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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

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Proposal prepared by the Norwegian delegation on "Inter-Party applications under Article 33 of the European Convention 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)

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I. Introduction

1. The Norwegian delegation has explored a possible path forward to address inter-party applications under Article 33 ECHR in light of the EU's envisaged accession to the Convention. The main elements of a possible solution are presented in this paper. The proposal draws inspiration from the Chair's Paper of 31 August 2020 and proposals subsequently presented by the Secretariat and the European Commission, as well as from the discussions within the 47+1 group on this and related topics.

2. The paper relates to inter-party applications between EU member states. In theory, it is also conceivable that the EU would file an inter-party application against an EU member state, or vice versa. For simplicity, this paper focuses solely on applications between EU member states as this seems to be the more realistic scenario. The issue of inter-party applications involving the EU and EU member states could be addressed at a later stage, either as part of the mechanism envisaged in this paper, or otherwise.

3. The aim of the proposal is to find an appropriate way to ensure that the ECtHR remains the master of its proceedings, applying as far as possible existing procedural tools, while leaving it to the EU to assess whether a case – or part of a case – falls within the material scope of EU law.

II. The need to address the issue in the accession instruments

4. The proposal takes as its starting point that inter-party applications under Article 33 ECHR shall continue to play their current role after an accession of the European Union to the Convention. It follows from Article 3 of Protocol 8 TEU and Article 344 TFEU, however, that EU member states may not submit an application under Article 33 ECHR against another EU member state concerning matters of EU law. In other words, the issue discussed here is relevant if – and only if – an EU member state files an application against another EU member state in breach of the obligation under EU law. The mechanism proposed in this paper will not have any bearing on inter-party applications between High Contracting Parties which are not members of the EU and EU member states or the EU, or vice versa.

5. In the view of the Norwegian delegation, it is necessary to address the issue of inter-party applications between EU member states in the accession instruments. It is recalled that the CJEU held in Opinion 2/13 that the possibility of an application under Article 33 ECHR, on matters of EU law, would have to be excluded.[1] Without providing relevant regulation in the accession instruments, it seems very likely that the CJEU would again find the Agreement incompatible with the EU treaties. While being mindful of the need to address the issue, its practical relevance should not be overstated given that EU member states can be expected to act in accordance with EU law, i.e. not introducing inter-party applications in violation of EU law in the first place.

[1] CJEU, Opinion 2/13, 18 December 2014, paragraph 213.

III. The main features of the proposal

6. A sound solution should as far as possible be based on the already existing procedural rules found in the Convention. The ECtHR must remain the master of its own proceedings, and should therefore take the decision with regards to whether an inter-party application is to be examined. However, as already discussed in relation to the co-respondent mechanism, the EU should have the final and authoritative word on the distribution of competences within the EU, including the exclusive jurisdiction of the CJEU under EU law. Inter-party applications between EU member states on EU law matters should not be carried out before the ECtHR.

7. Taking some inspiration from the proposals under consideration on the co-respondent mechanism, a possible solution to the issue of inter-party applications could have four elements:

- Information: A mechanism whereby the ECtHR provides information to the EU of inter-party cases between EU member states
- Clarification: The possibility for the EU to assess whether a violation of Article 344 TFEU has taken place upon bringing such application before the ECtHR
- Withdrawal: A new obligation, set out in the accession instruments, for the applicant to withdraw an application to the extent it has been brought in violation of Article 344 TFEU
- Safeguard mechanism: A mechanism for the unlikely event that such a violation is established without the applicant High Contracting Party is complying with its duty to withdraw the case

8. The Convention provides already today procedural tools which could facilitate such a procedure. Some additional elements could be added to these in the accession instruments. In particular, there is practice in the case-law of the ECtHR to strike out a case under Article 37 ECHR whenever a High Contracting Party which has brought an application under Article 33 ECHR, notifies the ECtHR that it does not wish to further pursue an application. This provision reads as follows:

> **"**Article 37 – Striking out applications
>
> 1. The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that:
>
> a. the applicant does not intend to pursue his application; or
> b. the matter has been resolved; or
> c. for any other reason established by the Court, it is no longer justified to continue the examination of the application.
>
> However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the protocols thereto so requires.
>
> 2. The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course."

