



Strasbourg, 23 January 2013



47+1(2013)R04

**FOURTH 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, Monday 21 January (2.00 pm) – Wednesday 23 January 2013 (4.30 pm)
Agora Building, Room G01
Council of Europe

1. Opening of the meeting and adoption of the agenda

1. The fourth 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 21-23 January 2013, 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. Draft legal instruments on the accession of the European Union to the European Convention on Human Rights: examination of proposals for amendments

2. After opening the meeting, the Chair gave the floor to a delegation which presented a common paper from 16 States which are not members of the European Union on major concerns regarding the Accession Agreement¹. In presenting the paper, it was indicated that the States which are not members of the EU welcomed the willingness of the EU to accede to the Convention. It was underlined that the main concern expressed in the document was to safeguard the integrity of the system, and that individual member States may have nuanced concerns on the different issues raised in the document. It was also underlined that this paper should not be seen as a counter-proposal to the Chairperson's compromise proposals presented in document 47+1(2013)001, which had not been taken into consideration when drafting the paper for reasons of timing. After the presentation, individual member States made their own general remarks on their respective positions. The document appears as Appendix III to the present report.

3. The representative of the EU indicated that by seeking accession to the Convention the EU did not seek to obtain any advantage. The purpose of the amendments proposed by the EU was but to adequately reflect the specific nature of the EU. He shared the view that the nature, the integrity and the effectiveness of the Convention system should be preserved and underlined that the EU was willing to engage to reach a balanced compromise.

4. The Chair then presented her compromise proposals, contained in document 47+1(2013)001, underlining that she was aware that they required compromise efforts on all sides and expressing the hope that they could meet with many of the concerns expressed.

5. The participants agreed to amend the fifth paragraph of the preamble, in order to bring the wording more in line with Article 34 of the Convention, and to stress further the relevance of Article 34 in the context of the accession in the corresponding paragraphs of the explanatory report.

6. A tentative agreement was reached on redrafting Article 1, paragraph 2 of the Accession Agreement which suggests the insertion of a "bridging clause" in Article 59, paragraph 2, letter b of the Convention, to make explicit that the Accession Agreement shall be an integral part of the Convention.

¹ The States presenting the paper were: Andorra, Armenia, Azerbaijan, Bosnia-Herzegovina, Iceland, Liechtenstein, Monaco, Montenegro, Norway, Serbia, Switzerland, Russian Federation, Turkey and Ukraine. During the meeting Georgia and Moldova also indicated that they associated themselves to the paper.

7. The participants also agreed that the wording of Article 59, paragraph 2, letter c, as proposed in Article 1, paragraph 2 of the Accession Agreement should not appear in the Convention but only in the Accession Agreement.

8. The participants indicated their readiness to accept the compromise proposed by the Chair as regards the insertion of a general attribution rule in the accession agreement (paragraph 2, letter c1, subparagraph aa) of the EU proposal). One delegation expressed however some hesitations, considering that this clause was not necessary and that it reaffirmed concepts deriving from general principles of international law.

9. As regards the more specific attribution rule proposed by the EU to deal with issues related to the common foreign and security policy of the EU (paragraph 2, letter c1, subparagraph bb) of the EU proposal), an agreement was reached not to include this clause as a separate sub-paragraph. The Secretariat proposed a further compromise, combining some additional wording to the general attribution clause and some wording in the explanatory report presenting the Court's general approach to the matter, which would also apply in cases concerning acts or measures adopted in the context of the common foreign and security policy of the EU. This proposal was considered positively, subject to confirmation at the next meeting. The proposal appears in Appendix IV to the present report.

10. With respect to the interpretation clauses proposed in Article 1, paragraphs 3 to 5 of the Accession Agreement, on the basis of the discussion it was agreed to add to the explanatory report an explanation about the absence of a reference to Article 2 of Protocol No. 6 in the first indent of Article 1, paragraph 3. Concerning Article 2, paragraph 1 of Protocol No. 4, it was agreed to maintain the reference in the text of Article 1, paragraph 5 with a minor amendment.

