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CCBE COMMENTS ON THE DRAFT RULES OF PROCEDURE OF THE GENERAL COURT

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INTRODUCTION

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 32 member countries and 13 further associate and observer countries, and through them more than 1 million European lawyers. The CCBE has examined the Draft Rules of Procedure (RoP) for the General Court and we attach comments which we hope are of assistance towards the development of these Rules.

GENERAL COMMENTS

The CCBE welcomes the additional clarity in the proposed new rules which we believe will contribute to increasing legal certainty. The CCBE also notes that the caseload of the General Court is of a different type to that before the Court of Justice. The General Court functions principally as a form of general administrative court dealing with cases raising issues both of fact and law.

"the main party"

Many powers in the draft are limited to the "main party". Situations do however arise where the party with the main interest in the outcome is not a main party, e.g. the beneficiary of state aid where the applicant in the case is a complainant/competitor. It seems wrong in principle and will lead to injustice in some situations to limit the powers in this way.

SPECIFIC COMMENTS

TITLE I – ORGANISATION OF THE GENERAL COURT

Article 38 Access to the file in the case

Article 38(2) provides that no third party may have access to the file without the express authorisation of the President of the General Court, once the parties have been heard and that a third party needs to file a written request "*accompanied by a detailed explanation of the third party's legitimate interest in having access to the file".*

CCBE comment: it is understandable that one needs to file a written request and that parties must be heard, but it seems unduly restrictive to require a detailed explanation - which in practice will be "proof" - of legitimate interest. One can see that requirement for intervention in a case, but it seems an unnecessary high hurdle for (public) access to court documents.

TITLE II – LANGUAGES

Article 45(4)

This relates to the arrangements for intellectual property cases. There is currently a specific and highly complex language regime for IP cases, which according to the Court delays such cases on average by 4-8 weeks and uses up valuable translation resources. The Court's proposal is that the language of the application will become the language of the case unless there is an objection, in which event it will be the language of the contested decision (and the Court will translate the application accordingly). In short, the Court anticipates that parties will translate written pleadings into their own language of preference and "*it remains open to him to use a language other than the language of the case at the hearing*".

CCBE comment: The CCBE supports this proposal as it will contribute to dealing with applications to the Court in IP matters in an efficient and cost-effective way. The CCBE believes there is no good reason for switching the language of proceedings after often 5 or more years of proceedings before OHIM with thousands of pages of submissions on the facts - unless of course the parties agree (expressly or by not objecting).

In addition, the CCBE supports the Court's willingness to allow any language to be used in IP cases at the hearing. In this regard we suggest that there should be a change to the language derogation provisions to give effect to this, which might alleviate some of the consequences of the IP rule change.

For example, the underlined words might be added to Article 45(1)(c):

- at the request of one of the parties, and after the other parties have been heard, the use of another of the languages mentioned in Article 44 as the language of the case for all or part of the proceedings may be authorised by way of derogation from subparagraph (b); such a request may not be submitted by an institution. <u>The Court shall normally grant a request relating to the oral procedure made by a party whose property rights or business activities are closely affected by the outcome of the case.</u>

TITLE III– DIRECT ACTIONS

Article 57 Methods of service

This article significantly amends current Art 100. It would result in the service of documents henceforth only by fax or e-curia, and not by regular mail or e-mail. E-mail is indicated not to allow for an undisputable date of receipt to be ascertained.

CCBE comment: The use of a fax is old-fashioned and may not be easily available. E-curia requires the opening of an e-curia account and still suffers "outage" from time to time such as in the week of 2 June 2014. Given the very strict approach to deadlines, the CCBE is of the view that e-mail must be maintained as a back-up.

Article 58 Calculation of time limits

CCBE comment: Regarding "procedural time-limits", it would be helpful if this notion could be defined in the RoP.

Article 64 Adversarial nature of the proceedings

CCBE comment: This is very good addition, as it now affirms the adversarial principle of the proceedings in a separate article in the RoP.

Article 66 Anonymity and Omission of certain information vis-à-vis the public

CCBE comment: The part of the provision that allows names to be kept anonymous for privacy reasons is obviously appropriate and needed. What is less obvious is the part of the provision providing that the court can on its own motion decide that certain information is omitted from documents that are available to the public. The explanatory note on the provision says that "*This provision also enables public access to certain information in documents available to the public (report for the hearing, notice in OJ, case-law of the GC available on internet) to be restricted*". It is indicated that the Civil Service Tribunal has included this rule from the outset.

