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**6<sup>TH</sup> MEETING OF THE CDDH AD HOC NEGOTIATION GROUP  
("47+1") ON THE ACCESSION OF THE EUROPEAN UNION TO  
THE EUROPEAN CONVENTION ON HUMAN RIGHTS**

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**Paper by the Chair to structure the discussion at the sixth meeting of the CDDH *ad hoc*  
negotiation group ("47+1") on the accession of the European Union to the European  
Convention on Human Rights**

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Strasbourg, Tuesday 29 September (9:30 a.m.) – Friday, 2 October 2020 (5:30 p.m.)  
Palais de l'Europe (Room 9), with the possibility to also attend the meeting via the KUDO  
videoconferencing system

Council of Europe

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## **Paper by the Chair to structure the discussion at the sixth meeting of the CDDH *ad hoc* negotiation group (“47+1”) on the accession of the European Union to the European Convention on Human Rights**

### **Introduction**

1. The present paper has been drafted in order to facilitate the discussion at the forthcoming sixth meeting of the CDDH *ad hoc* negotiation group on the accession of the European Union to the European Convention on Human Rights (hereinafter: the “47+1 Group”) which is scheduled from 29 September to 2 October 2020.
2. The paper is intended to take stock of the issues which should be discussed by the “47+1 Group” in order to fulfil its mandate and present revised draft accession instruments to the Steering Committee for Human Rights (CDDH). In doing so, the paper follows the order of the agenda for the sixth negotiation meeting. It commences with a short overview of the previous accession negotiations, followed by a recollection of the basic principles of the negotiation process and an overview of the possible instruments for addressing the issues.
3. The paper deals exclusively with problems that arise from Opinion 2/13 of the Court of Justice of the European Union (hereinafter: “CJEU”) of 18 December 2014. It addresses four “baskets” in which the issues can be grouped (as well as one additional point which is covered separately at the end of the paper, since it does not fit into any of the four baskets). The baskets are then divided into narrower, individual issues. Each of these issues contains a description and a section on “Possible action by the ‘47+1 Group’” which proposes a way forward to address the matter at the sixth negotiation meeting. As Appendix I to the document, a table is added which lists all issues covered in this paper. It should however be noted that the division of the various issues within a particular basket is owed to the stock-taking approach of this paper. Some of the issues are inevitably inter-related.
4. Delegates are invited to use this document as a working paper to prepare themselves for the forthcoming sixth negotiation meeting and to actively participate in the discussion.

### *Short overview of the previous accession negotiations*

5. Following the inclusion of a legal obligation for the European Union (EU) to accede to the European Convention on Human Rights (hereinafter: the “Convention”) in the Treaty on European Union (TEU), the Council of Europe set up an expert group in 2010 to elaborate the preparatory work. The group consisted of seven experts from members of the EU and seven members of states that were not members of the EU, plus a representative from the European Commission. It met eight times in total. In order to conduct more formal negotiations on the basis of this work, the CDDH subsequently set up the “47+1 Group” (which is composed of representatives from each of the 47 Council of Europe member states plus the European Commission) which held a total of five negotiation meetings during the period 2011-2013.
6. In April 2013, the “47+1 Group” submitted its final report to the CDDH, containing the draft instruments on the accession of the EU to the Convention. Apart from a draft agreement on the accession of the EU to the Convention (hereinafter: the “draft Accession Agreement”), the “47+1 Group” also added a draft declaration by the EU on the co-respondent mechanism. Furthermore, it elaborated a new draft rule to be added to the Rules of the Committee of Ministers for the supervision of the execution of judgements, setting out special voting rules in the Committee of Ministers (thereby ensuring that the obligation of the EU member states to vote in a coordinated manner does not prejudice the exercise of the supervisory functions of the execution of judgments in cases where the EU is a respondent or co-respondent). Finally,

a draft memorandum of understanding (between the EU and a State applying the content of Union law pursuant to an international agreement) was added as an appendix. The final report expressly stated that all these instruments, as well as the explanatory report to the draft Accession Agreement, constituted one single “package”.<sup>1</sup>

7. Neither the CDDH nor the Committee of Ministers have yet formally adopted the draft instruments, pending the completion of internal procedures by the negotiating parties, in particular - at EU level - the opinion of the CJEU.

8. On 18 December 2014, the CJEU ruled in its Opinion 2/13 that the draft Accession Agreement was not compatible with Article 6(2) and Protocol No. 8 of the TEU for a number of reasons outlined in that opinion.

9. By a letter of 31 October 2019, co-signed by the then President and the First Vice-President of the European Commission, the Secretary General of the Council of Europe was informed that the EU stood ready to resume the negotiations on its accession to the Convention.

10. In January 2020, the Committee of Ministers renewed the negotiation mandate of the CDDH to finalise as a matter of priority, and in co-operation with the representatives of the EU, the accession instruments in an “*ad hoc* group 47+1” and on the basis of the work already conducted.

11. Due to the COVID-19 pandemic, the sixth and the seventh negotiation meetings of the “47+1 Group”, originally envisaged for March and May 2020 respectively, had to be postponed. In order to respond to the situation, the “47+1 Group” held an informal virtual meeting on 22 June 2020. During that meeting, several key addresses were provided.<sup>2</sup> The European Commission presented its position paper for the forthcoming negotiations.<sup>3</sup> Finally, a general round of statements and comments was held during which a number of Council of Europe member states as well as the European Commission intervened.<sup>4</sup>

12. Summarising the discussion held at the virtual meeting on 22 June 2020, I noted that all delegations which had taken the floor had been positive to the EU’s accession to the Convention and had expressed a will to participate constructively in the negotiations. Most delegations had underlined the need for a balance between implementing the requirements of Opinion 2/13 of the CJEU on the one hand and ensuring equal treatment (both with regard to applicants and other High Contracting Parties) on the other. While there would be some hard work ahead of the Group, I concluded that the informal meeting had been an encouraging sign of the commitment and willingness of participants to achieve the common goal of revising the draft accession instruments to allow the EU to accede to the Convention.<sup>5</sup>

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<sup>1</sup> See paragraph 3 of the Interim Report by the CDDH to the Committee of Ministers of 9 July 2013 (CM(2013)93add1).

<sup>2</sup> See the meeting report of the informal virtual meeting of 22 June 2020 (47+1(2020)Rinf). The key addresses are reproduced in the report as Appendices III-V.

<sup>3</sup> European Commission, Position paper for the negotiations on the European Union’s accession to the European Convention for the protection of Human Rights and Fundamental Freedoms (document 47+1(2020)1). The presentation is available as Appendix VI to the meeting report of the informal virtual meeting of 22 June 2020 (47+1(2020)Rinf).

<sup>4</sup> For a summary of the discussion, see paragraphs 19-28 of the meeting report of the informal virtual meeting of 22 June 2020 (47+1(2020)Rinf).

<sup>5</sup> *Ibid*, paragraph 28.

## *Principles of the negotiation process*

13. At the outset of its original work, the “47+1 Group” had agreed on several general principles as a basis for the negotiations. These principles are listed at the beginning of the explanatory report to the draft Accession Agreement and are recalled below:

*“As general principles, the Accession Agreement aims to preserve the equal rights of all individuals under the Convention, the rights of applicants in the Convention procedures, and the equality of all High Contracting Parties. The current control mechanism of the Convention should, as far as possible, be preserved and applied to the EU in the same way as to other High Contracting Parties, by making only those adaptations that are strictly necessary. The EU should, as a matter of principle, accede to the Convention on an equal footing with the other Contracting Parties, that is, with the same rights and obligations. It was, however, acknowledged that, because the EU is not a State, some adaptations would be necessary. It is also understood that the existing rights and obligations of the States Parties to the Convention, whether or not members of the EU, should be unaffected by the accession. Finally, the distribution of competences between the EU and its member States and between the EU institutions shall be respected.”<sup>6</sup>*

## *Instruments for addressing the issues identified by Opinion 2/13*

14. The “47+1 Group” will not only have to address the issues described in this paper, but it will need to discuss how to implement any possible solutions it develops. As with the original draft accession instruments of 2013, the “47+1 Group” has at its disposal a number of instruments to which amendments or clarifications could be made, most of which have already been mentioned above in paragraph 6. In the elaboration of revised draft accession instruments at negotiators’ level, the Group may consider making use any of the following “tools” in the course of its work:

- Amendments to the Convention or its Protocols;
- Amendments or clarifications to the draft Accession Agreement (which, according to the so-called *passerelle*-clause in its Article 1, paragraph 2, will constitute an integral part of the Convention);
- Amendments or clarifications to the explanatory report to the draft Accession Agreement (Appendix V);
- Any draft unilateral or multilateral declaration (to be made at the signature of the draft Accession Agreement) or memorandum of understanding which could be added as an Appendix to the draft Accession Agreement;
- Any other instrument, which may strictly speaking not form part of the “accession package” but which may contribute to a solid solution to a problem (which may require a dialogue with the body competent to make such amendments, e.g. with the European Court of Human Rights (hereinafter: the “ECtHR”) with regard to its “Rules of the Court”).

