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Conseil des barreaux européens
La voix des avocats européens

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Contribution du CCBE au rapport 2021 sur l'état de droit

26/03/2021

Introduction

Le Conseil des barreaux européens (CCBE) représente les barreaux de 45 pays, soit plus d'un million d'avocats européens. Le CCBE agit également en tant qu'organe consultatif et intermédiaire entre ses membres et entre ses membres et les institutions de l'Union européenne dans les matières transfrontalières d'intérêt commun.

La régulation de la profession, la défense de l'état de droit, les droits humains et le maintien des valeurs démocratiques sont les missions essentielles du CCBE. Les domaines de préoccupations principaux comprennent le droit d'accès à la justice, le développement de l'état de droit, le respect des droits de la défense et l'efficacité du système judiciaire, qui sont des valeurs fondamentales de la profession d'avocat.

Le CCBE accorde toujours une grande importance au respect de l'état de droit, des principes démocratiques et des droits fondamentaux. Les valeurs du CCBE et de ses organisations membres sont conformes à la Charte des droits fondamentaux de l'Union européenne, et notamment à son préambule, où il est indiqué, entre autres, que « consciente de son patrimoine spirituel et moral, l'Union se fonde sur les valeurs indivisibles et universelles de dignité humaine, de liberté, d'égalité et de solidarité ; elle repose sur le principe de la démocratie et le principe de l'État de droit. Elle place la personne au cœur de son action en instituant la citoyenneté de l'Union et en créant un espace de liberté, de sécurité et de justice. » Les valeurs du CCBE sont également conformes à l'article 47 (Droit à un recours effectif et à accéder à un tribunal impartial), l'article 48 (Présomption d'innocence et droits de la défense), et l'article 49 (Principes de légalité et de proportionnalité des délits et des peines). Par conséquent, le CCBE salue l'engagement et les efforts de la Commission européenne pour renforcer l'état de droit dans l'UE.

Les avocats sont toujours confrontés aux défis découlant de la pandémie de Covid-19 et de ses conséquences sur l'accès à la justice, la qualité de la justice, la protection des valeurs démocratiques et le respect de l'état de droit et des droits humains dans nos sociétés. Il est plus important aujourd'hui que jamais que la Commission européenne continue à suivre ces évolutions de manière continue et prenne les mesures nécessaires pour empêcher l'affaiblissement de l'état de droit.

Le CCBE apprécie son inclusion en tant que partie prenante au processus de consultation ciblée du rapport sur l'état de droit pour l'année 2021, reconnaissant ainsi le rôle important joué par le CCBE et ses membres dans la défense de l'état de droit dans l'Union européenne. Sa participation confirme également la nécessité absolue de la présence des avocats à un niveau parallèle à celui des juges et des procureurs en tant qu'acteurs clés du système judiciaire. Dans ce contexte, le CCBE souhaite que la Commission reflète l'importance des avocats et leur inclusion dans la définition de l'État de droit.

Le CCBE reconnait l'importance du renforcement de l'état de droit pour l'avenir de la démocratie en Europe et affirme dès lors sa volonté de poursuivre sa coopération avec toutes les institutions clés de

l'UE, y compris la Commission européenne, et d'apporter son soutien au renforcement de l'état de droit dans l'UE.

Déclaration du CCBE sur le rapport 2020 sur l'état de droit

Le CCBE cherche dans ce document à mettre en évidence les évolutions les plus importantes en matière d'état de droit qui concernent la profession d'avocat et ses membres au niveau européen.

Le CCBE se réfère également à sa déclaration sur le rapport 2020 sur l'état de droit publiée à la suite des discussions et des échanges internes intensifs avec la Commission européenne après la publication du premier rapport annuel sur l'état de droit en septembre 2020. Dans cette déclaration, le CCBE regrette que l'indépendance des avocats n'ait pas été suffisamment prise en compte dans le rapport 2020 sur l'état de droit et a demandé une analyse plus approfondie de l'indépendance des avocats et des barreaux dans le prochain rapport annuel 2021 sur l'état de droit, en particulier la reconnaissance du fait que l'indépendance des avocats et des barreaux est une composante indispensable de l'indépendance des systèmes judiciaires et de l'état de droit.

Dans cette déclaration, ainsi que dans les lettres adressées à la Commission de la part du CCBE et des barreaux nationaux, il a été demandé à plusieurs reprises que la Commission élabore une définition claire de l'état de droit au niveau de l'UE qui intègre explicitement les avocats et leur rôle dans l'administration de la justice. Ce n'est qu'à cette condition que l'indépendance des avocats et des barreaux qui les représentent pourra être efficacement contrôlée et protégée à l'échelle de l'UE et, par conséquent, à l'échelle des États membres. L'indépendance doit toutefois être la norme garantie et non le but ultime. Une profession indépendante seule serait impuissante sans participation. D'après une nouvelle définition révisée de l'état de droit dans l'UE, la mesure préventive efficace à cet égard pourrait être mise en place. Celle-ci se traduirait par une participation et une consultation permanentes des avocats et des barreaux, tant au niveau européen que national, sur des questions qui influencent les valeurs fondamentales de la profession mais surtout qui affectent les citoyens qu'ils représentent et les droits fondamentaux qu'ils cherchent à défendre.

Indépendance de la justice, des avocats et des barreaux

Le CCBE condamne toute tentative visant à compromettre et à mettre en péril l'indépendance de la justice. Par conséquent, le CCBE partage pleinement les préoccupations de la Commission européenne mises en avant dans le premier rapport sur l'état de droit concernant la nécessité de renforcer l'indépendance judiciaire, en particulier dans certains États membres de l'UE.

L'indépendance des avocats et des barreaux est liée à l'indépendance des autres acteurs du pouvoir judiciaire et fait partie de l'indépendance du pouvoir judiciaire en général. L'indépendance des avocats est nécessaire à la défense convenable des clients, y compris dans leurs recours contre l'État, pour protéger les avocats de toute assimilation à leurs clients, pour renforcer la confiance entre les avocats et leurs clients grâce au droit au secret professionnel, pour préserver l'état de droit et pour remplir le rôle important et irremplaçable de prévention des abus de pouvoir.

Le CCBE rappelle combien il est important que tous les avocats aient l'indépendance et la liberté d'exercer leurs activités professionnelles sans crainte de représailles, d'entraves, d'intimidation ou de harcèlement afin de maintenir l'indépendance et l'intégrité de l'administration de la justice et de l'état de droit[1].

[1] L'importance de l'indépendance est explicitement reconnue dans de nombreux documents internationaux tels que les Principes de base relatifs au rôle du barreau adoptés par le huitième Congrès des Nations Unies en 1990 et la Recommandation R(2000)21 sur la liberté d'exercice de la profession d'avocat adoptée par le Comité des ministres du Conseil de l'Europe, ainsi que dans plusieurs documents politiques adoptés par le CCBE, notamment la Charte des

En ce qui concerne la prévention des décisions et actions arbitraires, il ne dépend pas seulement des législateurs des États de prévoir l'accès à la justice et les recours juridiques respectifs pour leurs citoyens. Il est nécessaire d'assurer l'existence d'une profession d'avocat indépendante autorégulée, composée d'avocats indépendants supervisés de manière indépendante, aptes et autorisés à contester les décisions prises par le pouvoir en place.

Portée de la contribution du CCBE

Le présent rapport constitue la contribution du CCBE et de ses barreaux membres des États membres de l'UE à la consultation ciblée des parties prenantes lancée par la Commission européenne dans le cadre de la préparation de son rapport annuel 2021 sur l'état de droit. Il rassemble les contributions reçues selon des catégories convenues collectivement et examinées plus précisément dans la partie concernant la méthodologie du rapport.

Méthodologie de la contribution du CCBE

Ce rapport a été compilé en utilisant la méthodologie suivante :

1. Données qualitatives pertinentes tirées des contributions des délégations des barreaux membres à la partie IV du questionnaire pour le tableau de bord 2021 de la justice dans l'UE.

   Ce tableau de bord est l'une des sources d'information utilisées par la Commission européenne pour le rapport sur l'état de droit. La participation du CCBE à l'élaboration de cette évaluation importante, ainsi que la décision de la Commission européenne d'ajouter un chapitre distinct sur l'indépendance des avocats et des barreaux dans le questionnaire pour le tableau de bord 2021 de la justice dans l'UE, constituent un pas dans la bonne direction pour la reconnaissance du rôle déterminant des avocats et des barreaux indépendants pour l'indépendance de la justice en Europe et pour le renforcement de l'état de droit dans l'UE.

2. Contributions reçues des barreaux membres sur les évolutions pertinentes en matière d'état de droit dans les États membres de l'UE, en accordant une attention particulière aux évolutions qui portent atteinte à l'indépendance des avocats et des barreaux, à l'accès à la justice, à la qualité de la justice, aux libertés fondamentales, à la démocratie et à l'état de droit.

Conclusions fondées sur les informations fournies en annexe de la présente contribution

Les barreaux nationaux des États membres de l'UE se considèrent comme des organisations indépendantes et autorégulées représentant leurs membres.

La pandémie de Covid-19 a entraîné des risques systémiques pour l'état de droit en Europe. En réponse aux menaces liées à la Covid-19, de nombreux pays ont, à juste titre, pris des mesures d'urgence et adopté des lois pour contenir le risque d'infection de masse, préserver la capacité du secteur médical à traiter les infections et faire face aux conséquences économiques de la crise. Dans sa déclaration sur les risques systémiques pour l'état de droit en temps de pandémie, le CCBE a exprimé ses préoccupations[2] au sujet de ces mesures, à la lumière de l'absence *de facto* d'examen parlementaire et de contrôle juridictionnel. Le CCBE a donc appelé les États membres à ne pas abuser des dispositions relatives à « l'état d'urgence » ou aux « pouvoirs spéciaux » accordés à l'exécutif. Le CCBE a plaidé pour

principes essentiels de l'avocat européen et le Code de déontologie des avocats européens (Principe a) de la Charte) ainsi que dans l'article modèle sur l'indépendance.

[2] Déclaration du CCBE sur les risques systémiques pour l'état de droit en temps de pandémie (15 mai 2020).

des clauses de temporisation adéquates pour ces mesures et ces lois, tel que le prévoient les lois constitutionnelles et fondamentales de la plupart des pays européens.

Les contributions reçues de la part des barreaux nationaux de plusieurs pays (par exemple, la Belgique, la République tchèque, l'Allemagne, la Grèce, la Pologne, l'Italie et la Slovaquie) comprennent des informations sur l'abus de pouvoir arbitraire de l'exécutif dans l'adoption de lois d'urgence dans le cadre de la pandémie de Covid-19, notamment selon une procédure accélérée, évitant ainsi l'examen parlementaire et la transparence. Des exemples de manque de sécurité juridique, de difficulté d'accès aux tribunaux et d'accès à la justice pendant la pandémie de Covid-19 y figurent également.

Les barreaux nationaux font part d'affaires et d'exemples où les atteintes à l'indépendance de l'avocat, à la confidentialité de la relation avec le client protégée par le secret professionnel, l'assimilation des avocats à la cause de leurs clients, les entraves à l'accès à la justice et les attaques et menaces à l'encontre d'avocats ont eu pour effet de porter atteinte à l'état de droit, d'interférer avec les principes de base[3] de l'indépendance de la profession d'avocat, de violer les droits fondamentaux et les principes démocratiques.

Le barreau italien rapporte un exemple d'ingérence récente des autorités publiques dans son autonomie patrimoniale et financière.

Des informations inquiétantes sont signalées concernant plusieurs affaires d'écoute illégale des téléphones d'avocats en France, en Italie et en Lituanie. Un certain nombre d'affaires ont également été rapportées au sujet de la perquisition de cabinets d'avocats (en Estonie, en Pologne, en Allemagne et en Roumanie). Le barreau lituanien cite une affaire de surveillance secrète illégale des activités d'un avocat.

Les barreaux belge, allemand, hongrois, italien, slovaque et roumain signalent que des avocats ont été assimilés à leurs clients, ce qui a conduit à des attaques injustes à l'encontre des avocats dans l'exercice de leurs activités professionnelles. Dans l'annexe de cette contribution figurent des exemples concrets d'arrestations d'avocats (en Pologne, en Belgique et en Roumanie).

Malheureusement, des informations ont également été reçues sur des affaires et des exemples de menaces à la sécurité physique des avocats en raison de leurs activités professionnelles (par exemple, en Allemagne et en Slovénie). Le barreau néerlandais rapporte un nombre croissant d'affaires de ce type.

Le CCBE a également été informé d'une décision récente de la Cour de cassation en France réduisant la portée du secret professionnel uniquement aux échanges liés à l'exercice des droits de la défense dans les affaires de lutte antifraude. Le barreau autrichien a signalé une affaire politiquement sensible dans laquelle le suspect a été interrogé à de multiples reprises sans avocat.

Plusieurs barreaux ont informé le CCBE de problèmes concernant le secret professionnel préjudiciables à la profession et à la garantie des droits fondamentaux des citoyens (par exemple, en Belgique, en République tchèque, en France, en Lituanie et en Roumanie).

Ces éléments sont particulièrement importants lorsqu'il s'agit de la transposition et de la mise en œuvre du droit de l'UE au niveau national. Un certain nombre de barreaux nationaux (Autriche, Lituanie, Danemark, Allemagne, Fance et Suède par exemple) ont rapporté des tentatives inquiétantes de compromettre et d'interférer avec le secret professionnel et les principes d'indépendance des avocats par l'intermédiaire de « surréglementation » (ou de *gold-plating*) dans la transposition de la directive européenne sur l'échange automatique et obligatoire d'informations dans le domaine fiscal en rapport avec les dispositifs transfrontières devant faire l'objet d'une déclaration (directive DAC 6).

[3] Principes de base relatifs au rôle du barreau adoptés par le huitième Congrès des Nations Unies en 1990 et la recommandation Rec(2000)21 sur la liberté d'exercice de la profession d'avocat adoptée par le Comité des ministres du Conseil de l'Europe.

Plusieurs barreaux nationaux (Malte, Allemagne, Danemark, République tchèque et Suède par exemple) ont fait référence à l'ingérence dans le droit au secret professionnel découlant des règles et exigences en matière de lutte contre le blanchiment de capitaux.

Dans quelques contributions des barreaux nationaux, les règles de protection des données ont été précisées dans le cadre des difficultés qu'ont les avocats à accéder aux informations et des refus reçus concernant les informations demandées par un avocat (par exemple en Lituanie) ou de l'absence d'autonomie administrative du contrôle de la protection des données pour la profession d'avocat et des pouvoirs disproportionnés des autorités de contrôle de la protection des données en Allemagne.

Le barreau hongrois a fait part de ses protestations contre les communiqués de presse trompeurs à l'encontre des avocats et contre à la modification d'une loi au sujet de l'indemnisation des personnes détenues, qui pourrait avoir des conséquences préjudiciables à la fois sur l'accès au droit et sur la profession d'avocat.

Le CCBE et ses barreaux membres remarquent que les discussions publiques et politiques au sujet des questions judiciaires sont devenues plus vives et conflictuelles au détriment des faits objectifs requérant une attention particulière. Ce genre de situation met en danger la confiance des citoyens et peut éventuellement mettre en péril l'état de droit. Le CCBE s'inquiète du fait que ce discours public plus agressif puisse progressivement porter atteinte à la sécurité physique des acteurs de la justice, dont les avocats.

Les affaires précises, les exemples concrets et les tendances relevés ci-dessus figurent dans les rapports nationaux des barreaux présents dans l'annexe de cette contribution.

La contribution du CCBE est ici principalement axée sur les questions relatives au principe de l'indépendance des avocats et des barreaux. Plusieurs barreaux ont toutefois également fourni des informations et des exemples faisant référence à des aspects plus larges de l'état de droit. À cet égard, le CCBE se réserve le droit d'élargir le cadre de sa contribution à l'avenir.

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Annex of the CCBE contribution for the Rule of law Report 2021

26/03/2021

Austria

The nine regional bars in Austria are public corporations and as such autonomous self-governing bodies of the lawyers and trainee lawyers in their respective state. The umbrella organisation of the regional bars is the Austrian Bar ("*Österreichischer Rechtsanwaltskammertag*", ÖRAK).

According to the law, the Austrian Bar is independent from the executive or other branches of the state. The Ministry of Justice has some structural supervisory powers over the Bar, however none regarding the day-to-day business of the bars.

Decisions concerning the authorisation to practise as a lawyer or to accede to the legal profession are taken by an independent authority on the basis of pre-defined criteria where decisions are subject to review by an independent and impartial judicial authority.

Lawyers' disciplinary offences are defined in a statute or code of ethics and professional conduct. The body/authority initiating disciplinary proceedings against a lawyer and taking decisions on disciplinary measures is independent from the executive and the legislature. Such decisions can be reviewed by an independent court. Only the bar or a court can suspend the licence of a lawyer pending the outcome of criminal proceedings.

There are guarantees in place to respect the confidentiality of the lawyer-client relationship in all aspects of their professional dealings including data, communications, and surveillance.

Where lawyers are subjected to a threat to their physical safety related to their role, they are granted the same protections as any other person.

Austrian court fees remain to be the highest in Europe. While they are midrange with regard to low-value litigation, Austrian court fees are *excessively* high concerning high-value litigation unlike in other member states where no cap/maximum fee is foreseen. This can pose a serious obstacle with regard to access to justice, both for companies and for citizens with high-value claims. Despite this being mentioned in the European Commissions' Rule of law Report in 2020, no changes have been introduced.

The Austrian Bar is very worried that a criminal **complaint has been filed against a critical journalist from the magazine "Die Presse" by prosecutors** belonging to the *Wirtschafts- und Korruptionsstaatsanwaltschaft* (Public Prosecutors Office for White Collar Crime and Corruption) who felt their work was criticised in a press article. This happened with regard to one of the journalist's articles about a Supreme Court Judgment which limited the possibility to keep private information without relevance to a case in procedural files. No initial suspicion was confirmed. This could be considered as an attempt to undermine independent journalism and freedom of expression.[1] The Austrian Bar also notes that **more complaints are filed by prosecutors with regard to lawyers' conduct in specific cases**. The aim seems to be to intimidate lawyers concerned as usually not even an initial suspicion can be confirmed.

