COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

46+1(2023)30
18 January 2023

17TH MEETING OF THE CDDH AD HOC NEGOTIATION GROUP ON THE ACCESSION OF THE EUROPEAN UNION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Proposed editorial revisions to the draft revised accession instruments (document prepared by the Secretariat under the authority of the Chairperson and Vice-chairperson)[1]

Strasbourg, Tuesday 31 January 2023 (9.30 am) – Thursday 2 February 2023 (5.00 pm)

(Agora, Room G02)

Council of Europe

---

[1] Proposed editorial revisions appear in track changes with blue highlighting. Changes to the 2013 versions of the draft instruments that have been tentatively agreed by the Group appear in bold.

Draft revised Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms

(Including proposals provisionally approved by the Group until its 15th meeting in October 2022)

Preamble

The High Contracting Parties to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5), signed at Rome on 4 November 1950 (hereinafter referred to as "the Convention"), being member States of the Council of Europe, and the European Union,

Having regard to Article 59, paragraph 2, of the Convention;

Considering that the European Union is founded on the respect for human rights and fundamental freedoms;

Considering that the accession of the European Union to the Convention will enhance coherence in human rights protection in Europe;

Considering, in particular, that any person, non-governmental organisation or group of individuals should have the right to submit the acts, measures or omissions of the European Union to the external control of the European Court of Human Rights (hereinafter referred to as "the Court");

Considering that, having regard to the specific legal order of the European Union, which is not a State, its accession requires certain adjustments to the Convention system to be made by common agreement,

Have agreed as follows:

Article 1 – Scope of the accession and amendments to Article 59 of the Convention

1. The European Union hereby accedes to the Convention, to the Protocol to the Convention and to Protocol No. 6 to the Convention.

2. Article 59, paragraph 2, of the Convention shall be amended to read as follows:

> "2.*a*. The European Union may accede to this Convention and the protocols thereto. Accession of the European Union to the protocols shall be governed, *mutatis mutandis*, by Article 6 of the Protocol, Article 7 of Protocol No. 4, Articles 7 to 9 of Protocol No. 6, Articles 8 to 10 of Protocol No. 7, Articles 4 to 6 of Protocol No. 12 and Articles 6 to 8 of Protocol No. 13.
>
> *b*. The Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms constitutes an integral part of this Convention."

3. Accession to the Convention and the protocols thereto shall impose on the European Union obligations with regard only to acts, measures or omissions of its institutions, bodies, offices or agencies, or of persons acting on their behalf. Nothing in the Convention or the protocols thereto shall require the European Union to perform an act or adopt a measure for which it has no competence under European Union law.

4. For the purposes of the Convention, of the protocols thereto and of this Agreement, an act, measure or omission of organs of a member State of the European Union or of persons acting on its behalf shall be attributed to that State, even if such act, measure or omission occurs when the State implements the law of the European Union, including decisions taken under the Treaty on European Union and under the Treaty on the Functioning of the European Union. This shall not preclude the European Union from being responsible as a co-respondent for a violation resulting from such an act, measure or omission, in accordance with Article 36, paragraph 4, of the Convention and Article 3 of this Agreement.[2]

5. Where any of the terms:

[2] *[Note from the Secretariat] There has been a proposal for a new Article 1, paragraph 4a. See document 46+1(2022)28REV.*

- "State", "States", or "States Parties" appear in Article 10 (paragraph 1) and 17 of the Convention, as well as in Articles 1 and 2 of the Protocol, in Article 6 of Protocol No. 6, in Articles 3, 4 (paragraphs 1 and 2), 5 and 7 of Protocol No. 7, in Article 3 of Protocol No. 12 and in Article 5 of Protocol No. 13, they shall be understood as referring also to the European Union as a non-state Party to the Convention;
- "national law", "administration of the State", "national laws", "national authority", or "domestic" appear in Articles 7 (paragraph 1), 11 (paragraph 2), 12, 13 and 35 (paragraph 1) of the Convention, they shall be understood as relating also, *mutatis mutandis*, to the internal legal order of the European Union as a non-state Party to the Convention and to its institutions, bodies, offices or agencies;
- "national security", "economic well-being of the country", "territorial integrity", or "life of the nation" appear in Articles 6 (paragraph 1), 8 (paragraph 2), 10 (paragraph 2), 11 (paragraph 2), and 15 (paragraph 1) of the Convention, as well as in Article 2 (paragraph 3) of Protocol No. 4 and in Article 1 (paragraph 2) of Protocol No. 7, they shall be considered, in proceedings brought against the European Union or to which the European Union is a co-respondent, with regard to situations relating to the member States of the European Union, as the case may be, individually or collectively;
- **'the Convention' is mentioned in the present Agreement, it shall be understood as referring to the Convention as interpreted by the Court.**

6. Insofar as the expression "everyone within their jurisdiction" appearing in Article 1 of the Convention refers to persons within the territory of a High Contracting Party, it shall be understood, with regard to the European Union, as referring to persons within the territories of the member States of the European Union to which the Treaty on European Union and the Treaty on the Functioning of the European Union apply. Insofar as this expression refers to persons outside the territory of a High Contracting Party, it shall be understood, with regard to the European Union, as referring to persons who, if the alleged violation in question had been attributable to a High Contracting Party which is a State, would have been within the jurisdiction of that High Contracting Party.

7. With regard to the European Union, the term "country" appearing in Article 5 (paragraph 1) of the Convention and in Article 2 (paragraph 2) of Protocol No. 4 and the term "territory of a State" appearing in Article 2 (paragraph 1) of Protocol No. 4 and in Article 1 (paragraph 1) of Protocol No. 7 shall mean each of the territories of the member States of the European Union to which the Treaty on European Union and the Treaty on the Functioning of the European Union apply.

8. Article 59, paragraph 5, of the Convention shall be amended to read as follows:

"5. The Secretary General of the Council of Europe shall notify all the Council of Europe member States and the European Union of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it or acceded to it, and the deposit of all instruments of ratification or accession which may be effected subsequently."

Article 2 – Reservations to the Convention and its protocols

1. The European Union may, when signing or expressing its consent to be bound by the provisions of this Agreement in accordance with Article 120, make reservations to the Convention and to the Protocol in accordance with Article 57 of the Convention.

2. Article 57, paragraph 1, of the Convention shall be amended to read as follows:

"1. Any State may, when signing this 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. The European Union may, when acceding to this Convention, make a reservation in respect of any particular provision of the Convention to the extent that any law of the European Union then in force is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article."

3. Reservations made by High Contracting Parties in accordance with Article 57 of the Convention shall retain their effects in respect of any such High Contracting Party which is a co-respondent to the proceedings.

Article 3 – Co-respondent mechanism

1. Article 36 of the Convention shall be amended as follows:

a. the heading of Article 36 of the Convention shall be amended to read as follows: "Third party intervention and co-respondent";

b. a new paragraph 4 shall be added at the end of Article 36 of the Convention, which shall read as follows:

"4. The European Union or a member State of the European Union may become a co-respondent to proceedings by decision of the Court in the circumstances set out in the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms. A co-respondent is a party to the case. The admissibility of an application shall be assessed without regard to the participation of a co-respondent in the proceedings."

2. Where an application is directed against one or more member States of the European Union, the European Union may become a co-respondent to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded of a provision of European Union law, including decisions taken under the Treaty on European Union and under the Treaty on the Functioning of the European Union, notably where that violation could have been avoided only by disregarding an obligation under European Union law. **The Court shall make available to the European Union information concerning all such applications that are communicated to its member States.**

3. Where an application is directed against the European Union, the European Union member States may become co-respondents to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the rights at issue defined in the Convention or in the protocols to which the European Union has acceded of a provision of the Treaty on European Union, the Treaty on the Functioning of the European Union or any other provision having the same legal value pursuant to those instruments, notably where that violation could have been avoided only by disregarding an obligation under those instruments. **The Court shall make available to the member States of the European Union information concerning all such applications that are communicated to the European Union.**

4. Where an application is directed against and notified to both the European Union and one or more of its member States, the status of any respondent may be changed to that of a co-respondent if the conditions in paragraph 2 or paragraph 3 of this article are met.

~~**5. A High Contracting Party shall become a co-respondent either by accepting an invitation from the Court or by decision of the Court upon the request of that High Contracting Party. When inviting a High Contracting Party to become co-respondent, and when deciding upon a request to that effect, the Court shall seek the views of all parties to the proceedings. When deciding upon such a request, the Court shall assess whether, in the light of the reasons given by the High Contracting Party concerned, it is plausible that the conditions in paragraph 2 or paragraph 3 of this article are met.**~~

5. **The European Union or its member States may become a co-respondent, either by accepting an invitation from the Court or upon their initiative. The Court admits a co-respondent by decision if the conditions in paragraphs 2 or 3 of this article are met according to a reasoned assessment by the European Union. Before a High Contracting Party becomes co-respondent, the Court shall grant the applicant an opportunity to state its views on the matter.**
The admission of the co-respondent does not prejudge the Court's decision on the case.

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

7. 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~~ **all** parties to make observations to the Court. The European Union shall ensure that such assessment is made quickly so that the proceedings before the Court are not unduly delayed. The provisions of this paragraph shall not affect the powers of the Court.

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

9. This article shall apply to applications submitted from the date of entry into force of this Agreement.

Article 4 – Inter-Party cases

1. The first sentence of Article 29, paragraph 2, of the Convention shall be amended to read as follows:

"A Chamber shall decide on the admissibility and merits of inter-Party applications submitted under Article 33".

2. The heading of Article 33 of the Convention shall be amended to read as follows: "Inter-Party cases".

3. **The European Union and its member States in their relations with each other shall not avail themselves of Article 33 of the Convention. Nor shall the member States of the European Union avail themselves of Article 33 of the Convention insofar as a dispute between them concerns the interpretation or application of European Union law.**

4. **The Court shall provide the European Union upon request with sufficient time to assess, as a matter of priority, whether and to what extent an inter-party dispute under Article 33 of the Convention between member States of the European Union concerns the interpretation or application of European Union law.**

Article 5 – Advisory Opinions under Protocol no. 16 to the Convention

Where a court or tribunal of a member State of the European Union that has ratified Protocol No. 16 to the Convention, in the context of a case pending before it, encounters a question relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto, that court or tribunal shall not be considered as a highest court or tribunal of a High Contracting Party for the purposes of Article 1, paragraph 1, of Protocol No. 16 to the Convention if the question falls within the field of application of European Union law.[3]

Commented [MD1]: N.b. the French version reads "Requests for Advisory Opinions…" ("Demandes d'avis consultatifs…")

Article 6 – Interpretation of Articles 35 and 55 of the Convention

Proceedings before the Court of Justice of the European Union shall be understood as constituting neither procedures of international investigation or settlement within the meaning of Article 35, paragraph 2.*b*, of the Convention, nor means of dispute settlement within the meaning of Article 55 of the Convention.

Article 7 – Mutual trust under European Union law

[3] *[Note from the Secretariat] There has been a proposal for a new Article 5a. See document 46+1(2022)28REV.*

Accession of the European Union to the Convention shall not affect the application of the principle of mutual trust within the European Union. In this context, the protection of human rights guaranteed by the Convention shall be ensured.

