



Position Paper

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

European Convention on the Protection of Lawyers – Proposal for elements and outline for the future legal instrument

Position Paper No.: 38/2022

Brussels, July 2022

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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.

European Convention on the Protection of Lawyers – PROPOSAL FOR ELEMENTS AND OUTLINE FOR THE FUTURE LEGAL INSTRUMENT

The position paper sets out the main elements and the structure, which are required for the future legal instrument in the view of the German Bar Association.

It defines the major elements, starting with the definition of lawyer. In our opinion, a definition, which is exclusively based on the criterion of the formal authorisation to practice law, is too narrow as regulations differ from country to country. Legal education or special training must be included in such a definition. Similarly a wider definition of client is also called for, which must include all people who are trying to instruct a lawyer. The future legal instrument should also contain dispositions with regard to the admission, to professional activities as covered *ratione materiae* by the legal instrument and with regard to professional responsibilities of lawyers.

- **Lawyer** – how this term should be understood (whether it should cover persons who are not formally authorised to practice but are performing functions generally associated with that of lawyers).

As the formal authorisation might be a criterion which is too narrow, given that regulations and processes differ from country to country, it is proposed that persons are included that belong to a profession or otherwise distinguishable group of people which is accepted in the relevant society as representing clients in legal matters on the basis of a legal education or special training and as performing functions generally associated with that of lawyers or with counsellors in legal matters.

- **Client** – how this term should be understood (whether it should not be limited to persons who have given a formal authorisation to act on their behalf but covering also those endeavouring to obtain services from a lawyer).

Clients should include those who are trying to instruct a lawyer (as defined above) to represent them.

- **Professional association** – elements for their independence and self-governing character; functions that should be exclusive to professional associations; whether some regulatory functions can be performed by other bodies subject to certain guarantees as to their independence; and what are the responsibilities of professional associations to lawyers and to others.

TG: The question should be answered in light of the protection against undue interference. Independence of the legal sector is essential, in particular independence from the executive and from other parties exercising influence and power other than the duly constituted parliament. The need for independence includes therefore professional associations of lawyers (as defined above) to the extent that they engage in activities designed to protect lawyers, develop standards of their practice in general and contribute to the judicial process and exercise of justice. These activities should be exercised for the benefit of the profession in general and not for the benefit of individuals at the cost of others (impartiality and independence). Other institutions and state agencies can be entrusted with regulatory and supervisory functions, but only based on general formal statutes passed by Parliament and subject to judicial review; in this case, their independence and protection from influence would have to be specifically guaranteed.

- **Admission** – what matters ought not to be taken into account in decision-making (including the prohibited grounds of discrimination) and who should be responsible for the application of the criteria for admission in individual cases.

In order to be recognised as a lawyer (as defined above) the following criteria may be taken into account:

- Legal knowledge
 - Freedom from influence by state institutions on the basis of employment relationships, appointment in official functions etc
 - There must not be discrimination on the basis of race, gender, political and sexual orientation.
 - Disqualification on the basis of judicial convictions may be considered only for serious crimes of non-political nature which are beyond justification by a concept of free speech (disregarding the extent to which such a concept is recognised in the relevant state)
- **Professional activities** – what activities should be regarded as covered for the purpose of the convention and the irrelevance to this issue of whether the activities are publicly-funded or pro bono.

Advising and representing clients (as defined above) in all matters involving legal issues. For the avoidance of doubt, (i) legal issues include tax matters, and (ii) the scope of representation includes any court proceedings, formal and non-formal procedures before state agencies and regulatory institutions, self-regulatory bodies, arbitrators, conciliators and mediators, representation before and in meetings of members in private organisations (for profit and non-for profit) and their boards, committees and constitutional and other bodies and functions, as well as any activity in preparation of such representation.

How the activity is funded and whether or not it is pro bono is irrelevant.

- **Protection** – the right not to be subjected to any form of harassment, threat, attack or unlawful interference with the conduct of professional activities or in response to such conduct and the duty of authorities to adequately safeguard lawyers who are subjected to any such harassment, threat, attack or interference.

The above describes the appropriate level of protection. Interference should be considered unlawful if it may not be based on formal statute and, if it is based on a statute, if this statute is not of the general nature but directed at a particular lawyer and /or does not meet human rights standards (including prohibition of discrimination) or the concept of rule of law and furthermore if the law is general but is used in a discriminatory, punitive manner against a lawyer, e.g. not for the purpose and aim it actually serves.

- **Professional rights** – the scope of the freedom to choose clients; the ability to meet and communicate with clients in confidence; access to files relevant to proceedings on behalf of clients; the ability to object for good cause to a judge's conduct or participation; the requirements governing search and seizure of offices, homes and elsewhere; the requirement of respect by judges and representatives of other parties to proceedings; freedom of choice in organisation of legal practice; and advertising.

