Committee on Rules of Procedure, Immunities and Institutional Affairs
Commission du Règlement, des immunités et des affaires institutionnelles

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Committee on Rules of Procedure, Immunities and Institutional Affairs

Hearing held in Strasbourg on 2 October 2019 (extracts from the minutes)

Rule 7 of the Assembly's Rules of Procedure on the challenge, on procedural grounds, of credentials submitted by national delegations: taking into account restrictive measures adopted by the European Union concerning individuals

The Chairperson said that during the June 2019 part-session, the challenge to the credentials of the Russian delegation had been referred to the committee for report. Mr Vareikis had been appointed rapporteur and a detailed exchange of views had taken place on the grounds on which the challenge had been based. Two specific issues had been discussed. The first related to the fact that the Russian delegation had been appointed by the parliament elected in 2016, whose legitimacy had been compromised by the incorporation of Ukrainian sovereign territory into a national constituency. The committee had requested the opinion of the Venice Commission on this matter. This opinion would be adopted by the Venice Commission at its December plenary session. The second issue concerned the fact that several members of the Russian delegation had been the subject of restrictive measures by the European Union for acts that had violated or threatened Ukraine's territorial integrity, sovereignty and independence. Even if the Assembly was not explicitly required to take into account the European Union's restrictive measures, such an obligation could implicitly follow from the Statute of the Council of Europe or the Memorandum of Understanding between the two institutions. The committee had therefore decided to hold a hearing by questioning experts in international law and the law of international organisations on the following specific question: "On the basis of the 2007 Memorandum of Understanding between the Council of Europe and the European Union, to what extent should the Parliamentary Assembly take into account the restrictive measures adopted by the European Union in respect of individuals in examining, on the basis of Rule 7 of its Rules of Procedure, the credentials of a national parliamentary delegation whose composition would contravene the provisions of the Statute of the Council of Europe?"

Mr Pierre Klein (*by videoconference*), Professor at the Centre for International Law, Faculty of Law – Free University of Brussels (Belgium), referred to the legal advice he had prepared at the committee's request and said that, in the Assembly's Rules of Procedure, there were two different types of challenge to a national delegation's credentials: one based on procedural grounds (Rule 7) and one on substantive grounds (Rule 8). The request he had received for an opinion made specific reference to Rule 7. Rule 7 cited, in an exhaustive way, the reasons for which a challenge on procedural grounds could be made – it did not list examples of possible grounds. Three grounds were given: disregard of one or more provisions of the Statute of the Council of Europe – and Rule 7 made particular but not exclusive reference to Articles 25 and 26 of the Statute – violation of the principles of equitable representation of political groups and of gender balance; and the absence of a solemn declaration by members to uphold the Organisation's principles and values. Only the first ground was relevant here with regard to the challenge of the credentials of the Russian delegation in this case. Rule 7 did not preclude a challenge from being based on statutory provisions other than Articles 25 and 26, which referred to requirements that were essentially of a procedural nature. The Statute made no reference to any obligation on the Council of Europe to take into account decisions adopted by other international organisations, in particular restrictive measures adopted by the European Union. However, Article 1.c of the Statute stated in a general way that the participation of States in the work of the Council of Europe "shall not affect the collaboration of its members in the work of the United Nations and of other international organisations

or unions to which they are parties". This was a standard provision in constitutive instruments of international organisations and was designed to avoid conflicts that could result for states from their participation in several international organisations with overlapping fields of action. This provision created obligations for member states, mainly not to act within the international organisation they joined to the detriment of the achievement of the aims of the other organisations to which they were already a party. But such a provision did not create obligations for the international organisation itself. Article 1.c reflected the commitment of Council of Europe member states to harmonise as far as possible the Council's action with their actions in other international organisations. This question arose more urgently with the increase in the number of international organisations on the European scene and the expansion of their fields of competence in areas that interacted with the Council of Europe's own field of competence. This was particularly true of the European Union, where the clear interaction between the fields of action of the two organisations had led to the conclusion of the 2007 Memorandum of Understanding.

