

CCBE – Stakeholder Submission to Rule of Law Report 2020 Horizontal Developments

14/05/2020

“In a society founded on respect for the rule of law the lawyer fulfils a special role. The lawyer’s duties do not begin and end with the faithful performance of what he or she is instructed to do so far as the law permits. A lawyer must serve the interests of justice as well as those whose rights and liberties he or she is trusted to assert and defend and it is the lawyer’s duty not only to plead the client’s cause but to be the client’s adviser. Respect for the lawyer’s professional function is an essential condition for the rule of law and democracy in society.”

CCBE Code of Conduct for European Lawyers, article 1.1

Introduction

The Council of Bars and Law Societies of Europe (CCBE) is recognised as the voice of the European legal profession and represents the Bars and Law Societies of 45 countries, and through them more than one 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 CCBE represents European bars and law societies in their common interests before European and other international institutions. It regularly acts as a liaison between its members and the European institutions, international organisations, and other legal organisations around the world.

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. A number of areas of special concern to the CCBE include access to justice, the development of the rule of law, and the protection of the client through the promotion and defence of the core values of the profession.

The CCBE always places a great emphasis on respect for the rule of law, democratic principles and fundamental rights. Therefore, the CCBE welcomes the commitment and the efforts of the European Commission to strengthen the rule of law in the EU, including by putting this priority high on its political agenda.

The CCBE strongly supports the need for regular monitoring of developments relating to the rule of law in all EU Member States and therefore considers the annual Rule of Law Report as an effective tool forming part of the comprehensive European rule of law mechanism. Such Report is potentially crucial in guaranteeing the basis for objective and fair political debate within different EU institutions.

The CCBE appreciates the methodology chosen by the European Commission of ensuring the diversity of relevant sources and the targeted consultation organised with the relevant stakeholders to prepare this annual report on the Rule of Law.

The CCBE values its inclusion as a stakeholder in the Rule of Law Report consultation process for 2020. This acknowledges the important role played by the CCBE in upholding the rule of law in the European Union.

The CCBE acknowledges the importance of strengthening the rule of law for the future of democracy in Europe and therefore affirms its readiness further to cooperate with the European Commission and to provide its support in strengthening the rule of law in the EU. In this submission, the CCBE seeks to highlight the most important horizontal developments involving the profession of lawyer at a European level.

In 2019, the [CCBE participated in the public consultation](#) launched by the European Commission after the publication of its Communication on “Further Strengthening the Rule of Law within the Union”, which set out the three pillars for future action – promotion, prevention and response. This submission aims to supplement and expand upon the comments already expressed as well as to identify the relevant factual developments from the perspective of Bars, Law Societies and lawyers of Europe.

Since 2015, the CCBE has issued several statements on the erosion of the rule of law in Poland, following legislative initiatives resulting in the undermining of the independence of the judiciary. In its latest [statement](#), the CCBE supported the approach of a “Forum for the Rule of Law” launched by the Polish Academy of Sciences, the purpose of which is to engage in a constructive dialogue and work towards long-term solutions.

In February 2020, on the occasion of the 48th European Presidents’ Conference in Vienna, the CCBE added its signature to the [Resolution on the Rule of Law](#), also signed by the representatives of many Bars and Law Societies. This resolution urges the European institutions and national authorities to make full use of the tools available in order to safeguard and restore the independence of the judiciary and the administration of justice in Europe, as well as to maintain the strict autonomy and independence of Bars and the legal professions, including the judiciary, especially as regards disciplinary proceedings.

In 2019 the [CCBE launched a video on Rule of Law](#), explaining to citizens the most important elements of the rule of law and the importance of respect for the rule of law in their everyday lives.

Executive summary

From 2019 to date the CCBE submitted numerous position papers, proposals for reform, submissions and letters of support to advocate for reform, amendment, enforcement and re-enforcement of the rule of law across a diverse range of areas impacting upon the justice system both at an EU and international level.

