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**5th 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**

**Draft elements prepared by the Secretariat on Final Clauses
(Chapter E of the draft list of issues)**

Strasbourg, Tuesday 25 January (9.30 am) – Friday 28 January 2011 (1.00 pm)

Agora Building, Room G04
Council of Europe

Introduction

The following Draft elements on Final Clauses (Chapter E of the provisional list of issues) have been prepared by the Secretariat.

The elements indicate, in most cases, whether or not a provision would be necessary for the purposes of the accession agreement, and whether or not an amendment to the Convention (and/or to its Protocols) would also be required. In most cases, different options and the relative advantages are presented for discussion. It is understood that the options presented are not, in some cases, the only possible solutions, and that the proposals presented by the Secretariat are not intended to prejudge discussion on alternative solutions.

The elements are conceived as “building blocks”: as such, their current presentation does not prejudge their final presence or manner of presentation in the accession agreement and, where appropriate, in the Convention.¹

¹ Questions of legislative techniques for introducing amendments to the Convention will be discussed at a later stage.

E.1. Signature and Ratification

1. The provisions on signature and ratification of the accession agreement should follow the usual practice of Council of Europe treaties, whereby the agreement shall be opened for signature with or without reservation as to ratification, acceptance or approval, thus leaving to the Parties the choice as to the way to express their consent to be bound (i.e. ratification, acceptance or approval).

2. Once the drafting is completed, the accession agreement, as approved by the CDDH and after the required consultations within the European Union, shall be transmitted to the Committee of Ministers. The latter, in accordance with the practice followed when adopting Council of Europe conventions and agreements, shall consult the Parliamentary Assembly before adopting the agreement and fixing a date for its opening for signature.

3. The accession agreement should be ratified by all the Contracting Parties to the Convention. As a consequence, if a new State becomes a Contracting Party to the Convention before the entry into force of the accession agreement, its ratification would also be required (it being understood that the State would neither be entitled to make any reservation nor to propose any amendment to the accession agreement, and would have to accept it as it stands). It may be foreseen that, when defining the obligations of a new member State upon which its accession to the Council of Europe would be conditional, such State be required to become a Party to the accession agreement immediately after its accession to the Convention. Insofar as the commitments of States becoming members of the Council of Europe are defined by the Parliamentary Assembly, the explanatory memorandum to the accession agreement would probably be the most appropriate place for such an indication.

4. One of the specificities of the accession agreement is that it would contain some provisions amending the Convention, which would deploy their effect immediately at the moment of the entry into force, and other provisions which would have more “permanent” effects and would remain a relevant basis for the functioning of the Convention system post-accession (i.e. the provisions on the accessory agreements, the financial provisions etc.). Unlike usual amending protocols, the agreement would therefore not cease to exist and to produce effects with its entry into force. As a consequence of this special situation, it may be appropriate to include among the obligations of future member States with a view to their accession to the Council of Europe the engagement to respect the provisions of the accession agreement², or at least those provisions which would still be applicable after the entry into force of the agreement³. In the latter case, insofar as the commitments of States becoming members of

² An alternative, more cumbersome solution, could be to keep the agreement, or at least the parts of it which would remain relevant after its entry into force, open for accession by future High Contracting Parties. In this case, the signature and ratification provision should contain a clause to that effect.

³ It could be possible, if necessary, to “separate” the provisions of the agreement which have permanent effect from those which would deploy their effect at the moment of its entry into force, and to require

the Council of Europe are defined autonomously by the Parliamentary Assembly, the explanatory memorandum to the accession agreement would probably be the most appropriate place for such an indication.

5. The accession agreement could therefore contain a standard provision which could be drafted as follows:

“1. This Agreement shall be open for signature by the Member States of the Council of Europe Parties to the Convention and by the European Union, which may express their consent to be bound by :

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

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

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

The possible need to amend this standard clause in order to take into account the specific provisions of the TFEU regarding the modalities of conclusion of the accession agreement for the EU should however be assessed.

C.2. Entry into force

a) Modalities of the entry into force

6. As regards the entry into force of the accession agreement, it should be recalled that the practice followed to date regarding the entry into force of amending protocols to the Convention requires the signature and ratification or acceptance by all the Parties to the Convention, which usually takes a few years.

7. In order to speed up the entry into force of an amending protocol, a “tacit acceptance clause” might be envisaged. Such a clause has for example been successfully applied in the case of the Protocol amending the European Convention on Transfrontier Television (ETS 171, 1998). The clause in question provided for automatic entry into force following the expiration of a period of two years, in the absence of any objection. The use of such a clause does not prevent Parties from using their internal procedures and from depositing an instrument of ratification or acceptance. However, after a fixed period of time (e.g. three years), the protocol would enter into force automatically, unless a Party to the Convention

future Council of Europe member States to ratify only those provisions which should be binding also upon them.

notifies the Secretary General of the Council of Europe of an objection to its entry into force. In this event, the protocol would enter into force once the State concerned has withdrawn its objection. This procedure could be used, *mutatis mutandis*, also in the context of the present accession agreement. On the other hand, it should be noted that such tacit acceptance procedures have only exceptionally been used in the Council of Europe and, more generally, in international treaty practice.