To what extent could it be inferred from the Memorandum of Understanding that the Assembly had an obligation to take into account the restrictive measures imposed by the European Union when the Assembly had to take a decision on a challenge to the credentials of a national delegation? The Memorandum sought to develop relations between the two organisations in areas of common interest, defined a general framework for co-operation to this end, set out a number of principles, and identified the main fields of co-operation and the means of such inter-institutional co-operation between the specific bodies, paying particular attention to the protection and promotion of human rights. As indicated in paragraph 17 of his legal advice, it was, however, undeniable that the Memorandum of Understanding reflected the commitment of the two European organisations to act as far as possible in concert for the achievement of goals of common interest and that, in such a context, the actions or decisions adopted by one of them should be taken into account by the other. The Memorandum referred to the relevant Council of Europe standards as "the Europe-wide reference source for human rights", and to the need to ensure the consistency of European Union legislation with the relevant Council of Europe conventions. It was rather the Council of Europe's texts that had to be taken into account by the European Union in its activities in the field of the protection and promotion of fundamental rights, which was explained in particular by the fact that all the member states of the European Union had previously acceded to the Council of Europe and were already bound by its conventions, and that in this field the Council of Europe had the most established expertise. On the other hand, the Memorandum did not contain any formal provision to the contrary, namely an obligation for the Council of Europe to take into account certain acts or decisions of the European Union, in particular acts relating to restrictive measures. It was therefore difficult to conclude that the Memorandum of Understanding could provide a sufficient basis for the Assembly to take into account European Union acts adopting restrictive measures when deciding on the validity of a delegation's credentials. However, the Memorandum reflected a fairly close desire for co-operation between the two European organisations with a view to achieving goals of common interest: it was therefore in line with this spirit that the actions or positions adopted by one of the organisations should not be ignored by the other when they dealt in parallel with problems or situations that fell within their respective fields of competence. The reactions of the Council of Europe and the European Union to the situation resulting from the annexation of Crimea were a good illustration of such a situation.

To conclude, there was no obligation for the Parliamentary Assembly to take into account any restrictive measures adopted by the European Union in dealing with a challenge to the credentials of members of a national delegation on procedural grounds, under Rule 7.1 of the Assembly's Rules of Procedure. The fact that these members were covered by such measures could not in itself be considered as a violation of the formal provisions of the Statute of the Council of Europe concerning the composition of the delegation. On the other hand, the Assembly would be fully justified in taking into account the existence of such restrictive measures when challenging the credentials of members of a national delegation on substantive grounds, under Rule 8 of the Rules of Procedure, insofar as that rule referred to a serious violation of the fundamental principles enshrined in the Preamble and Article 3 of the Statute. In point of fact, the restrictive measures adopted by the Council of the European Union in response to situations such as those under discussion could be considered as revealing or confirming the existence of such a serious violation and could help to substantiate the Assembly's decision to refuse to validate the credentials of a delegation on this basis. This would be in line with the commitment of the Council of Europe and the European Union to co-operate, as reflected in the 2007 Memorandum of Understanding.

Mr Władysław Czapliński, Professor at the Institute of Law Studies, Polish Academy of Sciences, Łódź (Poland), agreed in principle with Professor Klein's conclusions. He said that the Council of Europe and the European Union were two separate organisations, each with its own field of competence and decision-making capacity. There was no direct provision in the 2007 Memorandum of Understanding setting out a commitment to mutual recognition of decisions or requiring their implementation. He found it difficult to classify this document and to assess whether and to what extent the MoU contained binding or non-binding obligations. For some commentators, the concept of "soft law" was not relevant; an agreement was an agreement and the

law was the law! Nevertheless, the Memorandum of Understanding did indeed fall within the scope of "soft law". From the perspective of the Vienna Convention on the Law of Treaties, which was a fundamental instrument of international law, binding treaties were well defined, but just because it was called a "memorandum" did not mean that a memorandum of understanding was non-binding. In a 2017 judgment in the case of the maritime delimitation of the Indian Ocean between Somalia and Kenya, the International Court of Justice acknowledged that the memorandum of understanding signed by the two states had the status of a binding document. The interpretation of an agreement depended on the intention of the parties: there was no binding element in the 2007 Memorandum of Understanding, which was an instrument for co-operation in the fields of human rights, democracy and the rule of law, other than the European Union's commitment to respect the Council of Europe's instruments, in particular the European Convention on Human Rights. Conversely, there was no direct obligation on the Parliamentary Assembly of the Council of Europe to take into account the decisions of the European Union.