15. In addition, the EU member states will adopt in the future at EU level internal rules on the EU’s accession to the Convention. These rules will however constitute an internal EU instrument which will not be elaborated within the “47+1 Group”.

16. In this sense, the current paper refers to the term “draft Accession Agreement” when only that Agreement itself (i.e. without appendices) is meant. When the paper refers to the term “draft accession instruments”, the draft Accession Agreement and its appendices are meant. Where the paper mentions the term “draft accession instruments and other means”, all possible instruments listed in paragraphs 14 and 15 are referred to.

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<sup>6</sup> Draft explanatory report, Appendix V to the Interim Report by the CDDH to the Committee of Ministers of 9 July 2013 (CM(2013)93add1), paragraph 7.

17. It is understood that a decision *where* to place a solution to a problem may at times be as challenging as finding the solution in the first place. On the other hand, the various instruments at hand may provide the “47+1 Group” with ample flexibility to carry out its work. In this respect, it should be recalled that the appendices to the Accession Agreement all form an integral part of the accession instruments which are expected to be adopted by the Committee of Ministers as a “package”.<sup>7</sup> In the decision where to place certain amendments to the draft accession instruments or other means, the “47+1 Group” should be guided by the principle that any solution must be legally sound.

### **Basket 1: EU-specific mechanisms of the procedure before the ECtHR**

18. This basket deals with the functioning of the co-respondent mechanism, including the *prior involvement*-procedure. In Opinion 2/13, the CJEU has raised a number of objections with regard to the co-respondent mechanism. They will be listed in detail below. What some of these issues have in common is, in the words of the European Commission in its position paper, that “they relate in essence to the fact that when applying these procedural mechanisms the ECtHR may be lead to interpret incidentally provisions of EU law”.<sup>8</sup> The discussion in the “47+1 Group” will need to focus on possible amendments to the draft accession instruments and other means which could address these objections.

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

19. For the forthcoming discussion within the “47+1 Group”, it may be useful to recall the purpose of the co-respondent mechanism. This mechanism was introduced into the draft Accession Agreement to accommodate the specific situation of the EU as a non-State entity with an autonomous legal system that is becoming a Party to the Convention alongside its own member states.<sup>9</sup> Moreover, the mechanism was meant to provide the Convention system with the necessary tools in light of the fact that accession of the EU to the Convention could lead to the unique situation in which a legal act is enacted by one High Contracting Party and implemented by another.<sup>10</sup>

20. The co-respondent mechanism is therefore not a procedural privilege for the EU or its member states. In the draft explanatory report, the mechanism was considered as a way to avoid gaps in participation, accountability and enforceability in the Convention system.<sup>11</sup> The introduction of the co-respondent mechanism is also fully in line with Article 1.b of Protocol No. 8 to the TEU which requires the Accession Agreement to provide for “*the mechanisms necessary to ensure that ... individual applications are correctly addressed to Member States and/or the Union, as appropriate.*”<sup>12</sup>

21. For cases in which the co-respondent mechanism applies, the possibility of a *prior involvement* of the CJEU was regulated in a special procedure to ensure that the ECtHR would only rule on a possible violation of the Convention by the EU after the CJEU had had the opportunity – if it had not been involved previously - to pronounce itself on the matter.

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<sup>7</sup> See paragraph 3 of the Interim Report by the CDDH to the Committee of Ministers of 9 July 2013 (CM(2013)93add1).

<sup>8</sup> Position paper by the European Commission, page 1.

<sup>9</sup> Draft explanatory report, paragraph 38.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*, paragraph 39.

<sup>12</sup> *Ibid.*, paragraph 41.

### *Overview of the issues in the present basket*

22. In total, this basket consists of six separate questions which the “47+1 Group” should discuss. The first issue relates to one of the two alternatives of applying the co-respondent mechanism. The second and third issues are linked to the concept of joint responsibility between the EU and its member states. The remaining three issues concern the *prior involvement*-procedure.

### *Features of the co-respondent mechanism which are unaffected by Opinion 2/13*

23. The “47+1 Group” had reached consensus on the necessity of the co-respondent mechanism, its incorporation into the Convention system (i.e. through the introduction of a new paragraph 4 into Article 36 of the Convention) and the criteria which should trigger this mechanism (laid out in Article 3, paragraphs 2 and 3 of the draft Accession Agreement). Paragraph 5 of Article 3 of the draft Accession Agreement recognised two possibilities for the co-respondent mechanism to be applied: a High Contracting Party could become a co-respondent by accepting an invitation from the ECtHR, or by decision of the ECtHR upon request by that High Contracting Party. From these features of the co-respondent mechanism, it is only the second option for applying the co-respondent mechanism (i.e. the decision of the ECtHR to apply the mechanism upon request by a High Contracting Party) to which the CJEU objected and which the “47+1 Group” is consequently invited to reconsider (see below, issue 1).

### **Issue 1: Possibility for the EU and its member states to become co-respondent in a particular case**

24. Article 3, paragraph 5 of the draft Accession Agreement states that, when deciding upon a request by a High Contracting Party to become a co-respondent, the ECtHR shall assess whether - in light of the reasons given by the High Contracting Party concerned - it is plausible that the criteria to apply the co-respondent mechanism are met.

### *Concerns raised by Opinion 2/13*

25. In Opinion 2/13, the CJEU raised the objection that in carrying out such review, the ECtHR would be required to assess the rules of EU law governing the division of powers between the EU and its member states as well as the criteria for the attribution of their acts or omissions, in order to adopt a final decision.<sup>13</sup> In the view of the CJEU, such a review would be liable to interfere with the division of powers between the EU and its member states.<sup>14</sup> In order to address this objection, the European Commission stated in its position paper that solutions would need to be found so that the decision to apply the co-respondent mechanism at the request of a High Contracting Party would not depend on the interpretation of EU law by the ECtHR.<sup>15</sup>

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<sup>13</sup> Opinion 2/13 of the Court of Justice of the European Union of 18 December 2014 (ECLI:EU:C:2014:2454) (hereinafter: “Opinion 2/13”), paragraphs 215-225 (see, in particular, paragraph 224).

<sup>14</sup> *Ibid*, paragraph 225.

<sup>15</sup> Position paper by the European Commission, page 2.

### *Possible action by the “47+1 Group”*

26. In light of the above, delegates of the “47+1 Group” are invited to consider whether a solution can be found, allowing the ECtHR to handle a request to apply the co-respondent mechanism which is based exclusively on an interpretation of EU law by the competent EU institutions.

27. It should be recalled that it is long-established jurisprudence of the ECtHR that it is limited to taking the domestic law of any High Contracting Party into consideration as interpreted by the domestic authorities.<sup>16</sup> This naturally also extends to EU law. In this regard, the “47+1 Group” may wish to take note of the fact that the ECtHR has already in its existing case-law been very diligent to respect the autonomy of EU law and to avoid every decision capable of encroaching it. For example, in the judgment of *Jeunesse v. the Netherlands*, the Grand Chamber of the ECtHR stated in 2014 that:

*“The Court emphasises that under the terms of Article 19 and Article 32 para. 1 of the Convention it is not competent to apply or examine alleged violations of EU rules unless and in so far as they may have infringed rights and freedoms protected by the Convention. More generally, it is primarily for the national authorities, notably the courts, to interpret and apply domestic law, if necessary in conformity with EU law, the Court’s role being confined to ascertaining whether the effects of such adjudication are compatible with the Convention.”<sup>17</sup>*

28. The ECtHR has recalled this principle in other EU-related cases when it had the occasion to do so.<sup>18</sup>

29. The discussion in the “47+1 Group” could focus on how this caution expressed by the Grand Chamber of the ECtHR could be translated into possible amendments to the draft accession instruments or other means in order to properly address this concern raised in Opinion 2/13. In this respect, the “47+1 Group” should take into account that the present matter is not solely about the examination of EU rules which are allegedly in violation of the Convention, but that the granting of the co-respondent status by the ECtHR follows directly from the distribution of competences within the EU. In hitherto common applications addressed against a single High Contracting Party, the ECtHR is not required to look at the distribution of such competences within that High Contracting Party (because irrespective of its domestic system and the division of competences therein, the application can only be addressed against that High Contracting Party). The situation that there may be a second High Contracting Party with certain competences relevant to the application is indeed novel and may thus deserve respective attention.

30. Moreover, despite the difference between a “third party” within the meaning of Article 36 of the Convention and a co-respondent, both concepts bear sufficient similarities to deserve further scrutiny and comparison. This is also supported by the fact that the co-respondent mechanism is envisaged by the draft Accession Agreement to be incorporated into a newly-added Article 36, paragraph 4 of the Convention. In particular, two of the three scenarios envisaged in Article 36 of the Convention (i.e. in paragraphs 1 and 3 respectively) provide for the status as “third party” to be granted as of a right. In order to find a solution, the “47+1 Group” may therefore take some inspiration from the manner in which Article 36 of the

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<sup>16</sup> See, for example, *Garcia Ruiz v. Spain*, judgment of 21 January 1999, paragraph 28.

