



Strasbourg, 9 November 2012



COUNCIL OF EUROPE CONSEIL DE L'EUROPE

47+1(2012)R03

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

Meeting report

Strasbourg, Wednesday 7 November (9.30 am) – Friday 9 November 2012 (1.00 pm)

Agora Building, Room G03
Council of Europe

1. Opening of the meeting and adoption of the agenda

1. The third negotiation meeting between the CDDH ad hoc negotiation group and the European Commission on the accession of the European Union to the European Convention on Human Rights was held on 7-9 November 2012, in Strasbourg, under the chairmanship of Ms Tonje Meinich (Norway). The list of participants appears in Appendix I. The agenda, as adopted, appears in Appendix II.

2. Exchange of views with Representatives of the Civil Society and of National Human Rights Institutions

2. In accordance with the decisions taken at the last meeting, delegations held an exchange of views with representatives of civil society, namely the Advice on Individual Rights in Europe (AIRE) Centre, Amnesty International, the European Trade Union Confederation (ETUC), the International Commission of Jurists, as well as with the European Group of National Human Rights Institutions and the Conference of International Non-Governmental Organisations of the Council of Europe.

3. The representatives of civil society and national human rights institutions stressed the purpose of the accession - notably to ensure that European citizens enjoy more complete protection of their human rights - the need for transparency and participation of civil society throughout the negotiation process, as well as certain procedural aspects of EU law which were perceived as being problematic with regard to Article 13 ECHR (right to an effective remedy). They expressed concern, inter alia, that the accession negotiation had not yet sufficiently taken into account the scope of the EU's obligations, which should encompass not only legislative acts but any "action" attributable to the EU, and the application of EU law by states which are members of the European Economic Area and the European Free Trade Association as well as in the bilateral agreements concluded by the EU and third countries. They also expressed concern about the effects of the attribution clauses proposed by the EU, the clarity of the test for the application of the co-respondent mechanism and the non-binding character of the mechanism. They also stressed that third party interventions might often be a more appropriate form of participation. Concerning the prior involvement of the Court of Justice of the EU (CJEU), they reiterated their concerns with respect to the participation of legal aid for applicants, the participation of third parties, the lack of clarity with regard to the effect of the ruling by the CJEU, and the need to ensure consultation of the civil society during the internal EU negotiations for this part of the mechanism. Concerning Article 7, the representatives of civil society and national human rights institutions stated their preference for a legal rule (as opposed to a "gentleman's agreement") and for the compromise achieved by the CDDH-UE instead of the panel proposal which, in their view, would be too complicated and create an unjustified privilege for the EU.

4. At the end of the exchange of views, the participants thanked the representatives of civil society and national human rights institutions for their very valuable presentations and contributions. They invited them to submit in writing the proposals for amendments which had not been submitted before the meeting, in order to be able to further reflect on them. The representatives of civil society and national human rights institutions expressed the view that another round of consultations would be desirable in the course of the ongoing negotiations.

3. Draft legal instruments on the accession of the European Union to the European Convention on Human Rights: examination of proposals for amendments

5. The Chair opened the discussion on the provisions of the Draft Accession Agreement, as it appeared in Appendix III to document 47+1(2012)R02.

6. The representative of the European Union presented the new EU proposal to amend Article 1, paragraph 2, letter c) of the draft. It was tentatively agreed to keep in the draft the expression “or of persons acting on their behalf”. As regards the introduction of a new subparagraph aa), he explained that the purpose of the amendment to the original proposal was to make explicit that the attribution of an act to a member State of the EU would not exclude the possibility for the EU to be held responsible, as a co-respondent, for the violation. Several delegations welcomed this clarification, but no agreement was yet reached on the exact wording for this provision, nor on where it should eventually appear.

7. Concerning the introduction of the new subparagraph bb), the representative of the European Union provided further clarifications on the reasons for the introduction of this provision, on the fact that this does not constitute a derogation to subparagraph (aa) and on the possibilities for the EU, under given circumstances, to intervene as co-respondent in cases calling into question acts taken under the Common Foreign and Security Policy. Some delegations of States which are not members of the EU expressed doubts as to the need for such a detailed provision and in particular the requirement that attributability must have been established by the CJEU, suggesting that part of this provision could be moved to the explanatory report. It was suggested that both subparagraphs aa) and bb) could be merged into a single provision. The EU made a new proposal (incorporated in footnote 1 of appendix III) which will be discussed at the next meeting.

