



ARTICLES

THE REVISED DRAFT AGREEMENT ON THE ACCESSION OF THE EU TO THE ECHR

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EU ACCESSION TO THE ECHR: THE NON-EU MEMBER STATE PERSPECTIVE

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ABSTRACT: The present *Article* addresses the perspective from a negotiator of a multilateral treaty that has not yet been finalised. The first part sets the frame of the former negotiation exercise and the preparatory work on which it is based. A particular focus lies on the non-EU Member States group, its main features, and the negotiating principles it has endeavoured to follow. The second part addresses the substance of the revised draft agreement, drawing on the structure in four baskets proposed by the EU Commission. The final part contains a general, provisional appraisal of the negotiation exercise, bearing in mind that the final position of the 46+1 negotiating parties is outstanding.

KEYWORDS: EU accession to the ECHR – negotiations – *Opinion 2/13* – Non-EU Member States – Negotiating principles – Committee of Ministers.

I. RESUMING NEGOTIATIONS: COMMON BASIS AND NEW REQUESTS

Following the adoption of *Opinion 2/13* of the Court of Justice of the European Union (CJEU) on 18 December 2014,¹ a period of analysis and reflection has been considered necessary by both sides, *i.e.* the European Union (EU) and the Council of Europe (CoE).²

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¹ *Opinion 2/13 Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454.

² For a short historic overview of the negotiation process, see the *Article* of T Meinich, 'From Opinion 2/13 to the 2023 Draft Accession Agreement: The Chair's Perspective' (2024) *European Papers* 685 www.europeanpapers.eu.



On 31 October 2019 the EU Commission informed the Secretary General of the CoE of the willingness of the EU to resume negotiations. On 15 January 2020 the Committee of Ministers of the CoE decided to relaunch the adoption of the legal instruments establishing the accession modalities of the EU to the ECHR. This was reflected in a Joint Statement on behalf of the CoE and the European Commission, which was issued on 29 September 2020.³ These developments led to the resumption of the negotiation process in the so-called “47+1” Group format. A first, informal meeting of the 47+1 Group took place in June 2020 and was followed by 13 subsequent formal negotiations, which ended with the 18th meeting of the 46+1 Group on 14–17 March 2023.⁴

From the outset it was generally accepted that the renegotiation process should not start from scratch – quite the contrary: the 2013 draft accession instrument was considered by all delegations, including those from the non-EU Member States (NEUMs), as a common basis and the main point of reference.⁵ In this context, the importance of the principles on the accession negotiations as outlined in para. 7 of the explanatory report to the 2013 Draft Accession Agreement (DAA) was recalled.⁶

The accession instruments of 2013 indeed represent a carefully elaborated package, and it was considered important not to draft an entirely new agreement. The EU, for its part, recalled that the renegotiation of a limited number of provisions of the Accession Agreement was required and that it would limit its request for amendments to what is strictly necessary to address these objections.⁷ The EU Commission’s position paper of 5 March 2020 was therefore meant to remedy only these objections, in the interest of the rule of law and legal certainty.⁸

While this approach was not *per se* challenged by the NEUMs,⁹ it became quickly apparent that at least some of the NEUMs did not want to limit the renegotiation exercise

³ Council of Europe and European Commission, *The EU’s Accession to the European Convention on Human Rights* (29 September 2020) www.coe.int.

⁴ The meetings were not renumbered, but continued from the numbering of the first round of negotiation. The change from “47+1” to “46+1” reflects the fact that Russia stopped participating in the negotiations following their exclusion from the Council of Europe in March 2022.

⁵ The ad hoc terms of reference adopted by the Ministers’ Deputies in January 2020 explicitly mentions that the negotiation shall resume “[...] on the basis of the work already conducted” (see 46+1 ad hoc Group, ‘Interim Report to the Committee of Ministers’, including the revised draft accession instruments in appendix CDDH(2023)R_Extra Addendum of 4 April 2023 para. 4).

⁶ Council of Europe, *Interim Report to the Committee of Ministers, for Information, on the Negotiations on the Ascension of the European Union to the European Convention on Human Rights* (29 September 2020) search.coe.int.

⁷ 47+1 ad hoc Group, ‘Meeting Report of the 8th Meeting, 47+1(2021)R8’ (June 2020) para. 8.

⁸ 47+1 ad hoc Group, ‘Meeting Report of the 6th Meeting, 47+1(2020)R6’ (22 October 2020).

