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Committee on Rules of Procedure, Immunities and Institutional Affairs

List of rights of participation and representation whose exercise may be deprived or suspended in the context of a challenge of credentials under Rule 10.1.c with respect to voting rights in the procedure for electing personalities by the Assembly

Opinion for the Bureau of the Assembly²

Prepared by the Chairperson of the Committee, Ms Petra De Sutter (Belgium, Socialists, Democrats and Greens Group)

1. At its meeting on 22 November 2018, the Bureau of the Assembly asked the Committee on Rules of Procedure, Immunities and Institutional Affairs “to review the list of rights of participation and representation whose exercise may be deprived or suspended in the context of a challenge of credentials under Rule 10.1.c with respect to voting rights in the procedure for electing personalities by the Assembly”.

1. Reminder of the existing regulatory framework on "sanctions" of national delegations

2. The Parliamentary Assembly may decide to take collective measures against its members by the deprivation or suspension of the exercise of a number of participation and representation rights, based on a breach or a violation of the provisions of its Rules of Procedure or the Statute of the Council of Europe, in the context of a procedure, that of the challenge or reconsideration of the credentials of national delegations for procedural or substantive grounds. There is in the Rules of Procedure no "autonomous" sanctions procedure with respect to a delegation or a member of the Assembly (with the exception of the Code of Conduct for members of the Assembly in the latter case).

1.1. *Decision of the Assembly on a challenge of credentials*

3. The procedures for challenging or reconsidering credentials are governed by Rules 7 to 10 of the Assembly's Rules of Procedure. When the Assembly is called upon to take a decision on a challenge to a national delegation's credentials, whether based on procedural grounds (Rule 7) or substantive grounds (Rules 8 and 9), it must, in accordance with Rule 10, take a decision on the basis of three possible alternatives:

- the ratification of the credentials, or the confirmation of the ratification of the credentials (Rule 10.1.a),
- the non-ratification of the credentials, or the annulment of the ratification of the credentials (Rule 10.1.b),
- the ratification of the credentials, or confirmation of ratification of the credentials together with the deprivation or suspension of 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 (Rule 10.1.c).

¹ On 14 December 2018, the Bureau decided to declassify the current document

² Approved by the Committee on 10 December 2018

4. The Assembly's Rules of Procedure lay down no list of participation and representation rights that may be deprived or suspended in the context of a challenge of credentials. Rule 10.1.c of the Rules of Procedure sets out a description of the sanctions which may be imposed on the members of a delegation in general terms only. For this reason, in April 2014 (in the context of the decision taken by the Assembly to suspend certain rights of the delegation of the Russian Federation (Resolution 1990 (2014)), the Bureau of the Assembly instructed the Rules Committee to clarify the regulatory framework and to draw up such a list of rights of representation and participation.

5. To date, there is no other framework for the implementation of Rule 10.1.c than the Opinion to the Bureau of the Assembly that the Rules Committee approved on 30 September 2014 ("Deprivation or suspension of the rights of participation or representation of Assembly members in the context of a challenge or reconsideration of the credentials of a delegation under Rules 7, 8 and 9 of the Assembly's Rules of Procedure" (document AS/Pro (2014) 10 def)). This opinion, which is based on the exclusive competence of the Rules Committee for interpreting the Rules of Procedure (Rule 70.2), is the only basis for the Assembly's decision when determining restrictive measures against a delegation.

6. This opinion of the Rules Committee:

- draws up a list of rights of participation and representation in the activities of the Assembly and its bodies that may be suspended or deprived in the context of a challenge of credentials, while recalling that such a comprehensive list cannot be exhaustive;
- also establishes a rigorous general framework to ensure that the Assembly's decision on deprivation or suspension of rights is clear, coherent, rational and understandable, namely that any decision by the Assembly to adopt sanctions should retain a degree of regulatory rationality and legal consistency so as to meet the need for legal certainty which must apply to any decision of this importance.

