

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

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**13<sup>TH</sup> MEETING OF THE CDDH AD HOC NEGOTIATION GROUP  
ON THE ACCESSION OF THE EUROPEAN UNION TO THE  
EUROPEAN CONVENTION ON HUMAN RIGHTS**

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**Revised proposals by the Secretariat for the termination of the co-respondent mechanism (Article 3, paragraph 5a. of the draft Accession Agreement) and other remaining issues in Basket 1**

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Strasbourg, Tuesday 10 May 2022 (10:00 am) – Friday 13 May 2022 (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 9 of the Palais de l'Europe)

Council of Europe

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**Revised proposals by the Secretariat for the termination of the co-respondent mechanism (Article 3, paragraph 5a. of the draft Accession Agreement) and other remaining issues in Basket 1**

**I. Introduction:**

1. At its 12<sup>th</sup> meeting (7-10 December 2021), the “47+1 Group” tentatively agreed on an operative paragraph for the triggering of the co-respondent mechanism (Article 3, paragraph 5) and corresponding paragraphs for the explanatory report. The text was reproduced in Appendix IV of the 12<sup>th</sup> meeting report (CDDH47+1(2021)R12).

2. The Group subsequently tasked the Secretariat with revising the proposal for the operative provision of Article 3, paragraph 5a (“Termination of the co-respondent mechanism”) to align its language with the tentatively agreed wording of Article 3, paragraph 5. It also tasked the Secretariat with proposing a compromise solution regarding the last remaining bracket in the text of Article 3, paragraph 5a (in the version which appears in Appendix III of the 11<sup>th</sup> meeting report, CDDH47+1(2021)R11).

3. In line with this request, the following proposal seeks to align the language of the provision on the termination of the co-respondent mechanism (Article 3, paragraph 5a) with the tentatively agreed version of the triggering of the co-respondent mechanism (Article 3, paragraph 5). In doing so, this paper also proposes a solution regarding the last remaining bracket in Article 3, paragraph 5a.

4. At the end of the present paper (Section V.), the Secretariat has also (re-)tabled revised proposals for the other remaining issues in Basket 1 which the Group is invited to discuss at its 13<sup>th</sup> meeting (1-4 March 2022).

**II. Article 3, paragraph 5a in its version of the 11<sup>th</sup> meeting of the 47+1 Group (October 2021):**

5. The Group considered the following proposal for Article 3, paragraph 5a. at its 11<sup>th</sup> meeting in October 2021:

5a. [The Court may terminate the co-respondent mechanism / The co-respondent mechanism shall be terminated] at any stage of the proceedings only if the conditions in paragraph 2 or 3 of this article are no longer met according to a reasoned declaration by the European Union based on an assessment of the applicable European Union law. The Court shall ensure that the views of all parties to the proceedings have been heard.

**III. Tentatively agreed language of Article 3, paragraph 5 at the 12<sup>th</sup> meeting in December 2021:**

6. The Group tentatively agreed on the following wording for Article 3, paragraph 5 at its 12<sup>th</sup> meeting in December 2021:

5. The European Union or its member States may become a co-respondent, either by accepting an invitation from the Court or upon their initiative. The Court admits a co-respondent by decision if the conditions in paragraphs 2 or 3 of this article are met according to a reasoned assessment by the European Union. Before a High Contracting Party becomes

co-respondent, the Court shall grant the applicant an opportunity to state its views on the matter.

The admission of the co-respondent does not prejudice the Court's decision on the case.

#### IV. Revised and aligned proposal by the Secretariat for Article 3, paragraph 5a:

7. In order to align the language for Article 3, paragraph 5a with the tentatively agreed language of Article 3, paragraph 5, the following proposal is tabled:

5a. The Court terminates the co-respondent mechanism by decision at any stage of the proceedings only if the conditions in paragraph 2 or 3 of this article are no longer met according to a reasoned assessment by the European Union. Before the co-respondent mechanism is terminated, the Court shall grant the applicant an opportunity to state its views on the matter.

#### V. Corresponding paragraphs for Article 3, paragraph 5a. for the explanatory report:

8. The alignment of the language of Article 3, paragraph 5a as proposed above would require slight modifications of the two corresponding paragraphs of the explanatory report for this provision. Such modifications of the version of the text considered by the Group at the last occasion (the 11<sup>th</sup> meeting in October 2021) are highlighted below in bold:

##### *Termination of the co-respondent mechanism*

58. 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. 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 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 - to be provided through a reasoned declaration in writing - of the material conditions for applying the co-respondent mechanism on the basis of the applicable EU law, the conclusion of which will be considered as determinative and authoritative.

59. Article 3, paragraph 5a. requires that the views of the ~~other parties to the proceedings, notably the applicant~~ applicant, are heard. To that effect, the Court will inform the ~~applicant other parties~~ applicant of the assessment and set a short time limit for possible comments. The Court will submit the comments 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. 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.