8. In the light of some requests for clarification made by one delegation with respect to the EU proposal for new paragraphs 21.a and 21.c of the explanatory report, the EU was invited to further reflect on an amendment of those paragraphs.

9. The delegations tentatively agreed with the wording proposed by the EU to complete the third indent of Article 1, paragraph 3, and on paragraphs 21.d, 22, 23 and 24 of the Explanatory Report, subject to the drafting adjustments that may be needed in the light of the placement of these provisions. The Secretariat was invited to provide for the next meeting some wording to complete paragraph 23 of the explanatory report and to add a paragraph concerning Article 1, paragraph 5.

10. Concerning the co-respondent mechanism (Article 3 of the draft Accession Agreement), the delegations discussed again the proposal to amend the text of paragraph 2 in order to ensure that the EU could become a co-respondent not only when an application is directed against an EU member State, but also when it is directed against a State which is not a member of the EU, and an application puts into question the compatibility with the Convention of an international agreement between that State and the EU. A few delegations reiterated their preference for this proposal, but showed some flexibility for a compromise solution mentioning in the explanatory report that the EU should request to intervene in such cases.

11. The delegations agreed with the proposal presented by the Secretariat to amend the provisions of the explanatory report corresponding to Article 3, paragraph 5, as amended at the last meeting.

12. Concerning the prior involvement of the CJEU in co-respondent proceedings (Article 3, paragraph 6 of the draft Accession Agreement), one delegation reiterated its reservation on the introduction of such a procedure.

13. With respect to Article 3, paragraph 7, delegations tentatively agreed on a compromise solution merging the existing proposals.

14. As regards the participation of the EU in the Committee of Ministers (Article 7 of the draft Accession Agreement), one delegation of a State which is not a member of the EU reiterated its proposal to restrict the participation of the EU in the Committee of Ministers to those functions which the Convention explicitly attributes to the latter, and consequently to delete the remainder of paragraph 1 of Article 7 which refers to participation in Committee of Ministers' statutory functions. That delegation suggested that the participation of the EU in the decision-making process should be assured otherwise in order to preserve the nature and composition of the Committee of Ministers as provided for under the Statute of the Council of Europe. One delegation noted that this proposal deserved further consideration. However, the proposal was not supported by other delegations. The Legal Service of the Council of Europe presented its views on the matter, as already presented in document CDDH-UE(2011)12. The delegation presenting the proposal reiterated its reservation on Article 7, paragraph 1, letters b) and c) of the draft Accession Agreement.

15. The Group discussed then the exercise of the right to vote and the expression of positions by the EU and its member States while the Committee of Ministers exercises its supervisory functions under Articles 39 and 46 of the Convention (Article 7, paragraph 2 of the draft Accession Agreement). With respect to letter (a), in the absence of any agreement on the actual modalities for the exercise of the supervisory functions in cases involving the EU, no agreement was reached on the EU proposal to delete the sentence "it derives from the European Union treaties that the European Union and its member States express positions and vote in a coordinated manner".

16. The delegations discussed again the EU proposal to replace draft Rule 18 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements with a gentleman's agreement to be adopted by the Committee of Ministers, in the light of additional explanations provided by the representative of the EU. Many delegations reiterated that a binding provision would be preferable, but any final decision on the form of this particular instrument should depend on its substance.

17. As regards the substance of the EU proposal regarding final resolutions by the Committee of Ministers, a tentative agreement was reached on the substance of that proposal, although no final decision was taken as to the majority required for the adoption of resolutions. In this respect, delegations considered with interest a Secretariat proposal aiming at introducing an adjustment clause to take into account possible variations in the number of High Contracting Parties and of EU member States. A final decision on the inclusion of such a clause would also depend on the majority retained.

18. As regards the substance of the EU proposal regarding decisions other than final resolutions (the “panel procedure”), a large majority of delegations of States which are not members of the EU who took the floor reiterated their strong opposition to the proposal as it stands, underlining again its complexity, the erosion of the Committee of Ministers’ prerogatives, and the fact that it did not preclude the possibility, for the EU and its member States, to eventually disregard the conclusions of the panel and use their block of votes in a decisive manner. Some delegations of States which are members of the EU noted that the “panel procedure” was not designed to have an impact on the ordinary work of the Committee of Ministers, that it only provided a solution for extreme cases, and that it should be possible to reconsider its scope.