[1] Article in *Die Presse*: https://www.diepresse.com/5924432/wksta-anzeige-gegen-journalistin-angriff-auf-pressefreiheit

Also, the Austrian Bar would like to mention a politically sensitive case concerning the Office for the Protection of the Constitution and Fight against Terrorism where the suspect, a former employee, has been **interrogated by the police at multiple occasions without a lawyer**. During the course of several days, the client in custody was interrogated even though his lawyer explicitly asked not to do so. After confessing to several crimes and handing over passwords to the investigators, he had to be admitted into psychiatric care. His lawyer expressed serious doubts whether there was valid agreement on the part of her client to be interrogated without his defence counsel. In another case, also concerning an employee to the Protection of the Constitution and Fight against Terrorism, the lawyer in charge also criticised that his client was interrogated without him being present at first.[2]

The Austrian Bar also notes **gold plating regarding the implementation of the DAC 6 Directive which is detrimental to the fundamental right of citizens to professional secrecy**. Firstly, according to § 9 para 1 *Rechtsanwaltsordnung*, lawyers are bound to professional secrecy. In cases where a client relieves the lawyer of this duty, the lawyer still has to assess whether this is in the client's interest. This is not reflected in § 11 *EU-Meldepflichtgesetz*. Secondly, according to § 11 para 4 *EU-Meldepflichtgesetz*, a duty for lawyers is imposed to disclose evidence regarding the information of intermediaries or their client to tax authorities. No specific preconditions have to be met for this disclosure which inevitably includes information protected by professional secrecy.

In some **family and succession law matters** of highest complexity, **time limits of only 14 days are foreseen for bringing an action**, see e.g. § 46 para 1 *Außerstreitgesetz*. This time limit even applies throughout the periods during summer and Christmas time when specific rules regarding proceedings apply (formerly known as "trial free time", *verhandlungsfreie Zeit*). In practice, this means that for decisions, some of them 60 pages and longer, which were served on 21 December 2018, lawyers had only five working days within this time frame. For comparison: the EU Succession Regulation foresees time limits of between 30 and 60 days with regard to questions of enforceability (see Art. 50 para 5 Regulation No. 650/2012).

Belgium

The Belgian Bar consists of "*Orde van Vlaamse Balies*" (Flemish), umbrella organisation of the 8 Flemish local bars and "*Ordre des Barreaux francophones et germanophone* (French- and German-speaking bars), umbrella organisation of the 9 French-speaking local bars and of the German-speaking bar.

According to the law, even though the principle of the independence of the Belgian Bar is well-established and can be derived from the extensive legislation on the competences of the bar in the Belgian Judicial Code, the independence is not explicitly pronounced as such. The executive or other branches of the state do not exercise a supervisory role over the Bar.

Decisions concerning the authorisation to practise as a lawyer (advocaat/avocat) are taken by an independent authority in the bar on the basis of pre-defined criteria. These decisions are subject to appeal and review by an independent authority (Disciplinary Council) with possible review by the supreme court (Cour de cassation) i.e. an impartial judicial authority.

Lawyers' disciplinary offences are defined in a statute or code of ethics and professional conduct. The authorities initiating disciplinary proceedings against a lawyer and taking decisions on disciplinary measures are independent from the executive and the legislature. Such decisions can be reviewed by an independent authority (Disciplinary Council) and with possible review by the supreme court (Cour de cassation) i.e. an impartial judicial authority. Only the bar or a court can suspend the licence of a lawyer pending the outcome of criminal proceedings.

[2] Article in *Der Standard* here: https://www.derstandard.at/story/2000123812259/beschuldigter-nun-in-psychiatrie-anwaelte-kritisieren-ermittler-in-bvt-affaere

There are guarantees in place to respect the confidentiality of the lawyer-client relationship in all aspects of their profession including data, communications, and surveillance.

Where lawyers are subject to a threat to their physical safety related to their role, they are granted the same protections as any other person.

The Belgian Bar has identified the tendency of prosecutors not to systematically notify the President of the Bar about telephone tapping of lawyers, the tendency of many police officers to put pressure on the defendants to make them renounce their "*Salduz*" right to a lawyer, as well as an aggressive request for information addressed by a tax authority official to a lawyer about his client: even if in this case the lawyer – and even if lawyers in principle – reacts well, by invoking professional secrecy and questioning their President of the Bar, this demonstrates a problem in training, information or the mentality of certain officials. This case that happened recently is not an isolated example. There is a risk that young lawyers might be tempted to give in.

Last year, three concrete examples of threats to the independence or professional secrecy of Belgian lawyers were identified.

Threat against a young lawyer in the context of a case under investigation before a financial prosecutor in insolvency law matters

A company executes a recovery plan. Against the written advice of its lawyer, it performs a set-off against the mutual debts of affiliated companies, even though these debts are subordinated. The public prosecutor's office takes the case and investigates it. The company declares that it acted on the advice of its lawyer and the latter is summoned as a suspect. The (confidential) letter is "shown" to the investigator. The examining magistrate then asks the lawyer to produce the letter and proof that it was sent, failing which he will carry out a search of the office to allow the mail to be seized. The technique of hearing the lawyer as a suspect and not as a witness is a considerable risk in terms of respecting professional secrecy.

Although the lawyer was not charged, the public prosecutor's office demanded that he be summoned to the Council Chamber, where he drew up an indictment for dismissal. In the meantime, the young lawyer, weakened by the case, could not stand the pressure and left the Bar.

Tendency to violate professional secrecy

During a search of the office of a lawyer who was considered a suspect in a case, the investigating judge and the public prosecutor's office wanted to put a confidential letter (between this lawyer and another lawyer) into the file in a case that had absolutely nothing to do with the case under investigation, and this only to give another colour to the file. After having gathered all the useful information from both lawyers concerned, the President of the Bar opposed this. Subsequently, before the Court, the explanations given by the President of the Bar were deliberately concealed by the public prosecutor's office so that the Court would not be aware of all the elements that would be useful for the control of the investigation in accordance with Belgian law. In the end, the Court considered that the seizure of this letter was covered by professional secrecy and that it could not constitute an exploitable piece of evidence, but the attitude of the investigation is worrying, especially as this is not an isolated case. Other similar cases are still under investigation.

Arrest of a lawyer

In November 2020, a lawyer was arrested in the context of a money laundering investigation carried out against one of her clients. This fits in the alarming trend whereby lawyers are increasingly targeted in criminal investigations by the prosecution or the investigating judge and are being identified with the suspects they defend. This is either an illustration of intimidation, endangering the independency of lawyers, or an attempt to push for evidence which falls under professional confidentiality.

In addition, the Belgian Bar would like to draw attention on worrying legislation.

Namely, during the COVID19-pandemic, repeated attempts were made to introduce the possibility of videoconferencing in criminal cases. It was not only suggested as an emergency measure but proposed as a modification in the Code of Criminal Procedure. This does not only pose serious questions with regard to the right to a fair process, but also for the confidentiality of the conversations between lawyers and clients.

The second example is the Flemish Decree on first line legal assistance from 26 April 2019 (which still needs an implementing decision by the Flemish government) which stipulates that the Flemish government organises the supervision of lawyers that provide first-line legal aid. It is evident that no form of surveillance can encroach on the confidentiality and independence of lawyers.

Bulgaria

According to the law, the Bulgarian Bar is independent from the executive or other branches of the state. The executive or other branches of the state do not exercise any supervisory role over the Bar.

Decisions concerning the authorisation to practise as a lawyer or to accede to the legal profession are taken by the bar itself on the basis of pre-defined criteria where decisions are subject to review by an independent and impartial judicial authority.

Lawyers' disciplinary offences are defined in a statute or code of ethics and professional conduct. The body/authority initiating disciplinary proceedings against a lawyer and taking decisions on disciplinary measures is independent from the executive and the legislature. Such decisions can be reviewed by authorities of the bar and are subject to judicial control only in certain cases, such as deprivation of rights. Only the bar or a court can suspend the licence of a lawyer pending the outcome of criminal proceedings, however, there is no such possibility until the issuance of a judgment in criminal proceedings.

There are guarantees in place to respect the confidentiality of the lawyer-client relationship in all aspects of their professional dealings including data, communications, and surveillance.

Where lawyers are subjected to a threat to their physical safety related to their role, they are granted the same protections as any other person.

Croatia

The Croatian Bar is a roof organisation of all lawyers and law trainees in the Republic of Croatia. The local bodies of the Croatian Bar are the Local Bars. The Local Bars are founded in the territory of each county and the City of Zagreb.

According to the law, the Croatian Bar is independent from the executive or other branches of the state. The Ministry of Justice exercises a supervisory role over the Bar, it is authorised to request the Bar to provide appropriate information about its work and to appeal to a decision rendered in a disciplinary procedure against an attorney-at-law. Final appeals regarding certain disciplinary measures and decisions regarding the status of lawyers can be made to the Supreme Court.

Decisions concerning the authorisation to practise as a lawyer or to accede to the legal profession are taken by an independent authority on the basis of pre-defined criteria where decisions are subject to review by the Executive Board of the Bar. The appeal to such decision can be made to the Management Board of the Bar. The judicial appeal may be made to the Supreme Court, the decision of which is final and binding.

Lawyers' disciplinary offences are defined in a statute or code of ethics and professional conduct. The body/authority initiating disciplinary proceedings against a lawyer and taking decisions on disciplinary measures is independent from the executive and the legislature. Such decisions can be reviewed by an independent court. Only the bar or a court can suspend the licence of a lawyer pending the outcome of criminal proceedings.

There are guarantees in place to respect the confidentiality of the lawyer-client relationship in case of interception of lawyer-client communication, nevertheless there are no guarantees regarding tax audit of

the law firm and other administrative checks and surveillance of a lawyer or his/her premises. As for the search and seizure of electronic data held by a lawyer, there are no specific guarantees; this depends on the physical location where data is being stored. With regards to guarantees for the search of the premises of a lawyer, there is a certain guarantee. However, the Attorney Act only prescribes that special rules for search apply to the search of a lawyer and their premises. The scope of interpretation depends on the circumstances of each case. For example, the Supreme Court ruled that a search of a lawyer's home is not considered a premise within the meaning of the Attorney Act.

There are no exceptions in law to respect for professional secrecy, although in some cases, a lawyer is obliged to disclose information to the Anti-Money Laundering Authority if there is a suspicion of money laundering practice. In this case, the lawyer will not be in breach of their professional secrecy obligation.

Where lawyers are subjected to a threat to their physical safety related to their role, they are granted the same protections as any other person.

Czech Republic

According to the law, the Czech Bar is independent from the executive or other branches of the state. The Ministry of Justice has some supervisory powers over the Bar, therefore the Bar is obliged to submit to the Ministry of Justice all professional regulations passed by its bodies. If it appears to the Ministry of Justice that a professional regulation of the Bar is contrary to the law, it is entitled to file an application for review by the court. Moreover, the Ministry of Justice shall exercise state supervision over activities of lawyers, European lawyers and legal trainees.

Decisions concerning the authorisation to practise as a lawyer or to accede to the legal profession are taken by an independent authority on the basis of pre-defined criteria where decisions are subject to review by an independent and impartial judicial authority.

Lawyers' disciplinary offences are defined in a statute or code of ethics and professional conduct. The body/authority initiating disciplinary proceedings against a lawyer and taking decisions on disciplinary measures is independent from the executive and the legislature. However, in rather exceptional cases, the Minister of Justice may also initiate the disciplinary proceedings against lawyers but even in such a case the disciplinary proceedings are carried out by the independent body of the Czech Bar. Such decisions can be reviewed by an independent court. Only the bar or a court can suspend the licence of a lawyer pending the outcome of criminal proceedings.

There are guarantees in place to respect the confidentiality of the lawyer-client relationship in all aspects of their professional dealings including data, communications, and surveillance.

Where lawyers are subjected to a threat to their physical safety related to their role, they are granted the same protections as any other person.

No serious systemic interventions which could jeopardise the independence of the Bar or lawyers, in general, have been detected during the past year.

The Czech Bar as the largest self-governing legal professional organisation in the Czech Republic, based on § 40 of Act No. 85/1996 Coll. on the Legal Profession, as amended, continues to perform the public administration in the field of advocacy and self-government for the entire legal profession.

In order to achieve this task, the Bar is not subject to the state authority and is not funded by the state. The self-governing activities are related to the mandatory membership of all lawyers in the Czech Bar, disciplinary liability, supervision of compliance with ethical rules, issuing professional regulations, etc. The self-governing competence of the Association is only limited by the power of the Minister of Justice, regulated by § 50-52c of the Act on the Legal Profession. According to them, the Minister of Justice may act as a disciplinary petitioner in disciplinary proceedings, appoints the members of the Bar Examination Board, issues

Disciplinary Code and Bar Rules of Examination in the form of legal regulation, and may file disciplinary actions. The Minister of Justice also ensures the compliance of professional regulations with the law and issues a regulation providing for Lawyers' Fees and Reimbursement for their provision of legal services.

Individual lawyers are also independent while providing legal services, as set out by § 3 of the Act on the Legal Profession. This independence means independence from state power, from diverse bodies and from anyone who would like to determine how a lawyer should provide their services.

The issue of independence is related, among other things, to the duty of professional secrecy of lawyers, which is a fundamental pillar of modern independent advocacy. Over time, there are recurrent attempts to modify, modulate or partially limit this professional secrecy. There are various reasons for that, but mainly, in such cases, the public authorities consider lawyers to be a welcome source of information about their clients, to exercise their power (for example in criminal proceedings, tax proceedings, AML etc.). The Czech Bar repeatedly draws attention to these cases in the legislative process, not to protect lawyers only, but especially their clients, because such attempts may endanger their fundamental human rights, in particular their rights of privacy and a fair trial.

In this regard, the Bar is currently investigating one concrete case of interference which would, however, be reported when there is enough evidence to distinguish it from the human error or if the court delivers a judgment. The case is related to possible tapping of confidential communication between a lawyer and his client and it would, if confirmed, raise serious concerns.

There is also another example that might be considered a trend related to a search of so-called "other lawyer´s premises" (outside a law firm´s office). In such cases, the police have a duty to inform the Bar sufficiently in advance to safeguard the presence of the appointed member of the Bar to be present during the search. Repeatedly, the Bar was informed about such a search by the police only after the search was initiated. The Bar has already initiated the communication with the respective authorities (the Police Presidium and the High Public Prosecutor´s Office) in this matter and would report on the outcome, if no remedy is taken.

Key legislative developments related to the Judiciary and the Legal Profession

A major topic in 2020 was an amendment to the **Act on Court Bailiffs and Enforcement Activities (the Enforcement Code)**. From the very beginning of the legislative process, the Czech Bar has been involved and opposed the embodying of the principle of territoriality and the merger of executions of an obligated person (debtor) by one bailiff (principle of "one debtor - one executor"). The Bar considers that competition is an indispensable attribute of a good functioning of enforcement authorities, distinguishes them from the courts´ enforcement and allows the entitled persons (creditors) to negotiate reasonable and dignified conditions of enforcement with the bailiff. Bailiffs are not public authorities, therefore local jurisdiction is out of the question, it is also a business and restrictions on local jurisdiction can be considered unconstitutional. The bailiff is seen as a specific entrepreneur, whose principal subject of activity is the enforcement of creditors' claims, as confirmed by the case law of the Constitutional Court. The introduction of territoriality would cause that small debts would become irrecoverable because the bailiff will not be motivated to collect them. This would lead to the return of the situation before the implementation of the Enforcement Code adopted in 2001.

The Bar is also aware of social issues related to enforcement. If the state wants to solve social problems associated with the over-indebtedness of the society, it is not possible to do it by limiting law enforcement but in other ways (debt relief, social benefits, etc.). The legislative process is not finished, the draft law has not yet been approved by the Chamber of Deputies of the Parliament of the Czech Republic.

Another topic that is worth mentioning is the amendment to the **Insolvency Act**, which was adopted (for incomprehensible reasons) without previous consultation procedure (within the COVID-19 State of

Emergency). The essence of the proposed amendment to the Insolvency Act is to reduce a debt relief period for all debtors from the current five years to three years. This is a fundamental conceptual change that has affected a significant number of legal relations between debtors and creditors in the long term. About hundreds of thousands of debt reliefs would be affected.

On 1 January 2021, an amendment to the **Act on certain measures to combat the legalisation of criminal proceeds and financing of terrorism** (hereinafter referred to as the AML Act) and certain other acts, including the Act on the Legal Profession, were amended and entered into force. The amendment includes a shift in the assessment of administrative offences under the AML Act, which will be considered as an administrative offence as before, but in the procedural regime of disciplinary proceedings before the Czech Bar, governed by the Act on the Legal Profession, the Bar Disciplinary Code and in a subsidiary manner the Criminal Procedure Code. This rule remains unchanged, but offences under the AML Act are subject to the Act on Liability for Misdemeanours and Proceedings on Them, as regards the conditions of liability for the offence, the types of administrative penalties and protective measures and the principles for their imposition. The current procedural regime is to be adapted, especially as regards the conditions for the suspension and termination of disciplinary proceedings. There were other changes adopted in the AML regulation related to the lawyers that the Bar considered as potentially dangerous while interfering with lawyers' duty of confidentiality, but finally compromise wordings had been found out between the Ministry of Finance and the Bar, and we must await if the practical application of those changes would not prove the Bar´s initial concerns.

In 2018 a part of Act No. 258/2017 Coll. came into force. The Act amends, among other things, the Act on the Legal Profession and which established a new, extended system of **free legal aid** provided by lawyers based on a designation by the Czech Bar Association. This system has extended legal aid funded by the state to persons who, for property and income reasons, cannot afford to choose and pay their lawyer. In 2020, the Czech Bar has continued to implement this system.

