

Appendix IV**DRAFT CDDH Report on a system of fees for applicants to the Court****A. Introduction**

1. The Declaration adopted at the Izmir Conference of 26-27 April 2011 “invites the Committee of Ministers to continue its reflection on the issue of charging fees to applicants...”¹ Following the subsequent Istanbul ministerial session (11 May 2011), the Ministers’ Deputies adopted follow-up decisions in which they *inter alia* “invited the CDDH, in order to facilitate decisions by the Committee of Ministers, ... to advise, setting out ... the main practical arguments for and against: on the issue of fees for applicants to the European Court of Human Rights...”²

2. The paper does not address the question of principle concerning whether or not introduction of a system of fees would represent an unacceptable limitation on or barrier to exercise of the right of individual application to the Court. Instead, it seeks to facilitate further examination of the practicality and utility of such a system.

3. The Registry of the Court made a technical contribution, which was examined during preparation of this report.³

B. The main aspects of a system of fees

4. Certain aspects of a possible system of fees may depend to some extent on the purpose or vision underlying its introduction. There are at least three possibilities here, which may overlap: a system intended as a deterrent to discourage clearly inadmissible applications;⁴ a system intended as a penalty for those introducing clearly inadmissible applications; and a system intended to reflect the fact that many member States’ highest courts themselves require applicants to pay a fee, although it has been suggested that a direct comparison between the situation of national courts and that of the Strasbourg Court may be inappropriate, for reasons including that legal aid is often available for proceedings before the former.

5. Whilst complete elaboration (or, at least, implementation) of a final model would require consideration of additional technical aspects,⁵ it is suggested that at this stage, the most relevant to be addressed are the following:

- a. at what stage of proceedings payment of the fee would be required;
- b. whether the fee would be set at a low level or a more significant one;
- c. whether the level of fee would vary depending on the applicant’s country of residence;
- d. whether there would be exemptions based on the applicant’s means;

¹ See doc. CDDH(2011)010, para. A.2.

² See doc. CM/Dep/Dec(2011)1114/1.5.

³ See doc. DH-GDR(2011)027.

⁴ Including applications considered abusive in the sense of Art. 35(3) ECHR, in application of the principle *de minimis non curat praetor* (cf. *Bock v. Germany*, App. no. 22051/07, decision of 19/01/10, and *Dudek v. Germany*, App. no. 12977/09, decision of 23/11/10).

⁵ For a list of some of these aspects, see section E below.

- e. whether there would be exemptions for specific categories of applicant;
- f. whether the Court would have discretion to waive the fee;
- g. whether the fee could be refunded should certain conditions be satisfied;
- h. how the fee could be paid.

6. The following are amongst the possible options for these aspects:

a. The stage at which payment would be required

- i. Payment could be required at the **outset**. This should be taken to mean when the completed application form is submitted to the Registry, as opposed to when the first communication is sent (since the application is not registered or subject to triage until a completed form is received). It would involve at least some risk of detering well-founded applications. On the other hand, it has been suggested that deterrence of clearly inadmissible applications is most effective if the court fee is required from the outset.
- ii. Payment could be required at a **later stage**. This could allow the Registry to advise those making applications preliminarily considered to be inadmissible of this fact and either to withdraw them or, should they wish to proceed to judicial determination, to pay the fee. It would have the advantage of having no deterrent effect on well-founded applications. It could, however, imply administrative and budgetary consequences prior to having any deterrent effect on clearly inadmissible applications. These consequences could be minimised if the Registry were to send the applicant a standard letter stating that after a preliminary examination, the application will probably be declared inadmissible, and inviting the applicant to pay an advance fee if s/he wished to obtain a judicial decision. Should the applicant not pay within the time limit, the application would be struck out of the list (or whatever may be the legal effect that would result from non-payment). It has nevertheless been suggested that such a system would be less effective in achieving the desired result of freeing resources to deal with admissible applications, instead increasing the Registry's work-load and decreasing the Court's case-processing capacity.

b. The level of the fee

- i. The fee could be set at a deliberately **low level**, so as to avoid deterring well-founded applications; figures of up to €50 have been mentioned. In this case, however, it might not be sufficient to deter a significant number of ill-founded applications.
- ii. The fee could be set at a **higher level**, to ensure deterrence of ill-founded applications.⁶ In this case, however, it would be necessary to include compensatory mechanisms in the system (e.g. exemptions, waivers or refunds) to avoid or minimise deterrence of well-founded applications and to differentiate according to country of residence (see further below). Such mechanisms, however, may have administrative and budgetary consequences (see further below).