1.2. Catalogue of potential "sanctions" established by the Rules Committee in 2014

7. In its 2014 Opinion, the committee draws up the following list of rights attached to the exercise of a member's functions in the Assembly, which are linked both to the activities of the Assembly and to those of the committees, divided into two main categories:

8. *Participation rights* include the following rights:

- right to vote (Rule 43)
- right to speak (Rule 35)
- right to speak in free debates (Rule 39)
- right of amendment (Rule 34)
- right to table motions for resolution or recommendation (as main mover or signatory) (Rule 25)
- right to table written declarations (Rule 54)
- right to address questions to the Committee of Ministers (Rule 59)
- right to be a committee member (Rule 44)
- right to be appointed rapporteur (Rule 50)
- right to request a debate under urgent procedure or a current affairs debate (Rules 51, 52 and 53)
- right to be a candidate for the office of President of the Assembly (Rule 15), chairperson or vice-chairperson of a committee or sub-committee (Rules 46 and 49)
- right to be a member of an ad hoc committee on observation of elections.

9. *Representation rights* cover the institutional representation in the Assembly bodies, on the one hand, and that in Council of Europe bodies and external institutions, on the other:

- representation in the Assembly bodies: Presidential Committee, Bureau, Standing Committee (Rules 14 and 15)
- representation in the Joint Committee (Rule 56)
- representation as an *ex officio* member in Assembly committees (Rules 19.5 and 44.1);
- institutional representation of the Assembly (in Council of Europe bodies, by Bureau decision)
- representation of the Assembly on an occasional basis (by Bureau or committee decision) at events, meetings, conferences, organised by Council of Europe bodies, international organisations or interparliamentary assemblies.

2. Elections by the Assembly and the right to vote of Assembly members

10. The right to vote is one of the rights of participation of members that may be deprived or suspended by the Assembly (see paragraph 8). In short, in the latest request, the Bureau of the Assembly asks the committee to determine whether the right to vote in the procedures for elections by the Assembly of the highest officials of the Council of Europe can be excluded from the list of possible "sanctions".

11. In its 2014 Opinion, the Rules Committee had briefly examined this question. It did so in the quite particular context of whether it was possible to allow, by an amendment to the draft resolution on the reconsideration of the credentials of the Russian delegation discussed at the April 2014 part-session, a specific exception to the overall application of the deprivation or suspension of the voting rights of the members of the delegation concerned, in order to enable them to take part in the election of the Secretary General of the Council of Europe in June 2014. The committee then recalled that "the right to vote of parliamentarians is one and indivisible (as it is for the citizens' vote)", thus justifying the position of the President of the Assembly who had ruled the amendment to the draft resolution out of order and had concluded that "depriving members of a delegation of their right to vote applies to all votes in the Assembly and its bodies".³

2.1. The right to elect the highest officials of the Council of Europe: general competence of the Assembly and the individual voting rights of Assembly members

12. In accordance with the principle of the hierarchy of legal norms, the Rules of Procedure of the Assembly (Article 28 of the Statute of the Council of Europe) cannot include provisions which are contrary to the Statute of the Council of Europe. The Rules of Procedure are derived from the Statute of the Organisation, and, through special provisions, serve to specify the general provisions it contains.

13. Various texts confer on the Assembly the exclusive competence to elect the highest officials of the Council of Europe: Article 36.b of the Statute of the Council of Europe, for the appointment of the Secretary General and Deputy Secretary General of the Council of Europe and Secretary General of the Parliamentary Assembly; Article 22 of the European Convention on Human Rights, for the election of judges; Article 9 of Resolution (99) 50 of the Committee of Ministers, for the election of the Commissioner for Human Rights. The Assembly's Rules of Procedure, for their part and by specific procedures, organise the election of these personalities and the participation of members of the Assembly in these elections.⁴ Nothing in the Rules of Procedure or complementary texts contradicts the letter of the Statute or the European Convention on Human Rights.