⁹ The non-EU Member States took the view that “the current negotiations should consider the challenges identified by the CJEU in Opinion 2/13, but at the same time take due consideration of the overall balance reached in the 2013 Accession Instruments” (see item 3 of the Common Statement, Appendix III of the 6th Meeting report: 47+1 ad hoc Group, in ‘Meeting Report of the 6th Meeting, 47+1(2020)R6’ cit.).

to those issues that had been considered problematic by the CJEU. Some delegations underlined the importance that the negotiations would look at the accession instruments as a whole and not be limited to those areas which the EU has identified in its position paper.¹⁰ More specifically, two delegations announced during the 6th meeting of the 47+1 Group their intention to raise other issues which were not contained in the Paper by the Chair to structure the discussion at the 6th negotiation meeting.¹¹ These issues concerned arts 6, 7 and 8 of the Draft Accession Agreement and its appendices.¹²

In addition to those material issues not addressed in *Opinion 2/13* which some NEUMs wanted to include in the negotiation process, another important request was raised: one delegation inquired about the possibility for an opinion of the ECtHR on the DAA.¹³ This was considered possible once the revised DAA has been officially submitted for adoption to the Committee of Ministers.¹⁴

A final, organisational aspect worth mentioning is the designation of the Chair and Vice-Chair of the 47+1 Group. As was the case in the first negotiations, the common understanding was that these positions should be held by delegates from NEUMs, not least to ensure a proper balance in the exercise and sufficient leeway to lead the discussions. While Tonje Meinich (Norway) accepted to continue to act as the Chairperson,¹⁵ the author of this contribution (Switzerland) was elected as Vice-Chair during the 6th meeting of the 47+1 Group.

Upon resumption of the negotiations, the NEUMs tried to organise themselves and find ways and means to coordinate their position. The way in which they did so will be analysed in further detail in section II below. These efforts immediately resulted in an informal meeting of the NEUMs held on the margins of the 6th meeting of the 47+1 Group. This meeting led to the adoption of a Common Statement of 1 October 2020 setting out *inter alia* Key Negotiating Principles of particular importance to the NEUMs.¹⁶ The NEUMs expressed their expectation that the EU would submit concrete drafting proposals in order to advance the negotiation process.¹⁷ Indeed, they felt it was up to the EU to take the initiative in this respect since they were all able support the result of the 2013 DAA.

¹⁰ 47+1 ad hoc Group, 'Meeting Report of the 6th Meeting, 47+1(2020)R6' cit. para. 3.

¹¹ 47+1 ad hoc Group, 'Paper by the Chair to Structure the Discussion at the Sixth Meeting of the CDDH ad hoc Negotiation Group ('47+1') on the Accession of the European Union to the European Convention on Human Rights' 47+1(2020)2 (31 August 2020).

¹² *Ibid.* para. 41.

¹³ *Opinion 2/13* cit.

¹⁴ *Ibid.* para. 43.

¹⁵ See T Meinich, 'From Opinion 2/13 to the 2023 Draft Accession Agreement: The Chair's Perspective' cit.

¹⁶ *Ibid.* para. 46 and Appendix III.

¹⁷ See item 4 of the Common Statement, Appendix III of 47+1 ad hoc Group, 'Meeting Report of the 6th Meeting, 47+1(2020)R6' cit.

II. NON-EU MEMBER STATES: AN ACTOR OF ITS OWN OR A LOOSE AGGREGATE OF DIVERGING INTERESTS?

II.1. CONTEXT, CHANGES AND ONGOING DEVELOPMENTS

The overall context of the negotiation process is well known: as a full member of the 47+1 Group, the EU is represented by the European Commission, which is entitled to negotiate also on behalf of the EU Member States. The position of the EU and its Member States must of course be aligned. This is done during EU-internal, separate meetings in which NEUMs do not participate. In the course of the negotiation within the 47+1 Group, the EU Member States cannot take a position which would contradict that of the EU. They can only intervene in support of the EU. This particular configuration is not unique: it exists whenever the EU negotiates its accession to a Council of Europe treaty pertaining to a subject matter for which there is an EU competence.

The NEUMs form the “counterparty” of the negotiation process. It is important to stress, however, that although the NEUMs may be seen as a group, they do not constitute a formal or institutional association of any sort. Admittedly, they have important interests in common, in particular their commitment to the preservation of the proper functioning of the Convention system and their willingness to avoid weakening the position of the applicants in the Convention procedures. The NEUMs also pursue the same main objectives, *i.e.*, to ensure a coherent development of human rights between Luxembourg and Strasbourg and to enhance human rights protection in Europe, including through the possibility of holding the EU directly and legally responsible for acts or omissions of its institutions.