These submissions included:

- A proposal currently under discussion within the Council of Europe bodies to draft a European Convention on the profession of lawyer, a first binding international instrument;
- Proposals for reforms to the European Court of Human Rights (ECtHR) which could rapidly contribute to reducing cumulative delays and backlogs of serious cases pending in ECtHR proceedings, by addressing possible ways to accelerate and improve the transparency and effectiveness of the allocation of cases within the ECtHR;
- Recommendations on legal aid as a fundamental tool for ensuring access to justice guaranteed by Member States and letters to the EU Commission highlighting the necessity for EU funding for asylum protection cases;
- An observation submission from CCBE members in relation to the trends and deficiencies that existed with regard to delays in disposal of court proceedings in their respective Member States.

The CCBE opposes any declaration that would be the responsibility of the lawyer that would impact on professional secrecy/legal professional privilege. Indeed whatever the legal basis for professional secrecy/legal professional privilege in each Member State (i.e. law, regulation or rules governing professional ethics) any derogation from professional secrecy/legal professional privilege must comply with the provisions of Article 8 of the European Convention on Human Rights and Article 7 of the Charter of Fundamental Rights of the European Union (read in conjunction with Article 52-3 of the said Charter). In this regard, the CCBE made the following recommendations:

- Recommendations on the protection of fundamental rights in the context of ‘national security’. The CCBE stresses the need to ensure the protection of professional secrecy as a fundamental guarantee of the rule of law in relation to governmental practices for the purpose of surveillance and law enforcement.
- The CCBE is following closely the developments regarding legislation in the area of anti-money laundering. In this regard, the CCBE strongly calls for full respect for legal professional privilege/professional secrecy. The requirements on a lawyer to report suspicions regarding the activities of clients based upon information disclosed by clients in strictest confidence is, in the view of the CCBE, a violation of the fundamental right to legal professional privilege and professional secrecy.
- Recommendations in relation to whistle-blower legislation in the context of preserving the professional secrecy/legal professional privilege/confidentiality of the lawyer-client relationship.
- Recommendations in relation to Directive (EU) 2018/822 (DAC6 Directive). The CCBE believes the obligations imposed on a lawyer under this Directive infringes lawyer-client professional secrecy/legal professional privilege, infringe Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 7 of the Charter of Fundamental Rights of the European Union, each of which protects lawyer –client privilege in a distinctive manner.

The CCBE works to assess and to analyse the information received about attacks on lawyers globally, including cases in criminal and political contexts. In the most serious cases, the CCBE refers the matter to key actors at an EU level and/or the Council of Europe. In some instances where appropriate it will express its support to the lawyer concerned.

The CCBE has actively assessed the impact of the COVID-19 pandemic on lawyers throughout Europe and their clients and across the national justice systems of its member Bars and Law Societies. Its

research indicates that the pandemic has resulted in significant difficulties in terms of access to justice. Difficulties have arisen in the areas of migration, family law, child law and criminal law, as well as in the transition to the provision of online hearings in the Member States. Real challenges exist at present for individuals seeking to apply for international protection, accessing barring orders and safety supports, bail applications and having appeals heard. Whilst the pandemic has naturally resulted in challenges in terms of providing access to justice for the courts and competent authorities of the Member States, the CCBE emphasises the fundamental importance of ensuring continuity in legal systems, even in times of crisis.

The CCBE has identified a worrying trend across some Member States to use the pandemic crisis to erode the rule of law and the fundamental rights and freedoms of individuals. It is the view of the CCBE that emergency measures should not be at the expense of the fundamental principles and values as set out in the Treaties and should be strictly limited to what is necessary and proportionate. The CCBE is currently working with its members to assess the implications in different jurisdictions for the status of the rule of law arising from the pandemic crisis. It proposes to make the appropriate recommendations to relevant stakeholders when this process is completed. This will be a priority matter for the future.

The CCBE works in collaboration with relevant institutional stakeholders to develop best practice guidance to support the upholding of the rule of law. These are identified in this report.

1. **Justice System**

A. **Independence**

1. **Appointment and selection of judges and prosecutors**

2. **Irremovability of judges, including transfers of judges and dismissal**

3. **Promotion of judges and prosecutors**

1. The CCBE emphasises the importance of experienced high-quality judges being appointed and being allowed to remain in office when they have proved both their competence and their commitment to an efficient Court both at national and EU level.
2. The [CCBE has called on Member States](#) to ensure that, where a sitting judge of the ECJ is of proven competence and is willing to continue as a member of the EU Courts, his or her mandate should be renewed and the judge should not be recalled, for example to reflect the changing domestic political situation or other domestic compromises, which have no place in a truly *communautaire* approach to justice in the EU.