11. Concerning the question of a possible extension of the co-respondent mechanism to situations in which an application directed against a State, which is not a member of the EU, puts into question the compatibility with the Convention of an international agreement between that State and the EU, the representative of the EU indicated his readiness to accept the compromise proposed by the Chair in document 47+1(2013)001. A number of States which are not members of the EU indicated that they could consider further the Chair's proposal as part of a wider compromise package, while still expressing a preference for the proposal put forward in their common paper. In the absence of an agreement, it was decided to discuss this matter again at the next meeting.

12. The question of the non-binding character of the co-respondent mechanism (Article 3, paragraph 5) was discussed in the light of the preference expressed in the paper by many States which are not members of the EU for a binding mechanism, and of the position expressed by the EU and in the Chair's document for keeping the mechanism as it currently stands. In this respect, the importance of the internal rules that the EU should adopt has been underlined. Also in this case, it was pointed out that the solution of this issue would depend on the general equilibrium of the text.

13. As regards the prior involvement procedure (Article 3, paragraph 6), the representatives of many States which are not members of the EU reiterated the concerns expressed in their paper, pointing out notably that part of the text defining the scope of the CJEU assessment was not pertinent for the Accession agreement since it dealt with EU internal matters. The representative of the EU reaffirmed the support of the EU and of its

member States for the current proposal. In the absence of an agreement, it was decided to resume discussion on this issue at the next meeting.

14. Similarly, many States which are not members of the EU explained that the draft Article 3, paragraph 7, did not respond sufficiently to their concerns about the Court's actual margin of decision. In the absence of an agreement, it was decided to resume discussion on this issue at the next meeting.

15. As agreed at the previous meeting, the Secretariat presented its views on Article 7, paragraph 1, indicating a preference for the solution proposed in document 47+1(2012)R03, for reasons of simplicity and of institutional equilibrium. Bearing in mind the position expressed in their paper and the proposal made by the Chair, the representatives of States which are not members of the EU indicated a preference for a revision of Article 7 paragraph 1 to the effect that the EU shall not have voting rights in the Committee of Ministers except in situations where the latter exercises its functions under the Convention (Articles 26, 39, 46 and 47). Decisions mentioned in Article 7, paragraph 1, letters b) and c) could first be taken by the Committee of Ministers without the EU voting and then forwarded for acceptance to the EU. The Secretariat was asked to provide more detailed examination of the implications of the various alternatives presented in the document of the Chair with respect to the different types of acts that the Committee of Ministers may adopt, well in advance for discussion at the next meeting.

16. As regards the voting rights in cases involving the EU, a consensus was reached on the principle that the relevant rules should appear in a binding instrument to be adopted by the Committee of Ministers. Consensus was also reaffirmed on the approach proposed as regards "final resolutions" of the Committee of Ministers, although no final agreement was reached on the majority required for the adoption of such resolutions.

17. With respect to the elements presented by the Secretariat at the end of the previous meeting concerning other types of decisions, the proposal concerning the adoption of procedural decisions and decisions requesting information by a "hyper-minority" was in principle supported. On the contrary, as regards the other decisions, the States which are not members of the EU reiterated their reluctance about the inclusion of the "panel procedure" in the system. The Chair invited the Secretariat to present a new proposal based on other majority rules and not involving the use of a panel for discussion at the next meeting.

18. Finally, the representative of the EU suggested that Article 7, paragraph 2, letters b) and c) could possibly be merged, but no agreement was reached on the substance about how to deal with EU voting rights in cases concerning the other High Contracting Parties.

19. As regards the explanatory report, the Group agreed to amend Paragraph 24a according to the proposal presented by the EU, and decided to discuss the amendments proposed to Paragraph 23 at the next meeting.

3. Any other business

20. The Group agreed to hold its next meeting in Strasbourg from 2 to 5 April 2013. The Chair recalled that it will be the last negotiation meeting scheduled, and invited all the delegations to pursue discussions with a view to reaching a satisfactory compromise.