It took a few meetings to establish good personal relations between the negotiators of the various delegations and to strengthen the level of confidence. This was not an easy task due to the large size of 46+1 Group and the complications brought by the Covid-19 pandemic. All meetings in 2020 and 2021 were held with a majority of delegates participating online, and it was not until 2022 that most of the delegates attended the negotiations in person. This state of affairs also complicated the work of the NEUMs, which almost exclusively resorted to online informal meetings to try and coordinate their positions ahead of the meetings of the 46+1 Group.

A final element needs to be mentioned regarding the overall context of the negotiations. From the point of the NEUMs, it was of paramount importance to have some sort of feedback from the ECtHR on the proposed amendments to the 2013 DAA. This has to do with the strong interest of the NEUMs to preserve the integrity and proper functioning of the Convention system. In that sense, the regular participation of a highly competent representative of the registry of the Court in all meetings of the 47+1 Group was highly appreciated. Even though the position expressed by this representative could not formally engage the ECtHR itself, it was nevertheless invaluable to help the NEUMs have a proper understanding of the implications of the amendments proposed. The NEUMs

would have welcomed a similar participation from a high-level representative from the CJEU during the negotiation process. This was, however, not accepted by the EU side. Hence the position of the CJEU, which was expressed in particular in *Opinion 2/13*, was always presented by the EU Commission. From a NEUMs standpoint, it was at times difficult to appreciate whether some of the hesitations expressed by the EU Commission to accept certain solutions or amendments would have been shared by the CJEU itself. This was notably the case as regards positive developments that occurred after *Opinion 2/13*, such as the jurisprudential evolution on the principle of mutual trust which probably rendered the objection raised by the CJEU in *Opinion 2/13* much less relevant in 2023.

II.2. NATURE, AIM AND WORKING METHODS OF THE NEUMS GROUP

As mentioned above, the NEUMs have organised themselves as an informal group.¹⁸ This was also the case during the first round of negotiation in 2010–2013. The re-establishment of this forum was therefore considered useful by all parties concerned. As an informal group, the NEUMs have no legal or statutory basis, no terms of reference and no rules of procedures. The author of the present *Article* agreed to act as the coordinator of the NEUMs, mainly to organise the meetings, lead the discussions and encourage at least some coordination without, however, acting with the prerogatives of a President. The NEUMs have always worked with a consensus-based approach, *i.e.* with no formal votes taking place. As a rule, an informal meeting of the NEUMs was organised before every meeting of the 46+1 Group with a view to preparing the latter. Additional, informal meetings of the NEUMs occasionally took place when needed. No meeting reports were drafted and, with the exception of the Common Statement mentioned below (see section II.3), no written document was produced by the NEUMs. This has of course not precluded the submission of individual written proposals, which have often attracted wide support from the NEUMs during the discussions.

The aim of the NEUMs was to exchange views, in particular on proposals submitted by the EU, as well as to inform each other of national positions. The NEUMs have also been used by those delegations which intended to submit a proposal as a forum to test the level of support for their proposal before tabling it in the 46+1 Group. The NEUMs have certainly always examined whether a common position on certain issues was possible, but did not aim to reach unanimity. Indeed, the dynamic of the 46+1 Group has

¹⁸ Although informal, the NEUMs has been at least indirectly recognised as an entity in the DAA, as reflected in the expression “High Contracting Parties other than the European Union and its member States” which is contained in Draft Rule 18 paras 1 and 5 of the Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements (see Appendix 3 of the “Interim report to the Committee of Ministers, for Information, on the Negotiations on the Accession of the European Union to the European Convention on Human Rights, Including the revised Draft Accession Instruments in Appendix”, CDDH(2023)R_EXTRA ADDENDUM of 4 April 2023, www.coe.int).

rather been to move collectively towards consensual solutions, and the NEUMs more or less acted in the same spirit.

As already mentioned, the NEUMs did not themselves take the initiative to propose amendments proposals to the 2013 DAA. It was therefore on the basis of mostly concrete proposals from the EU that the NEUMs sought to evaluate the potential consequences for the proper functioning of the Convention system and the overall balance of the DAA. Such analysis was instrumental for the NEUMs to decide whether or not a given proposal could be supported. This has, however, been a challenging exercise since a number of questions are legally complex and, for some, highly technical. A deep knowledge not only of ECHR case law but also of the working methods and practical functioning of the ECtHR is needed to be able to answer those questions. This has also been the case with regard to both applicable rules and evolving practice concerning the supervision of the execution of judgments by the Committee of Ministers. Against this background, the NEUMs have frequently relied on the assessment made by the Court's representative to take a stance on a number of proposals. To name a few, this has been in particular the case on amendment proposals regarding the operation of the co-respondent mechanism and those concerning inter-party applications, two topics where the need to respect the judicial independence of the ECtHR and the fact that it must remain master of its own proceedings have been considered essential. As concerns supervision of execution and voting modalities at the Committee of Ministers, the NEUMs requested a number of information documents from the Secretariat¹⁹ and legal opinions from the DLAPIL.²⁰ This has proven extremely useful to enable the NEUMs to make their own sound analysis and, eventually, to be able to support the revised DAA.

