

CCBE Contribution for the Rule of Law Report 2021

26/03/2021

Introduction

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 45 countries and, through them, more than 1 million European lawyers. The CCBE also acts as a consultative and intermediary body between its Members and between the Members and the institutions of the European Union on cross-border matters of mutual interest.

The regulation of the profession, the defence of the rule of law, human rights and democratic values are the most important missions of the CCBE. Several areas of special concern to the CCBE include access to justice, the development of the rule of law, the respect for the right to a defence and the effectiveness of the Justice system, which are core values of the profession.

The CCBE always places a great emphasis on the respect for the rule of law, democratic principles and fundamental rights. The values of the CCBE and its Member organisations are consistent with the Charter of Fundamental Rights of the European Union, and in particular its preamble, where it is stated, inter alia that “Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice”, CCBE values are also consistent with Article 47 (Rights to an effective remedy and to a fair trial), Article 48 (Presumption of innocence and right to a defence), and Article 49 (Principles of legality and proportionality of criminal offences and penalties). Therefore, the CCBE welcomes the EU Commissions commitment and its efforts to strengthen the rule of law in the EU.

Lawyers are still confronting the challenges arising as a result of COVID-19 and its consequences on access to justice, quality of justice, protection of democratic standards and the upholding of the rule of law and human rights in our societies. It is more important now than ever before that the European Commission continues to monitor such developments on an ongoing basis and take such action as is necessary to prevent the undermining of the rule of law.

The CCBE values its inclusion as a stakeholder in the Rule of Law Report targeted consultation process for 2021. This acknowledges the important role played by the CCBE and its members in upholding the rule of law in the European Union. It also acknowledges the unconditional necessity for the inclusion of lawyers on a parallel level to that of judges and prosecutors as key actors within the justice system. In this context, the CCBE wishes the Commission to mirror the importance of lawyers and their inclusion in the definition of the Rule of Law.

The CCBE acknowledges the importance of strengthening the rule of law for the future of democracy in Europe and therefore affirms its readiness to continue its cooperation with all the key EU institutions, including the European Commission and to provide its support in strengthening the rule of law in the EU.

CCBE Statement on the Rule of Law Report 2020

In this submission, the CCBE seeks to highlight the most important rule of law developments involving the profession of lawyer and of concern to its members at a European level.

In addition, the CCBE refers to its [CCBE statement on the 2020 Rule of Law Report](#) which was published after intensive internal discussions and exchanges with the European Commission after publication of the first annual Rule of Law Report in September 2020. In this Statement the CCBE expressed its regret that the independence of lawyers was not sufficiently addressed in the 2020 Rule of Law Report and called for a more developed analysis of the independence of lawyers and Bars in the next annual 2021 Rule of Law Report, and in particular a recognition that the independence of lawyers and Bars are an indispensable component of the independence of the justice system and of the rule of law.

In this Statement, and through letters to the Commission, from the CCBE and the national Bars, it has been repeatedly asked that the Commission develop a clear Rule of Law definition at an EU level that explicitly includes lawyers and their role in the administration of justice expressly in this definition. Only then, can the independence of lawyers and their representative Bars be effectively monitored and safeguarded at an EU level and consequentially at a Member State level. Independence, however, should be the guaranteed standard, not the ultimate goal. An independent profession alone would be powerless without involvement. Based on a new revised EU Rule of Law definition, the effective preventive measure in this regard could be established. This would result in lawyers and the Bars participating and consulting on an ongoing basis at both an EU and national level, on matters that influence the core values of the profession, but most importantly, that affect the citizens they represent and the fundamental rights they seek to uphold.

Judicial independence and independence of lawyers and Bars

The CCBE condemns any attempts to jeopardise and endanger judicial independence. Therefore, the CCBE fully shares the concerns of the European Commission stressed in the first Rule of Law Report regarding the need to enhance judicial independence, especially in certain EU Member States.

