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COMMENTS

LAW ON THE BAR AND ADVOCATES' ACTIVITY (2017)

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Nove Pravosuddya Justice Sector Reform Program (New Justice)

Contracting Officer's Representative: Oleksandr Piskun, Democracy Project Management Specialist, Office of Democracy and Governance

Development Objective 1: More Participatory, Transparent and Accountable Government Processes

Author: Luba Zimanova Beardsley, Bar Governance Expert

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DISCLAIMER

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INTRODUCTION

The United States Agency for International Development (USAID) Nove Pravosuddya Justice Sector Reform (New Justice) Program in the Ukraine is designed to support the Judiciary, the Government, the Parliament, the Bar, Law Schools, Civil Society, Media and Citizens to create the conditions for an independent, accountable, transparent, and effective justice system that upholds the rule of law and to fight corruption in Ukraine. In achieving this overarching goal, New Justice focuses on the following objectives:

Objective 1: Judicial Independence and Self-Governance Strengthened.
Objective 2: Accountability and Transparency of the Judiciary to Citizens and the Rule of Law Increased.
Objective 3: Administration of Justice Enhanced.
Objective 4: Quality of Legal Education Strengthened.
Objective 5: Access to Justice Expanded and Human Rights Protected.

The Report is prepared based on the TOR titled USAID New Justice Program

The Comments includes the following sections:

- Regulation (answer to the question "yes or no?");
- Scope of (Self) Regulation (comparison of the draft law with international practice);
- Scope of Monopoly (brief analysis of the impact of the current scope of monopoly);
- Bar (analysis of the draft proposal on the internal organization of the Bar per the draft Law);
- Attorney Client Privilege and Attorney Client Confidentiality (brief analysis);
- Entry to the Profession (Brief analysis);
- Disciplinary Enforcement.

REGULATION

Two questions arise in the context of the provision of market based legal services. The first question is: Does the market for legal services requires regulation? The second question is: What kind of regulation is optimal for protecting the public interest?

The Constitution of Ukraine: (i) guarantees professional legal assistance; (ii) delegates the regulation of legal service providers to a professional association of attorneys (the Bar); (iii) defines the scope of attorneys' monopoly; and (iv) demands that the basic principles of the organization and operation of the Bar are legislated by the law. The model in which a profession regulates its own affairs is called "self-regulation" . The choice of the regulatory model appears to be motivated by the need to protect the independence of the legal profession. Little, if any, economic analysis has been done to assess the effects of the chosen regulatory model and/or how it compares to other alternatives of regulating.

The Council of Bars and Law Societies of Europe (CCBE) defines Lawyers' Independence as follows: "The many duties to which a lawyer is subject require the lawyer's absolute independence, free from all other influence, especially such as may arise from his or her personal interests or external pressure. Such independence is as necessary to trust in the process of justice as the impartiality of the judge. A lawyer must therefore avoid any impairment of his or her independence and be careful not to compromise his or her professional standards in order to please the client, the court or third parties. This independence is necessary in non-contentious matters as well as in litigation. Advice given by

a lawyer to the client has no value if the lawyer gives it only to ingratiate him- or herself, to serve his or her personal interests or in response to outside pressure".

Economic Justification for the regulation of the legal profession and legal service market is found in the monopolistic and noncompetitive features of the legal services market through which the price of legal services depends on the value placed on them by clients and not on the actual costs of services . Consequently, all countries of the European Union (EU) and the majority of other countries do regulate the market for legal services and the legal profession. This justification applies to the Ukrainian market for legal services.

Normative Justification stems from the current legislative framework of Ukraine, which includes the Constitution and the "Law on the Bar and Practicing Law" (the Law). The European Court of Justice and all EU member countries have recognized that regulation of the provision of legal services is necessary to protect public interests, such as access to justice and the proper functioning of the legal profession. Self-regulation, conceptually, is justified by the need to protect the independence of legal service providers (particularly vis a vis the Government). Self-regulation, in the case of legal services, addresses the collective independence of the members of the legal profession. The Ukraine history of totalitarian regimes in which the legal profession was controlled by the political establishment and the state justifies some form of self-regulation.

SCOPE OF (SELF) REGULATION

This section focuses only on the more generic issues of the scope of regulatory and/or self-regulatory frameworks. Currently, regulatory tendencies are leaning toward self-regulation and deregulation. In many countries, the legal market and legal professions are subject to some form of external regulation and/or oversight. For instance, in Poland, Slovakia and the Czech Republic, the Ministry of Justice (MOJ) regulates the attorneys' fee schedule. In other countries (e.g. France and Italy) the professional organization of lawyers is tightly connected to and/or overseen by the courts.

