

To His Excellency Mr Marek Kuchciński
Marszałek Sejmu
Rzeczypospolitej Polskiej
Wiejska 4/6/8
00-902 Warszawa
Polska

Brussels, 12th January 2016

Re: Draft law on amendments to the law on Police and other acts in connection with the judgment of the Polish Constitutional Tribunal from 30 July 2014.

Your Excellency,

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 32 member countries and 13 further associate and observer countries, and through them more than 1 million European lawyers.

The Polish National Council of Legal Advisers and the Polish Bar Council has informed the CCBE concerning the Polish draft law on amendments to the Act on Police and to other acts related to the state secret services, in particular, in relation to the regulation of data surveillance and data retention. These amendments are proposed as fulfilling the requirements laid down in the judgment of the Polish Constitutional Tribunal dated 30 July 2014. The particular concern of the CCBE is related to the provisions on access to information protected by the professional secrecy of advocates and legal advisers.

The CCBE attaches great importance to the maintenance of the rule of law. It considers that it is a fundamental element of the rule of law, including the right to a fair trial, the secrecy of a client's communications with his lawyers should be inviolable. This is a principle which is enshrined in article 6 of the European Convention on Human Rights and also in the Charter of Fundamental Rights of the European Union. Communications between clients and their lawyers also engage the fundamental right to respect for the privacy of correspondence under article 8 of the ECHR, and under the EU Charter. These fundamental rights are guaranteed by the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union.

The Court of Justice of the European Union has underlined the principle of confidentiality, stating that:

*“the principle of the protection against disclosure afforded to (...) communications between lawyer and client is based principally on a recognition of the very nature of the legal profession, in as much as it contributes towards the maintenance of the rule of law and that the rights of the defence must be respected”.*¹

Also the European Court of Human Rights (referred hereafter as “the Court”) has underlined in many cases that preserving free confidential communication between the client and the

¹ AM&S case (C-155/79), paragraphs 20 and 24

lawyer is a basic requirement for a fair trial and is protected by articles 6, 8 and 10 of the European Convention of Human Rights.²

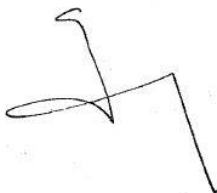
It is to be noted that, whereas the rights under articles 8 and 10 are qualified (the rights being exempted from interference save as such interference is in accordance with the law and necessary in a democratic society in the interests of national security, public safety, and the other purposes mentioned in those articles), the article 6 right is unqualified. Interference with the professional secrecy apparently attaching to lawyer-client communications may be permissible in relation to the so-called “iniquity exception”, which is to say where the lawyer is complicit with the client in the conduct of a criminal or other unlawful activity, though a proper analysis of this situation reveals it not to be an exception, but, rather, a situation which is not protected by legal professional secrecy in the first place.

From the jurisprudence of the Court arises that any limitation of the confidentiality may be of an exceptional character only, and surveillance as well as retention of data protected by professional secrecy must be subject to supervision by an independent judge who is not participating in the proceeding to which the surveillance is related.³ In order to provide true protection of lawyer-client communications, such supervision should be prior to and not posterior to the carrying out of the surveillance. These principles have been emphasised in other judgments, where the Court has described a number of criteria to be fulfilled in order to avoid the violation of the professional secrecy protected by the Convention.⁴ In addition the Court indicated that information covered by professional secrecy, including information obtained by surveillance, should not be used in criminal proceeding.⁵ This principle is directly set out in national laws of many member States of the European Union.

The Court underlines also, in several judgments, the essential principle of equality of arms in both civil and criminal proceedings. The minimum requirement in this regard is an equal access to the means of appeal to review decisions restricting professional secrecy; in criminal cases, such means should be granted both to the public prosecutor and to the defender.⁶

CCBE is concerned that the draft law does not fully respect these fundamental principles laid down in the Convention and in the jurisprudence of the Court, and calls upon the Sejm of the Republic of Poland to ensure that amendments to the Act on Police and other Acts respect and guarantee the fundamental rights of its citizens and are compatible with principles of international law binding Poland, including, in particular, the European Convention of Human Rights, the Charter of Fundamental Rights of the European Union, and the case law of the European Court of Human Rights and of the Court of Justice of the EU respectively.

Yours sincerely,



Michel Benichou
CCBE President

² For example, the judgments of the Court in *S v. Switzerland* (28 November 1991), *Foxley v. United Kingdom* (20 June 2000), *Campbell v. United Kingdom* (25 March 1992).

³ *Erdem v. Germany* (5 July 2001) paragraphs 47, 56, 67.

⁴ For example judgment of the Court in *Sérvulo v. Portugal* (3 September 2015).

⁵ *R.E v. United Kingdom* (27 October 2015)

⁶ Judgments in *Dombo Beheer v. The Netherlands* (27 October 1993), *Belziuk v. Poland* (25 March 1998), *Vermeulen v. Belgium* (20 February 1996).