APPENDIX I**List of participants****MEMBERS / MEMBRES****ALBANIA / ALBANIE**

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

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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

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Mr Levon AMIRJANYAN, Chef du département des affaires juridiques, Ministère des affaires étrangères, Yerevan

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

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Mr Chingiz ASGAROV, Agent of the Government of the Republic of Azerbaijan at the European Court of Human Rights, Baku

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BOSNIA AND HERZEGOVINA / BOSNIE-HERZEGOVINE

Ms Sandra MALEŠIĆ, Assistant Agent of the Council of Ministers, of Bosnia and Herzegovina before European Court of Human Rights, Sarajevo

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CROATIA / CROATIE

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CYPRUS / CHYPRE

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

CZECH REPUBLIC / REPUBLIQUE TCHEQUE

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DENMARK / DANEMARK

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* * *

INTERPRETERS / INTERPRÈTES

Chef d'équipe : Corinne McGEORGE

Didier JUNGLING

Isabelle MARCHINI

APPENDIX II**Agenda**

- 1. Opening of the meeting and adoption of the agenda**
- 2. Draft legal instruments on the accession of the European Union to the European Convention on Human Rights: examination of proposals for amendments**

Working documents

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| <u>Appendix III</u> to the Report of the 3rd negotiation meeting (7-9 November 2012): Draft Revised Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms | 47+1(2012)R03 |
| Chairperson's proposal on outstanding issues | 47+1(2013)001 |
| 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 | 47+1(2013)002 |
| Common paper of Andorra, Armenia, Azerbaijan, Bosnia-Herzegovina, Georgia, Iceland, Liechtenstein, Republic of Moldova, Monaco, Montenegro, Norway, Serbia, Switzerland, Russian Federation, Turkey and Ukraine on major concerns regarding the Draft revised Agreement on the Accession of the European Union to the European Convention on Human Rights | 47+1(2013)003 |
| 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) |

Reference documents

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| Report of the 3 rd negotiation meeting (7-9 November 2012) | 47+1(2012)R03 |
| 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 |
| Decisions of the 1145 th meeting of the Ministers' Deputies (13 June 2012) | 47+1(2012)001 |

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| Report of the Extraordinary meeting of the CDDH (12-14 October 2011) | CDDH(2011)R Ex |
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3. Any other business

APPENDIX III

Common paper of Andorra, Armenia, Azerbaijan, Bosnia-Herzegovina, Georgia, Iceland, Liechtenstein, Moldova, Monaco, Montenegro, Norway, Serbia, Switzerland, Russian Federation, Turkey and Ukraine on major concerns regarding the Draft revised Agreement on the Accession of the European Union to the European Convention on Human Rights²

21.01.2013

I. Introduction

1. After the third negotiation meeting of CDDH+1, two informal meetings of States which are not members of the EU have taken place in Strasbourg, with a view to discussing issues of common concern related to the Draft Accession Agreement.

2. The present paper dresses the list of these issues and presents some alternative proposals. For reasons of timing, the proposal of the Chair could not have been taken into consideration. In this sense, it should not be seen as a counter-proposal to the latter.

Even if this paper is put forward jointly, individual member states continue to voice their particular positions and nuanced concerns on different issues raised. In hope of advancing the negotiation process, however, and in the constructive spirit of clarity on some major points, this paper has been put together.

3. In the view of the non-EU member States listed in the title of this common paper (in the following: NEUMS), most legal issues that have been identified as controversial in the negotiation process can be resolved in a constructive spirit and given a common understanding on the purpose of the accession.

II. General remarks

4. The NEUMS welcome the intention of the EU to become a party to the Convention. Accession will close gaps in human rights protection by guaranteeing that any person, non-governmental organisation or group of individuals claiming to be a victim of a violation of the ECHR by an institution or body of the EU can bring a complaint against the EU before the Strasbourg Court under the same conditions as those applying for complaints brought against member States. Accession will also enable the EU to defend itself directly before the Strasbourg Court in matters where EU law or actions of the EU have been impugned. In addition, it will reduce the risk of divergence and ensure consistency between human rights case law of the Strasbourg and Luxembourg Courts.