The independence of lawyers and Bars are unconditionally interlinked with the independence of other actors of the judiciary and are a part of the independence of the judiciary in general. The independence of lawyers is important to properly defend clients, including in their actions against the State, to protect lawyers from being identified with their clients, to build trust between lawyers and their clients through the right to legal professional privilege, to preserve the rule of law and to fulfil the important and irreplaceable role to prevent the abuse of powers.

The CCBE stresses the importance for all lawyers to have the independence and freedom to carry out their professional duties without fear of reprisal, hindrance, intimidation or harassment in order to preserve the independence and integrity of the administration of justice and to maintain the rule of law.¹

Especially with regard to the prevention of arbitrary decisions and actions, it does not only depend on the states' lawmakers to provide for access to justice and the respective legal remedies for their citizens. There is a need to ensure the existence of an independent self-regulated legal profession

¹ The importance of independence is clearly acknowledged in many international documents such as [Basic Principles on the Role of Lawyers](#) adopted by the Eighth United Nations Congress, 1990 and the [Recommendation Rec\(2000\)21 on the freedom of exercise of the profession of lawyer](#) adopted by the Committee of Ministers of the Council of Europe, as well as in several policy documents adopted by the CCBE, in particular, the [Charter of Core Principles of the European Legal Profession and the Code of Conduct for European Lawyers](#) (Principle a) of the Charter) as well as in the [Model Article on Independence](#).

which comprises independent lawyers who are independently supervised and who are able and allowed to challenge decisions which are taken by those who are in power.

Scope of the CCBE contribution

This report comprises the contribution by the CCBE and its member Bars from the EU Member States to the targeted stakeholder consultation launched by the European Commission in the preparation of its 2021 Annual Rule of Law Report. It brings together the submissions received on the basis of collectively agreed category areas more particularly discussed under Methodology of the CCBE contribution.

Methodology of the CCBE contribution

This report has been compiled using the following methodology:

1. Relevant qualitative data sourced from member Bar delegations' contributions to Part IV of the 2021 EU Justice Scoreboard Questionnaire.

The EU Justice Scoreboard is one of the information sources used by the European Commission for the Rule of Law Report. The involvement by the CCBE in the development of this important assessment, as well as the decision of the European Commission to include a new separate chapter on the independence of lawyers and Bars in the questionnaire for the 2021 EU Justice Scoreboard, is a positive step in the right direction acknowledging the integral role of independent lawyers and Bars for the independence of justice in Europe and for strengthening the rule of law in the EU.

2. Contributions received from member Bars on the relevant rule of law developments in EU Member States, with particular focus on developments that undermine the independence of lawyers and Bars, access to justice, quality of justice, fundamental freedoms, democracy and the rule of law.

Conclusions based on information provided in Annex to this contribution

The national Bars in EU Member States consider themselves as independent, self-regulated organisations representing their members.

The COVID-19 pandemic has resulted in systemic risks for the rule of law in Europe. Responding to the COVID-19 threats, many countries have understandably taken emergency measures and enacted legislation to contain the risk of mass infection, to safeguard the medical capacity to deal with infections and to address the economic consequences of the crisis. In its statement about the systemic risks for the rule of law in times of the pandemic, the CCBE expressed its concerns² in relation to emergency measures, in the light of de facto absence of Parliamentary monitoring and judicial review. The CCBE therefore called upon member states not to abuse such 'State of Emergency' provisions or 'Special Powers' granted to the Executive. The CCBE pleaded for adequate sunset clauses for such measures and legislation as foreseen in the constitutional and fundamental laws of most European countries.

In the contributions received from national Bars of several countries (e.g. Belgium, Czech Republic, Germany, Greece, Poland, Italy and Slovakia) information on an arbitrary abuse of power by the executive in enacting emergency COVID-19 legislation, including for fast track purposes and thereby

² [CCBE Statement about systemic risks for the Rule of Law in times of the pandemic \(15 May 2020\).](#)

avoiding parliamentary monitoring and transparency, as well as examples of lack of legal certainty, difficulty to access the courts and access to justice during COVID-19 pandemic were provided.