It would be beneficial if the General Court can develop guidelines to apply this provision, as one would want to have some understanding and legal certainty as to how this is applied. The starting point should be transparency.

Article 67 Order in which cases are being dealt with

CCBE comment: It is to be welcomed that priority can be given at any stage. The CCBE would find it helpful and would welcome clear guidelines on how priority might be granted or refused.

Article 70 and 71 Decisions on stay and resuming of proceedings

CCBE comment: This provision is to be welcomed.

Article 75 Length of written pleadings

The explanatory note indicates that limiting the number of pages is no novelty and that the inclusion in the RoP is to underline its importance.

CCBE comment: The provision that the President (of Court or Chamber) will only in cases involving particularly complex legal or factual issues allow for a pleading exceeding the page limit, has the risk of developing into a rigidly applied limitation of length of pleadings, to the detriment of properly presenting a case and informing the court. The CCBE experience with inflexible page limits is not a favourable one and we cannot support this provision.

Only if the length of the written pleadings can be limited by the General Court, the CCBE wishes to note the following. The rules and the accompanying explanation are somewhat unclear, because they do not specify what consequences apply if a party provides a document that exceeds the maximum number of pages allowed. The last paragraph of the explanation would suggest that this does not render the application inadmissible. However, that does not seem to clearly follow from the text of the Rules of Procedure. The rules on costs which provide that the Court can charge a party for court costs if it refuses to regularise a document would also apply because pleadings exceed the maximum number of pages.

It is suggested that the following can usefully be added to Article 75 (to the extent the General Court will be able to limit the length of the written pleadings).

75(3) – The submission of written pleadings in excess of the maximum number of pages as determined by the General Court will not render these pleadings inadmissible. However, unreasonable failure to comply with the General Court's order to regularize the written pleadings can result in the party being ordered to compensate additional costs incurred for the translation of these pleadings. These costs will be set in accordance with Article 224.

Article 78 Annexes to Application

CCBE comment: It is very welcome that one does not need to prove anymore that a Power of Attorney by legal entity to lawyer has been properly conferred. A power of attorney ("authority to act") as indicated in Art 51(3) will suffice as it does in national proceedings. This is believed to be a common source of regularization and the change is plainly justified in terms of efficiency.

Article 83 Reply and Rejoinder

The GCt takes over the provision from Art 126(2) RoP ECJ, that the president can specify the matters to which the reply or the rejoinder should relate.

CCBE comment: There is a difference to be made between the General Court and the ECJ. At the level of the ECJ on appeal, a full debate (at least in theory) of all the legal and factual issues and arguments has at least taken place before the General Court, This is not the case before the General Court. It could be argued that it hampers a proper review by the General Court and access to justice not to have a proper possibility to address in full the facts and arguments brought forward in the defence. The CCBE appreciates the benefits of specifying the topics that should be addressed in a reply and rejoinder. However, the CCBE is of the view that such suggestions should not preclude other reply arguments being made.

Article 84 New pleas in law

CCBE comment: The Court proposes to guarantee the right of other parties to respond to new pleas in law, which is to be welcomed. We note that the proposed text does not require that this be in writing, and so it may only be at a hearing.

Article 86 Modification of the application

This explicitly provides that the form of order sought (the "conclusions") in an action can be modified if the contested measure is replaced or amended by another measure with the same subject-matter. It provides a procedure for doing so.

CCBE comment: The CCBE welcomes this step. It codifies existing practice and removes unnecessary duplication of proceedings.

Article 88 General

CCBE comment: Regarding Article 88 (1) this provides that only the main parties may propose measures of organisation of procedure. The current text at Article 64(4) of the existing RoP says simply that "any party" may propose measures. This is an example where the quality of the proposal rather than the status of the party as a main party should be determinative.

Regarding draft Article 88 (2) the CCBE does not support the provision in Article 88(2), second sentence. We do not see why it would be necessary to specify why the application has not been made earlier. This seems to suggest that the application could be refused because it had not been introduced earlier. However, it should be for the Court to get to the bottom of the case, when necessary, on its own initiative. Therefore, the fact that a request for measures of organization or inquiry could have been introduced earlier should not be a reason to refuse it.