TG: There should be no limitation on the freedom to choose clients and the ability to meet and communicate with them in confidence. Where notifications are requested from lawyers for the protection of the interest of the general public and their legal interests ("Rechtsgüter") the requests must follow a balancing test taking into account the infringement of a trust relationship between lawyer and client. Lawyers should never have to risk that they are seen by their clients as agents of the government.

Files to be used in government and court proceedings must be available to lawyers well in time to properly prepare for the proceedings and discuss the content with clients.

Complaints against government officials, court officers, prosecutors and judges must be possible without fear of revenge or personal disadvantages. For the protection of the impartial exercise of their function by judges, the review of the complaint should be exercised by other judges elected by the judges of the relevant court.

- **Professional responsibilities** – what should be the relationship with clients; obligations (if any) to be owed to judges, other lawyers, public officials and the public, other matters considered relevant to the dignity and honour of the profession and responsibilities relating to the rule of law and the administration of justice; and the requirement to undergo continuing education and training while in practice.

Expectations of lawyers and their behaviour:

- A client must be legally entitled to confide to his or her lawyer any facts and views in the context of the mandate given or contemplated to be given. Therefore the lawyer must be obliged to keep such information and whatever he or she learns and develops in the context of the mandate confidential and free from any pressure by third parties or institutions (including, but not limited to, the state and the government, courts, public prosecutors and state agencies). Laws may not require the breach of confidentiality unless the provision has been enacted as a formal law after a balancing of interest test (see above). Such test must clearly show that the disclosure is necessary to avoid significant risks from other persons and institutions which clearly outweigh the infringement upon the client through forced disclosure by the lawyer.
- A lawyer must put the interest of the client above his or her own. A lawyer must be able to act for clients in a manner independent from third-party influence.
- Lawyers should be free to accept or refuse clients. A lawyer must not be forced to continue the representation of a client if there is no basis of trust between them.
- Lawyers must respect, and cooperate with, an efficient judicial process as long as such process may be considered fair and impartial. The lawful interests of the clients however have priority. The same is true for all of court proceedings.

- Lawyers are expected to act only in matters where they are competent in terms of legal knowledge, to keep that knowledge up to date, and to disclose to their clients situations in which it would be better for the client if the presentation was continued by another lawyer.
- **Expression** – the provision of civil and penal immunity for statements made in good faith in pleadings or professional appearances before courts, tribunals and other bodies; the extent of protection for statements about parties and proceedings elsewhere; and the ability to take part in the public discussion on matters concerning the administration of justice, legal reform and the promotion and protection of human rights.
 - The provision of civil and penal immunity for statements made in good faith in pleadings or professional appearances before courts, tribunals and other bodies is necessary to ensure the independence of the actions of a lawyer;
 - Statements about parties and proceedings elsewhere should be permitted unless they breach the obligation of confidentiality towards the client or do not need the standards of general laws (deformation etc);
 - Lawyers should be free to take part in the public discussion of matters concerning the administration of justice, legal reform and the promotion and protection of human rights.
- **Assembly and Association** – freedom to demonstrate and to establish associations other than those performing the functions of professional associations.

There should be no particular limitations on lawyers. Supervision, if any, must not result in repression and protection must be granted if they engage themselves accordingly.

- **Discipline** – criteria governing the basis for the institution of disciplinary proceedings and elaboration both of the requirements for disciplinary process itself and of the sanctions that can be imposed.

Disciplinary proceedings should be kept separate from bodies adjudicating other breaches of law known in order to ensure impartiality of the disciplinary body. Breaches which according to the weight of the infringement justify only minor sanction can be handled by the self-regulating body of lawyers. More significant cases should be handled at the outset from special courts which are formed at the ordinary courts but are compliant with the standards of human rights and local procedural law. In any case, appeals ought to be possible and will be handled by superior courts.

The maximum of sanctions should reflect (i) the objective significance of the breach and (ii) the objective factors such as the state of mind (negligence or intent? Excusable errors? Record of the lawyer) and be not disproportionate. A prohibition to act as lawyer and the cancellation of the admission should be the maximum sanction available but for extremely grave cases only

. In case of a breach of laws of general application, sanctions as generally available under these laws may be imposed under general laws.

- **Jurisdiction** – whether and how the standards should be applied in the context of legal practice occurring beyond the limits of the jurisdiction in which a lawyer is formally qualified.

The standards should apply wherever the lawyer is acting. If a lawyer is acting in a jurisdiction other than its own jurisdiction and if the lawyer complies the standards prescribed there, not breach of the professional rules of the home country should be seen.

- **Mechanism(s) for implementation**
- Implementing body – composition and functioning

According to the principle of self-regulation, the rules should be set by Parliament. Parliament should provide for the self-regulating bodies of lawyers to add additional detail to the rules set by Parliament.

- Monitoring/Collective complaints - method of assessing compliance.

The efficiency and result of actions of the self-regulating bodies should be reviewed at pre-determined points of time such as every three or five years. Law organisations should be asked to prepare reports, publish them and deliver them to the Ministry of Justice of their home country.