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Support to the implementation of the judicial reform in Ukraine
Підтримка впровадженню судової реформи в Україні

Opinion

On the Draft Law on amending the Law of Ukraine "On the Bar and Practice of Law" and other related legislative acts of Ukraine

Prepared by the Council of Europe's project "Support to the implementation of the judicial refrom in Ukraine" on the basis of analysi of the Council of Europe experts
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LIST OF ABBREVIATIONS

CoE	Council of Europe
CCBE	Council of Bars and Law Societies in Europe
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
JRC	Judicial Reform Council
UN	United Nations Organisation
UNBA	Ukrainian National Bar Association

I. Introduction

1. By letter of 28 July 2017, the Coordinator of the Judicial Reform Council (JRC) requested that the Council of Europe (CoE) provide an expert Opinon on the compliance of the draft law of Ukraine "*On amending the Law of Ukraine "On the Bar and Practice of Law*" (hereafter in this report "the Draft") with the CoE standards. The CoE invited two consultants, Mr Vahe Grigoryan and Mr Rytis Jokubauskas (hereafter in this report "the experts") to provide an assessment of the Draft. In December 2017, the Opinion *On the Draft Law on amending the Law of Ukraine "On the Bar and Practice of Law" and other related legislative acts of Ukraine* was submitted to the Ukrainian authorities.

2. The comments and observations of the stakeholders were noted while drafting this report. Meetings and discussions between the stakeholders and the experts took place in October 2017 and December 2017 in Kyiv. During these mutually fruitful discussions the preliminary Opinion of the experts was discussed with the Ukrainian authorities.

3. Following the submission of the Draft to the Ukrainian Parliament by the President of Ukraine, the Coordinator of the JRC requested by letter of 10 September 2018 the Council of Europe to update the text of the preliminary Opinion so as to reflect the changes introduced in the Draft. The Opinion on the Draft Law of Ukraine "*On amending the Law of Ukraine "On the Bar and Practice of Law*" has therefore been updated by CoE expert Mr Rytis Jokubauskas in September-October 2018.

4. The experts were asked to make an assessment of the Draft on its compliance with the CoE standards and recommendations and European practice with regard to the organisational structure and functioning of the bar, in particular Article 6 of the ECHR and Recommendation Rec(2000)21 of the Committee of Ministers to the Member States on the Freedom of exercise of the profession of lawyer ('the CoE Recommendation')

5. The assessment of the experts is based on the English translation of the text of the Draft provided by the CoE.

6. This assessment was carried out in the framework of the CoE project "*Support to the implementation of the judicial reform in Ukraine*". In October-November 2018 the project updated the initial assessment in light of the changes introduced to the Draft by the authorities. The current opinion incorporates the latest input by the CoE experts.

7. In the text of the Opinion the words *attorney, advocate* and *lawyer* are used as synonyms and do not imply other jurists.

8. Given that the work on the Draft is ongoing at the moment of releasing of this Opinion, the experts are not addressing at this stage the style, the format or other

editorial issues concerning the Draft, considering them as a matter of editorial review.

9. The Opinion deals with those provisions of the Draft that raise potential issues in respect of their compatibility with the applicable European standards.

10. The advice and expertise provided in the present Opinion relate to the technical aspects of the reform of the legal profession. No issue or question raised during the discussions with the stakeholders related to political considerations for or against this reform or a particular element of it will be commented on by the experts.

II. Applicable standards

11. In Ukraine, the profession of advocate (barrister/counsel/attorney/solicitor/lawyer) was established many centuries ago, and during the nineteen-nineties, the legislator put in place a new framework for the exercise of the lawyer's profession. The profession became one of the pillars of the national justice system as a result of the increasing focus of societies and nations on the importance of respecting and protecting fundamental human rights.

12. The quality of justice depends directly on the work done by lawyers. The European Court of Human Rights has established the criteria for a fair trial as protected by Art.6 of the European Convention on Human Rights.

13. The Consultative Council of European Judges (CCJE) prepared in 2013 an Opinion on the relations between judges and lawyers based on the principle that that relationship has an impact on, and can help improve, quality and efficiency of justice. The Opinion takes account of the United Nations Basic Principles on the Independence of the Judiciary (1985), the UN Basic Principles on the Role of Lawyers (1990), the Bangalore Principles of Judicial Conduct (2002) and the CCBE Code of Conduct for European Lawyers and the Charter of Core Principles of the European Legal Profession.