Article 89 Purpose

This is the provision on the scope of measures of organisation of procedure.

CCBE comment: The CCBE believes the Court has missed an opportunity to allow for amicus curiae briefs, which is a possibility in favour of which the CCBE has previously advocated. It could be a useful source of insight for the Court, and would avoid the need to "take sides". It would provide less work than interventions and would not require access to the file.

Thus we suggest new wording along the following lines:

(g) accepting into the file a written submission from a third party that the General Court views as offering useful information or insight into the issues in the case;

(h) inviting a third party to be represented at the hearing in accordance with the provisions of Article 19 of the Statute.

This solution would also give the Court a flexible instrument to "bring in" persons who may be affected by the proceedings, without the immediate need for them to become interveners. In particular for interim measures cases, where the hearing may happen very quickly, this could be especially useful

Articles 97 and 98 Witnesses' and experts' oaths and perjury

CCBE comment: These deal with oaths and perjury by witnesses and experts summoned or appointed by the Court. They are uncontroversial in themselves, but it should be noted that the Court has not taken the opportunity to establish any ethical requirements for "experts" instructed by parties to produce reports that will then be used by them as evidence.

Thus there are no Court-imposed rules applicable to the way in which economists or other "experts" instructed by parties should conduct their work, or any obligation that that they should be "independent" from the party that has instructed them. Arguably, this omission may in practice reduce the credibility of such experts, and thus the weight that is given to their evidence by the Court.

Article 103 Treatment of confidential information and material

CCBE comment: This article raises issues of concern similar to those raised concerning Article 105 (see separate submission on Article 105).

Article 106 Oral part of the procedure

CCBE comment: This recognises that in certain circumstances, the General Court may rule on direct actions without a hearing. This is broader than currently, where this possibility exists only for IP cases and appeals. This possibility is indeed conditional on both (a) the requirement that no "main party" has made a reasoned application (within three weeks of the notice that the written procedure is closed) to request an oral hearing, and moreover that even in the absence of such a request (b) the General Court does not find that a hearing would be useful.

The CCBE believes that it would be helpful to introduce a provision corresponding to Article 113(2)(c) of the current draft. Thus, a party should be allowed to request an oral hearing after the initial 3-week period, if that request is based on facts which are of such a nature as to be of a decisive factor for the decision in which the party was not aware of at the time it decided not to request an oral hearing. It should also be possible for a party, not being a main party in the proceedings, to also have this possibility.

Article 107 Date of the hearing

CCBE comment: The CCBE welcomes the recent practice in some cases of setting the date for the hearing as long as possible in advance. This is particularly important in light of the new Article 107(2). It also avoids requests for rescheduling of a hearing.

Article 108 Absence of the parties from the hearing

CCBE comment: This is new and deals with the absence of the parties from the hearing. It allows in such a case:

- the General Court to proceed with the hearing even where a party is not present at the hearing (be it "without excuse" or after having informed the Court that it would be absent); or
- the General Court to close the oral part of the procedure if "the main parties" have indicated they would not be present at the hearing.

The CCBE welcomes this Article

Article 115 Recording of the hearing

CCBE comment: This allows the President to authorise a party in the procedure – following a "duly substantiated request" – to listen on the Court's premises to the sound recording of the hearing. The CCBE believes this is an improvement and is to be welcomed. The CCBE would also request that this provision be broadened. The parties should also be allowed to inspect, where available, the transcript of the hearing, in particular, if one wishes to lodge an appeal.

Chapter 12 Actions and issues determined by orders

Chapter 12 (Articles 126-132) contemplates a number of "actions and issues" which the GC may decide to rule on by reasoned order, on a proposal from the Judge-Rapporteur.

CCBE comment: Whereas, with regard to Article 129 (Absolute bar to proceeding with a case), it is being proposed to add in the text of the corresponding provision of the RoP in force (Article 113) the requirement that the main parties be heard, no such requirement is contemplated in draft Articles 126 (Action manifestly bound to fail) and 128 (Declining of jurisdiction). The CCBE sees no objective reason for treating differently the "actions and issues" in Chapter 12, and suggests that the requirement that the main parties be heard should be inserted also in the text of draft Articles 126 and 128.

