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**6TH NEGOTIATION MEETING BETWEEN THE CDDH AD
HOC NEGOTIATION GROUP AND THE EUROPEAN
COMMISSION ON THE ACCESSION OF THE EUROPEAN
UNION TO THE EUROPEAN CONVENTION ON HUMAN
RIGHTS**

**Position p a p e r f o r t h e n e g o t i a t i o n s o n t
European Convention for the protection of Human Rights and Fundamental
Freedoms**

Introduction by the Secretariat of the CDDH ad hoc negotiation group

1. The following document is a position paper by the European Commission on possible amendments sought to the draft accession agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms. The purpose of the paper is to inform the discussion to be held at the 6th negotiation meeting between the CDDH ad hoc negotiation group and the European Commission on the accession of the European Union to the European Convention on Human Rights, which will be held in Strasbourg from 24-26 March 2020.
2. Delegates are invited to study the document together with the relevant parts of the working and reference documents as outlined in the agenda to the meeting (47+1(2020)OJ06).



EUROPEAN UNION

Position paper for the negotiations on the European Union's accession to the Convention for the protection of Human Rights and Fundamental Freedoms

1. Introduction

The European Union's "Accession to the European Convention for the protection of Human Rights and Fundamental Freedoms ("ECHR") is a key priority for the EU. It emphasises the EU's commitment to common values.

The EU is an autonomous legal order, unique in its institutional and legal features, to which its Member States have transferred competences and which is precluded by its very nature from being considered a State under international law. While fully recognising the principle of equality between the parties to the ECHR, the specificities of the EU as a legal order need to be taken into account when defining the conditions for accession to the ECHR.

It results from the opinion of the Court of Justice of the European Union ("CJEU") of December 2014 (A-2/13) that certain amendments to the draft Accession Agreement of 2013 ("draft Accession Agreement") are required to take account of the specificities.

The EU seeks amendments to the draft Accession Agreement only to the extent strictly necessary to address the objections raised by the CJEU in opinion A-2/13.

Next to a small number of clarifications¹, these amendments concern four areas:

- the EU specific mechanisms of the procedure before the European Court of Human Rights ("ECtHR"),
- the operation of inter-party applications (Art. 33 ECHR) and of references for an advisory opinion (Protocol 16) in relation to EU Member States,
- the principle of mutual trust between the EU Member States,
- EU acts in the area of the Common Foreign and Security Policy which are excluded from the CJEU's jurisdiction.

¹ These concern in particular the limitations under EU law regarding the possibility for EU Member States to avail themselves of Article 53 ECHR as well as the scope of the prior involvement procedure.

2. EU specific mechanisms of the procedure before the ECtHR

The objections of the CJEU regarding the EU specific mechanisms of the procedure before the ECtHR (co-respondent participation of the EU / the EU Member States² and prior involvement of the CJEU³) relate in essence to the fact that when applying these procedural mechanisms the ECtHR may be lead to interpret incidentally provisions of EU law.

Therefore, solutions need to be found which ensure that neither the participation of the EU / the EU Member States as co-respondents to the proceedings nor the granting of sufficient time for the prior involvement procedure to be conducted will depend on an – even incidental – interpretation of EU law by the ECtHR.

3. Operation of inter-party applications (Art. 33 ECHR) and of references for an advisory opinion (Protocol 16) in relation to EU Member States

The objections of the CJEU regarding the operation of inter-party applications (Art. 33 ECHR) in relation to EU Member States⁴ r e l a t e t o t h e p o s s i b i l i t y o f t o rule on compliance with the Charter on fundamental rights of the EU, in disputes between EU institutions and EU Member States as well as between different EU Member States (relating to situations where the defendant is arguably implementing EU law) being undermined. In the same vein, the objections of the CJEU regarding the operation of references for an advisory opinion (Protocol 16) in relation to EU Member States relate to a possible circumvention of the preliminary reference procedure provided for in Article 267 TFEU⁵. Pursuant to that provision, a court of an EU Member State against whose decisions there is no judicial remedy under national law is obliged to make a preliminary reference to the CJEU where a question regarding the interpretation of the EU Treaties or the validity or interpretation of acts of the EU institutions is raised in a case pending before such a court.

Therefore, solutions need to be found, which preclude the risk of the aforementioned exclusive jurisdiction of and procedure before the CJEU being undermined or circumvented by the operation of inter-party applications (Art. 33 ECHR) and of references for an advisory opinion (Protocol 16) in relation to EU Member States. Such solutions should preserve to the largest possible extent the existing features of those procedures before the ECtHR.

4. Principle of mutual trust between the EU Member States

The objections of the CJEU regarding the principle of mutual trust between the EU Member States⁶ r e l a t e t o t h e r i s k t h a t t h e E U ' s a c c e s s i balance of the EU and undermine the autonomy of EU law, as regards cross-border

² Cf. paragraphs 215 – 235 of Opinion A-2/13.

³ Cf. paragraphs 236 – 248 of Opinion A-2/13.

⁴ Cf. paragraphs 196 – 200 of Opinion A-2/13.

⁵ Cf. paragraphs 201 – 213 of Opinion A-2/13.

⁶ Cf. paragraphs 191 – 195 of Opinion A-2/13.

cooperation between EU Member States and in particular the transfer of persons and the recognition and enforcement of decisions.

Therefore, a solution needs to be found which takes account of the fact that EU law may provide for a specific distribution of responsibilities between EU Member States involved in such cross-border cooperation. In that context it should also be noted that there seems to be high degree of convergence in the recent case-law of the ECtHR and the CJEU on that matter.

5. E U a c t s i n t h e a r e a o f C F S P t h a t a r e e x c l

The objections of the CJEU regarding those EU acts in the area of CFSP which are excluded from the CJEU⁷ relate to the fact that bestowing on the ECtHR the power to carry out judicial review of these acts in the manner provided for by the draft Accession Agreement would fail to have regard to the specific characteristics of EU law.

Therefore, a solution needs to be found, which allows for reflecting the EU internal distribution of competences for remedial action in the allocation of responsibility for the EU acts at issue for the purpose of the ECHR system.

⁷ Cf. paragraphs 249 – 257 of Opinion A-2/13.