14. It should be noted that the above-mentioned texts establish the competence of the Assembly, as a statutory organ, to elect these personalities. They do not confer on parliamentary delegations or members of the Assembly – individually – the right to participate in the election of the highest officials of the Organisation. This responsibility is attached to an organ of the Council of Europe – the Parliamentary Assembly – which exercises it through its members.

15. Only the Assembly's Rules of Procedure (Rule 40.11, Rule 41.b, procedure for elections by the Parliamentary Assembly) provide that it is the members of the Assembly who are called upon to vote and take part in the election of such personalities. This explains why the right to participate in such elections, because it is part of the individual voting rights of Assembly members, was included among the rights whose suspension or deprivation could be considered pursuant to Rule 10.1.c.⁵

2.2. The election of the highest officials of the Council of Europe: a joint responsibility of the Parliamentary Assembly and the Committee of Ministers

³ Letter of the President of the Assembly dated 9 April 2014, in reply to a letter sent by Mr Pushkov, chairperson of the Russian parliamentary delegation, on 8 April 2014 ("the right to vote of members of the Parliamentary Assembly is indivisible and depriving members of a delegation of their right to vote apply to all votes in the Assembly and its bodies").

⁴ See in particular the procedure for elections by the Parliamentary Assembly adopted by the Bureau of the Assembly on 5 September 2016, ratified by the Assembly on 10 October 2016 - Assembly Rules, pages 160 et seq.

⁵ In this regard, it should be recalled that the right to vote in the Assembly is an individual one (Rule 43 of the Assembly's Rules of Procedure) and that the members of the Assembly "exercise their mandate freely and independently" and "members express their opinions freely, whether through their statements, speeches or votes, in all their activities in the Assembly and its various bodies"(Resolution 2126 (2016) on the nature of the mandate of members of the Parliamentary Assembly).

16. It was precisely with this specific legal and regulatory framework in mind that the committee wished to re-examine more carefully the proposal to exclude from possible sanctions the right of Assembly members to participate in the election of Council of Europe highest officials (see the report debated by the Assembly at the October 2018 part-session on "Strengthening the decision-making process of the Parliamentary Assembly concerning credentials and voting" (Doc. 14621)). It noted that a change of approach was motivated by the need to seek greater coherence of rules that apply to the Committee of Ministers and the Parliamentary Assembly with regard to the representation and participation of member States in both statutory organs.

17. The rapporteur of the committee pointed out in the explanatory memorandum to this report that " *While the Assembly's electoral competence derives in fact from texts of differing legal value (from the Statute of the Council of Europe for the Secretary General and Deputy Secretary General of the Council of Europe and the Secretary General of the Parliamentary Assembly, from the European Convention on Human Rights for the election of judges, and from a Committee of Ministers resolution for the Commissioner for Human Rights), the fact that the procedures for selecting and electing candidates fall within a remit that is exercised jointly (or at least shared) with the Committee of Ministers should prompt the Assembly to exclude the right to elect these figures from the scope of participation rights that could be suspended.*"

18. In that respect, paragraph 2 of the Joint Parliamentary Assembly/Committee of Ministers' interpretative Statement of March 2010 on rules and procedures for the future elections of the Secretary General of the Council of Europe states that "*the election of the Secretary General is a shared responsibility*".

19. Accordingly, the Rules Committee invited the Assembly, in paragraph 9 of the draft resolution, to decide "*that the deprivation or suspension of certain rights of participation or representation in the activities of the Assembly does not affect the rights of Assembly members to take part in the election of judges to the European Court of Human Rights, the Commissioner for Human Rights, the Secretary General and Deputy Secretary General of the Council of Europe and the Secretary General of the Parliamentary Assembly*".⁶

20. No member of the committee or of the Assembly contested this proposal, and no amendment was tabled on this point when the report was presented to the Assembly.