14. The Venice Commission examined these issues in its 2016 Rule of Law Checklist where it says that *"the Bar plays a fundamental role in assisting the judicial system. It is therefore crucial that it is organised so as to ensure its independence and proper functioning. This implies that legislation provides for the main features of its independence and that access to the Bar is sufficiently open to make the right to legal counsel effective. Effective and fair criminal and disciplinary proceedings are necessary to ensure the independence and impartiality of the lawyers."*

15. A memorandum prepared by the Council of Europe's Parliamentary Assembly in 2017 on "The case for drafting a European Convention on the profession of lawyer" notes that *"Lawyers play an important role throughout individuals' interaction with the authorities in relation to the exercise and protection of their rights. This is particularly so within the judicial system. As the European Court of*

Human Rights has recognised, "the specific situation of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. They therefore play a key role in ensuring that the courts, whose mission is fundamental in a State based on the rule of law, enjoy public confidence. However, for members of the public to have confidence in the administration of justice they must have confidence in the ability of the legal profession to provide effective representation. Lawyers are protagonists in the justice system, directly involved in its functioning and in the defence of a party." The role played by lawyers in ensuring effective protection of individual rights extends beyond the judicial system. They provide legal advice prior to judicial proceedings and in alternative dispute resolution proceedings, when important issues may be resolved without recourse to often over-burdened domestic judicial systems; indeed, independent expert legal advice may discourage unrealistic clients from pursuing non-meritorious cases through the judicial system."

16. In addition to these standards on the role of lawyers there in, sources of soft-law and advisory/guiding opinion level documents also provide standards to be followed in regulating the profession nationally. Such instruments as:

- Recommendation Rec(2000)21 of the Committee of Ministers to the Member States on the Freedom of exercise of the profession of lawyer ('the CoE Recommendation'),
- Universal standards on the role of bar associations, such as the UN Basic Principles on the Role of Lawyers, endorsed by the United Nations General Assembly in December 1990 ('UN Principles'),

are also valuable sources of guidance for national legislators and policy makers.

17. Other documents are also relevant as sources of guidance :

- Declaration of Perugia on Professional Principles of Conduct of Bars and Law Societies of the European Community of 16 July 1977, approved by the Advisory Committee of Bars and Law Societies of the European Community ('The declaration of Perugia');

- Code of Conduct for European Lawyers adopted in plenary on 28 October 1998 and subsequently amended in plenary session of CCBE on 19 May 2006 in Oponto;

- Recommendation No. (81)7 of the Committee of Ministers of the CoE of 14 May 1981 on measures facilitating access to justice;

- Recommendation No. (86)12 of the Committee of Ministers of the CoE concerning measures to prevent and reduce the excessive workload in the courts.

18. The combination of all of the principles and standards included in these documents constitute the notion of "CoE standards" applicable to each of the areas discussed below.

III. General remarks

19. The Draft represents a step forward as compared to the Law of Ukraine On the Bar and Practice of Law in force since 2012.

20. The main novelties of the Draft are the creation of new possibilities for advocates to practice law under a labour contract and as part of the civil service, as well as a further restructuring of the self-government bodies within the legal profession. The experts wish to commend the overall very positive and constructive approach of the authorities during the discussions and meetings and their readiness to discuss in detail the complex issues that arose while preparing the Draft. The experts are grateful for such a fruitful contribution on the part of the authorities.

21. Apart from the issues noted in the comments and the recommendations in this report, the experts note that the provisions of this Draft are in compliance with the CoE standards for the regulation and protection of the legal profession, and in some areas provide even a higher level of protection for lawyers for the exercise of their professional duties and the self-regulation and self-governance of their community.

22. However, despite the Draft's overall compliance with the CoE standards for the regulation of the profession, certain improvements to the Draft should be considered. This report thus focuses on the key issues which the experts considered calling for improvement.

IV. Comments by Article

A. General provisions

Article 3

23. The Draft sets out that the objective of the bar (advocacy, practising law) is to promote the implementation of the rule of law in Ukraine and to ensure the right of everyone to receive professional legal assistance. Such an objective is in full compliance with the CoE standards.

Article 4

24. Article 4 sets out the principles for the practice of law. The three main principles that constitute the core of legal profession are independence, loyalty and confidentiality. All three principles are in the Draft, followed by the principles of the rule of law, avoidance of conflict of interests, integrity and others. These principles for the practice of law comply with the CoE standards.

B. Acquiring the right to practice law and Organisational Forms of Practicing Law (Section II)

Article 6

25. The status of attorney may be obtained by an individual who has higher legal education, knows the official language, has experience in the field of law and has passed an examination. Such requirements to become an attorney comply with the CoE standards.

Article 7

26. The list of occupations that are incompatible with those of attorney is set out in Article 7. In some European countries, the list of compatible occupations is provided at the same time (e.g. Paragraph 2 of Article 115 of Decree 91-1197, France). Incompatible occupations tend to be ones that threaten an attorney's independence, e.g. "*an occupation which is inconsistent with the profession of a lawyer, particularly his/her status as an independent agent in the administration of justice, or which is likely to undermine confidence in the lawyer's independence*" (Paragraph 8 of Article 7, Federal Lawyers Act, Germany), "*a profession which is contrary to the requirements for the professional ethics of advocates or the principle of independence*" (subparagraph 7 Paragraph 1 of Article 36 of Law on the Bar, Estonia).