<sup>17</sup> *Jeunesse v. the Netherlands*, judgment of 3 October 2014 [GC], application no. 12738/10, paragraph 110.

<sup>18</sup> See, for example, *Avotins v. Latvia*, application no. 17502/07, judgment of 23 May 2016 [GC], paragraph 100; *Thimothawes v. Belgium*, application no. 39061/11, judgment of 34 April 2017, paragraph 71.



Convention regulates the various alternatives through which certain stakeholders may obtain the status of “third parties”.

## **Issue 2: Joint responsibility and member states’ reservations under the Convention**

### *Reservations under the Convention and the rule of joint responsibility*

31. According to Article 57 of the Convention, any state may - when signing that Convention or when depositing its instrument of ratification - make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character are not permitted under this article.

32. Article 3, paragraph 7 of the draft Accession Agreement provides that 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 are - as a general rule - to be jointly responsible for that violation.

### *Concerns raised by Opinion 2/13*

33. In Opinion 2/13, the CJEU considered the interplay of Article 57 of the Convention with the concept of joint responsibility under the co-respondent mechanism as laid out in Article 3, paragraph 7 of the draft Accession Agreement. The CJEU noted that this provision in the draft Accession Agreement does not preclude a member state from being held responsible, together with the EU, for the violation of a provision of the Convention in respect of which that member state may have made a reservation in accordance with Article 57 of the Convention.<sup>19</sup> The CJEU considered that this would be at odds with Article 2 of Protocol No. 8 to the TEU, according to which the Accession Agreement is to ensure that nothing therein affects the situation of member states in relation to the Convention, in particular in relation to reservations thereto.<sup>20</sup>

### *Possible action by the “47+1 Group”*

34. It should be recalled that the draft Accession Agreement deals in Article 2 with the possibility of the EU to make a reservation upon accession. It also establishes in Article 11 a general prohibition of reservations in respect of the Accession Agreement itself. However, the current version of the accession instruments does not address the issue of reservations made by EU member states to the Convention (made at the time when these states themselves acceded to the Convention) and their possible effect on cases to which the co-respondent mechanism applies.

35. The issue relates to two different constellations: firstly, the situation in which an EU member state is respondent and has made a reservation; and, secondly, the situation in which an EU member state is a co-respondent and has made a reservation. On a general note, it should be recalled that where an EU member state is a respondent in a given case and has made a valid reservation, the case or the part of the case covered by the reservation would be considered inadmissible *ratione materiae* under the general rules. Conversely, a novel

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<sup>19</sup> Opinion 2/13, paragraph 227.

<sup>20</sup> *Ibid*, paragraph 228.

constellation arises through the co-respondent mechanism in which an EU member state is a co-respondent in a given case and has made a reservation.

36. In this context, it should be noted that it follows from the express wording of Article 57 of the Convention that a (co-)respondent Party could not have made a reservation to a right in the Convention whose violation is alleged in an individual application to which the co-respondent mechanism applies, unless that reservation is made in respect of a specific law which was already in force at the time the (co-)respondent Party acceded to the Convention.<sup>21</sup>

37. In light of the above, the “47+1 Group” is invited to discuss any amendments to the draft accession instruments or other means to address this specific issue under the co-respondent mechanism.

### **Issue 3: Exceptions from the general principle of joint responsibility**

#### *The principle of joint responsibility in the draft Accession Agreement*

38. As a general principle, Article 3, paragraph 7 of the draft Accession Agreement states that “[i]f 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 the 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.”

39. The importance of the general principle of joint responsibility is further explained in the draft explanatory report:

*“(...) 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.”<sup>22</sup>*

#### *Concerns raised by Opinion 2/13*

40. In Opinion 2/13, the CJEU did not raise any objections with regard to the general principle of joint responsibility as such, but with the possibility for the ECtHR to deviate from this principle on the basis of reasons provided by the respondent and the co-respondent, since this would naturally be based on the assessment of the rules of EU law governing the division

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<sup>21</sup> It should be recalled that, under the Vienna Convention on the Law of Treaties, states formulating reservations usually derogate generally from a treaty provision, while under the Convention they may do so only in respect of a specific piece of national legislation in force when signing or ratifying the Convention (see J. Polakiewicz, *An insider's view: the CJEU's objections in opinion 2/13*, Human Rights Law Journal 2016, p. 19).

<sup>22</sup> Draft explanatory report, paragraph 62.

of powers between the EU and its member states and the attributability of the act or mission in question. The CJEU reasoned that it had exclusive jurisdiction to ensure that any agreement between the co-respondent and respondent respects the relevant EU law relating to the apportionment of responsibility between the EU and its member states.<sup>23</sup>

#### *Possible action by the “47+1 Group”*

41. In light of these objections, delegates of the “47+1 Group” may wish to first give some fresh thought to whether apportioning responsibility by the ECtHR under the Convention does bring any added-value to the accession of the EU such as to override the concerns expressed by the CJEU. Conversely, they may wish to consider whether one single form of joint responsibility for co-respondent cases could facilitate the streamlining of the draft Accession Agreement and secure that applicants can easily receive any compensation that has been awarded, while at the same time solving the present issue.

42. In the event that delegates would wish to maintain the possibility for the ECtHR to apportion responsibility between a EU member state and the EU in exceptional cases, they are invited to discuss whether an arrangement could be included in the draft accession instruments which would allow the ECtHR to deviate from the principle of joint responsibility under Article 3, paragraph 7 of the draft Accession Agreement on the basis of the EU’s own understanding and interpretation of EU law.

43. In this regard, the issue bears many similarities with the first issue in this basket, i.e. the triggering of the co-respondent mechanism. The same observation as under Issue 1 should be made with regard to the ECtHR’s approach in its case-law, which is very diligent in respecting the autonomy of EU law, stating that it is not competent to apply or examine alleged violations of EU rules unless and in so far as they may have infringed rights and freedoms protected by the Convention.<sup>24</sup> As with the previous similar issue, one of the aspects on which the discussion in the “47+1 Group” may focus could be how this caution expressed by the ECtHR could be better reflected in the draft accession instruments in order to address the present concern raised in Opinion 2/13.

#### **Issue 4: Identifying instances in which the *prior involvement*-procedure applies**

##### *Purpose of the prior involvement-procedure*

44. The *prior involvement*-procedure is regulated in Article 3, paragraph 6 of the draft Accession Agreement as follows:

*“In proceedings to which the European Union is a co-respondent, if the Court of Justice of the European Union has not yet assessed 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 European Union law as under paragraph 2 of this article, sufficient time shall be afforded for the Court of Justice of the European Union to make such an assessment, and thereafter for the parties to make observations to the Court.”*

45. The procedure was introduced with regard to applications to which the co-respondent mechanism applies and in which the national courts had not made a preliminary reference under Article 267 of the Treaty on the Functioning of the European Union (TFEU) to the CJEU. Inspired by the principle of subsidiarity, the procedure should ensure that the CJEU had a chance to pronounce itself on the interpretation of EU primary law and the validity of EU

<sup>23</sup> Opinion 2/13, paragraphs 229-234.

<sup>24</sup> *Jeunesse v. the Netherlands*, judgment of 3 October 2014 [GC], application no. 12738/10, paragraph 110.

secondary law (including its compatibility with the Convention) before the ECtHR would decide on an application with regard to the compatibility with the Convention rights.<sup>25</sup> Irrespective of this, the ruling by the CJEU would not have a binding effect on the ECtHR.<sup>26</sup>

#### *Concerns raised by Opinion 2/13*

46. Opinion 2/13 confirmed the necessity of the procedure with regard to both the principle of subsidiarity and for ensuring the proper functioning of the judicial system of the EU, and held that it satisfies the requirement that the competences of the EU and the powers of its institutions be preserved, as required by Article 2 of Protocol No. 8 to the TEU.<sup>27</sup> However, the CJEU considered that the draft accession instruments should have made provision for the fact that it was for the competent EU institution to answer the question whether the CJEU had already given a ruling on the same question of law as that at issue in the proceedings before the ECtHR (requiring necessarily the interpretation of the CJEU's case-law).<sup>28</sup>

#### *Possible action by the "47+1 Group"*

47. The draft accession instruments currently do not lay down a rule on how the *prior involvement*-procedure is triggered. Delegates of the "47+1 Group" are invited to discuss whether such a rule should be added to the draft accession instruments. In this regard, the same observation as under Issues 1 and 3 should be made with regard to the ECtHR's approach in its case-law, which is very diligent in respecting the autonomy of EU law, stating that it is not competent to apply or examine alleged violations of EU rules unless and in so far as they may have infringed rights and freedoms protected by the Convention.<sup>29</sup> As with the previous similar issues, one of the aspects on which the discussion in the "47+1 Group" may focus could be how this caution expressed by the ECtHR could be better reflected in the draft accession instruments in order to address the present concern raised in Opinion 2/13.

