

TEXT PROPOSALS AND AMENDMENTS

SUBMITTED BY THE UNITED KINGDOM FOR THE 17TH MEETING OF THE CDDH AD HOC NEGOTIATION GROUP (“46+1”) ON THE ACCESSION OF THE EUROPEAN UNION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Regarding Articles 3 and 7 of the draft Accession Agreement

Overview

Since negotiations resumed in September 2020, there has been reaffirmation at different points, of the fundamental principles that underpin these negotiations.

Accession to the ECHR must preserve the rights of all individuals under the Convention, including the rights of all applicants in proceedings before the European Court of Human Rights (the Court).

The EU’s accession to the ECHR must not compromise the integrity of the Council of Europe and in turn must not translate to preferential treatment for the EU. The proper functioning and effectiveness of the Convention system must be preserved and there must be protection for the current balance of Council of Europe institutions. Accession should not lead to exclusion of jurisdiction of the Court in specific areas.

We have also been reminded that consideration should be given to accommodating the specificities of the EU’s internal legal order, though the Convention should only be amended where strictly necessary to facilitate EU accession.

The EU must also be willing to take meaningful action to accommodate its own specificities in order to facilitate its accession to the Convention. The EU must also observe the fundamental principles of the Convention system. Where there is a need for special mechanisms to address the relationship between the EU and its member States, the EU should address these through its own internal rules and procedures where possible.

Objectives of this paper

As negotiations are now nearing completion, the UK has revisited the fundamental principles set out above with the aim of ensuring fairness between the High Contracting Parties and protecting the integrity of the institutions. The aims of this paper are firstly, to put forward a new fourth option in respect of Article 7; and secondly to provide some additional proposals for amendments to relevant text in Article 3, in the hope of being able to resolve the UK’s current reservations. Further updates may be required to various parts of the Explanatory Report in light of these proposed changes.

Article 7

Reiterating the fundamental principle of ensuring the proper functioning and effectiveness of the Convention system is preserved, the UK proposes a fourth option on voting to be considered by the group. This option is proposed in recognition of the specificities of the EU’s internal legal order – where, as a matter of EU law, the EU and its member States are required to coordinate their positions and vote in the same manner. This situation is not applicable to any

other High Contracting Party to the Convention and therefore gives the EU unfair influence through its ability to command a majority of votes. We therefore propose the following:

New '0' + proposal

To adopt an approach under which neither the EU nor its member States would have a vote in relation to the supervision of the execution of a judgment of the ECtHR where the EU is a respondent or co-respondent, including referral of a matter back to the ECtHR for a ruling on interpretation, and referral to the ECtHR for a ruling on an alleged failure to abide by a final judgment (Article 46(2) – (5) ECHR)

In light of the fact that the EU upon accession will be able to command a majority bloc of 27 of the 46 Council of Europe member States, this new '0 +' proposal would ensure that the voting mechanism does not allow the EU or its member States any extra influence or the ability to restrain or limit the Committee of Ministers.

Article 3

It is essential to protect the effectiveness of the Convention system, and the operation of the Court. Whilst the current text on the **co-respondent mechanism** no longer arbitrarily removes decision-making power from the Court and puts it into the hands of a High Contracting Party, we consider that the draft could more explicitly clarify the role of the Court in managing this mechanism. It must be clear that the Court is the final arbiter in the interpretation of the Convention and remains master of its proceedings.

In respect of the **Prior Involvement Procedure**, there remains a concern about the lack of a specific time-limit that the Court of Justice of the European Union (CJEU) must abide by when conducting its assessment of the EU basis of the act or omission complained of. Although it has been noted that a process exists for the CJEU to provide an opinion in 6-8 months, it is not sufficiently clear in the current draft that this is the time limit applicable for the CJEU determination. Provision has also not been made for how the prior involvement procedure will work in practice when it is triggered. Whilst it may be left for the EU to decide their procedure internally, that procedure should be communicated to other Contracting Parties before the text can be agreed. This will provide for clarity and certainty for all the parties in the proceedings before the Court. As to **Joint Responsibility**, whilst the UK agrees with the premise that respondents and co-respondents should be held jointly responsible for a violation of Convention Rights, it should nonetheless be for the Court to make such a decision.