19. The Chair concluded the discussion on this issue stressing that neither the “panel procedure”, as it stands, nor the solution presented by the “7+7” group, which would not be acceptable for the EU and its member States, represented valid options for the negotiation. To this effect, the Secretariat presented general elements for a possible solution for further discussion at the next meeting.

20. With respect to letters (b) and (c) of Article 7, paragraph 2, a few delegations questioned again the approach proposed in these provisions and proposed that the EU should refrain from expressing a position and from voting also in cases concerning States which are not members of the EU. After an exchange of views, in which it was underlined that the EU was not asked to renounce to its right to vote but to the exercise of this right, the delegations decided to discuss this issue again at a later stage.

21. The delegations tentatively agreed to delete the second indent of paragraph 2, letter b) of Article 8 (Participation of the EU in the expenditure related to the Convention) in accordance with the proposal of deletion made by the Directorate of Finances and Linguistic Services of the Council of Europe.

22. Appendix III contains a revised text of the draft Accession Agreement, as well as of relevant provisions of the explanatory report, presented by the Chair at the end of the meeting as her synthesis of the work carried out by the Group. The Secretariat was invited to present a consolidated version of the explanatory report for the next meeting.

4. Any other business

23. The Group agreed to hold its next meeting in Strasbourg from 21 (afternoon) to 23 January 2013, and to tentatively fix the dates of the subsequent meeting from 3 to 5 April 2013.

APPENDIX I

List of participants

MEMBERS / MEMBRES

ALBANIA / ALBANIE

Ms Ledina MANDIA, General State Advocate of the Republic of Albania, Ministry of Justice, Tirana

ANDORRA / ANDORRE

Mr Joan FORNER ROVIRA, Senior Legal Adviser, Government Agent to the European Court of Human Rights, Department of General and Legal Affairs, Ministry of Foreign Affairs

ARMENIA / ARMENIE

Mr Levon AMIRJANYAN, Chef du département des affaires juridiques, Ministère des affaires étrangères, Place de la République, Yerevan

AUSTRIA / AUTRICHE

Mrs Leonore LANGE, Division for International Affairs and General Administrative Affairs, Federal Chancellery, Dpt. V/5, Constitutional Service, Wien

Mr. Robert WEISS, Legal Adviser, Permanent Representation of Austria to the EU, Bruxelles

AZERBAIJAN / AZERBAIDJAN

Mr Chingiz ASKAROV, Agent of the Government of the Republic of Azerbaijan at the European Court of Human Rights, Prezident Sarayi, Baku

BELGIUM / BELGIQUE

Mme Isabelle NIEDLISPACHER, co-Agent du Gouvernement, SPF Justice, Service des Droits de l'Homme, Bruxelles

BOSNIA AND HERZEGOVINA / BOSNIE-HERZEGOVINE

Excusé/excused

BULGARIA / BULGARIE

Mr Dimitar PHILPOV, Director, Human Rights Directorate, Ministry of Foreign Affairs of Bulgaria, Sofia

CROATIA / CROATIE

Mrs Romana KUZMANIĆ OLUIĆ, Counselor in the Division for Human Rights and International Regional Organizations and Initiatives, Ministry of Foreign and European Affairs, Directorate for Multilateral Affairs and Global Issues, Zagreb

CYPRUS / CHYPRE

Mr. Nikolas KYRIAKOU, Counsel for the Republic, Law Office of the Republic, European Law Section, Nicosia

CZECH REPUBLIC / REPUBLIQUE TCHEQUE

Mr Vit SCHORM, Government Agent, Ministry of Justice, Praha

DENMARK / DANEMARK

Ms. Nina HOLST-CHRISTENSEN, Ministry of Justice, Copenhagen

ESTONIA / ESTONIE

Ms Maris KUURBERG, Government Agent before the European Court of Human Rights, Legal Department, Ministry of Foreign Affairs, Tallinn

FINLAND / FINLANDE

Mr Arto KOSONEN, Government Agent, Director, Unit for Human Rights Court and Conventions, Legal Service, Ministry of Foreign Affairs, Government

Ms Tuire SIMONEN, Legal Officer, Unit for Human Rights Courts and Conventions, Legal Service, Ministry for Foreign Affairs, Government

FRANCE

Mme Anne-Françoise TISSIER, Sous-directeur des droits de l'homme, Agent du Gouvernement, Ministère des affaires étrangères, DJ/HOM, Paris

