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23 June 2009

Reconsideration on substantive grounds of previously ratified credentials of the Ukrainian delegation (Rule 9 of the Assembly's Rules of Procedure)

Committee Opinion¹

Committee on Rules of Procedure, Immunities and Institutional Affairs
Rapporteur: Mr Eduard LINTNER, Germany

A. Committee's conclusions

The Committee on Rules of Procedure, Immunities and Institutional Affairs considers that the proposal in the report by the Committee on Legal Affairs and Human Rights concerning the credentials of the Ukrainian delegation ([Doc. 11963](#)) complies with the Assembly's Rules of Procedure and the Statute of the Council of Europe. However, it wishes to present an amendment which adds a specific consideration to the draft resolution.

B. Explanatory memorandum

1. Introduction

1. On 19 May 2009, Mr Marty and 19 other Assembly members tabled a motion for a resolution requesting the annulment of the ratified credentials of the Ukrainian delegation on substantive grounds, in accordance with Rule 9 of the Rules of Procedure ([Doc. 11921](#)).
2. At its meeting on 28 May 2009, the Bureau decided to refer the matter to the Committee on Legal Affairs and Human Rights for report and to the Committee on Rules of Procedure, Immunities and Institutional Affairs for opinion in accordance with Rule 9.2 of the Assembly's Rules of Procedure. This decision was ratified by the Standing Committee on 29 May.
3. It is striking that the Assembly should have received for the third time, in less than a year, a motion for the annulment of the credentials of a delegation, when the procedure provided for in Rule 9 had previously been unused since its introduction in 1996.
4. The Committee on Rules of Procedure, Immunities and Institutional Affairs expressly recalls its previous opinions, which mention the criteria to be applied when the Assembly considers such requests. In particular the committee considered that "as the procedure in question [was] of major political importance and [needed] to be conducted with rigour because of its implications, it [could not] be used as a mere means of exerting pressure for purely tactical reasons".² It is for this reason that the Committee on Rules of Procedure,

1. See [Doc. 11963](#), report submitted by the Committee on Legal Affairs and Human Rights.

2. See the opinion of the committee on the "Reconsideration of the Russian delegation's previously ratified credentials on substantive grounds" ([Doc. 11728](#)) and the opinion of the committee on "The implementation by Armenia of Assembly Resolutions 1609 (2008) and 1620 (2008)" ([Doc. 11799](#)).



Immunities and Institutional Affairs pays particular attention to the reasons behind a request for reconsideration of a delegation's credentials, and that it intends to consider the request's conformity with the Assembly's Rules of Procedure.

5. The Committee on Rules of Procedure, Immunities and Institutional Affairs will also consider in this opinion whether the proposal put forward by the Committee on Legal Affairs and Human Rights in its report (see [Doc. 11963](#)) complies with the Rules of Procedure, in particular Rule 9, and with the Statute of the Council of Europe.

2. Compliance of the motion calling for reconsideration of credentials with the Rules of Procedure

6. Firstly, the Committee on Rules of Procedure, Immunities and Institutional Affairs considers it useful to consider the preliminary request in the motion for a resolution for reconsideration of the ratified credentials of the Ukrainian parliamentary delegation under Rule 9 in the light of the Rules of Procedure.

2.1. On the formal admissibility of the motion

7. Rule 9.2 states: "A motion for a resolution to annul ratification shall be tabled by at least twenty members, belonging to at least two political groups and five national delegations". The motion is admissible, having been tabled by 20 members, belonging to four political groups and 11 national delegations.

8. The deadline provided for in Rule 9.2 ("A motion for a resolution to annul ratification shall ... be distributed at least two weeks before the opening of a part-session (...)") was also met, as the motion was received and distributed on 19 May 2009.

2.2. On the grounds of the motion

9. Rule 9.1.a states that "The Assembly may reconsider ratified credentials of a national delegation as a whole ... on a motion for a resolution to annul ratification based on the grounds set out in Rule 8.2 ...".

10. Rule 8.2, meanwhile, stipulates that:

"The substantive grounds on which credentials may be challenged are:

a. serious violation of the basic principles of the Council of Europe mentioned in Article 3³ of, and the Preamble to, the Statute; or

b. persistent failure to honour obligations and commitments and lack of co-operation in the Assembly's monitoring procedure."