Article 130 Preliminary objections and issues

Draft Article 130(1), "*A defendant applying to the General Court for a decision on inadmissibility or lack of competence without going to the substance of the case shall submit the application by a separate document within [two months after service on him of the application]*".

CCBE comment: In this respect, the CCBE takes issue with the current interpretation of the corresponding provision in the RoP in force (Article 114). Although, as a matter of logic, the requirement that the defendant submit an application for a decision on inadmissibility/lack of competence by "a separate document" within the time limit for lodging the defence should imply that the defence must also be lodged at the same time, as a matter of practice Article 114 is interpreted as meaning that, where such an application is timely filed, the defence may then be lodged at a later stage. This has the effect that, in such a scenario, a longer time limit than that

established in draft Article 81 applies to the lodging of the defence. As a matter of equality of arms, this is not a desirable situation.

Therefore, it is suggested to amend as follows the final part of the text of draft Article 130(1): " *… shall submit the application, at the same time as submitting the defence, by a separate document within the time-limit referred to in Article 81*".

Article 144 Decision on applications to intervene

As indicated in the explanatory notes, draft Article 144, in confirming that secret or confidential material may be excluded from material communicated to an intervener, makes it clear – by referring to the "main parties" in paragraphs 2 and 4 – that an application for confidential treatment can only be made by a main party vis-à-vis an intervener, whereas an intervener cannot apply for documents produced by him to be treated as confidential vis-à-vis another intervener.

CCBE comment: Although the objective of "*enabl[ing] disputes to be disposed of as soon as possible*", which is indicated in the explanatory notes as the reason for the proposed change, certainly deserves praise, protection of the parties' confidential business secrets and other sensitive information is also an objective worthy of protection in the framework of proceedings before the General Court. Should the final version of Article 144 enshrine the principle that interveners cannot apply for documents produced by them to be treated as confidential vis-à-vis other interveners, potential interveners would be forced to face the alternative between intervening and having to make public confidential information to the other interveners, or not exercising at all their procedural right to intervene in order to protect the value of the sensitive data at stake. It is therefore recommended that references to the "*main parties*" in paragraphs 2 and 4 be replaced by references to referring to the "*parties*", as far as applications for certain secret or confidential information in the file in the case not to be communicated to an intervener are concerned.

Chapter 16 Urgent procedures – Section 1. Expedited procedure

Under the expedited procedure a written statement in intervention may be lodged only if the General Court, by way of a measure of organisation of procedure, so allows (draft Article 154(3)). Moreover, the General Court may decide to rule without an oral part of the procedure where the main parties decide not to participate in a hearing and the General Court considers that it has sufficient information available to it from the material in the file in the case (draft Article 155(1)).

CCBE comment: The combined effect of these provisions is a risk that the intervener, despite its application to intervene being granted, may find it impossible to be heard in writing or orally. This seems undesirable from the standpoint of access to justice, despite the urgency of the case in which the expedited procedure applies. It is therefore suggested that in the text of draft Article 155(1) the words "*the main parties*" be replaced by "*the parties*" (as defined in draft Article 1, c) and d), respectively).

Title IV – PROCEEEDINGS RELATING TO INTELLECTUAL PROPERTY RIGHTS

Article 174 Replacement of a party

CCBE comment: This provision codifies existing case-law on the replacement of a party when the intellectual property right concerned has been transferred to a new owner (who will replace the original owner in the proceedings before the Court). There are two points that need to be clarified.

Firstly, it should be clarified that the "*the intellectual property right affected by the proceedings before the Court*" includes both the IP right applied for or challenged and any other IP right that is invoked against it. Thus, the provision for replacement should apply to all rights affected by the proceedings.

Second, the right to apply for replacement should be extended from the successor in title of that right to include also the assignor and, even more importantly, the other party involved in the proceedings. The Court's judgment decision can ever only affect the current right holder. Thus, where the assignee has no interest in the proceedings or would even be willing to settle but cannot be bothered to request the replacement, the other party should be able to request this.

Article 179 Parties authorized to lodge a response

CCBE comment: The Court is proposing to abolish the second round of written pleadings in intellectual property cases. Clearly, this will save time and Court resources. On the other hand, it reduces the ability of parties effectively to respond to arguments raised by their opponents. The possibility of a hearing or of the Court adopting measures of organisation of procedure may not be an adequate substitute.