### **Issue 5: Informing the competent EU institution about cases in which the *prior involvement*-procedure could be triggered**

#### *Concerns raised by Opinion 2/13*

48. To ensure that the competent EU institutions have the opportunity to assess whether a certain application before the ECtHR satisfies the requirements of the *prior involvement*-procedure (in particular whether the CJEU has already given a ruling on the question at issue in the case at hand), Opinion 2/13 suggested that this procedure should be set up in such a way as to ensure that the EU is systematically informed about relevant cases pending before the ECtHR.<sup>30</sup>

#### *Possible action by the "47+1 Group"*

49. The delegates of the "47+1 Group" are invited to discuss whether the draft accession instruments or other means could make provision for a procedure in which the EU is fully and systematically informed about cases in which the co-respondent mechanism (including the

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<sup>25</sup> Draft explanatory report, paragraph 66.

<sup>26</sup> *Ibid*, paragraph 68.

<sup>27</sup> Opinion 2/13, paragraph 236.

<sup>28</sup> *Ibid*, paragraph 239.

<sup>29</sup> *Jeunesse v. the Netherlands*, judgment of 3 October 2014 [GC], application no. 12738/10, paragraph 110.

<sup>30</sup> Opinion 2/13, paragraph 241.

*prior involvement*-procedure) could possibly apply. This should be done in particular in dialogue with representatives from the Registry of the ECtHR and by taking into consideration the role of the EU member states as respondents in such cases.

#### **Issue 6: *Prior involvement*-procedure also to apply in cases where the CJEU interprets EU secondary law**

50. This issue addresses the extent to which the *prior involvement*-procedure would enable the CJEU to examine the compatibility of the provision of EU law concerned with the relevant rights guaranteed by the Convention in the course of an application before the ECtHR for which the co-respondent mechanism applies. Paragraph 66 of the draft explanatory report states that the words “assessing the compatibility of the provision” mean, in essence, to rule on the validity of a legal provision contained in secondary law or on the interpretation of a provision of primary law.

#### *Concerns raised by Opinion 2/13*

51. In the absence of express wording to the contrary, the CJEU concluded in Opinion 2/13 from this paragraph in the explanatory report that the draft accession instruments exclude the possibility of bringing a matter before the CJEU in order for it to rule on a question of interpretation of secondary law by means of the *prior involvement*-procedure.<sup>31</sup> The CJEU considered that limiting the scope of the *prior involvement*-procedure, in the case of secondary law, solely to questions of validity adversely affects the competences of the EU and the powers of the CJEU in that it does not allow the latter to provide a definitive interpretation of secondary law in the light of the rights guaranteed by the Convention.<sup>32</sup>

#### *Possible action by the “47+1 Group”*

52. Delegates of the “47+1 Group” are invited to consider any solution to this issue. On a general note, it should be in the interest of all High Contracting Parties that the ECtHR’s judgments are based on the authoritative interpretation of EU law. In other words, the ECtHR should not be allowed to be misled in its understanding of EU law, as this may have adverse consequences for the execution of the ECtHR’s judgments. Against this background, delegates of the “47+1 Group” may wish to consider ensuring consistency in the draft accession instruments that provision is made (though the *prior involvement*-procedure) to compensate for the possible failure by the domestic courts of EU member states to make preliminary references to the CJEU regarding both the validity and the interpretation of EU secondary law. As it is very arguable that the competence of interpreting a norm is included as a “minus” in the competence of ruling on its validity, the “47+1 Group” could discuss a possible clarifying explanation to paragraph 66 of the draft explanatory report.

<b>Basket 2: Operation of inter-party applications (Article 33 of the Convention) and of references for an advisory opinion (Protocol No. 16) in relation to EU member states</b>
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53. This basket can be divided into issues relating to inter-party cases under Article 33 of the Convention and issues relating to requests for advisory opinions under Protocol No. 16 to the Convention.

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<sup>31</sup> *Ibid*, paragraph 243.

<sup>32</sup> *Ibid*, paragraph 247.

54. Both issues have in common that EU member states could potentially use the procedures in the Convention system - in the event of specific circumstances – to disregard their obligations under EU law and thereby to circumvent internal EU procedures. In its intervention at the informal meeting of the “47+1 Group” on 22 June 2020, the European Commission gave further explanations: “*This whole issue is of course linked to the specific setting that the Union seeks to join the Convention alongside its own member states and that Union law provides for certain internal judicial procedures involving different Contracting Parties to the Convention, namely either the Union and a Member State or several member states. We therefore need to devise solutions that take account of these specificities.*”<sup>33</sup>

### **Issue 1: Article 33 of the Convention (“Inter-party cases”)**

55. According to Article 33 of the Convention, any High Contracting Party may refer to the ECtHR any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party. As of 31 August 2020, twenty-six such inter-party applications<sup>34</sup> had been brought to the ECtHR since the entering into force of the Convention.<sup>35</sup>

56. In order to allow the introduction of such applications against the EU once it has acceded to the Convention, Article 4 of the draft Accession Agreement provides the necessary editorial changes to the Convention, notably the changing of the heading of Article 33 of the Convention to “Inter-party cases”.

#### *Concerns raised by Opinion 2/13*

57. Article 3 of Protocol No. 8 to the TEU lays down that nothing in the Accession Agreement shall affect Article 344 TFEU, a provision which states 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.*”<sup>36</sup>

58. When the EU accedes to the Convention, the latter itself will form integral part of EU law within the scope *ratione materiae* of EU law.<sup>37</sup> Consequently, EU member states would be in violation of Article 344 TFEU if they would lodge an inter-party application against another EU member state or the EU itself in EU-related matters with regard to their compliance with the Convention.<sup>38</sup> The objections of Opinion 2/13 regarding the operation of inter-party cases under Article 33 of the Convention relate to the possibility that the CJEU’s jurisdiction to rule on such matters would be undermined in such instances.<sup>39</sup>

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<sup>33</sup> See the presentation by the European Commission of its position paper, as Appendix VI of the meeting report to this informal meeting (47+1(2020)Rinf, pages 24-27, at page 26).

<sup>34</sup> Prior to the accession of the EU to the Convention, applications between two or more High Contracting Parties are called “inter-state applications” (see Article 33 of the Convention). For reasons of simplicity, the present paper however uses the term “inter-party applications”, irrespective of whether it refers to (potential) applications brought to the ECtHR before or after EU accession.

<sup>35</sup> A list of inter-party applications is available on the website of the ECtHR: [https://echr.coe.int/Pages/home.aspx?p=caselaw&c=#n14600328386149446327969\\_pointer](https://echr.coe.int/Pages/home.aspx?p=caselaw&c=#n14600328386149446327969_pointer)

<sup>36</sup> Note in this regard paragraph 74 of the draft explanatory report which – referring to Article 5 of the draft Accession Agreement – states that Article 55 of the Convention does not prevent the operation of the rule set out in Article 344 TFEU.

<sup>37</sup> Opinion 2/13, paragraph 204, cf paragraph 180.

<sup>38</sup> See also the European Commission’s position paper (document 47+1(2020)1), page 2.

<sup>39</sup> See Opinion 2/13, paragraphs 201-214.

### *Inter-party applications not affected by the issue*

59. It is important to bear in mind that Article 344 TFEU only concerns inter-party applications by EU member states against other EU member states where the application is related to EU law. Being a rule of EU law, it goes without saying that the provision does not prevent High Contracting Parties which are not in the EU to bring applications under Article 33 of the Convention against one or more EU member states (regardless of the matter concerned). Article 344 TFEU is also not affected by situations in which EU member states bring inter-party applications under Article 33 of the Convention against other EU member states in respect of cases which are not related to EU law, or against High Contracting Parties which are not members of the EU.

### *Practical relevance of the issue*

60. It should be stated at the outset that in practice this situation (i.e. in which an inter-party application under Article 33 of the Convention is brought before the ECtHR which would be in violation of Article 344 TFEU) can be expected to arise extremely rarely, judging from the past seventy years since the Convention entered into force. The recent inter-party case of *Slovenia v. Croatia* (brought in 2016) was the first case ever between two EU member states brought before the ECtHR in the history of the Convention.<sup>40</sup> Very few inter-party applications between High Contracting Parties which later became EU member states were brought prior to their joining of the EU.<sup>41</sup> Moreover, *Slovenia v. Croatia* refers to events which concerned the disintegration of the former Yugoslavia, which predated by decades those states' accession to the EU.

61. But irrespective of its practical impact, the reference in Article 3 of Protocol No. 8 TEU to Article 344 TFEU will make it necessary – not least as a matter of principle - for the “47+1 Group” to take a fresh look at the issue, also in light of potential future inter-party applications brought by EU member states against the EU, which will be possible for the first time once the EU has acceded to the Convention (however remote also the likelihood may be that such applications would be lodged with the ECtHR).