27. Other occupations, especially if they provide a substantial income for the advocate, would be a direct threat to independence. The comments of the CCBE on the Charter of Core Principles states that:

> … A lawyer needs to be free - politically, economically and intellectually - in pursuing his or her activities of advising and representing the client. This means that the lawyer must be independent of the state and other powerful interests, and must not allow his or her independence to be compromised by improper pressure from business associates.

28. The drafters may wish to consider the option of setting out the list of incompatible occupations in open-ended form (e.g. "*and any other occupation that is incompatible with attorney's independence*").

29. See also the comments in respect of Articles 28-29.

Article 9

30. The Draft sets out that the qualification exam consists in verifying the level of professional training of the person who wishes to become an attorney, in establishing that his/her command of the necessary theoretical knowledge in the field of law and awareness of the rules of professional conduct, as well as practical experience and skills, correspond to the level that is necessary to practice law. The qualification exam for a person who intends to become an attorney consists of an anonymous written test.

31. These aims and type of examination envisaged correspond to the practice of other European countries and comply with the CoE standards.

Article 11

32. Part 4 sets out that the certificate and ID card of the attorney is not limited by the age of the person and are valid indefinitely. The purpose of the ID card is to identify the person. There may be cases where advocates practice for more than 50 years. People's physical appearances change over time, and it may become impossible to identify a person from a picture that is 25 years old. The law does not need to go into specifics about the term of validity of the ID card – the Bar Association can decide that. However, the bar association may wish to consider introducing a fixed term of validity of the ID cards.

Articles 12-14

33. An advocate may practice as an individual practitioner, within an attorneys' office or an attorneys' company. These different forms comply with European standards.

Article 16

34. In many European countries, trainees are subject to disciplinarily liability. It is an important aspect of their preparation for the activity of advocate. As trainees cannot be disbarred, their disciplinary procedure would require separate disciplinary sanctions, including, but not only, the discontinuation of their traineeship.

C. Rights, Duties and Guarantees of a Lawyer (Section III)

Article 20

35. Insuring professional liability is indicated as an advocate's right in Article 20 Paragraph 1 sub-paragraph 15 of the Draft. The CCBE Code of Conduct for European Lawyers states that: *"3.9.1. Lawyers shall be insured against civil legal liability arising out of their legal practice to an extent which is reasonable having regard to the nature and extent of the risks incurred by their professional activities".* The CCBE has adopted Minimum standards for European Lawyers' Professional Indemnity Insurance, which states that: "*There should be mandatory requirements for all lawyers to be insured against civil (or public) legal liability arising out of their legal practice*".

36. The concept of professional liability insurance is absent in the current Law on the Bar and it would appear that the vast majority of Ukrainian advocates do not insure their professional liability. As a result, professional liability insurance as a product is practically non-existent on the insurance market in Ukraine.

37. Given this situation, the introduction of voluntary professional liability insurance as a step towards mandatory professional liability insurance in the near future is a positive development. Nevertheless, in order to promote professional liability insurance and create conditions for the development of such insurance products, and in order to make this provision really applicable, the Bar Council should be given the authority to adopt recommendations of professional liability insurance. Without general recommendations for professional liability insurance (minimum insurance cover per case and year, "acts-committed" or "claims-made" principle, etc.) insurance companies would not be able to develop such non-individual insurance products and the practical application of this provision would be impeded in practice.

Article 22

38. Paragraph 1 of this Article envisages the possibility of a lawyer to provide legal assistance simultaneously to two or more clients whose interests are mutually controversial or are likely to be controversial, provided the clients jointly authorise the attorney or explicitly agree to such a situation after the lawyer has explained to them the principle of avoidance of conflicts of interests.

39. It is very important that the Draft includes certain provisions for the regulation of this important obligation of a lawyer.

40. A conflict of interest is dangerous situations that may lead to compromising the interest of the client and the independence of the lawyer. Even if the clients would agree to face such a situation, it is still an occasion which the lawyer must find a solution to avoid, in the best interests of the client. The professional life of a lawyer is full of highly complex situations and relations, including those envisaged in this provision. However, there should be highly compelling reasons for "legitimising" a professional conduct that would lay the lawyer open to a real or apparent conflict of interest vis-à-vis one or more clients.

