

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

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25 March 2021

**9TH MEETING OF THE CDDH AD HOC NEGOTIATION
GROUP (“47+1”) ON THE ACCESSION OF THE
EUROPEAN UNION TO THE EUROPEAN
CONVENTION ON HUMAN RIGHTS**

Meeting Report

Tuesday 23 March 2021 (10:00 a.m.) – Thursday 25 March 2021 (4:30 p.m.)

(Due to the COVID-19 situation, the meeting was held through the KUDO
videoconferencing system)

Council of Europe

1. The CDDH ad hoc negotiation group (“47+1 Group”) on the accession of the European Union (EU) to the European Convention on Human Rights (ECHR) held its 9th meeting from 23-25 March 2021. Due to the COVID-pandemic, the meeting was held via videoconference. The list of participants is attached as Appendix II.

Item 1: Opening of the meeting and adoption of the agenda

2. The Chair of the “47+1 Group”, Ms Tonje MEINICH (Norway), opened the meeting and asked delegates about the adoption of the agenda. The Chair explained that the agenda of the meeting is limited to a number of issues in order to enable a more in-depth discussion. She stated at the same time that the discussion of other issues raised by delegations, either emanating from Opinion 2/13 or other parts of the accession instruments, is to be continued in the upcoming meetings. The Group adopted the agenda without further changes (Appendix I).

Item 2: Discussion of proposals submitted in respect of Article 53 of the Convention

3. The Secretariat introduced a proposal submitted in respect of Article 53 of the Convention, which sought to clarify that the provision should not be construed as precluding High Contracting Parties from jointly applying a legally binding common level of protection of human rights, provided that the level of protection granted by the Convention (as interpreted by the European Court of Human Rights, hereinafter: “the Court”) is met. In light of the subsequent discussion, the Group considered and agreed upon the language of a new paragraph to be inserted in the explanatory report. It also discussed whether there should be a provision in the draft Accession Agreement reflecting this principle. There was no consensus on this, but if it was decided that such a provision should be inserted, there was no objection to the proposed language. The text for the explanatory report and a possible provision in the draft Accession Agreement is attached as Appendix III.

Item 3: Discussion of proposals submitted on the principle of mutual trust between the EU member states (Basket 3)

4. The EU introduced a proposal on the principle of mutual trust between the EU member states, which consisted of a provision for the Accession Agreement. The first sentence stated that the High Contracting Parties recognise that the Convention must be interpreted and applied taking into account the special importance of mutual recognition mechanisms established by EU law, which are founded on the principle of mutual trust, in the relationship between the member states of the EU. The second sentence laid out that the principle of mutual trust requires those member states, when implementing EU law (notably in the area of freedom, justice and security), to consider – save in exceptional circumstances - that fundamental rights have been observed by the other EU member states. The proposal also included the corresponding paragraphs for the explanatory report, clarifying the principle of mutual trust and its limits. The EU pointed out that the two European courts seek to reconcile the importance of mutual recognition mechanisms and the importance of protection of fundamental rights. In the view of the EU, the proposal would leave sufficient space for the case-law of the two European courts to continue to develop.

5. During the discussion, delegations acknowledged the legitimacy of the principle of mutual trust as a means to achieve an area of freedom, security and justice within the EU, and recognised the need to address that principle in the accession instruments. Some delegations expressed in principle support for the proposal, in particular the first sentence. Other delegations however considered it inappropriate that all High Contracting Parties, including those which are not member states of the EU, should “recognise” in a binding agreement the “special importance” of that principle.

6. A number of delegations expressed support to revise the proposal by putting a stronger emphasis on the case-law of the Court as a starting point. They referred in particular to the Grand Chamber judgment of *Avotins v. Latvia* (no. 17502/07, judgment of 23 May 2016, paragraphs 113-116), in which the Court set out its principle approach on the matter (including being mindful of the importance of the mutual-recognition mechanisms and the mutual trust which they require, and considering these mechanisms - if not applied automatically and mechanically in the event of certain substantiated human rights concerns - to be wholly legitimate in principle from the standpoint of the Convention). It was also suggested that the High Contracting Parties should not “recognise” the principle of mutual trust, but “recall” the Court’s established case-law on this topic.