We propose retaining the current arrangements (Article 135(2) of the existing RoP) for the Court to decide on a reasoned request whether to allow a second round of written proceedings. If needed, it could be stricter in its approach to such requests than today. However, we would be concerned if it was excluded.

Article 191 Other provisions applicable

CCBE comment: Article 191 imports the rules of Title III into intellectual property cases. In particular, this has the effect of abolishing the current one month delay for requesting an oral hearing (Article 135a of the existing RoP) and replacing it with the three week delay proposed in Article 106.

However, intellectual property cases have a particular need for this extra week, since there are often several levels involved on the side of a party, for example the litigation counsel involved for the first time for the application to the Court, the instructing counsel who handled the proceedings before OHIM (often a patent attorney who cannot act before the Court), instructing counsel (e.g. US counsel) and ultimately the party's in-house legal department. The loss of a week may be very significant to the party in this context, while it has only marginal impact on the overall length of the proceedings.

We request the re-instatement of a one month delay to request an oral hearing in intellectual property cases. In any event, it may be appropriate to insert a provision dealing explicitly with the need to ask for a hearing and the time limit into Title IV. The issue is important, and there is a clear risk that parties may be "surprised" – it is not really sufficient to rely on a general cross reference to the provisions of Title III.

TITLE V APPEALS AGAINST DECISIONS OF THE CIVIL SERVICE TRIBUNAL

CCBE comment: Articles 201(1) [206(1)] and 207(2) applied jointly may significantly deteriorate the procedural situation of the appellant (party who brought the cross-appeal): not only the second round of exchange of writs (procedural documents) is excluded but also there will be no hearing to clarify the particular aspects of the response; therefore, unless both parties agree not to have either the second round of exchange of writs or the hearing, the joint application by the president of Articles 201(1) [206(1)] and 207(2) should be excluded.

Articles 201(2) and 206(2) – the President of the Court may limit the number of pages of the reply and the rejoinder – the CCBE believes that any limits should not be binding.

Regarding Article 209 (Manifestly well-founded appeal or cross-appeal decided by the reasoned order), the CCBE supports this Article.

Article 212(2) - The CCBE believes that the content of Art. 212 mirrors the content of Art. 75 with a slight modification, stating that the President the General Court will only in cases involving particularly complex issues allow for a pleading exceeding the page limit - the risk of developing into a rigidly applied limitation of length of pleadings, to the detriment of properly presenting a case and informing the Court, is considerable. It would be beneficial to consult the institutions and the Bar and Law Societies on their experience.

Title VI Procedures after a case is referred back to the General Court

CCBE comment: We agree with the modifications introduced in Article 217 of the draft.

FINAL PROVISIONS

Article 225 Videoconferencing

CCBE comment: The introduction of this provision is warmly welcomed as the use of videoconferencing has been already proposed by the CCBE as a part of proceedings before the Court of Justice and the General Court. This technique is already used at national level and can be also used by the EU courts. In this regard it must be ensured that the use of videoconferencing do not affect the exercise of the rights conferred on the parties or the quality of simultaneous interpretation (see the comment following the text of the proposed Art. 225 going in the same direction). On the other hand, it will be difficult to expect that the use of videoconferencing "*should in all circumstances allow the members of the formation of the Court to conduct the oral proceedings in the same way (fr. d'une manière identique) as in a courtroom*" - minor modifications/adaptations would be expected.

Article 228 Publication and entry into force of these Rules

The CCBE suggests excluding Article 86 from the list of provisions mentioned in paragraph 3 of Art. 228 as the new provision of Art. 86 is clearly advantageous to the applicant vis-à-vis the EU Institution/agency and (as specified in the comment) "codif[ies] a judicial practice that complies with the principle of the proper administration of justice, is faithful to the requirement of procedural economy and ensures legal certainty." Therefore, it should be applied not only to cases brought after the entry into force of the RoP, but to all cases pending before the General Court.

CONCLUSION

As indicated, the CCBE hopes its comments are of assistance towards the development of the Rules and we are happy to answer any questions should the need arise.

ANNEX

Comments by the CCBE on article 105 and article 103 of the Draft Rules of Procedure of the General Court

I. General overview

1. The General Court ("**CG**") has informed the Council of Bars and Law Societies of Europe ("**CCBE**") that it intends to revise its Rules of Procedure ("**RP**") and has invited the CCBE to submit comments. The CCBE is grateful for this opportunity and would like to submit the following comments on article 105 of the Draft RP CG.