11. The motion contesting the credentials which is before the Assembly alleges "a serious violation of the basic principles of the Council of Europe mentioned in Article 3 of ... the Organisation's Statute" related to the persistent refusal, by the Government of Ukraine, to provide the Assembly with the name of a third candidate for the list of candidates for the election of a judge to the European Court of Human Rights, and to the appointment of an ad hoc judge, who is actually sitting in the Court, "which undermines the credibility of the Court and is contrary to Ukraine's basic obligations as a High Contracting Party to the European Court of Human Rights". The signatories of the motion then conclude on the need for the Assembly "to annul the ratification of the credentials of the Ukrainian delegation to the Parliamentary Assembly, on substantial grounds, in accordance with Rule 9.1.a of the Assembly's Rules of Procedure".

12. In these previous opinions on the reconsideration of a delegation's credentials, the committee drew the Assembly's attention to its desire not to see the procedure provided for in Rule 9 become trivialised through misuse. The Rule 9 procedure was established concurrently with the consolidation of the procedure for monitoring member states' obligations and commitments, in keeping with the Assembly's wish to be able to "challenge ratified credentials when urgent action is deemed necessary".⁴

3. Article 3: "Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I."

4. See report on "Challenge of credentials of national delegations in the course of an ordinary session", [Doc. 7481](#), and [Resolution 1081 \(1996\)](#).

13. In the same previous opinions, the Committee on Rules of Procedure, Immunities and Institutional Affairs recommended that any motion to challenge a delegation's credentials on the basis of Rule 9 should be properly substantiated and that the authors should cite evidence for the serious violation mentioned in Rule 8.2. The Committee on Rules of Procedure, Immunities and Institutional Affairs observes that the motion for the annulment of the credentials of the Ukrainian parliamentary delegation is supported by detailed arguments setting out the grounds for the request.

3. Consideration of the proposal made by the Committee on Legal Affairs and Human Rights

14. The Committee on Rules of Procedure, Immunities and Institutional Affairs examined the report adopted by the Committee on Legal Affairs and Human Rights, and discussed whether the draft resolution it contained complied with the Assembly's Rules of Procedure and the Statute of the Council of Europe.

15. Rule 9.4 states that: "a report submitted to the Assembly or the Standing Committee under paragraphs 2 and 3 shall contain a draft resolution proposing in its operative part:

a. confirmation of the ratification of the credentials;

b. annulment of the ratification of the credentials;

c. confirmation of the ratification of the credentials together with depriving or suspending the exercise of some of the rights of participation or representation of members of the delegation concerned in the activities of the Assembly and its bodies".

16. The Committee on Legal Affairs and Human Rights proposes, "for the time being, not to annul and therefore to confirm the credentials of the Ukrainian parliamentary delegation, on the understanding that disregard – by Ukraine – of its basic obligations under the Convention and the Organisation's Statute must be resolved without further delay".

17. The Committee on Rules of Procedure notes that the report submitted by the Committee on Legal Affairs and Human Rights contains a detailed statement of the ins and outs of the problem of the election of a judge to the Court in respect of Ukraine, which has lasted for over two years. The committee concludes that there has been "disregard – by Ukraine – of its basic obligations under the Convention and the Organisation's Statute". Whereas the Committee on Legal Affairs and Human Rights claims that this constitutes "a serious violation of basic principles of the Council of Europe mentioned in Article 3 of, and the Preamble to, the Organisation's Statute", the Committee on Rules of Procedure, Immunities and Institutional Affairs wonders whether the arguments put forward would in fact have been sufficient to substantiate and justify a call for a penalty – if it had been called for by the Committee on Legal Affairs and Human Rights, which is not the case – proportional to the seriousness of the grounds.

18. The Committee on Rules of Procedure, Immunities and Institutional Affairs notes that the Assembly can be seized again of the matter at any moment since a new motion under Rule 9.1 may be tabled if the problem is not resolved "without further delay". Furthermore, in January 2010, the credentials of the Ukrainian parliamentary delegation will need to be ratified and, if appropriate, may be challenged under Rules 7 and 8.