9. We have identified four inter-state cases (*Ireland v. United-Kingdom (II)*[2], *Georgia v. Russian Federation (III)*[3]*, Ukraine v. Russian Federation (III)*[4] and *Latvia v. Denmark*[5]) in which the Convention organs have struck out the cases in accordance with Article 37(1) ECHR.

[2] *Ireland v. United-Kingdom (II), Application No.* 5451/72, decision by the European Commission of Human Rights of 1 October 1972.
[3] *Georgia v. Russian Federation (III)*, *Application No*. 61186/09, decision by the ECtHR of 16 March 2010.
[4] *Ukraine v. Russian Federation (III)*, *Application No*. 49537/14, decision by the ECtHR of 1 September 2015.
[5] *Latvia v. Denmark*, *Application No.* 9717/20, decision by the ECtHR of 16 June 2020.

Hence, there is some practice in the jurisprudence of the ECtHR that it will not exercise its jurisdiction under Article 33 ECHR if the Parties concerned no longer wish to pursue the case.

IV. Assessment of the different steps of the proposal

IV.1 Information

10. An obligation to provide information to the EU about cases that involve EU member states is already proposed in a new paragraph 4a of Article 3 (which is currently under consideration), and it might therefore not be necessary to have a special information procedure for the inter-party cases if the Group will eventually agree in principle on such proposal. Inter-party cases between EU member states have so far been very rare and this is not likely to change after EU accession. Providing information to the EU about such cases would consequently not have any tangible impact on the workload of the ECtHR.

11. The following paragraphs suggest proposals for the other three elements, without determining their exact placement in the draft accession instruments (which could be decided upon at a later stage if there is agreement in principle on the substance of the proposals). See, however, some indications on the possible placement of the text proposals in section 5 below.

IV.2 The possibility for the EU to assess whether a violation of Article 344 TFEU has taken place upon bringing such application before the ECtHR

12. Whether an application falls within the scope of Article 344 TFEU is essentially a matter of EU law and should thus be determined by the Union itself. The proposal consequently provides that the ECtHR should provide the opportunity for the EU to assess whether the issue concerns the interpretation or application of EU law. The case in question would thus be temporarily suspended while the EU makes its assessment.

A possible formulation could be as follows:

"The Court shall provide the European Union with sufficient time to assess whether – and if so, to what extent – inter-party disputes between member states of the European Union concern the interpretation or application of European Union law."

13. The formulation draws directly from the wording of Article 344 TFEU, as this article provides the scope of the test to be adopted by the EU in its assessment. The proposal leaves it to the EU itself to establish an appropriate procedure to assess the application's conformity with Article 344 TFEU – whether it be through an infringement procedure pursuant to Article 258 TFEU or otherwise. However, in the interest of the individuals impacted by the alleged breach of the provisions of the Convention, it is important that the EU ensures that the assessment is made without undue delay so that the proceedings before the ECtHR may continue in due course.

14. The formulation "to what extent" captures the possibility that an inter-party application may have several elements of which some may not fall within the scope of Article 344 TFEU ("mixed applications").

IV.3 An obligation for the applicant to withdraw an application brought in violation of Article 344 TFEU

15. The accession instruments could spell out an obligation for the EU member states that any inter-party application brought before the ECtHR which is subsequently confirmed to be in violation of Article 344 TFEU, shall be withdrawn. This approach would ensure that the procedural obligation lies where it belongs, i.e. on the EU member states. The power to strike out the case would, however, remain with the ECtHR, as master of its own proceedings.

A possible formulation could be as follows:

"To the extent that such applications concern the interpretation or application of European Union law, the applicant shall notify the Court that it no longer intends to pursue the application."

16. When the party has notified the ECtHR that it no longer intends to pursue the application, the Court will strike out the application in accordance with Article 37(1) a, in line with its normal procedure. Where it is established that only a part of the application falls within the scope of Article 344 TFEU ("mixed applications"), the obligation to withdraw will be limited to this part – as captured by the wording "to the extent".