In most jurisdictions, one or more of the following is regulated in some manner: (i) the provision of advice/representation (service) for financial reward; (ii) the use of specific professional titles indicating expertise in legal matters; and (iii) the right to appear on behalf of one of the parties before the courts.[1]

The scope of regulation and/or self -regulation varies from the state to state; regulation normally includes: (but is not limited to): (i) restriction on entry to the profession (including scope of service, scope of professional monopoly and rights and obligation of local, foreign, international, and EU attorneys); (ii) restriction on advertisement[2] and other means to promote competition; (iii) regulation of fees (fee scale and regulation of maximal and/or minimal fee); (iv) restrictions on contracts (prohibition of some forms of contracts; contingency fee based contracts [contingency fee, settlement of conflict; litigation]); (v) restriction on organizational forms (divided profession [e.g. solicitors, barristers] and forms of practicing [solo practitioners, partnerships and corporations]); (vi) organization of the profession as a whole

[1] Frank H. Stephen and James H. Love, University of Strathclyde, Glasgow, UK Regulation of the Legal Profession

[2] Advertisement is welfare enhancing because it improves the choice of clients.

(an association and its functions, structure, procedures, membership; external relationships); (vii) ethics and disciplinary systems (including complaint system);; and most recently, also (vii) requirements and responsibilities for continuing professional development.

The above topics are usually organized in a few chapters: scope of service; professional organization and relationship to other professions/entities; entry to the profession and the right of establishment; and attorneys and their relationship to the Bar, to the clients, to the courts and to other legal professionals.[3]

The key advantages of self-regulation compared to regulation include: (i) higher sensitivity toward the independence of attorneys; (ii) lower costs of regulation to acquire information necessary to regulate; and (iii) economy of scale stemming from the combination of the functions of service provider and regulator. The key risks of the self-regulation model include: (i) tendencies toward cartelism and regulatory capture[4]; and (ii) insufficient protection of the interests of clients.

As said before, the key purpose of (self) regulation is to address the failure of the market for legal services: an information asymmetry between client and attorney in combination with the monopoly of the Bar and legal professionals to provide legal service. Hence, the principal focus of the regulation should be "reducing information asymmetry and encouraging competition on the market, mitigating risks of cartelism and regulatory capture and protecting the interests of clients".

The factors to be considered when making decisions about the form and model of regulation include:

- Scope of monopoly for legal service (defined in Article 131/2 of the Constitution);
- Level of internal (within profession) and external (with other professionals and non-professionals) competition:
- Scope of information asymmetry (e.g. level of legal awareness of general population; stability and quality (gaps, complexity) of legal and regulatory framework; quality of legal and administrative institutions (e.g. adherence to law; consistency and predictability of decisions); access to legal information:
- Composition of users of legal system clients (information asymmetry applies mostly to small businesses and one-time users);
- Preferences of the clients;
- Capacity of institutions to perform regulatory/supervision/enforcement functions;
- Signs of /tendencies toward cartelism and regulatory capture.

In the absence of specific EU rules in the field, each Member State, Switzerland and the state of European Economic Area (EEA) is, in principle, free to regulate the legal profession in its territory. The EU Parliament Resolution on the Single Market Strategy (26 May 2016) states clearly the diversity of rules among the member countries. In most member states, the Bar authorities, in addition to the State, have the responsibility of adopting regulations. 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*

[3] The EU Countries' national Laws on BAR : http://www.ccbe.eu/documents/professional-regulations/#panel-712-1

[4] Cartelism is the practice of controlling production and prices by agreements between or among companies/service providers. Regulatory capture occurs when a regulatory agency created in the public interest, instead advances the commercial concerns of interest groups that dominate the industry of sector it is charged to regulate.

interest, and the duty to observe strict professional secrecy.[5] Thus, EU requires 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.

CCBE Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers[6] provide a clue into the expectations of EU regarding the scope of regulatory framework for legal profession and lawyers. The Charter and Code include: (i) the key national and international principles regulating the legal profession and (ii) a Code of Conduct of European Lawyers[7]..For details see Annex 1.

Observations of EU market for Legal Services suggest the following regulatory developments/trends in respect to the focus of regulations: the impact of IT, competition and barriers to entry; restrictions on business and ownership arrangements in the profession; and reserved activities and qualification requirements. For details see "Assessing the Economic Significance of the Professional Legal Service Sector in EU States" by Yarrow and Decker (2012).[8]

Per the Ukrainian Constitution (Article 92 and 131), the content of the laws related to the market for legal profession and the legal profession should be limited to the principles (fundamentals) of two sets of issues: "the organization" and the "operation of the Bar".[9] The proposed draft of the Law (the Law draft) is, on one hand, exceeding the rather narrow Constitutional mandate. On the other hand, it does not include some very important issues which normally are a part of the legal and/or regulatory framework of the legal market and legal profession, more notably, liability of attorneys for damage caused in the course of service provision and their insurance regime; rights of clients' vis a vis lawyers and the Bar; compliance systems; fee regulation; a legal regime for specialization and advertisement; and professional development of lawyers. In addition, the law would benefit from more specific coverage of the relationship of the attorneys with the courts (after all, attorneys are a part of judiciary), and other legal professionals with whom they compete on the market for legal services.

The above in balance appears to be a function of: (i) overemphasizing the need to protect lawyers and the Bar (so called trade union functions) at the cost of delivering on a greater public good, which is access to justice and protection of clients; and (ii) underestimating the economic dimension of the rules/regulation.