International law constituted a specific legal order. The interpretation of a national court was based on a textual assessment of the national legislation or legal act in question. Its approach was very different from that of an international court, whose perspective was much broader, and which took several factors into account: the purpose and intention of the act, the legal environment and the context of the act. This was what made it possible to identify whether or not there were any obligations or a binding commitment between the parties. General international law made it mandatory to refrain from recognising the consequences of an internationally wrongful act. This principle was to be found in numerous instruments and had been reiterated in several resolutions of the United Nations General Assembly and the Security Council. Three landmark judgments of the International Court of Justice had also enshrined this principle of non-recognition of the consequences of internationally wrongful acts: the 1971 advisory opinion on South Africa's continued presence in Namibia (UN member states had an obligation to uphold the illegality of South Africa's presence in Namibia and the non-valid nature of the measures it had taken on Namibia's behalf); the 2004 advisory opinion on the legal consequences of the construction of a wall on Palestinian territory (obligation on all states not to recognise the unlawful situation resulting from the construction of the wall and not to give aid or assistance in maintaining the situation created by its construction); the 2012 judgment on the jurisdictional immunities of the state – *Germany v. Italy*. These three judgments recognised the same principle, and to the extent that all subjects of international law were required to refrain from recognising the consequences of an unlawful act, it could be assumed that what was valid for states was also valid for international organisations. The doctrine was therefore clear.

The question at hand related precisely to the consequences of the annexation of Ukrainian Crimea by the Russian Federation, i.e. an internationally wrongful act, and to the recognition of the consequences of that act, for example the illegal election of parliamentarians in that constituency. There were therefore directions in which all international organisations that shared the same values and interests should be headed. From this point of view, it was important for the Council of Europe to take into account the Memorandum of Understanding, which was more of a political obligation, in order to take into consideration the European Union's decisions. There was, within the doctrine of international law, a conflict between those who supported the normative force of facts – how facts could change international law – and those who supported the old principle of Roman law *ex injuria jus non oritur* – subjective rights could not arise from an unlawful act and be based on an unlawful foundation. Respect for this principle, which was the moral component of international law, was of fundamental importance.

Mr Vareikis thanked the two experts for the quality and relevance of their analyses. He inferred from their conclusions that the Council of Europe was not obliged to implement the decisions of the European Union but that the Assembly had complete competence and sovereignty to take its own decision on a challenge to credentials: whether they were ratified or rejected, it was a political decision.

Mr Czapliński confirmed that there were legal bases for such an analysis even though, ultimately, it came down to a political decision.

Mr Klein felt that it was a political decision because the Parliamentary Assembly was a political body; nonetheless, a political decision was not an arbitrary decision, as it was based on precise rules – the Statute of the Council of Europe and the Rules of Procedure of the Parliamentary Assembly – and, of course, on international law. He concurred with the analysis of Professor Czapliński that it was completely out of the question to recognise the consequences of an internationally wrongful act; a decision taken on that basis would also be a legal decision.

Mr Vareikis wondered whether following a decision by the Assembly to recognise members of parliament who were the subject of an EU sanction, or who had been unlawfully elected in a constituency which was not

internationally recognised, the right to remain in their delegation would constitute a precedent by which the Assembly would be bound in the future. Could the Assembly change its mind at a later date?

Mr Czapliński said that the concept of “precedent” was not recognised in international law. But if the Assembly recognised the lawfulness of an act, then it would no longer be possible for it to re-evaluate or withdraw that recognition.

Mr Kox thanked the experts for their very clear answer to the question they had been asked. The fact that a member of parliament was included on the EU’s list of sanctions was not a valid ground in the context of Rule 7 which could result in the exclusion of the delegation. He noted that the experts considered that Rule 8 could serve as a regulatory basis to examine a challenge to credentials on this ground. Was it acceptable for an international organisation to decide to exclude representatives of a state which was a member state of the Council of Europe but not a member of the international organisation in question? That would run counter to the Parliamentary Assembly’s competence to decide itself on its composition, on the basis of its own rules. If one accepted that the European Union could exclude members of another international organisation, then that could also apply to all other parliamentary assemblies.

Mr Klein reiterated that each international organisation operated in accordance with its own rules which were based on their constitutive act. A decision of one organisation could be taken into account by another, but this was not mandatory. The international organisation was “sovereign” in its assessment and decision vis-à-vis a particular state. There was no immediate or necessary link between organisations and their decisions. The question of whether or not an organisation should take into account the decision of another organisation highlighted other problems.

Mr Czapliński commented that the European Union’s decision showed the way forward by, to a certain extent, reminding the Council of Europe that the two organisations shared common values; it was an invitation to the Council of Europe to support the Union’s decisions on this basis.