In January 2021, a broad amendment to the **Act on Courts and Judges** was approved. The amendment is to take effect from next year. According to the Ministry of Justice, the aim of the amendment to the Act on Courts and Judges is to introduce a uniform and transparent system for the selection of judges and court officials. It is based on the recommendations of the Council of Europe Group of States against Corruption. The Commission for the selection of new judges will not be set up by the Minister of Justice according to the approved amendment. The presidents of regional courts and both Supreme courts (Supreme Court and Supreme Administrative Court) should be involved in the creation of the Commission according to the recommendation of the Constitutional and legal committee of the Chamber of Deputies of the Parliament. Critics of the original proposal feared that politicians would influence the judiciary. The amendment will also affect the system of training and selection of judges. The current one is not uniform. For example, in the regional courts, the judicial trainees have been replaced by assistant judges. The amendment, therefore, abolishes the current status of judicial trainees. The courts will therefore be staffed mainly by judicial assistants who will assist judges in dealing with the day-to-day agenda. Assistants with a passed judicial examination as well as candidates from other legal practice with an equivalent professional examination will be able to apply in a selection procedure for newly created positions of judicial candidates. These selected candidates will acquire the skills necessary for the function of a judge during annual training. Subsequently, they will be able to apply for a selection procedure for a specific judge position.

There is **no compulsory training for lawyers** (unlike trainee lawyers) in the Czech Republic. Nevertheless, the Czech Bar has prepared a 3-year training programme for lawyers ("Continuous training for lawyers"), which was launched in 2019. Participation in further training requires that a lawyer obtain at least 36 study points in the field of law, other legal or related fields, legal skills or other domains. A lawyer who obtains the required amount of study points within three years is entitled to receive a CBA certificate of continuous training for lawyers. A lawyer who has completed this programme and obtained the Bar certificate has a right to inform

clients and the public he/she holds such certificate and is also entitled to use the benefits, discounts provided or ensured by the Bar in the next three-year cycle of continuous training.

The issue of **lawyers' tariff** remains a current problem. The urgency of changing lawyers' tariff is not just about increasing specific items but an overall recodification which would reflect the current economic situation and societal changes that have taken place since its adoption in 1996. The amendment is not only desirable, but necessary. Some items have been increased over time, but many of them were significantly reduced. In the autumn of 1997, the remuneration of a lawyer appointed by the court was reduced by 10% as a part of a reduction in the state's costs in connection with the floods of the same year. This reduction, known as a "flood tax", has not been abolished yet. Although we are facing a long-term drought, it is currently 20% and at some point it even amounted to 30%. The Minister of Justice has promised that this will happen as of 1 January 2022. The Czech Bar aims to make this change effective as from 1 July 2021 at the latest.

As a positive example could be mentioned the mandatory representation of the plaintiff by a lawyer included in the draft legislative proposal for the national implementation of the Directive on Representative Actions for the Protection of the Collective Interests of Consumers.

Constitutional review of laws

In 2020, **the Constitutional Court decided for example in cases of The Act on Conflict of Interests** (Central Register of Asset Declarations) – Pl. ÚS 4/17 - 2, P. ÚS 38/17 – 1, from 11 February 2020 and constitutional complaints regarding **government restrictions regulating the pandemic situation. In its decision Pl. ÚS 4/17 – 2 the Constitutional Court** rejected the complaint of the President of the Republic and also a complaint of a group of MPs to repeal parts of the Conflict of Interest Act, as amended, and other related laws. Members of the Government are, therefore, still not able to run radio and television broadcasts and issue periodicals. At the same time, the law makes it impossible for companies in which Members of the Government have at least a quarter share to tender for public contracts, non-interest subsidies and investment incentives. In its ruling, the Constitutional Court dealt extensively with objections to tie-up with European Union law, distinguishing between its effects on the contested provisions of Section 4a (broadcasting and periodical press) and Sections 4b and § 4c (application for public contracts, subsidies and investment incentives). According to the Constitutional Court, the regulation in Section 4a is primarily a solution to the national issues of the political and constitutional system in order to preserve the principles of the democratic rule of law and the associated national identity. Therefore, the objections that if something like this is not regulated by EU law, then it cannot be regulated on a national level, are unfounded. On the other hand, membership of the European Union implies a commitment to sincere cooperation with its institutions, i.e. to take all appropriate general or specific measures to fulfil its obligations, including the adoption of "all necessary national legal measures to implement legally binding Union acts".

In January 2021, the **Constitutional Court ruled on the unconstitutionality of certain provisions of the Electoral Act to the Chamber of Deputies**. In brief, the subject of its decision was on equality of polls. The abolished provisions must be recently implemented by the Parliament in order to come into effect still before the elections to the House of Deputies of the Parliament, i.e. by October 2021 at the latest. President of the Republic Miloš Zeman and Prime Minister Andrej Babiš publicly criticised the decision of the Constitutional Court, while the President in addition to his criticism decided to take away the state decoration from the President of the Constitutional Court Dr. Pavel Rychetský. In society, these unprecedented invectives were perceived as an interference with the independence of the Constitutional Court.

The judgment of the Supreme Administrative Court regarding data storage/processing

The Supreme Administrative Court in its decision 2 As 164/2019 – 30 from 2 April 2020 **dismissed the cassation complaint of the Ministry of the Interior against the decision of the Data protection authority**. The data protection authority decision stated that it is not necessary to keep the DNA profile in the National DNA Database for specific persons who have not been convicted, regardless of the method of termination of the criminal proceedings. The necessity of another storage was not fulfilled given the nature of the offence

of obstruction of the enforcement of an official decision that does not show a sufficient degree of social harmfulness and danger to the society. The municipal court dismissed the action of the Ministry in the judgment under appeal since the administrative authorities of both have reached the right conclusions. According to the court, three out of six persons whose sensitive data have been processed, criminal proceedings have been terminated due to effective remorse or acquittal, which is why the person concerned must be considered innocent and therefore the processing of their data in the DNA database is illegal. The same applies to the fourth person who has been prosecuted for the offence of obstruction of the enforcement of an official decision, which is not serious enough to be necessary to maintain a DNA profile, compared to violent or drug crime, nor was it a relapse. The Supreme Administrative Court upheld the decision of the Municipal Court and stated that judicial practice does not assess the fulfilment of the criterion of necessity solely on the intention of the person to commit the offence, however necessary the condition is, for further processing of personal data and not only their collection. The complainant´s argument that similar wrongdoing is not excluded in the future is unfounded. The logic of the matter is the opposite. It is not that similar wrongdoing should not be excluded in the future to justify continued interference with the rights of the individual, but the perpetrator himself, how the crime was committed, his or her criminal history and specifically identified circumstances must support the conclusion that the repetition of criminal activities is a threat or can be expected, and the preservation of DNA samples or other personal data is significant for the assessment of this impending crime. The risk of recurrence of crime or its escalation is never excluded, even for the perpetrators of negligent crime. If any processing of personal data should be only evaluated retrospectively, there would be no need for specific rules different from the collection of personal data itself.

Accessibility and judicial review of administrative decisions

The actual problem of administrative justice is in the number of cases and the delays in the proceedings. The need to discuss an amendment to the Administrative Procedure Code, namely the inadmissibility criteria, was already raised in January 2020 by the participants of a seminar held under the auspices of the President of the Chamber of Deputies of the Parliament of the Czech Republic and its Constitutional Committee. Representatives of the Bar, the Chamber of Tax Advisers, judges and other representatives of the professional legal public agreed to submit the amendment in a compromise version with the aim to reduce the workload of the Court. It was agreed that the possibility of rejecting the cassation complaint for inadmissibility should be extended only to those cases which are, on the one hand, strong in number and where, at the same time, the purpose of the cassation complaint in terms of unifying the case law of the administrative courts is not so significant. These are cases in which a single judge decides at first instance, i.e. those which are doctrinally perceived as less complex in type and are entrusted precisely for this reason to a specialised single judge and not to a chamber, as is customary in administrative justice. Originally, the draft legislation of the Chamber of Deputies contained the right of the Supreme Administrative Court to reject any cassation complaint if the Court found that it did not substantially exceed the interests of the applicant. In the case law, it should have dealt only with complaints which are important not only for the matter under assessment, but also for the unification of the case law of the administrative courts. The final amendment of the Administrative Procedure Code was adopted in January 2021 in the compromised version. It is, however, the fact, that the amended rules impose restrictions and, in some cases, narrow the access to justice to the Supreme Administrative Court.

COVID-19 pandemic

The whole year 2020 and the beginning of 2021 were marked by a pandemic of the COVID-19 virus and the declaration of a state of emergency, which was declared not only in spring but also in autumn (5 October 2020) and has been repeatedly extended until February 2021. The Czech Bar has regularly and publicly commented on the situation of the state of emergency and related emergency measures (so-called crisis measures). The Czech Bar always appealed that the state of emergency and appropriate restrictions of rights should not be maintained for a longer period than necessary for the protection of life and health. The Bar stressed that the state of legislative emergency should not be abused to pass acts that are not related directly to the state of emergency and consideration of ordinary legislation should be postponed until normal state or dealt with in a normal procedural order. In February 2021, the Chamber of Deputies of the Parliament of

the Czech Republic did not grant a further extension of the state of emergency, which was declared from 5 October 2020. Despite this fact, the government of the Czech Republic subsequently declared a new state of emergency, for the same reason (health threat in connection with the occurrence of coronavirus referred to as SARS CoV-2 in the Czech Republic), although the material conditions existing at the time of Parliament´s denial remained unchanged.

On 18 February, the Chamber of Deputies of the Parliament of the Czech Republic approved the new Pandemic Law, which should enter into force as from 1 March 2021. The Law was drafted and approved again under the current state of emergency in accelerated procedure, and it is a reaction of the Government to the decision of the Chamber of Deputies of the Parliament of the Czech Republic (mainly the opposition parties) not to grant a further extension of the state of emergency. There was, therefore, no time to comment on the draft law and it would be only now analysed by the experts and the Bar.

COVID-19 pandemic and Accessibility of courts

The judiciary, like any area today, is affected by an ongoing pandemic and the related state of emergency. The courts continue to function even in times of emergency, but with the obligation to observe strict hygienic measures and with the principle of prioritising written communication. The Ministry of Justice has issued recommendations for the functioning of the courts given the epidemiological situation. The Ministry recommends that only judicial proceedings that are strictly necessary should be ordered, in particular about the running of limitation and prescription periods or other reasons requiring an immediate court decision; or maybe held without jeopardising measures necessary to protect the health of judges, lay judges, court staff and other persons, taking into account, in particular, the need for the personal presence of participants and other persons at the hearing and the organisational, material and personnel conditions of each court.

The official statistics on the length of proceedings are available on webpages of the Czech Ministry of Justice[3]. Currently, only statistics for the year 2019 are available. However, it is expected that those for the year 2020 will be available soon. From the point of view of the Czech Bar and especially lawyers representing their clients before courts, the length of proceedings, delays and pending cases have always been problematic and concerning the current pandemic situation, it is expected that the backlog of cases is to be increased.

However, no extraordinary backlog of cases in courts was officially reported by the Ministry of Justice.

Framework, policy and use of impact assessments, stakeholders'/public consultations and transparency and quality of the legislative process

The Czech Bar noted a significant increase of exceptions regarding the applicant's obligation to send a bill to comment proceedings in connection with the COVID-19 pandemic as part of the ongoing monitoring of the legislative procedure. The absence of a proper comment procedure has significant importance and impact on the transparency of political decision-making. The implemented legislative procedure prevents the adoption of the new legislation in constitutionally compliant manner, without proper justification of the reasons for the adoption and its necessity. The Czech Bar is convinced that some bills rushed to be adopted in shortened regime do not have any connection with the ongoing pandemic (for example, the amendment to the Insolvency Act), or there is granted insufficient time for a shortened comment procedure or there are no other convincing reasons to bypass the standard legislative procedure. It is clear that sending the bill to the comment procedure is also necessary for preparing a government bill as such, because without the opinions of other ministries, the bill may suffer irreparable defects, as shown by repeated amendments to the Public Health Protection Act. Regarding this issue, the Czech Bar appealed to the Legislative Council of the Government and the Minister of Justice.

Rules and use of fast-track procedures and emergency procedures

[3] https://www.justice.cz/web/msp/statisticke-udaje-z-oblasti-justice

The Czech Bar has publicly commented on two proposals to adopt fundamental amendments to the important legal regulations in response to the current epidemiological situation. In one case the Bar´s concerns were aimed even at a Constitutional law - the Security Act and the Crisis Management Act.
The Czech Bar also commented on the bill to the Public Health Protection Act, Public Health Act. The bill does not provide sufficient guarantees of the legality of the procedure and may lead to its abuse, especially while weakening the possibility of its control, at the moment.

The position of the Czech Bar concerning the newly declared state of emergency declared on 15 February 2020: "The declaration of a "new" state of emergency without the approval of the Chamber of Deputies ignores the role of the legislative power as a control mechanism and therefore is to be considered not only a fundamental violation of the constitutional principles enshrined in the Constitutional Act on the Security of the Czech Republic, but also an obvious ignorance of the principle of parliamentary democracy. It is to be believed that acknowledging the relevance of the conduct of some governors and the subsequent actions of the Government is generally unacceptable and cannot be justified by the need to further combat the COVID-19 pandemic. The subjectively enforced criterion of Government responsibility cannot take precedence over the Constitution as the fundamental pillar of a democratic legal order, rule of law and protection against totalitarianism. The Czech Bar believes there is a clear circumvention of the purpose and meaning of the law by a procedure which is not foreseen by law and which cannot be justified even by pursuing a legitimate aim, such as the protection of public health."[4]

Cyprus

The Cyprus Bar, the Disciplinary Board and the Legal Council constitute the bodies regulating the legal profession in Cyprus. Local Bars comprise all lawyers practising the profession in each District. There are six Local Bars, one for each of the six Districts of Cyprus.

According to the law, the Cyprus Bar is independent from the executive or other branches of the state. The executive or other branches of the state do not exercise any supervisory role over the Bar.

Decisions concerning the authorisation to practise as a lawyer or to accede to the legal profession are taken by an independent authority on the basis of pre-defined criteria where decisions are not subject to review by an independent and impartial judicial authority.

Lawyers' disciplinary offences are defined in a statute or code of ethics and professional conduct. The body/authority initiating disciplinary proceedings against a lawyer and taking decisions on disciplinary measures is independent from the executive and the legislature. Such decisions can be reviewed by an independent court. Only the bar or a court can suspend the licence of a lawyer pending the outcome of criminal proceedings.

There are no guarantees in place to respect the confidentiality of the lawyer-client relationship in the different aspects of their professional dealings such as data, communications, and surveillance.

Where lawyers are subjected to a threat to their physical safety related to their role, they are granted the same protections as any other person.

Denmark

The Danish Bar conjoins lawyers holding the Danish title "*Advokat*" authorised to practise law whether in Denmark, Greenland, The Faroe Islands or abroad.

According to the law, the Danish Bar is independent from the executive or other branches of the state. The executive or other branches of the state do not exercise any supervisory role over the Bar.

[4] The full-text announcement of the Czech Bar is available in Czech here: https://advokatnidenik.cz/2021/02/15/cak-k-vyhlaseni-nouzoveho-stavu-usnesenim-vlady-ze-dne-14-2-2021/ "

Decisions concerning the authorisation to practise as a lawyer or to accede to the legal profession are taken by an independent authority, precisely the authorisations are approved by the Ministry of Justice upon recommendation/consultancy with the Danish Bar. Such decisions on the basis of pre-defined criteria where decisions are subject to review by the Ministry of Justice upon recommendation/consultancy with the Danish Bar.

Lawyers' disciplinary offences are defined in a statute or code of ethics and professional conduct. The body/authority initiating disciplinary proceedings against a lawyer and taking decisions on disciplinary measures is independent from the executive and the legislature. Such decisions can be reviewed by an independent court. Only the bar or a court can suspend the licence of a lawyer pending the outcome of criminal proceedings. The criminal proceedings would as an overall point of departure need to be concluded before a licence would be suspended on the ground of the criminal case.

There are guarantees in place to respect the confidentiality of the lawyer-client relationship in all aspects of their professional dealings including data, communications, and surveillance. A court cannot order a lawyer to disclose information covered by professional secrecy obtained by the lawyer in his/her professional capacity as defence counsel, but it can where the information is obtained by the lawyer in his/her professional capacity other than as a defence counsel.

Where lawyers are subjected to a threat to their physical safety related to their role, they are granted the same protections as any other person.

The Danish Bar had two main challenges in 2020.

The implementation of DAC6

On 19 December 2019, the bill to transpose the terms of DAC6 into Danish law was passed by the Danish Parliament. This granted the Danish tax authorities the mandate to issue administrative regulation and adopt and implement the principles of lawyers to report cross-border arrangements. It has been a priority for the Danish Bar and Law Society to seek as much clarification on the practical aspects of the implementation of the DAC6 regulation in Denmark as possible. Although the Danish DAC6-regulation does include some form of legal professional privilege, the scope of the exemption is very limited. This means that, in most cases, lawyers will still be required to report arrangements despite the fact that lawyer-client privilege would otherwise apply. The Danish Law and Bar Society considers the regulation compromising for the legal professional privilege and the principles of independency for lawyers in Denmark, and they see this regulation as an exception to these otherwise respected and prevailing principles in Danish law.

The Danish Bar believes that the way the implementation has been carried out by the tax administration could have a potentially great impact on how larger as well as smaller law firms could fulfil their new reporting obligations. Consequently, in 2020, the Danish Bar welcomed an invitation to participate in a string of meetings with the Danish tax authorities to highlight and address considerations in regard to the DAC6 regulation, provide input and outline answers and guidance to be used in the pivotal guidelines issued by the government on DAC6 in Denmark.

The future EU AML Authority (the Communication from the Commission on an Action Plan for a comprehensive Union Policy on preventing money laundering and terrorist financing)

The Danish Bar sees the proposal of a supranational EU AML Authority as a great threat to the independence of lawyers.

It is undisputable that there have been in recent years a number of substantial money laundering cases among large companies in the financial sector in the EU, where the cross-border element has been an important factor. Therefore, as the Commission proposes, strengthening the supervision of similar money laundering cases in the financial sector could possibly help preventing similar money laundering cases. The strengthening of the supervision has been suggested to include a future EU AML Authority which should include not only the financial sector, but also supranational supervision of lawyers.

