

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

47+1(2022)19
10 February 2022

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

Document by the Secretariat on the state of play of the proposals for Basket 2

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

Document by the Secretariat on the state of play of the proposals for Basket 2

I. Introduction:

1. At its forthcoming 13th meeting (1-4 March 2022), the “47+1 Group” will resume its discussion on Basket 2 (see agenda item 3). It should be noted that no new proposals are introduced for the time being and the discussion will continue on the proposals which have been submitted to the Group at past meetings. To facilitate the preparation, the present document gives an overview of the state of play of those proposals.

II. Proposals for inter-party cases (Article 33 of the Convention):

Revised proposal by the Norwegian delegation and the Secretariat

2. The following revised proposal was tabled by Norway and the Secretariat at the 11th meeting in October 2021 (see document CDDH47+1(2021)10):

Article 4 – Inter-Party cases

[...]

3. The Court shall provide the European Union upon request with sufficient time to assess whether – and if so, to what extent – an inter-party dispute under Article 33 of the Convention between two or more member States of the European Union, or between the European Union and one or more of its member States, concerns the interpretation or application of European Union law. Insofar as such an application concerns the interpretation or application of European Union law, the applicant High Contracting Party shall notify the Court that it no longer intends to pursue the application.

Explanatory report:

72. With the EU’s accession to the Convention, it will be possible that inter-party disputes arise under Article 33 of the Convention between the EU and one or more of its member States, in addition to the already existing possibility of such disputes between two or more EU member States. Insofar as such inter-party disputes concern the interpretation and application of EU law it follows from Article 344 of the TFEU (to which Article 3 of Protocol No. 8 to the Treaty of Lisbon refers) that EU member States “undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein”.

72a. Although the High Contracting Parties concerned can be expected to act in accordance with Article 344 of the TFEU, Article 4, paragraph 3 contains a safeguard clause which would provide the opportunity for the EU, having received information about any such communicated inter-party dispute in accordance with Article 3, paragraph 4a., to request sufficient time to assess whether – and if so, to what extent – that dispute concerns the interpretation or application of EU law. In order not to delay unduly the proceedings before the Court, the EU shall ensure that the conclusion of the assessment is duly reasoned and communicated quickly in writing. Where the assessment concludes that an application falls within the scope of Article 344 of the TFEU, Article 4, paragraph 3 establishes an obligation for the applicant High Contracting Party to withdraw the inter-party application. 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 is limited to this part, as captured by the wording “insofar as”.

72b. In light of its previous case-law¹, it can be expected that the Court would, following such withdrawal, strike out the application to the extent necessary by applying Article 37 of the Convention in a spirit of cooperation having due regard to the nature of the EU legal system. In the unlikely event that a High Contracting Party fails to comply with its obligation to withdraw its application, it is understood that it would no longer be justified to continue the examination of the application and that the Court can be expected to make the necessary arrangements to that effect under Article 37, paragraph 1.c of the Convention.

72c. Article 4, paragraph 3 does not concern inter-party applications between High Contracting Parties which are not members of the EU and EU member States or the EU, or *vice versa*. Moreover, inter-party applications between EU member States which do not concern EU law are likewise not affected by the provision.

Proposed amendments by the European Union on the revised proposal by the Norwegian delegation and the Secretariat

3. At the 11th meeting in October 2021, the EU proposed the following amendments to the above proposal (in bold, see also Appendix IV of the 11th meeting report (CDDH47+1(2021)11, pp. 23-24):

Article 4 - Inter-Party cases

(...)

3 (new). The Court shall provide the European Union upon request with sufficient time to assess whether ~~—and if so, to what extent—~~ an inter-party dispute under Article 33 of the Convention between ~~two or more~~ member States of the European Union, ~~or between the European Union and one or more of its member States,~~ concerns the interpretation or application of European Union law. Insofar as ~~such an application the dispute~~ concerns the interpretation or application of European Union law, ~~the applicant High Contracting Party shall notify the Court that it no longer intends to pursue the application. the application shall be inadmissible / the Court shall strike the application out of its list.~~

► *For cases between the EU and its Member States, see the initial EU proposal:*

4 (new). The following sentence is added to Article 33 of the Convention:

“This Article shall not apply to applications brought by the European Union against one of its member States or to applications brought by a member State of the European Union against the European Union.”

Explanatory report:

Inter-party cases between member States of the EU

72. ~~With the EU’s accession to the Convention, it will be possible that inter-party disputes arise under Article 33 of the Convention between the EU and one or more of its member States, in addition to the already existing possibility of such disputes between two or more EU member States.~~ Insofar as ~~such~~ inter-party disputes concern the interpretation and application of EU law it follows from Article 344 of the TFEU (to which Article

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

3 of Protocol No. 8 to the Treaty of Lisbon refers) that EU member States “undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein”.