4. **Allocation of cases in courts**

3. The CCBE strongly supports the necessity of maintaining the credibility and efficiency of court proceedings so as to ensure effective protection of citizens and to uphold the rule of law.
4. In June 2019, the CCBE submitted [proposals](#) for reforms to the machinery of the ECtHR which could rapidly contribute to reducing cumulative delays in ECtHR proceedings, by addressing ways to accelerate and improve the transparency and effectiveness of the allocation of cases within the ECtHR.

9. **Independence of the Bar (chamber/association of lawyers)**

5. An independent legal profession is a prerequisite for the rule of law. The importance of this independence is highlighted in many key 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](#).
6. The CCBE Charter identifies the core principles approved and acknowledged as common to all European lawyers that they have committed to respect, although these principles are expressed in slightly different ways in different jurisdictions. The principles are essential for the proper administration of justice, access to justice and the right to a fair trial, as required under the European Convention on Human Rights.
7. More precisely, a lawyer's independence, and the freedom for lawyers to pursue their client's cases are included in Principle a) of the CCBE Charter, stating that:
8. *"A lawyer needs to be free - politically, economically and intellectually - in pursuing his or her activities of advising and representing the client. This means that the lawyer must be independent of the state and other powerful interests and must not allow his or her independence to be compromised by improper pressure from business associates. The lawyer must also remain independent of his or her own client if the lawyer is to enjoy the trust of third parties and the courts. Indeed, without this independence from the client there can be no guarantee of the quality of the lawyer's work. The lawyer's membership of a liberal profession and the authority deriving from that membership helps to maintain independence, and bar associations must play an important role in helping to guarantee lawyers' independence. Self-regulation of the profession is seen as vital in buttressing the independence of the individual lawyer. It is notable that in unfree societies lawyers are prevented from pursuing their clients' cases and may suffer imprisonment or death for attempting to do so."*

9. As emphasised in the [model article on independence](#) adopted by the CCBE in 2017, it follows from those principles that society needs a fair system of administration of justice that guarantees the independence of lawyers in the discharge of their professional duties, without any improper restriction, influence, inducement, pressure, threats or interference, direct or indirect, of any kind or for any reason.
10. The model article in question clarifies that independence means that lawyers:
- (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference;
 - (b) are able to travel and to consult with their clients freely both within their own country and abroad;
 - (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognised professional duties, standards and ethics;
 - (d) shall be free from external pressure;
 - (e) shall resist any influence stemming from his/her own personal interests; and
 - (f) shall not compromise their professional standards to please the client, the court, third parties or public authorities.
11. Independence is therefore necessary:
- to enable lawyers properly to defend clients against the State,
 - to protect lawyers from being identified with clients,
 - to build trust between lawyers and their clients, and
 - to preserve the rule of law.
12. It should be noted in this regard that these issues are also reflected in Article 2.1. of the CCBE Code of Conduct.¹ The importance of self-regulation of Bars and Law Societies is fundamental to the Rule of Law and is expressed in terms of freedom from state intervention. This is emphasised by Principle j, of the CCBE Charter. Only strong self-regulation can guarantee long-term freedom and independence of the legal profession as an agent in the administration of justice.
13. Both the principle of independence and the self-regulation of the legal profession are recognised at international level ([UN Basic Principles on the Role of Lawyers](#) 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) and at EU level ([the European Parliament resolution](#) of 23 March 2006 on the legal profession and the general interest of the functioning of legal systems). These documents reaffirm the importance of ensuring the independence, competence, integrity and responsibility of members of the legal professions as well as the vital role of professional associations of lawyers in this context.
14. When speaking about the importance of independence of the Bar and lawyers, the CCBE stresses the importance for all lawyers to have the 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.
15. The CCBE works to assess and to analyse the information received about attacks on lawyers all over the world, including cases arising in a criminal and political context. In the most serious cases, the CCBE refers the matter to key actors at the level of the European Union and/or the Council of Europe. In some cases the [CCBE also expresses support](#) to lawyers by requesting the relevant government to ensure that a full and impartial investigation of a particular case is carried out, as well as to guarantee that that all necessary measures are taken to ensure that the lawyers are able to perform their professional duties without fear of reprisal, hindrance, intimidation or harassment

¹ The CCBE Code of Conduct applies to the cross-border activities of lawyers within the European Union and the European Economic Area, the Swiss Confederation as well as the Associate and Observer Members of the CCBE once these rules have been adopted as enforceable rules at national level.