⁶ It has been suggested that applicants pay a fee equal to 10% of the average cost of processing an application, which on 2010 figures would result in a fee of, say, €150 (€1,420 average cost per case).

The expert consultant's study notes that "The amount demanded as a court fee is extremely variable from one State to another and sometimes even within the same State, between different matters. In certain States ..., the amounts have been set so as to be quite low, most often so as to be limited to dissuading ill-founded applications or to ensure full or partial financial autonomy for the court. In other States..., the amounts are in some situations deliberately high in order to be really effective or are shortly going to be subject to large increases... Court fees in administrative matters vary considerably."⁷

- c. A fee variable according to the applicant's country of residence⁸
- i. The fee could be **the same** regardless of an applicant's country of residence. In this case, however, a higher level of fee may be inappropriate, since it could be insufficient to deter a significant number of ill-founded applications from applicants resident in countries with higher per capita income but too high to avoid deterring well-founded applications from applicants resident in countries with lower per capita income. For this reason, a system involving a standard level of fee for applicants wherever resident might be considered discriminatory, the more so if set at a higher level.
 - ii. The fee could **vary** depending on the applicant's country of residence,⁹ being set, for example, according to relative levels of per capita national income. Indeed, the Court already assesses relative levels of national income when fixing levels of just satisfaction in individual cases, with division of member States into four zones on the basis of World Bank figures. Calculation of the different levels of fee may thus in principle have minimal administrative and budgetary consequences, although there may be cases in which the Court would be required to determine the applicant's place of residence; a further difficulty could be the question of what fee should be applied to applicants resident in non-member States. A differentiated system however would enhance the deterrent function of the fee system.

The expert consultant's study notes that "it is possible to imagine a variability [in the fee] based on the disparity in average standard of living... In practice, no State clearly applies this criteria. Certain States make use, however, of a comparable approach..."¹⁰

The fee may vary according to relative standard of living in up to five of the 25 States on which the expert consultant was able to obtain detailed information.¹¹

- d. Exemptions based on the applicant's means

⁷ Op. cit., pp. 10-11.

⁸ It should be noted that a variable level of fee would not necessarily exclude the need for other compensatory mechanisms such as exemptions (see below).

⁹ See doc. CDDH(2011)R72 Addendum I, Appendix IV, para. 8: it should be noted that the CDDH report refers to "state of origin"; it is suggested that this could be confused with the concept of "country of origin" used in refugee law, in which case it may not be appropriate for current purposes.

¹⁰ See doc. DH-GDR(2010)002 REV., p.10.

¹¹ Ibid, p. 27.

- i. The fee could be the same regardless of an applicant's means (financial situation), i.e. with **no exemptions** based on means.¹² Again, in this case a higher level of fee may be inappropriate, since it could deter well-founded applications from persons of limited means. On the other hand, a lower level of fee may be less effective, as it would fail to deter ill-founded applications from applicants of greater means. A system without exemptions based on means might thus be considered discriminatory as between applicants from the same country but of different means. It should be noted, however, that the expert consultant's study has not clearly established that all national fee systems include means-based exemptions (although the question of relative means may be addressed otherwise, for example through provision of legal aid for those of lesser means). Consideration could be given to whether it would be open to States to challenge an applicant's eligibility for an exemption, for example by disputing their real personal circumstances or financial status.
- ii. Certain applicants could be **exempted** from the fee on account of their means. This could be established, for example, by reference to entitlement to state benefits, free legal representation or remission from court fees in the country of residence. Such an exemption would help avoid deterring well-founded applications from persons of limited means and thereby reduce any discriminatory effect. Determination of whether individual applicants qualified for exemption could, however, have considerable administrative and budgetary consequences. Furthermore, the existence of different grounds for qualification to certain entitlements in different countries could be considered as contributing to a form of discrimination as between applicants from different countries when determining entitlement to exemption from the fee. That said, it should be noted that the Registry has experience of administering a system of means-testing in the context of grants of legal aid. An approach inspired by the Registry's practice in that context may avoid some of the problems that could arise in the current context, although it would still entail some administrative or budgetary consequences.

