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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

JOINT OPINION

ON THE DRAFT LAW ON THE BAR AND PRACTICE OF LAW OF UKRAINE

by
the Venice Commission
and
the Directorate of Justice and Human Dignity within the Directorate General of Human Rights and Rule of Law of the Council of Europe

Adopted by the Venice Commission
at its 88th Plenary Session
(Venice, 14-15 October 2011)

on the basis of comments by
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I. INTRODUCTION

1. By a letter of 29 April 2009, Mr. Serhiy Holovaty, Chairman of the Commission for Strengthening Democracy and the Rule of Law (consultative body to the President of Ukraine) sought the Venice Commission's opinion on a draft law on the Bar of Ukraine and Practice of Law (CDL-REF(2011)040) .

2. The following rapporteurs were invited by the Venice Commission to provide their comments on this draft Law: Mr. Heller, Mr. Dan Meridor and Mr Mihai who were joined by Mr Jokubauskas and Mr Mullerat invited by the Legal and Human Rights Capacity Building Department to act as rapporteur for this joint opinion. Their comments appear respectively in documents CDL(2011)069, CDL(2011)067, CDL(2011)068 and DG-HL (2011) 12.

3. On 15 September, the TEJSU Project Office[1] in Kyiv and the Venice Commission organised meetings in Kyiv on the draft Law in which Messrs Mihai and Mullerat participated. The results of these meetings are reflected in the present opinion.

4. The present opinion was adopted by the Commission at its 88th Plenary Session (Venice, 14-15 October 2011).

II. GENERAL REMARKS

5. The present joint opinion was drafted on the basis of the rapporteurs' comments, the European Convention on Human Rights and its Protocols, the European Court of Human Rights' cases / case-law and the Code for European Lawyers adopted by the Council of Bars and Law Societies of the European Union (CCBE) (the CCBE Code) on 28 October 1988 as Ukraine has the status of observer member of the CCBE. According to the CCBE Statutes (V) all members including observer members shall adopt the CCBE Code. For an explanation of specific elements of the CCBE, reference is made to document DG-HL (2011)12.

Degree of detail of the draft Law

6. It should be noted that the Draft Law is particularly long (11 sections and 74 articles). The Draft Law tends to be all comprehensive, covering all the entities, status and activities of advocates and their bar association with many details. Being so detailed and casuistic, it runs the risk to be too rigid in application, neglecting the varied human element of each particular case. Such detailed provisions may be subject to frequent changes. **It is preferable to have detailed provisions regulated by the Bar itself rather than having to ask Parliament to amend the Law in each case.**

7. Some of the provisions of the Draft Law are very relevant, others are not. Examples of the latter are: Article 9. 2 (documents to be attached to the application for admission of advocates); Articles 10 and 11 (details of qualification examination procedures); Article 33 (procedure for paying the fee); Article 38.10 (establishing time periods for changes of information about a advocate). Ideally the law should limit to contain the former ones and leave the latter preferably for the profession or for secondary regulation to develop the Law.

8. The Draft Law is over-regulatory. Some examples of this hyper-regulation is the regulation of law firms (what the Draft Law refers as "bar associations") by Article 18; the types of law practice by Article 24; the drafting, refusing and terminating agreements for the provision of legal assistance by Articles 29, 30 and 31 (it is recommended to be more simple and flexible).

[1] Office of the Joint Programme between the European Commission and the Council of Europe on "Transparency and Efficiency of the Judicial System of Ukraine".

9. The listing of advocates' rights and obligations in Articles 37 and 38, as well as Article 39 on the guarantees pertaining to law practice deserve a particular attention (see below, in comments by Article).

10. The Venice Commission underlines that the legal profession has the vocation to be self-regulated and self-governed. Self-governance is a well-entrenched prerogative of the legal profession. Advocates enact the ethical rules that govern their conduct in connection both with the practice of law and their personal lives. When questions are raised concerning the application of ethical standards, advocates make the decisions (i) whether or not to file charges, (ii) how disputed facts should be resolved, and (iii) with respect to the appropriate sanction.