Article 8 – Election of judges[4]

1. A delegation of the European Parliament shall be entitled to participate, with the right to vote, in the sittings of the Parliamentary Assembly of the Council of Europe whenever the Assembly exercises its functions related to the election of judges in accordance with Article 22 of the Convention. The delegation of the European Parliament shall have the same number of representatives as the delegation of the State which is entitled to the highest number of representatives under Article 26 of the Statute of the Council of Europe.

2. The modalities of the participation of representatives of the European Parliament in the sittings of the Parliamentary Assembly of the Council of Europe and its relevant bodies shall be defined by the Parliamentary Assembly of the Council of Europe, in co-operation with the European Parliament.

Article 9 – Participation of the European Union in the meetings of the Committee of Ministers of the Council of Europe[5]

1. Article 54 of the Convention shall be amended to read as follows:

"Article 54 – Powers of the Committee of Ministers

1. Protocols to this Convention are adopted by the Committee of Ministers.

2. Nothing in this Convention shall prejudice the powers conferred on the Committee of Ministers by the Statute of the Council of Europe."

2. The European Union shall be entitled to participate in the meetings of the Committee of Ministers, with the right to vote, when the latter takes decisions under Articles 26 (paragraph 2), 39 (paragraph 4), 46 (paragraphs 2 to 5), 47 and 54 (paragraph 1) of the Convention.

3. Before the adoption of any other instrument or text:

- relating to the Convention or to any protocol to the Convention to which the European Union is a party and addressed to the Court or to all High Contracting Parties to the Convention or to the protocol concerned;
- relating to decisions by the Committee of Ministers under the provisions referred to in paragraph 2 of this article; or
- relating to the selection of candidates for election of judges by the Parliamentary Assembly of the Council of Europe under Article 22 of the Convention,

the European Union shall be consulted within the Committee of Ministers. The latter shall take due account of the position expressed by the European Union.

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

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

---

[4] [Note from the Secretariat] Proposals concerning this article are still under examination by the Group. See document 46+1(2022)28REV.

[5] [Note from the Secretariat] Proposals concerning this article are still under examination by the Group. See in particular documents 46+1(2022)28REV and 46+1(2023)29.

b. where the Committee of Ministers otherwise supervises the fulfilment of obligations by a High Contracting Party other than the European Union, the member States of the European Union are free under the European Union treaties to express their own position and exercise their right to vote.

Article 10 – Participation of the European Union in the expenditure related to the Convention[6]

1. The European Union shall pay an annual contribution dedicated to the expenditure related to the functioning of the Convention. This annual contribution shall be in addition to contributions made by the other High Contracting Parties. Its amount shall be equal to 34% of the highest amount contributed in the previous year by any State to the Ordinary Budget of the Council of Europe.

2. a. If the amount dedicated within the Ordinary Budget of the Council of Europe to the expenditure related to the functioning of the Convention, expressed as a proportion of the Ordinary Budget itself, deviates in each of two consecutive years by more than 2.5 percentage points from the percentage indicated in paragraph 1, the Council of Europe and the European Union shall, by agreement, amend the percentage in paragraph 1 to reflect this new proportion.

b. For the purpose of this paragraph, no account shall be taken of a decrease in absolute terms of the amount dedicated within the Ordinary Budget of the Council of Europe to the expenditure related to the functioning of the Convention as compared to the year preceding that in which the European Union becomes a Party to the Convention.

c. The percentage that results from an amendment under paragraph 2.a may itself later be amended in accordance with this paragraph.

3. For the purpose of this article, the expression “expenditure related to the functioning of the Convention” refers to the total expenditure on:

a. the Court;

b. the supervision of the execution of judgments of the Court; and

c. the functioning, when performing functions under the Convention, of the Committee of Ministers, the Parliamentary Assembly and the Secretary General of the Council of Europe,

increased by 15% to reflect related administrative overhead costs.

Formatted: Highlight

4. Practical arrangements for the implementation of this article may be determined by agreement between the Council of Europe and the European Union.

Article 11 – Relations with other agreements

1. The European Union shall, within the limits of its competences, respect the provisions of:

a. Articles 1 to 6 of the European Agreement relating to Persons Participating in Proceedings of the European Court of Human Rights of 5 March 1996 (ETS No. 161);

b. Articles 1 to 19 of the General Agreement on Privileges and Immunities of the Council of Europe of 2 September 1949 (ETS No. 2) and Articles 2 to 6 of its Protocol of 6 November 1952 (ETS No. 10), in so far as they are relevant to the operation of the Convention; and

c. Articles 1 to 6 of the Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe of 5 March 1996 (ETS No. 162).

2. For the purpose of the application of the agreements and protocols referred to in paragraph 1, the Contracting Parties to each of them shall treat the European Union as if it were a Contracting Party to that agreement or protocol.

[6] *[Note from the Secretariat] The percentage indicated in paragraph 1 will be updated at the time the Group approves the draft accession instruments. This article is therefore still under examination by the Group.*

3. The European Union shall be consulted before any agreement or protocol referred to in paragraph 1 is amended.

4. With respect to the agreements and protocols referred to in paragraph 1, the Secretary General of the Council of Europe shall notify the European Union of:

a. any signature;

b. the deposit of any instrument of ratification, acceptance, approval or accession;

c. any date of entry into force in accordance with the relevant provisions of those agreements and protocols; and

d. any other act, notification or communication relating to those agreements and protocols.

Article 12 – Signature and entry into force

1. The High Contracting Parties to the Convention at the date of the opening for signature of this Agreement and the European Union may express their consent to be bound by:

a. signature without reservation as to ratification, acceptance or approval; or

b. signature with reservation as to ratification, acceptance or approval, followed by ratification, acceptance or approval.

2. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.

3. This Agreement shall enter into force on the first day of the month following the expiration of a period of three months after the date on which all High Contracting Parties to the Convention mentioned in paragraph 1 and the European Union have expressed their consent to be bound by the Agreement in accordance with the provisions of the preceding paragraphs.

4. The European Union shall become a Party to the Convention, to the Protocol to the Convention and to Protocol No. 6 to the Convention at the date of entry into force of this Agreement.

Article 13 – Reservations

No reservation may be made in respect of the provisions of this Agreement.

Article 14 – Notifications

The Secretary General of the Council of Europe shall notify the European Union and the member States of the Council of Europe of:

a. any signature without reservation in respect of ratification, acceptance or approval;

b. any signature with reservation in respect of ratification, acceptance or approval;

c. the deposit of any instrument of ratification, acceptance or approval;

d. the date of entry into force of this Agreement in accordance with Article 120;

e. any other act, notification or communication relating to this Agreement.

In witness whereof the undersigned, being duly authorised thereto, have signed this Agreement.

Done at ..... the ....., in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe and to the European Union.

Appendix 2[7]

Draft declaration by the European Union
to be made at the time of signature of the Accession Agreement

"Upon its accession to the Convention, the European Union will ensure that:

a. it will request to become a co-respondent to the proceedings before the European Court of Human Rights or accept an invitation by the Court to that effect, where the conditions set out in Article 3, paragraph 2, of the Accession Agreement are met;

b. the High Contracting Parties to the Convention other than the member States of the European Union, which in a procedure under Article 267 of the Treaty on the Functioning of the European Union are entitled to submit statements of case or written observations to the Court of Justice of the European Union, be entitled, under the same conditions, to do so also in a procedure in which the Court of Justice of the European Union assesses the compatibility with the Convention of a provision of European Union law, in accordance with Article 3, paragraph 7~~6~~, of the Accession Agreement."

[7] *Appendix numbering in accordance with the 2013 CDDH Interim Report to the Committee of Ministers.*

Appendix 3[8]

Draft rule to be added to the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements in cases to which the European Union is a party

"Rule 18 – Judgments and friendly settlements in cases to which the European Union is a party"

Formatted: Highlight

1. Decisions by the Committee of Ministers under Rule 17 (Final Resolution) of the present rules shall be considered as adopted if a majority of four fifths of the representatives casting a vote and a majority of two thirds of the representatives entitled to sit on the Committee of Ministers are in favour.

2. Decisions by the Committee of Ministers under Rule 10 (Referral to the Court for interpretation of a judgment) and under Rule 11 (Infringement proceedings) of the present rules shall be considered as adopted if one fourth of the representatives entitled to sit on the Committee of Ministers is in favour.

3. Decisions on procedural issues or merely requesting information shall be considered as adopted if one fifth of the representatives entitled to sit on the Committee of Ministers is in favour.

4. Amendments to the provisions of this rule shall require consensus by all High Contracting Parties to the Convention."

[8] *[Note from the Secretariat] Proposals concerning Appendix 3 are still under examination by the Group. See in particular documents 46+1(2022)28REV and 46+1(2023)29.*

Appendix 4

Draft model of memorandum of understanding
between the European Union and X [State which is not a member of the European Union]

"1. Upon a request by X, the European Union will seek leave to intervene pursuant to Article 36, paragraph 2, of the Convention for the Protection of Human Rights and Fundamental Freedoms in a case brought against X in which an alleged violation of the Convention or its Pprotocols calls into question a provision of European Union law, including decisions taken under the Treaty on European Union and under the Treaty on the Functioning of the European Union, which, pursuant to an international agreement concluded with the European Union, X is under an obligation to apply.

2. Where the European Court of Human Rights in a judgment against X has established a violation calling into question a provision of the nature referred to in point 1, the European Union will examine with X which measures are required by the European Union following such judgment. To this end, use will be made of the procedures provided for under the relevant international agreement."

Appendix 5

Draft explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms

Introduction

1. The accession of the European Union (hereinafter referred to as "the EU") to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (ETS No. 5; hereinafter referred to as "the Convention") constitutes a major step in the development of the protection of human rights in Europe. The objective of the accession is to enhance coherence in human rights protection in Europe by strengthening participation, accountability and enforceability in the Convention system.

2. Discussed since the late 1970s, the accession became a legal obligation under the Treaty on European Union (hereinafter referred to as the "TEU") when the Treaty of Lisbon came into force on 1 December 2009. Pursuant to Article 6, paragraph 2, of the TEU, "[t]he Union shall accede to the [Convention]. Such accession shall not affect the Union's competences as defined in the Treaties". Protocol No. 8 to the Treaty of Lisbon set out a number of further requirements for the conclusion of the Accession Agreement. Protocol No. 14 (CETS No. 194) to the Convention, which was adopted in 2004 and which entered into force on 1 June 2010, amended Article 59 of the Convention to allow the EU to accede to it.

I. Need for an accession agreement

3. The above provisions, although necessary, were not sufficient to allow for an immediate accession of the EU. The Convention, as amended by Protocols Nos. 11 (ETS No. 155) and 14, was drafted to apply only to Contracting Parties who are also member States of the Council of Europe. As the EU is neither a State nor a member of the Council of Europe, and has its own specific legal system, its accession requires certain adaptations to the Convention system. These include: amendments to provisions of the Convention to ensure that it operates effectively with the participation of the EU; supplementary interpretative provisions; adaptations of the procedure before the European Court of Human Rights (hereinafter referred to as "the Court") to take into account the characteristics of the legal order of the EU, in particular the specific relationship between an EU member State's legal order and that of the EU itself; and other technical and administrative issues not directly pertaining to the text of the Convention, but for which a legal basis is required.

