



Strasbourg, 14 September 2022

## **LEGAL OPINION**

**Subject: 46+1 – Article 7 (4) (a) of the draft Accession Agreement. Laying down voting rules in the Committee of Ministers’ Rules for the supervision of the execution of judgments and of the terms of friendly settlement**

### **Introduction**

1. At the 14th meeting of the CDDH ad hoc negotiation group (“46+1 Group”) on the accession of the European Union (EU) to the European Convention on Human Rights (ECHR) a legal opinion was requested on the possible legal bases, including but not only those found in the Statute or the Convention, for voting rules in Committee of Ministers (CM) DH meetings. Already during the first round of negotiations for the accession of the EU to the, the drafters of the Accession Agreement became cognisant of the need to counterbalance the obligation of the EU and its member States to co-ordinate their positions and votes, on the one hand, and the rights of the non-EU member States to continue to have an effective and meaningful role in the supervision of the execution of judgments of the European Court of Human Rights (Court), on the other hand. This meant, in other words, that a way should be found to avert the EU, together with its member States, from blocking negative execution decisions against it in the CM. Such blocking would be possible if the habitual voting majorities as enshrined in the Statute of the Council of Europe (Statute) and the ECHR were to be directly applied. Given that a legal obligation for EU coordination exists with regard to cases in which the EU is either a respondent or co-respondent, it was considered sufficient to introduce a respective balancing rule only in this context, as Article 7 (4)(a) of the draft Accession Agreement (dAA), which reads as follows:

*“The exercise of the right to vote by the European Union and its member States shall not prejudice the effective exercise by the Committee of Ministers of its supervisory functions under Articles 39 and 46 of the Convention. In particular, the following shall apply:*

*a. in relation to cases where the Committee of Ministers supervises the fulfilment of obligations either by the European Union alone, or by the European Union and one or more of its member States jointly, it derives from the European Union treaties that the European Union and its member States express positions and vote in a co-ordinated manner. **The Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements shall be adapted to ensure that the Committee of Ministers effectively exercises its functions in those circumstances.***”

2. Yet following the way Article 7 (4)(a) of the dAA is currently drafted it does not impose voting rules itself but simply authorises the adaptation of the Rules of the CM for the Supervision of the Execution of judgments and of the terms of friendly settlements (Supervision Rules) to this end. Consequently, the inclusion of a new rule into the Supervision Rules was proposed in Appendix 3 to the draft accession instruments with regard to cases to which the EU is a Party. According to this new draft Rule 18, as contained in the 2013 draft accession instruments, decisions by the CM ...

- (1) ... under Rule 17 (Final resolution) ... **shall be considered as adopted if a majority of four fifths of the representatives casting a vote and a majority of two thirds of the representatives entitled to sit on the Committee of Ministers are in favour;**
- (2) ... under Rule 10 (Referral to the Court for interpretation of a judgment) and under Rule 11 (Infringement proceedings) ... **shall be considered as adopted if one fourth of the representatives entitled to sit on the Committee of Ministers is in favour;**
- (3) ... on procedural issues or merely requesting information **shall be considered as adopted if one fifth of the representatives entitled to sit on the Committee of Ministers is in favour.**

3. In contrast, the respective voting majorities currently applicable in the CM Human Rights meetings with regard to all judgments are as follows:

- a) For final resolutions under Rule 17, the applicable majority is drawn directly from **Article 20 (d) of the Statute** according to which ‘all other’ resolutions of the Committee – and thus including final resolutions in the execution context - require a two-thirds majority of the representatives casting a vote, and of a majority of the representatives entitled to sit on the Committee;

- b) Decisions by the CM concerning referral for interpretation and infringement proceedings under Rules 10 and 11 require, under **Article 46 (3) and (4) of the ECHR**, a majority vote of two-thirds of the representatives entitled to sit on the Committee;
- c) Lastly, decisions on procedural issues and on requests for information require, according to **Article 20 (b) of the Statute**, a simple majority vote of the representatives entitled to sit on the Committee.

4. A comparison between the so far applicable rules relying on the majorities laid down in the Statute and the ECHR and the new qualified majorities and hyper-minorities proposed in draft Rule 18 raise multiple pertinent legal questions to be dealt with in the following:

- I. Permissibility of indicative voting
- II. Definitive nature of an indicative vote
- III. Mandatory formal voting under Article 46 of the ECHR
- IV. Hierarchy of norms

#### ***I. Permissibility of indicative voting***

5. The wording chosen for draft Rule 18, “*shall be considered as adopted*”, instead of, for instance, “*shall be adopted*” or “*shall require*” appears to indicate that it is not the intention to introduce new majorities for formal votes but to replace or precede a formal vote by an indicative vote through new provisions in the Supervision Rules. This assumption is corroborated by paragraph 88 of the 2013 draft Explanatory Report. According to the said paragraph draft Rule 18 is based on the principle that, when a certain number of representatives entitled to sit on the Committee are in favour of the respective decision, it shall be considered as adopted, *without a formal vote and without referring to the majorities set out in the otherwise applicable higher-ranking instruments*. Instead of a formal vote on the matter, an indicative vote is conducted.

6. In the practice of the CM, indicative votes are not a new phenomenon but, in fact, used quite frequently and they are not unknown in DH meetings either. As a pre-stage to a subsequent formal vote, for instance, they are provided for by Article 10 (7) of the Rules of

Procedure for the meetings of the Ministers' Deputies.<sup>1</sup> An indicative vote can be carried out as a permissible pre-stage to decisions taken on a consensual basis, without a formal vote. To introduce indicative voting also in the accession instruments thus appears as a legally viable option at the disposal of the drafters.