11. The main arguments for self-regulation of the legal profession are that it is necessary to preserve the independence of the bar, the independence of the judiciary, and the rule of law; it ensures the protection from state interference. Advocates are best placed to assess their peers. Self-regulation is both the most efficient and rigorous means of regulating the profession. For a long time, self-regulation has been part of legal traditions (since at least the 15th century) that it has become part of the profession's unwritten constitution.

12. However there are no standardised forms of self-regulation and in many states law and the self-regulation of the profession co-exist.

13. The Draft Law recognises the right of the bar to self-government (Articles 38, 4-5; 54, 2 and especially Section IX) but not the right to self-regulate. This should be developed as set out below.

Terminology

14. Three particular issues relating to terminology should be raised at the outset, even though these issues may result from the English translation :

- Advocate : only one term should be used in the law to name the same professional. It seems that the term of advocate is the most used in the draft law and the most appropriate. It is suggested that, for the sake of clarity, reference to "lawyers" (e.g. in Article 1 Definition of terms) be deleted.
- The notion of "attorney-client privilege" is rather an American notion than a European one. In Europe there is a concept of "professional secrecy" or "professional secret". This concept is a single and absolute concept (no exceptions).
- Bar association : in many states and in international relation this term is used for the organisation of the Bar and not for cooperation between individual advocates. For example the name of the most important international organisation of advocates is "International Bar Association." The term "bar association" is used for example in Article 1 Definition of terms and in Article 15 Practice of law. This should be replaced for example by "association of advocates" or "Law firm".

III. COMMENTS ARTICLE BY ARTICLE

Section I General provisions

15. Article 1 sets out the definition of the terms used in the law, and therefore indirectly, the scope of the law.

16. Article 1.1, 1.2, 1.7 (and 1.11): The law defines an "advocate" as an individual carrying out "practice of law" on the grounds and according to the procedure as defined by the Law (Article 1.1.1) , the "practice of law" as the independent professional systematic activities of a "defense" lawyer (an advocate) on provision of legal assistance, performing legal defence and representation (…) (Article 1.2.) and the "defense" as the advocate's activity aiming at ensuring the observation of the individuals' and legal entities' legitimate rights and interests by the investigatory, pre-trial investigation, state prosecution and court in criminal judiciary and administrative offence cases consideration;

17. No reference is made to civil courts in the definition of "defense". This raises a doubt on whether advocates who defend individuals in civil matters or before civil courts are covered by the draft law. This doubt is attenuated by the wording of Article 26.4 (see below). However, this should be clarified.

18. Article 1.3: An advocate's inquiry is defined as a binding written request by an advocate to provide information. However, such a request cannot be made binding for everybody. Article 39.13 states that everybody has an obligation to provide the information requested by an advocate's inquiry on a free-of-charge basis within ten days, with civil liability in case of breach of such obligation. The Commission's delegation was informed that in Ukraine, judges do not enforce requests for information made by advocates and therefore their request needed to be made enforceable by the present draft law. **While it could be acceptable to impose an obligation to provide information in particular on state agencies, such a request can be made obligatory only in judicial proceedings and not on the basis of the advocate's request only**. Both Article 1.3 and Article 39.13 should therefore be amended or deleted. Procedural legislation may need to be amended as well in order to ensure that valid requests for information by advocates are enforced by judges.

19. Article 1.5 provides that a fee is a monetary remuneration. However the CCBE Code does not require that the fee be in money. Advocates and clients may agree on a non-pecuniary fee, for instance livestock in rural area. It is therefore recommended to delete the adjective "monetary".

20. Article 2, which defines the Bar of Ukraine, is a very important provision of the Draft Law. Its wording could be improved as follows:

1. Article 2.1 states that the Bar of Ukraine is authorised by the Constitution. No such authorisation seems to exist and this reference should be deleted.
2. Article 2.1: the reference to "access to justice" should be deleted as advocates only provide legal advice or representation whereas "access to justice" is provided by the state.
3. Article 2 .2: reference to "confidentiality" should be removed as advocates have a duty of confidentiality with the client; bars have not such a duty, unless they obtain knowledge of information covered by the professional secrecy of an advocate, for example in disciplinary proceedings.
4. Article 2.3: only the quality of legal assistance is referred to in this paragraph. However "advocates' self-government and qualifications and disciplinary commissions of the Bar" should ensure liability for the quality of representation and defence as well. It is therefore recommended to add "representation and defence" to "legal assistance"

21. Article 3.1 provides as follows: "*Organization and activities of the bar of Ukraine shall be regulated by the Constitution of Ukraine*, *this Law and other laws of Ukraine to the extent that does not go counter to this Law, other legislative acts of Ukraine, advocates' ethics rules, decisions of advocates' self-government bodies*". This provision establishes a legislative hierarchy that cannot be regulated in ordinary law and could only derive from Constitution. Conflicts of laws have to be solved using the *lex posterior* and the *lex specialis* rules.

