

CCBE position on the proposed new legal instrument on the Profession of Lawyer: The need for a binding legal instrument accompanied by an implementation mechanism

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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 supports the work carried out by the Council of Europe on a European Convention on the profession of lawyer. It considers that such an instrument is needed in order to respond to the growing attacks and challenges faced by the legal profession.

On 31 March 2021, at its 1400th meeting, the Committee of Ministers' Deputies of the Council of Europe took note of the [study on the feasibility of a new, binding or non-binding, European legal instrument on the profession of lawyer – possible added-value and effectiveness](#), carried out by the European Committee on Legal Co-operation (CDCJ).

Under the authority of the European Committee on Legal Co-operation (CDCJ), a committee of experts will now be instructed to prepare a draft legal instrument, binding or non-binding, aiming at strengthening the protection of the profession of lawyer and the right to practise the profession without prejudice or restraint. On the basis of the draft legal instrument prepared by this committee of experts, the CDCJ, in its plenary, will then propose to the Committee of Ministers the nature of the legal instrument, binding or non-binding.

In this context and given the central role the legal profession plays in the administration of justice, the defence of human rights, democracy and the rule of law, the CCBE strongly supports the idea that there are compelling reasons for adopting a binding legal instrument on the profession of lawyer. These reasons are found in the above-mentioned feasibility study¹ and some of them can be outlined as follow:

Definition of the profession of lawyer

The scope of this new binding legal instrument should be limited to the regulated profession of lawyer and bars and law societies. In this regard, a lawyer would be defined as a person who is a member, and entitled to practice as such, of a legal professional regulated body within its own jurisdiction. This definition should then be completed to include any person who claims that his/her rights under this new binding legal instrument have been violated

¹ <https://rm.coe.int/eng-examen-de-faisabilite-d-un-instrument-juridque-europeen-couv-texte/1680a22790>

based on their legitimate activities as a lawyer, in order to include those lawyers who have been disbarred or suspended on the basis of their professional activities and who are no longer formally recognised as lawyers in their own jurisdictions anymore, or who are no longer allowed to practise.

Risks for the profession

The study shows that there are genuine and extensive problems facing the legal profession, both as regards its members and the institutions regulating it. These problems are not the same – either in nature or extent – in all Member States but there is good reason to believe that the problems have become more and more prevalent in recent years².

Existence of non-binding instruments

None of the existing non-binding instruments can be regarded as covering comprehensively all the issues that are relevant for the profession of lawyer such as freedom to choose clients; loyally respecting the interests of clients; prohibition on identifying lawyers with their clients or their clients' causes; limitation on the duty to report on clients; independence in respect of publicly-funded work; ability to object for good cause to a judge's conduct or participation; ability to take part in the public discussion on matters concerning the promotion and protection of human rights; taking cases to international procedures; civil and penal immunity for statements made in good faith in pleadings or professional appearances; freedom of choice in organisation of legal practice; communication and advertising; the election by members of the council or executive body of lawyers' associations; the duty of authorities to adequately safeguard lawyers who are threatened or harrassed; independence of the lawyer and the professional bars and law societies; self-governing professional bars and law societies; promote their continuing education and training; the dignity and honour of the profession; and responsibilities relating to the rule of law and the administration of justice³.

Although some of these non-binding instruments have been taken into account in various proceedings before the European Court of Human Rights, such as the UN Basic principles on the role of lawyer or the Recommendation No. R(2000)21, the rulings ultimately given in the cases concerned either do not explicitly refer to these instruments, or are not categoric as to what a particular provision requires where they do refer to it.

There is therefore no authoritative interpretation of the standards provided in these instruments. And, even when "there cannot genuinely said to be a problem of interpretation, there is a failure to observe these requirements notably as regards threats and harassment and giving effect to provisions linked to requirements in the European Convention, such as those concerned with disciplinary procedures"⁴.

In addition to this, the non-binding route already taken within the Council of Europe in Recommendation No. R(2000)21 has proven insufficient authority regarding the appropriate

² Feasibility Study, p. 93

³ Feasibility Study, p. 75

⁴ Feasibility Study, p. 76

approach in respect of the profession of lawyer due to its non-binding nature and the absence of implementing mechanism. In this regard, the study also shows that an implementation mechanism without the authority of a binding instrument would not be satisfactory and vice-versa. Therefore, the best instrument would be a binding legal instrument, such as a Convention that would be more similar to treaties that deal with human rights, which not only prescribe standards but also establish new mechanisms or rely on ones already established with a view to securing their implementation.