41. The Charter of Core Principles of the European Legal Profession, adopted by the CCBE on 24 November 2006[1], contains a list of ten core principles common to the national and international rules regulating the legal profession, namely: independence, trust and personal integrity, confidentiality, respect for the rules of other bars and law societies, incompatible occupations, personal publicity, the client's interests and the limitation of lawyer's liability towards the client. The Charter was also referred to by the ECtHR in cases where the professional duties and liabilities of lawyers were at issue in questions brought before the Court.[2]

[1] See the Charter at: http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DEONTOLOGY/DEON_CoC/EN_DEON_CoC.pdf

[2] See for example, *Morice v. France* [GC], app. No. 29369/10, § 134

42. The experts recommend that these principles be used as the basis for formulating rules concerning such a highly complex issue as the obligation of lawyers to avoid conflicts of interests.

43. The experts would draw attention to paragraph 3.2 of the Charter of Core Principles of the European Legal Profession, which reads as (emphasis added):

> 3.2.1. A lawyer **may not** advise, represent or act on behalf of two or more clients in the same matter if there is a conflict, or a significant risk of a conflict, between the interests of those clients.
>
> 3.2.2. A lawyer **must** cease to act for both or all of the clients concerned when a conflict of interests arises between those clients and also whenever there is a risk of a breach of confidence or where the lawyer's independence may be impaired.
>
> 3.2.3. A lawyer **must** also refrain from acting for a new client if there is a risk of breach of a confidence entrusted to the lawyer by a former client or if the knowledge which the lawyer possesses of the affairs of the former client would give an undue advantage to the new client.

44. The experts advise considering the benefit of the precisely designed wording of these paragraphs of the Charter of Core Principles of the European Legal Profession.

45. Certain jurisdictions provide some discretion for clients to give their consent to the engagement of a lawyer in situations where a conflict of interest is at least possible. Should the Ukrainian legislature opt for such an approach, there should nevertheless be certain limitations for lawyers to take on cases where such a risk exists. It must be made clear that the lawyer cannot represent or advise a client in a case of a new client, where the lawyer's knowledge of the former client's activity and business would favour the new client.

46. It is also worth noting that the obligation to prevent a conflict of interest extends to lawyers "*practising in associations*"[3]. The application of obligations in paragraphs 3.2.1 to 3.2.3 of the Charter of Core Principles of the European Legal Profession to lawyers practising in attorney companies is a well-established approach of CCBE member associations. The experts recommend considering including these limitations in the Draft as part of Article 22.

47. In paragraph 3(1), the term "*opposite*" limits the list of persons who in reality may have conflicting interests. While the term "*opposite party*" has a certain procedural definition within the legal vocabulary, the list of persons who may have a conflicting interest in proceedings is not limited only to the "*opposite party*". The term "*a party to the proceeding with conflicting interest*" would fit better with the purpose of this Article.

48. Similarly, in paragraph 4 of the same Article, the restriction imposed on a lawyer to avoid or prevent a conflict of interest concerns only the situations where the

[3] See the paragraph 3.2.4 of the Charter of Core Principles of the European Legal Profession

lawyer is restricted to represent "*a case against the other client*" (who had trusted or otherwise made available information to the lawyer while benefitting from latter's services). Such a restriction does not cover all possible situations of conflict of interest, which the lawyer is under a professional obligation to avoid or prevent. It is not only the party against whom the case is in legal terms introduced that may have conflicting interest with the client[4]. The term "*against*" in the procedural context has a very precise meaning and does not include relations where, for example, the party to the proceedings is not procedurally against the client, but may have a conflicting interest. The experts would encourage the drafters to clarify these issues in the Draft.

Article 24

49. The strengthening of the guarantees for the practice of law is one of the major positive developments in the Draft. The current law does not provide sufficient guarantees against interferences with the practice of law. For example, searches of law offices or seizure of advocates' documents is possible without any safeguards or procedural requirements in respect of any person, including the lawyer's client. Such a situation risks reducing the principle of confidentiality to nothing more than a declaration.

50. The Draft provides many safeguards protecting confidential information. Information, items (things), and documents obtained in the course of the implementation of measures for criminal proceedings, operative and search measures or investigative (search) actions in relation to an attorney cannot be used as evidence for the prosecution of his/her client. Such a development of guarantees of the practice of law in the Draft is above the minimum and basic requirements as provide for by the CoE standards.

D. Legal Profession and Other types of Activities (Section IV)

Article 27

51. See also the comments in respect of Articles 7, 28-30.

Article 28

52. The work of advocates under a labour contract, i.e. in a situation of employment, is allowed in some European countries. Advocates may work under a labour contract either in law firms (moderate approach) or any companies (liberal approach), with the aim of providing legal services to the employer. Any other employment possibilities are usually limited to academic and scientific work.

[4] For example, two or more victims in the criminal procedure, who are not procedural opponents ("against" each other), but may have conflicting interests in the proceedings. Or, the third party to the civil litigation, who will not necessarily have coinciding and common interests with the party to the litigation, while not being procedurally against the client of the lawyer.

