



Strasbourg, 28 January 2011

CDDH-UE(2011)03

**5<sup>th</sup> WORKING MEETING OF THE CDDH INFORMAL WORKING  
GROUP ON THE ACCESSION OF THE EUROPEAN UNION TO THE  
EUROPEAN CONVENTION ON HUMAN RIGHTS (CDDH-UE)  
WITH THE EUROPEAN COMMISSION**

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**Draft meeting report**

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Strasbourg, Tuesday 25 January (9.30 am) – Friday 28 January 2011 (1.30 pm)

Agora Building, Room G04  
Council of Europe

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**Item 1:        Opening of the meeting and adoption of the agenda**

1.        The fifth working meeting of the CDDH informal working group on the accession of the European Union to the European Convention on Human Rights (CDDH-UE) with the European Commission was held in Strasbourg on 25-28 January 2011 with Ms Tonje MEINICH (Norway) in the Chair. The list of participants can be found in Appendix I. The agenda as adopted and the references to the working documents appear in Appendix II.

**Item 2:        Exchange of views with representatives of civil society**

2.        In accordance with the decisions taken at the last meeting, the participants held an exchange of views with representatives of civil society, namely the Advice on Individual Rights in Europe (AIRE) Centre, speaking also on behalf of Amnesty International, the European Trade Union Confederation and JUSTICE, and with the European Group of National Human Rights Institutions.

3.        The representatives of civil society stressed the vast potential of topics which could raise an issue under both EU law and the Convention after the EU accession to the latter, such as the transfer and detention of asylum seekers, the transfer of suspects under the EU arrest warrant, cross-border issues, child custody issues, discrimination based on nationality, trafficking of human beings or data protection. They underlined the importance to apply to the EU with regard to the Court's jurisdiction *ratione temporis* the same standards as for any other High Contracting Party that had acceded to the Convention system in the past. With regard to the introduction of a co-respondent mechanism, the representatives of civil society suggested that, while the introduction of such a mechanism was in general to be welcomed and certainly to the applicant's benefit, its application should rather be handled with caution. They underlined that in their view in the majority of cases involving EU law it would be sufficient to involve the EU as a third party to the proceedings, rather than as a co-respondent, and that the use of the co-respondent mechanism would add considerable burden on the applicants, not least with regard to legal costs. Finally, it was underlined that in cases involving co-respondents third-party interventions should commence only once the submissions by the co-respondent has been received. The representatives of civil society also gave their opinions on the prior involvement of the Court of Justice of the European Union in cases in which it has not been able to pronounce itself on the compatibility of an EU act with fundamental rights.

4.        At the end of the exchange of views, the participants thanked the representatives of civil society for their very valuable presentations and contributions. They stressed that this input had provided considerable elements for reflection in view of the discussion of certain issues at future meetings. The representatives of civil society wishing to do so were invited to submit a new paper with their observations in writing on time for the next meeting of the CDDH-UE, in March 2011. The representatives of civil society expressed the view that a second round of consultations would be desirable once discussion on the first draft of the accession agreement will be completed.

**Item 3.:      Elaboration of the accession instrument(s) :****a.      Procedural means guaranteeing the prior involvement of the Court of Justice in cases in which it has not been able to pronounce on compatibility of an EU act with fundamental rights (item C.5 of the provisional list of issues)**

5.      The participants were informed about the meeting held on 17 January 2011 in Luxembourg between delegations of the European Court of Human Rights and of the Court of Justice of the European Union, and about the joint communication by the Presidents of the two Courts (attached in Appendix III). The participants then focused on option 4 proposed by the Secretariat in document CDDH-UE(2011)02.