GERMANY / ALLEMAGNE

Mr Hans-Jörg BEHRENS, Head of Unit IVC1, Human Rights Protection; Government Agent before the European Court of Human Rights, Bundesministerium der Justiz, Berlin

GREECE / GRECE

Mme Athina CHANAKI, Conseiller juridique adjoint auprès du Service juridique (Section de droit international public) du Ministère grec des affaires étrangères, Athènes

HUNGARY / HONGRIE

Ms Monika WELLER, Co-Agent for the Hungarian Government before the European Court of Human Rights, Ministry of Public Administration and Justice, Budapest,

ICELAND / ISLANDE

Ms. Guðfríður Lilja GRÉTARSDÓTTIR, Ministry of the Interior, Reykjavík

IRELAND / IRLANDE

Mr Peter WHITE, Agent for the Government of Ireland, Assistant Legal Adviser, Legal Division, Department of Foreign Affairs and Trade, Dublin

LATVIA / LETTONIE

Ms Natalja Freimane, Senior Desk Officer, Office of Representative of the Government of the Republic of Latvia before International Human Rights Organizations, Ministry of Foreign Affairs, Riga

LIECHTENSTEIN

Excusé/excused

LITHUANIA / LITUANIE

Mrs Elvyra BALTUTYTE, Agent of the Government of the Republic of Lithuania to the European Court of Human Rights, Ministry of Justice, Vilnius

Ms Gintarė PAŽERECKAITĖ, Justice and Home Affairs Counsellor, Permanent Representation of Lithuania to the EU, Brussels, Belgium

LUXEMBOURG

Mme Brigitte KONZ, Conseillère à la Cour d'Appel, Luxembourg

Mme Anne KAYSER-ATTUIL, Représentante Permanente Adjointe, Représentation Permanente du Luxembourg auprès du Conseil de l'Europe et Consulat Général, Strasbourg

REPUBLIC OF MOLDOVA/ REPUBLIQUE DE MOLDOVA

Mr Lilian APOSTOL, Expert, Ministère de la justice, Chisinau

MONTENEGRO

Mr Zoran PAZIN, State Agent to the ECHR, Podgorica

THE NETHERLANDS / PAYS-BAS

Mr Roeland BÖCKER, Ministry of Foreign Affairs, International Law Division, The Hague

Mme Geertje ROHOF, Ministry of Foreign Affairs, European Law Division, The Hague

NORWAY / NORVEGE

Ms. Marthe Kristine FJELD, Adviser, Norwegian Ministry of Justice and Public Security, Legislation Department, Oslo

Ms Tonje MEINICH, (**Chairperson/Présidente**), European and International Affairs, Norwegian Ministry of Justice, Oslo

POLAND / POLOGNE

Ms Marta KACZMARSKA, Ministry of Foreign Affairs, Warsaw

ROMANIA / ROUMANIE

Mme Aniela Băluț, Directrice, Direction du Droit Européenne, Ministère des Affaires Etrangères, Bucharest

RUSSIAN FEDERATION / FEDERATION DE RUSSIE

Mr Vasily NEBENZIA, Director of the Department of Humanitarian Cooperation and Human Rights, Ministry of Foreign Affairs of the Russian Federation, Moscow

Mme Maria MOLOTSOVA, 1st Secretary, Department for International Humanitarian Cooperation and Human Rights, Ministry of Foreign Affairs, Moscow

Mme Diana ELOYEVA, Legal Department, Ministry of Foreign Affairs, Moscow

Mr Vladislav ERMAKOV, Deputy to the Permanent Representative, Chancery, Strasbourg

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Mr Slavoljub CARIC, Government Agent, Ministry of Justice and Public Administration, Office of the Agent before the ECHR, Belgrade

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Ms Tanja TRTNIK Ministry of Justice and Public Administration of the Republic of Slovenia, International Cooperation Service, Ljubljana

SPAIN / ESPAGNE

Mr Jorge CARRERA DOMÉNECH, Counselor of Justice at the Spanish Permanent Representation at the European Union, Brussels – Belgium

SWEDEN / SUEDE

Ms Jessica SJÖSTRAND, Deputy Director for the Swedish Ministry for Foreign Affairs, Department for International Law, Human Rights and Treaty Law, Stockholm

Ms Sara FINNIGAN, Deputy to the Permanent Representative, Swedish Chancery, Strasbourg, France