7. A number of delegations raised concerns with the manner in which the second sentence was drafted, in particular its potential restrictive effect on the already-existing case-law of the Court once the EU has acceded to the Convention. Several delegations stated that any solution should be mindful of not setting in stone the developing case-law on the matter.

8. The Group was divided over the question of placement in the accession instruments for addressing the principle of mutual trust. Some delegations, including the EU, stated the necessity that a provision is inserted in the draft Accession Agreement. Other delegations opposed having a provision in the Accession Agreement and argued that this would create within the agreement a situation whereby High Contracting Parties would be divided as EU / EU member states and non-EU member states which is against the principle of equality among all High Contracting Parties of the Convention. These delegations thus considered that the matter should be included in the explanatory report or as a declaration by the EU member states as Appendix to the draft Accession Agreement. A third group of delegations expressed a flexible approach as to the placement, while also recalling that the Accession Agreement - in contrast to the Convention – would also provide room to address issues which were relevant only for a certain group of High Contracting Parties.

9. The Group invited the Secretariat to table a revised proposal on the basis of the discussion for a future meeting. Delegations were invited to support the Secretariat with any additional proposals which could be used for further discussion.

10. The representative of the Registry of the European Court of Human Rights informed the Group about the fact that the Court was about to deliver a new judgment on 25 March 2021 regarding the European Arrest Warrant scheme (*Bivolaru and Moldovan v. France*, nos. 40324/16 and 12623/17), which could be of relevance for the present discussion.

Item 4: Discussion of proposals submitted on the situation of EU acts in the area of the Common Foreign and Security Policy that are excluded from the jurisdiction of the Court of Justice of the European Union (Basket 4)

11. The EU gave a presentation of building blocks for a solution for certain acts in the area of the Common Foreign and Security Policy (CFSP) that are excluded from the jurisdiction of the Court of Justice of the European Union (CJEU). The building blocks related to the need for a new attribution clause in the draft Accession Agreement. Such clause would enable the EU to allocate, for the purposes of the Convention, responsibility for an CFSP act of the EU to one or more EU member state(s) if such act is excluded from the judicial review of the CJEU due to the limitations of the latter’s jurisdiction, despite such limitations being narrowly interpreted by the CJEU. The autonomy of EU law would require that the determination of whether such act falls within the CJEU’s jurisdiction is provided by the EU itself. Such a solution would guarantee that all CFSP acts and omissions would fall under the external control of the Court with regard to their compatibility with the Convention, while making it legally possible for the EU to accede to it. While the need for the reattribution of a certain CFSP act

could be presumed to arise extremely rarely (and even less in the future, as the CJEU continues to clarify the extent of its jurisdiction with regard to the CFSP), such a solution would be needed to align responsibility under the EU treaties with the attribution of responsibility for the purposes of the Convention system. The EU stated that such a solution would not affect the individual rights of applicants. In particular, applicants will be able to receive just satisfaction from one or more EU member state(s) designated by the EU as internationally responsible.

12. Delegations stressed the complexity of the subject-matter and welcomed in general that the building blocks for a proposal would not entail an exclusion of the jurisdiction of the ECtHR and retained the principle that the Court would be able to rule on the compatibility with the Convention of all CFSP acts. Several delegations noted that an attribution clause would be in accordance with public international law and may facilitate the finding of attribution for the Court, which currently decides cases on international responsibility without being guided by a specific attribution clause. Some delegations raised reservations against having such an attribution clause, *inter alia*, on the grounds of its compatibility with international law. Several delegations stated that it did not matter so much to whom CFSP acts were attributable, as long as applicants could raise before the Court their compatibility with the Convention.

13. Several delegations expressed concern that such a reattribution clause could put the applicant at a disadvantage, given that it may entail the changing of a respondent Party in an ongoing proceeding before the Court, subject the applicant to a lengthy and cumbersome process or challenge the ultimate role of the Court in determining Parties responsible for breaches of the Convention. They stressed that the procedure should not lead to a result that the applicant has to exhaust additional domestic remedies, possibly in various EU member states, for which the time-limits may have already expired by the time a decision on reattribution is communicated. This could also negatively reflect on the Convention system as a whole. Any possibility to reattribute responsibility for a CFSP act should be sufficiently anchored in the draft Accession Agreement in order to ensure sufficient transparency. Ultimately, much would depend on the concrete details of such a proposal which would have to be compatible with the negotiating principles.