4. It was therefore necessary to establish, by common agreement between the EU and the current High Contracting Parties to the Convention, the conditions of accession and the adjustments to be made to the Convention system.

5. As a result of the accession, any person, non-governmental organisation or group of individuals will have the right to submit the acts, measures and omissions of the EU, like those of every other High Contracting Party, to the external control exercised by the Court in the light of the rights guaranteed under the Convention. This is all the more important since the EU member States have transferred substantial powers to the EU. At the same time, the competence of the Court to assess the conformity of EU law with the provisions of the Convention will not prejudice the principle of the autonomous interpretation of EU law.

6. The EU is founded on the respect for fundamental rights, the observance of which is ensured by the Court of Justice of the European Union (hereinafter referred to as "the CJEU") as well as by the courts of the EU member States; accession of the EU to the Convention will further enhance the coherence of the judicial protection of human rights in Europe.

7. 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, and that the distribution of competences between the EU and its member States and between the EU institutions shall be respected.

II. Principal stages in the preparation of the Accession Agreement

8. Before the elaboration of this Agreement, the accession of the EU to the Convention had been debated on several occasions.

9. The Steering Committee for Human Rights (CDDH) adopted at its 53rd meeting in June 2002 a study[9] of the legal and technical issues that would have to be addressed by the Council of Europe in the event of possible accession by the EU to the Convention, which it transmitted to the Convention on the Future of Europe, convened following the Laeken Declaration of the European Council of December 2001, in order to consider the key issues arising for the EU's future development with a view to assisting future political decision making about such accession.

10. When drafting Protocol No. 14 to the Convention in 2004, the High Contracting Parties decided to add a new paragraph to Article 59 of the Convention providing for the possible accession of the EU. It was, however, noted even at that time that further modifications to the Convention were necessary to make such accession possible from a legal and technical point of view[10] and that such modifications could be made either in an amending protocol to the Convention, or in an accession treaty between the EU and the States Parties to the Convention.

11. The entry into force of the Treaty of Lisbon in December 2009 and of Protocol No. 14 to the Convention in June 2010 created the necessary legal preconditions for the accession.

12. The Committee of Ministers adopted, at the 1085th meeting of the Ministers' Deputies (26 May 2010), ad hoc terms of reference for the CDDH to elaborate, in co-operation with representatives of the EU, a legal instrument, or instruments, setting out the modalities of accession of the EU to the European Convention on Human Rights, including its participation in the Convention system.[11] On the EU side, the Council of the EU adopted on 4 June 2010 a decision authorising the European Commission to negotiate an agreement for the EU to accede to the Convention.

13. The CDDH entrusted this task to an informal group (CDDH-UE) of 14 members (seven from member States of the EU and seven from non-member States of the EU), chosen on the basis of their expertise. This group held in total eight meetings with the European Commission. The CDDH submitted a report to the Committee of Ministers on the work carried out by the CDDH-UE, with draft legal instruments appended, on 14 October 2011. On 13 June 2012 the Committee of Ministers gave a new mandate to the CDDH to pursue negotiations with the EU, in an ad hoc group ("476+1"), with a view to finalising the legal instruments setting out the modalities of accession of the EU to the Convention. This negotiation group held in total five meetings with the European Commission. In the context of the meetings of the CDDH-UE and of the "476+1" group three exchanges of views were held with representatives of civil society, who regularly submitted comments on the working documents.

14. In the context of the regular meetings which take place between the two courts, delegations from the Court and the CJEU discussed on 17 January 2011 the accession of the EU to the Convention, and in particular the question of the possible prior involvement of the CJEU in cases to which the EU is a co-respondent. The joint declaration by the presidents of the two European courts summarising the results of the discussion provided a valuable reference and guidance for the negotiation.

15. On 11 September 2013, the Committee of Ministers took note of the interim report of the CDDH on the negotiations on the accession of the EU to the Convention, including the draft accession instruments as adopted by the "47+1" group.[12] On 18 December 2014, the CJEU issued Opinion 2/13 , which concluded that the agreement on accession was not compatible with EU law.[13]

---

9. Document CDDH(2002)010 Addendum 2.
10. See the explanatory report to Protocol No. 14, paragraph 101.
11. CM/Del/Dec(2010)1085, of 26 May 2010.
12. CM/Del/Dec(2013)1177/4.2, adopted by the Committee of Ministers at its 1177th meeting.
13. Opinion 2/13 pursuant to Article 218(11) TFEU, ECLI:EU:C:2014:2454, European Union: Court of Justice of the European Union, 18 December 2014.

To address the concerns expressed in this opinion, it was necessary to resume the negotiations in order to amend the draft accession agreement and its appendices.

16. By letter of 31 October 2019, the President and the First Vice-President of the European Commission informed the Secretary General of the Council of Europe that the EU stood ready to resume the negotiations on its accession to the Convention. At its 92nd meeting (26-29 November 2019), the CDDH proposed a series of arrangements for continuation of the negotiations within an ad hoc group composed of representatives of the 47 Member States of the Council of Europe and a representative of the European Union ("47+1").[14] On 15 January 2020, the Ministers' Deputies approved the continuation of the ad hoc terms of reference of the CDDH to finalise as a matter of priority, in co-operation with the representatives of the EU, in an ad hoc group "47+1" and on the basis of the work already conducted, the legal instruments setting out the modalities of accession of the EU to the Convention, including its participation in the Convention system and, in this context, to examine any related issue.[15]

17. On 16 March 2022, the Committee of Ministers decided under Article 8 of the Statute of the Council of Europe that the Russian Federation would cease to be a member of the Council of Europe forthwith. As a result, the Russian Federation no longer participated in the work of the CDDH or any of its subordinate bodies, including the CDDH ad hoc negotiation group on the accession of the EU to the Convention. This group then continued the negotiations in a "46+1" format.

18. Following the resumption of the negotiations in September 2020, the "46+1" group held a total of … meetings and, in this context, three additional exchanges of views with representatives of civil society on various issues relevant to the discussions.

19. The present explanatory report is part of a package of instruments prepared by the negotiating group which all form part of the context underlying the accession of the EU to the Convention. Explanatory reports have been used by the European Court of Human Rights as a means of interpretation.

20. After the opinion provided by the CJEU on …, the CDDH approved the draft Aaccession Aagreement and sent it to the Committee of Ministers on ... The European Court of Human Rights adopted an opinion on the draft Aaccession Aagreement on … The Parliamentary Assembly adopted an opinion on the draft Aaccession Aagreement (Opinion … of …). The Accession Agreement was adopted by the Committee of Ministers on … and opened for signature on ....

Formatted: Highlight

III. Comments on provisions of the Accession Agreement

Article 1 – Scope of the accession and amendments to Article 59 of the Convention

21. It was decided that, upon its entry into force, the Accession Agreement would simultaneously amend the Convention and include the EU among its Parties, without the EU needing to deposit a further instrument of accession. This would also be the case for the EU's accession to the Protocol (ETS No. 9) and to Protocol No. 6 (ETS No. 114) to the Convention. Subsequent accession by the EU to Protocols No. 4, 7, 12 and 13 would require the deposit of separate accession instruments.

22. The amendments to the Convention concern paragraphs 2 and 5 of Article 59.

23. Article 59, paragraph 2, of the Convention, as amended, defines the modalities of EU accession to the protocols and the status of the Accession Agreement. It is divided into two sub-paragraphs.

Accession to protocols

24. Under paragraph 2.*a*, a provision is added to Article 59 of the Convention to permit the EU to accede to the protocols to the Convention. To ensure that this provision can serve as a legal basis for the accession to those protocols, Article 59, paragraph 2.*a*, states that the provisions of the protocols

[14] *Document CDDH(2019)R92.*
[15] *CM/Del/Dec(2020)1364/4.3, adopted by the Committee of Ministers at its 1364th meeting.*

concerning signature and ratification, entry into force and depositary functions[16] shall apply, *mutatis mutandis*, in the event of the EU's accession to those protocols.

Status of the Accession Agreement

25. Article 59, paragraph 2.*b*, of the Convention states that the Accession Agreement constitutes an integral part of the Convention. This therefore makes it possible to limit the amendments made to the Convention. For instance, attribution and interpretation clauses, provisions about privileges and immunities and about the participation of the EU in the Committee of Ministers of the Council of Europe are thus dealt with in the Accession Agreement. It should be noted that the Accession Agreement does not contain any specific provision about its denunciation. Since upon entry into force, it will be an integral part of the Convention, it would not be possible to denounce it separately from the Convention; conversely, denunciation of the Convention will imply the denunciation *ipso facto* of the Accession Agreement. In so far as the Accession Agreement will still have legal effect after the EU has acceded, its provisions will be subject to interpretation by the Court. To implement the Accession Agreement, the EU will adopt internal legal rules regulating various matters, including the functioning of the co-respondent mechanism. Similarly, the Rules of Court will also be adapted.

Effects of the accession

26. Article 1, paragraph 3, of the Accession Agreement reflects the requirement under Article 2 of Protocol No. 8 to the Treaty of Lisbon that the accession of the EU shall not affect its competences or the powers of its institutions. This provision also makes it clear that accession to the Convention imposes on the EU obligations with regard to acts, measures or omissions of its institutions, bodies, offices or agencies, or of persons acting on their behalf.

27. Under EU law, the acts of one or more Member States or of persons acting on their behalf implementing EU law, including decisions taken by the EU institutions under the TEU and the Treaty on the Functioning of the European Union (hereinafter referred to as the "TFEU"), are attributed to the member State or member States concerned. In particular, where persons employed or appointed by a member State act in the framework of an operation pursuant to a decision of the EU institutions, their acts, measures and omissions are attributed to the member State concerned. Attribution to a member State does not preclude the EU from being responsible as a co-respondent. Conversely, under EU law, acts, measures and omissions of the EU institutions, bodies, offices or agencies, or of persons acting on their behalf, are attributed to the EU. The foregoing applies to acts, measures or omissions, regardless of the context in which they occur, including with regard to matters relating to the EU common foreign and security policy. For the sake of consistency, parallel rules should apply for the purposes of the Convention system as laid down in Article 1, paragraph 4, of the Accession Agreement.

28. More specifically, 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[17] was there a specific rule on attribution, for the purposes of the Convention, of such acts or measures to either the international organisation concerned or its members.

29. The attribution of such an act to a member State of the EU shall not preclude the possibility that the ~~European Union~~EU becomes a co-respondent in the same case if the conditions set out in Article 3 paragraph 2 are met, that it takes part in the procedure in accordance with the relevant paragraphs of the same Article and with Article 36, paragraph 4, of the Convention and that it may be held jointly responsible for a violation resulting from such an act, measure or omission, in accordance with Article 3, paragraph ~~7~~8.