(examples include: [Murder of lawyer Derk Wiersum \(27/09/2019\)](#) and [Harassment and intimidation at the lawyer Botagoz Jardemalie \(07/11/2019\)](#)).

16. In 2020, the CCBE supported an initiative of one of its members - a questionnaire on the protection of lawyers as co-operators of the justice system - in order to collect information regarding the protection provided to lawyers in Europe against attacks on the exercise of their functions. Further work and analysis of this issue will be considered within the CCBE.
17. The independence of the Bar or lawyers should also particularly require respect in relation to court proceedings. In April 2020 the CCBE provided comments to the European Court of Human Rights (ECtHR) regarding proposed amendments to the Rules of the ECtHR on the representation of applicants and inappropriate submissions by, or conduct of, the representatives of a party (Rules 36 and Rule 44 D respectively). The CCBE recognised that the ECtHR has the power to control its procedures, including setting the requirements for practising lawyers to be permitted to plead before it. Nevertheless, the decision in exceptional cases to exclude a practising lawyer (a member of a Bar) from pleading before the ECtHR is of such significance for their standing and entitlements that the CCBE believes that it is essential that that lawyer's Bar is informed and engaged in the exclusion decision, as well as any decision about reinstatement.

B. Quality of Justice

12. Accessibility of courts (e.g. court fees, legal aid)

18. Legal aid is a fundamental tool for ensuring that access to justice is guaranteed by Member States.
19. In 2018, the CCBE developed the [Recommendations on legal aid](#) setting out a number of guiding principles for the proper delivery of legal aid. The Recommendations were prepared on the basis of an extensive survey examining specific aspects of the various national legal aid systems, covering all areas of law and focusing on the independence of legal aid providers, the qualification of legal aid providers, fees of legal aid lawyers, billing of expenses, budgeting of legal aid by the state, and the administration of legal aid.
20. In 2019, the CCBE intervened and supported its member the "*Uniunea Națională a Barourilor din România*" (UNBR) to stop the intended reduction of budget allocation for 2019 by the Ministry of Finance of Romania for the category of legal services. The CCBE considers that lowering of the budget allocated to legal aid may result in hindering the proper provision of legal aid.
21. The CCBE believes that access to justice and to legal assistance is of paramount importance in all cases, including in particular where citizens are vulnerable, such as where they are seeking asylum. Legal aid and interpretation are essential resources where persons are seeking, at any stage of the procedure, to exercise their fundamental rights to international protection guaranteed by EU law. This is an approved [CCBE position of March 2019](#). In this regard, the CCBE has indicated in its [letter](#) sent to the European Commission on 25 March 2020, that the legal advice which is supposed to be available to persons who wish to apply for international protection on the Aegean Islands (Greece) cannot be accessed by them because it is not provided at all, nor funded by the European Union or the public authorities at first instance and that the public legal assistance available at appeal stage is practically non-existent or effectively inaccessible. The legal assistance that is available at first instance such as the European Lawyers in Lesvos Project (www.elil.eu) is, instead, funded at present by the European legal professions or by other actors and cannot hope to address the needs of all persons requiring assistance at this time. This results in a barrier to access to justice. Therefore, there is a fundamental necessity for a properly funded asylum legal service at both first instance and appeal levels in all EU member states, in order to facilitate access to justice and to uphold the rule of law.
22. Also, any developments which, whether it be for budgetary or other reasons, put in question the right of migrants to independent advice have to be taken very seriously. For example, in Austria a contract was awarded to a state-owned limited liability company. This entity is to provide legal advice and legal representation for refugees in the procedures before the First Instance Authority and the procedure before the Asylum Courts. Previously, several NGOs provided legal assistance and

received government funds for this. This development raises serious concerns with regard to the independence of the legal advice which might be given by the company concerned.