14. Several delegations contributed with ideas for avoiding such negative repercussions for the applicant. These involved, *inter alia*, looking into the admissibility criterion of exhaustion of domestic remedies; the Court's case-law on effective remedies; the possibility to have the EU and its member state(s) as respondents, but with the possibility to remove one respondent at a later stage or deviate from the principle of joint responsibility (as currently provided under the co-respondent mechanism); the possibility for the EU to designate, in advance of the applicant's filing an application with the Court, to which respondent Party a certain act is attributed; and the complementary function of a third-party intervention by the EU under Article 36 of the Convention if a CFSP act was to be reattributed to one or more EU member state(s).

15. Many delegations considered that the discussion could be facilitated if the various scenarios for applications alleging a Convention violation of CFSP acts could be provided in writing in a systematic manner, in order to identify which type of acts and procedural constellations might require a reattribution and to estimate how such a proposal could work in practice.

16. The Chair concluded that the discussion had been very constructive and that delegations had stated the need to look further into the issue of a reattribution clause as provided in the EU's proposal, provided that, *inter alia*, such a possibility would be transparent, sufficiently anchored in the draft Accession Agreement and ensure the rights of the applicant. She also welcomed the various ideas generated during the discussion which could contribute to finding an appropriate solution and which should be developed further. The EU was invited to submit for the next meeting refined building blocks, or even more preferable, a concrete wording proposal. The EU was further invited to submit to the

Group in writing further explanations on how the proposed mechanism will function on the basis of the various scenarios in which applications alleging a Convention violation of a CFSP act could reach the Court.

Item 5: Any other business

17. The Group will hold its 10th negotiation meeting from 29 June – 2 July 2021. It also took note of the tentative dates for the 11th meeting (5-8 October 2021) and the 12th meeting (7-10 December 2021). The Group also decided to hold another exchange of views with civil society and national human rights institutions at its 10th meeting.

Item 6: Adoption of the meeting report

18. The Group adopted the present meeting report before the closure of the meeting.

APPENDIX I**Agenda**

- 1. Opening of the meeting and adoption of the agenda**
- 2. Discussion of proposals submitted in respect of Article 53 ECHR**
- 3. Discussion of proposals submitted on the principle of mutual trust between the EU member states (Basket 3)**
- 4. Discussion of proposals submitted on the situation of EU acts in the area of the Common Foreign and Security Policy that are excluded from the jurisdiction of the Court of Justice of the European Union (Basket 4)**
- 5. Any other business**
- 6. Adoption of the meeting report**

Working documents

Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms	CM(2013)93 add1, Appendix 1, pp. 3-9
Draft declaration by the European Union to be made at the time of signature of the Accession Agreement	CM(2013)93 add1, Appendix 2, p. 10
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	CM(2013)93 add1, Appendix 3, p. 11
Draft model of memorandum of understanding between the European Union and X [State which is not a member of the European Union]	CM(2013)93 add1, Appendix 4, p. 12
Draft explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms	CM(2013)93 add1, Appendix 5, pp. 13-28
Position paper for the negotiation on the European Union's accession to the European Convention for the protection of Human Rights and Fundamental Freedoms	47+1(2020)1
Paper by the Chair to structure the discussion at the 6 th negotiation meeting	47+1(2020)2
Compilation by the Secretariat of recent cases in the area of Basket 3 ("The principle of mutual trust between the EU member states")	47+1(2020)4rev

Negotiation Document submitted by the European Union on 2 November 2020	Restricted
Compilation by the European Commission of recent and currently pending cases before the Court of Justice of the European Union in the area of Basket 4 (“Common Foreign and Security Policy”)	Non-paper
Proposals by the Secretariat for discussion of agenda items 4 and 5	47+1(2021)5
Non-paper prepared by the Secretariat regarding the estimated expenditure related to the Convention regarding Article 8 of the draft Accession Agreement	47+1(2021)6
Proposed modifications by the European Union to the draft Accession Agreement in relation to Basket 3	Restricted
Building blocks submitted by the European Union in the area of Basket 4	Non-paper