53. In some European countries, an advocate may be employed by other advocates or in a law firm. Such employment might have some specificity (e.g. the ability to render legal services only on behalf of the advocate-employer or law firm).

54. There are very few European countries that allow advocates to be employed by non-advocate(s). Such cases exist for historical reasons and the practice is not expanding (see the decision the European Court of Justice the *Akzo Nobel* case of 14 September 2010 where it stated that:

> It follows that the requirement of independence means the absence of any employment relationship between the lawyer and his client so that legal professional privilege does not cover exchanges within a company or group with in-house lawyers. <…> the concept of the independence of lawyers is determined not only positively, that is by reference to professional ethical obligations, but also negatively, by the absence of an employment relationship. An in-house lawyer, despite his enrolment with a Bar or Law Society and the professional ethical obligations to which he is, as a result, subject, does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his client. Consequently, an in-house lawyer is less able to deal effectively with any conflicts between his professional obligations and the aims of his client.

55. The experts understand the willingness of the legislator to introduce such form of activity, especially in the light of the Constitutional amendments regarding the right of representation in court. These provisions do not contradict the existing European practice, although the overall diminishing trend in Europe as regards the practice of advocates under labour contract should be noted.

56. The experts recommend that the Draft state clearly, listing relevant subparagraphs, the disciplinary sanctions applicable to an advocate working under a labour agreement (contract) other than with an attorney bureau or attorney company. See also the comments in respect of Article 30.

57. It should also be mentioned that the rights and guarantees, disciplinary liability and consequences for advocates working under a labour agreement (contract) with an attorney bureau or an attorney company is very different from those who work under labour agreement (contract) with other persons. With this in mind, the experts consider that dividing the provisions into two Articles would be preferable.

Article 29

58. The possibility of combining advocacy with the status as an official representative of a commercial enterprise or other legal entity needs some consideration.

59. In many European countries, lawyers serve as board members for various types of legal persons or they head NGOs. The possibility for attorneys to be the official representative of a commercial enterprise or other legal entity does not contradict European standards *per se*. But concerns may arise if such position is paid.

60. Even if gaining the status of official representative of commercial enterprise or other legal entity is not related to a labour contract, the financial dependency of the advocate from the legal person (the *de facto* employer), places the advocate in position similar to that of advocates working under labour contracts. Moreover, advocates are not forbidden from providing legal services to business partners, clients, competitors, owners and subsidiaries of commercial enterprises or other legal entities where they hold the status of an official representative. This creates additional risks of conflicts of interests. Therefore additional safeguards need to be introduced, if not in the Draft, then at least in secondary legislation.

Article 30

61. Article 30 deals with the status of the attorney as a civil servant at the national level and the level of local self-government. Most European countries do not allow lawyers to hold public office (e.g. Austria, Czech Republic, Estonia, Finland, Lithuania, Slovak Republic, Slovenia, Spain). The possibility to keep the status of a lawyer while in public service in other European countries is very rare and due to the different procedures in place for gaining/suspending the status of a lawyer. Lawyers in public service are subject to various restrictions which in general mean they cannot practice law (e.g. Germany).

62. The Draft sets out that attorneys working within the civil service must suspend their legal practice. Such a requirement follows the practice of other European countries.

63. Given that the Draft prescribes that an advocate working in the civil service is obliged to give up temporarily the right to practice law, the way of introducing and discontinuing the manner of suspension of that right is important.

64. As regards disciplinary liability, any use of termination of the right to practice law as a disciplinary sanction for lawyers whose right to practice has already been temporarily suspended to enable them to work within the civil service would make no immediate sense. Presumably all other sanctions are applicable, but this leaves some room for interpretation. The law should be as clear as possible, especially when it comes to such sensitive aspects as disciplinary liability. Therefore, the experts recommend to state clearly (listing relevant subparagraphs) what disciplinary sanctions are applicable for an advocate employed within the civil service.

65. The participation in the work of attorneys' self-governing bodies includes the right to vote, the right to receive information, the right to be elected, and other rights. The provision envisaging the loss of the right for attorneys employed within the civil service to be elected to the bodies of self-governance or to participate in the work of bodies of attorneys' self-governance might be misinterpreted to suggest that advocates employed within the civil service have the right to vote. The wording of this provision could be improved by adding one

word: "… and has no right to *otherwise* participate in the work of bodies of attorneys' self-government …"

66. The experts understand the motivation on the part of the legislator in introducing such a form of activity for attorneys. The introduction of a status of attorneys that is different from that of a practising attorney could be a way forward in clarifying these provisions of the Draft