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[5] CCBE statement on the European Commission Consultation on the regulation of professions: Member States' National Action Plans and proportionality in regulation
http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/EU_LAWYERS/Position_papers/EN_EUL_20160819_CCBE_statement_on_proportionality.pdf

[6] NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf

[7] Code is a binding text for all member states: all lawyers who are members of the bars of these countries (whether their bars are full, associate or observer members of the CCBE) have to comply with the Code in their cross-border activities within the EU, the European Economic Area and the Swiss Confederation as well as within associate and observer countries. The Code has been recognized by the EC and European courts and is beginning to be treated as authoritative by national courts

[8] http://www.ccbe.eu/NTCdocument/RPI_study_Yarrow_D1_1348650358.pdf

[9] Normally, the right of Verchovna Rada to legislate should not be limited by a subject of legislation. Yet, the Constitution's explicit reminder regarding the scope of regulation cannot and should not be ignored. The plausible interpretation of the intent of the Articles 92 and 131 of the Constitution is that the law at hands should leave all matters which do not originate generally biding rights and obligations for a subsequent regulation of the Bar. The Law should include a clear reference in terms of the subject and scope of the regulation(s).

SCOPE OF MONOPOLY

The advocacy organization in Europe can be also generally classified into three groups: (i) the system of the Scandinavian countries (advokat); (ii) the system of the UK and Ireland with a profession differentiated between solicitors (basically legal advice and transactions) and barristers (representation before courts), and (iii) the civil law system of other countries with a unified profession of lawyers and a separate profession for notaries public.

According to the scope of monopoly within the EU, we identify three systems:(i) complete monopoly: advice and defense (e.g, Spain, France, Germany, Austria), where lawyers exercise a complete monopoly of legal services, both in legal representation and legal advice; (ii) partial monopoly (eg, Belgium, Italy, Netherlands, United Kingdom, Ireland), where lawyers have a monopoly on legal defense or representation in court but not in legal advice; and (iii) no monopoly (eg Finland, Sweden) where lawyers exercise no monopoly on defense before courts or on advice, so that any non-lawyer can exercise legal functions (although without using the title of advokat).

Another distinction relevant to the scope of monopoly and/or specialization of lawyers (and hence regulation) is the status of corporate in-house lawyers. In EU member states: (i) in some countries (e.g Spain), in-house lawyers have full status as a lawyer, as they are members of the bar and can advise and defend their clients in court, either on behalf of the company that they work with or other clients; (ii) in other countries (eg UK, Ireland) in-house lawyers are members of bars or law societies but cannot advise or defend anyone outside their employers,; and (iii) in other countries (eg France, Belgium), in-house lawyers are not members of the bar, cannot appear in court, and cannot even be called lawyers (avokat) but rather "corporate jurists" (juriste d'entreprise).[10]

The scope of monopoly determines (among other factors) the nature of regulation. In Ukraine, legal service is professionalized (the Constitution and laws give those with legal education privilege to provide legal service). The scope of monopoly can be determined through the definition of “legal service” and through definition of relationship to other legal professions which operate on the market of legal services. Regarding the former, the draft law offers two definitions of legal service: one, in Section 1 a General Provision (Article 2,5,6,9) and another in Section III Article 19, on Types of Practicing Law. Both articles are comprehensive and detailed. But they are not complete or identical. “Less is More” applies to the definition of legal service as the term is very broad and contextual. As for the former, the Draft Law needs yet to include some form of information about who else is providing legal service and about the relationship between attorneys and these providers.

Overall, the scope of monopoly of attorneys (*vis a vis* other legal service providers), according to the Constitution, involves the plea before courts and the representation in dealing with enforcement institutions in criminal proceedings. This monopoly may be reduced by laws as necessary in certain types of disputes and/or clients. The monopoly was introduced in June 2016 and should become effective incrementally in the future, by 2019.

Due to lack of data/statistics (regarding the market for legal services, the scope of increase of the service and costs of these services), it would be difficult, if not impossible, to make any reasonable assessment of the impact of the new monopoly of attorneys on their well-being

[10] Ramon Mullerat: Law Practice in a Globalized World: The European Experience http://aei.pitt.edu/43369/1/Mullerat_LawPracticeGlobalization.pdf

and on the well-being of their clients. It is advisable that the Bar monitors the above impacts so the current regulation can be adjusted.

THE BAR

The main goals of the amendment are further decentralization of the internal structure, transparency of decision-making and stronger self-determination (of individual attorneys).

FUNCTIONS OF THE BAR

Normally, the Bar has two key functions: (i) to protect broader public interests (welfare of society and corporate social responsibility[11]); and (ii) to protect the interest of attorneys (so called trade union function). The Draft Law offers two different definitions of the Bar and its functions. Article 2 assigns to the Bar two main functions: securing legal services and managing the profession/Bar. Article 45 defines the Bar's functions more narrowly as "ensuring the implementation of the objectives of attorneys' self-government". Both definitions, however, refer to the Bar as a public institution. If so, the Draft Law should unequivocally emphasize the Bar's responsibility for the greater public good, which is access of the public to affordable legal services and to justice.