8. The accession agreement could therefore contain, according to the preferred option, the following provisions:

“Traditional” option:

“This Agreement shall enter into force on the first day of the month following the expiration of a period of [x] months⁴ after the date on which all Parties to the Convention and the European Union have expressed their consent to be bound by the Agreement in accordance with the provisions of Article [... (article on signature and ratification)].”

Tacit acceptance option

“1 This Agreement shall enter into force on the first day of the month following the expiration of a period of [x] months after the date on which all Parties to the Convention and the European Union have expressed their consent to be bound by the Agreement in accordance with the provisions of Article [... (article on signature and ratification)].

2 However, this Agreement shall enter into force following the expiry of a period of [...] years after the date on which it has been opened for signature, unless a Party to the Convention, or the European Union, has notified the Secretary General of the Council of Europe of an objection to its entry into force.

3 Should such an objection be notified, the Agreement shall enter into force on the first day of the month following the expiration of a period of [x] months following the date on which the Party to the Convention, or the European Union, which has notified the objection has expressed its consent to be bound by the Agreement in accordance with the provisions of Article [... (article on signature and ratification)]. Any objection shall be without prejudice to the other Parties’ tacit acceptance in accordance with the preceding paragraph.”

⁴ The time lapse between the deposit of the last instrument of expression of consent to be bound and the entry into force of the agreement should be sufficient to ensure that all the possible practical arrangements necessary for the functioning of the Convention system with the EU as a High Contracting Party are made. Some arrangements - such as the adoption of internal EU rules or the necessary Council of Europe statutory resolutions (which could be drafted in a manner to make them conditional upon the EU accession) - could already be made before the ratification. In contrast to this, the certainty of the entry into force of the accession agreement (which only ratification can ensure) would be indispensable for other arrangements. That is the case, for instance, as regards the election of the judge on behalf of the EU.

b) Effects of the entry into force

9. As discussed already under Chapter A, another question concerns the effects of the entry into force of the accession agreement. All the provisions presented so far are based on the assumption that the European Union will accede to the Convention simply by ratifying the accession agreement, which will therefore also serve as an “instrument of accession”. In other words, the ratification of the accession agreement by the hitherto 47 High Contracting Parties and by the European Union will have the simultaneous effect, at the moment of the entry into force of the agreement, of amending the Convention and expanding its membership to the European Union, without the need for a further deposit of an instrument of accession to the Convention by the latter.

10. Another solution would be that the ratification of the accession agreement determines its entry into force and the necessary adaptations of the Convention, and that the European Union will subsequently deposit (possibly within a prescribed time-limit) an instrument of accession to the Convention, thereby formally acceding to it.

11. The final choice among these options may have an impact on a number of provisions in which it is necessary to determine the moment from which those provisions produce their effects (such as, for instance, the provision on reservations). In those provisions, reference would have to be made to either the entry into force of the agreement or to the deposit of the accession instrument by the European Union.

C.3. Future amending and additional protocols

12. The European Convention on Human Rights does not contain specific provisions regarding its amendment. So far, each new amending protocol has been drafted and approved by a steering committee composed of representatives of all the member States of the Council of Europe and adopted by the Committee of Ministers. Given the identity in the membership of the Council of Europe and of the Convention, this practice was in compliance with the requirements of the Vienna Convention on the Law of Treaties regarding amendments to treaties (Articles 39 and 40), while preserving at the same time the central role of the Committee of Ministers of the Council of Europe in the procedure for the adoption of Council of Europe conventions, agreements and protocols related thereto. The same procedure has been followed with regard to the adoption of other legal instruments, such as recommendations, declarations and resolutions which are related to the Convention system (see, for instance, the recent Committee of Ministers’ Resolution CM/Res(2010)26 establishing an Advisory Panel of Experts on Candidates for the Election as Judge to the European Court of Human Rights, which entrusts the Committee of Ministers with the task of appointing the members of the Advisory Panel).

13. It should be determined whether, upon its accession to the Convention, the European Union should be entitled to a right to vote on all issues related to the Convention which are not explicitly mentioned in the latter itself (see also item D.3 of the document CDDH-UE(2010)15).

14. As regards amending (and additional) protocols to the Convention, international law rules would require the consent of the European Union as a contracting party to a multilateral treaty, for the adoption of a new protocol. In order to respect the prerogatives of the Committee of Ministers with regard to the adoption of Council of Europe conventions and protocols, a possible solution could be to specify – presumably in the Convention – that any amendment to the Convention shall be adopted by the Committee of Ministers in its composition expanded to all the High Contracting Parties to the Convention. Another possible solution, already used in other Council of Europe instruments opened to the accession of non-member states or of the European Union, would consist in leaving the decision on amendments to the Committee of Ministers in its statutory composition, but only following consultations and after having obtained the unanimous consent of all the Parties to the Convention⁵.

