

## CCBE position on the draft Convention on the protection of the profession of lawyer

16/02/2023

### EXECUTIVE SUMMARY

With this position paper, the CCBE sets out some of the most important drafting proposals to be included in the future legal instrument on the protection of the profession of lawyer. This position paper has been drafted in view of the upcoming discussions within the Committee of experts on the protection of lawyers (CJ-AV), which is expected to finalise the draft Convention by the end of 2023. The following elements are being outlined in this position paper:

- the definition of “lawyer” and the scope of the future Convention;
- the definition of “professional associations”;
- the need to protect the lawyer-client confidentiality principle, which requires a clear definition of “confidentiality” and a comprehensive provision protecting this right and duty of the lawyer;
- the need for both an effective monitoring mechanism of general compliance with the obligations created by the Convention, and a second mechanism to examine individual complaints of non-compliance with those obligations.

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 46 countries and, through them, more than 1 million European lawyers.

Since its very initiation in 2017, the CCBE has strongly supported the work carried out by the Council of Europe on the establishment of a new legal instrument on the protection of the profession of lawyer, i.e. a European Convention on the protection of the profession of lawyer. The CCBE strongly believes that a binding legal instrument is needed in order to respond to the growing attacks and challenges faced by the legal profession which directly hinder the respect for the rule of law and access to justice for the lawyers’ clients. Soft law instruments, such as the Committee of Ministers’ Recommendation R(2000)21 and the United Basic Principles on the Role of Lawyers, have not measured up to this task. Furthermore, the CCBE supports the idea that this new binding legal instrument should also be open to non-Member States to the Council of Europe.

In January 2022, the Committee of Ministers of the Council of Europe established a [Committee of experts on the protection of lawyers \(CJ-AV\)](#). The Committee is tasked with the elaboration of a legal instrument aimed at strengthening the protection of the profession of lawyer and the right to practice

the profession without prejudice or restraint. It will report to the Committee of Ministers through the European Committee on Legal Co-operation (CDCJ).

As an observer within the CJ-AV and the CDCJ, the CCBE is actively contributing to the work of the CJ-AV during and in-between its meetings. In this context, since the start of the work of the CJ-AV, the CCBE has sent some initial drafting proposals. In this position paper, the CCBE sets out some of the most important drafting proposals for this new legal instrument on the protection of the profession of lawyer.

As for the **definition of “lawyer”** and the **scope** of the protection under this new instrument, the CCBE believes that the scope of this new legal instrument should be limited to the regulated profession of lawyer. In this regard, the CCBE proposes that “for the purposes of the Convention the term “lawyer” shall mean a natural person who belongs to a professional association and who under national law is entitled to practise law in such a capacity”. This definition identifies those who should benefit individually from the protection of the Convention. Additionally, the CCBE believes that the same protection should be given to any person who is or was admitted to the relevant professional association as a lawyer and who has suffered an infringement of rights under this convention because of that person's legitimate activities as a lawyer. This protection should also be given to any person who has the necessary qualifications to become a lawyer but has not been admitted to the relevant professional association and who claims that the reasons for refusal of admission included any legitimate activities which, had they been carried out by such person as a lawyer, would have amounted to an infringement of the rights accorded by this convention.

Regarding the **definition of “professional association”**, the CCBE proposes that “for the purposes of this Convention the term “professional association” shall mean any professional representative body of lawyers to which some or all lawyers may belong and which has the purpose of promoting or protecting lawyers' interests and/or which has some responsibility in the field of regulating the practice of law”.

As regards the protection of **the lawyer-client confidentiality principle**, the CCBE is convinced that the term “confidentiality” should be defined in the Convention. This definition is essential, since confidentiality is one of the core principles of the practice of the profession of lawyer and of the rule of law, and constitutes the basis of the relationship of trust between lawyers and their clients. Also, from a legal and statutory point of view, there is nothing to prevent confidentiality from being defined in the same way as other definitions in an international instrument. Even though confidentiality may be a difficult concept to explain, the importance of such a definition requires its inclusion in the definitions chapter. Indeed, due to the existence of different concepts pertaining to the principle of lawyer-client confidentiality, whose application varies between jurisdictions, unless the term is defined in the Convention it may be interpreted inconsistently, undermining the effectiveness of the Convention. The explanatory report should then further explain what is meant by this concept in different legal traditions.

Therefore, the CCBE proposes that "confidentiality" should be defined as follows: “For the purposes of this Convention, the term "confidentiality" refers both to the right and also to the duty of the lawyer to keep clients' matters confidential and/or to respect professional secrecy, as applicable under national laws, regulations and/or professional deontological rules in each jurisdiction”.

Furthermore, in order to ensure the adequate protection of the lawyer-client confidentiality principle, the provision on the protection of professional rights should read as follows: “Parties shall ensure the confidentiality of all data and communications exchanged between lawyers and clients, prospective clients and, where applicable with third parties, and all documents drawn up by lawyers, whatever

form these may take, for the purpose of giving or receiving legal advice and/or representation in proceedings before a court, tribunal or other body”.

Concerning the implementation of the future Convention, the CCBE believes that the implementation of binding commitments first requires the effective monitoring of general compliance with the obligations created by the Convention.

Additionally, the CCBE is convinced that the future Convention can only be effectively implemented if a second mechanism is provided to examine individual complaints of non-compliance with those obligations. For this second mechanism, the CCBE proposes to build on the petition’s mechanism provided for in article 71 of the PACE rule.

The **implementation mechanism** should include a Convention Committee responsible for regularly monitoring and communicating about the national implementation of the Convention. This Committee should have the competence to make recommendations to the Committee of Ministers. These recommendations should not be subject to unanimity, in order to avoid watering down the effective monitoring of the Convention. Additionally, consideration should be given, where appropriate, to the possibility of on-site visits, the possible hearing of experts. There should also be a possibility of requesting national, European and other regional or international lawyers' organisations to submit reports and/or recommendations to the Convention Committee, as well as considering such if not specifically requested. A state reporting mechanism may also be included.

Moreover, once the Convention has been signed and ratified it will be possible for lawyers to invoke it before the national courts of many jurisdictions.

In order for the Convention to provide a remedy for individual complaints, lawyers and professional associations need a mechanism whereby they can complain about individual fact situations of non-compliance with obligations under this Convention. One mechanism that could be explored is that of Rule 71 of the PACE Rules of Procedure, which provides for an individual petitions procedure to PACE. This mechanism has seldom been used and is little known but it presents the advantage that it already exists, is free for the petitioner. It would also immediately exclude as inadmissible petitions which could be made as complaints to the ECtHR or which relate to pending cases before the ECtHR or cases already determined by the ECtHR. Another advantage of building on an existing mechanism is that it could limit the additional costs for its implementation.

Finally, in order for these proposed implementation systems to ensure the effective application of the Convention, the latter should impose substantive obligations using language that directly guarantees individually enforceable rights, such as that States “shall ensure” the relevant rights.

To conclude, the CCBE reiterates its strong support of the work carried out by the Council of Europe on the establishment of a new legal instrument on the protection of the profession of lawyer, and it will continue contributing to the drafting process and make sure that the voice and practical experience of the European profession of lawyer is reflected in this new instrument.