However, lawyers play a completely different role in society compared to the financial sector. Lawyers help to ensure legal certainty and rule of law for ordinary citizens and companies. This entails that it is of utmost importance that we also can act as lawyers for clients who have the state or other public institutions as counterparties. It will undermine the independence if a client's counterpart really has to supervise the lawyer at the same time. In order to ensure the independence of lawyers, the supervision of lawyers must therefore be carried out by a national legal authority that is independent of the state, public authorities and other organisations.

It would be a significant violation of lawyers' independence if a public institution was to supervise lawyers, and the Danish Bar therefore strongly dissociates itself from the Commission's proposal. The Danish Bar fears that the EU supervision of lawyers could lead to a significant weakening of the basic rule-of-law guarantees on which a modern state governed by the rule of law is based. Citizens' access to independent legal advice is one of the core values of a modern state governed by the rule of law.
The Commission's proposal for joint EU supervision should therefore not include lawyers.

The Danish Bar has throughout 2020 upheld a strong focus on fighting and challenging this proposal from the Commission: In June 2020, the Danish Bar drafted a response to the Danish authorities concerning the Communication from the Commission, and in the second half of 2020 an additional three letters were drafted by the Bar to respond to the Draft Council Conclusions on anti-money laundering and countering the financing of terrorism.

The view of the Danish Bar in all of their letters was that the independence and special status of lawyers is inconsistent with a governmental supervision including EU supervision. Furthermore, lawyers are not comparable with the financial sector which to a great extent is established and organised in the same way in all Member States.

It should be noted that the Danish Bar already has increased its focus on the prevention of money laundering. Initiatives include doubling the number of supervisors in the two supervisory departments. Also, a special money laundering supervision has been introduced in 2020 and a risk assessment of lawyers in 2021.

Estonia

The Estonian Bar is a self-governing professional association, formed as legal person in public law.

According to the law, the Estonian Bar is independent from the executive or other branches of the state. The Ministry of Justice exercises supervision over the organisation of the state legal aid system. The Ministry of Justice shall:

- repeal, partly or in full, a legal act adopted by a body of the Bar which is contrary to the law or regulation;

- forbid performance of an act by a body of the Bar which is contrary to the law or regulation;

- require a body of the Bar to perform an act if failure to perform an act by a body of the Bar or delaying the performance is contrary to the law or regulation.

Decisions concerning the authorisation to practise as an attorney are only taken by an independent authority, the Board of the Bar on the basis of pre-defined criteria. These decisions can be contested in administrative court.

Attorneys' disciplinary offences are defined in a statute or code of ethics and professional conduct. The body/authority initiating disciplinary proceedings against an attorney and taking decisions on disciplinary measures is independent from the executive and the legislative power. Such decisions can be reviewed by an independent court (administrative court). Only the bar can suspend the licence of an attorney pending the outcome of the proceedings.

There are guarantees in place to respect the confidentiality of the lawyer-client relationship in all aspects of

their professional dealings including data. Concerning communications and surveillance, in practice the guarantees are unsatisfactory and can be considered not sufficient.

Where lawyers are subjected to a threat to their physical safety related to their role, they are granted the same protections as any other person.

The Estonian Bar draws the attention to the cases undermining and not respecting the confidentiality of lawyer-client communications. Client confidentiality could be endangered when a law office is being searched. The practice shows that cases can be very different. For example, court order for searching law office can be of different quality. There are examples when a judge issues a very detailed court order (i.e. the practice of ECHR has been taken into account regarding the measures for protecting client confidentiality, etc.) and some worrying practice have also been seen, where no court order has been issued, but a judge just accepts the prosecutor's office request for a search with an endorsement. It is allowed by the law (according to the Code of Criminal procedure § 91 clause 2: Unless otherwise provided by this Code, a search may be conducted at the request of the Prosecutor's Office on the basis of an order of a preliminary investigation judge or on the basis of a court order. Both an order of a preliminary investigation judge as well as a court order to resolve a search request by the Prosecutor's Office may be drawn up as an endorsement on the request of the Prosecutor's Office). The Bar is working for the purpose to change the law and not to allow endorsements in the case of searching the law office.

The Estonian Bar informs about the new practice followed in Estonia in comparison to last year, when a law office is being searched, an attorney at law on behalf of the Bar is present during the search. The role of the Bar representative is to ensure that client confidentiality is safe and only evidence prohibited by the court order will be taken (when a search is allowed by the endorsement of the court, the situation is more complex). This practice is also favoured by the ECHR and the Bar is working to ensure and to regulate in the respective law the role of the Bar representative.

Finland

The Finnish Bar is a public corporation with official duties related to the management of membership of attorneys-at-law and the supervision of the profession.

According to the law, the Finnish Bar is independent from the executive or other branches of the state. The executive or other branches of the state do not exercise any supervisory role over the Bar.

Decisions concerning the authorisation to practise as a lawyer or to accede to the legal profession are taken by an independent authority on the basis of pre-defined criteria where decisions are subject to review by an independent and impartial judicial authority. The Bar only takes decisions on admittance to the bar attorneys at law or licensed legal counsels (*luvan saanut oikeudenkäyntiavustaja*).

Lawyers' disciplinary offences are defined in a statute or code of ethics and professional conduct. The body/authority initiating disciplinary proceedings against a lawyer and taking decisions on disciplinary measures is independent from the executive and the legislature. Such decisions can be reviewed by an independent court. Only the bar or a court can suspend the licence of a lawyer pending the outcome of criminal proceedings. This refers to Attorneys at Law only. Regarding the Licensed legal counsels (*luvan saanut oikeudenkäyntiavustaja*) the final decision on revoking a licence is made by a governmental organisation (*oikeudenkäyntiavustajalautakunta*) operating under the Ministry of Justice.

There are guarantees in place to respect the confidentiality of the lawyer-client relationship in all aspects of their professional dealings including data, communications, and surveillance. There are no exceptions in law or otherwise to this respect for professional secrecy. Although in some cases, a Court can order the defendants attorney to testify regarding the information obtained as a defence counsel in criminal cases if the person is being prosecuted regarding a crime that carries the maximum penalty of no less than 6 years of imprisonment.

Where lawyers are subjected to a threat to their physical safety related to their role, they are granted the same protections as any other person.

In 2020, no threat to independence of the Bar or lawyers was identified in Finland.

France

According to the law, the Bar in France is independent from the executive or other branches of the state. The executive or other branches of the state do not exercise any supervisory role over the Bar.

Decisions concerning the authorisation to practise as a lawyer or to accede to the legal profession are taken by an independent authority, which makes such decisions on the basis of pre-defined criteria where decisions are subject to review by an independent and impartial judicial authority.

Lawyers' disciplinary offences are defined in a statute or code of ethics and professional conduct. The body/authority initiating disciplinary proceedings against a lawyer and taking decisions on disciplinary measures is independent from the executive and the legislature. Such decisions can be reviewed by an independent court. Only the bar or a court can suspend the licence of a lawyer pending the outcome of criminal proceedings. In practice, the law is not always upheld as is noted below.

There are guarantees in place to respect the confidentiality of the lawyer-client relationship in all aspects of their professional dealings including data, communications, and surveillance.

Where lawyers are subjected to a threat to their physical safety related to their role, they are granted the same protections as any other person.

Among the current challenges facing Bars and lawyers in 2020, including concrete cases undermining the rule of law, the following three cases can be highlighted in France in 2020.

Vincent Nioré case[5]

On 22 July 2019, the General Prosecutor of the Paris Court of Appeal, Ms Catherine Champrenault, referred the matter to the disciplinary body of the Paris Bar against Maître Vincent Nioré, whose mission within the Bar is to assist his colleagues during searches and to ensure that their rights are respected. She accused him of failure to comply with the obligations and core principles of the legal profession due to his behaviour and insulting and threatening remarks made during a hearing before the judge for liberties and detention on 18 April 2019, when he contested the conduct of an investigation hindering professional secrecy. On 22 July 2020, the Disciplinary Council of the Paris Bar dismissed Mr Nioré's case[6]. It stressed his freedom of speech during hearings, which is guaranteed by Article 10 of the European Convention on Human Rights.

This case illustrates the possibility for magistrates to initiate disciplinary proceedings against lawyers. This is all the more problematic as lawyers do not have the capacity to refer to the High Judicial Council in the event of an alleged breach of professional ethics from a judge.

This is all the more questionable as a report by the Inspectorate-General of Justice recommends a reform of the disciplinary control of the Bars, in particular through the establishment of the *échevinage* within the framework of regional disciplinary councils, i.e. the establishment of disciplinary bodies composed of both lawyers and magistrates.[7]

[5] https://www.dalloz-actualite.fr/flash/audience-disciplinaire-de-vincent-niore-que-procureure-generale-vienne-voir-ce-qu-il-se-passe-#.YCq_Gy3pNpR .
[6] *Ordre des avocats de Paris, conseil de discipline, 22 juill. 2020, n° 300/322356, Autorité de poursuite c. Vincent Nioré.*
[7] Mission sur la discipline des professions du droit et du chiffre, Rapport définitif, Octobre 2020, n°074-20.

The "wiretapping" case

The newspaper Le Point revealed on 24 June 2020, that the National Financial Prosecutor's Office (PNF) had studied the detailed telephone records of several law firms, including that of the current Minister of Justice, Mr Dupond-Moretti, with a view to searching for and identifying alleged informants within the judiciary who could have provided information to two individuals, both of whom were lawyers and also involved in a case under investigation. The PNF also had the telephones of several of these lawyers geolocated over a period of time long enough to examine whether they had been present close to where a person that was informed of the wiretapping might have been. This case was followed by an investigation, at the end of which the Inspectorate-General of Justice issued a report[8] concluding that the PNF's use of detailed telephone bills did not expose excessively their private life or lawyers' professional secrecy.

However, this report highlights a lack of feedback from the PNF to the Public Prosecutor's Office, its supervisory authority, in view of the sensitivity of the main case involving a former President of the Republic and suspected leaks within the judiciary. As the former head of the PNF refused to be heard by inspectors, the Inspectorate-General of Justice was unable to determine the reasons for this shortcoming.

This case therefore illustrates the broader issue of the functioning of the PNF, which has powers to investigate offences it suspects, powers which it exercises in the context of procedures known as 'investigations' that it decides to initiate and that are conducted under its direction. The PNF favours investigations to the detriment of judicial information, which allows it to have full control over the investigation without any contradiction or control. Such a lack of control does not provide any guarantee against possible serious violations of professional secrecy and fundamental rights.

Lawyers' professional secrecy: reduction of the scope of protection to exchanges related to the exercise of the rights of defence only

The Criminal Division of the Court of Cassation has ruled that correspondence between a lawyer and their client may be seized in the framework of planned visits, provided that they do not concern the exercise of the rights of defence[9]. In this matter, the case concerned the seizure of correspondence between a company and its lawyer by virtue of a visit and seizure under Article L. 450-4 of the Commercial Code.

However, Article 66-5 of Law No. 71-1130 of 31 December 1971 on the reform of certain judicial and legal professions provides that: "In all matters, whether in the field of counselling or defence, consultations addressed by a lawyer to his client or intended for the client, correspondence exchanged between the client and his lawyer, between the lawyer and his colleagues, with the exception for the latter of those marked "official", interview notes and, more generally, all case materials are covered by professional secrecy".

While the Criminal Division stresses that correspondence is subject to professional secrecy, it reduces the scope of protection to exchanges relating to the exercise of the rights of defence only. Therefore, a company that is subjected to a computer search by agents of anti-fraud authority (*Direction générale de la concurrence, de la consommation et de la répression des fraudes - DGCCRF)* can only request the withdrawal of correspondence exchanged with its lawyer if it proves that it is related to the exercise of its rights of defence. It will be up to the judge for liberties and detention, seized of a dispute as to the application of professional secrecy, to check the content, which implies an analysis of the emails sent between the claimant and their lawyers to dispute, if applicable, the interpretation according to which these correspondences are related to the exercise of the rights of defence.

Such a solution would appear to be contrary to Article 8 of the European Convention on Human Rights as interpreted by the European Court of Human Rights, which grants enhanced protection to the

[8] Inspection de fonctionnement d'une enquête conduite par le parquet national financier, Rapport définitif, Septembre 2020 n° 069-20.
[9] Cass. crim, 25 novembre 2020, 19-84.304, ECLI:FR:CCAS:2020:CR02299.

correspondence that a lawyer maintains with their clients, whatever its purpose, and requires that any interference with this right be duly justified in order to comply with Article 8.

The implementation of DAC6

Order No. 2019-1068 of 21 October 2019, which transposes Directive 2011/16/EU on the automatic and compulsory exchange of information in the field of taxation in relation to cross-border schemes subject to declaration (DAC 6), obliges lawyers to act as informers for the public authorities to the detriment of their clients, thereby undermining their role as defenders of the rule of law and impairing their ability to subsequently organise their clients' defence in the context of a fair trial that respects the equality of arms.

Germany

According to the law, the Bar in Germany is independent from the executive or other branches of the state. The German Federal Bar is a self-regulatory body incorporated under state supervision by the Federal Ministry of Justice and Consumer Protection. Such supervision shall be limited to ensuring that the law and the by-laws are observed and, in particular, that the duties assigned to the German Federal Bar are performed. The Federal Ministry of Justice may repeal the by-laws passed by the *Satzungsversammlung* (Statutory Assembly), a body installed with the German Federal Bar. The regional Bars are independent from the State and self-regulatory within the statutory framework set by the federal legislator. They are public bodies which are under the supervision of the judicial authorities of the respective federal state (*Land*) as regards compliance with the duties transferred to them for self-regulation. Next to the bars, there is the German Bar Association (*Deutscher Anwaltverein – DAV*), founded in 1871, which is a body constituted on the basis of voluntary membership. It represents the interests of the German legal profession. Its members are 252 local Bars (*Anwaltvereine*).

Decisions concerning the authorisation to practise as a lawyer or to accede to the legal profession are taken by an independent authority on the basis of pre-defined criteria where decisions are subject to review by an independent and impartial judicial authority.

Lawyers' disciplinary offences are defined in a statute or code of ethics and professional conduct. Any court proceedings before a lawyer's disciplinary court must be initiated by a public prosecutor who is part of the executive. However, the body taking decisions on disciplinary measures against lawyers is independent from the executive and the legislature. Such decisions can be reviewed by an independent court. Only the bar or a court can suspend the licence of a lawyer pending the outcome of criminal proceedings.

There are guarantees in place to respect the confidentiality of the lawyer-client relationship in all aspects of their professional dealings including data, communications, and surveillance. Nevertheless, confidentiality of the lawyer-client relationship has always been insufficiently protected, particularly against search and seizure measures. This situation will be aggravated if the new bill, which intends to limit the prohibition of seizure expressly to cases where the relationship of trust between the suspect (person or entity) and the person entitled to the right to refuse to give evidence is to be protected, will enter into force. Nevertheless, lawyers have the right to refuse testimony on professional grounds in respect of that information which was confided to them or became known to them in this capacity.

Where lawyers are subjected to a threat to their physical safety related to their role, they are granted the same protections as any other person.

The German Federal Bar (BRAK) and the German Bar Association (DAV) have provided the following information concerning the independence of the Bar and lawyers:

COVID-19 measures taken by the German government

The German Bar is critical of the Federal Government's approach with regard to its measures against the COVID-19 pandemic. In the view of the Bar, the Bundestag has not been consulted and involved sufficiently,

despite or especially in view of the multiple extensions and amendments to the ordinances at federal and state level.

"Anti-Money-Laundering-Notification-Ordinance (Real Estate)" – GwGMeldV-Immobilien
The German Bar is also critical of the so-called Anti-Money-Laundering-Notification-Ordinance (Real Estate) (*Verordnung zu den nach dem Geldwäschegesetz meldepflichtigen Sachverhalten im Immobilienbereich – GwGMeldV-Immobilien*), which has entered into force in October 2020. The ordinance was issued on the basis of Section 43(6) of the Anti-Money-Laundering Act (*Geldwäschegesetz – GwG*). This provision authorises the Federal Ministry of Finance, in agreement with the Federal Ministry of Justice and Consumer Protection, to determine by ordinance "circumstances" in real estate transactions that must always be reported by lawyers and other trusted professions pursuant to Section 43(1) GwG. It was intended to only define exceptions in the area of real estate transactions, in which the suspicious activity notification must also be submitted by members of the trusted professions in accordance with Section 43(1) No. 1-3 GwG, even if this means breaking their duty of confidentiality. In fact, however, the ordinance creates, in part, new substantive notification obligations. It should also be criticised that the ordinance now requires suspicious activity notifications to be made on the basis of certain factual constellations. The text of the ordinance, however, contains a large number of uncertain legal terms which results in notification obligations being deprived of their purpose, while at the same time interfering disproportionately with the professional secrecy of the lawyer-notary.

The German Federal Bar (BRAK) and the German Bar Association (DAV) have criticised this ordinance in statements. The BRAK is considering supporting a constitutional complaint made by an affected lawyer.[10]

National implementation act of the DAC6 Directive on the mandatory automatic information exchange in the field of taxation on reportable cross-border arrangements
The Directive introduced reporting obligations on cross-border tax arrangements also for intermediaries. Whilst the Directive provides for an exemption for the legal profession, the German implementation act has not made use of this. Thus, lawyers, as far as they act as intermediaries, are affected by the reporting obligation. It is not prohibited per se for the German legislator to go further than what is required by the Directive. The German implementation provides in Section 138 f of the Fiscal Code (*Abgabenordnung – AO*) for the possibility of lifting the lawyer's duty of confidentiality. If the client makes use of this, the lawyer must report all the information mentioned in Section 138 f AO. If not, the lawyer must still report parts of the information, and the client must report the remaining information himself, even if the client could be identified on the basis of the information to be provided by the lawyer.