22. Article 3.2 providing for the priority of treaties over the present draft Law restates a general principle of Ukrainian constitutional law, which need not to be repeated in the present Law.

23. The wording of Article 4.1 which states that "*Only advocates are entitled to provide professional legal assistance, defense and representation of rights (…)*" might need some improvement. The provisions of Articles 4.1 and 24.3 do not match. Article 4.1 refers to professional legal assistance only, which can reasonably only be understood as a paid service, whereas Article 24.3 uses the words "with or without payment. **There should be just one provision regulating the monopoly of advocates** and Article 24.3 should be deleted. The borderline to legal services by other institutions, like NGOs, Chambers of Commerce, Trade Unions etc. is not easy to find. The difference could be that only legal services against payment belong to the monopoly, but not unpaid services connected with the object of other institutions. For instance, trade unions could advise in labour law and consumer protection cases, but not for example in divorce cases.

24. According to Article 4.3 "*The right to carry out practice of law arises from the date of entering the information on the chosen organizational form of practice to the Uniform Register of the Bar and the Law Practice of Ukraine*." This article has to be read in conjunction with Article 6 which states that to gain the statute of advocate, an individual has – among others - to select a legal and organisational form of practice.

25. **The right to practice should not depend on the whether an advocate has already selected a legal and organisational form of practice** as developed in Section III "*Practice of law organisational forms*". **Once an advocate fulfils the criteria, he or she should be able to exercise the profession in any admissible form and the advocate should be free to change the organisational form at any moment.**

26. Article 4.4 : These principles are somehow miscellaneous. It would be better either to delete this paragraph or to **refer to the three fundamental ethical principles of advocates: independence, confidentiality and loyalty (avoidance of conflicts of interests).** The essential notion of "conflicts of interests" is lacking in the law and should be included and developed in the law.

27. The purpose of Article 5.1, which states that "*The Bar is not included in the system of state and local authorities*" is not clear. Note that it is already stated in Article 2.1 that the Bar is a public institution. A reference to the independence of the Bar from the state and local authorities would perhaps be more appropriate.

28. Article 5.3 states that "*The state and local authorities must agree with the appropriate level advocates' self-government bodies the draft legislative acts to the issue of the bar of Ukraine organization and operation*". Unless there is a translation error, it is impossible to oblige "*The state and local authorities"* (which have the sovereign power to make law or other regulations) "*to agree*" on the content of the legislation or regulations with the addressees of such legislation or regulations. Instead, there should be an obligation to hold prior consultations.

29. The purpose of Article 5.4.1 is not clear. The generalisation of statistical data should not become a means of control by the state of the legal profession members.

30. Article 5.5 and Article 5.6 : These privileges are unusual and could allow the executive bodies to discriminate among members and limit advocates' independence. They should be deleted. Local self-government bodies or executive bodies could exert pressure on advocates by providing or not "better" premises to them.

Section II "Gaining the right to perform practice and the status of advocate"

31. Article 6 sets out the requirements for obtaining the status of advocate. As already mentioned under Article 4.3 it should not be necessary for an advocate to select a legal and organisational form of practice to gain the right to practice.

32. Article 7.1.1. The Commission would like to stress that the issue of incompatible professions has been dealt with in a different way in some European states, which have regulated compatible professions instead of incompatible ones.

33. Articles 9, 10 and 11 which concern the qualification examination contain some details which should not be regulated on the level of law (for examples 9.1, 10.1, 10.3, 11.3, 11.7). Large parts of these articles should be left to self-regulation by the Bar.