19. Moreover, the Committee on Legal Affairs and Human Rights notes that the existing situation – the dilatory attitude of the Ukrainian authorities in putting forward a third candidate and the appointment of ad hoc judges – is likely to undermine the credibility of the Court.

20. The Committee on Rules of Procedure, Immunities and Institutional Affairs shares the concern of the Committee on Legal Affairs and Human Rights at seeing the normal procedures foreseen by the European Convention on Human Rights and the existing regulations "circumvented for an indefinite period" (see paragraph 12 of the explanatory memorandum) by the Ukrainian authorities simply because they have blocked the procedure for the election of a judge by refusing to forward a complete list and have appointed ad hoc judges – with no democratic legitimacy – to occupy, for a prolonged period of time, the post normally assigned to a judge elected by the Parliamentary Assembly. However, the committee takes note of the appointment by the Ukrainian Government of a new ad hoc judge for a three-month fixed term as from 1 September 2009.

21. The Committee on Rules of Procedure, Immunities and Institutional Affairs takes the view that the Assembly could therefore consider the implications of the failure to nominate a third candidate and the fact that an ad hoc judge is taking the place of a judge duly elected by the Assembly in respect of Ukraine in the light not of the functioning of the Court but of the failure to respect its own competence in this regard. To allow such an abusive situation, whereby recourse to ad hoc judges is favoured to the detriment of judges who are

fully fledged because they have been elected by the Assembly, to occur and tolerate its persistence is tantamount to denying the competence of the Assembly to elect judges, as provided for in the European Convention on Human Rights.

22. The Committee on Rules of Procedure, Immunities and Institutional Affairs therefore considers that the Assembly, in particular its Committee on Legal Affairs and Human Rights, should examine more closely the question of ad hoc judges and their prerogatives. It will be remembered that in April 2010 the Assembly will have to elect 21 judges (unless Protocol 14, having been ratified at last by all the member states, comes into force before then). Could the Assembly, on that occasion, allow one or more of these 21 member states to resort to the same dilatory attitude as the Ukrainian Government, at the risk of seeing the election timetable completely disorganised and the Court's functioning disrupted? As the Committee on Legal Affairs and Human Rights points out in its report, not only do such arrangements "threaten to undermine the credibility of the Court" and its proper functioning, but they also seriously call into question the competence of the Assembly itself.

4. Amendment to the draft resolution presented by the Committee on Legal Affairs and Human Rights

23. The Committee on Rules of Procedure, Immunities and Institutional Affairs wishes to table one amendment to the draft resolution, worded as follows:

"After paragraph 5 of the draft resolution, add the following new paragraph:

'Moreover, the Assembly considers that the blocking by the Ukrainian authorities of the election of a judge in respect of Ukraine, the failure to communicate the name of a third candidate and the appointment of ad hoc, unelected judges who have been performing the duties of judge in the Court in respect of Ukraine since January 2009 in lieu and place of a judge duly elected by the Assembly seriously calls into question the Assembly's electoral competence as provided for in the European Convention on Human Rights.'"

5. Concluding remarks

24. The Committee on Rules of Procedure, Immunities and Institutional Affairs considers that the draft resolution contained in the report submitted by the Committee on Legal Affairs and Human Rights ([Doc. 11963](#)) meets the requirements of Rule 9 and complies with the Assembly's Rules of Procedure and the Statute of the Council of Europe.

25. The Committee on Rules of Procedure, Immunities and Institutional Affairs considers, however, that the Assembly should examine in greater detail the question of ad hoc judges and their prerogatives in the light, in particular, of the potential consequences of other member states' dilatory attitude for the timetable for elections to the Court – given that in April 2010 the Assembly will have to elect 21 judges – and the Court's functioning.

Reporting committee: Committee on Legal Affairs and Human Rights.

Committee seized for opinion: Committee on Rules of Procedure, Immunities and Institutional Affairs.

Reference to committee: Reference 3573 of 29 May 2009.

Opinion unanimously approved by the committee on 23 June 2009.

Secretariat of the committee: Mr Heinrich, Mrs Clamer.