Formatted: Highlight

[16] *These are, namely: Article 6 of the Protocol, Article 7 of Protocol No. 4 (ETS No. 46), Articles 7 to 9 of Protocol No. 6 (ETS No. 114), Articles 8 to 10 of Protocol No. 7 (ETS No. 117), Articles 4 to 6 of Protocol No. 12 (ETS No. 177) and Articles 6 to 8 of Protocol No. 13 (ETS No. 187).*

[17] *See, inter alia, Behrami and Behrami v. France and Saramati v. France, Germany and Norway, Application No. 71412/01, decision of 2 May 2007, paragraph 122; Al-Jedda v. United Kingdom, Application No. 27021/08, judgment of 7 July 2011, paragraph 76.*

30. It should also be noted that, since the Court under the Convention has jurisdiction to settle disputes between individuals and the High Contracting Parties (as well as between High Contracting Parties) and therefore to interpret the provisions of the Convention, the decisions of the Court in cases to which the EU is party will be binding on EU institutions, including the CJEU.[18] [19]

Technical amendments to the Convention

31. Three interpretation clauses are added to the Accession Agreement. This avoids amending the substantive provisions of the Convention and the protocols, thereby maintaining their readability. All of the protocols provide that their substantive provisions shall be regarded as additional articles to the Convention, and that all the provisions of the latter shall apply accordingly; this clarifies the accessory nature of the protocols to the Convention. It follows that these general interpretation clauses will also apply to the protocols without their needing to be amended to that effect.

32. By virtue of the first indent of Article 1, paragraph 65, various terms that explicitly refer to "States" as High Contracting Parties to the Convention (that is, "State", "States" or "States Parties") will, after the accession, be understood as referring also to the EU as a High Contracting Party. The second indent of paragraph 5 contains a further list of terms relating more generally to the concept of "State" or to certain elements thereof. The inclusion of the terms "national law", "national laws", "national authority" and "domestic" in that list is justified as they should be understood as referring to the internal legal order of a High Contracting Party. The inclusion of the term "administration of the State" in that list is justified as, pursuant to Articles 298 and 336 of the TFEU, the institutions, bodies, offices and agencies of the EU have the support of a public administration and of a civil service. The last indent of paragraph 5 addresses terms which are contained in provisions of the Convention and certain protocols dealing with the justification of restrictions placed on the exercise of certain rights guaranteed by those instruments ("national security", "economic well-being of the country", "territorial integrity" and "life of the nation"). Those terms will be understood with regard to situations relating to the member States of the ~~European Union~~EU either individually or collectively, irrespective of whether the ~~European Union~~EU is the sole respondent in a case or a co-respondent in a case brought against those member States. As regards the application to the EU of the expression "life of the nation", it was noted that it may be interpreted as allowing the EU to take measures derogating from its obligations under the Convention in relation to measures taken by one if its member States in time of emergency in accordance with Article 15 of the Convention.

Formatted: Highlight

Formatted: Highlight

33. Article 1, paragraph 6, contains an additional interpretation clause which clarifies how the expression "everyone within their jurisdiction" in Article 1 of the Convention will apply to the EU. As jurisdiction under Article 1 of the Convention is primarily territorial, this interpretation clause clarifies that the EU is required to secure the rights of persons within the territories of the member States of the EU to which the TEU and the TFEU apply. Nevertheless, the Court has recognised that in certain exceptional circumstances, a High Contracting Party may exercise jurisdiction outside its territorial borders.[20] Accordingly, where the Convention might apply to persons outside the territory to which the TEU and the TFEU apply, this clause makes it clear that they should be regarded as within the jurisdiction of the EU only in cases where they would be within the jurisdiction of a High Contracting Party which is a State had the alleged violation been attributable to that High Contracting Party.

34. Article 1, paragraph 87, refers to certain provisions in the Convention and certain protocols which use the terms "country" or "territory of a State". Given that the EU itself is neither a country nor a State, and therefore does not have a territory of its own, the provision clarifies that these terms are understood as referring to each of the territories of EU member States to which the TEU and the TFEU apply. The territorial scope of these treaties, including with regard to certain overseas countries and territories, is set out in Article 52 of the TEU and Article 355 of the TFEU.

35. There are some expressions in the Convention that have not been included in the interpretation clauses. An interpretation clause was not considered necessary for the expression "internal law" appearing in Articles 41 and 52 of the Convention, since this expression would be equally applicable to the EU as a High Contracting Party. For reasons pertaining to the specific legal

[18]. See also, in this respect, Court of Justice of the European Communities, opinion 1/91 of 14 December 1991 and opinion 1/92 of 10 April 1992.

[19] [Note from the Secretariat] There has been a proposal for new paragraphs in the explanatory report corresponding to the proposal for a new Article 1, paragraph 4a. See document 46+1(2022)28REV.

[20]. Al-Skeini v. United Kingdom, Application No. 55721/07, judgment of 7 July 2011, paragraphs 131-132.

order of the EU, the concept of EU citizenship is not analogous to the concept of nationality that appears in Articles 14 and 36 of the Convention, Article 3 of Protocol No. 4 and Article 1 of Protocol No. 12. Likewise, the terms "countries" appearing in Article 4, paragraph 3.*b*, of the Convention, "civilised nations" appearing in Article 7 of the Convention, and "State", "territorial" and "territory/territories" appearing in Articles 56 and 58 of the Convention and in the corresponding provisions of the protocols,[21] do not require any adaptation as a result of the EU's accession. Finally, the absence of a reference to the word "State" in Article 2 of Protocol No. 6 (concerning death penalty in time of war) is due to the fact that the EU has no competence to avail itself of the option set out in that provision.

36. Finally, a technical amendment to Article 59, paragraph 5, of the Convention takes into account EU accession for the purposes of notification by the Secretary General.

Article 2 – Reservations to the Convention and its Protocols

37. The EU should accede to the Convention, as far as possible, on an equal footing with the other High Contracting Parties. Therefore, the conditions applicable to the other High Contracting Parties with regard to reservations, declarations and derogations under the Convention should also apply to the EU. For reasons of legal certainty, it was, however, agreed to include in the Accession Agreement a provision (Article 2, paragraph 1) allowing the EU to make reservations under Article 57 of the Convention under the same conditions as any other High Contracting Party. Any reservation should be consistent with the relevant rules of international law.

38. As Article 57 of the Convention currently only refers to "States", technical adaptations to paragraph 1 of that provision are necessary to allow the EU to make reservations under it (see Article 2, paragraph 2, of the Accession Agreement). The expression "law of the European Union" is meant to cover the ~~Treaty on European Union~~TEU, the ~~Treaty on the Functioning of the European Union~~TFEU, or any other provision having the same legal value pursuant to those instruments (the EU "primary law") as well as legal provisions contained in acts of the EU institutions (the EU "secondary law").

39. In accordance with Article 1, paragraph 1, of the Accession Agreement, the EU accedes to the Convention, to the Protocol to the Convention and to Protocol No. 6 to the Convention. The EU may make reservations to the Convention and to the Protocol; no reservations are permitted to Protocol No. 6, pursuant to its Article 4. In the event of EU accession to other existing or future protocols, the possibility to make reservations is governed by Article 57 of the Convention and the relevant provisions of such protocols.

40. Article 2, paragraph 1, of the Accession Agreement gives the EU the possibility to make reservations to the Convention either when signing or when expressing its consent to be bound by the provisions of the Accession Agreement. In accordance with Article 23 of the 1969 Vienna Convention on the Law of Treaties, reservations to the Convention made at the moment of the signature of the Accession Agreement shall be confirmed, in order to be valid, at the moment of expression of consent to be bound by the provisions of the Accession Agreement.

41. **The co-respondent mechanism as provided under Article 3 of the Accession Agreement is a newly introduced feature of the Convention system. Therefore, Article 2, paragraph 3 of the Accession Agreement clarifies that reservations made under Article 57 of the Convention by a High Contracting Party which is a co-respondent to the proceeding retain their effects under this mechanism. In this respect, it should be recalled that applications concerning a provision of the Convention in respect of which a High Contracting Party has made a reservation are declared incompatible *ratione materiae* with the Convention with regard to that Party[22], provided that the issue falls within the scope of the reservation[23] and that the reservation is deemed valid by the Court for the purposes of Article 57 of the**

Formatted: Highlight

Formatted: Highlight

Formatted: Highlight

[21]. *These are, namely: Article 4 of the Protocol, Article 5 of Protocol No. 4, Article 5 of Protocol No. 6, Article 6 of Protocol No. 7, Article 2 of Protocol No. 12 and Article 4 of Protocol No. 13.*

[22] ***Benavent Díaz v. Spain, Application No. 46479/10, decision of 31 January 2027, paragraphs 53 and 64; Kozlova and Smirnova v. Latvia, Application No. 57381/00, decision of 23 October 2001.***

[23] ***Göktan v. France, Application No. 33402/96, judgment of 2 July 2022, paragraph 51.***

Convention[24]. A reservation made by a co-respondent High Contracting Party under Article 57 of the Convention may consequently preclude the possibility to find that the latter is jointly responsible with the respondent High Contracting Party under Article 3, paragraph ~~7~~8 of the Accession Agreement. However, the responsibility of the respondent Party which has not made a reservation remains.

Article 3 – Co-respondent mechanism

42. A new mechanism is being introduced to allow the EU to become a co-respondent to proceedings instituted against one or more of its member States and, similarly, to allow the EU member States to become co-respondents to proceedings instituted against the EU.

Reasons for the introduction of the mechanism

43. This mechanism was considered necessary 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. 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 agreed upon by its member States may be implemented by institutions, bodies, offices or agencies of the EU. With the accession of the EU, there could arise the unique situation in the Convention system in which a legal act is enacted by one High Contracting Party and implemented by another.

44. The newly introduced Article 36, paragraph 4, of the Convention provides that a co-~~-~~respondent has the status of a party to the case. If the Court finds a violation of the Convention, the co-respondent will be bound by the obligations under Article 46 of the Convention. The co-respondent mechanism is therefore not a procedural privilege for the EU or its member States, but a way to avoid gaps in participation, accountability and enforceability in the Convention system. This corresponds to the very purpose of EU accession and serves the proper administration of justice.

45. As regards the position of the applicant, the newly introduced Article 36, paragraph 4, of the Convention states that the admissibility of an application shall be assessed without regard to the participation of the co-respondent in the proceedings. This provision thus ensures that an application will not be declared inadmissible as a result of the participation of the co-respondent, notably with regard to the exhaustion of domestic remedies within the meaning of Article 35, paragraph 1, of the Convention. Moreover, applicants will be able to make submissions to the Court in each case before a decision on joining a co-respondent is taken (see below, paragraphs 57~~47~~ to 60~~50~~).

46. The introduction of the co-respondent mechanism is also fully in line with Article 1.*b* of Protocol No. 8 to the Treaty of Lisbon, 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". Using the language of this protocol, the co-respondent mechanism offers the opportunity to "correct" applications in the following two ways.

Situations in which the co-respondent mechanism may be applied

47. The mechanism would allow the EU to become a co-respondent to cases in which the applicant has directed an application only against one or more EU member States. Likewise, the mechanism would allow the EU member States to become co-respondents to cases in which the applicant has directed an application only against the EU.

48. Where an application is directed against both the EU and an EU member State, the mechanism would also be applied if the EU or the member State was not the party that acted or omitted to act in respect of the applicant, but was instead the party that provided the legal basis for that act or omission. In this case, the co-respondent mechanism would allow the application not to be declared inadmissible in respect of that party on the basis that it is incompatible *ratione personae*.

[24] Grande Stevens and Others v. Italy, Application No. 18640/10, judgment of 4 March 2014, paragraphs 206-211.

49. In cases in which the applicant alleges different violations by the EU and one or more of its member States separately, the co-respondent mechanism will not apply.