The EU requirement that the BAR of its Member Countries, Switzerland and EAA Countries are responsible for the greater public good (administration of justice and protection of human rights) is another reason why the draft Law should emphasize and elaborate performance of the function of protection of the public interest. On behalf of lawyers in Europe, the CCBE demands from the EU and national authorities that all citizens' fundamental rights, freedoms and basic rights, are and will be, protected by the unconditional observance of the principles of democracy and the rule of law.[12]

The Draft Law provides an opportunity to emphasize the integration of the Bar into the judicial system (Chapter 8 of the Constitution). This can be done through adding, e.g., the following formulation: "……in the spirit off furthering the administration of justice and according to the law" or "the Bar is a public …… within the judicial branch of the Government….". Another possibility of expressing the new status of the lawyers and the Bar includes: e.g. subordinating the lawyers' disciplinary system under ultimate court control (court and not Bar will make ultimate decisions); and to create much closer ties of the regional and the national branches of the Bar with corresponding levels of the courts.

The new definition should also translate into a set of specific responsibilities for the Bar and lawyers. The areas of concern may include: more specific articulation of responsibilities vis a vis clients and the courts; the specialization of lawyers and their right to advertisement; the recognition of professional exams, practice, experience of other legal professions (e.g. judges, prosecutors and notaries); the rules for delegating contractual responsibilities to another lawyers; more specific regulation of fee calculation, schedule; a complaint system through which clients/courts/other institutions would be able to channel their grievances; liabilities of lawyers for damage caused to clients; compulsory insurance of attorneys; right of clients to

[11] Corporate social responsibility is a business approach that contributes to sustainable development by delivering economic, social and environmental benefits for all stakeholders.
[12] Ramon Mullerat: Law Practice in a Globalized World: The European Experience http://aei.pitt.edu/43369/1/Mullerat_LawPracticeGlobalization.pdf

terminate contract; and provision and/or public access to information (e.g. regarding disciplinary proceedings).

BAR'S ORGANIZATION AND PROCEDURES

A fierce competition among various interest groups and the regional and central branches of Ukraine National Bar Association (UNBA) over the control of the market experienced during last five years is a strong indicator of the weaknesses of the Bar's organization – its structure, decision-making procedures and practices. The draft law provides an opportunity to address these weaknesses.

Below are more specific comments to the organization and decision-making procedures of the Bar:

- The competition among interest groups will likely lead to many challenges to even relatively clear rules, hence unpredictability. This risk can be mitigated (in addition to clear through creating a simple but transparent and inclusive system for the interpretation of rules, and through clear definitions of who is responsible, which would/should be open to judicial review.
- The organizational structure, division of powers and responsibilities, and the flow of funds should be aligned. They should reflect the principle of decentralization on which the Bar is based.
- The Conference, which is composed of all members of the Bar, should be a primary source of powers (as opposed to the Congress).
- The length of the mandates of the members of the Congress needs to be clarified.
- The Regional Council and its institutions should have most if not all original regulatory and decision making powers. The central level should have only those functions which must be handled at the central level and/or are delegated to it by the regional institutional level, e.g. representation *vis a vis* the central authorities; support to and coordination of the Regional Councils; overseeing other central institutions; organizing meetings of the congress; maintaining the central register of attorneys and information management.
- The regulatory functions should be with the Conference (at the regional level) and/or with the Congress (with its central jurisdiction).
- National and Regional Councils' regulations should be subject to the compulsory approval of the Conference or the Congress.
- The quotas for delegates or the methods of their calculation and similar matters should be transparent and predictable. Hence, they should be covered by laws or regulations. They should not be a prerogative of the National Council only.
- The Presidents of the Regional Bars (possibly, vice presidents) should be *ex-officio* members of the National Council.
- Vice-presidents (of the regional and national councils) should be elected by Conference or Congress.
- The impeachment framework should have clear rules regarding the reasons, process and follow on steps for the Presidents, Vice-Presidents (in case s/he is elected in direct election); and possibly Chairmen of Committees should be put in place.
- Given the size of the country and the large number of members of the Bar, in order to encourage direct participation of attorneys in governing the BAR, the virtual form of conferencing /congressing; possibility of deputation; longer time for informing attorneys about meetings should be considered.
- The Qualification and Disciplinary committees should be two separate entities. The prerogative of the qualification committee should involve three main tasks – admission of attorneys; continuing education (including rules for certification in connection with the

specialization attorneys[13]); and setting up minimal performance standards (in collaboration with the Disciplinary Committee). The Disciplinary Committee should have the prerogative to implement a complaint system. More attention should be paid to a complaint system that would become the main vehicle for detecting misconduct of attorneys.

- The rules for financing the Bar needs to be improved.
    - The payment for exams and annual contributions to the Bar should be set as a flat fee. Any other calculation, particularly the calculation contingent on loosely defined variables such as "the need of the Bar and the average income at the moment of the submission of application" is too complex, non-transparent and hence open to abuse. It also sets a wrong incentive to the Bar as it attempts to reimburse funding of its expenses.
    - For the same reason, the deduction from the Regional QDCs to the HQDC should not depend on what the HQDC and/or the National Council determine is needed.
    - Clear rules should be set regarding the whole budget cycles of regional and national levels of the Bar.