34. If retained at all, the criteria of "identification of personal and moral features" in Article 10.1 should be elaborated to leave not too much room for qualifications and disciplinary commissions to reject applications on this ground.

35. Article 10.2.5 provides that the examinations are conducted by the Qualification and Disciplinary Commission whose decisions may be appealed before the High Qualifications and Disciplinary Commission of the Bar (which is understood to replace the present High

Qualifications Commission of Advocates). It should be possible to challenge before the courts the decisions of the High Qualifications and Disciplinary Commission of the Bar. ***

36. Article 12 concerns traineeships. This is an excellent element of the advocate's training. However, it would be advisable to conduct an evaluation of whether there are sufficient advocates and law firms which have the time and also the space in their offices to adequately accept and train the potential trainees. It should be clarified whether during the traineeship period the trainees will have the right to receive a small remuneration paid by the state or by the advocate. **The advocate who supervises the traineeship should be obliged to make an assessment of the results of the traineeship to be submitted to the Regional Bar Council, which would keep this information in the file of the trainee.**

37. In relation to Article 13.1 see comments made in respect of Articles 4.3 and 6. In addition, Article 13.1 should be read in conjunction with Article 26.4. Article 26.4 states : "*An advocate can be exempted from an appointment as a defense counsel if the advocate has no practical experience in criminal law or if the advocate's license does not apply to practice in the field of criminal justice ….*" This provision seems to imply that the advocate's licence can be limited to field of criminal justice. Such a provision cannot be found anywhere else in the draft Law. However, of this were so, this would not be in conformity with European standards. The advocate's license should be a general license.

38. On another aspect, Article 13.1 provides that "*According to the traineeship results a regional bar council takes the decision on issuing an advocate's license to practice law to a person or denial to issue thereof. (…)*". However the Law is silent on how and by whom "*the traineeship results*" are assessed. This should be completed.

39. The starting point of the 30 days time limit to challenge the decision to refuse a license to practice law to an advocate should be the notification of this decision (and not the date of the decision itself as set out in Article 13.2).

40. Article 14.2 sets out that "*The text of Oath, signed by the advocate, shall be stored by the regional bar council in the advocate's personal file*" does not appear necessary. The Commission would like to point out that it is not necessary to keep a file for each member unless there have been disciplinary procedures against that member or the traineeship report. The date when the advocate took the oath could be registered by the Bar and the advocate could be obliged to display the signed copy in his/her office.

Section III : Practice of law organisational forms

41. In general, this section is too detailed and quite confusing. It should simplified, especially relating to advocates who want to work as a individual practitioner.

42. Article 16 defines a "legal office" and Article 17 a "law bureau". Both have the same definition - a legal practice carried out by an individual - except that one is a legal entity or the other not. However the interest in the distinction is not clear. It is not clear either why in the case of the "law bureau" (which is a legal entity) the agreements with clients are not concluded in the name of the legal entity, as one would expect, but by the advocate.

43. Article 18 on "bar associations" is very detailed and sometimes confusing. As pointed out above with the terminological issues, the title of this Article should be changed to "forms of cooperation between advocates". The Draft Law should regulate the function of an advocate, and then contain only some basic rules on the various forms of partnership. Other rules should be left to secondary regulation / by-laws or acts of self regulation. **The form of cooperation, the partners' agreement, its contents, validity and termination should not be mandatory but left to the will of the contracting partners.** Even if several of these points should not be regulated on the level of the law, a few of the shortcomings in substance are addressed below:

44. Article 18.2 refers to a "simple company". It is not clear why a simple company needs to have a managing partner and why this person should be elected. Usually, in partnerships, the partners will distribute the managing duties between themselves, rather than appoint a

managing partner and leave all administrative matters to him. The partnership agreement can provide otherwise but the Law should not set rigid rules, which moreover are quite unusual in partnerships in other countries.

45. The draft Law also provides that a partnership agreement shall be terminated in case of termination or suspension of a partner's advocate license unless the partnership agreement provides differently. It is not clear why the drafters chose this option as the standard rather than the providing for the continuation of a partnership and making the termination an exception. A rule for compensation of the partner who left the partnership is missing. What happens if a partner dies? The case where no partner with a valid license remains needs to be regulated.