Third party intervention and the co-respondent mechanism

50. The co-respondent mechanism differs from third party interventions under Article 36, paragraph 2, of the Convention. The latter only gives the third party (be it a High Contracting Party to the Convention or, for example, another subject of international law or a non-governmental organisation) the opportunity to submit written comments and participate in the hearing in a case before the Court, but it does not become a party to the case and is not bound by the judgment. A co-respondent becomes, on the contrary, a full party to the case and will therefore be bound by the judgment. The introduction of the co-respondent mechanism should thus not be seen as precluding the EU from participating in the proceedings as a third party intervener, where the conditions for becoming a co-respondent are not met.

51. It is understood that a third party intervention may often be the most appropriate way to involve the EU in a case. For instance, if an application is directed against a State associated to parts of the EU legal order through separate international agreements (for example, the Schengen and Dublin Agreements and the Agreement on the European Economic Area) concerning obligations arising from such agreements, third party intervention would be the only way for the EU to participate in the proceedings. The issue of the EU requesting leave to intervene will be dealt with in separate memoranda of understanding between the EU and the concerned States, upon their request.

The tests for triggering the co-respondent mechanism

52. In order to identify cases involving EU law suitable for applying the co-respondent mechanism, two tests are set out in Article 3, paragraphs 2 and 3, of the Accession Agreement. These tests would apply taking account of provisions of EU law as interpreted by the competent courts. The fact that the alleged violation may arise from a positive obligation deriving from the Convention would not affect the application of these tests. They would also cover cases in which the applications were directed from the outset against both the EU and one or more of its member States (Article 3, paragraph 4, of the Accession Agreement).

53. In the case of applications notified to one or more member States of the EU, but not to the EU itself (paragraph 2), the test is fulfilled if it appears that the alleged violation notified by the Court calls into question the compatibility of a provision of (primary or secondary) EU law, including decisions taken under the TEU and the TFEU, with the rights at issue defined in the Convention or in the protocols to which the ~~European Union~~EU has acceded. This would be the case, for instance, if an alleged violation could only have been avoided by a member State disregarding an obligation under EU law (for example, when an EU law provision leaves no discretion to a member State as to its implementation at the national level).

Formatted: Highlight

54. In the case of applications notified to the EU, but not to one or more of its member States (paragraph 3), the EU member States may become co-respondents if it appears that the alleged violation as notified by the Court calls into question the compatibility of a provision of the primary law of the EU with the Convention rights at issue.

55. On the basis of the relevant case law of the Court, it can be expected that such a mechanism may be applied only in a limited number of cases.

Outline of the procedure under the co-respondent mechanism

56. The co-respondent mechanism will not alter the current practice under which the Court makes a preliminary assessment of an application, with the result that many manifestly ill-founded or otherwise inadmissible applications are not communicated. Therefore, the co-respondent mechanism should only be applied to cases which have been notified to a High Contracting Party[25]. Article 3, paragraph 5, of the Accession Agreement outlines the procedure and the conditions for applying the

[25]. The term "notified" refers to the procedure whereby, pursuant to Article 54, paragraph 2, letter b of the Rules of the Court, the Court gives notice of an application to a respondent.

co-respondent mechanism, whereby a High Contracting Party becomes a co-respondent either by accepting an invitation by the Court or by decision of the Court upon the request of that High Contracting Party. The following paragraphs are understood as merely illustrating this provision. For those cases selected by the Court for notification, the procedure initially follows the information indicated by the applicant in the application form.

A. Applications directed against one or more member States of the European Union, but not against the European Union itself (or vice versa)

~~**xx. In cases in which the application is directed against one (or more) member State(s) of the EU, but not against the EU itself, the latter may, if it considers that the criteria set out in Article 3, paragraph 2, of the Accession Agreement are fulfilled, request to join the proceedings as co-respondent. Where the application is directed against the EU, but not against one (or more) of its member States, the EU member States may, if they consider that the criteria set out in Article 3, paragraph 3, of the Accession Agreement are fulfilled, request to join the proceedings as co-respondents. Any such request should be reasoned. In order to enable the potential co-respondent to make such requests, it is important that the relevant information on applications, including the date of their notification to the respondent, is rapidly made public. The Court's system of publication of communicated cases should ensure the dissemination of such information.**~~

57. **In cases in which the application is directed against one (or more) member State(s) of the EU, but not against the EU itself, the latter may, if the criteria set out in Article 3, paragraph 2, of the Accession Agreement are fulfilled, initiate the co-respondent mechanism with a request to join the proceedings as co-respondent. Where the application is directed against the EU, but not against one (or more) of its member States, the EU member States may, if the criteria set out in Article 3, paragraph 3, of the Accession Agreement are fulfilled, initiate the co-respondent mechanism with a request to join the proceedings as co-respondents. This should happen in a timely manner once the EU has received the relevant information.**

58. **Determining whether the material conditions for applying the co-respondent mechanism in both scenarios (Article 3, paragraphs 2 and 3) are met presupposes an assessment of the applicable rules of EU law governing the division of powers between the EU and its member States. Therefore, in the event of a request by a High Contracting Party to join the proceedings as a co-respondent, the Court will admit the co-respondent if, according to an assessment by the EU of the material conditions for applying the co-respondent mechanism on the basis of the applicable EU law, those conditions are met. The conclusion of this assessment by the EU will be considered as determinative and authoritative. When admitting a co-respondent, the Court retains however a discretion for all other aspects of the procedure, for example with regard to the Court's decision to grant legal aid to the applicant in light of the triggering of the co-respondent mechanism.**

59. Moreover, the Court may, when notifying an alleged violation or at a later stage of the proceedings, invite a High Contracting Party to participate in the proceedings as a co-respondent ~~**if it considers that the criteria set out in Article 3, paragraphs 2 or 3, as appropriate, are met**~~. In such case, the acceptance of the invitation by that High Contracting Party **within a time-limit set by the Court** would be a necessary condition for the latter to become co-respondent**.** ~~**No High Contracting Party may be compelled to become a co-respondent.**~~ This reflects the fact that the initial application was not addressed against the potential co-respondent, and that no High Contracting Party can be forced to become a party to a case where it was not named in the original application. **The EU or its member State(s), as the case may be, will however accept to become co-respondent if the reasoned assessment by the EU concludes that the material conditions for applying the co-respondent mechanism are met.**

~~**xx. The Court will inform both the applicant and the respondent about the invitation or the request, and set a short time limit for comments.**~~

~~**xx. In the event of a request to join the proceedings as a co-respondent made by a High Contracting Party, the Court will decide, having considered the reasons stated in its request as well as any submissions by the applicant and the respondent, whether to admit the co-respondent to the proceedings, and will inform the requester and the parties to the case of its decision. When taking such a decision, the Court will limit itself to assessing whether the**~~

~~reasons stated by the High Contracting Party (or Parties) making the request are plausible in the light of the criteria set out in Article 3, paragraphs 2 or 3, as appropriate, without prejudice to its assessment of the merits of the case. The decision of the Court to join a High Contracting Party to a case as a co-respondent may include specific conditions (for example, the provision of legal aid in order to protect the interest of the applicant) if considered necessary in the interests of the proper administration of justice.~~

60. **The EU's assessment should be provided to the Court in writing through a reasoned declaration, irrespective of whether such assessment is made following an invitation or as the basis for a request. In the event of an invitation, it should be provided regardless of whether that invitation is accepted or declined. It is understood that the Court would issue such an invitation only in cases that it considers appropriate in light of the particular circumstances of the case. The Court will inform the other parties and set a short time limit for possible comments. Where the applicant has commented on the material conditions for the application of the co-respondent mechanism, the Court will communicate this to the EU and set a short time limit to provide the EU with the possibility to reconsider its assessment in light of these comments. The principles set out in paragraph ~~53~~58 ~~remain applicable.**

61. **The admission of the co-respondent is a prior procedural question and is thus to be distinguished from the Court's decision on the merits of the application, on which the assessment referred to above will have no bearing.**

B. Applications directed against both the EU and one or more of its member States

62. **In a case which has been directed against and notified to both the EU and one (or more) of its member States in respect of at least one alleged violation, the status of any respondent may be changed to that of a co-respondent if the conditions in paragraph 2 or paragraph 3 of this provision are met (Article 3, paragraph 4). The procedure outlined in the above paragraphs would apply *mutatis mutandis*.**

~~xx. In a case which has been directed against and notified to both the EU and one or more of its member States in respect of at least one alleged violation, either of these respondents may, if it considers that the conditions relating to the nature of the alleged violation set out in Article 3, paragraphs 2 or 3, are met, ask the Court to change its status to that of co-respondent. As in the case described under *A* above, the Court may invite a respondent to change its status, but the acceptance by the concerned respondent would be a necessary condition for such a change. The High Contracting Party (or Parties) becoming co-respondent(s) would be the Party (or Parties) which is (or are) not responsible for the act or omission which allegedly caused the violation, but only for the legal basis of such an act or omission.~~

~~xx. The Court will inform both the applicant and the other respondent about the invitation or the request, and set a short time limit for comments.~~

~~xx. In the event of a request for a change of status made by a respondent, the Court will decide whether to make the change of status, having considered the reasons stated in the request, as well as any submissions by the applicant and the other respondent. The Court will inform the parties to the case of its decision. When taking such a decision, the Court will limit itself to assessing whether the reasons stated by the High Contracting Party (or Parties) making the request are plausible in the light of the criteria set out in Article 3, paragraph 2 or 3, as appropriate, of the Accession Agreement, without prejudice to its assessment of the merits of the case.~~

Termination of the co-respondent mechanism

~~xx. The Court may, at any stage of the proceedings, decide to terminate the participation of the co-respondent, particularly if it should receive a joint representation by the respondent and the co-respondent that the criteria for becoming a co-respondent are not (or no longer) met. In the absence of any such decision, the respondent and the co-respondent continue to participate jointly in the case until the proceedings end.~~

63. **In the course of the proceedings, it may become apparent that the material conditions for the application of the co-respondent mechanism in Article 3, paragraph 2 or 3, as the case may be, no longer apply. In those circumstances, there would be no longer a legitimate reason to continue the application of the co-respondent mechanism, as the proper administration of justice would not require that a High Contracting Party is maintained as co-respondent if it is neither responsible for a violation nor capable of remedying it. On that basis, Article 3, paragraph ~~5a.~~6 provides for a possibility to terminate the co-respondent mechanism. Such termination shall in principle represent the *actus contrarius* to that mechanism's original application. Therefore, the Court will decide according to a renewed assessment by the EU - to be provided through a reasoned declaration in writing - of the material conditions for applying the co-respondent mechanism on the basis of the applicable EU law, the conclusion of which will be considered as determinative and authoritative.**

64. **Article 3, paragraph ~~5a.~~6 requires that the views of the applicant are heard. To that the Court will inform the applicant of the assessment and set a short time limit for possible comments. The Court will submit the comments to the EU and set a short time limit to provide the EU with the possibility to reconsider its assessment in light of these comments. The co-respondent mechanism shall not be terminated for any reasons other than the fact that the material conditions for applying the mechanism no longer apply.**

Information concerning potential co-respondent cases

65. **Article 3, paragraphs 2 and 3 of the Accession Agreement states that the Court shall make available information to the EU concerning all cases communicated to its member States and make available to the latter information concerning all cases communicated to the EU. The aim of these provisions is to ensure that the EU and its member States will be in a position to determine in which cases to initiate the co-respondent mechanism, as well as – in proceedings to which the EU would become co-respondent – to identify in which of these cases to initiate the *prior involvement*-procedure under Article 3, paragraph 76.**

Friendly settlements

66. Both the respondent and the co-respondent will need to agree to a friendly settlement under Article 39 of the Convention.