The working methods of the NEUMs did not include separate consultation sessions with NGOs and other actors from civil society. A number of NEUMs, however, have called for regular consultation with non-governmental actors. This has been done in the context of the formal meetings of the 46+1 Group.²¹ Although there has been no uniform position from the NEUMs on the numerous requests and suggestions voiced by NGOs, there has been a clear trend to support those proposals stressing the need to avoid weakening the position of the applicants in the procedures conducted before the ECtHR. In this context,

¹⁹ See 47+1 ad hoc group, 'Meeting Report of the 12th Meeting, 47+1(2021)R12' (10 December 2021) on scenarios in the context of art. 7 of the Draft Accession Agreement.

²⁰ See Legal opinion DLAPIL21/2022_JP/IS, Directorate of Legal Advice and Public International Law, Council of Europe of 14 September 2022, prepared by DLAPIL, Laying Down Voting Rules in the Committee of Ministers' Rules for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlement; and Background paper, 'Voting Rights of European Union in Council of Europe Treaties, DLAPIL16/2021 JP/IS/DG, Directorate of Legal Advice and Public International Law, Council of Europe' (17 November 2021).

²¹ The 46+1 Group held three exchanges of views with representatives of civil society, at its 7th, 10th, and 13th meetings.

the NEUMs have been willing to limit the risk of unduly prolonging individual application procedures, including upon activation of the co-respondent mechanism.

II.3. COMMON STATEMENT AND KEY NEGOTIATING PRINCIPLES

The main concerns and common objectives from the NEUMs have been expressed in the above-mentioned Common Statement, which was adopted in the 6th Meeting of the 47+1 Group. This Common Statement sets out the following six Key Negotiating Principles which are deemed particularly important to the NEUMs:²²

- Equality of all High Contracting Parties;
- Preserve the proper functioning of the Convention system;
- Maintain the rights of applicants in the Convention procedures;
- No exclusion of jurisdiction of the European Court of Human Rights in specific areas
- Existing rights and obligations of the States Parties to the Convention, whether or not members of the EU, should be unaffected by the accession;
- Taking into account the specific nature of the EU, which is not a State.

During the negotiation, these principles have often been referred to by NEUMs and therefore offered useful guidance to exclude certain ideas, support certain proposals or move towards more widely acceptable solutions. The EU Commission accepted these principles as a valid reference point and took particular care to show that due regard had been given to them in its proposals.

In addition to these Key Negotiating Principles, the Common Statement mentions a few other points which were certainly less operational for the discussions, but nevertheless expressed certain expectations from the NEUMs. Two of these points are worth mentioning:

First, the NEUMs expressed the hope that “the EU accession to the ECHR should not undermine the Convention system or the effectiveness of the Council of Europe as an organisation”.²³ Admittedly, this is a very general statement. It should be understood as a reminder that it is of utmost importance to respect the independence of the ECtHR and the obligation from the High Contracting Parties to abide by the final judgments it delivers. The role of the Committee of Ministers is essential in this respect, and all High Contracting Parties bear a collective responsibility for this to happen. Behind this NEUMs statement one may easily detect some fears that together with its 27 Member States, the EU would in future be in a position to act as a numerical strong bloc. This might change the dynamic within the Committee of Ministers, which should continue to seek consensus to the extent possible and show sensitivity to national positions.

²² 47+1 ad hoc Group, ‘Meeting Report of the 6th Meeting, 47+1(2020)R6’ cit. Appendix III, item 1.

²³ *Ibid.* Appendix III, item 3.

Second, the NEUMs clearly wanted that “adaptations to the DAA be made to the extent possible within the EU internal legal order”.²⁴ This expectation has been voiced several times during the negotiation process, for example in relation to inter-party applications,²⁵ CFSP (section III.4)²⁶ or Protocol no. 16.²⁷ Indeed, it was at times difficult for the NEUMs to understand why legally binding obligations on EU Member States enshrined in the EU internal legal order would have to be matched with corresponding obligations in the DAA, the addressees of which are both EU and non-EU Member States. While this expectation from the NEUMs was only partly met regarding issues pertaining to sections III.1 and III.3, one may at least hope issues around CFSP (section III.4) will eventually be solved by the EU internally.