67. See also the comments in respect of Articles 28-29.

A. Suspension and Termination of the Right to Practice Law (Section VI)

Article 36-37

68. Paragraph 2(1) of this Article provides that disciplinary authorities may suspend an attorney from the legal profession for "*re-occurrence of misconduct within a year*". This does not completely solve the existing problem of excessive discretion of the disciplinary bodies regarding such a strict sanction as suspension of the attorney's practice. It is recommended that the term "*misconduct*" be given a specific definition to prevent situations in which a minor (even if repeated) breach of the law or the code of ethics/conduct of Bar members, would expose lawyers to harsh sanctions in the form of the suspension of their law license. This could raise issues under Article 1 of the Protocol to the ECHR (see paragraphs in this section below). It should be noted, however, that the current law does not contain any prevention mechanisms of such an abuse and several cases have been reported in which even harsher sanction (such as termination of the right to practice law) were applied to attorneys for seemingly dubious reasons[5].

69. The ECtHR's continuous position in its well-established case law in this field, starting from *Döring v. Germany*,[6] is that the right relied on by the applicant could be likened to the right property and the peaceful enjoyment of possessions protected in Article 1 of Protocol No. 1 to the ECHR. The Court found that Mr Döring, by setting up his law practice and running it successfully, had built up a clientèle; this had in many respects the nature of a private right and constituted an asset, and hence a possession within the meaning of the first sentence of Article 1. References were also made to professions such as tax consultants or accountants.[7] In *Döring v. Germany*, the disbarment of the applicant, who had to close down his law practice, indisputably led to the loss of his clientele and income. The Court consequently found that there had been an interference with his right to the peaceful enjoyment of his possessions. This was a measure to

[5] The shadow report "The Advocacy of Ukraine: Lessons of the First Years of Self-Government" of 19 September 2018, prepared by the NGO "Laboratory of Legislative Initiatives" in cooperation with the NGO "Tomorrow's Lawyer" at the request of the Verkhovna Rada of Ukraine Committee on Legal Reform and Justice, §4.9. (page 53)

[6] *Döring v. Germany* (dec.), app. No. 37595/97, 9 November 1999

[7] See, *mutatis mutandis*, the *Van Marle and Others v. the Netherlands* judgment of 26 June 1986, § 41; the *H. v. Belgium* judgment of 30 November 1987, § 47(b).

control the use of his property under the second paragraph of Article 1 of Protocol No. 1. The Court has concluded similarly in other cases.[8]

70. In the examination of an application from Germany in *Wendenburg and Others v. Germany*[9], the Court similarly reiterated that (emphasis added):

> Referring to its previous case law, the Court notes that insofar as it concerns a loss of future income, the applicants' complaint falls outside the scope of Article 1 of Protocol No. 1, which is not applicable to future earnings, but only to existing possessions, that is to say income once it has been earned or where an enforceable claim to it exists […] **The applicability of Article 1 however extends to law practices and their clientele, as these are entities of a certain worth that have in many respects the nature of a private right and thus constitute assets and therefore possessions within the meaning of the first sentence of Article 1**

71. In the judgment of *Buzescu v. Romania*[10] , the Court developed further its position and, referring to its previous case law, noted that the applicability of Article 1 of Protocol No. 1 extends to law practices and their goodwill, as these are entities of a certain worth that have in many respects the nature of private rights, and thus constitute assets, being possessions within the meaning of the Article.

72. In *Lederer v. Germany*[11], the Court accepted that the applicant's removal from the Bar Council roll, forcing him to close down his legal practice, led to the loss of part of his clientele. There had therefore been an interference with his right to the peaceful enjoyment of his possessions. The interference amounted to a measure to control the use of property, to be considered under the second paragraph of Article 1 of Protocol No. 1.

73. Since a violation of the Rules of professional conduct is already a ground for the suspension of the right to practice law under Article 36 of the Draft, therefore, given the vague content of paragraph 2(1) of Article 36, it is recommended that this provision be deleted.

74. It is also recommended that a clear provision about the need to observe the principle of proportionality when imposing sanctions of suspension or termination of the right to practice law be included in Articles 36 and 37 of the Draft. Given the context of difficulties of the transitional period of the reform of legal profession in Ukraine, such a provision may serve as a deterrent against any arbitrary application of these two harsh disciplinary sanctions.

75. As regards examples of other European jurisdictions concerning the grounds for suspension and termination of the right to practice law, and the grounds on which these sanctions may be imposed, the experts find it appropriate to refer to the

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[8] *Döring v. Germany* (dec.), app. No. 37595/97, 9 November 1999
[9] *Wendenburg and Others v. Germany* (dec.), app. No. 71630/01, 6 February 2003
[10] *Buzescu v. Romania*, app. No. 61302/00, judgment of 24 May 2005, § 81
[11] *Lederer v. Germany* (dec.), app. No. 6213/03, 22 May 2006

well-established and developed practice of the Solicitors Disciplinary Tribunal of England and Wales[12].