### *Possible action by the “47+1 Group”*

62. Despite the limited practical relevance of this issue in the past seventy years described above, it is conceivable at least in theory that cases could arise in which it is difficult to determine whether EU law is at issue in a particular inter-party application between two EU member states, or the EU itself, pending before the ECtHR. This question raises two sub-questions:

- How should it be established whether or not an inter-party application does relate to EU law, and
- What should be the consequences if the case in question does relate to EU law?

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<sup>40</sup> *Slovenia v. Croatia* (application no. 54155/16), for which a Grand Chamber hearing was held on 12 June 2019.

<sup>41</sup> While Ireland and the United Kingdom both joined the EU in 1973, the two inter-party applications *Ireland v. the United Kingdom* had previously been brought, in 1971 and 1972 respectively (applications nos. 5310/71 and 5451/72).

63. The first question only relates to the constellation of an inter-party application which has been brought by one EU member state against another EU member state.<sup>42</sup> This is because an application from an EU member state against the EU itself would necessarily involve EU law.

64. The “47+1 Group” may wish to consider whether possibilities could be provided for the EU to clarify the matter (i.e. to establish whether an application filed under Article 33 of the Convention amounts to a breach of Article 344 TFEU) internally at an early stage of the proceedings before the ECtHR, for example through the use of existing internal procedures.<sup>43</sup>

65. In this regard, the “47+1 Group” could discuss with the representatives of the Registry of the ECtHR in what manner the current procedures of the ECtHR already provide for flexibility to allow the EU sufficient time to conclude internal procedures should a respective inter-party application be pending before the ECtHR which has triggered such procedures at EU-level.

66. It can be assumed that the ECtHR would have no interest in prematurely finalising the treatment of an inter-party application before any such internal procedures would be completed, not least because it is clear that a judgment by the ECtHR delivered on the basis of an application which would subsequently turn out to be in breach of EU law is likely to give rise to great difficulties for its execution, as the latter would necessarily involve EU law.

67. In this connection, it is recalled that in a number of different contexts, the ECtHR has accommodated sufficient flexibility in order to allow High Contracting Parties to finalise an internal procedure before deciding on certain applications pending in Strasbourg (being inspired by the principle of subsidiarity). For example, the ECtHR has developed the “pilot judgment procedure” as a technique of identifying the structural problems underlying repetitive cases against many countries and imposing an obligation on states to address those problems. A key feature of the pilot judgment procedure is the possibility of adjourning (or “freezing”) related cases for a period of time on the condition that the government act promptly to adopt the national measures required to satisfy the judgment.<sup>44</sup> The ECtHR would then only resume to decide the adjourned cases if the administration of justice so requires.<sup>45</sup>

68. Likewise, the *prior involvement*-procedure envisaged by the draft Accession Agreement (Article 3, paragraph 6) already foresees a situation where the ECtHR would not resume to rule on a pending application while the CJEU is provided with the opportunity to promptly pronounce itself on the compatibility of certain EU law with fundamental rights.<sup>46</sup>

69. The “47+1 Group” could discuss whether an arrangement is feasible that captures a similar spirit with regard to inter-party applications brought by an EU member state against

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<sup>42</sup> Both constellations mentioned in this paragraph include the possibility that more than one EU member state could have brought such inter-party applications or act as “defendant” High Contracting Parties for the purpose of such applications.

<sup>43</sup> In this context, it is conceivable that a way could be found that the EU is notified of such applications in order to prepare for the necessary internal procedure to commence.

<sup>44</sup> This procedure has been fully institutionalised in Rule 61 of the ECtHR’s Rules of the Court. See also the Factsheet by the Registry of the ECtHR on the “Pilot judgment procedure”: <https://echr.coe.int/Pages/home.aspx?p=press/factsheets&c=>

<sup>45</sup> Even prior to the “pilot judgment procedure”, the introduction of the *Pinto* law in Italy establishing a new domestic remedy prompted the ECtHR to stay the processing of respective pending applications and ask the applicants to first exhaust the newly-introduced remedies as a condition for the processing of the application to be resumed (see, for example, the case of *Daddi v. Italy*, application no. 15476/09, decision of 2 June 2009).

<sup>46</sup> See paragraph 69 of the draft explanatory report.



another EU member state or the EU, in order to provide the EU with the possibility to finalise an internal procedure to respond to the bringing of such applications possibly involving EU law.

70. Some inspiration could also be taken from case-law of the Arbitral Tribunal established under the United Nations Convention on the Law of the Sea which – in a very similar situation - suspended a decision on a dispute brought by one EU member state against another EU member state, while waiting for the EU to internally clarify whether bringing the matter before that tribunal had violated Article 344 TFEU.<sup>47</sup> In that case, the EU member state which had brought the dispute later withdrew its claim, after the internal EU procedures had confirmed that the claim had been brought in violation of Article 344 TFEU.<sup>48</sup>

71. The “47+1 Group” may also consider whether the draft accession instruments should contain any provision for the event that the respective EU institutions would find that the case does involve EU law.

72. In both regards, it should be recalled that the European Commission has advocated that any solution should preserve to the largest possible extent the existing features of the inter-party application procedure<sup>49</sup> and that – since the problem is related to procedures - the solution might also be mainly of a procedural nature.<sup>50</sup>

## **Issue 2: Requests for advisory opinions under Protocol No. 16 to the Convention**

73. Protocol No. 16 to the Convention provides for the possibility of designated highest national courts and tribunals of High Contracting Parties to request advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto. Protocol No. 16 was signed on 2 October 2013, i.e. six months after the “47+1 Group” had adopted its final report at its fifth negotiation meeting (2-5 April 2013) and submitted it to the CDDH.

### *Background information to Protocol No. 16*

74. The Protocol entered into force, after having received its tenth ratification, on 1 August 2018. As of 31 August 2020, the Protocol had received sixteen ratifications (amongst them by nine EU member states)<sup>51</sup> and seven additional signatures (amongst them from three EU

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<sup>47</sup> Arbitral Tribunal Constituted Pursuant to Article 287 and Article 1 of Annex VII of the UN Convention on the Law of the Sea, *Ireland v. the United Kingdom* (“The MOX Plant Case”), Order No. 3 (Suspension of Proceedings on Jurisdiction and Merits ...) of 24 June 2003, in particular paragraphs 20-30. The decision is available on the website of the Permanent Court of Arbitration: <https://pca-cpa.org/en/cases/100/>

<sup>48</sup> Arbitral Tribunal Constituted Pursuant to Article 287 and Article 1 of Annex VII of the UN Convention on the Law of the Sea, *Ireland v. the United Kingdom* (“The MOX Plant Case”), Order No. 6 (Termination of Proceedings) of 6 June 2008. The decision is available on the website of the Permanent Court of Arbitration: <https://pca-cpa.org/en/cases/100/>

<sup>49</sup> See the European Commission’s position paper (document 47+1(2020)1), page 2.

<sup>50</sup> See the presentation by the European Commission of its position paper, as Appendix VI of the meeting report to this informal meeting (47+1(2020)Rinf, pages 24-27, at page 26).

<sup>51</sup> These are Estonia, Finland, France, Greece, Lithuania, Luxembourg, the Netherlands, the Slovak Republic and Slovenia. The Council of Europe member states which are not members of the EU and which have ratified the Protocol are: Albania, Andorra, Armenia, Georgia, San Marino and Ukraine.

member states)<sup>52</sup>. While the Protocol does not allow for reservations<sup>53</sup>, the EU member states which ratified it have made declarations for the purpose of indicating the courts and tribunals which should be competent to make a request for an advisory opinion.<sup>54</sup> None of these declarations relate to any matter of EU law or the jurisdiction of the CJEU. As of 31 August 2020, the ECtHR has delivered two advisory opinions under Protocol No. 16, one of which was in relation to a request from the highest court of an EU member state.<sup>55</sup>

75. It may be useful for the discussion within the “47+1 Group” on this issue to briefly recall the main features of Protocol No. 16 to the Convention. Only the highest courts and tribunals of a High Contracting Party – provided they have been designated so by the latter - may request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto.<sup>56</sup> The requesting court or tribunal may seek an advisory opinion only in the context of a case pending before it.<sup>57</sup> The ECtHR is not obliged, but has discretionary powers to decide whether to accept a request for an advisory opinion.<sup>58</sup> It is important to note that there is no obligation whatsoever on a designated national court or tribunal to make a request for an advisory opinion under Protocol No. 16 to the Convention. Finally, advisory opinions given by the ECtHR are not binding on the national court which has sought the opinion.<sup>59</sup>

#### *Concerns raised by Opinion 2/13*

76. Under Article 267 TFEU, the highest courts and tribunals of EU member states are under an obligation to make a preliminary reference to the CJEU where an interpretation of a provision of EU law is material for deciding the case and where the interpretation of the relevant provision is neither clear beyond reasonable doubt nor follows from existing case-law of the CJEU.<sup>60</sup> Currently, this already applies to provisions of the EU Charter of Fundamental Rights which correspond to provisions in the Convention. Once the Convention will form integral part of EU law as a result of EU accession, this would apply to the Convention itself in the context of cases where EU law is at issue.

