

President of the Court of Justice of the European Union
Palais de la Cour de Justice
Boulevard Konrad Adenauer
Kirchberg
L-2925 Luxembourg
Luxembourg

22 July 2013

Dear President Skouris

Thank you for your reply of 18 June 2013 to our letter of 21 May 2013. We are grateful to you for your letter, and for forwarding our letter to the members of the Court. This letter comes from the same organisations.

We wish to clarify that we were not seeking to suggest that there is an *obligation* on the Court to conduct a public consultation whenever it considers amendments to the rules of procedure. Rather, we were respectfully suggesting that the Court should hold a consultation in the unusual circumstances of the particular amendment that the Court is currently considering, namely to permit the Court to take into account information to which some parties to the proceedings will not have access. The reasons why a consultation is appropriate in these unusual circumstances are as follows.

First, an amendment of this kind will not be a mere procedural change (even though it is envisaged that it will appear in procedural rules). It would have a significant substantive impact on the rule of law and rights of defence. This may affect the validity and legality of the amendments.

Second, as we observed in our previous letter, when it was once suggested to the European Court of Human Rights by the Government of a Contracting Party that the Court should look at documentation that should not be disclosed to the applicant on national security grounds, the Court refused to do so. The recent judgment of the Court of Justice in Case C- 300/11 ZZ v *Secretary of State* suggests that the Court of Justice might well (absent a rule change of the kind proposed) take a similar position.

Third, we understand that there have already been discussions on this issue with the Council, Commission, Member States and third countries, who only represent the interests of defendants and decision-makers, but not applicants or those representative of the public interest and the wider range of stakeholders in or users of the Court. A public consultation would permit the Court to take into account a wider and more balanced range of views.

Finally, we wish to draw to the Court's attention to the recent judgment of the United Kingdom Supreme Court in *Bank Mellat v HM Treasury (No 1)* [2013] UKSC 38, concerning the use of closed material procedures in the United Kingdom. The Court will see the very strong opposition expressed to any exceptions to the principle of open justice. A majority of the Supreme Court decided that it could adopt a closed

material procedure in that case, but only because of the particular applicable primary legislation (the Counter-Terrorism Act 2008 and Part 79 of the Civil Procedure Rules) which had been the subject of extensive legislative scrutiny and debate.

That legislative scheme has built into it a number of safeguards, namely: (a) the use of Special Advocates; and (b) an express “override” provision stating that nothing the Act or the Civil Procedure Rules made pursuant to it should require a Court to act in such a way as to contravene Article 6 of the European Convention on Human Rights. These safeguards are themselves the product of long-running democratic scrutiny and public debate (embracing both legislative bodies, NGOs and the media) in the United Kingdom. No such debate has occurred at the EU level.

We would be grateful if you would consider this matter again in light of our clarifications, and would be happy to meet to discuss this issue. We would be grateful if you would circulate this letter to the other Members of the Court.



Maura McGowan QC, Chairman, Bar Council of England and Wales



Nick Fluck, President of the Law Society of England and Wales

Bruce Beveridge WS, President, Law Society of Scotland

Richard Keen QC, Dean of the Faculty of Advocates, Scotland (please note that our previous letter referred in error to the Rt Hon Lord Gill as signatory on behalf of the Faculty; this was an administrative error which was not the fault of the Faculty of Advocates)

Mark Mulholland QC, Chairman, General Council of the Bar of Northern Ireland

David Nolan SC, Chairman, General Council of the Bar of Ireland

Andrea Coomber, Director, JUSTICE (the United Kingdom section of the International Commission of Jurists)

Shami Chakrabarti CBE, Director, Liberty (the National Council for Civil Liberties)

Professor Sir Jeffrey Jowell QC, Director, the Bingham Centre for the Rule of Law

Tom de la Mare QC, Chair, Bar European Group

Javan Herberg QC, Chair, Constitutional and Administrative Law Bar Association

Gordon Nardell QC, Circuit Leader, European Circuit of the Bar of England and Wales

James Flynn QC, Chairman, Competition Law Association

Lucinda Orr, Chairman, Bar Association for Commerce, Finance and Industry

Michael Soole QC, Chairman, Chairman, Technology and Construction Bar Association

We have sent copies of this letter to:

Dr Marc Jaeger, President of the General Court of the European Union

Mr Alfredo Calot Escobar, Registrar, European Court of Justice

Emmanuel Coulon, Registrar, General Court of the European Union

Klaus-Heiner Lehne MdEP, Chair of Legal Affairs, European Parliament

Lord Boswell of Aynho, European Law Scrutiny Committee of the House of Lords

Dr Hywel Francis MP, Parliamentary Joint Committee on Human Rights

Legal Directorate, United Kingdom Foreign and Commonwealth Office