3. Position of the committee

3.1. Conclusions on the competence of the Rules Committee

21. The terms of reference of the Rules Committee is "to advise the Bureau of the Assembly on all matters of procedure or report to the Assembly or the Standing Committee on questions of interpretation or modification to the Rules of Procedure" (Resolution 1842 (2011) on the terms of reference of Assembly committees), which falls under Rule 70.2 of the Assembly's Rules of Procedure.

22. The competence of the Assembly to elect judges to the European Court of Human Rights, the Commissioner for Human Rights, the Secretary General and the Deputy Secretary General of the Council of Europe and the Secretary General of the Parliamentary Assembly is included in texts – the Statute of the Council of Europe, the European Convention on Human Rights in particular – which do not fall within the interpretative competence of the Rules Committee.

23. On the other hand, the right of members of the Assembly to take part in these elections is contained in the Rules of Procedure of the Assembly. The Rules Committee may therefore, in the framework of its general competence for interpreting the Rules of Procedure, determine the scope of sanctions that may apply to members of a national delegation whose credentials have been challenged or reconsidered pursuant to Rule 10.1.c.

⁶ In this report, it was also clearly pointed out that "*only Assembly members may participate in such elections: this would mean that the delegation members who were deprived of some of their rights of participation and representation as a result of a formal decision of the Assembly, including their voting rights, could participate in the election of the aforementioned figures. On the other hand, any parliament not having had its credentials ratified by the Assembly or, by its own choice, not represented in the Assembly by a delegation, has no claim to participation in these elections*".

3.2. *Conclusions on the revision of the list of "sanctions"*

24. The Rules of Procedure allow the Assembly, when considering or reconsidering the credentials of a national delegation, whether on procedural or substantive grounds, while ratifying or confirming those credentials, to deprive or suspend the members of the delegation concerned of "the exercise of some of the rights of participation or representation ... in the activities of the Assembly and its bodies" (Rule 10.1.c). These rights are not listed in the Rules, but in an Opinion approved by the Rules Committee in 2014, which aims to provide a suitable framework for decision-making when the Assembly decides on a challenge of credentials. The Assembly shall not introduce sanctions other than those mentioned in this Opinion.

25. It is not disputed that the Assembly's Rules of Procedure, with regard to the right to vote of the members of the Assembly, intends to draw a distinction between what falls within the ordinary decision of the Assembly (adoption of a resolution, recommendation, opinion, amendment, urgent procedure, agenda, etc.) and what relates to the procedure of appointments by the Assembly. The latter indeed meets specific and separate provisions both in the Rules (methods of voting - Rule 40; Majorities required - Rule 41) and in the complementary rules governing the procedure for elections.

26. The Rules Committee notes that the Assembly's Rules of Procedure disassociate the general right to vote of Assembly members – which is governed by the Rules of Procedure – from their participation in the election by the Assembly of the highest officials of the Council of Europe – which is a right of the Assembly recognised, in particular, by the Statute of the Council of Europe and the European Convention on Human Rights and which it exercises through its members.

27. The Rules Committee considers that, as they stand, the Assembly's Rules of Procedure do not contradict, in any of their provisions, either the Statute of the Council of Europe or the European Convention on Human Rights. However, the implementation of the Rules or the interpretation given to them cannot run counter to the letter or the spirit of the statutory or conventional provisions.

28. The Assembly has no jurisdiction to interfere with the application of the Statute of the Council of Europe and the European Convention on Human Rights. Accordingly, when it decides to deprive or suspend certain rights of participation or representation in the activities of the Assembly and its bodies (Rule 10.1c of the Rules of Procedure), the Assembly cannot interfere with the rights of Assembly members to take part in the election of judges to the European Court of Human Rights, the Commissioner for Human Rights, the Secretary General and the Deputy Secretary General of the Council of Europe and the Secretary General of the Parliamentary Assembly.

29. Lastly, it shall be pointed out that only members of the Assembly, belonging to delegations whose credentials have been duly ratified by the Assembly, may take part in the election of the above-mentioned personalities.