The German Federal Bar (BRAK) and the German Bar Association (DAV) have commented on this and have criticised the fact that no use has been made of the exemption provided for in the Directive. Also, the inclusion of lawyers and tax advisors who are subject to a statutory duty of confidentiality as intermediaries is criticised with regards to the breach of the duty of confidentiality.[11]

Association Sanctions Act

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[10] https://www.brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2020/juni/stellungnahme-der-brak-2020-30.pdf
https://www.brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2020/januar/stellungnahme-der-brak-2020-1.pdf
https://anwaltverein.de/de/newsroom/sn-43-20-gwmeldv

[11] https://www.brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2019/november/brak-positionspapier-in-ergaenzung-der-gemeinsamen-stellungnahme-von-bstbk-wpk-und-brak-zum-regierungsentwurf-eines-gesetzes-zur-einfuehrung-einer-pflicht-zur-mitteilung-grenzueberschreitender-steuergestaltungen-br-drs-489-19.pdf
https://www.brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2019/november/gemeinsame-stellungnahme-zum-gesetzentwurf-zur-einfuehrung-einer-pflicht-zur-mitteilung-grenzueberschreitender-steuergestaltungen-von-bstbk-wpk-und-brak.pdf
https://anwaltverein.de/de/newsroom/sn-42-19-mitteilungspflicht-grenzueberschreit-steuergestaltungen

Unacceptable, in the opinion of the Bar, in the light of the rule of law is the case law regarding searches in foreign law firms following the ruling of the Federal Constitutional Court (*Beschl. v. 27.06.2018; Az. 2 BvR 1287/17*) as well as the draft law.

According to the draft law for a law to strengthen integrity in business (Corporate Sanctions Act), it is envisaged that – in general and independently of the new draft – any records and correspondence with clients can be seized unless they relate to the defence of defendants. This would be a unique breach in Europe of the principle of confidentiality between lawyers and their clients. The German delegation strongly opposes this draft law. In addition, violations of supervisory duties through no fault of the acting persons should result in an association sanction. The draft law therefore completely abandons the fault principle and links sanctions solely to the objective existence of legal violations. This construction contradicts fundamental principles of the rule of law, according to which a - sanctioning - attribution of liability on an objective basis should be excluded. In addition, the draft law conflicts with the right to be heard insofar as it affects the company as a secondary party in the investigation proceedings.
The BRAK and the DAV have expressed their concerns about the government draft in their statements.[12]

BND Act
The ECtHR recently admitted the complaints of the organisation "Reporters without Borders", as well as of Prof. Niko Härting, member of the Information Law Committee of the DAV, against the mass e-mail surveillance by the BND on the basis of the BND Act. Both complaints allege a violation of Article 8 ECHR, and the organisation "Reporters without Borders" also alleges a violation of Article 10 ECHR. The plaintiffs argue that in light of their activities, it is likely that the excessive interception of e-mails by the BND in 2013 and 2012, respectively, resulted in emails sent by them also being intercepted and read. The complaints also relate to the fact that the individuals affected by the mass surveillance by the BND are not entitled to an effective legal remedy because they cannot obtain judicial review in the absence of notice. Furthermore, the surveillance itself is grossly disproportionate. A large part of the e-mails of the complainant, Niko Härting, is also subject to the lawyer-client privilege. BRAK and DAV consider supporting this lawsuit.[13] Application No. 81993/17 as well as application No. 81996/17 before the ECtHR.

Lack of self-administration of data protection supervision for the legal profession in Germany
The evaluation of the Federal Data Protection Act (*Bundesdatenschutzgesetz – BDSG*) has shown once again the need for the establishment of an independent contact point for data protection supervision within the self-administration of the legal profession as well as the need for centralisation and sectoral orientation. In Germany, data protection supervision is currently (in addition to a few sectoral supervisory bodies) assigned to 17 different regional authorities and one federal authority. This leads to inconsistent legal interpretations and divergent supervisory practices. This complicates data protection compliance in law firms and other institutions. In addition, the geographic division of responsibilities makes it difficult to develop sectoral expertise.

Incorrect recommendation by data protection supervisory authorities on e-mail correspondence for persons bound by professional secrecy
The Data Protection Conference – the joint body of the German data protection supervisory authorities – published a guidance document entitled "Measures for the protection of personal data when communicating by e-mail". In this document, the Conference expresses excessive, unclear and legally inaccurate demands on e-mailing by persons bound by professional secrecy. The authorities demanded specifically that, in contrast to the usual transport encryption, content encryption must always be used for e-mail correspondence from persons bound by professional secrecy. Furthermore, additional measures – which are not explained in detail and also not required in addition to content encryption – must be taken to ensure

[12] https://www.brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2020/juli/stellungnahme-der-brak-2020-33.pdf
https://anwaltverein.de/de/newsroom/sn-39-20
[13] https://www.sueddeutsche.de/politik/bundesnachrichtendienst-egmr-geheimdienst-1.5169941

that unauthorised persons cannot gain access to the content of the e-mail. The data protection authorities took an inaccurately broad interpretation of the professional secrecy existing in Germany, namely lawyer-client privilege, and assumed based on this interpretation that all communications by a person bound by professional secrecy are subject to professional secrecy and are therefore also subject to special confidentiality requirements in terms of data protection law. However, in contrast to the controversial data protection requirements of Article 24 of the General Data Protection Regulation (*Datenschutzgrundverordnung – DSGVO*), client confidentiality in Germany is fully at the discretion of the client. If the client wishes, as it is often the case, that e-mail correspondence is only secured by transport encryption, the client's wish is decisive and the lawyer is allowed to communicate with the client in this way pursuant to Section 2(2) of the Rules of Professional Practice (*Berufsordnung für Rechtsanwälte – BORA*).

Investigative powers of data protection supervisory authorities

In the past year, data protection supervisory authorities again demanded that lawyers disclose contents of their mandates or otherwise be sanctioned with a penalty payment, which would result in a violation of professional law and would be punishable by law. This was done even though the demands were considered disproportionate in view of the associated breach of client confidentiality and the relatively minor importance of the requested information for the protection of other legal interests. This shows the necessity for a comprehensive limitation also for cases of Article 58(1) lit. a-c of the General Data Protection Regulation (*Datenschutzgrundverordnung – DSGVO*), in addition to the existing limitation of the supervisory powers of the authorities in Germany in Section 29(3) of the Federal Data Protection Act (*Bundesdatenschutzgesetz – BDSG*). The German Federal Bar (BRAK) and the German Bar Association (DAV) take the view that the national legislator is authorised to enact corresponding restrictions on authorities, despite the opening clause of Article 90(1) DSGVO, which is limited to the cases of Article 58(1) lit. d and e DSGVO, provided that this merely implements the principle of proportionality recognised under EU law. Against this background, the BRAK has called on the Federal Government to support the enactment of a corresponding provision. Similarly, the BRAK calls for more far-reaching safeguards of lawyer-client-confidentiality also at a European level. To this end, the BRAK has called on the Federal Government to advocate for an extension of the opening clause of Section 90(1) DSGVO to the cases of Article 58(1) lit. a-c DSGVO.[14]

Threats against Frankfurt lawyer Seda Basay-Yildiz

As already mentioned by the DAV in its contribution to the Rule of Law Report 2020, Basay-Yildiz was the counsel for the ancillary claim of the family of the first NSU victim in the NSU trial before the Munich Higher Regional Court; she also represented a defendant classified as a dangerous person; she has been personally threatened for two and a half years now. The first letter referred to the representation of the dangerous person, sender is "NSU 2.0". Basay-Yildiz's data was retrieved from a police computer in police station 1 in Frankfurt am Main, to which several officers have access. Some of them could be proven to have made right-wing extremist statements and references. Even after the suspension of five police officers, the threats continued, data not accessible to the public continued to be used and, for example, the murder of Walter Lübcke was referred to in later threatening letters. According to media reports[15], the clarification and support measures on the part of the Frankfurt police appear to be insufficient. In the meantime, further persons are threatened by the "NSU 2.0", data was retrieved from police computers in Wiesbaden. The attack on this lawyer is an attack on the legal profession as such.

Greece

According to the law, the Bars and Associations of Greek Lawyers are independent from the executive or other branches of the state. The Ministry of Justice has some limited supervisory powers over the Bar, referring to the legal aid system, to the publication of the results of the competition test for trainee lawyers.

[14] https://www.brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-europa/2020/april/stellungnahme-der-brak-2020-16.pdf
[15] https://www.sueddeutsche.de/politik/rechtsextremismus-nsu-2-0-seda-basay-yildiz-1.5122351

The Bars are recognised by the national code of Lawyers (article 89) as fully independent professional organisations and Legal Entity of Public Law. Bar duties include, in accordance with Article 199 of the Lawyers Code, "a) to take care of the general dignity of lawyers and administration of respect that is essential and required during the exercise of their duty, b) the submission of proposals and opinions concerning the amelioration of the interpretation and application of legislation, c) the statement of comments and of judgments as to the administration of justice, d) the debate and the decision on any issue which concerns the legal profession or its members or as professional degree and on any general issue of National or Social content". Over the years, the institutional position of Bars of the country was regulated legislatively as a factual recognition of the status of its members as fundamental assistant in the administration of Justice and gradually lawyers were established as well as to the consciousness of ordinary citizens as rights defenders and safeguards of institutions.

Decisions concerning the authorisation to practise as a lawyer or to accede to the legal profession are taken by an independent authority on the basis of pre-defined criteria where decisions are subject to review by an independent and impartial judicial authority.

Lawyers' disciplinary offences are defined in a statute or code of ethics and professional conduct. The body/authority initiating disciplinary proceedings against a lawyer and taking decisions on disciplinary measures is independent from the executive and the legislature. Such decisions can be reviewed by an independent court. Only the bar or a court can suspend the licence of a lawyer pending the outcome of criminal proceedings.

There are guarantees in place to respect the confidentiality of the lawyer-client relationship in all aspects of their professional dealings including data, communications, and surveillance. Lawyers have the right to refuse testimony on professional grounds in respect of the information, which was confided to them in this capacity.

Where lawyers are subjected to a threat to their physical safety related to their role, they are granted the same protections as any other person.

Impact of COVID-19

The Greek judicial system last year did not work due to the COVIDovid-19 pandemic. In Greece, the majority of the judicial proceedings (civil-commercial-criminal-administrative) had been postponed for about three months in order to limit the risk of virus spread. By the common decision of Ministers of Justice and Public Health, public hearings of the Council of State and all regular administrative courts of the country were suspended for that period, with the exception of those relating to the provision of provisional judicial protection and the publication of judgments. At the same time, the operation of the country's Civil Courts, Criminal Courts and Public Prosecutions was suspended for the same period, as follows:

- trials before civil and criminal courts,
- the legal and judicial time limits for bringing proceedings and other actions before the courts and prosecutors, as well as the expiry of the relevant claims, and
- enforced enforcement procedures and auctions under the current provisions.

It is furthermore foreseen that the functioning of the courts was limited to the actions necessary to deal with cases before the courts, as well as those which, as the case may be and at the discretion of the governing body of each of them, are urgent and need immediate attention. Indubitably, these days of quarantine and general lockdown have already changed the ordinary work of law offices and firms at a global level. The Greek Bar was forced to overcome quite a few challenges in order to stay productive and this encouraged the appearance of new opportunities regarding the use of technical means. It goes without saying that the COVID-19 crisis affected, in more or less permanent ways, the way in which lawyers' function on a professional level. It is more than safe to say that the use of alternative non-physical ways of meeting with clients, attending public authorities or even the Courts without our physical presence will probably gain more traction in days to come.

Due to the COVID-19 pandemic, the Greek State made a lot of steps to digitalise the Public Administration. The consequences of the pandemic lead the Government to use technical tools and digitalisation creating enormous possibilities to connect. For lawyers, the use of technology is acceptable as a useful instrument. On the other hand, in order to give citizens the opportunity to reach their own potential during the COVID-19 outbreak, we should make the use of technology our top priority, to the extent that this is reasonably possible. The solutions that are currently being considered must be harmonised with the principles of proportionality, privacy and personal data protection. For this reason, it is of great importance that the European Commission will take coordinated action regarding the next steps of the Member States on the subject of the implementation of relevant applications. Furthermore, the new strategy of the Commission for more digitalisation promoting technologies is very positive.

The Bars and Associations of Greek Lawyers during the period of lockdown try to be active underlining the value and the importance of access to justice. The Plenary Session of the Presidents of the Greek Bars promoted the request of keeping the courts opened. The topic of the rule of law has formed a significant part of the discourse within the professional public and in the society in general over the period considered. Various deficiencies in the procedural aspect of rule of law principles were strongly communicated by various representatives of professional bodies as well as individuals. As law society we are very interested to raise the awareness of rule of law issues.

Hungary

The Hungarian Bar Association (HBA) and regional bar associations (RBA) in Hungary are autonomous self-governing public bodies. The HBA is vested with the duties to represent the legal profession vis-à-vis the government, exercise a general oversight over the RBAs, determine certain rules pertaining to the legal profession by issuing by-laws and to review the decisions of the RBA relative to disciplinary measures.

According to the law, the Hungarian Bar is independent from the executive or other branches of the state. The Minister of Justice shall supervise the legality of the operation of the territorial bars and the Hungarian Bar. In carrying out their supervisory function, the minister shall ensure that the operation of the bar does not violate the law, statutes or the regulations of the Hungarian Bar.

Decisions concerning the authorisation to practise as a lawyer or to accede to the legal profession are taken by an independent authority on the basis of pre-defined criteria where decisions are subject to review by an independent and impartial judicial authority.

Lawyers' disciplinary offences are defined in a statute or code of ethics and professional conduct. The body/authority initiating disciplinary proceedings against a lawyer and taking decisions on disciplinary measures is independent from the executive and the legislature. Such decisions can be reviewed by an independent court. Only the bar or a court can suspend the licence of a lawyer pending the outcome of criminal proceedings.

There are guarantees in place to respect the confidentiality of the lawyer-client relationship in all aspects of their professional dealings including data, communications, and surveillance. However, the client and his legal successor have the right of disposal over the lawyer-client privileged information, they can release a lawyer from the obligation to maintain confidentiality.

Where lawyers are subjected to a threat to their physical safety related to their role, they are granted the same protections as any other person.

According to the Hungarian Bar, currently there are no general, system-wide problems, nor extraordinary actions against lawyers in Hungary.

Notwithstanding the above and save for issues explained in more details below, there are some issues to be reported regarding the daily court practice. However, it is not the law but its implementation that is the subject of criticism (see below the problem of the Constitutional Court case law).

Concerning the **Constitutional Court**, nowadays it may be experienced that the court plays an (too) active role. It acts as a court of fourth instance in more and more cases, in fact it reviews the merits of judgments by the ordinary courts. It therefore unnecessarily intervenes in the functioning of the ordinary courts by questioning judicial discretion and independence.

At the beginning of 2020, there were **bad press communications against lawyers**. The Hungarian Bar strongly protested against the misleading media releases and also against unwanted intervention by politicians who had the clearly recognisable intention to influence the courts and to block the enforcement of final and binding judgments. The subject of the case was a compensation to be paid to detained persons for unsatisfactory prison circumstances (experiencing inhumane conditions). The decision of the court was unfavourable for the government.

In addition to bad press communications against lawyers, there was an amendment to an existing law concerning the compensation payable to detained persons which appears to be detrimental to both the access to law and also the legal profession. The legislative amendment **prohibited the payment of the compensation on a lawyer's escrow account** in respect of compensation to be paid to the detained persons. This provision entered into force on 1 January 2021.

According to the new amendment of the law, the amount paid in the context of the compensation/indemnification must be reserved for the time of release of the sentenced person, and the commander may, at the request of the convicted person, authorise the payment of part of the amount paid under the indemnity to the relative or contact person of the convicted person in circumstances requiring special consideration. This means that, despite the fact that the detainee receives compensation, he/she still cannot access his or her account until they are released.

The compensation shall be the detainee's money, which they receive for an infringement of the law by the State. As a result of their detention, they can only dispose of it in a limited manner as stipulated in the legislation.

Moreover, according to the provision, detainees may not pay lawyers' fees from the compensation deposited on an escrow account. Therefore, if a lawyer assists in the indemnification procedure, they must, in principle, wait for their client to be released before receiving their fee from the compensation received.

Therefore, since 7 March 2020, the indemnification amount cannot be transferred to a lawyer's escrow account. This is a completely unjustifiable distinction at the expense of detainees, as the lawyer may receive deposited money on his/her escrow account in any other case. It cannot be excluded that the purpose of the restriction was to discourage lawyers from undertaking compensation cases, as the number of lawyers who will be ready to take a case and wait several years for the related fees will certainly shrink substantially. It is certainly easier, safer and less time-consuming to deduct the fee from the amount received on the escrow account, and then to pass on the remaining compensation to the detainee and/or their family, than to collect the fee for the work from the detained client maybe several years later, if at all. If lawyers have to wait for their client to be released because the detainee cannot refer a lawyer's fee from the deposit account, it is certainly much more difficult for detainees to have access to legal assistance.

The above results, on the one hand, are a rule of law issue (the detainee cannot find a legal representative or has a much narrower choice), and on the other hand, it is an unjustified restriction on the activities of lawyers.

Introduction of (i) the mandatory application of case law published by the *Kúria* (Supreme Court of Hungary), (ii) the uniform jurisprudence decisions of the *Kúria*, and (iii) the uniform jurisprudence complaint and related procedure as of 1 April 2020

These regulations are heavily criticised for a number of reasons. First, there was no impact assessment before the introduction, nor was the judiciary's opinion obtained. The availability and searchability of the precedents published by the *Kúria* is not up to date and there are many individual decisions published in other publications and taken into consideration by judges. It is also not clear whether the entire published decision shall become mandatory (including both the ratio decidendi and obiter dicta), or only the ratio decidendi. There was no time left for the preparation for the rapid implementation of the new rules which may detrimentally affect the certainty in judicial decision-making. Moreover, with the mandatory application of the published precedents, the relative independence of a judge with regards to his/her interpretation of the applicable law as the actual case requires is also reduced.

In addition, the law introduced a fourth level forum within the *Kúria* in making a final decision in a case. So far, in addition to the ordinary first and second instance judgments, the law provided for an extraordinary review of the final and binding judgment by the *Kúria*, and this was the end for resolving a case pending before the court. Now, under the new regime, any party may file a so-called unitary jurisprudence complaint, where the *Kúria* – in a panel selected by the President of the *Kúria* – will decide in the matter at hand examining the compliance of the final decision with the published *Kúria* individual decisions.

The reasoning of the new law refers to the recommendation of the Venice Commission. However, there are many dissenting opinions, even from the highest circles of judges, saying that this is not what the Venice Commission recommended, and the new system may lead to confusion, decreased independence of judges and the granting of too much decision-making power to the *Kúria*.