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<sup>52</sup> These are Belgium, Italy and Romania. The Council of Europe member states which are not members of the EU and which have signed (but not yet ratified) the Protocol are: Bosnia and Herzegovina, Norway, Republic of Moldova and Turkey. For a full list of signatures and ratifications, see the relevant part of the website of the Council of Europe Treaty Office:

[https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/214/signatures?p\\_auth=xV0d4DUW](https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/214/signatures?p_auth=xV0d4DUW)

<sup>53</sup> Article 9 of Protocol No. 16 to the Convention.

<sup>54</sup> Such declaration is mandatory in accordance with Article 10 of Protocol No. 16.

<sup>55</sup> These two advisory opinions were given by the ECtHR in relation to Armenia (advisory opinion of 29 May 2020, concerning a request by the Armenian Constitutional Court on the interpretation of an article of the Penal Code making it a criminal offence to overthrow the constitutional order and its application under Article 7 of the Convention) and France (advisory opinion of 10 April 2019, concerning a request by the French Court of Cassation on the obligation to register the details of the birth certificate of a child born through gestational surrogacy abroad in order to establish the legal parent-child relationship with the intended mother, as adoption may serve as a means of recognising that relationship).

<sup>56</sup> Article 1, paragraph 1 of Protocol No. 16 to the Convention.

<sup>57</sup> Article 1, paragraph 2 of Protocol No. 16 to the Convention.

<sup>58</sup> A panel of five judges of the Grand Chamber shall decide whether to accept the request for an advisory opinion upon written reasons given by the requesting court or tribunal (Article 2, paragraph 1 of Protocol No. 16 to the Convention). The panel shall give reasons for any refusal to accept the request (Article 2, paragraph 1, second sentence).

<sup>59</sup> Article 5 of Protocol No. 16 to the Convention. Note however paragraph 27 of the explanatory report to Protocol No. 16: “*Advisory opinions under this Protocol would have no direct effect on other later applications. They would, however, form part of the case-law of the Court, alongside its judgments and decisions. The interpretation of the Convention and the Protocols thereto contained in such advisory opinions would be analogous in its effect to the interpretative elements set out by the Court in judgments and decisions.*”

<sup>60</sup> See the European Commission’s position paper (document 47+1(2020)1), page 2.

77. The objections by Opinion 2/13 relate to concerns about a possible circumvention of the *preliminary reference*-procedure under Article 267 TFEU.<sup>61</sup> In order to avoid such circumvention, Opinion 2/13 states that the draft Accession Agreement should have made a provision in respect of the relationship between the mechanism established by Protocol No. 16 and the *preliminary reference*-procedure provided for in Article 267 TFEU.<sup>62</sup>

*Possible action by the “47+1 Group”*

78. The “47+1 Group” may consider in what manner the draft accession instruments or other means should address the issue of a possible circumvention of EU law, under certain factual circumstances, by a request made by a designated court of tribunal of an EU member state for an advisory opinion of the ECtHR. In this connection, it may be important to bear in mind that it can be assumed that the drafters of Protocol No. 16 (including representatives from all EU member states) did not have in mind the creation of a possibility for EU member states to use that Protocol to circumvent an EU internal, mandatory procedure.

79. As with the case of inter-party applications under Article 33 of the Convention, a possible way forward could be to consider the feasibility of an arrangement to provide the EU with the possibility to finalise an internal procedure with a view to determining whether the filing of a request for an advisory opinion by the court or tribunal of an EU member state under Protocol No. 16 would amount to a violation of EU law (i.e. Article 267 TFEU).<sup>63</sup> As with the inter-party applications, it can be assumed that the ECtHR has an interest in knowing - prior to taking a decision on whether or not to accept a request for an advisory opinion - whether and, if so, to what extent exactly EU law applies to the facts of the case pending before the requesting court. This element is likely to have a decisive impact on the chances of any opinion given by the ECtHR to be duly followed at domestic level (if the ECtHR were to decide on the request in substance), despite its non-binding nature.

80. An important basis for the discussion and possible starting point to find a solution of the issue could be the fact that – unlike in the case of inter-party applications under Article 33 of the Convention – the ECtHR is not obliged, but has certain discretionary powers for deciding whether to accept a request for an advisory opinion under Protocol No. 16.

81. The EU is not acceding to Protocol No. 16 itself, which was recognised by the CJEU.<sup>64</sup> Hence the draft Accession Agreement as an international treaty for all High Contracting Parties may not necessarily be the sole place in which this issue could be solved. Therefore, delegates may also wish to discuss in which way complementary measures could assist in resolving the issue and engage in a dialogue with possible stakeholders with the competence to take those measures. This could most notably concern the ECtHR. As mentioned above, the ECtHR has been in its case law very diligent in respecting the autonomy of EU law. The “47+1 Group” could take some inspiration from this caution expressed by the ECtHR in finding a solution to the present issue.

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<sup>61</sup> Opinion 2/13, paragraphs 196-200.

<sup>62</sup> *Ibid*, paragraph 199.

<sup>63</sup> As with the issue under Article 33 of the Convention (see above, page 16), it is also conceivable that a way could be found that the EU is notified of such requests for advisory opinions in order to prepare for the necessary internal procedure to commence.

<sup>64</sup> Opinion 2/13, paragraph 197.

82. Finally, in order to avoid the wrong assumption that an omission by a national court or tribunal to make a reference of a case to the CJEU under Article 267 TFEU could be remedied through involving the CJEU in the course of an *advisory opinion*-procedure under Protocol No. 16, a solution could also include an amendment of paragraph 65 of the draft explanatory report to clarify that the *prior involvement*-procedure to be established for the co-respondent mechanism (Article 3, paragraph 6 of the draft Accession Agreement) applies only to adversarial proceedings and not to requests for advisory opinions under Protocol No. 16.<sup>65</sup> While the current wording of that paragraph (“Cases in which the EU may be a co-respondent arise from individual applications...”) already excludes the possibility to apply the procedure for any matters which are not related to an individual application under Article 34 of the Convention for which the co-respondent mechanism applies, this could be further refined in order to eliminate any possible misunderstandings.

### **Basket 3: The principle of mutual trust between the EU member states**

#### *Concerns by Opinion 2/13*

83. In Opinion 2/13, the CJEU underlined the fundamental importance in EU law of the principle of mutual trust between the EU member states, given that it allows an area without internal borders to be created and maintained. It further reasoned that:

*“Thus, when implementing EU law, the member states may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU.”*<sup>66</sup>

84. By not including a provision in the draft Accession Agreement which would recognise the obligation of mutual trust between EU member states in certain circumstances, the CJEU considered that the underlying balance of the EU and the autonomy of EU was negatively affected.<sup>67</sup>

85. During the presentation of its position paper, the European Commission elaborated on this issue as follows:

*“That principle is of constitutional significance for the EU, in that it allows an area without internal borders to be created and maintained. Pursuant to the principle of mutual trust, EU law may provide for a specific distribution of responsibilities between the EU Member States involved in cross-border cooperation, regarding in particular the transfer of persons and the recognition and enforcement of decisions. EU law may thus determine the extent to which each Member State of the European Union is required to presume that fundamental rights have been observed by any other Member State. The principle of mutual trust between the EU Member States should however not be seen as being at odds with the obligations of the state parties to the Convention. To the contrary, there is a high degree of convergence between the recent case-law of the ECtHR and the recent case-law of the CJEU regarding fundamental rights protection in the context of regimes of cross-border cooperation between EU Member States based on the principle of mutual trust. We thus need to find a way to adequately reflect the principle of mutual trust between the EU Member States in the accession agreement.”*<sup>68</sup>

<sup>65</sup> See on this point Opinion 2/13, paragraph 198.

<sup>66</sup> *Ibid*, paragraph 192.

<sup>67</sup> *Ibid*, paragraph 194.

<sup>68</sup> Presentation by the European Commission of its position paper, as Appendix VI of the meeting report to this informal meeting (47+1(2020)Rinf, pages 24-27, at page 26).