6.      Most participants recognised that in cases where the European Union is a co-respondent, the Court of Justice of the European Union should have the opportunity to rule, if it has not yet done so, on the conformity of the act of the European Union at issue with fundamental rights, and that for this purpose an internal EU accelerated procedure should be set up and referred to in the accession agreement. Such a procedure should not affect the competences of the European Court of Human Rights. It was also recognised that while the procedure before the European Court of Human Rights should take into account the proceedings before the Court of Justice of the European Union, the latter should not unduly delay the procedure before the European Court of Human Rights. On this basis, the Group tentatively agreed on a possible text of a provision for the accession agreement dealing with the matter, which appears in Appendix IV to the present report, and gives instructions to the Secretariat with regard to the corresponding text for the explanatory report. However, a number of participants reserved their general position on the introduction of this procedure, including with respect to its conformity with the principle of equality of all High Contracting Parties. Some participants considered that such procedure should also be mentioned in the Convention, pending a clearer definition of the co-respondent mechanism, of which such procedure would be part. It was therefore agreed to come back to this question in the context of the future discussions on the co-respondent mechanism.

**b.      Exchange of views with Mr Mário Martins, Director General of Administration, on Participation of the EU in the expenditure related to the Convention system (item D.4 of the provisional list of issues)**

7.      In the absence of the Director General of Administration, the Secretariat reported to the participants about the developments in the discussions with the European Commission on the possible methods for calculation of the contribution of the EU to the expenditure related to the Convention system. On the basis of the conclusion of such discussions, the Secretariat shall submit a proposal for a specific provision in the accession agreement.

**c.      Examination of issues mentioned in chapter E of the provisional list of issues on the basis of draft elements prepared by the Secretariat**

8.      The participants discussed the question of the final clauses of the accession agreement on the basis of draft elements prepared by the Secretariat. As regards the signature and ratification of the accession agreement, it was agreed that the accession agreement should contain a provision based on the standard clause proposed by the Secretariat in paragraph 5 of document CDDH-UE(2011)01, with a number of amendments taking into account the specificities of such agreement.

9. It was also agreed that only the current High Contracting Parties to the Convention and the EU will become parties to the accession agreement, and that therefore a classical provision opening the latter for signature by any (current and future) party to the Convention would not be necessary. As regards States becoming High Contracting Parties to the Convention after the opening for signature of the accession agreement, the possible need to ensure that they are bound by the provisions of the accession agreement which have “permanent” effects shall be ensured otherwise.

10. As regards the modalities of the entry into force of the accession agreement, the participants agreed that a tacit acceptance clause is an option that could not politically be envisaged, and that in such context a “traditional” entry into force clause such as the one proposed by the Secretariat in paragraph 8 of document CDDH-UE(2011)01 would be preferable. Most participants also considered that the characteristics and the effects of the accession agreement were such that it would not seem appropriate to give provisional application to it, or to a part thereof.

11. The participants agreed, as regards the effects of the entry into force of the accession agreement, that the ratification of the accession agreement by the 47 High Contracting Parties to the Convention and by the European Union, and the consequent entry into force, will have the simultaneous effect of amending the Convention and include the European Union among its Parties, without the need for a further deposit of an instrument of accession to the Convention by the latter.

12. With respect to future amending and additional protocols (item E.3 of the provisional list of issues), the participants noted that this question was strictly linked to the question of the possible right to vote to be granted to the European Union in the Committee of Ministers when the latter exercises functions under the Convention (in particular under Articles 39 and 46), on which no consensus had been reached at the last meeting.

13. With respect in particular of the right of the EU to take part in the decision-making procedure when elaborating amending and additional protocols to the Convention, as well as other instruments related thereto, the discussion focused on two questions: on the elaboration of which instruments should the EU take part with a right to vote, and in which Council of Europe bodies should such participation be envisaged. On the first question, it was considered that the EU should be entitled to a right to vote when adopting amending and additional protocols to the Convention, as well as with regard to instruments by which it would, as a party to the Convention, be directly affected. On the second question, bearing in mind the distinction between the “statutory” and the “conventional” functions of the Committee of Ministers, it was noted that, so far, the Convention did not contain any provision regarding the adoption of amending and additional protocols, and that such instruments were at present adopted by the Committee of Ministers exercising its “statutory” functions.

14. On this basis, the participants considered that it could be possible, in principle, to amend the Convention to have the effect that decisions regarding amending and additional protocols, as well as any other non-binding instrument addressed to the High Contracting Parties to the Convention, may be taken by the Committee of Ministers with the participation, with right to vote, of the other High Contracting Parties to the Convention.