Election of the new President of the *Kúria* (the Supreme Court in Hungary): András Zs. Varga, the former Deputy of the Highest Prosecutor, a former judge of the Constitutional Court, a highly knowledgeable and experienced jurist and professor at the University of Law, was elected as the President of the *Kúria* for 9 years. However, he was not supported by the Council of the Judiciary, as it was argued that he used the political power based on the qualified majority in the Parliament to push his appointment through.

Ireland

The Bar of Ireland is the representative body for the barristers' profession in Ireland. The Law Society of Ireland is the educational and representative body for the solicitors' profession in Ireland. The Law Society has some regulatory functions relating to the solicitor profession, however the Legal Services Regulatory Authority is the independent statutory body with responsibility for the regulation of the barrister and solicitor professions.

According to the law, the Bar in Ireland is independent from the executive or other branches of the state. The executive or other branches of the state do not exercise any supervisory role over the Bar. The Legal Services Regulatory Authority is Ireland’s independent national statutory regulator for both branches of the legal profession – barristers and solicitors. Its key functions are to regulate the provision of legal services by legal practitioners and to ensure the maintenance and improvement of standards in the provision of legal services.

Decisions concerning the authorisation to practise as a lawyer or to accede to the legal profession are taken by an independent authority, which makes such decisions on the basis of pre-defined criteria where decisions are subject to review by an independent and impartial judicial authority.

Lawyers’ disciplinary offences are defined in a statute or code of ethics and professional conduct. The

body/authority initiating disciplinary proceedings against a lawyer and taking decisions on disciplinary measures is independent from the executive and the legislature. Such decisions can be reviewed by an independent court. Only the bar or a court can suspend the licence of a lawyer pending the outcome of criminal proceedings.

There are guarantees in place to respect the confidentiality of the lawyer-client relationship in all aspects of their professional dealings including data, communications, and surveillance. A court can order a lawyer to disclose information covered by professional secrecy obtained by the lawyer in his/her professional capacity whether as a defence counsel or not.

Where lawyers are subjected to a threat to their physical safety related to their role, they are granted the same protections as any other person.

In Ireland, the Guide to Professional Conduct for Solicitors clearly sets out solicitors' professional responsibility to retain professional independence as a core value of their profession. The guide states: "Solicitors must always retain their professional independence and their ability to advise their clients fearlessly and objectively. Independence is essential to the function of solicitors in their relationships with all parties and it is the duty of solicitors that they do not allow their independence to be compromised. Solicitors should not allow themselves to be restricted in their actions on behalf of clients or restricted by clients in relation to their other professional duties. A solicitor's independence is necessary because of his various relationships of trust. The independence of a solicitor's advice is an essential value."

The Law Society is not aware of any examples undermining the independence of lawyers in 2020.

Italy

According to the law, the Bar in Italy is independent from the executive or other branches of the state. The Bars are only subject to supervision by the Ministry of Justice, but some administrative dispositions can be appealed before the Administrative Court.

Decisions concerning the authorisation to practise as a lawyer or to accede to the legal profession are taken by an independent authority on the basis of pre-defined criteria where decisions are subject to review by an independent and impartial judicial authority.

Lawyers' disciplinary offences are defined in a statute or code of ethics and professional conduct. The body/authority initiating disciplinary proceedings against a lawyer and taking decisions on disciplinary measures is independent from the executive and the legislature. Such decisions can be reviewed by an independent court. Only the bar or a court can suspend the licence of a lawyer pending the outcome of criminal proceedings.

There are guarantees in place to respect the confidentiality of the lawyer-client relationship in all aspects of their professional dealings including data, communications, and surveillance. The lawyer, their collaborators and employees may not be obliged to disclose information of any kind on what they have become aware of in the exercise of their profession or collaborative activity or by virtue of their employment, except in the cases provided for by law. In practice these guarantees are not always upheld as noted below.

Lawyers can be granted protection in case of a threat to their physical safety related to their role, such protection is ordered by a national governmental authority (Central Bureau of Inter-Forces for Personal Security- *UCIS*).

The duty (and right) of independence of lawyers in Italy is based on the right of defence, guaranteed by Article 24 of the **Constitution**, but also on the principles of equality (Article 3 of the Constitution) and fair trial (Art. 111 of the Constitution). The right to a fair trial enshrined in Article 6 **ECHR** presupposes not only an independent Judiciary but also an independent Bar.

The Italian Law recognises to the National Bar Council (*Consiglio Nazionale Forense - CNF)* the right and the duty to protect the public interest in the proper exercise of the legal profession and the autonomy/independence of the professional system through the disciplinary function exercised in a judicial form. The CNF acts as second instance judge on the complaints proposed against the disciplinary measures adopted by the local Disciplinary Bodies. The judgment of the CNF can be appealed directly to the United Sections of the Cassation Court.

The CNF also formulates ethical rules that indicate the conduct and specific morality required by the lawyer in the exercise of his duties and in her/his social conduct. At the deontological level, the duty of independence is laid down in Article 9 of the Italian Lawyer's **Code of Conduct**. The independence of lawyers is also intimately linked to the conflict of interest (Article 24 of the Code of Conduct) and to the incompatibility with the legal profession governed by Article 18 of the **Professional Law** (New regulation of the legal profession, Law No. 247 of 31 December 2012). It is mainly in the latter area that cases have emerged in 2020.

According to the CNF, there were some cases originated or pending in 2020/2021 regarding the above-mentioned principles.

Economic Independence

Pursuant to Article 24(2) of the Professional Law, the Bar is divided into the district Orders and the National Bar Council. Paragraph 3 of that article states that '*the CNF and the district Orders are noneconomic public bodies of an associative nature established to ensure compliance with the principles laid down in this law and with the rules of the Code of Conduct, as well as for the purpose of protecting users and the public interests connected with the exercise of the profession and the proper performance of the judicial function'* (unofficial translation).

On the financial level, the same provision states that '*They are endowed with patrimonial and financial autonomy, are financed exclusively by the contributions of the members, determine their own organisation by appropriate regulations, in compliance with the provisions of the law, and are subject exclusively to the supervision of the Minister of Justice*.' (unofficial translation).

Therefore, even though they are public bodies, the law establishes in their patrimonial and financial autonomy a central element for preserving their independence from other powers of the State, subjecting these public bodies to a private, or in any event unregulated, type of discipline.

The CNF is defending this aspect of independence from various investigations initiated by various State bodies, in particular attributable to the Ministry of Finance/Internal Revenue Service, the Court of Auditors and the Antitrust Authority, who seem to question this autonomy, evoking control instruments applicable to public bodies financed by the State. The CNF is confident that it will be able to assert its arguments in the ongoing proceedings.

Coming to some examples of possible interference in patrimonial autonomy, there is the request for control over the CNF's participation in foundations, associations and companies (pursuant to Articles 20 and 24 of Legislative Decree No. 175 of 19 August 2016, also known as the *'Testo Unico sulle Società Pubbliche'* Consolidated Law Text on Public Companies), to which the CNF has always responded by pointing out that in no way can the function of control over private funds be equated with that of a political/accounting nature applied to the system of public company shareholdings.

On a similar trajectory, the CNF replied, also on behalf of the local Bars, to the State Accountant General at the Ministry of Economy and Finance, that even the control on the expenditure of its own personnel cannot be subject to the supervision and control activity pursuant to Article 1, paragraph 2, of the aforementioned Consolidated Law Text on Public Companies.

Finally, with reference to the provisions on professional fees and the advertising of lawyers' activities, amended following the transposition of the European legislation on the freedom of services, it should be noted that the Italian Antitrust Authority (AGCM) has imposed a very high fine on the CNF for having maintained on its website the fees applicable before the reform, inter alia on a page of historical archives, alleging a violation of the principles of competition repeatedly on the sole fact of the presence on the site of the previous information. After a partial review of the measure before the Council of State, in 2016 the CNF appealed before the ECHR for violation of procedural principles (but the case has not yet been dealt with).

It must be noted that the AGCM has repeated the allegations by adopting other decisions imposing further fines. The CNF appealed the AGCM's decision before the TAR Lazio which finally decided to annul the AGCM's decision for violation of the principle of an adversarial process. Moreover, it did not find any new violations of the competition rules by the CNF.

The AGCM's attitude seemed inquisitorial, treating the CNF (which is a Public Body) as a cartel; although the CJEU case law states that such could be the function of a professional association that publishes a scheme of fees (price agreement between competitors), the publication was not new, and their permanence on the site was only of a historical nature.

Independence and Incompatibilities

Most of these cases resulted in the decisions of the CNF and only few in jurisdictional decisions.
Among the jurisprudential decisions, the CNF highlighted the Judgment of the United Sections of the Court of Cassation, No. 7761 of 9 April 2020, which followed the appeal against the CNF's judgment 217/2018. The Court of Cassation rejected the appeal and upheld the CNF's judgment. The case was about the violation of the Code of Conduct by a lawyer who accepted and exercised the position of member of an arbitration board in a situation of incompatibility. Two lawyers, father and son, partners in the same law firm, were involved. One of them was the defendant of one of the parties and the other a member of the arbitration panel. The Court of Cassation specified the irrelevance of the fact that no exception had been raised during the arbitration proceeding, stating that the prohibition on assumption of office is not negotiable by the parties and is intended to protect the deontological profile of lawyers by guaranteeing the independence and impartiality of the arbitration panel.

Concerning the opinions provided by the CNF:
- Opinion No. 51 of 23 October 2020 was ruled on the incompatibility between enrolment in the Register of Lawyers and teaching of non-legal subjects in institutions other than those provided for by Article 19 of Law 247/12. The CNF stated that on the basis of the principle of protection of acquired rights, this limitation applies only to lawyers enrolled in the Bar after the entry into force of the new regulation of the legal profession (Law No. 247 of 31 December 2012);

- in its Opinion No. 33 of 23 October 2020, the CNF reiterated the incompatibility of the profession of lawyer with "*any activity as an employee, even if with limited working hours*" (Article 18(d) of Law No. 247/12). In this case, the interested party had established an employment relationship to provide extrajudicial advice in the field of labour law to an association representing craftsmen and small and medium-sized enterprises;

- about incompatibility between the legal profession and salaried employment, in its Opinion No. 5 of 25 June 2020 the CNF also stated that the incompatibility remains even if an employee is on unpaid leave for one year.

COVID-19: impact of the emergency measures on the key principles of the legal profession

Also in Italy, the COVID-19 pandemic overwhelmed the judicial system and the legal profession in 2020. The Italian government handled the situation by adopting several emergency measures by means of emergency decrees (Law Decrees - DL) and, on the basis of the DL, the President of the Government has adopted more

specific measures (Decree of the President of the Council of Ministries - DPCM), which is the aim of essentially introducing restrictions.

The emergency legislation has challenged many key principles of the profession such as access to Justice, professional secrecy, and confidentiality of the conversations between lawyer and client. From this point of view, particularly critical are the measures that have imposed the conduct of the criminal trial behind closed doors or the participation, during the preliminary investigation phase as well as at any type of hearing, of persons detained by videoconference or remote connection and the possibility of carrying out appeal judgments in the council chamber without the intervention of the public prosecutor and the lawyers for appeals against first-degree sentences.

The CNF has constantly monitored the situation which raises serious questions regarding the right to a fair trial and which undermines the principles underlying the legal profession.

After the declaration of the state of emergency, the restrictions kept increasing day-by-day, reaching a peak with the national lockdown established by Decree of the President of the Government as of 9 March 2020 which brought nearly all activities to a halt. For the entire period of the national lockdown (between 9 March and 11 May 2020), all scheduled hearings and pending proceedings were automatically postponed to a later date (after 11 May). The CNF has offered its collaboration to the Government for a prompt reactivation of the Justice System.

Since the end of the suspension period, from the opening of the transitional phase starting from 12 May 2020 (second phase), the Italian Justice System has strived to get back on track, implementing the emergency provisions adopting the necessary organisational measures, such as managing judicial proceedings through a remote connection (virtual hearings) or through the electronic exchange and filing of written notes (written hearings). On the basis of the DL and of some notes of the Ministry of Justice, the Presidents of the local Tribunals have adopted organisational measures. The Italian Bars have noted a lack of homogeneity among these measures. In this context, the CNF has worked to support the profession through various initiatives aimed at providing information to lawyers on the changing situation and at stipulating memoranda of understanding with the Judiciary (the Supreme Council of the Judiciary, Court of Cassation and with the Administrative State Council), developing a series of operational guidelines for managing virtual and written hearings, in order to provide a strong core of common rules for all the different proceedings, compliant with the right to a fair trial and to an effective remedy and due process guarantees. However, the suggestions relating to the necessary and appropriate measures to be adopted and the legislation to be amended have not always been considered by the government and in some occasions, the consultations have not been organised. For example, the suggestions on the use (and the non-use) of virtual hearings on Criminal proceedings have not been fully taken into account by the government.

The pandemic has highlighted how the effectiveness of Judicial Systems is crucial for the respect of the rule of law and requires the collaboration of Lawyers with Judges and Judicial staff.

Personal cases (mostly on media/social networks) – Independence from the abuse of power

There are some cases concerning individual lawyers that the CNF has monitored, expressing solidarity and proximity, respecting where necessary, the judiciary. Such cases, however, do not represent serious systemic aspects, but rather isolated incidents that are deplorable, but which often find a solution in the same remedies provided by the laws of the State.

The national/regional media also report cases of lawyers who are heavily insulted, threatened or even physically attacked due to their activity. This can happen in the office, on the street, on the social media and even in the courts during a hearing.

Recently after an episode which shook the public opinion, a local politician openly commented on it on social networks, accusing lawyers who defend criminals of being in collusion with criminal organisations. The local Bar reacted by expressing deep disconcert and reiterating that the function of a lawyer is to defend the individual and to act as a staunch defender of the Constitution in the event of a friction between the rights of the individual and the interests of the State (newspaper article of 6 January 2021).

A similar case concerned a lawyer involved in an investigation by the Naples Anti-Mafia District Directorate which, on 26 June 2019, led to the arrest of numerous people. The accusations against the lawyer were based on the contradictory revelations of some mafia "repentant". These inconsistencies had already emerged at the time of the investigations when the Preliminary Investigations Judge (GIP) rejected the application of the pre-trial detention. However, the lawyer has been subjected to wiretapping for years given his role of defence lawyer of people involved in a criminal organisation. After 19 months, the GIP, on request of the same Public Prosecutor, filed the lawyer's position. Even if the charges have been dropped, the image of the lawyer has been damaged, because during those days he was labelled as “the Camorra's lawyer”, (newspaper article of 2 February 2021).

On the subject of wiretapping and the violation of the lawyer's independence, a serious episode has provoked the firm reaction of the President of the local Criminal Chambers. The episode relates to the wiretapping and transcription of the content of a telephone conversation between a lawyer and his client. This episode is in violation of the laws that prohibit wiretapping, the right of defence and also of the internal circulars that prohibit the Public Prosecutor from including any transcription of these conversations in the case file. The President of the Criminal Chambers sent a complaint to the Chief Public Prosecutor at the Court of Cassation, Council of Magistracy and invited the judiciary to take a stand (newspaper article of 11 February 2021).

Another case concerning the wiretapping of conversations between lawyers and their clients concerns a lawyer of the local Bar who appealed to the European Court of Human Rights alleging an infringement of the right of defence as he discovered that the conversations with his client had been intercepted. The client in question was in prison and the lawyer would discuss with him the defence strategy by means of telephone conversations. The lawyer found the transcripts of these conversations in the investigation file and therefore learned that they had been intercepted. The lawyer maintains that this violates article 103 paragraph 5 of the Italian Code of Criminal Procedure according to which “The interception of conversations or communications of the defence counsel, of private investigators authorised and appointed in connection with the proceedings, of technical consultants and their assistants, as well as those between them and the persons assisted by them, is not allowed”. (newspaper article of 8 January 2021 https://www.ildubbio.news/2021/01/08/io-avvocato-intercettato-mentre-parlavo-con-lassistito/).

Latvia

The Latvian Collegium of Sworn Advocates is an independent professional corporation of Latvian sworn advocates uniting all sworn advocates practising in Latvia.

According to the law, the Bar in Latvia is independent from the executive or other branches of the state. The executive or other branches of the state do not exercise any supervisory role over the Bar.

Decisions concerning the authorisation to practise as a lawyer or to accede to the legal profession are taken by an independent authority on the basis of pre-defined criteria where decisions are subject to review by an independent and impartial judicial authority.

Lawyers’ disciplinary offences are defined in a statute or code of ethics and professional conduct. The body/authority initiating disciplinary proceedings against a lawyer and taking decisions on disciplinary measures is independent from the executive and the legislature. Such decisions can be reviewed by an independent court. Only the bar or a court can suspend the licence of a lawyer pending the outcome of criminal proceedings.

There are guarantees in place to respect the confidentiality of the lawyer-client relationship in all aspects of their professional dealings including data, communications, and surveillance.

Where lawyers are subjected to a threat to their physical safety related to their role, they are granted the same protections as any other person.

Lithuania

The Lithuanian Bar is a public legal entity representing lawyers in Lithuania.

According to the law, the activities of the Lithuanian Bar are based on the principle of independent self-governance of advocates (lawyers), however, following the Law on the Bar, the Lithuanian Bar is obligated by law to coordinate the procedures, related exclusively with activities of advocates with the Ministry of Justice. However, the executive or other branches of the state do not exercise any supervisory role over the Bar.

Decisions concerning the authorisation to practise as a lawyer or to accede to the legal profession are taken by an independent authority on the basis of pre-defined criteria where decisions are subject to review by an independent and impartial judicial authority.

Lawyers' disciplinary offences are defined in a statute or code of ethics and professional conduct. According to the Law on the Bar, a disciplinary action against advocates can be instituted by the Bar Council, but also by the Minister of Justice as discussed below. Nevertheless, the body taking decisions on disciplinary measures is independent from the executive and the legislature. Such decisions can be reviewed by an independent court. Only the bar or a court can suspend the licence of a lawyer pending the outcome of criminal proceedings.

According to the law, it is prohibited to examine, inspect, or take the advocate's practice documents or files containing information related to his/her professional activities, examine postal items, wiretap telephone conversations, control any other information transmitted over telecommunications networks and other communications or actions, except for the cases when the advocate is suspected or accused of a criminal act. In case law, this last provision is interpreted by expanding its limits.