17. Article 37(1), second subparagraph, provides for a special rule for the continued examination if "respect for human rights … so requires". The Court has so far not applied this special rule in inter-state cases.[6] If the Convention system itself imposes an obligation to withdraw applications, as proposed in this paper, it can be safely assumed that the ECtHR would strike out the application in the case of a withdrawal, especially in view of the already existing case-law on inter-state applications.

This could be spelt out in the accession instruments, probably in the explanatory report, along the following lines:

"In light of the obligation to withdraw inter-party applications to the extent that such application concerns the interpretation or application of European Union law, it is the understanding of the High Contracting Parties that the Court would, following a withdrawal by the applicant state, cf. Article 37 first subparagraph litra a, strike out the application or relevant part of the application. The provision provided for in Article 37, paragraph 1, second sub-paragraph on the possible continued examination of the application, would not appear to pose an obstacle in the light of previous jurisprudence of the Court."[7]

IV.4 Safeguard mechanism in case a violation of Article 344 TFEU is established without the applicant High Contracting Party withdrawing the case

18. The draft accession instruments could also establish a safeguard for the scenario that the EU member state which has lodged the inter-party application in violation of Article 344 TFEU, does not fulfil its obligation to withdraw the application. Although this seems to be a very unlikely scenario, it may nonetheless have to be addressed in order to provide a watertight solution to the issue. In this case the Court could strike out the case (or in the case of a "mixed application", the relevant parts of the case) in accordance with Article 37(1) c of the Convention, based on the fact that the High Contracting Party concerned has not fulfilled its obligation under the accession instruments to notify that it no longer intends to pursue the

[6] In the above-cited inter-state cases which were struck out under Article 37 ECHR, the Court simply confirmed "the absence of any special circumstances regarding respect for the rights guaranteed by the Convention or its Protocols", without giving further reasons for this.

[7] An added Footnote could cite the cases mentioned in Footnote 2–5 of this paper.

application, and that it therefore is no longer justified to continue the examination of the application.[8]

A possible formulation could read:

"If a member state of the European Union fails to comply with its duty to withdraw the case or parts of the case, despite a clarification from the European Union that the application concerns the interpretation or application of European Union law, the Court shall strike the application out of its list on the basis that it is no longer justified to continue the examination of the application, in accordance with paragraph 1.c of Article 37 of the Convention."

V. Text proposals

19. Below we have reproduced the four concrete text proposals put forward in this paper. As a preliminary position, we indicate that the two first proposals could probably be included in the accession agreement, whereas the two latter could be inserted in the explanatory report with accompanying text. The question of relevant placement within the accession instruments could, however, be left for a later discussion.

1. The Court shall provide the European Union with sufficient time to assess whether – and if so, to what extent – inter-party disputes between member states of the European Union concern the interpretation or application of European Union law.

2. To the extent that such applications concern the interpretation or application of European Union law, the applicant shall notify the Court that it no longer intends to pursue the application.

3. In light of the obligation to withdraw inter-party applications to the extent that such application concerns the interpretation or application of European Union law, it is the understanding of the High Contracting Parties that the Court would, following a withdrawal by the applicant state, cf. Article 37 first subparagraph litra a, strike out the application or relevant part of the application. The provision provided for in Article 37, paragraph 1, second sub-paragraph, on the possible continued examination of the application, would not appear to pose an obstacle in the light of previous jurisprudence of the Court.

4. If a member state of the European Union fails to comply with its duty to withdraw the case or parts of the case, despite a clarification from the European Union that the application concerns the interpretation or application of European Union law, the Court shall strike the application out of its list on the basis that it is no longer justified to continue the examination of the application, in accordance with paragraph 1.c of Article 37 of the Convention.

[8] Some inspiration could perhaps be taken in this respect from the legal intention contained in Article 35(3) a ECHR, which states that an abuse of right of individual petition shall render an application inadmissible.