III. ISSUES OF PARTICULAR IMPORTANCE TO THE NON-EU MEMBER STATES

III.1. BASKET 1

The Chair’s paper to structure the discussion of the 47+1 Group dealt exclusively with problems that arise from *Opinion 2/13* of the CJEU.²⁸ It addresses four “baskets” in which the issues can be grouped. Basket 1 essentially deals with the functioning of the co-respondent mechanism (art. 3 DAA), including the prior involvement procedure (art. 3(7) DAA).

This mechanism had already been agreed upon during the first round of negotiations. Hence the overwhelming majority of the NEUMs did not question its pertinence nor the need to adapt it to address the problems identified by the CJEU. The main concerns expressed by certain NEUMs were rather aimed to ensure the possibility for the ECtHR to keep a say on whether the EU would be co-respondent or cease to be co-respondent in a given case,²⁹ it being accepted that the question whether the co-respondent mechanism is called for in a given case is purely a matter of EU law. The reason behind such fears from the NEUMs was that no gaps in accountability should be created at the expense of the applicants, including in the execution process.³⁰ The prior involvement procedure was widely

²⁴ 47+1 ad hoc Group, ‘Meeting Report of the 6th Meeting, 47+1(2020)R6’ cit. Appendix III, item 3 in fine.

²⁵ *Ibid.* para. 22.

²⁶ 46+1 ad hoc Group, ‘Meeting Report of the 15th Meeting, 46+1(2022)R15’ (7 October 2022) para. 24.

²⁷ 47+1 ad hoc Group, ‘Meeting Report of the 8th Meeting, 47+1(2021)R8’ (4 February 2021) para. 15.

²⁸ 47+1 ad hoc Group, ‘Paper by the Chair to Structure the Discussion at the Sixth Meeting of the CDDH *ad hoc* Negotiation Group (‘47+1’) on the Accession of the European Union to the European Convention on Human Rights’ cit.

²⁹ See for example 47+1 ad hoc Group, ‘Meeting Report of the 6th Meeting, 47+1(2020)R6’ cit. para. 13; 47+1 ad hoc Group, ‘Meeting Report of the 7th Meeting, 47+1(2020)R7’ (26 November 2020) para. 7; Meeting Report of the 8th Meeting, paras 12-13; 47 +1 ad hoc group, ‘Meeting Report of the 11th Meeting, 47+1(2021)R11’ (8 October 2021) paras 24 and 27.

³⁰ See 47+1 ad hoc Group, ‘Meeting Report of the 8th Meeting, 47+1(2021)R8’ (4 February 2021) cit. para. 11.

considered inherent and necessary to the co-respondent mechanism, although one delegation pointed to the risk that it could unduly delay the proceedings.³¹ The introduction of an automatic, joint responsibility from the respondent and co-respondent parties (art. 3(8) DAA) was easily accepted by the NEUMs since it improves accountability in the execution process and thereby reinforces the position of the applicant.³²

III.2. BASKET 2

This basket encompasses issues relating to inter-party cases under art. 33 of the Convention and issues relating to requests for advisory opinions under Protocol no. 16 to the Convention.

Regarding inter-party applications, art. 5 of the 2013 DAA was considered insufficient by the CJEU since it allowed for the possibility that the EU or its Member States might submit an application to the ECtHR, under art. 33 of the ECHR, concerning an alleged violation thereof by a Member State or the EU, respectively, in conjunction with EU law.³³ The CJEU therefore requested an express exclusion of the jurisdiction of the ECtHR over such cases.³⁴

A first proposal by the EU to settle the problem was considered with concern by several NEUMs, mostly because they felt that it would limit the jurisdiction of the ECtHR and raise issues with regard to the equality of High Contracting Parties.³⁵ Even though some NEUMs suggested that this was rather a matter related to internal EU matters,³⁶ the discussions went on further on the basis a new proposal put forward by the Norwegian delegation and the Secretariat, which attracted wider support but proved too detailed procedurally speaking.³⁷ After lengthy discussions, the 46+1 Group agreed on key elements to solve the issue,³⁸ namely: reiteration of the legal obligation of EU Member States according to art. 344 TFEU; recognition of the possibility for the EU to assess whether and to what extent an inter-party dispute concerns the interpretation or application of EU law; and preservation of the ECtHR competence to remain master of the proceedings in deciding to strike out the inter-party application on the basis of art. 37 ECHR. The wording eventually found in art. 3(3) and (4) DAA remains rather general so as to leave flexibility in practice for both the ECtHR and the CJEU. Important precisions were also included in

³¹ See 46+1 ad hoc Group, 'Meeting Report of the 13th Meeting, 46+1(2022)R13' (13 May 2022) para. 7.

