DeutscherAnwaltVerein

Position Paper

of the German Bar Association by the Committees on Professional Law, Human Rights and European Law

on the Draft text for a future Legal Instrument on the Protection of the Profession of Lawyer (working version 5 – 13/03/2023)

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The German Bar Association (Deutscher Anwaltverein – DAV) is the professional body comprising more than 61.000 German lawyers and lawyer-notaries in 253 local bar associations in Germany and abroad. Being politically independent, the DAV represents and promotes the professional and economic interests of the German legal profession on German, European and international level. The DAV is registered in the Lobby Registry for the representation of special interests vis-à-vis the German Bundestag and the Federal Government under register number R000952.

The German Bar Association appreciates the opportunity to once again comment on the updated version of the Draft Legal Instrument on the Protection of the Profession of Lawyers (CJ-AV (2022)05 prov5).

Some important aspects are now included in the text of the Draft Convention (e.g. the protection of the confidentiality of lawyer-client communication) and there is a higher level of protection compared to the initial draft of the Convention. Nevertheless, the DAV noted that with regard to some aspects the actual 'working version' has narrowed down the scope of some provisions compared to the previous working versions (3 and 4).

As a consequence, we would like to make the following amendments and comments. The formulations amended by us are **underligned and written in bold.**

Amendments and comments:

1. Recital 11

Recital 11 should read:

~~Considering~~ Noting the different manner in which the profession of lawyer may be organised in member States of the Council of Europe and other signatories to this Convention;

2. Article 2 – Scope

Article 2 para 2 lit. b) should read:

*“Any person who is recognised by international and regional courts, tribunals and organisations **as competent to act** in the conduct of proceedings before them.”*

There is no need for the additional requirement that the person is actually acting before the respective court. The persons’ competence to act before the court or organisation shall be sufficient in order to be protected by the Convention. He or she needs protection also if, say, a government prevents them from acting before a tribunal. Thus, the wording of the previous working version 3 is preferable.

3. **Article 3 – use of terms**

Art 3 lit. d) should read:

*„Professional association” shall mean a representative body to which some or all lawyers [may] belong, whether directly or indirectly, or be enrolled and which also has some responsibility for **regulating, organising or representing** their profession under domestic law”.*

4. **Article 5 – Entitlement to practice**

Regarding the current wording of Art. 5 para 1 lit. b) the DAV is wondering why the previous version has been restricted? The sexual orientation and eventual disabilities of a lawyer should remain aspects of discrimination that have to be banned.

5. **Art. 6 – Professional rights**

a) **Article 6 para 1 lit. n:**

The DAV is wondering, why the “unhindered access to and communication with” is foreseen only with regard to international courts and not with regard to domestic courts and tribunals as well?

It should therefore read:

“have unhindered access to and communication ***with domestic courts and tribunals, international courts and tribunals or bodies established under the authority of an international organisation*** *with competence to receive and consider communications relating to human rights and fundamental freedoms;*

b) Article 6 para 3 (Restrictions)

The DAV suggests a combination of options 1 and 2, which should read as follows :

No restrictions shall be placed on the exercise of these rights other than those prescribed by law and ~~are strictly necessary in a democratic society~~ **in compliance with the European Convention of Human Rights and the respective case law of the European Court of Human Rights.”**

The wording “strictly necessary in a democratic society” is too vague and would be interpreted in a too broadly manner by some of the Parties. However, the reference to the European Convention of Human Rights and the case-law of the ECHR in option 2 seems to be a good approach, but regarding the wording of option 2 it is not clear who would be responsible for the list of restrictions and if the Parties could agree on the details.

6. Article 7 - Expression

In Article 7 it should say:

“Parties shall ***ensure through the necessary legislative and other measures,*** *to guarantee the right of lawyers, individually and collectively, and of professional associations to promote the rule of law and take part in public discussion of the substance, interpretation and application of existing and proposed legal provisions, the administration of justice and the promotion and protection of human rights, as well as to make proposals for reforms concerning these matters.“*

The current wording would be satisfied if a Party became active only after a lawyer had become a victim of an act forbidden under the Convention. This would be insufficient.

Parties ought to take also preventive actions. Therefore, the wording should read *“necessary legislative and other measures”* to make sure that also preventive measures are taken by the Parties.

7. **Article 8 - Discipline**

a) **Article 8 Para 1:**

Parties shall ***ensure through the necessary legislative and other measures,*** *that the […]*

See above.

b) **Article 8 Para 2**

“Parties shall ***ensure through the necessary legislative and other measures, that […]”***

See above.

c) **Article 8 Para 2 lit. d**

It should read: “subject to challenge **by the lawyer concerned** before an independent and impartial tribunal established by law. ~~by the lawyer concerned~~.

d) **Article 8 Para 3**

“Parties shall ***ensure through the necessary legislative and other measures, that […]”***

See above.

8. **Article 9 – Protection**

a) **Article 9 Para 1 and Para 2**

Regarding article 9 Para 1 and Para 2, it is questionable if the right of the lawyer/the representatives of the professional association of being informed and of being present during a measure of search and seizure shall be subject to a respective request of the lawyer concerned.

Article 9 Para 2 states that the Parties shall ensure […] that the professional associations "*are able*" of being informed etc. The lawyer concerned should have the right to object.

b) Article 9 Para 2

It should read:

„Parties shall ***ensure through the necessary legislative and other measures*** *that professional associations are able,* ***unless there are opposing,*** *strictly necessary requirements for preventing, investigating and prosecuting crime, to safeguard the rights set forth in this Convention, including by: […]"*

c) Article 9 Para 2 lit. a)

It should read:

„being informed promptly about the arrest or detention of any lawyer, its legal basis and the place of ***where she or he is detained,*** ~~*detention*~~ ***unless she or he objects;"***

d) Article 9 Para 2 lit. b)

"*having through their representatives or an independent lawyer, prompt and effective access to the lawyer arrested or detained,* ***unless she or he objects;***"

e) Article 9 Para 2 lit. c)

It should read:

„*being ~~able~~* ***present*** *through their representatives,* ***or an independent lawyer*** *~~to supervise~~* ***during*** *any search of a lawyer, her or his premises, vehicles, or devices****, as well as any documents and any other data or material,*** *~~being~~* ***in relation with*** *her or his professional purposes ~~as well as any documents, other forms of data and any kind of equipment~~ that may be seized;*“

f) Article 9 Para 2 lit. e)

In Article 9 Para 2 lit. e) the staff of the lawyer and the staff of his or her law firm as well as of the professional association he or she is associated with should be included.
Thus, it should read:

„being informed where secret ~~covert~~ surveillance has been undertaken with respect to a lawyer, his or her staff or law firm or with respect to the professional association (including its staff) the lawyer is associated with;”

g) Article 9 Para 2 lit. f)

Article 9 Para 2 lit. f should not be written in brackets.

h) Article 9 Para 4:

It should read:

“Parties shall ***ensure through the necessary legislative and other measures*** *the prevention and punishment of any conduct prohibited by paragraph 3.a. including where such conduct is committed by non-State actors.”*

9. Article 10 – Convention Committee

In Article 10 Para 6 it should say:

„The Convention Committee ~~may~~ is competent and entitled to receive applications from any person or professional association claiming to be a victim of a violation

by a State Party of the rights set out in this Convention or any protocols hereto. The State Parties undertake not to hinder or interfere with the effective exercise of this right.“

It has to be expressly pointed out that the Convention Committee is competent to receive complaints about a violation of the Convention. The current wording that they only “may” receive these applications is not clear enough.