National Bars have advised of cases and examples where interferences with the independence of the lawyer, breaches of confidentiality of the client-lawyer relationship protected through legal professional privilege, identification of lawyers with their clients, obstacles to access to justice and attacks and threats to individual lawyers have resulted in the undermining of the rule of law, the interference with the basic principles³ on the independence of lawyers, breaches of fundamental rights and democratic principles.

The National Bar Council of Italy reported example of recent interference with its patrimonial and financial autonomy by state authorities.

Worrying information about several cases has been reported in relation to the unlawful wiretapping of lawyers' phones in France, Italy and Lithuania. There are also a number of cases reported that relate to the search of a lawyers' offices (in Estonia, Poland, Germany, Romania). The Lithuanian Bar has reported a case of unlawful covert surveillance of a lawyer's activities.

The Belgian, German, Hungarian, Italian, Slovak and Romanian Bars have reported that lawyers have been associated with their clients leading to unjust attacks on lawyers in the performance of their professional duties. In the Annex to this contribution the concrete examples of arrests of lawyers (in Poland, Belgium and Romania) are provided.

Unfortunately, information was also received on cases and examples of threats to the physical safety of lawyers arising from their professional activities (e.g. in Germany, Slovenia). In the Netherlands, the Bar has reported a growing amount of such cases.

The CCBE was also informed about a recent decision of the Court of Cassation in France reducing the scope of the legal professional privilege to exchanges related to the exercise of the rights of the defence only, in anti-fraud cases. A politically sensitive case where the suspect has been interrogated on multiple occasions without a lawyer was reported by the Austrian Bar.

Several Bars informed the CCBE about challenges regarding professional secrecy which are detrimental for the profession and for ensuring the fundamental rights of citizens (e.g. Belgium, Czech Republic, France, Lithuania, Romania).

This is of relevance particularly, when it comes to the transposition and implementation of EU law at a national level. A number of national Bars (e.g. from Austria, Lithuania, Denmark, Germany, Sweden, France) reported worrying attempts to compromise and interfere with the legal professional privilege and the principles of independence of lawyers by so-called goldplating in the transposition of the EU directive on mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements ([DAC6 Directive](#)).

Several national Bar respondents (e.g. from Malta, Germany, Denmark, the Czech Republic and Sweden) referred to the interference with the right to legal professional privilege arising from the anti-money laundering rules and requirements.

In a few inputs from national Bars the data protection rules were mentioned in the context of the difficulty for lawyers to access information and refusals received regarding information requested by an advocate (e.g. in Lithuania) or lack of self-administration of data protection supervision for the legal profession and the disproportionate powers of data protection supervisory authorities in Germany.

The Hungarian Bar Association informed about their protests against the misleading media releases against lawyers and an amendment to an existing law concerning the compensation payable to

³ [Basic Principles on the Role of Lawyers](#) adopted by the Eighth United Nations Congress, 1990 and the [Recommendation Rec\(2000\)21 on the freedom of exercise of the profession of lawyer](#) adopted by the Committee of Ministers of the Council of Europe.

detained persons which could have consequences that are detrimental to both the access to law and also the legal profession.

The CCBE and its member Bars note that public and political discussions with regard to judicial issues have become more heated and contentious to the detriment of objective facts that require attention. This puts the trust of citizens at risk and has the potential to endanger the rule of law. The CCBE is concerned that this more aggressive public discourse could gradually impair the physical safety of justice actors, including lawyers.

The particular cases, concrete examples and trends noted above are contained in the national Bar reports in Annex to this contribution.

The input of the CCBE is primarily focused on matters relating to the principle of the independence of lawyers and Bars in this contribution. However, several Bars have also provided information and examples referencing broader elements of the rule of law. In this regard, the CCBE reserves the right to broaden the scope of its contribution in future.