³² See *ibid.* para. 12; 46+1 ad hoc Group, 'Meeting Report of the 17th Meeting, 46+1(2023)R17' (2 February 2023) paras 12–13.

³³ See Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454 para. 207.

³⁴ *Ibid.* para. 213.

³⁵ See 47+1 ad hoc Group, 'Meeting Report of the 7th Meeting, 47+1(2020)R7' cit. para. 13.

³⁶ See art. 344 TFEU, which sets out a clear legal obligation for EU Member States.

³⁷ See 47+1 ad hoc group, 'Meeting Report of the 11th Meeting, 47+1(2021)R11' cit. paras 8-9 and 4-10.

³⁸ See 46+1 ad hoc Group, 'Meeting Report of the 14th Meeting, 46+1(2022)R14' (7 July 2022) paras 8–14.

the explanatory report, especially on mixed applications and the scope of the interpretation or application of EU law.³⁹

As regards Protocol no. 16, which was signed after the 47+1 Group had adopted its final report on the 2013 DAA, the objections raised by the CJEU in its by *Opinion 2/13* concern a possible circumvention of the preliminary reference-procedure under art. 267 TFEU due to the fact that no provision had been included in the 2013 DAA.⁴⁰ Although initially reluctant to do so, since the problem is essentially an internal matter of the EU which exists even without EU accession,⁴¹ the NEUMs eventually accepted the inclusion of a provision in the DAA (art. 5).⁴² The effect of this provision is to preclude recourse to the advisory opinion procedure before the ECtHR where EU law, as interpreted by the CJEU, requires a court or tribunal to instead submit a request to the CJEU under art. 267 TFEU.

III.3. BASKET 3

This basket concerns the principle of mutual trust. By not including a provision in the Draft Accession Agreement which would recognise the obligation of mutual trust between EU Member States in certain circumstances, the CJEU considered that the underlying balance of the EU and the autonomy of EU was negatively affected.⁴³

During the negotiation process, it became clear that the way in which the mutual trust principle was taken into account by the ECtHR and interpreted and applied by the CJEU was a matter of constant evolution. Some NEUMs considered that mutual trust would not necessarily have to be reflected in the DAA itself.⁴⁴ The EU, however, insisted that a specific provision be provided for. This was eventually accepted and resulted in a short, general provision – albeit without obvious normative effect – included in the DAA (art. 6) instead of a mere mentioning in the draft explanatory report. Since the issuing of *Opinion 2/13* in December 2014, there has been increased convergence in the case law of the CJEU and the ECtHR on mutual trust although the two systems remain autonomous.⁴⁵ The 46+1 Group was wise enough to avoid crystallising this state of affairs in the DAA. It preferred to highlight the most recent significant rulings with regard to the limits to the operation of mutual-

³⁹ See Draft Explanatory Report of the DAA, paras 82 and 84.

⁴⁰ See *Opinion 2/13* cit. paras 196–200.

⁴¹ See 47+1 ad hoc Group, 'Meeting Report of the 8th Meeting, 47+1(2021)R8' (4 February 2021) cit. para. 15.

⁴² See 46+1 ad hoc Group, 'Meeting Report of the 14th Meeting, 46+1(2022)R14' cit. paras 8–14.

⁴³ See *Opinion 2/13* cit. paras 196–200.

⁴⁴ See 47+1 ad hoc group, 'Meeting Report of the 11th Meeting, 47+1(2021)R11' cit. paras 11–18.

⁴⁵ See J Callewaert, 'The European Arrest Warrant under the ECHR: A Matter of Cooperation, Trust, Complementarity, Autonomy and Responsibility' (2021) *ZesS-Sonderband* 105–114; L Robert, 'La présomption Bosphorus à l'épreuve du mandat d'arrêt européen' (2021) *Revue de l'Union européenne* 519–525.

recognition mechanisms under EU law in light of the ECHR.⁴⁶ Furthermore, a specific mentioning of the fact that mutual trust can also be relevant to non-EU Member States in the context of bilateral agreements concluded with the EU was added.⁴⁷

