

Ms. Marialena Tsirli
Registrar
European Court of Human Rights
Council of Europe
F-67075 Strasbourg-CEDEX
France

Brussels, 20 May 2022.

Subject: The proposed new Rule 44F and the proposed amendment to Rule 33 § 1 of the Rules of the Court

Dear Registrar,

I am writing to you in my capacity as President of the Council of Bars and Law Societies of Europe (CCBE) which represents the bars and law societies of 46 countries, and through them more than one million European lawyers.

The regulation of the profession, the defence of the rule of law, human rights and democratic values are the most important missions of the CCBE. The CCBE therefore greatly values its relationship with the Court and the opportunity to respond to your letter of 23 March 2022 inviting its comments on the proposed introduction of a new Rule 44F in the Rules of Court and a consequential amendment of Rule 33(1).

This proposal has been studied by the CCBE's Permanent Delegation to the ECHR (PD Stras), which has drawn upon comments from specialists from national Bars and Law Societies in reaching its assessment.

First, the CCBE welcomes the Court's commitment to transparency in consulting the Court's users, including notably the CCBE, on the proposed amendment of the Rules and for providing an appropriate window within which comments can be gathered and submitted to the Court. The CCBE is committed to this form of dialogue with the Court to ensure that the Court's procedures enable it to face the scale of its task in interpreting and applying the Convention.

Secondly, the CCBE understands that the opportunity for consultation with Court users, including Member States of the Council of Europe, is intended to bring the experience of those users to the Court's attention, while the ultimate responsibility for the procedure adopted and for any change in the Rules rests with the Court.

This reflection is particularly relevant in relation to the proposed introduction of Rule 44F, which proposes a new mechanism for handling exceptionally sensitive material. Undoubtedly the Court has been confronted with difficulties arising from the handling of such material in a small number of cases. Those difficulties have been amplified in certain cases by the very nature and sensitivity of the material in question, but it is fair to say that the problem which the proposed Rule 44 F is intended to address is very rare in the Court's case load.

Thirdly, therefore, considerations of proportionality suggest that the solution which the Court adopts in dealing with such sensitive material should strike an appropriate balance between the frequency and severity of the problem and the extent of the Court's resources applied to its resolution.

The methodology proposed by draft Rule 44F is that questions of the management of very sensitive documents should be referred to a separate group of judges from those who are empanelled to determine the application as a whole. This approach reflects the provisions of the Rome Statute, a document designed exclusively for the determination of international criminal law.

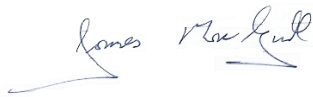
Undoubtedly, the Court has a wider mandate than that addressed by the Rome Statute. Applications to the Court originate from domestic proceedings. While the management of very sensitive material is not an uncommon issue in the practice of national courts, it would be highly unusual for a court confronted with such an issue to have recourse to a differently constituted group of judges, who are not otherwise seized of the dispute in question, to determine how the sensitive material should be handled.

While there are clearly competing interests as to whether judges can be expected to be able to put certain matters out of their minds in determining interlocutory and substantive issues, the introduction of a fresh group of judges to determine issues of document management in a case in which they are not otherwise concerned, also raises practical problems.

As a result the CCBE would respectfully invite the Court to consider in particular whether the additional demands on judicial resources which would arise from the operation of the proposed Rule 44F represents an appropriate balance between ensuring the fairness of its procedures and the reasonably prompt determination of all the applications before it.

The CCBE is grateful for the opportunity to comment on this proposed amendment of the Rules of Court and remains at the Court's disposal for any further consultations.

Yours sincerely,

A handwritten signature in blue ink that reads "James MacGuill". The signature is written in a cursive style with a long horizontal stroke at the end.

James MacGuill SC
CCBE President