46. Article 18.4: in entrepreneurship companies agreements on provision of legal assistance are concluded by the managing partner. Even in very large international offices the contracts with clients are usually concluded by the individual advocates on behalf of the company, only following certain general standards (for instance hourly rates), in most cases stipulated by a partnership council. If there is a managing partner he or she has to deal with administrative duties only. Again, the draft Law establishes a rule which may reveal to be difficult to put in practice.

47. Article 19 is very confusing. The Article seems to describe what a "lawyer" is but it uses the term "advocate". This Article seems incompatible with the definition made in Article 4.1.

48. Article 19.1 seems too detailed and too restrictive. **Within the framework of general labour laws, the employer lawyer and the employee lawyer should be free to make any type of labour arrangements they want.**

49. The reference to "general manager" in Article 19.4 should be removed.

50. Article 20 states that *"The interference by other bar association participants, advocates' self governance bodies with the legal views of an advocate in a particular case is prohibited".* **Prohibition of interference by the state and any public entity should also be mentioned** and even earlier in the draft law, probably under Article 5. The principle of independence from state bodies and other advocates should be set out in Section I of the draft Law.

51. Article 21.3 sets out the entitlement of assistant advocates in detail. However, an assistant advocate is an employee and it is up to the employer to authorise his or her assistant to perform actions or to give instructions.

Section IV Practice of law. Provision of legal assistance by an advocate, implementation of protection and representation

52. Article 24 lists the type of law practice ("advocate's activity"). The Article should either be limited to a general statement or further elements need to be added. If the latter approach is chosen, the following activities could be added in Article 24.1 :

1. mediation;
2. fiduciary activities consisting of receiving, in deposit or escrow accounts, on behalf and at the expense of the client, financial funds and goods, as well as the placement and administration thereof, on behalf and at the expense of the client;
3. temporary establishment of trading companies headquarters at the advocate's professional office, the registration of such companies, on behalf and at the expense of the client, of interest shares, shares, or stock of companies thus registered.

53. Following the above approach, "witness" could be added in the list of individuals in Article 24.1.3.

54. Article 24.3 should be deleted (see above under par. 23 concerning Article 4.1).

55. The Articles 25 and 26 will need to be amended as consequence or the recent adoption of the Law on Legal Aid in May 2011.

56. Article 25 which deals with „Pro bono legal aid“ should be redrafted in the light of the Law on Legal Aid, which was recently adopted. What happens if there are so many cases of legal aid that the pro bono legal assistance exceeds 144 working hours per year mentioned in paragraph 3? Proceedings could take several months. Can a defence counsel give up to defend an accused after 144 working hours and would s/he pass on the case to another advocate acting pro bono? Who identifies this advocate, the Bar?

57. The **regulation of the "legal assistance agreement" in Article 28 should be left to general contract law**.

58. Article 28.4 should be deleted. If an agreement is signed by the legal representative of the client, no subsequent consent should and can be required from the client him/herself unless the agreement is revoked by the client.

59. Article 29 on the "form of agreement of the provision of legal assistance" should be completed by adding the possibility for the advocate to conclude a legal assistance agreement by fax, email or other modern means of communication.

60. Both the client and advocate can terminate their relationship at any time and without giving a reason (Article 31) but there are two basic conditions. For the client, to pay the fees for all work done or prepared to be done. For the advocate, s/he cannot terminate the client-advocate relationship or withdraw from a case or matter unless at a moment and in a manner that it does not harm the client's interest. Ideally the withdrawal must be made with sufficient time in advance before any important step to be taken in the case and even suggesting the names of several advocates or firms for the client to choose to replace the withdrawing advocate (CCBE Code, Article 3.1.4)

61. Article 32 fees must be reasonable and take into account the time spent.

62. Article 33 should foresee the possibility for the advocate to request an "advance payment" for fees and expenses (which seems to be the case according to paragraph 8 of this Article).

63. Article 33.7 provides that the fees for legal aid shall be made pursuant to the legislation of Ukraine but Article 25 of the Law on Free Legal Aid adopted on May 2011 only states that the advocate has the right "to receive appropriate remuneration". There seems to be a legal gap which should be regulated by secondary legislation in co-operation with the Bar Association.