In reply to **Mr Schwabe** who asked whether the Council of Europe could be a party to memoranda of understanding with several organisations and decide to act differently with regard to each of them, **Mr Czapliński** said that the Assembly’s decision, whether based on one or even a number of agreements, remained its own decision. He referred to the principle of “estoppel” in international law and the obligation of international partners to follow the same policy and maintain the same position with regard to each subject of international law. It would be surprising, and risky, to sign several memoranda of understanding that were mutually exclusive! It was imperative to follow the same line, the same policy, the same rule with regard to each party.

Ms Goguadze also thanked the experts and referred to the spirit of the Memorandum of Understanding, which sought to strengthen the links between the two international organisations, intensify co-operation on shared values and promote common interests. Examining whether and to what extent European Union decisions should be implemented by the Council of Europe meant first of all determining whether these decisions were based on common principles and shared values. Was this an important argument when considering a challenge to credentials?

Mr Klein felt that the Memorandum of Understanding did not necessarily have to be taken into account; it was above all the Statute of the Council of Europe that established the Assembly’s competence to examine the matter, in the light of the serious violations of the Statute set out in Rule 8 of its Rules of Procedure. This was a sufficient basis. The European Union’s decision was a factor to be taken into consideration because it highlighted the existence of the violations of international law and their seriousness, which justified the restrictive measures.

Mr Czapliński felt that an international organisation was necessarily bound by the decision of another international organisation. Accordingly, if the Council of Europe were to amend the European Convention on Human Rights, the European Union would have to take this into account even if it was not a party to it. The European Court of Justice of the European Union had relied on an opinion of the Venice Commission in its judgment of June 2019 *European Commission v. Republic of Poland* on the rule of law. This was an example of how an organisation took into account the position of a partner. In this case, there was the direct application of a Council of Europe decision and that was what the Memorandum of Understanding stipulated. In an opinion of the Court of Justice of the European Union on the conclusion by the European Union of an international agreement, the Court had held that, if there was an applicable solution taken on the basis of a provision of the EU Treaties and there was a similar provision in the international agreement, those provisions did not necessarily have to be understood or interpreted in the same way. In taking into account reciprocal commitments to co-operate, it was therefore possible that the obligations incumbent on one party to the MoU

might be different and even more demanding than those to be fulfilled by the other party. Once again, there was no direct obligation, but the values and principles shared by the two organisations were so similar that the Council of Europe had to take into account, indirectly, the Union's decisions in this field.

Sir Edward Leigh commented that the grounds for challenging the credentials of the Russian delegation were not founded on the correct legal basis, which was confirmed by **Mr Czapliński**, who clearly stated that, without absolutely excluding the application of Rule 7 of the Rules of Procedure, the objection raised should be examined under Rule 8, and by **Mr Klein**, who felt that such a challenge could not be based on Rule 7 but that Rule 8 provided a better legal basis.

Mr Schwabe said that the question was whether or not the committee could allow members who were on a blacklist to take part in an interparliamentary co-operation assembly. He was of course in favour of taking action against those who had committed crimes or violated international law, or a Magnitsky Act, but if a blacklist procedure were to be organised on the basis of memoranda of understanding between international organisations or even between states, this would raise a completely different problem from the point of view of the scope of bilateralism.

Mr Klein said that what was being discussed related to reactions to a situation that concerned not only the Council of Europe or the European Union, but also, on a more global level, the United Nations, and acts that had been condemned by the United Nations General Assembly, which had taken a clear position on the situation in the Crimea region. Measures taken by any organisation or national authority against persons must be the subject of a clear consensus as to the illegality of the situation on which they were based, taking into account the obligation not to recognise such a situation or to give it any legal effect. To recognise the credentials of a national delegation which included members of parliament elected in an annexed territory not internationally recognised would run counter to this position. This was a situation whose illegality had triggered reactions from the international community and international organisations.

Mr Czapliński commented that the reaction to internationally wrongful acts, by applying countermeasures – and rejecting the credentials of a delegation was a countermeasure – must be proportional to the gravity of those acts. The annexation of part of the territory of a state by another state was a serious international crime. If one did not react adequately or put an immediate end to abuses as soon as they occurred, it would be very difficult to react to such abuses when they occurred again in the future.