15. Finally, the participants agreed on the notification clause proposed by the Secretariat in paragraph 20 of Document CDDH-UE(2011)01.

**Item 4: Any other business**

16. The participants agreed on the possibility, at one of the forthcoming meetings, to hold an exchange of views with members of the Parliamentary Assembly. The participants also agreed to hold their 7<sup>th</sup> meeting from 10 to 13 May 2011, subject to confirmation by the CDDH. Decisions on future meetings were postponed waiting for guidance from the CDDH in this respect. The 6<sup>th</sup> meeting will be held, as agreed, from 15 to 18 March in Strasbourg.

## APPENDIX I

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## APPENDIX II

### Agenda

1. **Opening of the meeting and adoption of the agenda**
2. **Exchange of views with representatives of civil society**

#### Working documents

Views of the European Group of National Human Rights Institutions on EU Accession to the ECHR submitted to the CDDH-UE Working Group	European Group of National Human Rights Institutions
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NGOs' perspective on the EU accession to the ECHR: the proposed co-respondent procedure and consultation with civil society	Joint submission
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Recommendations on the EU's Accession to the European Convention on Human Rights (ECHR) submitted by the European Trade Union Confederation (ETUC) to the CDDH-UE Working Group	ETUC/CES
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3. **Elaboration of the accession instrument(s) :**

- a. **Procedural means guaranteeing the prior involvement of the Court of Justice in cases in which it has not been able to pronounce on compatibility of an EU act with fundamental rights (item C.5 of the provisional list of issues)**

- b. **Exchange of views with Mr Mário Martins, Director General of Administration, on Participation of the EU in the expenditure related to the Convention system (item D.4 of the provisional list of issues)**

- c. **Examination of issues mentioned in chapter E of the provisional list of issues on the basis of draft elements prepared by the Secretariat**

#### Working documents

Draft elements prepared by the Secretariat on Final Clauses (Chapter E of the draft list of issues)	CDDH-UE(2011)01
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Draft additional elements prepared by the Secretariat on Procedural means guaranteeing the prior involvement of the Court of Justice of the EU in cases in which it has not been able to pronounce on compatibility of an EU act with fundamental rights (Item C.5 of the provisional list of issues)	CDDH-UE(2011)02
4th working meeting report (6-8 December 2010)	CDDH-UE(2010)17

Draft elements prepared by the Secretariat on the Procedure before the European Court of Human Rights (Chapter C of the draft list of issues)	CDDH-UE(2010)12
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Draft elements prepared by the Secretariat on Institutional and Financial issues (Chapter D of the draft list of issues)	CDDH-UE(2010)15
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4. **Any other business**

**APPENDIX III****Joint communication from Presidents Costa and Skouris**

Delegations from the European Court of Human Rights (ECHR) and the Court of Justice of the European Union (CJEU) met on 17 January 2011 at the seat of the CJEU, in Luxembourg, in the context of the regular meetings of the two courts. As is usual on the occasion of these meetings, subjects of common interest were discussed. The first subject related to the application of the Charter of Fundamental Rights of the European Union and the second to the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

1. As regards the Charter, it was observed that it has swiftly become of primary importance in the recent case-law of the CJEU. Since 1 December 2009, the date on which the Treaty of Lisbon entered into force and the date on which that treaty conferred on the Charter the status of primary law of the EU, it has been cited in some thirty judgments. Thus the Charter has become the reference text and the starting point for the CJEU's assessment of the fundamental rights which that legal instrument recognises. It is thus important to ensure that there is the greatest coherence between the Convention and the Charter insofar as the Charter contains rights which correspond to those guaranteed by the Convention. Article 52(3) of the Charter provides moreover that, in that case, the meaning and scope of the rights under the Convention and the Charter are to be the same. In that connection, a "parallel interpretation" of the two instruments could prove useful.