5. On the other hand, the final legal instruments for the accession must ensure a just, reasonable and practical system which takes into account the specific nature of the EU, and at the same time preserves the nature, the integrity and the effectiveness of the Convention and respects the values and traditions of the Council of Europe.

6. To reach these aims, the following principles should be respected:

² Version as it stands after the Third negotiation meeting, Doc. 47+1 (2012)R03, Appendix III ("Conclusions presented by the Chair"). Text distributed in English only.

- The amendments to the ECHR and the adaptations of the system as a whole should be limited to what is strictly necessary for the purpose of the accession;
- Accession should, to the largest possible extent, be based on the principle of equal footing between the EU and the 47 HCP, with due respect to its special status as a non-state actor. Derogations to this principle should only be admitted on an exceptional basis and should not be inconsistent with the aims of the accession;
- Differences between States which are members of the EU and States which are not members of the EU should be avoided.

III. Article 1 Scope of accession and amendments to Article 59

1. Art. 1 para. 2, lit. c ("actors")

7. The text should explicitly state that "actors" whose actions, measures or omissions can be attributable to the EU include persons.

2. Art. 1 para 2, lit. c1. aa ("attributability")

8. The NEUMS take note of the amendments made by the EU to its proposal concerning the introduction of a new subparagraph aa). The placement and the exact wording of this provision need further discussion.

3. Art. 1 para 2, lit. c1. bb) (exclusion of CFSP)

9. The proposed exclusion of CFSP causes major concern for different reasons (political sensitivity; restriction of the jurisdiction of the Strasbourg Court) and should be deleted.

4. Art. 1 para 3, first indent (list of Protocols)

10. The Draft does not mention any more Art. 2 of Protocol 4 (which the EU does not intend to ratify for the time being) and Art. 2 of Protocol 6 (partial application of the Protocol). This raises questions and concerns which need to be discussed.

IV. Art. 3 Co-respondent mechanism (CRM)

In relation to the positions presented in this chapter, Norway does not make up a part of the NEUMS.

1. Art. 3 § 2 (extension of CRM)

11. The NEUMS, with the exception of Iceland, opt for a solution ensuring that the EU can (or must, if the CRM is binding; see below, point 12) 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 member of the EU, and the application raises questions of compatibility with the Convention of an international agreement between that State and the EU. In these cases, there is an interest of that State to see the EU participating in the procedure and, if appropriate, in the execution of the judgement of the Court.

2. Art. 3 § 5 (*non binding character of CRM*)

12. The NEUMS point out that, given the main purpose of accession, it would be consequent to make the CRM binding in the sense that the EU and its member States have to accept the invitation of the Court. A optional character of the CRM might lead to gaps in participation and, consequently, to lack of accountability and enforceability in the ECHR system.

3. Art. 3 § 6 (*prior involvement*)

13. The NEUMS affirm that the prior involvement of the Luxembourg Court is not consistent with the principle of subsidiarity, that the procedure would constitute a privilege for one Contracting Party and that the impact on the Strasbourg Court of the assessment made by the Luxembourg Court should not be underestimated. The subsidiary nature of the supervisory mechanism established by the ECHR requires that any person with a claim that their rights and freedoms as set forth in the ECHR have been violated, has available an effective remedy before a domestic authority providing adequate redress, where appropriate.

14. The issue needs further consideration and should be seen in the wider context of derogations from the principle of equal footing.

4. Art. 3 § 7 (*responsibility*)

15. Regarding the question of joint responsibility, the NEUMS welcome the compromise solution presented in the last meeting of the CDDH-UE 47+1, in the sense that a joint request for single responsibility is not sufficient to bind the Court. On the other hand, the Court is not authorized to hold only one party responsible if there is no joint request. The NEUMS are of the opinion that in judicial proceedings, a tribunal can in no circumstances be bound by the conclusions presented by one or several parties. In this sense, the proposal appears to be inconsistent with the ECHR system: the Court should decide on its own whether to hold the EU liable as a co-respondent and the latter should comply with the ruling.