2. Article 105 relates to the treatment of information or material pertaining to the security of the Union or of its Member States or to the conduct of their international relations. It provides the CG with a legal basis in order for it to rule in a case taking into consideration confidential information or material not communicated to the other party, after considering that this information or material is essential and not ensuring that the person concerned is able to ascertain the reasons upon which the decision taken in relation to him/her is based.

3. CCBE considers that this issue has not only to be examined in the light of the adversarial principle referred to in article 64 of the Draft RP GC, under which all information and material must be fully communicated between the parties, but also, more broadly, in the general framework of the rights of the defence, affirmed in Article 41(2) of the Charter of Fundamental Rights of the European Union ("**the Charter**"), the right to effective judicial protection, affirmed in Article 47 of the Charter and the right to a fair trial affirmed in Article 6 of the European Convention on Human Rights (the "**Convention**") as they have been interpreted by the Court of Justice ("**CJ**") and by the European Court of Human Rights ("**ECHR**").

4. In our opinion, the new draft procedural framework established in article 105 of the Draft RP CG does not comply with those fundamental rights and, therefore, we kindly ask the GC to reconsider the content of this new provision. The CCBE also considers that similar concerns arise with regard to the provisions in Article 103.

5. Our position on Article 105 is further explained in the following paragraphs.

II. Article 105, paragraph 7 RP GC

A. Content of article 105, paragraph 7 RP GC

6. This provision enables the GC to base its judgment on information or material which, owing to its confidential nature, has not been communicated to the person concerned.

7. Article 105, paragraph 7 RP GC applies when three conditions are met:

(i) A non-confidential version or a non-confidential summary of the information or material must have been submitted to the other main party in accordance with article 105, paragraph 6 RP GC.

(ii) The GC must consider that confidential information or material not included in the non-confidential version or non-confidential summary (*i.e.* not communicated to the other main party) is essential in order for it to rule in the case and must remain confidential.

(iii) The GC shall take account of the fact that a main party has not been able to make his views on it known.

B. Article 105, paragraph 7 RP GC under the perspective of the CJ case-law

8. In Case C-300/11 *ZZ v Secretary of State for the Home Department*, the Grand Chamber of the CJ held that even in a case in which state security prevents disclosure to the affected person (in that case disclosure of the grounds of expulsion), "the person concerned must be informed, in any event, of the essence of the grounds on which a decision refusing entry taken under Article 27 of the Directive 2004/38 is based, as the necessary protection of state security cannot have the effect of denying the person concerned his right to be heard and, therefore, of rendering his right of redress as provided for in Article 31 of that Directive" [65]. The Grand Chamber rejected the opinion of the Advocate General which had suggested that the "irreducible minimum" principle (set out below) only applies in the context of detention. If it is strictly necessary to withhold some of the evidence supporting grounds, court must still ensure that the person being expelled "is informed, in any event, of the essence of the grounds in a manner which takes due account of the necessary confidentiality of the evidence" [69].

9. In *Kadi II*, the Grand Chamber of the CJ made clear that the "irreducible minimum" principle applies to financial restrictions. It ruled that, where a person is subject to an EU restrictive measure, "respect for rights of defence and the right to effective judicial protection requires that the competent Union authority disclose to the individual concerned the evidence against the person available to that authority and relied on as the basis of its decision… the competent Union authority must ensure that that individual is place in a position in which he may effectively make known his views on the grounds advanced against him[1].

10. The CJ did not state that disclosure of a summary outlining the information's content or that of the evidence in question allows the judge to base its judgment on

[1] Joined Cases C-584/10 P, C-593/10 P and C-595/10 P Commission and Others v Kadi [2013] ECR, paragraph 111-112.

information or material which, owing to its confidential nature, has not been communicated to the other main party, as it is actually provided for in article 105, paragraph 7 RP GC.

11. In the CCBE's view, article 105, paragraph 7 RP GC is creating a new regime, not validated by the CJ case-law, which can give rise to future infringements of fundamental rights affirmed in the Charter and ECHR. That provision the CG, with legal basis on this provision, to base its judgement on grounds and information or material not communicated to the person concerned.

