



**CCBE PECO COMMITTEE COMMENTS ON
THE DRAFT UKRAINIAN LAW ON THE BAR
(NEW VERSIONS OF THE DRAFT LAWS ON THE BAR AND
THE PRACTICE OF THE LEGAL PROFESSION)**

Conseil des barreaux européens – Council of Bars and Law Societies of Europe

association internationale sans but lucratif

Avenue de la Joyeuse Entrée 1-5 – B 1040 Brussels – Belgium – Tel.+32 (0)2 234 65 10 – Fax.+32 (0)2 234 65 11/12 – E-mail ccbe@ccbe.eu – www.ccbe.eu

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THE DRAFT UKRAINIAN LAW ON THE BAR**
(new versions of the draft laws on the bar and the practice of the legal profession)

We have been able to examine two draft laws on the Ukrainian Bar: the one prepared by the MP Sergey Miroschnichenko and some of his colleagues, and the other prepared by the MP A.V. Portnov and two of his colleagues.

These two drafts contain several major differences but also many similar and even identical articles. Incidentally, the numbering of the articles is often similar or identical in both versions.

In our opinion, these two drafts should not raise any objections of principle from the CCBE. The creation of a national Ukrainian Bar would indeed constitute significant progress in a country in which there are currently only private lawyers' associations and no single body to represent the legal profession.

Both proposed texts are indeed subject to various criticisms, but it is not our role to criticize these texts as to the desirability of one provision or another or the possible misuses of some of the proposed mechanisms. Nor is it our role to opine on the similarities or differences with the way the legal profession is organized in our countries.

Our Ukrainian colleagues must take a stand on the text's main issues.

Our analysis has to limit itself to analyzing the logical coherence of the texts, any discernable inaccuracies, and the texts' compliance with the most commonly accepted solutions or trends in member countries of the CCBE.

Experts appointed by the CCBE presented their main observations in the conclusions and [recommendations](#) following the Round Table held in Kiev on September 26, 2008.

This time the aim is to make recommendations on several narrowly-defined topics.

Juristes-entrepreneurs and in-house counsel

The problem of in-house counsel and lawyers practising in a firm is intensely debated in Ukraine and many other countries.

We regret that neither of the two drafts has a specific article on the topic.

In the Portnov draft (article 5.7), the scope of lawyer activities excludes:

- *staff (in-house) legal counsels who work for legal entities or individuals and are employed (contracted) by legal entities or individual entrepreneurs, and*
- *human rights advocacy activities of non-governmental organisations.*

From that one may infer that in Miroschnichenko's draft these two activities are not excluded.

Further, the Portnov draft (article 8) provides that:

Prosecutors, investigators, judges, notaries, experts, patent agents, legal counsels and the following individuals may not engage in advokat's activity or acquire the advokat's status:

- (1) *individuals who work in a court, prosecution, notary, police, national security, government and administrative or local authorities or are in military or public service, that is individuals who perform activities incompatible with the advokat's status;*

The Miroschnichenko draft (article 9) excludes the simultaneous pursuit of the following activities.

- 1) *work in a court, a public prosecutor's office, internal affairs offices, the Security Service of Ukraine, in appointed positions in state authorities or local authorities;*
- 2) *military or alternative (non-military) service;*
- 3) *notarial activities;*
- 4) *work as a court expert.*

Both drafts (article 5) provide that only lawyers will provide professional representation in court.

Only advocates may represent and defend rights, freedoms and lawful interests of individuals and legal entities in Ukrainian courts on a regular and professional basis, unless otherwise stated in this Law.