In response to the **Chairperson**, who wondered, if the Council of Europe were to refuse to take into account the individual sanction measures decided by the European Union, whether, in theory, the European Union could for its part refuse to apply the decisions of the Council of Europe or the European Court of Human Rights, considering that it was not bound by the Memorandum of Understanding, **Mr Kox** said that the European Union had never asked the Parliamentary Assembly to apply the MoU in a particular way; **Mr Czapliński** confirmed that the Memorandum did not constitute a legal basis for a decision by the Assembly, but an indirect source concerning the application of the procedure for challenging credentials, and **Mr Klein** reiterated his preference for relying on Rule 8 of the Assembly's Rules of Procedure as a less controversial legal basis.

The Chairperson thanked the experts for the clarity of their analysis and their willingness to answer members' questions. The committee would resume its deliberations at its next meeting, in particular on the basis of the opinion it had requested from the Venice Commission which would have been adopted by that time.

APPENDIX – List of participants / *Liste des participants*

Members / *Membres*	Political group / *Groupe politique*	Country / *Pays*
Mr Indrek SAAR, Chairperson	SOC	Estonia / Estonie
Ms Nino GOGUADZE, Vice-Chairperson	EC / CE	Georgia / Géorgie
Mr Raphaël COMTE, Vice-Chairperson	ALDE / ADLE	Switzerland / Suisse
Ms Ingjerd SCHOU, Vice-Chairperson	EPP/CD	Norway / Norvège
Ms Thorhildur Sunna ÆVARSDÓTTIR	SOC	Iceland / Islande
Mr José BADIA	EPP/CD	Monaco
Ms Petra BAYR	SOC	Austria / Autriche
Mr Hendrik DAEMS	ALDE / ADLE	Belgium / Belgique
Mr Piero FASSINO	SOC	Italy / Italie
Sir Roger GALE	EC / CE	United Kingdom / Royaume-Uni
Mr Michael Aastrup JENSEN	ALDE / ADLE	Denmark / Danemark
Mr Artuss KAIMIŅŠ	NR / NI	Latvia / Lettonie
Mr Haluk KOÇ	SOC	Turkey / Turquie
Mr Tiny KOX	UEL / GUE	Netherlands / Pays-Bas
Sir Edward LEIGH	EC / CE	United Kingdom / Royaume-Uni
Mr LEITE RAMOS Luís	EPP/CD	Portugal
Mr Ian LIDDELL-GRAINGER	EC / CE	United Kingdom / Royaume-Uni
Mr Filippo LOMBARDI	EPP/CD	Switzerland / Suisse
Mr George LOUCAIDES	UEL / GUE	Cyprus / Chypre
Mr Alvise MANIERO	NR / NI	Italy / Italie
Mr Duarte MARQUES	EPP/CD	Portugal
Mr Matern von MARSCHALL	EPP/CD	Germany / Allemagne
Mr Hişyar ÖZSOY	UEL / GUE	Turkey / Turquie
Mr Aleksander POCIEJ	EPP/CD	Poland / Pologne
Mr Stefan SCHENNACH	SOC	Austria / Autriche
Mr Frank SCHWABE	SOC	Germany / Allemagne
Mme Nicole TRISSE	NR / NI	France
Mr Robert TROY	ALDE / ADLE	Ireland / Irlande
Mr Egidijus VAREIKIS	EPP/CD	Lithuania / Lituanie
Mr Johann WADEPHUL	EPP/CD	Germany / Allemagne
Mr Martin WHITFIELD	SOC	United Kingdom / Royaume-Uni
Mr Markus WIECHEL	EC / CE	Sweden / Suède

Secretariat of the Parliamentary Assembly / *Secrétariat de l'Assemblée parlementaire*

Mr Wojciech SAWICKI, Secretary General of the Parliamentary Assembly / *Secrétaire général de l'Assemblée parlementaire*
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M. Yann DE BUYER, Head of the Central Division / *Chef de la Division centrale*
Mme Valérie CLAMER, Head of the Secretariat of the Committee */ Chef du Secrétariat de la commission*
Mme Kateryna GAYEVSKA, Secretary of the Committee / *Secrétaire de la commission*
Mme Fatima NOUICER, Assistant / *Assistante*

Secretariat of political groups / *Secrétariat des groupes politiques*

Ms Francesca ARBOGAST, Socialist Group (SOC) / *Groupe socialiste (SOC)*

Secretariat of national delegations / *Secrétariat des délégations nationales*

Ms Bylgja ÁRNADÓTTIR, Iceland / *Islande*
Ms Fabrizia BIENTINESI, Italy / *Italie*
Mr Eric CHRISTENSEN, Norway */ Norvège*
Ms Anita HELLAND KJUS, Norway / *Norvège*
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Experts

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