Unilateral declarations

67. Both the respondent and the co-respondent will need to agree to make a unilateral declaration of a violation for which they are both responsible.

Effects of the co-respondent mechanism

68. As noted above, it is a special feature of the EU legal system that acts adopted by its institutions may be implemented by its member States and, conversely, that provisions of the EU founding treaties established by its member States may be implemented by institutions, bodies, offices or agencies of the EU. Therefore, the respondent and the co-respondent(s) are ~~**normally**~~ held jointly responsible for any alleged violation in respect of which a High Contracting Party has become a co-respondent. This is without prejudice to Article 2, paragraph 3 of this Agreement on reservations made by High Contracting Parties in accordance with Article 57 of the Convention. ~~**The Court may, however, hold only the respondent or the co-respondent(s) responsible for a given violation on the basis of the reasons given by the respondent and the co-respondent, and having sought the views of the applicant. Apportioning responsibility separately to the respondent and the co-respondent(s) on any other basis would entail the risk that the Court would assess the distribution of competences between the EU and its member States. It should also be recalled that the Court in its judgments rules on whether there has been a violation of the Convention and not on the validity of an act of a High Contracting Party or of the legal provisions underlying the act or omission that was the subject of the complaint.**~~ **This is**

without prejudice to Article 2, paragraph 3 of this Agreement on reservations made by High Contracting Parties in accordance with Article 57 of the Convention.

Referral to the Grand Chamber

69. Any Party may request the referral of a case to the Grand Chamber under Article 43 of the Convention; the respondent or co-respondent could therefore make such a request without the agreement of the other. Internal EU rules may, however, set out the conditions for such a request. Should a request be accepted, the Grand Chamber would re-examine the case as a whole, in respect of all alleged violations considered by the Chamber and with regard to all Parties.

Exclusion of retroactivity

70. Article 3, paragraph 89, of the Accession Agreement provides that the co-respondent mechanism applies only to applications submitted to the Court from the date on which the EU accedes to the Convention (that is, the date upon which the Accession Agreement comes into force), including applications concerning acts by EU member States based on EU law adopted before the EU became a Party to the Convention.

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

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

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

73. **Determining whether it is necessary to initiate the prior involvement of the CJEU under Article 3, paragraph 6 7 depends upon a finding by the EU of whether the CJEU has already undertaken the assessment described in paragraph 7266. This finding by the EU will be considered as determinative and authoritative, as is the case for the conclusion by which the co-respondent mechanism is triggered under Article 3, paragraph 5. Insofar as possible, the EU will examine the need to initiate the prior involvement procedure at the same time as examining the need to trigger the co-respondent mechanism.**

74. **If the prior involvement of the CJEU applies, assessing the compatibility with the Convention shall mean to rule on the validity or the interpretation of a legal provision contained in acts of the EU institutions, bodies, offices or agencies, or on the interpretation of a provision of the TEU, the TFEU or of any other provision having the same legal value pursuant to those instruments.** The CJEU will not assess the act or omission complained of by the

applicant, but the EU legal basis for it. **The assessment should take place before the Court decides on the merits of the application. This procedure, which is inspired by the principle of subsidiarity, only applies in cases in which the EU has the status of a co-respondent. The prior involvement procedure does not apply in a procedure before the Court that has been initiated by a request for an advisory opinion made by a highest court or tribunal of a Member State of the EU in accordance with Protocol No. 16 to the Convention. It is understood that parties involved – including the applicant, who will be given the possibility to obtain legal aid – will have the opportunity to make observations in the procedure before the CJEU.**

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

76. The examination of the merits of the application by the Court should not resume before the parties and any third-party interveners have had the opportunity to assess properly the consequences of the ruling of the CJEU. In order not to delay unduly the proceedings before the Court, the EU shall ensure that the ruling is delivered quickly. In this regard, it is noted that an accelerated procedure before the CJEU already exists and that the CJEU has been able to give rulings under that procedure within six to eight months.

Article 4 – Inter-Party cases

77. Once the EU is a Party to the Convention, all States Parties to the Convention will be able to bring a case against the EU and vice versa under Article 33 of the Convention**, subject to the principle in Article 4, paragraph 3~~a~~ of the Accession Agreement**.

78. The term "High Contracting Party" is used in the text of Article 33 of the Convention. Changing the heading to "Inter-Party cases" makes that heading correspond to the substance of Article 33 after the EU's accession. For the sake of consistency, the reference to "inter-state applications" in Article 29, paragraph 2, of the Convention is likewise adjusted.

~~**xx. An issue not governed by the Accession Agreement is whether EU law permits inter-Party applications to the Court involving issues of EU law between EU member States, or between the EU and one of its member States. In particular, Article 344 of the TFEU (to which Article 3 of Protocol No. 8 to the Treaty of Lisbon refers) 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".**~~

79. **Article 4, paragraph 3~~a~~ provides that the ~~European Union~~EU and its member States themselves of Article 33 of the Convention in their relations with each other. This provision applies to disputes between ~~European Union~~EU member States and the ~~European Union~~EU, as member States insofar as the dispute concerns the interpretation or application of ~~European~~ fact that the Convention will become an integral part of ~~European Union~~EU law after accession that an inter-party application brought by one ~~European Union~~EU member State alleging a Convention by another will necessarily involve the interpretation of application of ~~European~~**

80. **The purpose of this provision is to ensure that as far as Article 33 of the Convention is concerned, ~~European Union~~EU accession to the Convention shall not affect the obligations of States under ~~European Union~~EU law. Insofar as such inter-party disputes concern the application of ~~European Union~~EU law, it follows from Article 344 of the TFEU (to which Article 8 to the Treaty of Lisbon refers) that EU member States "undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein". Where only a part of the application falls within the scope of article 344 TFEU and the remainder of the application can be treated as a separate dispute (a "mixed application"), the principle in paragraph 3~~a~~ does not apply to the latter part of the application.**

81. **Although the High Contracting Parties concerned can be expected to act in accordance with Article 344 of the TFEU, Article 4, paragraph ~~3b~~ 4 contains a safeguard clause which provide the opportunity for the EU, to request sufficient time to assess whether – and if so, for mixed applications, to what extent – that dispute concerns the interpretation or application of ~~European Union~~EU law. It is intended that under Article 3, paragraphs 2 and 3, the Court would information on both individual and inter-party applications. The need to avoid undue delay in the proceedings pending before the Court suggests that the ~~European Union~~EU would give**

assessment procedure. The ~~European Union~~EU should also ensure that the conclusion of the assessment is duly reasoned.

82. **Article 4, paragraphs 3a and ~~3b~~ 4 do not concern inter-party cases between High Contracting Parties which are not members of the ~~European Union~~EU and ~~European Union~~EU member States or the ~~European Union~~EU. Moreover, inter-party applications between ~~European Union~~EU member States which do not concern ~~European Union~~EU law are likewise not affected by Article 4, paragraph 3a.**

Article 5 – Advisory Opinions under Protocol no. 16 to the Convention

83. **Article ~~4a~~ 5 reconciles the EU judicial system, composed of the courts of the EU member States and the EU judicature, with the advisory opinion mechanism established by Protocol No. 16. The effect of this clause is to preclude recourse to the advisory opinion procedure before the Court where EU law, as interpreted by the CJEU, requires a court or tribunal to instead submit a request to the CJEU for a preliminary ruling under Article 267 of the TFEU. The final decision in the proceedings in which the CJEU has given a preliminary ruling would still be subject to review by the Court should there be an individual application under Article 34 of the Convention. Article ~~4a~~5 does not affect the prerogative of designated highest courts and tribunals of the EU member States that have ratified the Protocol to seek advisory opinions from the Court on any question that falls outside the field of application of EU law.[26]**

Article 6 – Interpretation of Articles 35 and 55 of the Convention

84. This provision clarifies that, as a necessary consequence of the EU accession to the Convention, proceedings before the CJEU (currently consisting of the Court of Justice, the General Court and the Civil Service Tribunal) shall not be understood as constituting procedures of international investigation or settlement, submission to which would make an application inadmissible under Article 35, paragraph 2.*b*, of the Convention. In this respect, it should also be noted that in the judgment in the case of *Karoussiotis v. Portugal* (No. 23205/08 of 1 February 2011) the Court specified that proceedings before the European Commission pursuant to Article 258 of the TFEU shall not be understood as constituting procedures of international investigation or settlement pursuant to Article 35, paragraph 2.*b*, of the Convention.

85. As regards Article 55 of the Convention, which excludes other means of dispute settlement concerning the interpretation or application of the Convention, it is the understanding of the Parties that, with respect to EU member States, proceedings before the CJEU do not constitute a "means of dispute settlement" within the meaning of Article 55 of the Convention. Therefore, Article 55 of the Convention does not prevent the operation of the rule set out in Article 344 of the TFEU.

Article 7 – Mutual trust under European Union law

86. **The EU law principle of mutual trust allows an area without internal borders to be created and maintained within the EU. According to the case-law of the CJEU, this principle means that, when implementing EU law, the EU member States are required to consider, save in exceptional circumstances, that fundamental rights have been observed by other EU member States (see Court of Justice of the European Union, *Aranyosi (C-404/15) and Căldăraru (C-659/15 PPU)*, judgment of 5 April 2016, paragraph 78). Mutual trust can also be relevant to non-EU member states in the context of bilateral agreements concluded with the EU.**

87. **For its part, the Court has been mindful in its case-law of the importance of the mutual-recognition mechanisms within the EU and of the mutual trust which they require (see *Avotins v. Latvia*, no. 17502/07, Grand Chamber judgment of 23 May 2016, paragraphs 113-116). The Court has noted the increased convergence between its own case-law and the case-law of the CJEU with regard to the limits to the operation of mutual recognition-mechanisms in light of a**

[26] *[Note from the Secretariat] There has been a proposal for a new paragraph in the explanatory report corresponding to the proposal for a new Article 5a. See document 46+1(2022)28REV.*

Formatted: Font: Bold, Highlight

Formatted: Font: Bold, Highlight

Formatted: Font: Bold, Highlight

Formatted: Font: Bold, Highlight

Formatted: Font: Bold, Highlight

Formatted: Font: Bold, Highlight

Formatted: Font: Bold, Highlight

real and individual risk of a violation of Article 3 of the Convention (*Bivolaru and Moldovan v. France*, nos. 40324/16 and 12623/17, judgment of 25 March 2021, paragraph 114). With regard to the mutual-recognition mechanisms under EU law, the Court also held that it must verify that the principle of mutual trust is not applied automatically and mechanically to the detriment of human rights (*Avotins v. Latvia*, cited above, paragraph 116; *Bivolaru and Moldovan v. France*, cited above, paragraph 100-101).[27]

Article 8 – Election of judges[28]

88. It is agreed that a delegation of the European Parliament should be entitled to participate, with the right to vote, in the sittings of the Parliamentary Assembly of the Council of Europe (and its relevant bodies). It was considered appropriate that the European Parliament should be entitled to the same number of representatives in the Parliamentary Assembly as the States entitled to the highest number of representatives under Article 26 of the Statute of the Council of Europe.