ATTORNEY CLIENT PRIVILEGE AND ATTORNEY CLIENT CONFIDENTIALITY

Two distinct concepts are used to preserve the confidential relationship between the lawyer and the client: (i) *an attorney-client privilege* (ACP); and (ii) *attorney-client confidentiality* (ACC). ACP is a privilege of the client not to disclose and/or prevent the lawyer from disclosing their mutual communication which pertains to a case at hand to the third party, including business associate and justice institutions. Attorney-client confidentiality (ACC) is an lawyer's duty not to reveal information that has been shared with him/her by the client and/or using such information in a way that may be disadvantageous to the client. The duty of confidentiality applies to the use of most information that may be used against the client.

The ACP applies only to the client (a physical or legal person) who has a valid contract and/or to who has communicated with a lawyer with the purpose to conclude a contract. During this communication, the lawyer must act in his capacity as a lawyer. Information shared during communication between the client and the lawyer which is also available to non-privileged sources is not protected. Since a client is a holder of ACP privilege, s/he is the one who can assert or waive this privilege. In case of death or termination of a client, the ACP privilege is normally/but not necessarily transferred to their successors. The exception from the ACP includes: death or termination of a client; fiduciary duty (corporations only); crime (in case a client seeks assistance in committing a crime) and in case of common interest.

In the EU the protection of confidentiality has the status of a general legal principle in the nature of a fundamental right. The protection of confidentiality is based on the following pillars: (i) the lawyer is bound by confidentiality; it is a duty of the lawyer, and may also be a right of the lawyer; (ii) confidentiality applies to any and all information about a client or a client matter which is given to the lawyer by his or her client or which is received by the lawyer in the course of the lawyer´s exercise of his or her profession, irrespective of the source of such information; (iii) confidentiality also applies to any and all documents

[13] The possibility of and consequence of specialization needs to be included in the Law.

prepared by the lawyer, to all those delivered by the lawyer to his or her client and to all communications between them; (iv) confidentiality applies both in litigation or advice; (v) confidentiality do not prevent a lawyer from disclosing confidential information to third parties and in particular to public authorities and courts, provided the lawyer has ascertained that: (a)such disclosure is in the best interests of the client; and (b)the client agrees with such disclosure; and (c) no applicable provisions forbid such disclosure; (vi) the lawyer is entitled to disclose confidential information in proceedings between the lawyer and his or her client or in proceedings against the lawyer provided such disclosure is necessary for such proceedings and there is a direct relation between such proceedings and the lawyer's mandate from this client. Proceedings include court, administrative, professional and alternative dispute resolution proceedings; and (vii). the lawyer shall ensure that his or her employees and any other person with whom he or she collaborates in the course of the exercise of his or her profession, comply with confidentiality...The EC Court of Justice ruled that ACP does not apply to lawyers who are bound to the client by a relationship of employment. However, the laws and practice of some EU countries continue to apply ACP to both private and employed lawyers. See full text of CCBE article on Model Article on Confidentiality [14]

COMMENTS TO THE DRAFT LAW

The Draft Law would benefit from clear definitions of both concepts. Specifically:

- ACP definition should include the purpose;
- Information should be defined; e.g. communication and information in any form;
  Client also should be defined e.g. as a person/firm which has a valid contract with an attorney and/or information was shared with him/her with the purpose of entering a contract;
- Be advised that attorney should be able to share information with other associates and employees only under the condition that the client's privilege is sufficiently secured;
- Attorney's obligation(s) should cover both, ACP and ACC. E.g. Attorney must not disclose ……; Attorney must not use …….. (See above). The law should also name conditions under which lawyer is freed of his/her duties and can release an information. In this case please consider using a positive and negative definitions.
- The draft Law should cover the situation of death of physical and termination of legal person; and
- ACP protection if an attorney delegates his/her responsibilities to another lawyer / employee of the firm) and in case of termination and suspension of a license; and
- The author should, to the extent possible, align the Draft Law with the EU policies and rules. .

ENTRY TO PROFESSION

In most EU jurisdictions, licensing and registration rules regulate entry to the legal professions, protect professional titles associated with the legal professions and representation before the courts. The extent of such restrictions varies among jurisdictions. For example, in Finland and Sweden there is no restriction on who can provide legal advice or represent others before the courts. On the other hand, in Germany and France there are restrictions on

[14] http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/TOWARDS_MODEL_CODE/MOD_Position_papers/EN_MOD_20161202_Model_Article_on_Confidentiality.pdf and EU CCBE Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers

who may proffer legal advice. In most jurisdictions, the right to represent others before the courts is restricted to members of designated professions.[15].

At present in Ukraine there are 60,000 attorneys registered and & licensed by the Bar to be fit to provide legal service. The number of attorneys per 100,000 inhabitants is 130, which is below average in Europe[16] In contrast to other European Countries, except for Albania and Malta, the numbers of certified lawyers in Ukraine between 2012 and 2014 was decreasing. It is difficult to explain the relatively low number of lawyers in Ukraine, as there are no direct quantitative restrictions for entry to the legal profession. The Ukraine's Bar should ge to the bottom of this matter and use the preparation of the ne Law as an opportunity to encourage the interest of the young lawyers to join the Bar.