The interim provisions (14) of Miroshnichenko's draft, but not those of Portnov's draft, allow the integration of those in-house counsels and legal advisers who make such a request:

The status of advocate may be acquired without taking the qualifying examination and undergoing a traineeship by a person who has a full higher education in law and at least three years' work experience in the field of law and who, at the time when this Law comes into force:

- 1) *has worked for the last two years in positions that require a full higher education in law in an association of advocates, with an advocate or in a commercial company whose main business is the provision of legal services;*
- 2) *has for the last two years systematically provided legal services as a private business operator, if this was his or her main activity.*

We note that there are many differences between the two drafts in this regard. Portnov's draft does not recognize in-house lawyers (*l'avocat en entreprise*) whereas Miroshnichenko's draft seems to allow them. The Miroshnichenko draft accepts a sort of combination of legal advisers/in-house counsels as it allows them to provisionally access the legal profession without examination. Portnov's draft totally omits them.

However, neither of the drafts proposes a solution to the continued coexistence of two "lawyer" professions: advocates and legal advisers. A divided, and thus inevitably weaker, legal profession will subsist. The Miroshnichenko draft allows the integration of a part of the legal adviser profession, but the problem will undoubtedly arise again a few years from now.

We would like to emphasize two points, in line with the recommendations made by the CCBE experts at the Kiev conference of September 26, 2008.

- *If the use of in-house counsels is permitted, it has to be organized by specific provisions. The CCBE has no position on whether it is useful to authorize the pursuit of the legal profession within a commercial firm but, if this solution is implemented, it has to be made, as the experts recommended, with « specific rules protecting and safeguarding the independence of the profession, avoidance of conflict of interest and the professional secrecy in the interest of the citizens ».*
- *The unity of the profession is a laudable goal as regards professionals, citizens and consumers. The experts have come to the conclusion that: "United we stand, divided we fall. For reasons of transparency and consumer protection, there should be one legal profession, with set rules, code of ethics and under the roof of a bar association."*

The existence of several similar professions can only confuse and weaken the protection of freedoms and the rule of law.

Conditions of access to the profession (Article 8)

A criminal conviction hinders access to the profession. The nature of the conviction and of the offence sanctioned in this way should be clearly stated. It is not necessarily desirable to include all criminal offences. Some offences could be minor or not dishonourable to a future lawyer.

Portnov's draft makes a distinction between intentional and non-intentional crimes, but neither considers the seriousness or age of the offence.

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Entry examination (M. article 12, P. article 11)

An outline of the examination is presented in the draft laws, but its precise terms are delegated to the qualification chamber (Portnov) or the Lawyer's Council (Miroshnichenko).

Law firms (M. article 19, P. article 20)

It would be desirable to create a form of limited-liability company, all the more so as there seems to be no mandatory insurance mechanism.

In addition to the three forms of practice accepted by both drafts, each draft also proposes to create one form of practice which does not exist in the other draft.

The Miroshnichenko draft speaks of a lawyers' college and the Portnov draft of a lawyers' board. Both are non-profit entities, but the first is individual and the second collective. It may be desirable for the future law to allow both types of entities.

Old age pension (M. article 34, P. article 39)

The difference between how long men and women contribute to their pensions is clearly discriminatory and would be contrary to EU law if Ukraine were to join the European Union. It seems the Portnov draft does not make such a distinction (see article 39).

Periodic training (M. article 35.5 P. article 36.5)

Both drafts speak only in general terms, and do not really tackle this issue.

Seeing as there is a trend in many bars in developing countries to establish minimum standards as to periodic and compulsory training, it would be reasonable to provide more accurate obligations concerning the training of Ukrainian lawyers (see the [CCBE Model Scheme for Continuing Professional Training](#) of November 25, 2006).

For instance, one could envision 10 compulsory hours of training per year.

Suspension of the right to practice (M. article 38.3 P. article 40.3)

The Miroshnichenko draft considers the case of a final judicial decision. It would be advisable to specify the type of decision in question. Disbarment or any criminal conviction?

The Portnov draft is more accurate since it mentions unintentional crimes.

However, in both cases, one wonders about the desirability of an automatic suspension without any evaluation of the seriousness of the offence.