## *Recent case-law of the ECtHR regarding the principle of mutual trust*

86. In the recent Grand Chamber judgment of *Avotins v. Latvia*, the ECtHR made some general observations to the principle of mutual trust within the EU legal system:

*“113. The Court is mindful of the importance of the mutual-recognition mechanisms for the construction of the area of freedom, security and justice referred to in Article 67 of the TFEU, and of the mutual trust which they require. As stated in Articles 81 § 1 and 82 § 1 of the TFEU, the mutual recognition of judgments is designed in particular to facilitate effective judicial cooperation in civil and criminal matters. The Court has repeatedly asserted its commitment to international and European cooperation (...). Hence, it considers the creation of an area of freedom, security and justice in Europe, and the adoption of the means necessary to achieve it, to be wholly legitimate in principle from the standpoint of the Convention. 114. (...) Limiting to exceptional cases the power of the State in which recognition is sought to review the observance of fundamental rights by the State of origin of the judgment could, in practice, run counter to the requirement imposed by the Convention according to which the court in the State addressed must at least be empowered to conduct a review commensurate with the gravity of any serious allegation of a violation of fundamental rights in the State of origin, in order to ensure that the protection of those rights is not manifestly deficient. (...) 116.(...) where the courts of a State which is both a Contracting Party to the Convention and a member State of the European Union are called upon to apply a mutual-recognition mechanism established by EU law, they must give full effect to that mechanism where the protection of Convention rights cannot be considered manifestly deficient. However, if a serious and substantiated complaint is raised before them to the effect that the protection of a Convention right has been manifestly deficient and that this situation cannot be remedied by European Union law, they cannot refrain from examining that complaint on the sole ground that they are applying EU law.”<sup>69</sup>*

87. With *Avotins v. Latvia* being a leading case by the Grand Chamber, the above doctrine has been applied by the ECtHR since then also to the EU’s mutual recognition mechanisms of the European Arrest Warrant<sup>70</sup> as well as the “Brussels IIbis”-Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters<sup>71</sup>.

### *Possible action by the “47+1 Group”*

88. The present basket on the principle of mutual trust is probably the area of the EU accession negotiations in which the most developments have occurred since Opinion 2/13 was delivered in December 2014, both with regard to the jurisprudence of the ECtHR and the CJEU.

89. While the above quote from the Grand Chamber judgment in *Avotins v. Latvia* demonstrates an express willingness on the side of the ECtHR to recognise the importance of the principle of mutual trust, the CJEU has delivered several judgments since Opinion 2/13 which gradually extended the scope of the “exceptional circumstances” under which the executing EU member state can be allowed to deviate from the obligation to presume that the requesting EU member state is honouring its human rights commitments. While the present paper does not sufficiently allow for an in-depth analysis of these developments, attention should be given to the European Commission’s statement at the informal virtual meeting on 22 June on the increasing convergence of the jurisprudence between the ECtHR and the CJEU.<sup>72</sup>

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<sup>69</sup> *Avotins v. Latvia*, application no. 17502/07, judgment of 23 May 2016 [GC], paragraph 113 and 116.

<sup>70</sup> *Pirozzi v. Belgium*, application no. 21055/11, judgment of 17 April 2018.

<sup>71</sup> *Royer v. Hungary*, application no. 9114/16, judgment of 6 March 2018.

<sup>72</sup> Presentation by the European Commission of its position paper, as Appendix VI of the meeting report to this informal meeting (47+1(2020)Rinf, pages 24-27, at page 26).

90. Therefore, delegates of the “47+1 Group” could seek to establish in more detail the convergence in the case-law of the CJEU and the ECtHR since the issuing of Opinion 2/13 in December 2014 which might facilitate the finding of solutions to this “basket”. To that effect, it could task the Secretariat to compile a respective document. On the basis of this work, the “47+1 Group” could discuss the feasibility of and the manner in which a reference to the principle of mutual trust could be integrated into the draft accession instruments or into other means.

#### **Basket 4: EU acts in the area of the Common Foreign and Security Policy**

##### *The jurisdiction of Union courts in the area of the common foreign and security policy*

91. The jurisdiction of the CJEU in the area of the common foreign and security policy (CFSP) is limited. It follows as a general principle from Article 24, paragraph 1 TEU that the CJEU shall not have jurisdiction with respect to the provisions dealing with the CFSP, with two exceptions laid down in Article 275, paragraph 2 TFEU. Firstly, the CJEU has jurisdiction to monitor compliance with Article 40 TEU which broadly speaking concerns the demarcation between the CFSP and other EU measures and competences. Secondly, the CJEU has jurisdiction in respect of proceedings relating to restrictive measures against natural or legal persons adopted by the Council of the European Union in the context of the CFSP.

92. Conversely, national courts of EU member states may act in this area in specific circumstances. According to Article 274 TFEU, save where jurisdiction is conferred on the CJEU by the EU treaties, disputes to which the EU is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the EU member states.

##### *The attribution clause in the draft Accession Agreement*

93. The draft Accession Agreement provided for a rule of attribution in Article 1, paragraph 4, according to which an act of an EU member state shall be attributed to that state, even if it implements EU law. This should not preclude the EU from being responsible as a co-respondent for a violation resulting from such an act. The explanatory report to the draft Accession Agreement specified that, where persons employed or appointed by an EU member state act in the framework of an operation pursuant to a decision of the EU institutions, their acts are attributed to the respective EU member state, while acts of EU institutions are attributed to the EU.<sup>73</sup> This would apply regardless of the context in which the relevant acts occur, including with regard to matters relating to the CFSP.

##### *Concerns by Opinion 2/13*

94. In Opinion 2/13, the objections of the CJEU regarding those EU acts in the CFSP which are excluded from its jurisdiction relate to the fact that bestowing on the ECtHR exclusively 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.<sup>74</sup>

95. In its position paper, the European Commission stated that a solution would need 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

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<sup>73</sup> Draft explanatory report, paragraph 23.

<sup>74</sup> Opinion 2/13, paragraphs 249-257.

Convention system.<sup>75</sup> The European Commission elaborated on its position during the presentation of its paper as follows:

*“We therefore need to devise a solution which takes account of the manner in which the competences for remedial action in the area of CFSP are distributed between the Union and its Member States. Such a solution would thus have to involve the Member States in certain cases, where acts of EU institutions or bodies are challenged before the Strasbourg Court. A solution should moreover not be a black or white one but rather be of a procedural nature, in order to be able to take account of future developments in the interpretation of Union primary law as regards the distribution of competences for remedial action in the area of CFSP.”*<sup>76</sup>

#### *Possible action by the “47+1 Group”*

96. Delegates of the “47+1 Group” are invited to engage in a discussion on how the draft accession instruments could meet the concerns of Opinion 2/13 regarding the special characteristics of EU law. In this connection, the attention of the Delegates is drawn to the explanatory report to the draft Accession Agreement which in paragraph 24 notes the absence of a specific rule in the ECtHR’s case-law on the attribution of acts or omissions to an international organisation or its members in the context of extra-territorial activities.<sup>77</sup> The ECtHR indeed indicated in *Al-Jedda v. the United Kingdom*<sup>78</sup> that its assessment of the attribution of such acts or omissions will depend on the particular facts of the case, not least on the terms of the legal instrument on the basis of which a given operation has been conducted (*in casu* the relevant Resolutions of the United Nations Security Council).

97. Against this background, and in light of the variety of situations which may occur in terms of the “distribution of work” between the EU and its member states in the field of CFSP, a possible starting point could be to assess the types of acts of EU institutions or bodies for which domestic remedies can be afforded only before the courts and tribunal of the EU member states, and to what extent these existing remedies could compensate – for the purposes of the draft accession instruments - for the fact that the EU treaties have regulated that certain acts adopted in the context of the CFSP fall outside the judicial review of the CJEU.

### **Discussion of possible additional clarifications**

98. In the position paper of the European Commission, it was stated that, in addition to the so-called “four baskets”, the EU would seek one clarification in the draft accession instruments with regard to Article 53 of the Convention.<sup>79</sup> The following section attempts to briefly describe the issue as mentioned in Opinion 2/13 and to suggest possible action by the “47+1 Group”.

<sup>75</sup> See the European Commission’s position paper (document 47+1(2020)1), page 3.

<sup>76</sup> See the presentation by the European Commission of its position paper, as Appendix VI of the meeting report to this informal meeting (47+1(2020)Rinf, pages 24-27, at page 27).

<sup>77</sup> Paragraph 24 of the draft explanatory report also noted that “(...) as regards the attributability of a certain action to either a Contracting Party or an international organisation under the umbrella of which that action was taken, in none of the cases in which the Court has decided on the attribution of extra-territorial acts or measures by Contracting Parties operating in the framework of an international organisation was there a specific rule of attribution, for the purposes of the Convention, of such acts or measures to either the international organisation concerned or its members”.

<sup>78</sup> *Al-Jedda v. the United Kingdom* [GC], application no. 27021/08, judgment of 7 July 2011, paragraphs 74-86.

<sup>79</sup> See the European Commission’s position paper (document 47+1(2020)1), page 1, Footnote 1.

*The links between the Convention, the EU Charter of Fundamental Rights and national human rights regimes*

99. The following provisions from the Convention and the EU Charter of Fundamental Rights address the interlinkage between the Convention (as an international human rights treaty), the EU Charter of Fundamental Rights (as a supranational human rights treaty addressed to the EU institutions, bodies, offices and agencies as well as to the EU member states when they are implementing EU law)<sup>80</sup> and the national human rights regimes of EU member states.