According to the Law admission to the Bar is conditional on whether an applicant has a high moral profile, is competent in the local official language, completed legal education, and has 2-years of legal experience that concludes with a qualification exam. The ability to practice is further conditioned by at least 6-month practical training, which should end by the issuance of a certificate to practice law, an oath to the bar president and a subsequent registration as a member.

The admission process in Ukraine could be streamlined Admission to a Bar is a licensing process, which can only result in admission or non-admission to practice law. There is no reason for this process to be composed of three steps, each of which produces a separate administrative decision appealable within the Bar or to an administrative court. This process is complex, probably lengthy and costly. It also opens the door to an unreasonable number of interventions by a large number of people which, as experience shows[17], are meant to change the natural course of actions.

The admission to a Bar should be streamlined. The practical training should be integrated into the preparation for the examination. The sole purpose of the practical training is to help the candidate to improve his/her skill to apply his/her understanding of general law and legal theories to real life situations. This certainly is a part of candidate's readiness for practicing law and should be examined the same way as other skills and competencies.

The examination of a candidate's basic fitness should be done and communicated to the candidates [if needed] by correspondence. Additional background checks can be done while candidates wait for examination results. Only the final result – a license and or denial of it – should be appealable. Needless to say, that in many countries even that is not allowed (e.g. US).

The admission should be based mostly on the results of an examination composed of a multiple- choice-test which challenges the candidate's basic understanding of legal theories, concepts and laws; the ability to apply these theories, concepts and laws to real life situation; and finally, and familiarity with ethical rules and professional responsibilities.

The Bar should also consider recognizing judicial and prosecutorial examinations.

The License to practice should be a subject to a reasonable flat fee regulated through a binding regulation rather than through a decision of the Bar.

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[15] The European Single Market and the Regulation of the Legal Profession: An Economic Analysis Frank H. Stephen

[16] CEPEJ Report, 2016: average number of lawyers per 100 000 inhabitants in 2014 in Ukraine was 147 and increasing. In Ukraine, the number of lawyers since 2012 has decreasing tendency. According to the study "Assessing the Economic Significance of the Professional Legal Service Sector in EU States" by Yarrow and Decker (2012) there was an average of 1.80 lawyers per 1000 head of population in 2008 in Europe (again by way of comparison in 2008, in the United States, there was an estimated 3.82 lawyers per 1000 head of population). However, the proportion of lawyers per capita in the EU varies significantly from state to state.

[17] Doing Business Report

DISCIPLINARY ENFORCEMENT SYSTEM

PRINCIPLES, FRAMEWORKS AND OBLIGATIONS

The Disciplinary Enforcement of the draft law needs to be scrutinized against the CCBE Recommendations on Disciplinary Process for the European Legal Profession18; a Summary of Disciplinary Proceedings and Contact Points in the EU and EEA Member States19, UN and CE Principles which apply to this area. For practical and inspirational reasons the framework should be also be reviewed against "Model Rules for Lawyer Disciplinary Enforcement" developed by the American Bar Association.20 The design should also take into consideration the CCBE's Code of Ethics which is "Bidding for Lawyers and Bars" operating within EU and EEA countries, and its "Model Articles on Conflict of Interests21 and Confidentiality"22.
In short, the above principles and rules stress the importance of a due independent process carried out and/or controlled by a professional organization through which basic human rights and attorney-client privilege are observed and imposed sanctions are proportionate and fair. The list of principles is in Annex 1.

DETAILED COMMENTS

The definition of disciplinary liability is too narrow: Disciplinary liability should be triggered by failing to meet standards of: professional competence, conduct and continuing learning (note the draft law is introducing continuing learning as a professional obligation). Since the legal profession is a part of the judiciary (the Constitution), the liability should extend to the relationship with the courts.
The list of misconducts should be added to a more general definition as an exemplary as opposed to exhaustive list. Expanding disciplinary liability to include attempted misconduct can be considered. There is a possibility of having two categories of misconduct which triggers disciplinary proceedings (more and less serious e.g. USA). The latter two approaches are used in US. The Finish definition of misconduct by lawyers in attached in footnote 26.23
Sanctions. The draft law proposes three types of sanctions: warning, suspension and disbarment. Typically, the sanctions include: warning, reprimand (written); fine, suspension, and disbarment. In some jurisdictions, the sanctions include temporary suspension of the

[18] http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/DISCIPLINE/EN_DISC_20070917_CCBE_Recommendations_disciplinary_proceedings.pdf
[19] http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/EU_LAWYERS/Position_papers/EN_EUL_20161128_Table_discipline.pdf
[20] https://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement.html
[21] http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/TOWARDS_MODEL_CODE/MOD_Position_papers/EN_MOD_20161202_Model Model Article on Conflict of Interests
[22] http://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/TOWARDS_MODEL_CODE/MOD_Position_papers/EN_MOD_20161202_Model_Article_on_Confidentiality.pdf
[23] If an advocate acts dishonestly or otherwise deliberately violates the interests of another person while practicing advocacy, the advocate shall be disbarred. If there are mitigating circumstances, a monetary penalty or a caution may be imposed instead. If an advocate otherwise acts in violation of proper professional conduct, a caution or a reprimand shall be imposed. If the advocate engages repeatedly in conduct referred to in this paragraph or paragraph 3, or if there are aggravating circumstances, the advocate may be disbarred or a monetary penalty imposed. The provision above in this paragraph applies also if an advocate commits an act detrimental to the reputation of the Bar.

right to practice law on some areas or appearing before the court (e.g. Germany) and/or interlocutory sanctions to enforce decisions of disciplinary proceedings or to respond to risks stemming from the original violation. Fine and reprimand should especially be included among the sanctions. The principle of proportionality of sanction should be elaborated on, e.g. by providing some general criteria according to which sanctions will apply.