2. The accession of the EU to the Convention constitutes a major step in the development of the protection of fundamental rights in Europe. The Member States of the EU have enshrined the principle of that accession in the Treaty of Lisbon. As regards the Council of Europe, Protocol No 14, which entered into force on 1 June 2010, amends Article 59 of the Convention in order that the EU may accede to it. As a result of that accession, the acts of the EU will be subject, like those of the other High Contracting Parties, to the review exercised by the ECHR in the light of the rights guaranteed under the Convention.

In the context of this review of consistency with the Convention, a distinction can be drawn between direct actions and indirect actions, namely, on the one hand, individual applications directed against measures adopted by EU institutions subsequent to the accession of the EU to the Convention and, on the other, applications against acts adopted by the authorities of the Member States of the EU for the application or implementation of EU law. In the first case, the condition relating to exhaustion of domestic remedies, imposed under Article 35(1) of the Convention, will oblige applicants wishing to apply to the ECHR to refer the matter first to the EU Courts, in accordance with the conditions laid down by EU law. Accordingly, it is guaranteed that the review exercised by the ECHR will be preceded by the internal review carried out by the CJEU and that subsidiarity will be respected.

By contrast, in the second case, the situation is more complex. The applicant will have, first, to refer the matter to the courts of the Member State concerned, which, in accordance with Article 267 TFEU, may or, in certain cases, must refer a question to the CJEU for a preliminary ruling on the interpretation and/or validity of the provisions of EU law at issue. However, if, for whatever reason, such a reference for a preliminary ruling were not made, the ECHR would be required to adjudicate on an application calling into question provisions of EU law without the CJEU having the opportunity to review the consistency of that law with the fundamental rights guaranteed by the Charter.

In all probability, that situation should not arise often. The fact remains, however, that it is foreseeable that such a situation might arise because the preliminary ruling procedure may be launched only by national courts and tribunals, to the exclusion of the parties, who are admittedly in a position to suggest a reference for a preliminary ruling, but do not have the power to require it. That means that the reference for a preliminary ruling is normally not a legal remedy to be exhausted by the applicant before referring the matter to the ECHR.

In order that the principle of subsidiarity may be respected also in that situation, a procedure should be put in place, in connection with the accession of the EU to the Convention, which is flexible and would ensure that the CJEU may carry out an internal review before the ECHR carries out external review. The implementation of such a procedure, which does not require an amendment to the Convention, should take account of the characteristics of the judicial review which are specific to the two courts. In that regard, it is important that the types of cases which may be brought before the CJEU are clearly defined. Similarly, the examination of the consistency of the act at issue with the Convention should not resume before the interested parties have had the opportunity properly to assess the possible consequences of the position adopted by the CJEU and, where appropriate, to submit observations in that regard to the ECHR, within a time-limit to be prescribed for that purpose in accordance with the provisions governing procedure before the ECHR. In order to prevent proceedings before the ECHR being postponed unreasonably, the CJEU might be led to give a ruling under an accelerated procedure.

3. The two courts take the view that the results of their discussion can usefully be made known in the context of the negotiations on accession ongoing between the Council of Europe and the EU. They are determined to continue their dialogue on these questions which are of considerable importance for the quality and coherence of the case-law on the protection of fundamental rights in Europe.

## APPENDIX IV

### **Draft provision for the accession agreement on the CJEU prior involvement**

The following provision could appear in the Accession Agreement under the same heading of the provisions dealing with the co-respondent mechanism:

“1. Prior to a decision by the European Court of Human Rights on the merits of a case in which the European Union is a co-respondent, the Court of Justice of the European Union shall have the opportunity to rule, if it has not yet done so, on the [validity /conformity] of the act of the European Union [if the question of the validity/conformity is raised by the applicant] with [regard to] fundamental rights as set out in the [notification of that case // the case of which notice has been given] to the parties.

2. The Court of Justice of the European Union shall give such a ruling in accordance with internal rules of the European Union which shall, in particular, ensure that the ruling is delivered quickly so that the proceedings before the European Court of Human Rights are not unduly delayed.

3. It is understood that the procedure of the European Court of Human Rights takes into account the proceedings before the Court of Justice of the European Union as referred to in paragraphs 1 and 2.”