72a. Although the High Contracting Parties concerned can be expected to act in accordance with Article 344 of the TFEU, Article 4, paragraph 3 contains a safeguard clause which would provide the opportunity for the EU, having received information about any such communicated inter-party dispute in accordance with Article 3, paragraph 4a., to request sufficient time to assess whether – and if so, to what extent – ~~that a dispute between EU member States concerns the interpretation or application of EU law. In order not to delay unduly the proceedings before the Court, the EU shall ensure that the conclusion of the assessment is duly reasoned and communicated quickly in writing.~~ With respect to the notion of ‘sufficient time’, it must be borne in mind that the process should allow for the initiation and completion of proceedings before the Court of Justice of the European Union (see, by way of example, Case C-459/03 Commission v Ireland). Where the assessment concludes that an application falls within the scope of Article 344 of the TFEU, ~~Article 4, paragraph 3 establishes an obligation for~~ the applicant High Contracting Party can be expected to withdraw the inter-party application. ~~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 is limited to this part, as captured by the wording “insofar as”.~~

72b. In light of its previous case-law (Footnote: Georgia v. Russian Federation (III), Application No. 61186/09, decision by the ECtHR of 16 March 2010; Ukraine v. Russian Federation (III), Application No. 49537/14, decision by the ECtHR of 1 September 2015; ~~Latvia v. Denmark, Application No. 9717/20, decision by the ECtHR of 16 June 2020; see also Ireland v. United Kingdom (II), Application No. 5451/72, decision by the European Commission of Human Rights of 1 October 1972.~~), it can be expected that the Court would, following such withdrawal, strike out the application to the extent necessary by applying Article 37(1)(a) of the Convention ~~in a spirit of cooperation~~ having due regard to the nature of the EU legal system. In the unlikely event that a High Contracting Party fails ~~to comply with its obligation~~ to withdraw its application, ~~it is understood that it would no longer be justified to continue the examination of the application and that~~ the Court can be expected to make the necessary arrangements ~~to that effect under Article 37, paragraph 1.c of the Convention.~~

72c. Article 4, paragraph 3 does not concern inter-party ~~cases applications between brought by~~ High Contracting Parties which are not members of the EU ~~and against~~ EU member States or the EU, or vice versa. Moreover, inter-party applications between EU member States which do not concern EU law are likewise not affected by the provision.

► A paragraph would have to be added regarding cases between the EU and its MS.

Proposal by the Russian delegation

4. The following proposal for a new Article 4, paragraph 3 has been tabled by the Russian Federation in its non-paper entitled “Preliminary considerations on the subject of possible solutions to issue raised in Opinion 2/13 of the CJEU consistent with the approach enshrined in the ‘2013 package’ and in the negotiating principles of NEUMS” (see paragraph 3 of the 11th meeting report, CDDH47+1(2021)R11, and paragraph 3 and Appendix III of the 12th meeting report (CDDH47+1(2021)R12):

Article 4 - Inter-Party cases

(...)

3. Without prejudice to Article 46, paragraph 1, of the Convention decisions of the European Court of Human Rights regarding inter-Party applications submitted under Article 33 of the Convention shall not affect the obligations of EU Member States under the founding Treaties of the European Union.

III. Proposals regarding requests for advisory opinions under Protocol No. 16 to the Convention

5. The Group discussed the following Secretariat proposal at its 7th meeting (February 2021, CDDH47+1(2021)5, pp. 8-9) and decided to revert to the issue at a later stage:

Article 4a – Requests for advisory opinions under Protocol No. 16 of the Convention

A new paragraph 4 of Article 1 should be added to Protocol No. 16 to read as follows:

“In the event of a request for an advisory opinion under this Protocol by a court or tribunal of a member State of the European Union which has acceded to this Protocol, the opportunity shall be afforded to the European Union to make a determination of whether and, if so, to what extent this amounts to a circumvention of the procedure in Article 267 of the Treaty on the Functioning of the European Union. Should this be established, the Court shall use its discretion under Article 2, paragraph 1 of this Protocol to reject the request as far as the latter breaches European Union law.”

6. Prior to this proposal, the EU had submitted for the 6th meeting (November 2020) a consolidated proposal for Article 33 of the Convention and Protocol No. 16 of the Convention which reads as follows:

Article 4a – Applications under Article 33 and references under Protocol No. 16

1. The Court shall inform the European Union of any application brought under Article 33 of the Convention by one member State of the European Union against another member State of the European Union as well as of any reference under Protocol No. 16 made by the highest court or tribunal of a member State of the European Union.

2. If the European Union informs the Court that an infringement procedure pursuant to the Treaty on the Functioning of the European Union has been brought in this respect against the member State of the European Union that has brought the application under Article 33 of the Convention or whose highest court or tribunal has made a reference under Protocol No. 16, the procedure before the Court shall be automatically suspended.

3. In the case referred to in paragraph 2 of this article, the European Union shall inform the Court of the outcome of the infringement procedure and of whether the proceedings before the Court is to be discontinued.