SWITZERLAND / SUISSE

Mr Frank SCHÜRMAN, Agent du Gouvernement, Chef de l'unité Droit européen et protection internationale des droits de l'homme, Office fédéral de la justice, Berne

M. Charles-Edouard HELD, Ambassadeur Extraordinaire et Plénipotentiaire, Représentant Permanent, Chancellerie, Strasbourg Cedex, France

Mr Daniel FRANK, Head Human Rights Section, Federal Department of Foreign Affairs, Federal Palace North, Berne

Mme Silvia GASTALDI, Office fédéral de la justice, Berne

“THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA” / “L'EX-RÉPUBLIQUE YOUGOSLAVE DE MACÉDOINE”

Ms Svetlana GELEVA, Head of Department for Multilateral affairs, Ministry of Foreign Affairs, Skopje

TURKEY / TURQUIE

Mme Burcu ERTUĞRUL, Legal Expert on Human Rights, Ministry of Foreign Affairs, Ankara

Mme Halime Ebru DEMIRCAN, Adjointe au Représentant permanent de la Turquie auprès du Conseil de l'Europe, Strasbourg

Mr Bayram TURGUT, Adjoint au Représentant permanent de la Turquie auprès du Conseil de l'Europe, Strasbourg

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Mr Yevgen PERELYGIN, Director, Bureau for European Integration, Secretariat of the Cabinet of Ministers of Ukraine, Ministry of Foreign Affairs, Kiev

UNITED KINGDOM / ROYAUME-UNI

Mr Rob LINHAM, Head of Council of Europe Human Rights Policy, Justice Policy Group, Ministry of Justice, London

EUROPEAN UNION/UNION EUROPEENNE

Ms Luisella PAVAN-WOOLFE, Ambassador, Head of the Delegation of the European Union to the Council of Europe, Strasbourg

Mr Hannes KRAEMER, Member of the Legal Service of the European Commission, Brussels

Mme Eglantine CUJO, Membre du Service juridique de la Commission européenne, Bruxelles

Mr Loránt HAVAS, Legal Advisor, legal Affairs Division, European External Action Service, Brussels

M. Jerome LEGRAND, Administrateur, EEAS, Bruxelles

Ms Kristi RABA, Fundamental Rights and Criminal Justice, DG D – Justice and Home Affairs, General Secretariat of the Council of the European Union, Brussels

Ms Katerina MARKOVOVA, Adjointe au Chef de la Délégation, Delegation of the European Union to the Council of Europe, Strasbourg

Mme Anna Katarzyna KOBUS, Stagiaire, Legal Service of the European Commission, Brussels

OBSERVERS / OBSERVATEURS

REGISTRY OF THE EUROPEAN COURT OF HUMAN RIGHTS / GREFFE DE LA COUR EUROPEENNE DES DROITS DE L'HOMME

M. Johan CALLEWAERT, Greffier Adjoint de la Grande Chambre / Deputy Grand Chamber Registrar

COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI) / COMITÉ DES CONSEILLERS JURIDIQUES SUR LE DROIT INTERNATIONAL PUBLIC (CAHDI)

Excused / Excusé

AIRE Centre

Ms Nuala MOLE,

Ms Biljana BRAITHWAITE, Consultant

Mr Jonathan TOMKIN, Barrister at the Irish bar

Amesty International

Mr Sébastien RAMU, Senior Legal Adviser, Law and Policy, International Secretariat, UK - London

Conference of INGOs of the Council of Europe / Conférence des OING du Conseil de l'Europe

Mme Stéphanie Bourgeois, Coordinatrice CEDH, Commission Droits de l'Homme, Strasbourg, France

European Group of National Human Rights Institutions (NHRI) / le Groupe européen des institutions nationales des droits de l'homme (INDH)

Ms Sinéad LUCEY, Irish Human Rights Commission, Jervis House, Dublin, Ireland

European Trade Union Confederation (ETUC) / Confédération européenne des syndicats (CES)

Mr Klaus LÖRCHER, ETUC Human rights adviser, Bruxelles

La Commission Internationale des Juristes (CIJ) / International Commission of Jurists (ICJ)

Mr Massimo FRIGO, Legal Adviser of the ICJ Europe Programme

Justice

Excused / excusé

SECRETARIAT

**DG I – Human Rights and Rule of Law / Droits de l'Homme et État de droit
Council of Europe / Conseil de l'Europe, F-67075 Strasbourg Cedex**