The expert consultant's study notes that "Numerous States take account ... of the personal financial situation of the parties at some point in the fee procedure, for example, in case of a request for exoneration from the fee".¹³

The fee is variable according to the financial situation of the parties in at least eight of the 25 States on which the expert consultant was able to obtain detailed information.¹⁴

- e. Exemptions for specific categories of applicant
 - i. There could be **no exemptions** for any applicants.
 - ii. Certain categories of applicant could be **exempted** from the fee. This could in particular be the case for persons deprived of their liberty.¹⁵ Depending

¹² See doc. CDDH(2011)R72 Addendum I, Appendix IV, para. 10.

¹³ See doc. DH-GDR(2010)002 REV., p.10.

¹⁴ Ibid, p. 27.

on the definition of categories and the ease with which proof of qualification could be established, determination of qualification may have only minimal administrative and budgetary consequences. (The option of charging fees only to legal persons would not seem to be sufficient as a response to the overall number of inadmissible applications.)

The expert consultant's study notes that "Exemptions relating to the applicant can arise from a certain vulnerability, but they can also be based on the very nature of the applicant. The applicant who exhibits a certain vulnerability can be exempted from paying procedural fees. Cases in which the exceptions are possible are defined by law and most often correspond to cases of intellectual, material [including persons deprived of their liberty] and financial [including impecuniosity] vulnerability."¹⁶

f. Court discretion to waive the fee

- i. The Court could have **no discretionary power** to waive the fee in any circumstances.
- ii. The Court could have a **discretion** to waive the fee. This discretion could be either unfettered or limited to specific circumstances.¹⁷ It would give the Court greater flexibility in addressing individual and exceptional circumstances. Introducing such a feature into a system of fees would, however, potentially prolong and complicate the procedure and would thus have administrative and budgetary consequences. Furthermore, it has been suggested that it would be unnecessary to include such a feature in addition to exemptions such as those described above.

The expert consultant's study notes that "in several States, the nature of certain cases allows direct exemption of the applicants. It is often so in family matters..."¹⁸

The fee may be variable according to the type of case in at least 21 of the 25 States on which the expert consultant was able to obtain detailed information.¹⁹

g. Refund of the fee

- i. The fee could **not be refundable** under any conditions.
- ii. The fee could be **refunded** should certain conditions be satisfied.²⁰ This could include refund by the respondent State as part of the award of costs in the event of the Court finding one or more violations. Should the fee be set at a high level so as to maximise the deterrent effect against clearly inadmissible applications, it could be refunded to those whose applications were not dismissed by a single judge as clearly inadmissible. In any case,

¹⁵ See doc. CDDH(2011)R72 Addendum I, Appendix IV, para. 11. It has also been suggested that exemptions be given to applicants complaining of violations of certain "core rights" guaranteed by the Convention (e.g. Articles 2, 3 and 4).

¹⁶ See doc. DH-GDR(2010)002 REV., p.12.

¹⁷ See doc. CDDH(2011)R72 Addendum I, Appendix IV, para. 13.

¹⁸ See doc. DH-GDR(2010)002 REV., p.12.

¹⁹ Ibid, p. 27.

²⁰ See doc. CDDH(2011)R72 Addendum I, Appendix IV, para. 14.

there would inevitably be certain administrative or budgetary consequences.