Reference documents

Ad hoc terms of reference concerning accession of the EU to the Convention given to the CDDH by the Ministers’ Deputies during their 1085 th meeting (26 May 2010)	CDDH(2010)008
Decision by the Minister’s Deputies Committee of Ministers at its 1364 th meeting (15 January 2020) on the continuation of the ad hoc terms of reference for the CDDH to finalise the legal instruments setting out the modalities of accession of the European union to the European Convention on Human Rights	CM/Del/JAN(2020)1364/4.3
Letter of 31 October 2019 by the President and the First Vice-President of the European Commission to the Secretary General of the Council of Europe	DD(2019)1301
Opinion 2/13 of 18 December 2014 of the Court of Justice of the European Union	A-2/13 ; EC LI: EU: C : 2014: 2454
Protocol No. 16 to the European Convention on Human Rights and its explanatory memorandum	Council of Europe Treaty Series No. 214

APPENDIX II**List of participants****MEMBERS / MEMBRES**

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DIRECTORATE OF LEGAL ADVICE AND PUBLIC INTERNATIONAL LAW / DIRECTION DU CONSEIL JURIDIQUE ET DU DROIT INTERNATIONAL PUBLIC	<p>Mr Jörg POLAKIEWICZ, Director, Directorate of Legal Advice and Public International Law, Council of Europe</p> <p>Ms Irene SUOMINEN, Directorate of Legal Advice and Public International Law, Council of Europe</p>

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DG I – Human Rights and Rule of Law / Droits de l'Homme et État de droit Council of Europe	Mr Christophe POIREL, Director / Directeur, Human Rights Directorate / Direction des droits de l'Homme
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DG I – Human Rights and Rule of Law / Droits de l'Homme et État de droit Council of Europe	Mr Matthias KLOTH, Secretary of the CDDH <i>ad hoc</i> negotiation group on the accession of the European Union to the European Convention on Human Rights / Secrétaire du Groupe de négociation <i>ad hoc</i> du CDDH sur l'adhésion de l'Union européenne à la Convention européenne des droits de l'homme
DG I – Human Rights and Rule of Law / Droits de l'Homme et État de droit Council of Europe	Mr Alfonso DE SALAS, Head of the Human Rights Intergovernmental Cooperation Division / Chef de la Division de la coopération intergouvernementale en matière de droits de l'Homme, Secretary of the CDDH / Secrétaire du CDDH
DG I – Human Rights and Rule of Law / Droits de l'Homme et État de droit Council of Europe	Ms Evangelia VRATSIDA, Assistant, Human Rights Policy and Cooperation Department / Assistante, Service des politiques et de la coopération en matière de droits de l'Homme
DG I – Human Rights and Rule of Law / Droits de l'Homme et État de droit Council of Europe	Ms Madeleine CHAUVARD, trainee, Human Rights Policy and Cooperation Department / stagiaire, Service des politiques et de la coopération en matière de droits de l'Homme

INTERPRETERS / INTERPRÈTES

Ms Claudine PIERSON

Mr Jan KROTKI

APPENDIX III

Proposal regarding Article 53 ECHR (placement in the accession instruments to be determined at a later stage, see paragraph 3 of the meeting report):

[Article 53 of the Convention shall not be construed as precluding High Contracting Parties from jointly applying a legally binding common level of protection of human rights and fundamental freedoms, provided that it does not fall short of the level of protection guaranteed by the Convention and, as relevant, its Protocols, as interpreted by the European Court of Human Rights.]

Paragraph for the explanatory report:

It is the understanding of the Parties that Article 53 of the Convention shall not be construed as precluding High Contracting Parties from jointly applying a legally binding common level of protection of human rights and fundamental freedoms, provided that it does not fall short of the level of protection guaranteed by the rights and freedoms defined in the Convention and, as relevant, the Protocols thereto, as interpreted by the European Court of Human Rights. Such agreement may derive from international or European cooperation (such as, for example, European Union law regulating the relationship between the member States of the European Union). In this respect, it is noted that the Convention does not prevent, but also not require the High Contracting Parties to grant more extensive protection in respect of the rights and liberties guaranteed therein than that implemented by it (see the case of *M.N. and others v. Belgium*, no. 3599/18, Grand Chamber decision of 5 May 2020, paragraph 140).