There are cases in practice, when, acting on the basis of the Law on Criminal Intelligence, an advocate's professional secret is violated even before starting a process under the Code of Criminal Procedure, without making any allegations or charges against the advocate. Even if the law states that a search or seizure at the place of practice or residence or motor vehicle of an advocate, a body search, an examination, inspection or seizure of documents and postal items may be conducted only in the presence of a member of the Council of the Lithuanian Bar, or an advocate authorised by it, there have been cases when searches were made at the place of residence of an advocate in the absence of advocates authorised by the Bar Council.

Moreover, with regard to guarantees relating to the interception of lawyer-client communication, formal guarantees exist, but law enforcement authorities follow the approach that possibly criminal activities of an advocate are not subject to the legal professional privilege.

According to the Code of Ethics for Advocates, an advocate has the right to disclose the advocate's professional secret without the client's consent when that is unavoidably necessary for (1) saving a human life, (2) the protection of rights and lawful interests of his/her client, his/her heir, successor, (3) the defence of the advocate's rights in a dispute with the client, however, only to the extent which is necessary for the correct resolution of the dispute. Presumably, namely in these cases the court could request that the advocate disclose information covered by professional secrecy.

Where lawyers are subjected to a threat to their physical safety related to their role, they are granted the same protections as any other person.

Covert actions of the law enforcement agencies against lawyers

The Law on Criminal Intelligence allows law enforcement authorities to perform covert actions of information collection (e.g. wiretapping of telephone conversations, control over electronic or other correspondence, etc.) without making allegations or charges, only according to data collected by officers that one is getting ready for commitment of a crime or that a crime is being committed or is committed. Therefore, advocates' communications can be controlled even in the absence of sufficient data that a criminal act was committed at all, even in the absence of a sufficient basis to start a pre-trial investigation (criminal procedure). Practices of law enforcement authorities show that control of persons, in respect of whom criminal intelligence actions are performed, is carried out according to the 24/7 principle, in this way controlling communication with all other clients of the advocate.

Information collected under the Law on Criminal Intelligence is a state secret and according to the Law on State Secrets and Official Secrets, it is impossible to learn about it unless it is used. This makes it possible for officers to covertly collect information which are subject to the legal professional privilege and not to notify about it if the collected data did not confirm the fact of the crime. After the end of the investigation of the copied data, in practice copies of all electronic data can be kept by officers and not destroyed, though officers no longer have a legitimate purpose to keep them.

Considering all the circumstances in the criminal intelligence regulation and alleged criminal intelligence activities against the Lithuanian Bar itself:

1) The Bar has submitted a petition to the ECHR (Application No. 64301/19). The case was communicated to the Government on 9 December 2020.

2) The Bar has also submitted a complaint to the European Commission regarding the infringement of EU law by mal transposition of Data protection directive (CHAP(2019)02116). The Bar received only the confirmation on the acceptance of the complaint and the notion about it being processed. The Bar has submitted the additional information, further clarifying the wrong transposition of the Directive in the domain of criminal intelligence.

3) The Bar also initiated legal proceedings in the national courts, *inter alia* seeking to submit the reference for the preliminary ruling to the European Court of Justice regarding the interpretation of Data protection directive. The request for the preliminary ruling was not even considered in the court of first instance. The Bar submitted the appeal to the court, which falls within the scope of TFEU Art.267(3). The appeal was accepted and currently pending the appointment of the date of hearing.

Law enforcement authorities follow the approach that possibly (alleged) criminal activities of an advocate are not subject to the legal professional privilege, even if formal guarantees exist. Therefore, in order to be able to apply criminal intelligence methods, preliminary information is enough in order to ascertain whether or not an advocate performs criminal activities. Thus, for example, when all conversations are wiretapped 24/7, there are no guarantees that records of such conversations (information learned during them) will not be used against clients of the advocate. According to information presented to the Lithuanian Bar by an advocate who directly experienced the intervention in the form of covert surveillance actions performed under the Law on Criminal Intelligence, law enforcement authorities, suspecting an advocate, are free to choose the scope of information collected by covert methods – they can use communication measures to survey activities of one specific advocate, but can also do that in respect of all advocates of that law firm, by carrying out covert surveillance according to the 24/7 principle, even in the absence of any legal basis to perform covert actions of obtaining information in respect of other advocates.

Disciplinary actions

According to the Law on the Bar, a disciplinary action against advocates can be instituted by the Bar Council. But the Law on the Bar establishes that the Minister of Justice also has such right. In 2019, the Minister of Justice used such right and, at the request of public prosecutors, instituted a disciplinary action against an advocate regarding their position (arguments) in court proceedings, even the court itself did not report any

breach of ethics to the Bar. The Court of Honour did not find a violation of advocates' ethics, then the prosecution office filed an appeal and now the case is pending before the Supreme Court.

Implementation of the DAC6 Directive

Article 61 (2)(3) of the Law on Tax Administration provides "In cases where there is no intermediary, or where the intermediary notifies the taxpayer or other intermediary concerned of the exercise of the right to be exempted from the obligation to notify a notifiable cross-border arrangement, the obligation to submit information on the cross-border arrangement to the Tax Inspectorate falls on another intermediary who has been notified of the exercise of the right to be exempted from the obligation to provide information or, in the absence of such an intermediary, on the taxpayer concerned. For the purposes of this Article, a taxable person concerned shall be any person who is in a position to implement a notifiable cross-border arrangement or who is prepared to implement a notifiable cross-border arrangement or who has started to implement a notifiable cross-border arrangement."

After the amendments to the Law which came into force, a lawyer is considered by the Tax Inspectorate as an intermediary and is obliged to notify a notifiable cross-border arrangement. Administrative liability – a fine for violations of said article – is also established. The Tax Inspectorate adopted Rules on notifiable cross-border arrangements. According to those Rules, the failure to provide the required information by the intermediary or the taxpayer concerned will be deemed not to have been fulfilled by the lawyer, as the lawyer has the primary obligation to provide information on the cross-border agreement to be notified to the Tax Inspectorate, despite the fact that the lawyer agreed with other intermediary or the taxpayer that they will provide information themselves. However, the Lithuanian Bar is of the position that the professional secrecy should be considered as prevailing in these cases.

Abuse of GDPR (data protection) against a right to obtain information

According to Law on the Bar, advocates, in collection of evidence, have the right receive from state and municipal institutions, registers, state information, systems the information, data (including special categories of personal data), documents, their copies held or controlled by them, which are necessary to provide legal services. For these reasons, the request of the advocate must contain proof of the relevance of the requested documents or their copies to the provision of legal services. If an advocate does not prove that the requested information, data, documents, or their copies are necessary for provision of legal services, he/she shall be denied them. The advocate therefore discloses certain information in connection with his/her client in order to obtain certain necessary data in the case or in the provision of other legal services, from the state and municipal institutions.

Cases have been observed particularly frequently when institutions, inter alia, referring to the General Data Protection Regulation, refuse to provide information requested by an advocate, requiring disclosing more and more information and in this way prove its necessity. Therefore, the Lithuanian Bar addressed state institutions in writing, drawing attention to the advocate's right to obtain data which are necessary for the provision of legal services and defining the scope and sufficiency of information in the advocate's request, so that institutions would not request excessive information subject to the legal professional privilege, and would not unreasonably refuse the provision of data requested by advocates.

Renouncing to the right to lawyer

From 8 January 2020, the amendment to the Prosecutor General's Recommendation on the Organisation and Conduct of Pre-Trial Investigations entered into force, supplementing these Recommendations with a new paragraph, which states that "The prosecutor and the pre-trial investigation officer shall take steps to ensure the necessary participation of defence counsel in cases prescribed by law. When a suspect is temporarily detained […], the prosecutor and/or the pre-trial investigation officer, ensuring the necessary participation of the defence counsel, shall follow the principles of economy and efficiency. In order to ensure the right to a defence, the detained suspect must be informed as soon as possible of the right to a lawyer and the procedure for exercising this right, as well as the right to dismiss a lawyer on his own initiative and

to defend himself. A detained suspect may refuse to be represented by a defence counsel immediately after detention, so the presence of a lawyer explaining to a detained suspect the right to have a lawyer is not mandatory. If the detained suspect refuses the defence counsel, if there are no circumstances (when the refusal of defence counsel is not binding), further pre-trial investigation procedures shall be carried out in the absence of the defence counsel. If the detained suspect expresses the wish to have a lawyer, the pre-trial investigation officer and the prosecutor shall ensure the presence of the lawyer during the further proceedings."

The suspect's refusal of a defence counsel if the defence counsel is not invited or present and the detained suspect does not have the opportunity to meet the defence counsel and consult them without outsiders is primarily contrary to Article 31(6) of the Constitution. Where the presence of a lawyer is necessary, the lawyer must appoint a lawyer ex officio for a detained suspect in such a way as to guarantee the right to a lawyer from the moment of actual detention. Thus, according to Article 31(6) of the Constitution, it is a priori impossible for a detained suspect to have no defence counsel and to abandon the defence counsel without the direct participation of the defence counsel in this process. The artificial creation of such a legal situation is potentially in conflict with Paragraph 6 of Article 31 of the Constitution.

Luxembourg

According to the law, the Luxembourg Bar is independent from the executive or other branches of the state. The executive or other branches of the state do not exercise any supervisory role over the Bar.

Decisions concerning the authorisation to practise as a lawyer or to accede to the legal profession are taken by an independent authority, which makes such decisions on the basis of pre-defined criteria where decisions are subject to review by an independent and impartial judicial authority.

Lawyers' disciplinary offences are defined in a statute or code of ethics and professional conduct. The body/authority initiating disciplinary proceedings against a lawyer and taking decisions on disciplinary measures is independent from the executive and the legislature. Such decisions can be reviewed by an independent court. Only the bar or a court can suspend the licence of a lawyer pending the outcome of criminal proceedings.

There are guarantees in place to respect the confidentiality of the lawyer-client relationship in all aspects of their professional dealings including data, communications, and surveillance. A court cannot order a lawyer to disclose information covered by professional secrecy obtained by the lawyer in his/her professional capacity whether as a defence counsel or not.

Where lawyers are subjected to a threat to their physical safety related to their role, they are granted the same protections as any other person: there is no specific legislative provision for the protection of lawyers who, like everyone else, have to go to the police if they are in danger.

The Luxembourg Bar is not aware of any facts which in 2020 would have been linked to a breach of confidentiality of communications between a lawyer and their client. The President of the Bar, who is the guarantor of professional secrecy and, as such, assists in criminal searches and seizures in order to ensure that professional secrecy is not breached, was not called upon in this respect during the period in question.

Furthermore, the Bar Council has not been informed of any incident relating to any infringement of the independence of the Bar or the independence of a lawyer, or any infringement of the security of lawyers due to their status as lawyers. In such cases, the Bar Council confirmed it would not have failed to react firmly.

Malta

According to the law, the Bar in Malta is independent from the executive or other branches of the state. The executive or other branches of the state do not exercise any supervisory role over the Bar.

Decisions concerning the authorisation to practise as a lawyer or to accede to the legal profession are taken by the members of the judiciary. They make such decisions on the basis of pre-defined criteria but these decisions are not subject to review by an independent and impartial judicial authority.

Lawyers' disciplinary offences are defined in a statute or code of ethics and professional conduct. The body/authority initiating disciplinary proceedings against a lawyer and taking decisions on disciplinary measures is independent from the executive and the legislature. Such decisions can be reviewed by an independent court. Only the bar or a court can suspend the licence of a lawyer pending the outcome of criminal proceedings.

There are certain guarantees in place to respect the confidentiality of the lawyer-client relationship in some aspects of their professional dealings such as data and communications. Nevertheless, some guarantees are missing such as protection in case of a search of the premises of the lawyer, in case of tax audit of the law firm and other administrative checks, including the surveillance of the lawyer or his/her premises.

Moreover, with the enactment of certain laws that regulate anti-money laundering and other tax-related matters, some privilege is to a certain extent being eroded. In fact, the anti-money laundering legislation imposes on lawyers the obligation to register Suspicious Transactions Reports (STRs) against their clients if they suspect that the client intends to commit money laundering.

When it comes to client files, the anti-money laundering authorities have the right to conduct inspections at law firms and request to see certain files. However, this right is only limited to those files of clients who are receiving certain services, as stated in the law.

Where lawyers are subjected to a threat to their physical safety related to their role, they are granted the same protections as any other person.

The Netherlands

The Dutch Bar (*Nederlandse orde van advocaten*, NOvA) is the professional organisation of the legal profession.

According to the law, the Dutch Bar is independent from the executive or other branches of the state. The executive or other branches of the state do not exercise any supervisory role over the Bar.

Decisions concerning the authorisation to practise as a lawyer or to accede to the legal profession are taken by an independent authority on the basis of pre-defined criteria where decisions are subject to review by an independent and impartial judicial authority.

Lawyers' disciplinary offences are defined in a statute or code of ethics and professional conduct. The body/authority initiating disciplinary proceedings against a lawyer and taking decisions on disciplinary measures is independent from the executive and the legislature. Such decisions can be reviewed by an independent court. Only the bar or a court can suspend the licence of a lawyer pending the outcome of criminal proceedings.

There are guarantees in place to respect the confidentiality of the lawyer-client relationship in all aspects of their professional dealings including data, communications, and surveillance. A court can order a lawyer to disclose information covered by professional secrecy obtained by the lawyer in his/her professional capacity whether as a defence counsel or not.

Where lawyers are subjected to a threat to their physical safety related to their role, they are granted the same protections as any other person. Unfortunately, there is a growing amount of such cases in the Netherlands.

The Dutch Bar will submit its own contribution to the Rule of law report 2021 to the European Commission.

Poland

According to the law, the Polish Bar is independent from the executive and its functioning has been regulated by the Parliament of the Republic of Poland under the Attorneys-at-Law Act, which states that the Polish Bar shall be independent in carrying out its tasks and subject only to law. The Minister of Justice shall exercise oversight of self-government activity within the scope and in the forms set out in statutory law.

Decisions concerning the authorisation to practise as a lawyer or to accede to the legal profession are taken both by the Minister of Justice of the Republic of Poland and the National Bar of Attorneys-at-Law, who make such decisions on the basis of pre-defined criteria where decisions are subject to review by an independent and impartial judicial authority.

Lawyers' disciplinary offences are defined in a statute or code of ethics and professional conduct. The body/authority initiating disciplinary proceedings against a lawyer and taking decisions on disciplinary measures is independent from the executive and the legislature. Such decisions can be reviewed by an independent court. Only the bar or a court can suspend the licence of a lawyer pending the outcome of criminal proceedings.

There are guarantees in place to respect the confidentiality of the lawyer-client relationship in all aspects of their professional dealings including data, communications, and surveillance.

Where lawyers are subjected to a threat to their physical safety related to their role, they are granted the same protections as any other person.

The National Bar of Attorneys-at-Law in Poland reported about several issues regarding the independence of the Bar and lawyers in Poland.

Influence of COVID-19 pandemic on access to justice in Poland

The COVID-19 pandemic results in restrictions to many public activities, which are in many cases implemented in government resolutions instead of statutory legislation and without pronouncing the state of emergency in Poland (adopted without proper parliamentary debate). Restrictions put in government's resolutions are executed by the Police and public administration (e.g. health authority) and violation of these rules are fined with the max PLN 30,000 penalty (EUR 6,700). This penalty can be enforced immediately, and the person needs to appeal to the court.

Access to courts in pandemic time encounters real obstacles and requires the possibility of using digital resources (e.g. participating in court videoconferences) or waiting for court meetings in safe conditions. It could delay rulings for a long time.

Lawyers are expected to provide a safe environment to clients and law firm staff. It usually requires remote operation mode, which could negatively affect the quality of professional legal service.

Actions of the Constitutional Tribunal, in particular its violation of the *nemo iudex in causa sua* principle and the controversial composition of the Tribunal due to judges nominated for the occupied judicial vacancies as well as consequences of the K1/20 ruling concerning the abortion law in Poland for criminal courts

The Polish Constitutional Tribunal still faces the controversies concerning the legality of the nomination of its three judges nominated and sworn in for vacancies which were already filled by judges duly elected by Parliament in 2015 (but not sworn in by the President) and issues due to the highly controversial decision from 22 October 2020 in the case *K 1/20* on the constitutionality of point 2 of subsection 1 of Article 4a of The Family Planning, Human Embryo Protection and Conditions of Permissibility of Abortion Act of 7 January 1993 in which the abortion law allows for exceptions to the general ban on abortions in cases of a high probability of a severe and irreversible foetal defect or incurable illness that threatens the foetus's life. The Tribunal decided that the law is unconstitutional, and the verdict has caused massive demonstrations all over

the country (the verdict was pronounced on 27 of January 2021). Legal controversies concerning i.a. the problem of the criminalisation of terminating pregnancies due to embryo pathological reasons by the decision of the Constitutional Tribunal, not by statute, contrary to the principle *nullum crimen sine lege*, arise.

Actions of the Supreme Court attempting to circumvent the prohibition for the judicial operation of the Disciplinary Chamber of the Supreme Court and actions targeted at judges applying the principle of sovereignty and direct application of the Polish Constitution (described in Article 8) through initiating disciplinary proceedings

Regarding the situation in the Polish Supreme Court, the CJEU and the Polish Supreme Court itself in three rulings found the Disciplinary Chamber not an independent court within the meaning of the EU and national law. In the case C-791/19 *Commission v Poland,* hearing by this Chamber in the disciplinary proceedings of judges has been ordered to be suspended until the final decision of the Tribunal is made. After this temporary ruling, the Disciplinary Chamber waived the immunity of judges in criminal proceedings. In the most significant cases of judges, both Polish Lawyers Bars announced their supportive position.

Actions targeted at the independence of lawyers (one example - advocate Roman Giertych's case)

The example of a highly problematic action from the perspective of safeguarding the rule of law in Poland, against the legal profession, legally protected information and rules of due process took place in 2020, when a lawyer was detained in the entrance of the court after appearing in court for his client, what could create the so-called freezing effect and further actions in this case (intention of searching the law office without the presence of a representative of the bar council) which could violate the legal professional privilege. Court decisions in this case are so far in favour of the lawyer.

