

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

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**10TH MEETING OF THE CDDH AD HOC NEGOTIATION GROUP
("47+1") ON THE ACCESSION OF THE EUROPEAN UNION TO
THE EUROPEAN CONVENTION ON HUMAN RIGHTS**

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

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

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

I. Introduction:

1. At its 9th meeting (23-25 March 2021), the "47+1 Group" discussed proposals with regard to "The principle of mutual trust between the EU member states" (Basket 3). The Group invited the Secretariat to table a revised proposal on the basis of the discussion (see paragraphs 4-10 of that meeting report, CDDH47+1(2021)R9).

2. In view of the discussion of the forthcoming 10th meeting, the Secretariat would like to introduce a proposal which is comprised of three elements. Firstly, a new paragraph to the preamble of the draft Accession Agreement is proposed (II.). Secondly, a new substantive provision for the draft Accession Agreement is proposed (III.). Thirdly, corresponding paragraphs for the explanatory report, which relate to both proposals under II. and III., are suggested.

II. New element for the preamble of the draft Accession Agreement:

3. The first part of the proposal is a new element for the preamble of the draft Accession Agreement, which is stated in the box below in bold:

Preamble

The High Contracting Parties to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5), signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"), being member States of the Council of Europe, and the European Union,

Having regard to Article 59, paragraph 2, of the Convention;

Considering that the European Union is founded on the respect for human rights and fundamental freedoms;

Considering that the accession of the European Union to the Convention will enhance coherence in human rights protection in Europe;

Considering, in particular, that any person, non-governmental organisation or group of individuals should have the right to submit the acts, measures or omissions of the European Union to the external control of the European Court of Human Rights (hereinafter referred to as "the Court");

Considering that, having regard to the specific legal order of the European Union, which is not a State, its accession requires certain adjustments to the Convention system to be made by common agreement,

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,

Have agreed as follows:

[...]

III. New provision for the draft Accession Agreement:

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

Article X – Mutual recognition under European Union law

Accession of the European Union to the Convention shall not affect the application of the principle of mutual trust in the context of mutual-recognition mechanisms within the European Union provided that such application is not automatic and mechanical to the detriment of human rights in an individual case.

IV. Corresponding paragraphs for the explanatory report:

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

Article X – Mutual recognition 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 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). The Court 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. According to the case-law of the CJEU, the principle of mutual trust 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).

3. The Court has noted the increased convergence between its own case-law and the case-law of the CJEU with regard to the limits 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 101). In line with this jurisprudence, Article X clarifies that accession of the EU to the Convention shall not affect the principle of mutual trust by requiring member States, in situations where EU law imposes an obligation of such mutual trust between them, to check in each case whether another member State has observed human rights, unless there is a serious and substantiated complaint of a Convention violation (see *Avotins v. Latvia*, cited above, paragraph 116) requiring that it be properly examined.