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Mr Daniele CANGEMI, Head of Division / Chef de Division, Human Rights Law and Policy Division / Division du droit et de la politique des droits de l'Homme

Mr Matthias KLOTH, Administrator, Human Rights Law and Policy Division / Division du droit et de la politique des droits de l'Homme

Mme Valérie PEARD, Principal Assistant, Human Rights Law and Policy Division / Division du droit et de la politique des droits de l'homme

Mme Frédérique BONIFAIX, Assistant / Assistante, Human Rights Law and Policy Division / Division du droit et de la politique des droits de l'Homme

Mme Corinne GAVRILOVIC, Assistant / Assistante, Human Rights Intergovernmental Cooperation Division / Division de la coopération intergouvernementale en matière de droits de l'Homme

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Ms Ulrika FLODIN-JANSON, Principal Administrator (Human Rights and Legal Co-operation), Secretariat of the Committee of Ministers.

Ms Nora TRENCH BOWLES, Trainee / Stagiaire, Secretariat of the Committee of Ministers

DLAPIL - Direction du Conseil Juridique et du droit international public/Directorate of Legal Advice and Public International Law

Mme Elise CORNU, Legal Advisor, Directorate of Legal Advice and Public International Law

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INTERPRETERS / INTERPRÈTES

Chef d'équipe : Didier JUNGLING

Lucie DE BURLET

Sylvie BOUX

APPENDIX II

Agenda

1. **Opening of the meeting and adoption of the agenda**
2. **Exchange of views with Representatives of the Civil Society and of National Human Rights Institutions**
3. **Draft legal instruments on the accession of the European Union to the European Convention on Human Rights: examination of proposals for amendments**

Working documents

Appendix III to the Report of the 2nd negotiation meeting (17-19 September 2012)	47+1(2012)R02
CDDH report to the Committee of Ministers on the elaboration of legal instruments for the accession of the European Union to the European Convention on Human Rights	CDDH(2011)009
Negotiation document submitted by the European Union on 30 October 2012	(Restricted)
Negotiation document submitted by the European Union on 14 June 2012	(Restricted)
Comments from Armenia	47+1(2012)003 bil (Restricted)
Comments from Norway	47+1(2012)004 bil (Restricted)
Comments from Switzerland	47+1(2012)005 bil (Restricted)
Letter from the Russian Federation	47+1(2012)006 bil (Restricted)
Opinion of the Directorate of Programmes, Finance and Linguistic Services on Article 8 of the draft Accession Agreement	CDDH-UE(2011)17

Reference documents

Report of the 2 nd negotiation meeting (17-19 September 2012)	47+1(2012)R02
Report of the 1 st negotiation meeting (21 June 2012)	47+1(2012)R01
Relevant excerpts of the Report of the 75 th meeting of the CDDH (19-22 June 2012)	47+1(2012)002
Decisions of the 1145 th meeting of the Ministers' Deputies (13 June 2012)	47+1(2012)001
Report of the Extraordinary meeting of the CDDH (12-14 October 2011)	CDDH(2011)R Ex

4. **Any other business**

APPENDIX III

Conclusions presented by the Chair

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

Preamble

The High Contracting Parties 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”), 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 the individual 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 status of the European Union as a High Contracting Party to the Convention and the Protocols thereto shall be further defined in the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms.

c. 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.¹”

3. Where any of the terms:

- ‘State’, ‘State Party’ ‘States’, or ‘States Parties’ appear in Article 10, paragraph 1 and in Article 17 of the Convention, as well as in Articles 1 and 2 of the Protocol, in Article 6 of Protocol No. 6, in Article 3 of Protocol No. 7, Article 4, paragraphs 1 and 2 of Protocol No. 7, in Articles 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 Article 7, paragraph 1, in Article 11, paragraph 2, in Article 12, in Article 13, and in Article 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 paragraph 1 of Article 6, in Article 8, paragraph 2, in Article 10, paragraph 2, in Article 11,

¹ The following amendment has been proposed:

c. Accession to **this** 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 **[...]**.

c1. For the purposes of this Convention, of the Protocols thereto and of the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the "Accession Agreement"):

- (aa) an act, measure or omission of organs or agents of a member State of the European Union shall be attributable only to that State, even if such act, measure or omission occurs when the State implements the law 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 3 (2), (4) (5) and (7) of the Accession Agreement,
- (bb) without prejudice to subparagraph aa), acts or measures shall be attributable only to the member States of the European Union where they have been performed or adopted in the context of the provisions of the Treaty on European Union on the common foreign and security policy of the European Union, except in cases where attributability to the European Union on the basis of European Union law has been established within the legal order of the European Union.

d. Nothing in **this** Convention, the Protocols thereto **or the Accession Agreement** shall require the European Union to perform an act or adopt a measure for which it has no competence under European Union law.

paragraph 2 and in Article 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.