23. The CCBE has been actively involved in dialogue with the association representing legal Protection Insurance companies in order to promote a better understanding of what the free choice of lawyer means for an insured individual and to ensure that the freedom to choose a lawyer is not rendered practically impossible by insurance companies. This is a paramount for protecting individuals against conflict of interests with the insurance company. According to a survey undertaken by the CCBE, the free choice of lawyer is not always properly respected in some Member States where an individual need to make use of the legal protection/expense insurance which he/she pays for.
24. Another point of importance for the CCBE is to avoid situations where the intervention of a lawyer is limited under the terms and conditions of insurance policies to litigation proceedings notwithstanding that the role of lawyers also extends properly to advising the insured and discussing with him/her of possible options and solutions when a legal issue is at stake. This matter is of considerable importance in view of case C-667/18 a decision in which is pending before the Court of Justice of the European Union. This case relates to a request for a preliminary ruling concerning the interpretation of article 201 (1) (a) of the Solvency II Directive as to whether the right of a holder of legal expenses insurance to choose a lawyer or a representative includes mediation proceedings or not. The Advocate General concludes that the Directive precludes national legislation from refusing to allow the holder of legal expenses insurance the free choice of a lawyer or representative in the event of judicial or extra judicial mediation. This matter is of considerable importance to the CCBE as the current position of legal protection insurers is that the right to the free choice of a lawyer under Legal Protection Insurance does not include such a choice in relation to extra judicial or prejudicial interventions of a lawyer.

C. Efficiency of the justice system

16. Length of proceedings

25. In September 2019, the CCBE approved a submission making observations on the CEPEJ paper on 'The role of parties and practitioners in avoiding or reducing delay in disposal of court proceedings.' In this submission, CCCBE members shared their practical experiences in their Member States which demonstrated the trends and deficiencies that existed from a horizontal perspective.
26. The CCBE submission found that in most jurisdictions there are schedules and time limits calculated to ensure efficient litigation in terms of timing. However, in some countries where there is what is on paper an efficient system, lack of adequate resources to implement those rules, renders them notional rather than real, and delays become endemic and systemic.
27. The CCBE supports the need to promote efficiencies in litigation and acknowledges the responsibility of lawyers to ensure that injustice is not brought about as an unintended consequence of the rigid application of procedural rules.
28. Conversely, if, due to the lack of judicial resources, cases are routinely listed for trial with no realistic prospect of proceeding on the allocated date, then a vast amount of non-judicial resources are wasted. The amount of practitioner time that might otherwise be available to progress procedural issues is simply lost in awaiting trials that never happen.
29. Taking into account a lawyer's duty to act in the best interests of the client, lawyers must always review all options when it comes to advising their clients on the choice of the most appropriate dispute resolution process. The selection of the preferred route must be merit-based and considered from an analytical and objective point of view. A solution for the delays in proceedings should never raise the threshold of access to justice and to the courts.
30. The CCBE believes that time limits on oral arguments might be acceptable in principle, but lawyers must be able to argue for and be granted exceptions if this is in the best interest of the client. In addition, due to variations in legal systems and related procedural rules, it is necessary that different legal traditions which exist across Member States be upheld and respected.

31. In June 2019, the CCBE made [proposals](#) to address the backlog of serious cases pending before the European Court of Human Rights (ECtHR) and the delays in the execution of the ECtHR's judgments. The CCBE made several proposals for reforms which could rapidly contribute to reducing cumulative delays, notably by accelerating the decision making process within the ECtHR (measures related to the allocation of cases within the ECtHR), and the working methods of the Committee of Ministers of the Council of Europe in supervising the execution of ECtHR judgments. The CCBE also emphasised the responsibility incumbent on lawyers, as representatives of applicants in domestic proceedings and before the ECtHR, to contribute energetically to assist reforms, especially through improvements in legal training, in order to accelerate proceedings.
32. In the field of migration, in March 2019, the CCBE when providing comments on the proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals (recast), underlined in [its position](#) the need to allocate sufficient time to the judiciary to deal with proceedings involving international protection cases, in particular, the need to ensure for the applicant in asylum proceedings a sufficient time limit to lodge an appeal and the existence of a suspensive effect for appeal procedures.