## VI. Proposals for other remaining issues in Basket 1:

### ***The prior involvement of the Court of Justice of the European Union***

9. The following changes, which are highlighted below in bold, are tabled for paragraphs 65-69 of the explanatory report:

#### *Prior involvement of the CJEU in cases in which the EU is a co-respondent*

65. Cases in which the EU may be a co-respondent arise from individual applications concerning acts or omissions of EU member States. The applicant will first have to exhaust domestic remedies available in the national courts of the respondent member State. These national courts may or, in certain cases, must refer a question to the CJEU for a preliminary ruling on the interpretation and/or validity of the EU act at issue (Article 267 of the TFEU). Since the parties to the proceedings before the national courts may only suggest such a reference, this procedure cannot be considered as a legal remedy that an applicant must exhaust before making an application to the Court. However, without such a preliminary ruling, the Court would be required to adjudicate on the conformity of an EU act with human rights, without the CJEU having had the opportunity to do so, by ruling on, as the case may be, the validity **or interpretation** of a provision of secondary law or the interpretation of a provision of primary law.

66. Even though this situation is expected to arise rarely, it was considered desirable that an internal EU procedure be put in place to ensure that the CJEU has the opportunity to assess the compatibility with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded of the provision of EU law which has triggered the participation of the EU as a co-respondent. Assessing the compatibility with the Convention shall mean to rule on the validity **or the interpretation** of a legal provision contained in acts of the EU institutions, bodies, offices or agencies, or on the interpretation of a provision of the TEU, the TFEU or of any other provision having the same legal value pursuant to those instruments. Such assessment should take place before the Court decides on the merits of the application. This procedure, which is inspired by the principle of subsidiarity, only applies in cases in which the EU has the status of a co-respondent. It is understood that the parties involved – including the applicant, who will be given the possibility to obtain legal aid – will have the opportunity to make observations in the procedure before the CJEU.

**66a. Determining whether it is necessary to initiate the prior involvement of the CJEU under Article 3, paragraph 6 presupposes an assessment of the applicable rules of EU law. Therefore, in a similar manner as for the procedure of assessing whether the criteria for triggering the co-respondent mechanism are met (Article 3, paragraph 5), the prior involvement of the CJEU will be initiated according to an assessment by the EU of the applicable EU law. The conclusion of this assessment by the EU will be considered as determinative and authoritative.**

67. **In the course of its prior involvement**, the CJEU will not assess the act or omission complained of by the applicant, but the EU legal basis for it.

68. The prior involvement of the CJEU will not affect the powers and jurisdiction of the Court. The assessment of the CJEU will not bind the Court.

69. The examination of the merits of the application by the Court should not resume before the parties and any third party interveners have had the opportunity to assess properly the consequences of the ruling of the CJEU. In order not to delay unduly the proceedings before the Court, the EU shall ensure that the ruling is delivered quickly. In this regard, it is noted that

an accelerated procedure before the CJEU already exists and that the CJEU has been able to give rulings under that procedure within six to eight months.

### ***Joint responsibility in co-respondent cases***

10. The following changes, which are highlighted below in bold, are proposed to Article 3, paragraph 7 and its corresponding paragraph 62 of the explanatory report:

#### ***Article 3, paragraph 7:***

7. If the violation in respect of which a High Contracting Party is a co-respondent to the proceedings is established, the respondent and the co-respondent shall be jointly responsible for that violation, **~~unless the Court, on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant, decides that only one of them be held responsible.~~**

#### ***Explanatory report:***

##### *Effects of the co-respondent mechanism*

62. As noted above, it is a special feature of the EU legal system that acts adopted by its institutions may be implemented by its member States and, conversely, that provisions of the EU founding treaties established by its member States may be implemented by institutions, bodies, offices or agencies of the EU. Therefore, the respondent and the co-respondent(s) are **normally** held jointly responsible for any alleged violation in respect of which a High Contracting Party has become a co-respondent. **~~The Court may, however, hold only the respondent or the co-respondent(s) responsible for a given violation on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant. Apportioning responsibility separately to the respondent and the co-respondent(s) on any other basis would entail the risk that the Court would assess the distribution of competences between the EU and its member States. It should also be recalled that the Court in its judgments rules on whether there has been a violation of the Convention and not on the validity of an act of a High Contracting Party or of the legal provisions underlying the act or omission that was the subject of the complaint. This is without prejudice to Article 2, paragraph 3 of this Agreement.~~**

11. In respect of the last sentence proposed above for paragraph 62 of the explanatory report (“*This is without prejudice to Article 2, paragraph 3 of this Agreement.*”), it is recalled that Article 2, paragraph 3 of the draft Accession Agreement 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.*”