(This question is not addressed in the expert consultant's study.)

h. Payment of the fee

- i. The fee could be paid by bank transfer (as in at least 22 of the 25 States on which the expert consultant was able to obtain detailed information.)²¹
- ii. The fee could be paid by internet (as in at least 8 of the 25 States on which the expert consultant was able to obtain detailed information.)²²
- iii. The fee could be paid by stamp (as in 7 of the 25 States on which the expert consultant was able to obtain detailed information.)²³
- iv. The fee could be paid by a combination of some or all of the above.²⁴

The expert consultant's study notes that "The modalities for the collection of fees differ greatly from one member State to another." The study mentions *inter alia* the following modalities: payment at the court, a bank or a post office; payment by cash, bank transfer, tax stamps, telephone or internet. It also notes that "The collection of fees is sometimes sub-contracted to a private body, most often an accredited bank, [in other cases] to a special private body ... or public bodies."²⁵

C. Two possible models

7. The above analysis of different possible options for certain aspects of a fee system may be seen as revealing tensions between competing interests.

- a. There may be tension between minimising administrative and budgetary consequences, on the one hand, and minimising discriminatory effect, on the other. For example, the risk of discrimination between applicants of different means from the same country may need to be reduced or avoided by allowing for exemptions based on means, which could have administrative and budgetary consequences. Similarly, the risk of discrimination between applicants from countries of different per capita national income may need to be reduced or avoided by having different levels of fee for different countries, which could have administrative or budgetary consequences.
- b. There may also be a tension between the competing interests of maximising deterrent effect against clearly inadmissible applications, on the one hand, and discriminatory deterrence of well-founded applications, on the other; and, as described above, there may then be a further tension between measures to reduce or avoid such discrimination, on the one hand, and minimising administrative and budgetary consequences, on the other. For example, a higher fee intended to maximise deterrent effect may need, in order to avoid

²¹ Ibid, p. 27.

²² Ibid.

²³ Ibid.

²⁴ It is suggested that other modalities that are mentioned in the expert consultant's study, such as payment by telephone or cheque, would not appear appropriate in the present context.

²⁵ See doc. DH-GDR(2010)002 REV., pp. 17-19.

detering also well-founded applications, to be accompanied by exemptions and/ or refunds, which could have administrative and budgetary consequences.

8. The following models are deliberately situated towards the extremes of a spectrum of possible models. They do not represent the only possibilities but are rather intended to illustrate certain consequences of various approaches. A cost-benefit analysis of these models is difficult and has not yet been possible; any final choice would require an evaluation and an adaptation of the mechanism.

I. Model I – lesser administrative and budgetary consequences

9. On the basis of the above analysis of the various options for each aspect of a fee system, a model with the following characteristics would appear to have lesser administrative and budgetary consequences.

- a. Fee set at a low level
- b. Flat rate fee for applicants, regardless of their country of residence
- c. No exemptions based on applicants' means
- d. Exemptions only for those in detention
- e. Court has no discretion to waive the fee
- f. Refunds only to successful applicants as part of the award of costs
- g. Payment by bank transfer, internet or stamps

10. It has been suggested that Model I exhibits the following advantages:

- (i) It is practical, simple and uniform in application and entails the least amount of administrative and budgetary burden.
- (ii) It would be sufficient as a form of deterrent to 'futile' or ill-founded applications and would not offend any applicant; its mere introduction and use alone would improve the quality of applications.
- (iii) It would not be punitive in effect or imply a penalty to the applicant and thus would not represent an unacceptable limitation on, or a barrier to, the exercise of the right of individual application to the court.
- (iv) It could be enhanced and/or modified to meet any prevailing caseload in order to be more effective in deterring inadmissible applications.

11. The principal possible disadvantages to such a model may be a lesser deterrent effect against inadmissible applications and discrimination on the basis of applicants' financial situation, as between both persons with average means resident in countries of different per capita national income and persons with different means within the same country of residence.

II. Model II – lesser discriminatory effect

12. On the basis of the above analysis of the various options for each aspect of a fee system, a model with the following characteristics would appear to be less discriminatory.