C. Article 105, paragraph 7 under the perspective of the ECHR case-law

12. According to the explanatory notes of the RP GC, the ECHR has held in case *A. and Others v. the United Kingdom* that there may be restrictions of the right to a fully adversarial procedure where strictly necessary in the light of a strong countervailing public interest, such as national security, the need to keep secret certain police methods of investigation or the protection of the fundamental rights of another person[2].

13. In fact *A v UK* establishes an absolute rule that a person must always be told "sufficient information about the allegations against him to enable him to give effective instructions" so that he can refute, as far as possible, the allegations against him [220]. It also establishes that this rule applies even where it would be damaging to national security to disclose this irreducible minimum [219, 223-224].

14. It is notable that all members of the House of Lords in *R (F) v Secretary of State for the Home Department* [2010] 2 AC 269 interpreted *A v UK* in this way. Lord Philips at [58-59], Lord Hope at [81] (the person "must be given sufficient information about the allegations against him to give effective instructions to the special advocate. This is the bottom line, or the core irreducible minimum … that cannot be shifted"), Lady Hale at [103] ("Strasbourg has now, in *A v United Kingdom* (2009) 49 EHRR 625, made it entirely clear what the test of a fair hearing is. The test is whether the controlled person has had the possibility effectively to challenge the allegations against him"), Lord Carswell at [109]: "The Grand Chamber in *A v United Kingdom* (2009) 49 EHRR 625 has expressly opted for an absolute rule". The Court of Appeal in *Bank Mellat v HM Treasury* [2012] QB 91 held that the "irreducible minimum" principle applies to financial restrictions just as much as to control orders and detention, and that the principle "required the Treasury's disclosure to be sufficient to enable the bank to give sufficient instructions not merely to deny, but actually to refute (in so far as that was possible) the 'essential allegations' relied on by the Treasury to justify the making and continuance of the direction".

[2] A. and Others v. the United Kingdom [GC], no. 3455/05, ECHR 2009.

15. CCBE considers that the regime created by article 105, paragraph 7 RP GC does not give effect to these principles. It can give rise to judgements confirming administrative decisions where the persons concerned are unable to challenge the allegations against him or. In CCBE's opinion, this infringes Article 6 of the Convention.

D. Conclusion

16. CCBE considers that article 105, paragraph 7 RP GC (i) is creating a new regime, not validated by the CJ case-law, which can give rise to future infringements of fundamental rights affirmed in the Charter and ECHR, (ii) is not the appropriate instrument to include such a regime and (iii) can give rise to judgements infringing the fundamental rights affirmed in the Convention.

III. Article 105, paragraph 6 RP GC

17. This provision states that, after weighing up the matters referred to in paragraph 5, the GC shall make a reasoned order specifying the procedures to be adopted to accommodate the requirements referred to in paragraph 5, in particular by inviting the party concerned to produce, for subsequent communication to the other main party, a non-confidential version or a non-confidential summary of the information or material, containing the essential content thereof and enabling the other main party, to the greatest extent possible, to make its views known.

18. Article 105, paragraph 7 RP GC describes the situation in which the GC shares the view that the content not included in the non-confidential version or the non-confidential summary of the information or material, although essential, must remain confidential.

19. Article 105, paragraph 6 RP GC and article 105, paragraph 7 RP GC do not refer to the consequences of a situation in which the non-confidential version or the non-confidential summary does not include, in the view of the GC, the essential content of the existing information or material.

20. They do not refer either to the situation in which some information or material that could have been disclosed, in the view of the GC, has not been included in the non-confidential version or in the non-confidential summary.

21. CCBE considers that the necessary consequence of both situations should be that the information or material (essential and non-confidential in the GC view) shall not be taken into account in the determination of the case. It is the solution that article 105, paragraph 4 RP GC provides for cases where the GC concludes that the information or material produced before it is relevant in order for it to rule in the case and is not

confidential, but the party concerned objects to communicate this information or material.

22. CCBE kindly asks the GC to consider the possibility of including a new sentence in article 105, paragraph 6 *in fine* RP GC with the following wording:

> "Where the General Court considers that information or material not included in the non-confidential version or non-confidential summary is relevant in order for it to rule in the case and could have been communicated to the other main party, such information or material shall not be taken into account in the determination of the case".