76. There are at least 2 important factors to take into the account in this regard:

a) The legislature should not describe in detail the grounds for suspension or termination of practice. Nor it is the task of the legislature to list the elements or factors, existence of which is necessary for ordering such a harsh sanction as termination or suspension of the practice;

b) The disciplinary authorities and the courts should enjoy a certain margin of discretion in establishing the practice of application of disciplinary sanctions with a view to various factors, such as (but not limited to) the seriousness of the misconduct, the culpability of the lawyer involved as respondent, the gravity of harm caused by the misconduct, and any aggravating and mitigating factors.

77. These issues are described in detail in "The Solicitors (Disciplinary Proceedings) Rules 2007" of England and Wales.[13]

78. The experts recommend considering the solutions and criteria outlined from this jurisdiction when dealing with such steps as suspension and termination of the right to practice law practice while bearing in mind of course the specifics of Ukrainian reality and context.

E. Lawyers' Discipline (Section VII)

79. It is a well-established practice of the ECtHR that disciplinary proceedings against a lawyer, in as much as they may result in either suspension or termination of the right to practice law, fall within the civil limb of Article 6(1) of ECHR. The ECtHR has in particular established in this regard, that:[14]

> The Court's case-law indicates that disciplinary proceedings in which the right to continue to exercise a profession is at stake give rise to "*contestations*" (disputes) over civil rights and obligations[…]. It is apparent that during the proceedings in issue, in this case, the applicant was at risk of being prevented from continuing to exercise his profession as a member of the Bar Association, if the penalty of expulsion had been applied.
>
> The Court recalls that Article 6 applies only to proceedings concerning "determination" of a "civil right". The outcome of the proceedings must, in principle, be directly decisive for the right in question […]

[12] See about the scopes of jurisdiction and practice of this tribunal at: http://www.solicitorstribunal.org.uk/about-us

[13] See the factors and criteria to be established for imposing sanctions in the paragraphs 16-20. The sanctions, such as fixed term suspension, indefinite suspension and striking off the roll (termination of practice) are provided in the paragraphs 41-44. See the "The Solicitors (Disciplinary Proceedings) Rules 2007" at: http://www.solicitorstribunal.org.uk/sites/default/files-sdt/Content/documents/uksi_20073588_en.pdf

[14] *A. v. Finland* (dec.), app. No. 44998/98, 8 January 2004

> However, for the applicability of Article 6 not only the concrete outcome of the proceedings is of importance. The Court reiterates that it is clear from its settled case-law that disciplinary proceedings in which, as in the instant case, the right to continue to practise a profession is at stake give rise to litigation over "civil rights" within the meaning of Article 6 § 1. The procedural guarantees of Article 6 § 1 apply to all litigants falling into this category […]

80. Thus, the guarantees foreseen under Article 6(1) of the ECHR must apply to the proceedings before the disciplinary authorities. It is to be welcomed that the authors of the Draft have provided in its text the guarantees for maintenance of the impartiality and independence of the disciplinary body. Still, these guarantees could be strengthened further.

F. Attorneys' Self-governance (Section VIII). Financial Support of Attorneys' Self-governance (Section IX)

Articles 49-72.

81. The law should set out the main rules of advocates' self-governance, but it should be limited to the regulation of the main aspects. Some self-governance issues are regulated in great detail. Such detailed regulation can be justified due to significant changes to the structure of self-governance. However, following the period of transition necessary to complete the Bar reform, it is important to progress towards a deregulation of the self-governance system.

Article 51

82. Attorneys' self-government is carried out through the Ukrainian National Bar Association (UNBA) and regional chambers of attorneys. A new element of the self-governance of advocates is being created – regional chambers. This is usual European practice.

Article 54

83. Article 54 sets out the system of national bodies of attorneys' self-governance, which consists of national and regional bodies. The national bodies of attorneys' self-governance are the Congress of attorneys, the Bar Council, the High Qualification Commission of the Bar, the High Disciplinary Commission of the Bar, and the High Audit Commission of the Bar. Regional bodies of attorneys' self-governance are a Conference of Attorneys of the Region, the Regional Bar Council, qualification commissions of the Bar, disciplinary commissions of the Bar, and regional Bar audit commissions. Such a system of attorneys' self-governance fully complies with European standards.

Articles 58, 59, 61 and 62

84. Currently, qualification and disciplinary commissions at regional and national level exist as separate legal entities. All these commissions function in two chambers – qualification and disciplinary. Although such a system is not *per se* contrary to European standards, no other European country has in place a structure of self-governance bodies in such a format.

