



CCBE President's speech for the 9th Congress of Portuguese lawyers

14 July 2023 – Fátima, Portugal



Panagiotis Perakis CCBE President, speech of 14 July 2023 in the 9th Congresso dos advogados Portugueses

Regarding the legislative reform in Portugal affecting the lawyer's profession

Dear Colleagues,

I am proud to address you here today in my capacity as President of the Council of Bars and Law Societies of Europe (CCBE). The CCBE is recognised as the official voice of the European legal profession, having as members the national bars of 46 countries, among them, of course, as full members, of all EU member states. I am here today representing all your European colleagues, from everywhere across Europe.

The CCBE is aware of the legislative reform in Portugal affecting the lawyer's profession with regard to the adoption of the new "Law on Professional Public Associations". The CCBE recognizes the serious implications which the legislative changes will have on the legal profession and the administration of justice in Portugal. In this regard, I sent, as CCBE President, a letter to the President of the Republic and the Prime Minister of Portugal, on the 19th of June.

The CCBE is concerned that the current legislative reform and proposed changes to the Statutes of the Bar Association will have direct implications for citizens and are being taken without sufficient consideration for the role of Bars and lawyers – such a role being essential in any democratic society.

According to our assessment, the new law would introduce important changes in the way legal services can be delivered which would have a negative impact on citizens.

In our letter we have highlighted that **registered lawyers are bound by strong professional and ethical rules**, including the observance and assurance of the professional secrecy in the relationship with the client. As the Court of Justice of the European Union has explained, the professional secrecy is not a right or a privilege of the lawyers, it protects the rights of their clients, and, more precisely, the citizens' fundamental right of access to justice. The professional secrecy is an **obligation** of the lawyers, serving the rule of law itself. In addition, registered lawyers, in many countries, like Portugal, must possess professional indemnity insurance.

These requirements offer important guarantees to the recipients of legal services. By allowing non-qualified lawyers, and even people with no law degree, to perform legal acts, the intended reform would not provide citizens with the necessary guarantees in relation to the exercise of their right of access to justice.

And there are much more we could say in this respect, in relation to the rights of the citizens and their right to access to a lawyer: what guarantee could really the citizens have of the quality of the services of someone who became lawyer with just a **12 months period of online training**? I believe it is very questionable.

Furthermore, the CCBE also noted, with concern, that a number of the proposed measures are directly interfering with the organisation and supervision of the Bar, which raises some fundamental questions regarding the preservation of its independence and rule of law principles. In our letter we referred to a number of important recognised International and

European standards on the role of Bars and lawyers in protecting the rule of law and fundamental rights. In most Member States, the Bar authorities are entrusted with the responsibility of adopting regulations designed to ensure the proper practice of the profession. Some of the essential rules adopted for that purpose are, in particular, the duty to act for clients in complete independence and in their sole interest, the duty to avoid all risk of conflict of interest, and the duty to observe strict professional secrecy. Thus, they require of members of the Bar that they should be in a situation of independence vis-à-vis the public authorities, other operators and third parties, by whom they must never be influenced. They must furnish, in that respect, guarantees that all steps taken in a case are taken in the sole interest of the client.

Without a guarantee of independence it is impossible for lawyers to fulfil their role. And **only the independence of the Bar Associations can guarantee the independence of the lawyers**, which is a prerequisite of the rule of law in every country.

And the independence of the Bars can be guaranteed only by their self-regulation.

This is why the independence of lawyers and Bars is officially considered as an indicator of the efficiency of the justice system and, even more, of the rule of law in every member-state. The European Commission investigates and assesses every year the level of independence of lawyers, as well as of the Bars (as it does for the judges too) and publishes the results on every country in the annual EU Justice Scoreboard and in the annual Rule of Law report. As you know, the importance of those two tools is very high, mainly of the Rule of Law report, under the provisions of article 2 of the Treaty on the functioning of the EU, with serious consequences, as it is obvious with the examples of Poland and Hungary. It would be an unfortunate development seeing Portugal in a similar situation.

The CCBE contributes in a regular basis for both (EU Justice Scoreboard and Rule of law report), providing information which is included in these two reports.

We also note a number of problematic issues regarding **proportionality**.

While there are circumstances when changes to aspects of the legal profession and legal services may be necessary and justified, it is questionable whether the proposed reform in the present case meets the requirement of proportionality with regard to the intended objectives.

In this context, the public interest objective regarding the protection of consumers of legal services and safeguarding of the proper administration of justice is of fundamental importance.

Consequently, we expressed our concerns regarding the question of whether the political and economic aspects of this reform provides sufficient consideration of the important consequences for access to justice and citizens' rights.

At this point, I would like to mention that according the Proportionality Test Directive (Directive (EU) 2018/958) on a proportionality test before adoption of new regulation of professions, it is the Member state's duty to provide sufficient evidence of the proportionality test in an objective and independent manner. In particular, Member States should carry out **an objective analysis**, taking into account the specific circumstances of that Member State, that demonstrates that there are genuine risks for the achievement of public interest objectives (see Recital 13 and Article 4 of the Directive). I understand that this necessary -legally required by the Directive- objective analysis, this impact assessment, does not exist in the actual Portuguese reform.