V. Art. 7 Participation of EU in the CM

1. Art. 7 § 1 (*scope of EU participation*)

16. The current practice within the Council of Europe has been to grant voting rights in the Committee of Ministers to member states only. In the absence of a clear change of position within the Council of Europe, it would not be advisable to depart from this practice.

17. Therefore, the NEUMS see merits in the proposal to restrict the participation of the EU in the Committee of Ministers related to the functions which the Convention explicitly attributes to the latter, and consequently to delete the remainder of paragraph 1 of Article 7 which refers to the participation in Committee of Ministers' statutory functions. 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.

18. The question raised is one of principle and should be solved within a wider context than the accession negotiations. A suitable arena for such a task could be the on-going review of the functioning of the Conventions, which includes an assessment of the rights of parties which are not

members of the Council of Europe. A decision on the solution chosen for the accession agreement should not create a new precedent and thereby prejudice the wider on-going review process.

2. Art. 7 § 2 a) (obligation to coordinate)

2.1 Text itself

19. The NEUMS prefer to keep the text in paragraph 2 letter a stating the obligation of the EU and its member States to express their positions and vote in a coordinated manner. Although it is merely declaratory, the sentence is of importance because it explains the need for a specialised regulation on voting where the EU is involved.

2.2 Rules on voting rights in cases involving EU: substance

20. In the view of the NEUMS, it would be appropriate to limit the adoption of special rules to very specific situations in which the EU would be most likely obliged to coordinate its position with that of its member States. In addition, 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 ECHR.

21. Regarding the majority required for adopting final resolutions, the NEUMS see some merits in the rule of a majority of 4/5 of all the HCP. This solution avoids the difficulty related to an adjustment clause.

22. As for the solution for decisions other than those relating to final resolutions, the panel solution proposed by the EU is not ideal and should preferably be rejected in its entirety.

2.3 Rules on voting rights in cases involving EU: placement

23. The NEUMS reiterate their hesitation towards the use of a gentleman's agreement. The voting rules are of such principal importance that they should be placed in a legally binding instrument.

3. Art. 7 § 2 b) and c) (lack of equal footing in cases not involving EU)

24. The NEUMS, with the exception of Norway, have doubts about the solution regarding the participation of the EU in the supervision of the fulfilment of obligations by the Contracting Parties, other than the EU. The proposed solution would give rise to differences in the supervision of the fulfilment of obligations by a Member State of the EU, on the one hand, and by a State which is not a member of the EU, on the other. In order to avoid such unequal treatment, the formulation should be amended so that the EU cannot express a position or exercise its right to vote where the Committee of Ministers supervises the fulfilment of obligations by other Contracting Parties.

APPENDIX IV**Draft Secretariat Proposal (paragraph 9 of the meeting report)****Accession Agreement (General Attribution Clause):**

For the purposes of the Convention, of the Protocols thereto and of this Agreement, 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, **including Council decisions taken under the Treaty on 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 this Agreement.

Explanatory report:

Under EU law the acts of Member States implementing EU law and Council decisions under the TEU are attributable to Member States. For the sake of consistency, parallel rules should apply for the purposes of the Convention system. It should be recalled that the approach followed by the Court 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, has consistently been to have regard to the particular facts of each case, and in particular to the applicable legal basis. It is expected that the Court would follow the same approach also in respect of the EU, after its accession, including with regard to matters related to the EU common foreign and security policy. In fact, 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 (see inter alia *Behrami and Saramati*, para. 122; *Al-Jedda*, para. 76) there was 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. Conversely, acts, measures and omissions of the EU institutions, bodies, offices or agencies, or of persons acting on their behalf are attributable to the EU in whichever context they occur, including with regard to matters related to the EU common foreign and security policy³.

³ Examples could be provided if necessary