

## CCBE position on the amendment of Rules 36 and 44 of the Rules of Court of the European Court of Human Rights (the Court)

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1. The Court has consulted the CCBE on a proposed amendment of its Rules relating to the conduct of applicant's representatives. The Court is master of its own Rules and their amendment, subject to a degree of consultation<sup>1</sup>. PD Stras, in consultation with the PECO and Deontology Committees, has prepared additions to the Court's proposed amendments, which are set out in the Annex (the CCBE Suggestions). The CCBE Suggestions concentrate on the effect of the proposed amendments on lawyers who are members of local or national Bars and Law Societies who plead before the Court.
2. The Court's proposed amendments simplify R 36(4)(b)<sup>2</sup> and group the power to supervise pleadings and the power to exclude a representative from pleading before the Court at all, in amended Rule 44D<sup>3</sup>. These amendment have been adopted by the Court, subject to present consultation.
3. The Court's proposals therefore fall into two parts. First, the existing powers to control and exceptionally reject prolix or repetitive submissions in a particular case is retained. These case-

<sup>1</sup> Rule 116 :

1. Any Rule may be amended upon a motion made after notice where such a motion is carried at the next session of the plenary Court by a majority of all the members of the Court. Notice of such a motion shall be delivered in writing to the Registrar at least one month before the session at which it is to be discussed. On receipt of such a notice of motion, the Registrar shall inform all members of the Court at the earliest possible moment.
2. The Registrar shall inform the Contracting Parties of any proposals by the Court to amend the Rules which directly concern the conduct of proceedings before it and invite them to submit written comments on such proposals. The Registrar shall also invite written comments from organisations with experience in representing applicants before the Court as well as from relevant Bar associations.

<sup>2</sup> (b) In exceptional circumstances and at any stage of the proceedings in the examination of an application, the President of the Chamber may, where he or she considers that the circumstances or the conduct of the advocate or other person appointed under the preceding sub-paragraph so warrant, direct that the latter may no longer represent or assist the applicant in those proceedings and that the applicant should seek alternative representation.

<sup>3</sup> Rule 44D – Inappropriate submissions by, or conduct of, the representative of a party

1. If the representative of a party in the proceedings makes abusive, frivolous, vexatious, misleading or prolix submissions, the President of the Chamber may ~~refuse~~ refuse to accept all or part of the submissions or make any other order which he or she considers it appropriate to make, without prejudice to Article 35 § 3 of the Convention.
2. (a) The President of the Court may, in exceptional circumstances, where he or she considers that the conduct of the advocate, or of the person appointed under Rule 36 § 4 (a) so warrant, direct that the said advocate or other person may no longer represent or assist a party before the Court. Such exclusion order may be for a definite or indefinite period.  
(b) Such a decision shall be reasoned and shall be taken upon a reasoned proposal by a Chamber, after the person concerned, the Government concerned, and if necessary, the Bar Association, are given the possibility of suggesting comments.  
(c) Upon the reasoned request of the person concerned, the President of the Court may, after consulting the Chamber, the Government and any Bar Association concerned, restore the rights of representation.

management powers are well understood and uncontroversial in principle. Secondly, The Court proposes to formalise the power to exclude a lawyer from pleading in any application. This power is to be expressly included in the Rules for the first time.

4. The Court's proposal for the exclusion decision recognises the severity and significance of such an exclusion decision for the lawyer. The Court's proposal limits the scope of the new provision to 'exceptional circumstances'. The extreme rarity of any such decision in the Court's practice underlines how exceptional such a case would be, as does the reservation of the decision to the President of the Court alone. The applicability is further narrowed by requiring a formal reasoned proposal to first be made by a Chamber of the Court to the President of the Court. Although 'exceptional circumstances' is a potentially broad term, these safeguards and the fact that this issue has been such a rarity in the Court's entire history, show that the new Rule will be truly exceptional.
5. Important further safeguards are provided: the Rule will apply to the conduct of the lawyer. An exclusion decision can only be taken after the lawyer (and others, see below) may comment. The decision must be reasoned and may exclude for a specified period or indefinitely. Thereafter the lawyer affected may apply to reverse the decision.
6. The CCBE recognises that the Court has the power to control its procedures including setting the requirements for those, including practicing lawyers, who plead before it. Nevertheless, the decision to exclude a practising lawyer who is a member of a Bar or Law Society is of such significance for the standing and entitlement of such a practicing lawyer that it is essential that that lawyer's Bar or Law Society is informed and engaged in the exclusion decision. This is necessary not merely to protect the lawyer's proper interests but also to ensure that the consequences of improper conduct which has been established can be taken into account by the Bar or Law Society for the wider protection of the profession and society.
7. Although the Court's proposed amendments have sought to address this issue, the amendments set out in the Annex are proposed by the CCBE to clarify the text and to ensure that an appropriate process is assured, with the input of the necessary parties. The reasons for these textual amendments are set out below.