64. The obligation of the regional bar council to take measures to protect the interest of the client in case of an attorney termination in practice puts an extraordinary burden on the bar which may be liable if the measures are not appropriate or on time (Article 33.8).

65. In Article 34, the time for the storage of the advocate's files of clients is too short.

66. Article 36 deals with the difficult issue of civil liability and insurance. The CCBE Code (3.9) provides that "*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. Should this prove impossible, the lawyer must inform the client of this situation and its consequences.*" Neither Article 36, nor any other article provide for a mechanism to ensure the implementation of the obligation of advocates to have a civil liability insurance.

67. In any case, paragraph 2 of this Article which provides that "*the state is not liable for damages caused by the wrongful actions of an advocate performing his/her professional activities*" states the obvious and can be deleted.

Section V Rights and obligations of an advocate. Guarantees for the practice of law

68. Articles 37 and 39 give a very detailed list of advocate's rights and guarantees. During the discussions in Kiev the difficulties to exercise the profession of advocate in Ukraine and the

impediments put to them by the authorities were raised. It was mentioned, for example, that often advocate's files are searched and confiscated by police or the prosecutor without a court order. The delegation's interlocutors insisted strongly that without having such explicit guarantees, states authorities would frequently infringe the advocates' rights and their professional secrecy.

69. Article 37 provides a very detailed **list of advocate's rights. Listing all the rights of advocates in a detailed manner carries the risk of forgetting some of them. It would therefore be advisable to precede the list by a general formula**, which would cover all the existing rights both at national level and in application of international treaties to which Ukraine is a party, in particular the European Convention of Human Rights, including the case-law of the Strasbourg Court. And the list itself should not be drafted as exhaustive.

70. Even if explicit guarantees may be required in the specific situation of Ukraine, the formulation of some of the advocate's rights listed by Article 37 seems excessive, in particular in items 4, 11 and 14.

71. Article 38 relates to professional ethics, which are the quintessence of the legal profession. **The draft Law should only set out the main ethical duties (independence, confidentiality and loyalty - avoidance of conflicts of interests) and refer for the rest to a code of ethical obligations. This code should also be the basis for disciplinary sanctions.** It seems that such a Code exists in Ukraine and is recognised as appropriate by the representatives of advocates but the Commission has not been able to study that Code.

72. Article 38.1.4 states that an advocate shall be obliged to comply with decisions taken by self-government bodies of the bar within the limits of their competence. Article 70 also states that the decisions of the Congress of Advocates, the Bar Council, the meetings/conferences of the bar members as well as of the regional bar councils taken within the limits of their competence specified by the law shall be binding upon all of the advocates.

73. It should be noted that decisions of any institution or body have to be made *within the limits of their competence* (Article 38.1.4). But only a court has the right to decide whether a decision taken was within the limits of competence or not. Advocates have the right to appeal any decision of self-government bodies of the bar to a court (Article 72.5). Therefore stressing in the law that advocate shall be obliged to comply with decisions taken by self-government bodies of the bar *within the limits of their competence* is redundant. This gives the impression that the legislator does not trust the bodies of bar self-government and indirectly encourages advocates to mistrust self-government bodies, which is not compatible with European standards, especially Principle V of the *Recommendation No. R(2000)21 on the freedom of exercise of the profession of lawyer.* This part of the sentence should therefore be deleted.

74. Article 38.2.5 states that an advocate shall be prohibited to cooperate with bodies conducting criminal and pre-trial investigations. However, one can have doubts on whether it is always in the interests of clients to prohibit advocates to cooperate with bodies conducting criminal and pre-trial investigations. That is not just the cases when advocates represent victims. It is also cases when it is in the interests of the accused to prove his/her innocence. Such a limitation might be in breach of advocate's independence and therefore be not in compliance with European standards. If other than general cooperation is meant by authors, it should be specified.