Discipline (articles 43 - 49)

The disciplinary procedure should be more precise. In particular, who, apart from the client, is entitled to refer a matter to the Disciplinary Board? For instance, is another lawyer entitled to do so?

A distinction should also be made between the investigative body, prosecutorial body and judgement body. It would be desirable if the same person did not hold the three posts. What rights does a lawyer subject to disciplinary proceedings have? The drafts mention several principles, but they could be more accurate.

Quorum, quotas (M. articles 53 and 58, P. articles 55 and 57)

What happens when the quorum is not reached? The Georgian Bar experienced serious difficulties in convening its assembly because of quorum requirements which turned out to be too high.

It would be advisable to create a mechanism preventing the impossibility of convening the assembly in cases of lawyer absenteeism. For instance, the holding of a second meeting with a reduced quorum.

The number of representatives per group of lawyers (quota) could perhaps be settled by law, rather than left to the judgement of the Bar's governing bodies.

As regards the holding of extraordinary meetings on demand of a part of the lawyers, the requested number seems too high (one third of all lawyers). It seems this figure, acceptable in small bars, would be very hard to reach when several thousand lawyers are involved.

Portnov's draft establishes different thresholds depending on whether the bar has more or less than 1 000 members. But it does not say what would happen if it were impossible to obtain the required majority because of poor attendance.

Moreover, article 58 (3) of Portnov's draft includes a provision requiring representatives to vote in line with their electors (a kind of binding mandate). This provision seems difficult to implement in practice.

The frequency of meetings is an issue worth mentioning. For instance, the Portnov draft (article 55) establishes multiple assignments for the Congress of Ukrainian lawyers, but only provides for one meeting every two years. Miroshnichenko's draft provides for one meeting a year. It seems essential for the most important bodies to meet regularly.

Registration of the national association and regional associations (M. articles 62 and 63)

A registration procedure of the various lawyers' institutions with the Ukrainian authorities is established. This procedure gives the state the opportunity to reject the registration or withdraw it.

Moreover, this procedure gives the impression that the Bar is nothing but a private association. It would be advisable for the law to create the bar associations directly, thus endowing them with legal personality upon creation without any registration requirement.

There is no such provision in Portnov's draft.

Notifications of meetings (M. article 71, P. article)

Notification by registered mail seems very cumbersome. Are we going to notify thousands of lawyers by registered letter? It would be advisable to stick to electronic notifications or posting and publication.

Public-liability insurance

The drafts do not really tackle the issue of lawyer professional liability insurance. It would be desirable to establish an insurance – either individual or collective – but compulsory (see the CCBE [Minimum standards for European Lawyers' Professional Indemnity Insurance](#) of December 2004).

In the interest of protecting clients and their lawyers, provisions on handling of funds would also be desirable.

Foreign lawyers (articles 72-77)

It is envisioned that foreign lawyers will be able to practice in Ukraine and associate with Ukrainian lawyers. This constitutes a positive development, even if their practice is restricted to their domestic law. Their being able to practice international law has not been contemplated.

Another positive development is that they will be able to participate in the activities of regional and national lawyer organisations. However, they will only be authorized to give advisory opinions. Would it not have been reasonable to provide that they could participate in collective decision-making or at least some of its aspects?

One provision establishes civil liability for low quality services. Is this not the case for all Ukrainian lawyers, and more generally every profession? It is difficult to understand why a specific provision for

foreigners would be necessary. Would it not be easier to say that foreign lawyers are subject to the same civil liability as Ukrainian lawyers?

It seems the provisions on foreign lawyers only deal with their permanent establishment. What if a lawyer temporarily moves to Ukraine? For instance, a foreign lawyer who goes to Ukraine for two days to negotiate a contract. It would be useful to specify his or her status and say that he/she is not required to obtain a practice permit.

As for the practice of Ukrainian lawyers abroad, it would be useful to specify whether they can register in other bars and whether they can become members of law bodies established abroad. This should be distinguished from the problems involving foreign bodies established in Ukraine.