## ***II. Definitive nature of an indicative vote***

7. Where indicative voting is introduced via a legally binding provision in the rules of procedure, as is the case for draft Rule 18, the question arises, whether this removes the possibility of a formal vote being conducted in addition, should it be requested by a Party.

8. The 2013 Explanatory Report refers to the 1994 'gentleman's agreement' regarding the adoption of recommendations to member States' governments in the CM:<sup>2</sup>

*“The Deputies agreed upon a Gentleman’s Agreement amongst themselves to the effect that no delegation should request the application of the rule of unanimity provided for under Article 20 (a)(i) of the Statute to block the adoption of recommendations to the governments of member States, if the majority foreseen in Article 20 (d) of the Statute has been attained.”<sup>3</sup>*

9. In want of a legally binding effect,<sup>4</sup> a 'gentleman's agreement' can only be applied as long as all member States collectively share the common understanding that it shall be applied. Once this understanding is no longer shared by all delegations, anyone of them is entitled to require the application of the unanimity rule provided for in the Statute (Article 20 (a) (i)). In other words, the agreement amongst member States to resort to the 'gentleman's agreement' does not bar the Committee from reverting back to the original rule envisaged by the Statute in an individual case and on an *ad hoc* basis if so required by one or more of its members.

10. This is different in the case of draft Rule 18. The legal effects of this legally binding provision are meant to be definitive. Their aim is to enable the adoption of a decision without a vote by catering for a qualified majority or hyper-minority as a minimum threshold to ensure

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<sup>1</sup> Article 10 (7) reads as follows: “Before proceeding to a vote, the Chairman may ask the Deputies to express their views on an indicative basis.”

<sup>2</sup> Footnote 25 to paragraph 88 of the Explanatory Report.

<sup>3</sup> Adopted by the Ministers' Deputies at their 519bis meeting on 4 November 1994.

<sup>4</sup> Under international law, a gentleman's agreement refers to an agreement made by States' representatives committing to perform certain acts or refrain from them. The nature of the commitment is regarded as political rather than legally binding or enforceable through courts.

that bloc voting in favour of the EU is averted. Once the respective threshold can be seen fulfilled, no delegation can disregard the binding voting rule by insisting on a formal vote.

### ***III. Mandatory formal voting under Article 46 of the ECHR***

11. Indicative votes cannot, however, be used as anything more than an indicator or stocktaking exercise to reveal the views of the Parties towards a certain decision in cases in which a formal vote is mandatory. This is not the case neither for final or interim resolutions nor for procedural decisions in CM DH meetings, i.e., for cases in which the applicable majority rule is drawn from the Statute. The practice of the CM shows that Article 20 of the Statute is not read and understood as a rule imposing a formal vote but rather as setting the applicable majorities, whenever and only when it is decided to proceed to voting.

12. The issue is, however, different as regards decisions concerning referral and infringement decisions under Article 46 (3) and (4) of the ECHR. For decisions under Article 46 ECHR a formal vote is obligatory and as such irreplaceable by an indicative vote:

*(3) [...] A referral decision **shall require a majority vote** of two thirds of the representatives entitled to sit on the Committee.*

*(4) If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, [...] **by decision adopted by a majority vote** of two thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.*

13. In this context, it is hence not possible to substitute the formal vote by an indicative vote. In its current form Rule 18 paragraph 2 is thus incompatible with Article 46 of the ECHR.

14. It could, however, nevertheless be possible to amend the majorities foreseen in Article 46 (3) and (4) ECHR in relation to cases in which the EU is a respondent or co-respondent in order to address the concern of EU bloc voting. For this purpose, the words “*considered as*” should be deleted in paragraph 2 of the new Rule 18 to read “*shall be adopted*” instead of “*shall be considered as adopted*”. This change would mean a transition from a rule on indicative voting to the introduction of a new voting majority for a formal vote.

#### ***IV. Hierarchy of norms***

15. As becomes apparent from paragraph 3 above, voting rules applicable in the CM DH meetings have so far not been regulated merely on the level of the Supervision Rules but, instead, these have been drawn from the hierarchically superior legal instrument on the level of an international multilateral treaty, the Statute and the ECHR. This could potentially pose a problem from the point of view of the principle of hierarchy of norms according to which lower-rank rules of procedure cannot amend a requirement set up by a higher-ranking norm. Draft Rule 18 makes, in other words, the respective majorities enshrined on the level of the Statute and the ECHR inapplicable to cases in which the EU is a party. This is so also in the case of paragraphs 1 and 3 of draft Rule 18 given that indicative voting is proposed as a substitute of a formal vote and not simply as an alternative that could be overridden by a subsequent formal vote.

16. The choice to introduce specific provisions on voting in the rules of procedure instead of the dAA itself is understandable from a practical point of view to ensure that any voting rule introduced can be adapted to changing circumstances easily and without the need to amend the dAA or the ECHR. It cannot hence be recommended to regulate the special majority thresholds in the dAA itself. Compliance with the principle of hierarchy of norms could, however, also be achieved by introducing, more clearly, an “authorising legal basis” (“*Ermächtigungsgrundlage*”) in Article 7(4)(a), second sentence:

***“By derogating from the majority requirements as enshrined in Article 20 (b) and (d) of the Statute and Article 46 (3) and (4) of the Convention, [t]he Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements shall be adapted to ensure that the Committee of Ministers effectively exercises its functions in those circumstances.”***

17. In addition, for purposes of legal clarity, the dAA could indicate that a paragraph 6 be added to Article 46 of the ECHR, which could read as follows:

***“The majority requirements as stipulated in paragraphs 3 and 4 shall not apply in cases to which the European Union is a party. The applicable majorities in such cases shall be laid down in the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.”***