Statute of Limitation. The draft law needs to clarify rules for the application of a statute of limitation. It should identify the objective (starting with the occurrence of a violation) and subjective (starting from the moment a misconduct becomes known to decisionmakers) statutes of limitation. It also needs to be made clear whether the disciplinary process should start or be completed within the above period of time.
A one-year statute of limitation is unusually short. In many jurisdiction (e.g. Canada, USA[24]), there is no statute of limitation for disciplinary violations of lawyers. Decisions regarding statutes of limitation should be made to protect consumers rather than lawyers who are unfit to perform their responsibilities. We recommend using a 5-year subjective and a 10-year objective statute of limitation.

Complaint. The discipline system will mostly be driven by complaints, as is the case in most jurisdictions. The Bar should develop an easy to access and operate complaint system. Complaints, however, should not be the exclusive source for information that can lead to the opening of an inquiry or investigation. The Bar should be able to open the disciplinary process based on so called reportable actions (an account or statement describing in detail an event, situation, or the like, usually as the result of observation, inquiry, etc.) and/or based on information from media. The criminal proceeding against a lawyer should also trigger a disciplinary proceeding.

Disciplinary Process. Overall, the process can be characterized as front-loaded, with unnecessary possibilities for appeal and reversal of decisions but limited opportunities for lawyers to exercise their right to be heard and defend themselves. There is a lack of clarity on some fundamental issues such as: guarantees of impartiality of decision-making (rules for appointment, conflict of interest and dismissal of those involved in the process; their powers and responsibilities); rules of evidence and burden of proof[25]; confidentiality and/or access to information about proceedings; protection of attorney client privileges; scope of subpoena's powers; and costs and their reimbursement.
The disciplinary process should include Evaluation, Investigation. Formal Charge, Review by Bar and Review by Court. The lawyer and complainant (if applicable) should be informed about the results of every step of the process. The evaluation, investigation and formal charge should be done by a dedicated disciplinary counsel appointed by the Disciplinary Chamber. It is highly recommended that each disciplinary chamber has a pool of disciplinary counsels ready to assist with disciplinary cases. The purpose of the evaluation is to filter out the complaints without merit, complaints which should be referred to a different organization, or which can be closed through other means e.g. mediation.
Investigations should focus on collecting evidence about "guilt or innocence". It, however, can lead to any of the above-mentioned decisions. A disciplinary counsel should be able to

[24] *ABA Model Rules*: Statutes of limitation are wholly inappropriate in lawyer disciplinary proceedings. Conduct of a lawyer, no matter when it has occurred, is always relevant to the question of fitness to practice. The time between the commission of the alleged misconduct and the filing of a complaint predicated thereon may be pertinent to whether and to what extent discipline should be imposed, but should not limit the agency's power to investigate. An unreasonable delay in the presentation of a charge of misconduct might make it impossible for an attorney to procure witnesses or the testimony available at an earlier time to meet such a charge. Discipline and disability proceedings serve to protect the public from lawyers who are unfit to practice; they measure the lawyer's qualifications in light of certain conduct, rather than punish for specific transgressions. Misconduct by a lawyer whenever it occurs reflects upon the lawyer's fitness.
[25] For instance in US in disciplinary proceedings the rule of evidence and burden or prove do not apply.

make a decision about dismissing a complaint (at least). Such decisions could be reviewed (based on the request of a complainant) by the Disciplinary Chamber or its Chair. The subject lawyer must be informed about the investigation and take active part in it. S/he should also have an opportunity to react to the formal charge, its filing with the disciplinary Chamber by a written statement, and be able to request a hearing to provide/request clarification.

The Review of the charge by the Disciplinary Chamber (there is no reason to involve the whole Qualification and Disciplinary committee in this phase of the Process) should lead to the final result. The decision could be reviewed one more time by the court upon the appeal of the lawyer.

The 36/2 article of the Draft Law [26] needs to be excluded from the draft law as it would discourage complaints and allow arbitrary dismissal of complaints. The intent of the Draft Law to protect lawyers against complaints without merit can be effectively done through an initial scrutiny of complaints and their dismissal without a full investigation.

[26] It shall not be allowed to abuse the right to apply to the qualification and disciplinary commission of the bar, inter alia, to initiate disciplinary liability of the attorney without having sufficient ground therefor, or to use the said right as a means of pressure upon the attorney in connection with his/her practice of law. "and "No disciplinary action may be instituted against the attorney upon application (complaint) that does not contain information about the existence of elements of misconduct in the attorney's actions, as well as upon any anonymous application (complaint)..