89. Modalities for the participation of the European Parliament in the work of the Parliamentary Assembly and its relevant bodies will be defined by the Parliamentary Assembly in co-operation with the European Parliament. These modalities will be reflected in the Parliamentary Assembly's internal rules. Discussions between the Parliamentary Assembly and the European Parliament to that effect already took place during the drafting of the Accession Agreement. It is also understood that internal EU rules will define the modalities for the selection of the list of candidates in respect of the EU to be submitted to the Parliamentary Assembly.

90. It is not necessary to amend the Convention in order to allow for the election of a judge in respect of the EU since Article 22 provides that a judge shall be elected with respect to each High Contracting Party. As laid down in Article 21, paragraphs 2 and 3, of the Convention, the judges of the Court are independent and act in their individual capacity. The judge elected in respect of the EU shall participate equally with the other judges in the work of the Court and have the same status and duties.

Article 9 – Participation of the European Union in the meetings of the Committee of Ministers of the Council of Europe[29]

Participation as regards functions explicitly foreseen in the Convention

91. The Convention explicitly confers a number of functions upon the Committee of Ministers of the Council of Europe, the main one being the supervision of the execution of the Court's judgments under Article 46 of the Convention and of the terms of friendly settlements under Article 39 of the Convention. The Committee of Ministers is also entitled to request advisory opinions from the Court on certain legal questions concerning the interpretation of the Convention and the protocols (Article 47 of the Convention) and to reduce, at the request of the plenary Court, the number of judges of the Chambers (Article 26, paragraph 2, of the Convention). Upon accession, the EU shall be entitled to participate in the Committee of Ministers' meetings, with the right to vote, when the latter takes decisions under these provisions. As all other High Contracting Parties, it shall have one vote.

92. To date, the Convention does not contain specific provisions regarding the adoption of protocols. Following the EU's accession to the Convention, it is consistent with the principles underlying the Accession Agreement and with the principles of the Vienna Convention on the Law of Treaties (in particular Article 39[30]) to ensure that the EU can participate on an equal footing with the other High Contracting Parties in the adoption of Committee of Ministers decisions relating to the adoption of protocols. In order to allow such participation of the EU, the Accession Agreement will add a new paragraph to Article 54 of the Convention (where it is stated that the Convention shall not prejudice the statutory powers of the Committee of Ministers), providing an explicit legal basis in the Convention for the Committee of Ministers' power to adopt protocols to the Convention. A reference to

---

[27] In these judgments, the Court dealt with the European arrest warrant (Bivolaru and Moldovan) and the recognition and enforcement of judgments in civil and commercial matters (Avotins).

[28] [Note from the Secretariat] Proposals concerning Article 8 and related paragraphs of the explanatory report are still under examination by the Group. See document 46+1(2022)28REV.

[29] [Note from the Secretariat] Proposals concerning Article 9 and related paragraphs of the explanatory report are still under examination by the Group. See document 46+1(2022)28REV.

[30]. Pursuant to Article 39: "A treaty may be amended by agreement between the parties (…)".

this new paragraph of Article 54 appears in Article 107, paragraph 2, of the Accession Agreement entitling the EU to participate in the Committee of Ministers, with the right to vote, when the latter takes decisions under specific provisions of the Convention. This provision will constitute a *lex specialis* in respect of the Statute of the Council of Europe, and in particular in respect of Article 15.*a* thereof. This is an exceptional provision derived from the particular circumstances of the accession of the EU to this Convention and the exceptional character of its participation. Therefore, these arrangements do not constitute a precedent for other Council of Europe conventions.

Participation as regards functions not explicitly foreseen in the Convention

93. The Convention does not deal with the adoption of a number of other legal instruments and texts, such as recommendations, resolutions and declarations, which are directly related to the functions exercised by virtue of the Convention by the Committee of Ministers[31] or the Parliamentary Assembly of the Council of Europe. Such legal instruments and texts may be addressed, for example, to the member States of the Council of Europe in their capacity of High Contracting Parties to the Convention, to the Committee of Ministers itself,[32] to the Court[33] or, where appropriate, to other relevant bodies.

94. After accession, the EU will be consulted within the Committee of Ministers[34] before the adoption of instruments or texts mentioned in Article 7, paragraph 3, of the Accession Agreement. The consultation will be limited to those instruments or texts that directly concern the functioning of the Convention system, for instance in terms of procedures before the Court, and the Committee of Ministers, as well as of procedures for the implementation of the Convention at domestic level. The latter include the domestic procedures of selection of candidates for election of judges by the Parliamentary Assembly in accordance with Article 22 of the Convention. The consultation will not extend to the adoption of other instruments or texts based on the Convention or the Court's case law, or inspired by them, aiming more generally at defining common principles in the development, promotion and protection of human rights. The expression "within the Committee of Ministers" indicates that a consultation of the EU will take place after the transmission of a draft instrument or text to the Committee of Ministers following its preparation by the competent subordinate body of the Council of Europe. The Committee of Ministers is required to take due account of the position that the EU may express, it being understood that it will not be bound by such position. Should the EU not express a position, the Committee of Ministers will proceed to the adoption of the instrument or text. This principle is set out in Article 107, paragraph 3, of the Accession Agreement.

Participation as regards the supervision of judgments and friendly settlements

95. Under EU law, the EU and its member States under certain circumstances are obliged to act in a co-ordinated manner when expressing positions and voting. Therefore, it is considered necessary to make specific provisions for the participation of the EU in the Committee of Ministers' supervision process under Articles 39 and 46 of the Convention. Appropriate guarantees are required to ensure that the combined votes of the EU and its member States will not prejudice the effective exercise by the Committee of Ministers of its supervisory functions under Articles 39 and 46 of the Convention. A general obligation to that effect appears in Article 97, paragraph 4, which also contains a number of specific provisions.

96. The introduction of these specific provisions should not be seen as a departure from the established practice that decisions in the Committee of Ministers are adopted by consensus with formal vote only exceptionally being taken.

---

31. For instance, the Committee of Ministers has adopted specific rules for the exercise of its functions regarding the supervision of the execution of judgments under Article 46, paragraph 2, of the Convention.

32. See, for instance, Resolution CM/Res(2010)26 on the establishment of an advisory panel of experts on candidates for election as judge to the European Court of Human Rights, which entrusts the Committee of Ministers with the task of appointing the members of the Advisory Panel.

33. See, for instance, Resolution Res(2004)3 on judgments revealing an underlying systemic problem.

34. In accordance with the decisions adopted by the Ministers' Deputies at their 579th meeting, on 3 December 1996, the representative of the EU to the Council of Europe participates in the meetings of the Ministers' Deputies and in the meetings of all subsidiary groups.

Supervision of obligations in cases where the EU is respondent or co-respondent

97. In the context of the supervision of the fulfilment of obligations either by the EU alone, or by the EU and one or more of its member States jointly (that is, arising from cases to which the EU has been respondent or co-respondent), it derives from the EU treaties that the EU and its member States are obliged to express positions and to vote in a co-ordinated manner. In order to ensure that such co-ordination will not prejudice the effective exercise of supervisory functions by the Committee of Ministers, it was considered necessary to introduce special voting rules. They will appear in a new rule to be included in the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.[35] The new voting rules will apply to all decisions in respect of obligations upon the EU alone or upon the EU and one or more of its member States jointly. As regards obligations upon only a member State of the EU, normal voting rules will continue to apply. The EU and its member States will fully participate in discussions leading to the adoption of decisions.

98. The specific rule applicable to decisions by the Committee of Ministers under Rule 17 (Final resolutions) of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements in cases to which the EU is a party appears under paragraph 1 of the new rule. In the case of the adoption of final resolutions, it must be ensured that the decision has sufficient support from all High Contracting Parties, be they members of the EU or not. Therefore, instead of the majority set out in Article 20.*d* of the Statute of the Council of Europe,[36] a majority of four fifths of the representatives casting a vote and a majority of two thirds of the representatives entitled to sit on the Committee are required for the adoption of final resolutions. In a system with 48 High Contracting Parties, this means that at least 32 votes would be required, but according to the number of members actually casting a vote the number of votes required for the adoption of a final resolution may vary between 32 and 39.

99. The specific rule applicable to decisions by the Committee of Ministers under Rules 10 (Referral to the Court for interpretation of a judgment) and 11 (Infringement proceedings) of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements in cases in which the EU is a party appears under paragraph 2 of the new rule. It is based on the principle that in order to preserve the integrity of the system, it should be possible in all circumstances, including in the event of a contrary position by the EU and its member States, to adopt decisions under Rules 10 and 11 in cases involving the EU. The solution proposed is that a relatively high "hyper-minority" of one quarter of the members entitled to sit on the Committee of Ministers shall be required to consider as adopted a decision under such rules. In a system with 48 High Contracting Parties, this means that 12 votes would be required to consider such decisions as adopted.

100. A specific rule has also been set out in paragraph 3 to avoid that the use of block votes may paralyse the ordinary functioning of the supervision mechanism. It should apply in particular to decisions on procedural issues and to decisions requesting information. The expression "decisions on procedural issues" shall be interpreted as encompassing all kinds of procedural decisions, including obviously the adoption of agendas and reports, but also – for instance – requests for confidentiality and decisions on whether a case should undergo "enhanced" or "standard" supervision. The expression "decisions requesting information" shall be interpreted as encompassing all requests for information which are addressed to a High Contracting Party in order to assess the state of execution of a judgment or of the terms of a friendly settlement, including action plans and action reports, where no position is taken on compliance by that High Contracting Party with the obligation under Article 46, paragraph 1, of the Convention. This rule is based on the same approach set out in the preceding paragraph. However, in so far as the majority required for the adoption of decisions under Article 46, paragraphs 3 and 4, of the Convention, as reflected in Rules 10 and 11, is higher than the majority required by the Statute of the Council of Europe for other decisions relevant for the exercise of functions under the Convention, the rule in paragraph 3 requires a lower "hyper-minority" than in paragraph 2. Therefore, decisions under paragraph 3 shall be considered as adopted if one fifth of the

[35]. Adopted by the Committee of Ministers at the 964th meeting of the Deputies, on 10 May 2006.
[36]. Pursuant to which: "All other resolutions of the Committee … require a two-thirds majority of the representatives casting a vote and of a majority of the representatives entitled to sit on the Committee."

representatives entitled to sit on the Committee is in favour of it. In a system with 48 High Contracting Parties, it means that 10 votes would be required to consider such decisions as adopted.