17. Enforcement of judgements

33. The CCBE believes that ensuring the enforcement of ECtHR judgments not only provides redress to victims of human rights violations but can act as a deterrent to the repetition of those violations, thus upholding the rule of law. Therefore, the CCBE made several [proposals](#) notably addressing the execution of ECtHR judgements by improving the working methods of the Committee of Ministers of the Council of Europe in supervising the execution of judgments, by increasing the time available for evaluating the execution of judgments, further improving transparency and studying and developing means for facilitating the enforcement of just satisfaction awards by national courts, including, but not limited to, those of the respondent State.
34. The CCBE is currently studying State practice on the enforcement of the monetary part of ECtHR judgments in the domestic legal order. This survey seeks to identify mechanisms for recognising and enforcing monetary awards made by the ECtHR under national law, both against the respondent state domestically, as well as in third countries, and under EU law.

18. Other issues (alternative dispute resolutions /legal professional privilege v. national security measures, access to lawyer in criminal proceedings/use of AI)

Mediation

37. Each person should have access to justice, but justice does not always originate from the court. Therefore, the legal profession should display advanced reflection and in-depth knowledge of all dispute resolution processes available across a broad spectrum, including mediation. Mediation is clearly one of the possible methods for the realisation of justice and, as such, clients should be made aware of the opportunities offered by mediation, which is, of course, a voluntary process of self-determination for parties, who may be advised that their interests may best be served by choosing mediation as a means of resolving their dispute.
38. Taking into account lawyers' duty to act in the best interests of the clients, lawyers must always review all options when it comes to advising their clients on the choice of the most appropriate dispute resolution process. Lawyers' approach to dispute resolution must therefore be conceptually neutral and the selection of the preferred option must be merit-based and considered from an analytical and objective point of view rather than acting on the basis of any prejudices, biases or pre-conceptions.
39. In March 2017, the [CCBE provided its contribution](#) to the reflection of the European Law Institute (ELI) and the European Network of Councils for the Judiciary (ENCJ) on the important topic of alternative dispute resolution (ADR).
40. In 2018, in collaboration with the European Commission for the Efficiency of Justice (CEPEJ) the CCBE developed the [Guide to Mediation for Lawyers](#). The aim of this guide is to raise awareness amongst lawyers with respect to mediation and demonstrate various professional challenges,

opportunities and incentives for lawyers that stem from the use of mediation, as well as the benefits for clients.

Legal professional privilege v. national security measures

41. The CCBE stresses the need to ensure the protection of professional secrecy as a fundamental guarantee of the rule of law in relation to governmental practices for the purpose of surveillance and law enforcement. In 2019, the CCBE adopted the [Recommendations on the protection of fundamental rights in the context of "national security"](#) to call for a guarantee of a fair balance between considerations of national security and the fundamental rights of citizens.
42. The CCBE highlighted the need for judicial control, adequate supervisory control, which must be entrusted to an independent judicial body, adequate legal remedies and sanctions implemented in the event that the rules are breached, together with explicit protection of professional secrecy and legal professional privilege to be provided in law. In this paper the CCBE also proposed a possible definition of national security and stressed the need for clear, robust procedures to ensure that the rule of law is upheld.

Access to lawyer in criminal proceedings

43. The right to a lawyer for accused persons is a gateway to a fair trial. When assessing the implementation of Directive 2013/48/EU in 2019, the European Commission noted that the extent of the directive's impact on Member States varies according to the national criminal justice systems in place. The evaluation also showed that transposition into national law and its practical application need to be further improved.
44. The CCBE believes that it is of fundamental importance that this directive be implemented by Member States in the correct manner. Therefore, it supports the commitment of the European Commission to taking appropriate measures in order to ensure conformity with the provisions of the directive throughout the European Union.

Use of AI

45. In February 2020, the CCBE adopted the [Considerations on the legal aspects of Artificial Intelligence \(AI\)](#) analysing various legal aspects arising out of the use of AI in the areas which most directly concern the legal profession.