4. Insofar as the term '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 the European Union (hereinafter: the "TEU") and the Treaty on the Functioning of the European Union (hereinafter: the "TFEU") apply. Insofar as that term 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 which, 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.

5. 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 the territories of the member States of the European Union to which the TEU and the TFEU apply.

6. 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 10, 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."

Article 3 – Co-respondent mechanism

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

a. The heading of Article 36 shall be amended to read as follows: “Third party intervention and co-respondent”.

b. The following paragraph shall be added at the end of Article 36:

“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 Convention rights at issue of a provision of European Union law, notably where that violation could have been avoided only by disregarding an obligation under European Union law.^{2 3}

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

² Amendment proposal: “Where an application is directed against one or more **High Contracting Parties other than the European Union, the latter** 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 Convention rights at issue of a provision of European Union law, notably where that violation could have been avoided only by disregarding an obligation under European Union law, **or, as regards States which are not members of the European Union, an obligation under international law incorporating European Union law.**”

³ Amendment proposed to Paragraphs 39 and 40 of the Explanatory Report:

39. 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.**

40. 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. **In particular, the EU [shall request]/[will, where appropriate, request] such intervention when an application calls into question the compatibility with the Convention rights of a provision of such agreements.**

compatibility with the Convention rights at issue 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.

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 by 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 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.**

6. In proceedings to which the European Union is co-respondent, if the Court of Justice of the European Union has not yet assessed the compatibility with the Convention rights at issue of the provision of European Union law as under paragraph 2 of this Article, sufficient time shall be afforded for the Court of Justice of the European Union to make such an assessment, and thereafter for the parties to make observations to the Court. **Assessing the compatibility shall mean to rule on the validity of a legal provision contained in acts of the European Union institutions, bodies, offices or agencies, or on the interpretation of a provision of the Treaty on European Union, the Treaty on the Functioning of the European Union or of any other provision having the same legal value pursuant to those instruments.** 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.

7. **If the violation in respect of which a High Contracting Party has become a co-respondent to the proceedings is established, the respondent and the co-respondent shall be jointly responsible for that violation, unless they have jointly requested the Court that only one of them be held responsible and the Court decides that only one of them be held responsible.**

8. 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:

“Article 33 – Inter-Party cases”.

Article 5 – 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 6 – Election of judges

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 number of representatives of the European Parliament shall be the same as the highest number of representatives to which any State is entitled 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 7 – Participation of the European Union in the Committee of Ministers of the Council of Europe

1. The European Union shall be entitled to participate in the Committee of Ministers, with the right to vote, when the latter takes decisions:

- a. under Article 26, paragraph 2, Article 39, paragraph 4, Article 46, paragraphs 2 to 5, or Article 47 of the Convention;
- b. regarding the adoption of Protocols to the Convention;
- c. regarding 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 point a) of this paragraph,**

or

- relating to the functions exercised by the Parliamentary Assembly of the Council of Europe **under Article 22 of the Convention.**

2. 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. 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
- b. Where the Committee of Ministers otherwise supervises the fulfilment of obligations by a member State of the European Union, the European Union is precluded for reasons pertaining to its internal legal order from expressing a position or exercising its right to vote. The European Union treaties do not oblige the member States of the European Union to express positions or to vote in a co-ordinated manner.
- c. Where the Committee of Ministers supervises the fulfilment of obligations by a High Contracting Party other than the European Union or a member State of the European Union, the European Union treaties do not oblige the member States of the European Union to express positions or to vote in a co-ordinated manner, even if the European Union expresses its position or exercises its right to vote.⁵

⁴ The following amendment has been proposed to Article 7.2.a:

- 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, **the Committee of Ministers shall agree on arrangements** to ensure that **it may** effectively exercise its functions in those circumstances.

⁵ The following amendment, merging Articles 7.2.b and 7.2.c, has been proposed:

“b. Where the Committee of Ministers supervises the fulfilment of obligations by a High Contracting Party other than the European Union [*alternative drafting*: by a member State of the European Union or by a State which is not a member of the European Union], the latter cannot express a position or exercise its right to vote. The member States of the European Union shall be free to express their own position and to exercise their right to vote”.

