions for applying the co-respondent mechanism are met.

55a. In order to ensure sufficient transparency for the other parties involved, including the applicant, the EU's assessment should be provided to the Court in writing, irrespective of whether such assessment is made following an invitation<sup>5</sup> or as the basis for a request. The Court will inform the other parties and set a short time limit for possible comments. For the applicant, this is primarily an opportunity to comment on the procedural matters referred to in paragraph 54 (in particular, the granting of legal aid). Where a party 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 for the EU to provide the latter with the possibility to reconsider its assessment in light of these comments.

55b. 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.

## **V. Proposal for a new paragraph 5a of Article 3 on the termination of the co-respondent mechanism**

8. At its 8<sup>th</sup> meeting, the "47+1 Group" considered a proposal for a new paragraph 5a. of Article 3 on the termination of the co-respondent mechanism. This proposal, after the addition of amendments made during the discussion, reads as follows: "[*The Court may decide that ]The participation of the co-respondent shall, at any stage of the proceedings, be terminated if the conditions in paragraph 2 or 3 of this article are [not or ]no longer met [on account of an assessment as indicated in paragraph 5. / Paragraph 5 shall apply mutatis mutandis]. [The Court shall ensure that the views of all parties to the proceedings have been heard.]"*

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<sup>4</sup> In this regard, it should be noted that it is already established case-law of the Court in the context of the hitherto existing procedural situation of an application against a respondent High Contracting Party that it is primarily for its national authorities, notably the courts, to interpret and apply domestic law, if necessary in conformity with EU law (see, for example, the judgments of *Jeunesse v. the Netherlands* (GC), Application No. 12738/10, judgment of 3 October 2014, paragraphs 110-112; and *Anheuser-Busch Inc. v. Portugal* (GC), Application No. 73049/01, judgment of 11 January 2007, paragraphs 85-86).

<sup>5</sup> The written reasons for the assessment should be provided regardless of whether that invitation is accepted or declined by the EU.

9. In light of the discussion, the Group invited the Secretariat to refine the proposal by taking account of the various proposed amendments and to also draft corresponding provisions for the explanatory report (see paragraph 14 of the 8<sup>th</sup> meeting report, CDDH47+1(2020)R8). On the basis of this request, the Secretariat submits the following proposal:

***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 an assessment by the European Union 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 corresponding paragraphs to the explanatory report (which would replace its current paragraph 59):***

*Termination of the co-respondent mechanism*

59. 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 (e.g. because of a clarifying decision by the CJEU). 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 for the Court 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 of the material conditions for applying the co-respondent mechanism on the basis of the applicable EU law which will be considered as final and authoritative.

59a. Article 3, paragraph 5a. requires that the views of the other parties to the proceedings, including the applicant, are heard before the EU makes the above assessment. To that effect, the Court shall notify the other parties of the EU's intention to terminate the co-respondent mechanism. The parties shall be given a short time limit within which to file at the Court their reasoned views. The Court will submit the views to the EU which shall take them duly into account. The EU should provide its reasoned assessment in writing to the Court. 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.