I. Anti-corruption framework

B. Prevention

22. Measures in place to ensure Whistle-blower protection and encourage reporting of corruption

46. The CCBE has a [position](#) on whistle-blowers' protection which was adopted in June 2018 in the context of the European Commission's Proposal for a Directive on the protection of persons reporting on breaches of Union law.
47. In its position, the CCBE highlighted the importance of preserving professional secrecy/legal professional privilege/ confidentiality. It welcomed the Commission's proposal and accepted the general principle that those who selflessly reveal information for the public benefit should be protected in their employment, provided that their actions are lawful and that the public benefit outweighs any harm which may result from the disclosure.
48. However, in order to uphold the rule of law, it is essential that the confidentiality attached to the relationship between lawyers and their clients is protected. Considered as one of the core principles of the legal profession² and being of universal public benefit, professional secrecy/legal professional

² See, for example, Principle b) of the CCBE Charter of Core Principles of the European Legal Profession.

privilege/ confidentiality can therefore never be compromised in the interests of individual employment protection from whistle-blowing (in a similar way that some human rights are evaluated as prevailing over others). Therefore, the solution adopted in the current Directive on the protection of persons who report breaches of Union law³, stating that the Directive shall not affect the application of Union or national law relating to [...] the protection of legal professional privilege⁴, was welcome.

49. It is important to note that professional secrecy is an obligation that is protected under sanctions in the criminal law codes in many Member States and cannot be used to protect or disguise illegality or to circumvent the law. Similarly, the scope of legal professional privilege does not extend to cover a case where the lawyer is engaged with the client in the furtherance of a criminal activity.

C. Repressive Measures

25. Criminalisation of corruption and related offences

50. The CCBE is following closely the developments regarding legislation in the area of anti-money laundering.
51. In this regard, the CCBE strongly calls for full respect for the principle of legal professional privilege/professional secrecy, as recognised by the ECJ and the ECtHR, which both have highlighted the importance of these principles.
52. For lawyers to be effective in defending their clients' rights, there must be confidence that communications between lawyers and their clients are kept confidential. In essence, without this guarantee, there is a danger that a client would lack the trust which enables the client to make full and frank disclosure to their lawyer, and, in turn, the lawyer would lack sufficient information required to enable the lawyer to provide full and comprehensive advice to their client, or represent their client effectively, thereby frustrating a crucial guarantee of a fair trial process.
53. The CCBE is anxious to highlight certain aspects of the role of the legal profession in the context of the anti-money laundering Directive.
54. Since 2001 (Directive 2001/97/CE), EU legislation has imposed reporting obligations on lawyers when they carry out a wide range of activities, with the exception being that only some information will be exempted from this obligation. Even if the Directive provides that legal advice remains subject to the obligation of professional secrecy, this general principle, according to the [CCBE position](#), infringes upon professional secrecy, as the lawyer is *de plano* subject to an obligation to disclose suspicions. The exception does not apply to lawyers themselves but only to some forms of information obtained in some circumstances. The exceptions are narrower in scope than the giving of legal advice.
55. The requirements on lawyers to report suspicions regarding the activities of clients based upon information disclosed by clients in strictest confidence is, in [the view of the CCBE](#), a violation of the fundamental rights mentioned above. The necessary reciprocal trust that is required between a client and his lawyer becomes an illusion when the lawyer is obliged to inform on mere suspicions regarding his client. The lack of confidence that a client will feel may induce the client not to provide complete information to his lawyer, notwithstanding that this information is both required and necessary in order for the lawyer properly to fulfil his duties.

³ [Directive \(EU\) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law](#)

⁴ See Article 3 (3) b and Recital 26 of the Directive

⁵ ECtHR, [André v France](#) (18603/03), 2008, §41: “professional secrecy [...] is the basis of the relationship of trust existing between a lawyer and his client.”