Existence of binding instruments and the ECHR case law

Firstly, the coverage by existing legally binding instruments such as the European Convention on Human Rights is insufficient as regards all the issues that are relevant for the profession of lawyer (see above).

Secondly, although the feasibility study's analysis of the case law of the European Court of Human Rights shows that there are elements of the provisions of Recommendation No. R(2000)21, as well as those of the other standards, which can be accommodated on the basis of the rights guaranteed by the European Convention on Human Rights, the study clearly demonstrates that⁵

- the case law of the European Court of Human Rights does not address all the issues relevant to the legal profession and probably cannot.
- the rights provided in the European Convention on Human Rights are minimum standards, some of its rights apply to clients rather than lawyers, and somewhat other more specific standards are appropriate to issues relating to the legal profession
- issues of an institutional nature will only ever be addressed partly – as an element of a case such as one dealing with disciplinary proceedings - rather than directly

The main reasons for these shortcomings can be explained by the fact that the European Court of Human Rights can now only rely on the rights provided in the European Convention on Human Rights, making the possibility of having recourse to the European Court of Human Rights unlikely to be ever fully adequate where issues of concern to a lawyer are addressed. This could however be overcome, should the European Court of Human Rights be able to rely on a binding legal instrument specifically related to the profession of lawyer. In concrete terms, the new binding legal instrument would not as such create a new complaint mechanism, but it would provide both national jurisdictions and the European Court of Human Rights with new additional specific legal provisions to which they could refer in cases concerning the legal profession. Although the European Court of Human Rights could not establish a violation of the new Convention, it could refer to it in interpreting rights established in the ECHR.

⁵ Feasibility Study, p. 77

Risk of non-ratification

As the study shows, while the risk of non-ratification certainly exists, it is important to keep in mind that the subject-matter of the new instrument is one that is central to two of the aims set for the Council of Europe, namely human rights and the rule of law. While there have been difficulties in securing ratification by all Member States of treaties regarded as “key” or “core” for the organisation, this has not been a discouragement to adding to the treaties that can be so categorised.⁶

Furthermore, although there could be a reluctance to ratify an instrument for which an implementation mechanism of some kind is also envisaged, it should be noted that it has not deterred significant numbers of Member States from ratifying treaties in recent years that include some form of implementation mechanism.

Moreover, “the absence of full participation in a treaty should not in itself be regarded as a failure. The participation in one linked to the core values of the organisation by a significant number of Member States still serves to reinforce those values. Furthermore, the successful operation of a treaty that is not generally adopted at an early stage can ultimately encourage others to ratify it at a later point in time.”⁷

Risk of non-flexibility and of inapplicability

Having more specific requirements regarding the respect for the independence of the legal profession [we are opposed to requirements additional to those applicable to the profession in our respective jurisdictions] does not necessarily mean that they need to be so specific that they cannot be adapted to evolving circumstances and apply to different jurisdictions and legal systems.

Financial risk

The risk that a new mechanism would be an undue financial and administrative burden for the Council of Europe can be easily overcome based on the choice made as to the particular form the implementation mechanism should take. This could notably be done by relying on already existing mechanisms such as the European Court of Human Rights (see above).

Implementation mechanism

Concerning the implementation mechanism for this new binding legal instrument, several options could be considered, including a complaint mechanism consisting of a body with the responsibility for ruling on individual or collective complaints about non-compliance with the standards set out in the instrument.

Alternatively, the CCBE would support the creation of a system of periodic reports by the Member States of the Council of Europe with the possibility of a recommendation by the

⁶ Feasibility Study, p. 83

⁷ Feasibility Study, p. 83

Committee of Ministers. And, in order to ensure that the facts reported are as accurate as possible in the light of the problems facing the legal profession, this system of periodic reports should be subject to input from lawyers, bars, law societies and their international associations, such as the CCBE.

Conclusion

In view of the above, the CCBE welcomes the conclusion of the study and therefore strongly supports the idea that there are compelling reasons for adopting a new binding legal instrument on the profession of lawyer providing both national jurisdictions and the European Court of Human Rights with new additional specific legal provisions to which they could refer in cases concerning the legal profession.

This new binding legal instrument should be accompanied by an implementation mechanism which could consist in a complaint mechanism with a body with the responsibility for ruling on individual or collective complaints about non-compliance with the standards set out in the instrument, or alternatively in a system of periodic reports by the Member States of the Council of Europe, subject to input from lawyers, bars, law societies and their international associations, such as the CCBE, with the possibility of a recommendation by the Committee of Ministers.