The UK therefore proposes the following amendments (new proposals in blue, changes made previously to the 2013 text in yellow highlight):¹

Article 3 – Co-respondent mechanism

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";

¹ The UK notes that further revisions to the draft accession agreement and appendices including the draft explanatory report will be required in light of these proposed changes and further editorial changes.

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 shall be 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.”

Where an application is directed against one or more member States of the European Union, the European Union may be appointed by the Court as 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 thereto to which the European Union has acceded, of a provision of European Union law, including decisions taken under the Treaty on European Union and 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.

Where an application is directed against the European Union, the European Union member States may be appointed by the Court as co-respondents to 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 thereto 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.

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. The Court may appoint the European Union or one or more of its member States as a co-respondent to the proceedings of the Court's own initiative or may grant leave to become a co-respondent having considered an application containing a reasoned assessment by the European Union or its member States to do so. The Court may grant leave to be a co-respondent only if the conditions in paragraphs 2 or 3 of this article are met. 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 prejudice the Court's decision on the case.

Revised and aligned proposal for Article 3, paragraph 5a:

5a. The Court may terminate 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. In making its decision the Court shall have regard to any reasoned assessment submitted by the European Union on this issue. Before the co-respondent mechanism is terminated, the Court shall grant the applicant an opportunity to state its views on the matter.

[Corresponding extracts of paragraphs on Article 3 for the explanatory report:]

Termination of the co-respondent mechanism

58. 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 no longer be 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. 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 **having regard to any** assessment by the EU **or its member States** 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.~~

59. Article 3, paragraph 5a. requires that the views of the applicant, are heard. To that effect, 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 make any further observations 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.

The prior involvement of the Court of Justice of the European Union

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, **a reasonable time-frame decided by the Court** 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~~ **Nothing in this paragraph shall affect the powers of the Court as the final arbiter of the application** and the rights of the applicant under the Convention, **including but not limited to the Court proceeding with the application if it considers that such an assessment from the Court of Justice of the European Union has been delayed beyond a reasonable time-frame. A reasonable time-frame for the purposes of paragraph 6 is within six to eight months. The Court retains its power to make a final determination of whether there has been a violation of the Convention rights in respect of the relevant provision of EU law**

(Corresponding paragraphs 65-69 of the explanatory report)

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

65. 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 interpretation** of a provision of secondary law or the interpretation of a provision of primary law. **Notwithstanding the CJEU's assessment on the conformity of an EU act with human rights in such cases, the Court remains the final authority on all matters concerning the interpretation and application of the Convention and the Protocols thereto to the EU.**

66. 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 European Union has acceded of the provision of EU law which has triggered the participation of the EU as a co-respondent. 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. [The EU will provide to the Court and the parties to the proceedings details of the compatibility assessment procedure.](#)

66a. Determining whether it is necessary to initiate the prior involvement of the CJEU under Article 3, paragraph 6 presupposes an assessment of the applicable rules of EU law. Therefore, in a similar manner as for the procedure of assessing whether the criteria for triggering the co-respondent mechanism are met (Article 3, paragraph 5), the prior involvement of the CJEU will be initiated according to an assessment by the EU of the applicable EU law. The conclusion of this assessment by the EU will be considered as determinative and authoritative.

67. In the course of its prior involvement, the CJEU will not assess the act or omission complained of by the applicant, but the EU legal basis for it.

68. 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.

69. 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 [within the required time-frame](#). In order not to delay unduly the proceedings before the Court, the EU shall ensure that the [assessment 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. [This time limit shall be observed by the CJEU in respect of the assessments it undertakes under the prior involvement procedure.](#)

Joint Responsibility

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, [as communicated by a decision of the Court.](#)

(Corresponding paragraph of Explanatory Report)

Effects of the co-respondent mechanism

62. 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) [should be](#) held jointly responsible for any alleged violation in respect of which a High Contracting Party has become a co-respondent. [This will be communicated by a decision of the Court.](#)