56. As a result, the essence of the lawyer/client relationship has, in the view of the CCBE, now been infringed upon as a result of the EU money laundering Directives.
57. The CCBE, [according to its position](#), would express in the clearest terms that it does not, and never will, condone the actions of any lawyer who knowingly participates in any criminal activity of a client, whether relating to money laundering or any other criminal activity. There are already professional ethical rules and disciplinary sanctions, in addition to criminal sanctions, in place to deal with lawyers who participate in criminal activity like this. In addition, it must be noted that if a lawyer is involved in any illegal activities, legal professional privilege or professional secrecy cannot be invoked.
58. [The CCBE firmly believes](#) that some of the provisions of the Directive conflict with basic core values of the profession and as a consequence comprise an effective diminution of citizens' rights. It is of course accepted that the legal profession has to, and will, play its part in the fight against money laundering and terrorist financing. However, the CCBE would like to emphasise that the application of a system designed for the financial services sector is fundamentally incompatible with many European legal systems and interferes with the role of lawyers within legal systems in upholding the rule of law.

IV. Other institutional issues related to checks and balances

C Accessibility and judicial review of administrative decision

40. Modalities of publication of administrative decisions and scope of judicial review

59. Regarding administrative matters, the [CCBE believes](#) that lawyers cannot be held liable for any legal gaps in tax legislation or distortions of interpretation between Member States.
60. [Directive \(EU\) 2018/822](#) (DAC6 Directive) introduces an obligation on intermediaries, including lawyers, to disclose potentially aggressive tax planning arrangements, and also the means for tax administrations to exchange information on these structures.
61. In the opinion of the CCBE, the purpose of DAC6 Directive is to enable Member States to identify any "gaps" in their respective laws and/or distortions of interpretation leading to imperfect taxation of taxable income. Member States are then to take appropriate legislative or regulatory measures to fill the legal gaps thus identified, so that 100% of the taxable income is effectively taxed in the various Member States and/or, for example, that a charge deducted in one Member State results in effective taxation in another Member State.
62. The CCBE understands that several Member States intend to transpose the DAC6 Directive by introducing a dual reporting obligation:
- a. A first declaration, which would be the responsibility of the lawyer, on the different parameters of the scheme itself without revealing the name of the client; and
 - b. A second declaration, which would be the responsibility of the taxpayer, and which would refer to the declaration previously made by his/her lawyer.
63. The CCBE opposes any declaration that would be the responsibility of the lawyer. Indeed, whatever the legal basis for professional secrecy/legal professional privilege in each Member State (i.e. law, regulation or rules governing professional ethics), any derogation from professional secrecy/legal professional privilege must comply with the provisions of Article 8 of the European Convention on Human Rights and Article 7 of the Charter of Fundamental Rights of the European Union (read in conjunction with Article 52-3 of the said Charter).
64. These provisions require that any exception and derogation from professional secrecy/legal professional privilege must satisfy the following double test:
- a. The "necessity" of the exemption from professional secrecy/legal professional privilege; and

- b. Assuming that the derogation is considered "necessary" for the "proportional" nature of the derogation, the judge must assess whether the derogation from professional secrecy/legal professional privilege is proportional to the objective to be achieved.
65. However, since the DAC6 Directive only covers lawful activities and not unlawful activities, the taxpayer can complete the entire declaration in the same way as the information he/she communicates to the administration each year with all his/her tax returns or in the event of a tax inspection (for example, the transfer pricing documentation provided annually or in the event of a tax inspection).
 66. A lawyer's declaration is therefore by no means "necessary" since the taxpayer's declaration cannot be interpreted as being "self-incriminating" insofar as it does not involve declaring illegal activities.
 67. Essentially, the obligations in DAC 6 infringe solicitor-client privilege in a way that is both unnecessary and, in any event, disproportionate to the objective to be achieved. Lawyers are not agents of the State, and lawyers cannot be held liable for any legal gaps in tax legislation or distortions of interpretation between Member States.
 68. The CCBE believes the obligations infringe the provisions of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 7 of the Charter of Fundamental Rights of the European Union which protect lawyer-client privilege in a distinctive manner.
 69. As regards the scope of judicial review in the migration area, in March 2019 the CCBE stressed in its position on the proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals (recast) that, in cases concerning the returning of illegally staying third-country nationals, appeals should not be restricted to a single level of jurisdiction, thus allowing Member States to apply higher levels of protection by virtue of their constitutions.