101. The "hyper-minorities" set out in paragraphs 2 and 3 for the adoption of decisions are based on the principle that, provided a certain number of the representatives entitled to sit on the Committee of Ministers are in favour of it (for instance, by an indicative vote), it shall be considered as adopted, without a formal vote and without referring to the majorities set out in the Convention and in the Statute of the Council of Europe. This procedure would be consistent with other procedures already in place in the Council of Europe, whereby delegations do not request the application of the voting rule prescribed by the Statute of the Council of Europe to block the adoption of a decision if it appears that a lower majority than the one prescribed in the Statute is attained.[37]

102. In the absence of specific provisions in the new rule, the majority rule set out in Article 20.d of the Statute of the Council of Europe applies to all other types of decisions, including the adoption of interim resolutions and of any other decisions expressing a position on compliance by the EU with the obligation under Article 46, paragraph 1, of the Convention. The EU could, by using its block of votes, impede the adoption of such interim resolutions and decisions. However, it was considered by the negotiating parties that it was politically highly unlikely that the EU would use the block of votes to this effect. In the current practice such interim resolutions and decisions are normally adopted by consensus. Moreover, the effective exercise by the Committee of Ministers of its supervisory functions will nevertheless be ensured. In fact, pursuant to paragraph 2 of the new rule, the adoption of decisions requesting second referral for infringement to the Court has been considerably facilitated by reducing the threshold required from two thirds to one fourth of the representatives entitled to sit on the Committee of Ministers.

103. These rules do not form part of the Accession Agreement, but will be submitted to the Committee of Ministers for adoption. They may therefore be amended if necessary, at a later stage by the Committee of Ministers, with the consensus of all the High Contracting Parties, without requiring a revision of the Accession Agreement or the Convention.

Supervision of obligations in cases against High Contracting Parties other than the EU

104. In the context of the supervision of the fulfilment of obligations under the Convention by one or more of the member States of the EU, the latter is precluded under the EU treaties, either for lack of competence in the area to which the case relates or as a result of the prohibition on circumventing internal procedures, from expressing a position or exercising its right to vote. In such circumstances, the EU member States have no obligation under the EU treaties to act in a co-ordinated manner, and therefore they can each express their own position and vote.

105. In the context of the supervision of the fulfilment of obligations under the Convention by a State which is not a member of the EU, the EU and its member States have no obligation under the EU treaties to express a position or vote in a co-ordinated manner. The EU member States can therefore each express their own position and vote, also where the EU expresses a position or exercises its right to vote.

Article 10 – Participation of the European Union in the expenditure related to the Convention[38]

106. According to Article 50 of the Convention, the expenditure on the Court shall be borne by the Council of Europe. After its accession to the Convention, the EU should contribute to the expenditure of the entire Convention system alongside and in addition to the other High Contracting Parties. This contribution is obligatory. It is noted that under the current system the amount of the contribution of each High Contracting Party is not linked to the Court's workload in respect of that Party, but is based on the method of calculating the scales of member States' contributions to Council of Europe budgets established by the Committee of Ministers in 1994, in its Resolution Res(94)31. The contribution

[37]. See, for instance, the decision taken at the 519bis meeting of the Ministers' Deputies (4 November 1994) – Item 2.2, paragraph C.

[38] [Note from the Secretariat] Article 10 and related paragraphs of the explanatory report will be updated according to the most recent figures at the time the Group approves the draft accession instruments. They are therefore still under examination by the Group.

would be regulated, as any other obligatory contribution, by Article 10 of the Financial Regulations of the Council of Europe, which sets out the conditions and the procedure for the payment of obligatory contributions,[39] and which would apply *mutatis mutandis* to the EU contribution. It is also recalled that the budgets of the Court and of the other entities involved in the functioning of the Convention system are part of the Ordinary Budget of the Council of Europe, and that the contribution of the EU would be clearly and exclusively dedicated to the financing of the Convention system. For this reason, the contribution should be affected to a subsidiary budget.

107. The participation of the EU in the expenditure related to the Convention system would not require any amendment to the Convention. However, the calculation method of the EU contribution needs to be defined in the Accession Agreement, which would provide the legal basis in this respect. The proposed method aims at being as simple and stable as possible and, as such, does not require the participation of the EU in the budgetary procedure of the Council of Europe, without prejudice to the application of the pertinent provisions (see above).

108. The relevant expenditure taken into account is that directly related to the Convention, namely: the expenditure on the Court and on the process of supervision of the execution of its judgments and decisions, as well as on the Parliamentary Assembly, the Committee of Ministers and the Secretary General of the Council of Europe when they exercise functions under the Convention. In addition, administrative overhead costs related to the Convention system are considered (building, logistics, IT, etc.) as requiring an increase of the above expenditure by 15%. The total amount is then compared to the total amount of the Ordinary Budget of the Council of Europe (including the employer's contributions to pensions), in order to identify the relative weight, in percentage, of such expenditure. On the basis of the relevant figures in the period 2009-2013, this percentage is fixed in paragraph 1 of Article 108 of the Accession Agreement at 34%. The EU contribution, which is affected to a subsidiary budget, is not taken into account for the purpose of this calculation.

109. As to the rate of contribution of the EU to the relevant expenditure, it is agreed that it shall be identical to that of the State(s) providing the highest contribution to the Ordinary Budget of the Council of Europe for the year, pursuant to the method of calculating the scales of member States' contributions to Council of Europe budgets established by the Committee of Ministers in 1994. Accordingly, the amount of the contribution of the EU for each year shall be equal to 34% of the highest amount contributed in the previous year by a State to the Ordinary Budget of the Council of Europe (including employer's contribution to pensions).[40]

110. In order to ensure the stability of the calculation method proposed, a safeguard clause is added in paragraph 2 of Article 108 of the Accession Agreement to the effect that, if the actual relative

---

[39]. Financial Regulations, Article 10:

> *"Each member State shall pay at least one third of its obligatory contribution in the course of the first two months of the year.*
>
> *The balance of the contribution due shall be payable before the end of the period of six months referred to in Article 39 of the Statute.*
>
> *The Committee of Ministers shall be notified of the list of member States whose contributions have not been paid in accordance with the above provisions.*
>
> *Member States that have not paid their entire contribution before the end of the period of six months referred to in Article 39 of the Statute shall be required to pay simple monthly interest of 0.5% on amounts remaining unpaid on the first day of each of the following six months, and 1% on amounts remaining unpaid on the first day of each month thereafter.*
>
> *The receipts account shall be credited with the amounts of contributions called. If a contribution remains unpaid in whole or in part at the end of the financial year, the unpaid amount shall remain recorded in a debtors account.*
>
> *The Committee of Ministers shall be informed of the situation regarding unpaid contributions in accordance with a timetable that it shall determine and, in any case, on the presentation of the annual accounts."*

[40]. As an example, for the year 2011 the Ordinary Budget, recalculated to include the employer's contributions to pensions, amounted to €235.4 million. The expenditure dedicated within the Ordinary Budget to the functioning of the Convention (including 15% of overhead costs) amounted to €79.8 million, which corresponds to 33.9%. The highest amount contributed by any State in the previous year (2010) to the Ordinary Budget of the Council of Europe corresponded to 11.7% of the budget. This percentage, applied to the amount of €79.8 million, would provide a contribution of €9.34 million.

weight of the expenditure related to the Convention system within the Ordinary Budget varies substantially, the percentage indicated in paragraph 1 of Article 10~~8~~ (currently 34%) shall be adapted by agreement between the EU and the Council of Europe. Such adaptation is triggered when, in each of two consecutive years, the difference between the percentage calculated based on real figures and the percentage in paragraph 1 of Article 10~~8~~ is more than 2.5 percentage points (that is, if the real figure is below 31.5%, or above 36.5%). This mechanism shall obviously apply also to any new percentage resulting from subsequent agreements between the EU and the Council of Europe.

111. In addition, in order to avoid any possible unintended effects of the safeguard clause and in particular to avoid the EU's accession resulting in a reduction in the resources available to the Convention system in comparison with before its accession, it is foreseen that no account shall be taken of a change in the percentage indicated in paragraph 1 of Article 10~~8~~ (34%) that results from a decrease in absolute terms of the amount dedicated within the Ordinary Budget to the functioning of the Convention as compared to the year preceding that in which the EU becomes a Party to the Convention. In case of major changes in the equilibrium set out in the Agreement, the revision mechanism set out would apply in order to preserve the relative level of the contribution.

112. The technical and practical arrangements for the implementation of the provisions set out in the Accession Agreement will be determined in detail by the Council of Europe and the EU.

Article 11 – Relations with other Agreements

113. A number of other Council of Europe conventions and agreements are strictly linked to the Convention system, even though they are self-standing treaties. For this reason it is necessary to ensure that the EU, as a Party to the Convention, respects the relevant provisions of such instruments and is, for the purpose of their application, treated as if it were a party to them. This is the case, in particular, for the European Agreement relating to Persons Participating in Proceedings of the European Court of Human Rights (ETS No. 161), and for the Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe (ETS No. 162), which sets up the privileges and immunities granted to the judges of the Court during the discharge of their duties. In addition, in its accession to the Convention, the EU should also undertake to respect the privileges and immunities of other persons involved in the functioning of the Convention system, such as the staff of the Registry of the Court, members of the Parliamentary Assembly and representatives in the Committee of Ministers; these are covered by the General Agreement on Privileges and Immunities of the Council of Europe (ETS No. 2) and its Protocol (ETS No. 10).

114. The accession of the EU to such instruments and their amendment would require a cumbersome procedure. Moreover, the system of the General Agreement on Privileges and Immunities of the Council of Europe is only open to member States of the Council of Europe. Therefore, the Accession Agreement imposes an obligation on the EU, as a Contracting Party to the Convention, to respect the relevant provisions of these instruments, and a further obligation on other Contracting Parties to treat the EU as if it were a party to these instruments. These provisions are accompanied by other operative provisions about the duty to consult the EU when these instruments are amended, and about the duty of the Secretary General, as depositary of these instruments, to notify the EU of relevant events occurring in the life of these instruments (such as any signature, ratification, acceptance, approval or accession, the entry into force with respect to a Party[41] and any other act, notification or communication relating to them).

Article 12 – Signature and entry into force

115. This article is one of the usual final clauses included in treaties prepared within the Council of Europe. It has been amended to provide that the Agreement should be open only to the High Contracting Parties to the Convention at the date of its opening for signature and to the EU.

---

[41]. In accordance with the relevant provisions of each agreement or protocol, that is, Articles 8 and 9 of the European Agreement relating to Persons Participating in Proceedings of the European Court of Human Rights, Article 22 of the General Agreement on Privileges and Immunities of the Council of Europe, Article 7 of the Protocol to the General Agreement on Privileges and Immunities of the Council of Europe and Articles 8 and 9 of the Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe.

116. Should any State become a member of the Council of Europe, and consequently a High Contracting Party to the Convention, between the opening for signature of this Accession Agreement and the date of its entry into force, that State will be required as part of its commitments for the accession to the Council of Europe to give an unequivocal binding statement of its acceptance of the provisions of this Agreement. The Committee of Ministers' resolution inviting that State to become a member of the Council of Europe shall contain a condition to that effect.

117. Should any State become a member of the Council of Europe and a High Contracting Party to the Convention after the entry into force of this Agreement, it will be bound by those provisions of the Agreement which have legal effects beyond the mere amendment of the Convention; this is ensured by the new Article 59, paragraph 2.*b*, of the Convention, which creates an explicit link between the Convention and the Accession Agreement.

Article 13 – Reservations

118. It is agreed that no reservations to the Agreement itself shall be allowed. This is without prejudice to the possibility for the EU to make reservations to the Convention, as provided for by Article 2.

Article 14 – Notifications

119. This article is one of the usual final clauses included in treaties prepared within the Council of Europe.