And, to avoid misunderstandings, the objective analysis that European law requires is not a fast provision regarding just a few economic -and secondary, I would add- aspects of the new legislation on the exercise of the profession of lawyer, by a body who does not have the necessary experience and the understanding of what the role of lawyers in the justice system and for the rule of law is. An appropriate objective analysis should take into consideration first of all the consequences of the reform on the access to justice rights of the citizens, on the function of the justice system and on the rule of law itself in Portugal. Such an analysis, such an impact assessment, as I said before, we understand that does not exist. In addition, a Competition Authority could never be in the position to conduct appropriately such a crucial impact assessment regarding the legal profession; it lacks the necessary skills and knowledges.

Dear colleagues, according the European Parliament's Resolution on the legal professions and the general interest in the functioning of legal systems of 23 March 2006, any reform of the legal professions **may have far-reaching consequences, going beyond competition law into the field of freedom, security and justice and, more broadly, into the protection of the rule of law in the European Union.** Therefore, the CCBE fears that such reform could create an unprecedented case in the European Union, and the proportionality of the proposed measures is highly questionable. This is the case if the detrimental effects of such reform are not properly evidenced, or if the views of the Bar Association are being disregarded.

This is why the CCBE also highlighted the need for **proper consultation with the Portuguese Bar Association** with respect to the current draft amending its Statute. We understand that a very limited period of time was provided for the Bar to respond to the draft amending their Statute, after the adoption of the new Law on Professional Public Associations. This creates the impression that the draft has been developed in a time period which has not accounted for a proper analysis of its impact, especially on the field of administration of justice.

Due to the fundamental importance of a well-functioning justice system in a democratic society, it is our belief that Bar Associations should be guaranteed a proper consultation in a timely and effective manner on any proposals that will impact on the professional activities of lawyers and the regulation of the profession.

The CCBE regrets that a governmental proposal with such an impact on the access to justice would disregard, in such an extended way, the proper involvement of the Portuguese Bar Association which is also entrusted with the mission to protect citizens.

In light of the above, the CCBE has urged the Portuguese government to:

- suspend the implementation of the draft law affecting the lawyer's profession in Portugal insofar as the access to justice and rights of citizens are being concerned.
- conduct a proper and independent impact assessment of the effect of the intended reform in the provision of legal services and for the administration of justice in Portugal, and
- ensure the proper involvement of the main actors of the intended reform.

Two weeks ago, on the 30 of June, we had our CCBE first Plenary Session of the year, in Chania, Greece. I had invited Fernanda, your President, to be present, in order to present the issue to the representatives of the national Bars of all the European countries who were present. She did so and I want to thank her for accepting my invitation and presenting with such an understandable and clear way all the aspects of the Portuguese legislative reform.

After her presentation, during the Plenary Session, all CCBE delegations expressed their extreme concern regarding those legislative changes in Portugal. They expressed their support to the *Ordem dos Advogados* and specifically requested that a further letter be sent to reiterate this support and to highlight once again the serious implications mentioned in our letter of 19 June to the Portuguese government. In this regard, as CCBE President, I already sent a further letter (on Wednesday 12 July) to the Portuguese government reiterating our earlier requests.

Dear colleagues,

The fundamental role of lawyers in the society is recognized with no doubts, long time ago. It would be enough to refer only to the Council of Europe Recommendation Nr. R (2000) 21 on the freedom of exercise of the profession of lawyer of 25 October 2000 and to the United Nations Basic Principles on the Role of Lawyers of 14 December 1990. According the United Nations and the Council of Europe, an independent legal profession is a critical component of a well-functioning judiciary and cornerstone of a democratic society based on the rule of law.

This special position of lawyers, in view also of the core values of the legal profession, **can justify specific limitations on the freedom to provide services and the freedom of establishment, limitations that do not apply to other service providers.**

The liberal democracy that the European law describes and requires for all member-states, as European law is interpreted by the Court of Justice of the European Union, is a system of check and balances, unifying democracy, fundamental rights and the rule of law. In this system the role of lawyers is irreplaceable. And in this system, there are limits for all. In our European liberal democracy there are limits -legal limits- of what majorities can do.

Dear friends, dear colleagues, the CCBE usually represents European Bars and Law Societies in their common interests before European and other international institutions. It regularly acts as a liaison between its members and the European institutions, international organisations, and other legal organisations around the world. But there are times that we need to make representations before national governments. **This is one of those times.**

As CCBE we will continue to do our main regular work -among others I want to mention at this point the CCBE's very important initiative and ongoing efforts with the Council of Europe for the adoption of a European Convention on the protection of the lawyers' profession.

But I commit that the CCBE will always support the efforts of our members to protect the profession, the quality of legal services and the rule of law before national authorities every time is needed. To defend our independence -Bars are and should be independent, in a democratic society they do not need supervision-, to defend the citizens' rights, because their rights are finally at stake.

This is the reason of my presence today here, in your congress.

Thank you for your time.

Panagiotis Perakis

President of the CCBE