Article 8 – Participation of the European Union in the expenditure related to the Convention

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;

[text deleted]

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 expenditure related to the functioning of the Convention comprises 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.

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

Article 9 – Relations with other Agreements

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

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 11 – Reservations

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

Article 12 – 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 10;
- 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.

Draft Elements for an instrument dealing with the supervision of the execution of judgments and of the terms of friendly settlements in cases involving the EU

A decision by the Committee establishing that the respondent and, as the case may be, the co-respondent or co-respondents have taken all the necessary measures to abide by the judgment or establishing that the terms of a friendly settlement have been executed shall be considered as adopted if a majority of **[three quarters][four fifths]** of the representatives casting a vote and **a majority of the representatives entitled to sit on the Committee** is in favour. **[Should the number of member states of the European Union, plus the European Union itself, exceed two thirds of the number of High Contracting Parties to the Convention, the required majority to consider such decision adopted shall rise to [...] of the representatives casting a vote and a majority of the representatives entitled to sit on the Committee.]**

[...]°

° A proposal was made to add the following elements concerning other types of decisions:

First type of decisions

- a) procedural decisions
 - b) interim resolutions requesting information (rule 16)
- ⇒ commitment of the EU and its MS not to vote against adoption if requested by 1/5 of representatives entitled to sit on the Committee of Ministers (currently 10 member states)
- ⇒ no panel

Second type of decisions

- a) infringement proceedings (art 46 (4) ECHR, rule 11) / referral to the Court for interpretation (art 46 (3) ECHR, rule 10)
 - b) interim resolutions other than requesting information (rule 16)
- ⇒ panel as proposed by EU
- ⇒ commitment by EU and its MS not to vote against panel proposal

Previous proposals:

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

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, the High Contracting Parties shall:

- a.* without prejudice to the provisions under sub-paragraphs *b* and *c*, consider decisions by the Committee of Ministers as adopted if a simple majority of the representatives entitled to sit on the Committee on behalf of those High Contracting Parties that are not member States of the European Union is in favour;
- b.* consider decisions by the Committee of Ministers under Rules 10 and 11 as adopted if two thirds of the representatives entitled to sit on the Committee on behalf of those High Contracting Parties that are not member States of the European Union are in favour; and
- c.* consider decisions by the Committee of Ministers under Rule 17 as adopted if, in addition to the majority set out in Article 20.*d* of the Statute of the Council of Europe, a simple majority of the representatives casting a vote on behalf of those High Contracting Parties that are not member States of the European Union is in favour.

B) Draft decision of the Committee of Ministers' deputies: gentleman's agreement on voting in cases to which the European Union is a party

Regarding the voting procedures in the circumstances referred to in paragraph 2 (a) of Article 7 of the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, the Deputies agreed upon the following Gentleman's Agreement amongst themselves:

[...]

(2) If a decision by the Committee under paragraph 3 or 4 of Article 46 of the Convention has not been adopted, although its adoption has been requested by two thirds of the representatives entitled to sit on the Committee on behalf of those High Contracting Parties that are not member States of the European Union, a panel shall be constituted.

That panel shall consist of one member designated either by the respondent or jointly by the respondent and the co-respondent or co-respondents, as the case may be, of one member designated by the High Contracting Parties that have requested the adoption of the decision at issue and of one chairperson, designated by the two aforementioned members.

The panel, after consulting with the respondent and the co-respondent or co-respondents, as the case may be, and with the High Contracting Parties that have requested the adoption of the decision at issue, shall propose the adoption of a decision by the Committee.

The Committee shall, not earlier than after 2 months and not later than after 4 months proceed to a vote on the panel's proposal.

Any representative entitled to sit on the Committee shall be deemed to have voted in favour of the panel's proposal, unless he or she has explicitly stated reasons to the contrary; these reasons shall be recorded in the minutes of the proceedings of the Committee.

(3) Paragraph (2) shall also apply where a decision by the Committee other than under paragraph 3 or 4 of Article 46 of the Convention and other than establishing that the respondent and, as the case may be, the co-respondent have taken all the necessary measures to abide by the judgment or establishing that the terms of a friendly settlement have been executed has not been adopted, although its adoption has been requested by a simple majority of the representatives entitled to sit on the Committee on behalf of those High Contracting Parties that are not member States of the European Union.