Portugal

According to the law, the Portuguese Bar is independent from the executive or other branches of the state. The executive or other branches of the state do not exercise any supervisory role over the Bar.

Decisions concerning the authorisation to practise as a lawyer or to accede to the legal profession are taken by an independent authority on the basis of pre-defined criteria.

Lawyers' disciplinary offences are defined in a statute or code of ethics and professional conduct. The body/authority initiating disciplinary proceedings against a lawyer and taking decisions on disciplinary measures is independent from the executive and the legislature. Such decisions can be reviewed by an independent court. Only the bar or a court can suspend the licence of a lawyer pending the outcome of criminal proceedings.

There are guarantees in place to respect the confidentiality of the lawyer-client relationship in all aspects of their professional dealings including data, communications, and surveillance.

Where lawyers are subjected to a threat to their physical safety related to their role, they are granted a protection due to law 145/2015 if carried by the General Council for reasons of threat to the profession.

Romania

According to the law, the Romanian Bar is independent from the executive or other branches of the state. The executive or other branches of the state do not exercise any supervisory role over the Bar.

Decisions concerning the authorisation to practise as a lawyer or to accede to the legal profession are taken by an independent authority, which makes such decisions on the basis of pre-defined criteria where decisions are subject to review by an independent and impartial judicial authority.

Lawyers' disciplinary offences are defined in a statute or code of ethics and professional conduct. The body/authority initiating disciplinary proceedings against a lawyer and taking decisions on disciplinary

measures is independent from the executive and the legislature. Such decisions can be reviewed by an independent court. Only the bar or a court can suspend the licence of a lawyer pending the outcome of criminal proceedings.

There are guarantees in place to respect the confidentiality of the lawyer-client relationship in all aspects of their professional dealings including data, communications, but excluding surveillance.

Where lawyers are subjected to a threat to their physical safety related to their role, they are granted the same protections as any other person.

The Romanian Bar has reported their concerns towards the serious violation of lawyers' rights in Romania. The Romanian Bar, through several widely publicised cases, has revealed practices within the criminal proceedings which violate the free exercise of the legal profession and the principles of the rule of law. These practices are referring in particular to[16]:

- Identification of lawyers with their clients and, by extension, with the political affiliations of their clients or the crimes they are accused of.
- Accusing lawyers for "crimes of opinion", for the legal reasoning they took into account in support of their client's interests and for actions performed within the normal exercise of the profession.
- Violation of professional secrecy by summoning lawyers to hearings as witnesses, in cases against their clients and by abusive searches of their professional premises, from where documents are taken whether those documents are related or not to the investigation.
- The violation of the principle of equality of arms using the practice that became systemic of transmitting the case file to the prosecution office in order for it to assess the possibility of formulating and motivating the appeal, in the context in which this right is not equally recognised for the defence; also, there are no guarantees regarding the preservation of the integrity of the evidence in the file.
- Accusation of lawyers who have used in the practice of their profession in front of the authorities final and irrevocable judgments that have been considered erroneous by prosecutors.
- The delayed motivation of court decisions, so that the convicted person cannot exercise the remedies provided by law within a reasonable time and are prevented from appealing in front of international courts.

These practices, according to the Romanian Bar, have become or tend to become systemic, affect the free exercise of the legal profession, infringe the equality of arms, the professional secrecy and, consequently, the citizen's right to a fair trial.

Slovakia

According to the law, the Slovak Bar is independent from the executive or other branches of the state. The executive or other branches of the state do not exercise any supervisory role over the Bar, although the Minister of Justice may file a disciplinary complaint and the tariff is adopted by the Ministry of Justice in the form of a resolution.

Decisions concerning the authorisation to practise as a lawyer or to accede to the legal profession are taken by an independent authority on the basis of pre-defined criteria where decisions are subject to review by an independent and impartial judicial authority.

Lawyers' disciplinary offences are defined in a statute or code of ethics and professional conduct. The

[16] Annex no. 1 – Identifying the lawyers with their clients
Annex no. 2 – Accusing the lawyer of profession-specific activities, including certain legal reasoning
Annex no. 3 – Hearing the lawyers as witnesses in cases filed against their clients
Annex no. 4 – Prosecuting lawyers regarding activities performed in view of court rulings considered wrong by the prosecutors

body/authority initiating disciplinary proceedings against a lawyer and taking decisions on disciplinary measures is independent from the executive and the legislature. Such decisions can be reviewed by an independent court. Only the bar or a court can suspend the licence of a lawyer pending the outcome of criminal proceedings.

There are guarantees in place to respect the confidentiality of the lawyer-client relationship in all aspects of their professional dealings including data, communications, and surveillance, although when it comes to practise, there is often a conflict on interpretation of the laws and breaches of confidentiality occur.

Where lawyers are subjected to a threat to their physical safety related to their role, they are granted the same protections as any other person.

In Slovakia, the topic of the rule of law has formed a significant part of the discourse within the professional public and in society in general over the period considered. Various deficiencies in the procedural aspect of rule of law principles were strongly communicated by various representatives of professional bodies as well as individuals.

The Slovak Bar reported about the following aspects: irregularities in legislative procedure, level of legal certainty, questionable application of criminal law institutes and misunderstanding of the role of lawyers.

Legislative procedure

Despite the commitment of the government taken according to the national chapter of the European Commission's 2020 Rule of Law Report[17], the transparency in the legislative processes has not increased in 2020.

- Most of the working groups of experts from different institutions and professional bodies that had been established before by the previous government were not convened after March 2020 and consultations with stakeholders have paused.
- This was in contrast with the fact that many measures/reforms/amendments in the area of justice proposed were significant and radical in their scope (e.g. establishment of a supreme administrative court with new competences, several constitutional changes related to judicial bodies, annulment of the decision-making immunity of judges, judicial map reform, etc.).
- Moreover, several legislative procedures unrelated to the COVID-19 legislation were adopted in accelerated procedure in the context of emergency state (such as Legislative procedure related to the Act on the Judicial Council).
- We have seen a number of changes in fundamental legal frameworks made through last-minute amendments via MP proposals and without any technical discussion (such as a proposal to take away the competence to review constitutionality of constitutional acts from the Constitutional Court, proposal to disapply the principle of independence of the prosecutor's office).

These examples of legislative procedure are disproportionate in terms of transparency of the constitutional legislation and the principle of legal certainty in the broadest sense. Our intention is not to question the objective of the proposals that may have been legitimate but the certain lack of procedural aspects of rule of law that provide checks and balances. Additions to the text of the draft Constitutional Act in the advanced stage of the legislative process shows features of cabinet law-making. Involvement of stakeholders was initiated in the form of online consultations and presentation of legislative proposals only in early 2021 after a strong call from the professional public.

[17] European Commission 2020 Rule of law Slovakia Report:
Commitment of the SR: "The Government appointed in March 2020 has indicated that it aims to improve the stability and predictability of the regulatory framework through actions such as improving of planning and of transparency in the legislative process"
Recommendation of the European Commission: "There is a need to improve the legislative process by strengthening the involvement of stakeholders".

The reaction of the Slovak Bar on the reported issues was as follows:

- A statement[18] was issued in relation to the draft Constitutional Act that was extremely controversial for both constitutional-political and constitutional-legal reasons in the part which was to explicitly limit the power of the Constitutional Court of the Slovak Republic to review the compliance of constitutional laws with the Constitution. The amendment was taken without standard legislative procedure.
- A statement[19] was issued on the amendment of the Constitution of the Slovak Republic submitted in the National Council of the Slovak Republic proposing to change the independence of the position of the prosecutor's office. The amendment was proposed without standard legislative procedure.
- A statement[20] was issued on the necessity to motivate the decision to apply the shortened legislative procedure – Amendment to the Act on the Critical Infrastructure.

Legal certainty

The COVID-19 crisis undoubtedly places major demands on all institutions involved in decision-making. However, the measures should be taken in such a way so that a certain level of legal certainty is met. While it was understandable that taking decisions and preparing the related legislation and regulations might have been chaotic in the beginning due to a lack of experience and practice, later on it was expected that it would be improved. Unfortunately, even at the beginning of 2021 the regulations were repeatedly adopted at the very moment, in contrast with what was declared by the members of government, and natural and legal persons often had a few hours to study, interpret and prepare for the implementation of the regulation. The principle of predictability was not fulfilled.

The Slovak Bar also points out that it was not always clear how to proceed with the visits of clients in detention or prison. The online consultations were not put in place and access to prison was regularly conditioned on negative test or counsels were requested to limit their visits.

Application of criminal law institutes

In 2020, the Slovak Bar witnessed an active approach to the criminal prosecution of alleged perpetrators suspected of corruption and abuse of public office. Although the interest in investigating antisocial activities is legitimate, the practice of law enforcement authorities has become questionable in certain aspects:

- The length of detention and the application of collusive detention is perceived as excessive, and the principle of proportionality is threatened. It is no exception that collusive detention lasts longer than 12 months in Slovakia. The issues have been put under the spotlight in the last year as a number of public officials/members of the judiciary were put in detention, also due to the mental health state of several detainees. Collusive detention is justified if there is a suspicion that the person would affect witnesses and their testimony. In Slovakia, it is usual that collusive detention lasts until all witnesses give testimony at the trial.
- There are leaks from criminal files.
- The media are informed about some particular information before the addresses receive it.
- Arrests are performed under the media spotlight and with unnecessary force. The authorities apply a draconian approach that is not proportionate to the situation.

The reaction of the Slovak Bar was as follows:

- The Slovak Bar proposed to the Ministry of Justice concrete changes to the Criminal Code to ensure the respect of fundamental rights[21].

[18] https://www.sak.sk/web/sk/cms/news/form/list/form/row/372965/_event
[19] https://www.sak.sk/web/sk/cms/link/news/372755
[20] https://www.sak.sk/web/sk/cms/news/form/link/display/474972/_event
[21] https://www.sak.sk/web/sk/cms/news/form/link/display/446772/_event

- A statement upon the death of a lawyer in collusive detention due to COVID-19[22] and failure to provide care and inform the family.

Lack of understanding of the role of lawyers

The right to defence and the right to a lawyer of suspected and accused persons is still generally misunderstood. It should be noted that these fundamental rights are undermined significantly when public officials condemn lawyers for undertaking defence. Moreover, there are cases when it was understood that a lawyer was detained due to the fact that he provided legal services or defence counsel to persons suspected of committing crime. This is a long-lasting issue as the Slovak Bar identified 17 cases since 2007 when a defence counsel was co-accused and later released based on the conclusion that the lawyer was not part of the criminal activity while losing the possibility to continue with the defence at the same time. This may be seen as a pattern used to prevent the lawyer from providing legal services.

Examples:

- A lawyer has been kept in collusive detention for 14 months and the accusation is based on the fact that he provided defence to members of an organised crime group. The situation led to an initiative of individual lawyers "*Za právny štát*" (For the rule of law) who point out that the detention of their colleague is too prolonged and not well motivated.[23]
- While *de lege lata* there are guarantees to confidentiality during searches of offices, in practice this is often breached and there are also cases of searches without a written warrant.
- Media headlines associate lawyers with their clients.

The reaction of the Slovak Bar was the following:

- *An Amicus Curiae* in the case of a detained lawyer. The Slovak Bar called for the respect of the principle that a lawyer cannot be prosecuted for the provision of legal services.[24]
- A press release: "It may happen to anyone, whether legitimately or on the basis of an error or false accusation, that they will have to ask for the help of a lawyer or defence counsel. That is why we regret that their work is being disparaged – through statements from some politicians, but also, for example, media headlines and articles, where they are associated with former clients so that it creates the impression that they have participated in their activities[25].

Other rule of law Initiatives

The developments described above led to a strong response from the professional public at the end of 2020. With the initiative "*Za právny štát*" (For the rule of law), under the current circumstances, judges are afraid to take decisions and the right to a defence counsel is undermined (97 advocates, 19 other legal professionals).[26] The "Call for the rule of law" Initiative (signed by 123 judges, 233 advocates, 74 other legal professionals) focuses on a wider scope of reservations that include the lack of transparency in legislative proposals, the absence of discussion with the professional public, disproportionate limitations of fundamental rights, threats to the independence of the judiciary and lawyers, the weakened competence of the Constitutional Court, abuse of detention, disrespect of the presumption of innocence, the use of the testimony of collaborative witness, cooperation of criminal authorities with the media, etc.[27]

Slovenia

[22] https://www.sak.sk/web/sk/cms/news/form/link/display/551009/_event
[23] https://zapravnystat.sk/wp-content/uploads/2020/12/TS-IAPS%CC%8C-17.12.2020.pdf
[24] https://www.sak.sk/web/sk/cms/news/form/list/form/row/370420/_event)
[25] https://www.linkedin.com/feed/update/urn:li:activity:6762760547323670528
https://www.dalito.sk/ak-advokat-zastupuje-klienta-neznamena-to-ze-schvaluje-jeho-trestnu-cinnost/
[26] https://zapravnystat.sk/
https://zapravnystat.sk/wp-content/uploads/2020/12/TS-IAPS%CC%8C-17.12.2020.pdf
https://www.facebook.com/zapravnystat/
[27] https://pravnystat.eu/en/

According to the law, the Slovenian Bar is independent from the executive or other branches of the state. The executive or other branches of the state do not exercise any supervisory role over the Bar.

Decisions concerning the authorisation to practise as a lawyer or to accede to the legal profession are taken by an independent authority, which makes such decisions on the basis of pre-defined criteria where decisions are subject to review by an independent and impartial judicial authority.

Lawyers' disciplinary offences are defined in a statute or code of ethics and professional conduct. The body/authority initiating disciplinary proceedings against a lawyer and taking decisions on disciplinary measures is independent from the executive and the legislature. Disciplinary proceedings are conducted exclusively within the Bar itself. An appeal is possible against the decision of the Disciplinary Committee of first instance, which is considered by the Disciplinary Committee of second instance. There is no possibility of appeal against the decisions of the Disciplinary Committee of second instance.

Only the bar or a court can suspend the licence of a lawyer pending the outcome of criminal proceedings.

There are guarantees in place to respect the confidentiality of the lawyer-client relationship in all aspects of their professional dealings including data, communications, and surveillance. There are no exceptions in law or otherwise to this respect for professional secrecy.

Where lawyers are subjected to a threat to their physical safety related to their role, they are granted the same protections as any other person.

In 2020, the Slovenian Bar was informed about one case of a lawyer being threatened with death by an unknown person. The lawyer reported this matter to the police. In this regard, the Slovenian Bar also had a meeting with the Ministry of Justice.

Spain

The General Council of Spanish Lawyers (*Consejo General of the Abogacía Española*) is the representative, coordinating and senior executive body of the 83 local Bars in Spain.

According to the law, the Spanish Bar is independent from the executive or other branches of the state. The General Council of Spanish Bars and the local Bars are responsible for the management and organisation of the public free legal aid service, the financing of which corresponds either to the Ministry of Justice or to the Autonomous Communities to which the State has transferred powers in the field of justice. The Law and its implementing Regulations of 2003 establish a series of obligations to provide documentary evidence of the use of public funds to the Council and the Bars which, as recipients of such funds, are also subject to the legislation on subsidies and the general budget.

Decisions concerning the authorisation to practise as a lawyer or to accede to the legal profession are taken by an independent authority on the basis of pre-defined criteria where decisions are subject to review by an independent and impartial judicial authority.

Lawyers' disciplinary offences are defined in a statute or code of ethics and professional conduct. The body/authority initiating disciplinary proceedings against a lawyer and taking decisions on disciplinary measures is independent from the executive and the legislature. Such decisions can be reviewed by an independent court. Only the bar or a court can suspend the licence of a lawyer pending the outcome of criminal proceedings.

There are guarantees in place to respect the confidentiality of the lawyer-client relationship in all aspects of their professional dealings including data, communications, and surveillance. There are exceptions in law or otherwise to this respect for professional secrecy.

Where lawyers are subjected to a threat to their physical safety related to their role, they are granted a protection according to the Criminal Code.

The Spanish Bar will submit its own contribution to the Rule of Law report 2021 to the European Commission.

Sweden

The Swedish Bar is an independent and self-regulated organisation representing lawyers in Sweden.

According to the law, the Swedish Bar is independent from the executive or other branches of the state. The executive or other branches of the state do not exercise any supervisory role over the Bar.

Decisions concerning the authorisation to practise as a lawyer or to accede to the legal profession are taken by an independent authority on the basis of pre-defined criteria where decisions are subject to review by an independent and impartial judicial authority.

Lawyers' disciplinary offences are defined in a statute or code of ethics and professional conduct. The body/authority initiating disciplinary proceedings against a lawyer and taking decisions on disciplinary measures is independent from the executive and the legislature. A decision by the Disciplinary Committee is not subject to appeal by the complainant. A disbarred member may appeal directly to the Supreme Court. Other sanctions are not possible to appeal. The Chancellor of Justice may also appeal decisions by the Disciplinary Committee to the Supreme Court. Only the bar or a court can suspend the licence of a lawyer pending the outcome of criminal proceedings.

There are guarantees in place to respect the confidentiality of the lawyer-client relationship in all aspects of their professional dealings including data, communications, and surveillance. Although there is no regulation that specifically targets information in electronic form, the Swedish Bar's working group has made the assessment that data servers, mobile telephones and other carriers of electronic information may be considered protected from seizure, unless the client wants the object to be handed over to the police or prosecutor.

Attorneys, counsels or defence counsels may be heard as a witness concerning matters entrusted to them in the performance of their assignment only if the party gives consent. By derogation to certain provisions, there is an obligation to give evidence for attorneys and counsels, however not defence counsels, if the issue concerns an offence in respect of which a less severe penalty than imprisonment for two years is not prescribed.

Where lawyers are subjected to a threat to their physical safety related to their role, they are granted the same protections as any other person.

The Swedish Bar pointed out the national implementation of EU legislation affecting the core values of the legal profession, e.g. the legislation on AML, DAC 6 and other information obligations put on lawyers in relation to different state authorities referring to a tendency for legal reforms which violates the professional secrecy of lawyers, the independence of lawyers and the client loyalty.