15. The same question arises as regards the adoption of other instruments related to the Convention (including notably non-binding instruments such as recommendations, declarations and resolutions). Such instruments are at present – as indicated above – adopted by the Committee of Ministers as a body of the Council of Europe acting pursuant to the Statute of the Council of Europe, and not as an “organ of the Convention”. These instruments are related to the functioning of the Convention system but there is no reference to such instruments in the Convention. The involvement of the European Union (in terms of the right to vote) could then be limited to the elaboration and approval of such texts at the level of intergovernmental committees. Subsequently, the Committee of Ministers could proceed to their adoption in its statutory composition. This procedure would be similar to the procedure already followed when adopting instruments related to other Conventions to which States which are not members of the Council of Europe are a party (such as the European Cultural Convention). One possible option would thus be to grant the European Union the right to vote as regards the adoption of other instruments related to Convention at the level of the intergovernmental committees of experts elaborating and approving such instruments, but not in the Committee of Ministers. Conversely, it could also be argued that, given the importance of such instruments for the correct functioning of the Convention system, it would seem appropriate that all High Contracting Parties to the Convention have a right to vote in the

⁵ See for instance Article 41 of the Council of Europe Convention on action against trafficking in human beings :

“1 Any proposal for an amendment to this Convention presented by a Party shall be communicated to the Secretary General of the Council of Europe and forwarded by him or her to the member States of the Council of Europe, any signatory, any State Party, the European Community, to any State invited to sign this Convention in accordance with the provisions of Article 42 and to any State invited to accede to this Convention in accordance with the provisions of Article 43.

2 Any amendment proposed by a Party shall be communicated to GRETA, which shall submit to the Committee of Ministers its opinion on that proposed amendment.

3 The Committee of Ministers shall consider the proposed amendment and the opinion submitted by GRETA and, following consultation of the Parties to this Convention and after obtaining their unanimous consent, may adopt the amendment.

4 The text of any amendment adopted by the Committee of Ministers in accordance with paragraph 3 of this article shall be forwarded to the Parties for acceptance.

5 Any amendment adopted in accordance with paragraph 3 of this article shall enter into force on the first day of the month following the expiration of a period of one month after the date on which all Parties have informed the Secretary General that they have accepted it.”

Committee of Ministers when the latter adopts such instruments. If this second option is considered preferable, the question should then be dealt with in the same manner as with regard to amendments to the Convention (see above).

16. While it would seem necessary that explicit provisions regulating this issue appear in the accession agreement, the question as to whether an amendment of the Convention would be necessary in this respect seems more open. It could be argued that, as to date, no explicit provisions regarding amendments appear in the Convention, and that therefore the general rules of international treaty law apply. As a consequence, one might further argue that an amendment would not be necessary since, in accordance with international law, the consent of the European Union would be required to adopt any amendment to the Convention after its accession. At the same time, the respect of the prerogatives of the Committee of Ministers when adopting Council of Europe legal instruments may justify the inclusion of an explicit provision in the Convention specifying that when adopting amendments to the Convention it shall sit in a composition extended to all the High Contracting Parties to the Convention.

17. As regards the decision to be taken with respect to the right to vote of the European Union in the Committee of Ministers and in its subordinate bodies when drafting and adopting other instruments related to the Convention but not referred to therein, a provision in the accession agreement would seem sufficient.

18. In addition, as already envisaged with respect to the composition of the Parliamentary Assembly and of the Committee of Ministers under chapter D, the adoption of a statutory resolution of the Committee of Ministers of the Council of Europe may be necessary – according to the final decisions taken – to give “internal” application to the provisions of the accession agreement (and of the Convention, if appropriate).

19. In the most simple scenario, in which it is agreed that the European Union shall be allowed to participate, with a right to vote, in the Committee of Ministers of the Council of Europe whenever it exercises functions related to the Convention (including the adoption of amending and additional protocols to the Convention and other non-binding instruments), the provision of the accession agreement could be similar to the provision suggested under point D.3 of document CDDH-UE(2010)15:

“1. The European Union shall be allowed to participate, with a right to vote, in the Committee of Ministers of the Council of Europe whenever it exercises functions related to the Convention.

2. The Committee of Ministers of the Council of Europe shall adopt a Statutory Resolution to this end.”

C.4. Notifications

20. The Secretary General of the Council of Europe shall act as depositary of the agreement. As such, it will be in charge of notifying the High Contracting Parties to the Convention and the European Union any signature, deposit of instrument of ratification, acceptance or approval, and any other relevant act relating to the agreement. The standard clause used in Council of Europe conventions and agreements, which could be used (with some adaptations) also in this context, is the following:

“The Secretary General of the Council of Europe shall notify the member States of the Council of Europe and the European Union 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.* any date of entry into force of this Agreement in accordance with Article ...;
- 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.”