ANNEX A. BASIC PRINCIPLES OF CODE OF ETHICS AND DISCIPLINARY PROCEEDINGS

CCBE Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers[27] provide a clue into the expectations of EU regarding the scope of regulatory framework for legal profession and lawyers. The Charter and Code include: of (i) the key national and international principles regulating the legal profession and (ii) a Code of Conduct of European Lawyers[28].. The ten key principles of legal profession include: (i) the independence of the lawyer, and the freedom of the lawyer to pursue the client's case; (ii) the right and duty of the lawyer to keep clients' matters confidential and to respect professional secrecy; (iii) avoidance of conflicts of interest, whether between different clients or between the client and the lawyer; (iv) the dignity and honor of the legal profession, and the integrity and good repute of the individual lawyer; (v) loyalty to the client; (vi) fair treatment of clients in relation to fees; (vii) the lawyer's professional competence; (viii) respect towards professional colleagues; (ix) respect for the rule of law and the fair administration of justice; and (x) the self-regulation of the legal profession.

The biding section of the documents covers the following scope of the issues:
(i) General Principles: Independence, Trust and Personal Integrity; Confidentiality; Respect for the Rules of Other Bars and Law Societies; Incompatible Occupations; Personal Publicity; Client's Interest; Limitation of Lawyer's Liability towards the Client;
(ii) Relations with clients: Acceptance and Termination of Instructions; Conflict of Interest; Pactum de Quota Litis; Regulation of Fees, Payment on Account; Fee Sharing with Non-Lawyers; Cost of Litigation and Availability of Legal Aid; Client Funds; Professional Indemnity Insurance;
(iii) Relations with the courts: Rules of Conduct in Court; Fair Conduct of Proceedings; Demeanour in Court; False or Misleading Information; Extension to Arbitrators etc;
(iv) Relations between lawyers: Corporate Spirit of the Profession; Co-operation among Lawyers of Different Member States; Correspondence between Lawyers; Referral Fees; Communication with Opposing Parties; Responsibility for Fees; Continuing Professional Development; Disputes amongst Lawyers in Different Member States.

The Code of Ethics includes: (i) a set of governing principles; (ii) rules defining relationship of lawyers with clients; (iii) rules defining their relationship with the courts: and (iv) rules governing relationship between lawyers (for details see Section 2, Scope of Regulation). The Framework for Disciplinary Proceeding offers a broad definition of lawyers' responsibilities29 and basic principles for the disciplinary enforcement framework. These principles are:(i) Although the State may set the framework within which disciplinary

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[27] NTCdocument/EN_CCBE_CoCpdf1_1382973057.pdf

[28] Code is a binding text for all member states: all lawyers who are members of the bars of these countries (whether their bars are full, associate or observer members of the CCBE) have to comply with the Code in their cross-border activities within the EU, the European Economic Area and the Swiss Confederation as well as within associate and observer countries. The Code has been recognized by the EC and European courts and is beginning to be treated as authoritative by national courts

[29] "The lawyer's duties do not begin and end with the faithful performance of what the law permits. A lawyer must serve the interests of justice as well as those whose rights and liberties he or she is trusted to assert and defend and it is the lawyer's duty not only to plead the client's cause but to be the client's adviser.

proceedings should take place, the proceedings should be independent of state authorities (excluding the ordinary court system); (ii) The primary responsibility of the conduct of disciplinary proceedings at first instance concerning lawyers preferably lies with the Bar; (iii) Disciplinary proceedings should be carried out in accordance with the principles of due process, as laid down in the European Convention on Human Rights, including the right to defend himself/herself through legal assistance; (iv) Disciplinary proceedings should be separate from criminal trials of the same alleged misconduct; and (v) Attorney-client privileged confidential information should be protected throughout the disciplinary proceedings, without prejudice to the lawyer's right to self-defense.

UN Basic Principles on Role of Lawyers/Disciplinary Process include: (i) Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national law and custom and recognized international standards and norms; (ii) Charges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures; lawyers shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice; (iii) Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review; (iii) All disciplinary proceedings shall be determined in accordance with the code of professional conduct and other recognized standards and ethics of the legal profession and in the light of these principles. The CE' set of recommendation Rec (2000)21of the Committee of Ministers to member states on the freedom of exercise of the profession of lawyer/Disciplinary Proceedings includes: (i) Where lawyers do not act in accordance with their professional standards, set out in codes of conduct drawn up by Bar associations or other associations of lawyers or by legislation, appropriate measures should be taken, including disciplinary proceedings; (ii) Bar associations or other lawyers' professional associations should be responsible for or, where appropriate, be entitled to participate in the conduct of disciplinary proceedings concerning lawyers; (iii) Disciplinary proceedings should be conducted with full respect of the principles and rules laid down in the European Convention on Human Rights, including the right of the lawyer concerned to participate in the proceedings and to apply for judicial review of the decision; and (iv) The principle of proportionality should be respected in determining sanctions for disciplinary offences committed by lawyers.