100. Article 53 of the Convention (“Safeguard for existing human rights”) states that:

*“Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any agreement to which it is a party.”*

101. Article 53 of the EU Charter of Fundamental Rights (“Level of protection”) states that:

*“Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions.”*

*Concerns by Opinion 2/13*

102. In Opinion 2/13, the CJEU referred to its case-law in which it interpreted Article 53 of the EU Charter of Fundamental Rights as meaning that the application of national standards of protection of fundamental rights must not compromise the level of protection provided by the Charter and the primacy, unity and effectiveness of EU Law.<sup>81</sup> The CJEU continued to state that:

*“In so far as Article 53 of the ECHR essentially reserves the power of the Contracting Parties to lay down higher standards of protection of fundamental rights than those guaranteed by the ECHR, that provision should be coordinated with Article 53 of the Charter, as interpreted by the Court of Justice, so that the power granted to Member States by Article 53 of the ECHR is limited — with respect to the rights recognised by the Charter that correspond to those guaranteed by the ECHR — to that which is necessary to ensure that the level of protection provided for by the Charter and the primacy, unity and effectiveness of EU law are not compromised.”<sup>82</sup>*

*Possible action by the “47+1 Group”*

103. Delegates of the “47+1 Group” are invited to reflect upon possible ways to address the above concern.

104. A starting point could be that Article 53 of the Convention does not require the ECtHR to enforce the application of national provisions that are more protective than the Convention

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<sup>80</sup> With regard to the interlinkage with the Convention, Article 52, paragraph 3 of the EU Charter of Fundamental Rights also states that: *“In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”*

<sup>81</sup> Opinion/13, paragraph 188, making reference to the judgment of *Melloni*, judgment of the Grand Chamber of 26 February 2013, EU:C:2013:107, paragraph 60.

<sup>82</sup> Opinion 2/13, paragraph 189.



rights. Article 53 rather prevents the Convention from limiting the effect of such national provisions. In other words, the ECtHR ensures the compatibility of acts of High Contracting Parties with the Convention, not with national provisions which may provide a higher standard.

105. While case-law on Article 53 of the Convention is very sparse, the Grand Chamber of the ECtHR recalled in the recent decision of *M.N. and others v. Belgium*<sup>83</sup> of May 2020 that Article 53 of the Convention would merely state that the Convention does not prevent the states parties from granting more extensive judicial protection in respect of the rights and liberties guaranteed therein than that implemented by it. (In this particular case, the higher standard in question was the application by the national courts of fair trial guarantees to the execution of an asylum-related domestic judgment, while the ECtHR concluded that Article 6 of the Convention was inapplicable to that case.)

106. The “47+1 Group” may discuss whether some inspiration could be taken from this recent Grand Chamber decision to address the respective concerns expressed in Opinion 2/13. The “47+1 Group” may also wish to consider the fact that it could be inferred from case-law of the ECtHR that the latter would not be competent to require enforcement of a national provision which grants a higher standard than the Convention, to the detriment of a supranational legal system which may limit the application of that higher standard in specific instances.

#### Appendix I – Table with the list of issues (and further references) discussed in this paper

Brief description of the issue	Relevant part of the draft accession instruments	Relevant paragraphs in Opinion 2/13	Possible action by the “47+1 Group”
Basket 1, issue 1:  Decision by the ECtHR on a request by a High Contracting Party to become a co-respondent	Article 3, paragraph 5 of the draft Accession Agreement  Paragraphs 53-58 of the draft explanatory report	Paragraphs 215-225	The “47+1 Group” is invited to consider whether a solution can be found allowing the ECtHR to handle a request to apply the co-respondent mechanism in a manner which is based exclusively on an interpretation of EU law by the competent EU institutions.
Basket 1, issue 2:  Joint responsibility and Member states’ reservations under	Article 3, paragraph 7 of the draft Accession Agreement	Paragraphs 226-228	The “47+1 Group” is invited to consider whether any changes or further explanations should be added to the draft accession

<sup>83</sup> *M.N. and others v. Belgium*, application no. 3599/18 (GC), paragraph 140.

Article 57 of the Convention	Paragraph 62 of the draft explanatory report		instruments in order to address this issue.
Basket 1, issue 3:  Exceptions from the general principle of joint responsibility	Article 3, paragraph 7 of the draft Accession Agreement  Paragraph 62 of the draft explanatory report	Paragraphs 229-234	The “47+1 Group” is invited to discuss whether the draft Accession Agreement should at all provide for any exceptions from the principle of joint responsibility, or whether an arrangement could be included in the draft accession instruments which would allow the ECtHR to deviate from the principle of joint responsibility on the basis of the understanding and interpretation of EU law by the competent EU institutions.
Basket 1, issue 4:  Identifying instances in which the <i>prior involvement</i> -procedure applies	Article 3, paragraph 6 of the draft Accession Agreement  Paragraphs 65-69 of the draft explanatory report	Paragraphs 236-240	The “47+1 Group” is invited to discuss whether a provision should be added to the draft accession instruments which would regulate the triggering of the <i>prior involvement</i> -procedure.
Basket 1, issue 5:  Informing the competent EU institution about cases in which the <i>prior involvement</i> -procedure could apply	Article 3, paragraph 6 of the draft Accession Agreement  Paragraphs 65-69 of the draft explanatory report	Paragraph 241	The “47+1 Group” is invited to discuss whether the draft accession instruments or other means could make provision of a procedure in which the EU is fully and systematically informed about cases in which the co-respondent mechanism (including the <i>prior involvement</i> -

			procedure) could apply.
Basket 1, issue 6:  <i>Prior involvement</i> - procedure also to apply in cases where CJEU interprets EU secondary law	Paragraph 66 of the draft explanatory report	Paragraphs 242-247	The “47+1 Group” is invited to consider a possible clarification to paragraph 66 of the draft explanatory report.
Basket 2, issue 1:  Inter-party applications (Article 33 of the Convention) brought in possible violation of EU law (Article 344 TFEU)	Article 4 of the draft Accession Agreement  Paragraphs 70-72 of the draft explanatory report	Paragraphs 201-214	The “47+1 Group” is invited to consider any solution to this issue, e.g. by providing the EU with the possibility to finalise an internal procedure to respond to the bringing of inter-party applications in possible violation of EU law.
Basket 2, issue 2:  Requests for advisory opinion under Protocol No. 16 brought in possible violation of EU law (Article 267 TFEU)	The draft accession instruments do not address this issue at the current stage	Paragraphs 196-200	The “47+1 Group” is invited to consider any solution to this issue, e.g. by providing the EU with the possibility to finalise an internal procedure to respond to the making of requests under Protocol No. 16 in possible violation of EU law.  The discussion could also include complementary measures to which the accession instruments could make reference to.  The Group could also discuss a clarification in paragraph 66 of the draft explanatory report that the <i>prior involvement</i> -

			procedure applies solely to adversarial proceedings (and not to Protocol No. 16).
<p>Basket 3:</p> <p>Principle of mutual trust between EU Member states</p>	<p>The draft accession instruments do not address this issue at the current stage</p>	<p>Paragraphs 191-194</p>	<p>The “47+1 Group” could seek to establish the convergence in the case-law of the CJEU and the ECtHR since the issuing of Opinion 2/13 in December 2014 which might facilitate the finding of a solution to this issue.</p> <p>On the basis of this work, the “47+1 Group” could discuss the manner in which the principle of mutual trust could be referenced to in the draft accession instruments.</p>
<p>Basket 4:</p> <p>Acts in the area of the CFSP that are excluded from the CJEU’s jurisdiction</p>	<p>The draft accession instruments do not address this issue at the current stage</p>	<p>Paragraphs 249-257</p>	<p>The “47+1 Group” is invited to engage in a discussion on how the draft accession instruments could meet the concerns of Opinion 2/13 regarding the special characteristics of EU law. A possible starting point could be to assess the types of acts of EU institutions or bodies for which domestic remedies can be afforded only before the courts and tribunal of the EU member states, and to what extent these existing remedies</p>

			could compensate – for the purposes of the draft accession instruments - for the fact that the EU treaties have regulated that certain acts adopted in the context of the CFSP fall outside the judicial review of the CJEU.
<p>Discussion of possible additional clarifications:</p> <p>Article 53 of the Convention</p>	<p>The draft accession instruments do not address this issue at the current stage</p>	<p>Paragraphs 186-189</p>	<p>The “47+1 Group” is invited to look at recent jurisprudence by the ECtHR on Article 53 of the Convention and, in light of such jurisprudence, discuss possible clarifications to the draft accession instruments or other means. Such clarifications could include reference to the fact that it can be inferred from the case-law of the ECtHR that the latter is not competent to enforce national provisions which may provide a higher standard than the Convention, in particular where supranational law limits the application of that higher standard in specific contexts.</p>

## **Appendix II – List of abbreviations**

CDDH	Steering Committee for Human Rights
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union