#### **Reasons for the CCBE's suggestions**

8. Amendment is proposed of R 36 and R 44D. The distinction between these Rules is that R 36 concerns the representation of an applicant in a particular case, whereas the new aspect of R 44 D concerns improper conduct by a representative leading to their temporary or permanent exclusion.
9. The CCBE Suggestion is that the Court's proposed R 44D 1, which concerns inappropriate submissions in a particular case, should be included in a new R 36(4)(b). The President of the Chamber would therefore be able to control the submissions which are accepted in any particular given case. The distinction between R 36 and R 44 should reflect the fact that the powers in R 36 are exercised in respect of a particular case by the Chamber President, whereas the even more exceptional general jurisdiction to exclude is exercisable by the President of the Court.
10. As a result of this suggestion, R 44 D deals solely with the more serious issue of *conduct* which is so serious as to justify a Chamber of the Court making a reasoned proposal to the President of the Court that a representative (whether a lawyer or a person appointed under R 36(4)(a)) should be temporarily or permanently excluded from representing any applicants before the ECtHR.
11. Five small but important amendments are suggested to the Court's proposed text of R 44 D:

- a. The decision of the President to exclude a person, or to reinstate a person, as able to represent applicants before the Court, should be reasoned and made public;
- b. Where the person concerned is a lawyer it is essential that their Bar or Law Society is given the opportunity to make submissions to the Court. This is vital not merely to ensure the propriety of such decisions by the President, but also because the Bar or Law Society will need to consider whether the conduct merits national disciplinary action. They must also be consulted necessarily on an application to lift the exclusion under R 44 D (c).
- c. The person concerned should have a right of reply to any comments made by the Government and Bar or Law Society.
- d. Because the application of R 44 is to *conduct*, rather than a particular pleading in a given case (to which R 36(4)(b) would now apply), it is not inevitable that any Government (still less 'the' Government) has been affected, or needs to be notified of the procedure. A Government which has been directly affected by the conduct should be able to make submissions about the proposed exclusion. It is unclear why Government comments about reinstatement would be necessary, or which Government might be concerned. The protection of the independence of the legal profession suggests that Government comments should be avoided.
- e. Any period of exclusion imposed should be specified and not be indefinite. It would be desirable to stipulate a maximum period, but given the potential length of proceedings under the Convention that would be impractical.

12. The CCBE Suggestions are set out in the Annex and are respectfully submitted to the Court.

## ANNEX:

### CCBE Draft amendments to the Court's proposal to amend Rules 36 and 44 D of the Rules of Court

#### Rule 36 – Representation of applicants

1. Persons, non-governmental organisations or groups of individuals may initially present applications under Article 34 of the Convention themselves or through a representative.
2. Following notification of the application to the respondent Contracting Party under Rule 54 § 2 (b), the applicant should be represented in accordance with paragraph 4 of this Rule, unless the President of the Chamber decides otherwise.
3. The applicant must be so represented at any hearing decided on by the Chamber, unless the President of the Chamber exceptionally grants leave to the applicant to present his or her own case, subject, if necessary, to being assisted by an advocate or other approved representative.
4. (a) The representative acting on behalf of the applicant pursuant to paragraphs 2 and 3 of this Rule shall be an advocate authorised to practise in any of the Contracting Parties and resident in the territory of one of them, or any other person approved by the President of the Chamber.

(b) If the representative of a party in the proceedings makes abusive, frivolous, vexatious, misleading or prolix submissions, the President of the Chamber may [...] refuse to accept all or part of the submissions or make any other order which he or she considers it appropriate to make, without prejudice to Article 35 § 3 of the Convention.

(cb) In exceptional circumstances and at any stage of the proceedings in the examination of an application, the President of the Chamber may, where he or she considers that the circumstances or the conduct of the advocate or other person appointed under the preceding sub-paragraph 4(a) so warrant, direct that the latter may no longer represent or assist the applicant in those proceedings and that the applicant should seek alternative representation.

5. (a) The advocate or other approved representative, or the applicant in person who seeks leave to present his or her own case, must even if leave is granted under the following sub-paragraph have an adequate understanding of one of the Court's official languages.

(b) If he or she does not have sufficient proficiency to express himself or herself in one of the Court's official languages, leave to use one of the official languages of the Contracting Parties may be given by the President of the Chamber under Rule 34 § 3.

#### Rule 44D – Inappropriate submissions by, or conduct of, the representative of a party

~~1. If the representative of a party in the proceedings makes abusive, frivolous, vexatious, misleading or prolix submissions, the President of the Chamber may [...] refuse to accept all or part of the submissions or make any other order which he or she considers it appropriate to make, without prejudice to Article 35 § 3 of the Convention.~~

~~1.2.~~ (a) The President of the Court may, in exceptional circumstances, where he or she considers that the conduct of the advocate, or of the person appointed under Rule 36 § 4 (a) so warrant, direct that the said advocate or other person may no longer represent or assist a party before the Court. Such exclusion order may only be for a definite or indefinite specified period.

(b) Such a decision shall be reasoned, made public and shall be taken upon a reasoned proposal by a Chamber, after the person concerned, the ~~Government concerned~~ relevant Bar and if

necessary, ~~the Bar Association~~ any Government directly affected by the conduct in question, are given the possibility of ~~suggesting~~ making adversarial comments.

(c) Upon the reasoned request of the person concerned, the President of the Court may, after consulting the Chamber ~~and the relevant Bar, the Government and any Bar Association concerned~~, restore the rights of representation by a public decision. If the President of the Court decides not to restore the rights of representation, he/she shall give reasons for his/her refusal.