85. The Draft law introduces separate (regional) qualification commissions of the Bar, (regional) disciplinary commissions of the Bar, a (national) Higher Qualification Commission of the Bar and a (national) Higher Disciplinary Commission of the Bar. National and regional attorneys' self-governance bodies do not have the status of a legal person and operate within the framework of the National Bar Association of Ukraine and the regional chambers of attorneys, respectively. Such a structure of self-government bodies is in line with best European practice.

Article 65.

86. Para 3 of Article 65 on limiting mandates to two consecutive terms seems to repeat the provisions of Para 3 of Article 49.

G. The Practice of Law in Ukraine by the Attorney of a Foreign State. Features of the Status of Attorney of a Foreign State (Section X).

Article 73

87. The Draft regulates the provision of legal services by foreign attorneys on a permanent basis. But there are no provisions on providing legal services on a temporary basis by foreign attorneys. It is therefore not clear whether foreign lawyers are allowed to provide legal services on a temporary basis in so-called *fly-in fly-out* cases. Requiring foreign attorneys to register for the provision of legal services on a permanent basis, but allowing foreign lawyers to provide legal services on a temporary basis without registration, would comply with European standards. Therefore the experts suggest including the provision of legal services by foreign lawyers on a temporary basis in the Draft law.

Transitional provisions

88. The transitional provisions stipulate that persons who have acquired the status of advocate and the right to practice law prior to the entry into force of this law retain the status of advocate and the right to practice law, except for those persons in respect of whom a decision was adopted on the termination of their right to practice. Certificates of the right to practice law issued prior to the entry into force of this law have the same force as a certificate issued under the new law. There is no requirement that they be replaced. Such provisions follow the best European standards.

89. The congresses of advocates of regions have to convene within four months, and the Congress of Advocates of Ukraine has to convene within six months, from the day of entry into force of the new law. All congresses have to adopt the decisions required by the new law. Such timeframes and requirements are adequate and reasonable.

V. Conclusions

90. The Draft law of Ukraine "*On amending the Law of Ukraine "On the Bar and Practice of Law*" is coherent and, in general, complies with the European standards.

91. The most positive development of the Draft is in the field of advocates' rights and guarantees, including but not limited to the participation of advocates in any investigative or procedural actions in which the client is entitled to participate; unhindered access to the premises of the court, the prosecutor's office, the police, the ministry of internal affairs, and law enforcement agencies; identified access to all state registries; a strengthened protection of information as part of the attorney-client privilege, including non-disclosure even with the client's permission, and use of any technical equipment without special authorisation.

92. The Draft develops the structure of the Bar self-governing bodies, adopting the model similar to the bar associations in Bulgaria, Germany, Hungary, Poland and other countries. The regional bodies of bar self-governance are merged into regional bar chambers. The disciplinary and qualification bodies are no longer in one separate legal entity but instead become bodies of the bar association according to the usual European practice. Although some development of additional legislation regarding the self-government of advocates can be expected, this Draft concludes the main processes of establishing a sound system of a unified bar association in Ukraine, a process that started with the Law on the Bar and Practice of Law in 2012. These steps, particularly the creation of regional bar chambers and providing those chambers with powers which, if responsibly exercised, could be an important counterweight to the existing heavily centralised system, are to be welcomed. It is important to note that only proper application of these provisions in practice will bring necessary changes.

93. The Draft also improves the definition of conflicts of interests, increases the number of forms of practicing law, and expands the number of disciplinary sanctions. With this change, the authorities aim to achieve a more balanced approach to the disciplinary liability and reduce the risks of any abuse by disciplinary bodies.

94. The experts also welcome the provisions of the draft law on the system of admission to the bar. Independent and automated testing of professional knowledge and skills can in principle reduce the risks of corruption. Likewise, the discontinuation of the requirement that interns pay for their internships may provide for a fairer access to the bar. The Experts note, however, that, as for all other findings in respect of the Draft, the law is an important starting point. Real change will have to be assessed on the basis of its implementation in practice.

95. Nonetheless, the present report makes some recommendations to improve the Draft, *inter alia*:

- setting out a list of incompatible occupations in open-ended form (e.g. "*and any other occupation that is incompatible with attorneys' independence*");
- reconsidering the inclusion of the provision of Article 11 that the ID card of an attorney of Ukraine valid indefinitely;
- introducing disciplinary liability for trainees;
- stating clearly, listing relevant subparagraphs, which disciplinary sanctions are applicable for an advocate working under a labour agreement (contract) other than with an attorney bureau or attorney company and for an advocate employed within the civil service;
- including relevant parts of the Charter of Core Principles of the European Legal Profession as regards the regulation of conflicts of interest;
- giving the UNBA the authority to adopt recommendations on professional liability insurance for advocates;
- considering including the provision of legal services by foreign lawyers on a temporary basis.