III.4. BASKET 4

In *Opinion 2/13*, the CJEU objected that the 2013 DAA failed to have regard to the specific characteristics of EU law in terms of the judicial review of acts, actions or omissions on the part of the EU in CFSP matters.⁴⁸

The fact that the jurisdiction of the CJEU is limited in CFSP matters, coupled with the above-mentioned objection raised by the CJEU, represents perhaps the most difficult issue to solve to make EU accession possible. It is true that in comparison to the situation when *Opinion 2/13* was delivered, the CJEU has had the opportunity to interpret the scope of its jurisdiction in an extensive way, but this is by no means a guarantee that no gaps persist.⁴⁹

Amending the European Treaties to extend the scope of the CJEU's jurisdiction would solve the issue, but this step does not seem likely to happen. An exclusion of the jurisdiction of the ECtHR in this matter would, theoretically, address the concerns expressed by the CJEU. This is, however, not an option since it would be in clear violation of the aforementioned Key Negotiating Principles – in particular the equality of all High Contracting Parties and the refusal to accept any exclusion of jurisdiction in specific areas. During the negotiation process, the EU Commission therefore proposed the introduction of a new attribution clause in the Draft Accession Agreement. Such a clause would have enabled the EU to allocate, for the purposes of the Convention, responsibility for an CFSP act of the EU to one or more EU Member State(s) if such act is excluded from the judicial review of the CJEU. A number of NEUMs expressed strong reservations and serious doubts about the envisaged clause due *inter alia* to its complex character and to the risk of putting the applicant at a disadvantage.⁵⁰ Given the scepticism and the many practical and operational difficulties pointed out by the NEUMs, the EU Commission decided to reconsider the feasibility of the reattribution mechanism.⁵¹ It subsequently informed the 46+1 Group of its intention to resolve the basket 4 issue internally.⁵²

⁴⁶ See Draft Explanatory Report of the DAA, para. 88.

⁴⁷ See *ibid.* para. 87 and, in particular, ECtHR *Tarakhel v Switzerland* App. n. 29217/12 [4 November 2014] para. 33.

⁴⁸ See *Opinion 2/13* cit. para. 257.

⁴⁹ See PV Elsuwege, 'Judicial Review and Common Foreign and Security Policy: Limits to the Gap-Filling Role of the Court of Justice' (2021) CLMR 1731-1760; S Johansen, *The Human Rights Accountability Mechanisms of International Organizations* (Cambridge 2020) paras 138–139.

⁵⁰ See 47+1 ad hoc Group, 'Meeting Report of the 9th Meeting, 47+1(2021)R9' (25 March 2021) paras 11–14; 47+1 ad hoc group, 'Meeting Report of the 12th Meeting, 47+1(2021)R12' cit. paras 12–13.

⁵¹ See 46+1 ad hoc Group, 'Meeting Report of the 13th Meeting, 46+1(2022)R13' cit. paras 37–38.

⁵² See Report of the "46+1" Group to the CDDH, CDDH(2023)R_EXTRA ADDENDUM cit. para. 8.

III.5. DECISION-MAKING BY THE COMMITTEE OF MINISTERS

The most important topic not identified by the EU in its position paper, which the NEUMs insisted on including in the negotiation, was the voting modalities at the Committee of Ministers.⁵³ Although initially this request was essentially supported by two NEUMs, it became clear over time that the underlying concern was shared by the rest of the NEUMs. After several rounds of discussion, the 46+1 Group eventually affirmed the need to revisit the provisions of the 2013 instruments so as to ensure that the supervisory system remains effective in cases where the EU and its Member States are obliged by EU law to vote in a coordinated manner, which could determine the outcome of voting. It was also necessary to ensure the meaningful participation of non-EU Member States where the votes of the EU and its Member States alone are insufficient to determine the outcome. The overall solution should also take account of the fact that the interest of the EU in voting for or against a particular decision may vary.⁵⁴

The 46+1 Group undertook to examine carefully the three main options presented in detail by the Secretariat: a revised version of Rule 18, a “0-vote”, or a “1-vote” approach.⁵⁵ Although the three main options would in principle all achieve the desired results, different preferences were expressed, including among the NEUMs. At its last meeting, the 46+1 Group agreed to adapt the approach based on the 2013 DAA (revision of Rule 18), whose underlying logic remained valid. An additional threshold was therefore introduced concerning the adoption of final resolutions, namely that of “a simple majority of votes cast by representatives of High Contracting Parties other than the EU and its member States” (Rule 18 para. 1). This was considered to be necessary to ensure meaningful participation of non-EU Member States in addition to the EU and its Member States.⁵⁶ A specific rule was also added to govern the adoption of interim resolutions (Rule 18 para. 3). Finally, a review clause was added to oblige the High Contracting Parties to examine the application of the new rules in a given time frame (Rule 18 para. 6).

