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From: Presidency
To: Permanent Representatives Committee/Council
Subject: Access to a lawyer and rule of law
- Presidency discussion paper

With a view to the meeting of the Justice and Home Affairs Council on 3 and 4 March 2022, delegations will find attached the above document.

Lawyers play an important role in protecting the rule of law and judicial independence, while respecting the separation of powers and fundamental rights. In their duties of advising, representing and providing legal assistance for their clients, they defend the rights and freedoms of individuals, plead before the courts and thus contribute to accessible, intelligible, fair and humane justice.

In a state governed by the rule of law, lawyers constitute not only a vital link between individuals and their justice system, but also a sturdy bulwark against any form of arbitrary power.

As underlined by the European Commission's 2021 Rule of Law Report, an effective justice system requires that lawyers be free to pursue their activities of advising and representing their clients, and bar associations play an important role in helping to guarantee lawyers' independence and professional integrity.

That is why lawyers must carry out their duties with certain guarantees vis-à-vis the public authorities, economic powers, the judiciary, their colleagues, their clients and even their own interests. In that regard, the bar associations within which lawyers are grouped and organised help to ensure their members' independence and professional integrity and provide them with an ethical framework for their work.

The rules governing the legal profession are now primarily enacted at national level. Indeed, there is no universal definition of a lawyer within the EU; rather, it varies from one Member State to another. However, both within and outside the EU, there are calls among lawyers to denounce attacks targeting their profession.

Worldwide, some 2 500 lawyers were murdered, arrested or threatened in the exercise of their activities between 2010 and 2020¹. The Council of Bars and Law Societies of Europe (CCBE) notes that on the European continent, where respect for the rule of law remains generally high, attacks on lawyers still occur and take the form of threats, breaches of confidentiality of the client-lawyer relationship, identification of lawyers with their clients and sometimes attempts to hinder the exercise of the profession.

Moreover, attacks on the legal profession are not only targeted at individual lawyers, but may also be aimed at the profession as a whole, whether directly or indirectly.

In general, wherever the rule of law is undermined and judicial independence is attacked, lawyers find themselves in a particularly vulnerable position. It is in that context that the Commission is placing increasing emphasis in its annual Rule of Law Report on examining the situation of lawyers in the various Member States. Given the significant role which they play in ensuring the functioning of the judicial system, in guaranteeing access to justice for their fellow citizens and in protecting fundamental rights and freedoms, lawyers are one of the most targeted professions whenever the rule of law comes under threat.

The 2021 EU Justice Scoreboard² stresses that bar associations play an important role in guaranteeing lawyers' independence and points out that European standards³ require, amongst other things, freedom of exercise of the profession of lawyer and the independence of the bar associations, and lay down the basic principles of disciplinary proceedings against lawyers.

¹ CCBE response of 6 December 2021 to the UN Special Rapporteur on the Independence of Judges and Lawyers' consultation for the preparation of its forthcoming report on protection of lawyers.
https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/HUMAN_RIGHTS/HR_Position_papers/EN_HR_20211206_CCBE-response-to-the-UN-Special-Rapporteur-on-the-Independence-of-Judges-and-Lawyers.pdf.

² See in particular Figure 58 ('Independence of Bars and lawyers').

³ Recommendation No. R(2000)21 of the Committee of Ministers of the Council of Europe.

In terms of binding instruments, Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms establishes the right to a fair trial, including the right to be represented by a defence counsel. Article 47 of the European Convention for the Protection of Human Rights and Fundamental Freedoms establishes the right to an effective remedy and to a fair trial, and guarantees everyone the possibility of being advised, defended and represented.

As regards soft law instruments, the 1990 United Nations Havana principles⁴ establish basic principles relating to the role of the Bar. Council of Europe Recommendation No. R (2000)21 on the freedom of exercise of the profession of lawyer⁵ calls on the States Parties to ensure, amongst other things, the freedom of opinion and expression of lawyers, respect for professional secrecy and the right to protection against all forms of pressure, sanctions or threats.

Within the European Union, the legal profession has been regulated from the perspective of the freedom to provide services. Directive 77/249/EEC of 22 March 1977⁶ and Directive 98/5/EC of 16 February 1998⁷ accordingly laid down the rules and conditions for a lawyer to practise, on an ad hoc or permanent basis, in a Member State other than that in which the qualification was obtained.

⁴ [Basic Principles on the Role of Lawyers](#), adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

⁵ [Recommendation No. R\(2000\)21](#) of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer, adopted on 25 October 2000.

⁶ [Council Directive 77/249/EEC](#) of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services.

⁷ [Directive 98/5/EC](#) of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained.

The exercise of the profession of lawyer has also been regulated indirectly in secondary legislation in criminal matters, such as Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings⁸, or Directive 2013/48/EU of 22 October 2013 on the right of access to a lawyer,⁹ Article 4 of which establishes the confidentiality of communication between lawyers and their clients.

The European Parliament, in its resolution of 23 March 2006 on the legal professions and the general interest in the functioning of legal systems, already had occasion to ‘*recognise[s] fully the crucial role played by the legal professions in a democratic society to guarantee respect for fundamental rights, the rule of law and security in the application of the law, both when lawyers represent and defend clients in court and when they are giving their clients legal advice*’.

However, there are no specific rules governing the status or ethics of the legal profession at EU level¹⁰. In that regard, the Court of Justice of the European Union has consistently held that, in the absence of specific European rules, ‘*each Member State is in principle free to regulate the exercise of the legal profession in its territory*¹¹’, as the rules applicable to that profession may differ greatly from one Member State to another.

While this lack of a common corpus offers considerable flexibility to case law, it prevents any reference to common standards in cases where the independence of lawyers, taken as a whole or individually, is compromised or at the very least contested.

⁸ [Directive 2012/13/EU](#) of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.

⁹ [Directive 2013/48/EU](#) of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

¹⁰ In 2021, the Council of Bars and Law Societies of Europe adopted a ‘Model Code of Conduct for European Lawyers’.

¹¹ CJEU, 19 February 2002, *Wouters et al. v Algemene Raad van de Nederlandse Orde van Advocaten*, [Case C-309/99](#), paragraph 99.

In that respect, discussions could be launched on a common set of rules for the profession of lawyer, as an essential element in ensuring the proper functioning of the judicial system within the European Union. Work along those lines is ongoing within the Council of Europe. The European Committee on Legal Cooperation (CDCJ) is currently examining the feasibility of a new European legal instrument on the profession of lawyer. Whether the European Union should also address this issue deserves consideration. The specific requirements relating to the quality of judicial decisions in order to implement the principle of mutual trust which characterises the European judicial area could provide justification for reflection by the Union as to whether and how it could adopt, in the medium to long term, a body of specific rules in this area.

In order to ensure joint progress on the means necessary to protect the profession, and with a view to safeguarding and promoting the rule of law, ministers will be invited to answer the following questions:

- 1) Do you consider, in the light of your national situation, that a European statute for lawyers, guaranteeing independent practice of the profession, could help to ensure respect for the rule of law?
- 2) What are the challenges that lawyers face in the EU in their efforts to defend the rule of law, and how could the EU help to address them?