- a. Fee set at a higher level
- b. Fee varies according to the applicant's country of residence
- c. Exemptions based on applicants' means
- d. Exemptions at least for those in detention
- e. Court has a discretion to waive fees for cases in specific circumstances

- f. Refund where the application is ruled admissible (alternatively, where not ruled clearly inadmissible)
 - g. Payment by bank transfer, internet or stamps
13. It has been suggested that Model II exhibits the following advantages:
- (i) It would appear to be more effective in dissuading ill-founded applications.
 - (ii) It would be less discriminatory, especially between applicants of different means.
 - (iii) Better account would be taken of the special characteristics of applicants and their applications.
 - (iv) A greater resulting revenue could cover the costs of administration.

14. The principal possible disadvantage to such a model may be the administrative consequences of exemptions based on applicants' means or circumstances and of determining their country of residence. There would also be administrative consequences attached to refunding the fee where an application is ruled admissible. There would remain some risk of deterrence of well-founded applications.

D. Legal basis of introduction of a system of fees

15. The CDDH has consulted the Legal Advice Department, which gave the following opinion on this issue.

“It would appear that the only issue at stake that could be examined from a legal and not practical standpoint is the question of whether or not an application to the European Court of Human Rights could be rejected in the case of non-payment of fees.

The existing legal framework provides for two rejection possibilities: an application could be declared inadmissible by the Court or refused by the Registry.

1. An application is declared inadmissible

It follows from the provisions of Article 35 of the European Convention on Human Rights that an application can only be rejected as being inadmissible if one or more criteria listed in the same Article are not complied with. Therefore, in order to enable the Court to declare an application inadmissible due to non-payment of fees, Article 35 of the Convention would need to be amended.

2. An application is not examined by the Court

According to Rule 47 of the Rules of Court, adopted by the plenary Court pursuant to Article 25 of the Convention, failure to comply with the requirements set out in paragraphs 1 and 2 of this Rule may result in the application not being examined by the Court. It could be envisaged to introduce an additional requirement of payment of fees to Rule 47. Thus, a failure to pay the fee would result in the refusal of the application by the Registry. As the Rule provides that failure to comply with any of the

requirements **may** (and not shall) result in the application not being examined, this would have the advantage of allowing for fees to be waived in certain cases (for example prisoners). Furthermore, of course, this model would not require any amendment of the European Convention.”

16. This opinion will require further examination before the issue can be definitively resolved.

E. Additional technical aspects to be examined at a later stage

17. The following technical aspects, although not essential to taking political decisions on whether or not to introduce a system of fees, would have to be addressed and resolved before any such system could be introduced.

- a. Whether the fee would be applied to applications already lodged with the Court. In this case, it may be possible to apply the procedure whereby the Registry advises those making applications preliminarily considered to be inadmissible either to withdraw them or, should they wish to proceed to judicial determination, to pay the fee.²⁶ The retrospective nature of such an approach, however, may be problematic.
- b. Who would be responsible for setting the level of the fee, whether the Committee of Ministers or the Court, and who would be responsible for revising it.
- c. Whether the initial general level of fee could be revised in the light of practical experience of operation of the system or a change in circumstances.
- d. How relative levels of fee between countries of different per capita income could be revised and whether there would be a mechanism for irregular revision in exceptional circumstances.
- e. Whether to establish a mechanism to regularly monitor and periodically evaluate the impact of fees, in order to establish whether and, if so, the extent to which they firstly, meet the objective of deterring clearly inadmissible cases and secondly, deter well-founded cases, the results to be made public.
- f. What the consequence would be if an applicant (who had not been exempted from payment) did not pay (the question arises independently of the stage of the procedure at which payment is requested – see above para. 6.a.i. and ii.): (1) “information” solution, i.e. letter from the Registry informing the applicant that his/her application will not be (further) examined for failure to pay the fee, or else (2) “formal” solution, either (a) decision of inadmissibility (which would require amendment of the Convention to introduce a new admissibility criterion) or (b) application of art. 37(1)(c) of the Convention.

²⁶ See para. 10.a.ii. above.