IV. AN OVERALL APPRAISAL OF THE REVISED DAA FROM A NON-EU MEMBER STATE PERSPECTIVE

The 2023 DAA attempts to address the key issues raised by the CJEU in *Opinion 2/13* as well as a number of targeted requests put forward by the NEUMs. Eventually, a limited number of provisions of the 2013 DAA were renegotiated on certain specific points. As a

⁵³ 47+1 ad hoc Group, ‘Paper by the Chair to Structure the Discussion at the Sixth Meeting of the CDDH *ad hoc* Negotiation Group (‘47+1’) on the Accession of the European Union to the European Convention on Human Rights’ cit.

⁵⁴ See 46+1 ad hoc Group, ‘Meeting Report of the 15th Meeting, 46+1(2022)R15’ cit. para. 5.

⁵⁵ See 46+1 ad hoc Group, ‘Meeting Report of the 16th Meeting, 46+1(2022)R16’ (24 November 2022) paras 3–16.

⁵⁶ See 46+1 ad hoc Group, ‘Meeting Report of the 18th Meeting, 46+1(2023)R18’ (17 March 2023) para. 3.

result, the overall balance of the text was largely preserved, as pointed out in the Common Statement on Key Negotiating Principles of particular importance to the NEUMs.⁵⁷ This led several NEUMs to welcome explicitly the fact that the negotiations had respected these principles.⁵⁸

As compared to 2013, the dynamic of the negotiation process had somewhat changed. This was due to the “limited” renegotiation exercise, as well as Brexit and the exclusion of the Russian Federation from the Council of Europe.

The initial expectation from the NEUMs that adaptations to the DAA should be made to the extent possible within the EU internal legal order⁵⁹ has perhaps not been fully met. This may be due to the sometimes overly prudent approach followed by the European Commission, coupled with the absence of a representative from the CJEU in the negotiation process. A notable exception concerns basket 4, but it remains to be seen whether the EU will be capable of adopting an internal, workable solution in the not-too-distant future. All in all, the 2023 DAA covers – sometimes at length – issues which are by nature internal to the EU, albeit without a negative impact on the Convention from a legal point of view. Similarly, the incorporation of certain amendments to the 2023 DAA itself is somewhat questionable: some issues could have been easily solved in the draft explanatory report without necessarily modifying the draft agreement itself. Again, this does not seem to entail any real legal problem.

During the whole negotiation process, the NEUMs have expressed a strong willingness to be associated as real partners as regards internal reflections and solutions developed by the EU. Against this background, the 46+1 Group noted that it would be necessary for all parties to the negotiations to be informed of and consider the manner in which the basket 4 issue had been resolved before they would be able to give their final agreement to the whole package of accession instruments.⁶⁰ It is in the same spirit that the NEUMs suggested that an informal Group of Friends of EU accession to the Convention could be created to function as a “sounding board” for discussion of the EU’s proposed internal basket 4 solution.⁶¹

On the basis of the tremendous amount of work and energy which has been spent in this project during the last 12 years or so, it is to be hoped that the DAA will be finalised soon with the support from the 46+1 Delegations. Both the CJEU and the ECtHR will then have to examine the DAA and give their opinion on it, the latter being a clear expectation from the NEUMs. There are reasons to be optimistic about the outcome of these judicial

⁵⁷ See 47+1 ad hoc Group, ‘Meeting Report of the 6th Meeting, 47+1(2020)R6’ cit. Appendix III, item 3, second sentence.

⁵⁸ See 46+1 ad hoc Group, ‘Meeting Report of the 18th Meeting, 46+1(2023)R18’ cit. para. 10.

⁵⁹ See 47+1 ad hoc Group, ‘Meeting Report of the 6th Meeting, 47+1(2020)R6’ cit. Appendix III, item 3, third sentence.

⁶⁰ See 46+1 ad hoc Group, ‘Meeting Report of the 18th Meeting, 46+1(2023)R18’ cit. para. 8; CDDH, ‘Interim Report to the Committee of Ministers’ (4 April 2023) para. 3.

⁶¹ See 46+1 ad hoc Group, ‘Meeting Report of the 18th Meeting, 46+1(2023)R18’ cit. para. 13.

procedures, but also on the subsequent ratification process provided the political will is there. It is after all in the interest of Europe as a whole that the EU accession to the ECHR eventually becomes reality.