75. The exhaustive list of guarantees in Article 39 is unusual in texts of this nature but it is understandable, in the light of the difficulties faced by advocates in Ukraine, which were pointed out at the discussions in Kyiv. However, some important comments should be made in this context :

- there is not sufficient reference to sanctions for violating such guarantees and such sanctions should be covered by the draft Law or by complementary legislation;
- in certain situations, some of these guarantees cannot apply. For such cases, the draft Law should **provide for exceptions and special proceedings, always involving courts of law** (possibly superior courts of law). This concerns in particular the

surveillance of means of communication and searches. The draft Law should make an explicit and general reference to the respect due by public authorities to the European Convention of Human Rights and the case law of the Strasbourg Court in this field;

- the relation between Article 39.4 (which prohibits in general terms certain criminal proceedings against the advocates) and Article 39.10 (which allows again in general terms the criminal proceedings, if they are carried out by specified superior level prosecutors) is not clear and should be redrafted;
- as concerns Article 39. 7, it is recalled that under the European Convention on Human Rights, a state has a positive obligation to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention. Whether this has to be recalled in the draft law (as Article 39.7 points out the obligation of the state to protect the life, health and property of the advocate) is, given the particular context in Ukraine, something left to the decision of the drafters; in the light of the general of the general positive obligation to protect everyone, the specific obligation to close relatives seems superfluous;
- as concerns Article 39.13, see under Article 1.3.

76. There seems to be a contradiction between Article 40.5 which states that "*the expenses incurred by the addressee of the inquiry must be compensated by the advocate submitting the inquiry"* and Article 39.13 which refers to "*on a free of charge basis*".

77. Is this only the right of the advocate to obtain the information etc. specified herein, or can the person himself do it without an advocate?

78. Article 41 should cover the three most important duties of a advocate i.e. independence, confidentiality and loyalty - avoidance of conflicts of interests.

79. Confidentiality as developed in this Article is too broad because it should be limited to the advocate-client relationship and not to all information "in connection with the practice of law".

80. The disciplinary and civil liability for breach of the confidentiality duty seems to be restricted only to past clients. The liability for the breach of confidentiality set out in the second sentence of Article 41. 3 should appear separately and be drafted as a general rule.

Section VI Suspension and termination of the right to practice law

81. Articles 42 and 43 are worded unclearly in several respects.

82. Article 42.1.3, 4 and 5 and Article 43.1, 2, 4 and 6 make reference to various court decisions. Are such decisions final and irrevocable?

83. Article 42.4 and Article 43.3 stipulate that a decision to suspend or to terminate the right to practice law can be appealed to the High Qualifications and Disciplinary Commission or to a court. Which is the criterion to be used for choosing between the two bodies? **The advocate should first turn to the High Qualification Commission and be able to appeal to a Court only against that decision, thus allowing the Bar to correct any errors internally first.**

84. Both articles stipulate several cases of suspension or termination. For instance, Article 42.1.4 and Article 43.1.4 both refer to the imposition of disciplinary measures on the advocate in the form of suspension or deprivation of the right to practice law and this is perfectly acceptable. However, **the draft Law should describe in which cases and for which wrongdoings the disciplinary commission of the bar can make such a decision. Evidently, the wrongdoings must be very serious since it would be disproportionate to apply such serious sanctions for small tax, traffic or civil offences or misdemeanour.**

85. Bar association orders should define the procedure to suspend or terminate the right of an advocate giving him or her the **time to defend him/herself and present the appropriate evidence in his/her defence** and with the necessary transparency

86. Article 43. 1 sets out as grounds to terminate the right to practice law the "provision of inaccurate information on the basis of which the advocate acquired the advocate's status". The article should specifically refer to serious misinformation because a minor defect on the information should not be sanctioned so radically

Section VII Disciplinary actions against an advocate

87. Article 45 provides that sanctions in disciplinary proceedings shall be admonition, suspension for a period between one month and one year, or deprivation of the right to practise law. The difference between admonition and suspension is very large and in many cases does not reasonably allow taking the gravity of the offence into account. It would be more reasonable to **include fines into the list of sanctions**. The draft Law does not mention any written submission for defence before initiating a disciplinary case. The refernce to conducting "collegial verification" (Article 49) does not seem sufficient in this respect. It is also not clear whether an advocate against whom a proceeding was initiated may be defended by another advocate. This should be possible.

88. Article 47.1 "*Initiating disciplinary action against an advocate*" provides that: " (…) *Disciplinary action against an advocate can be initiated by the qualifications and disciplinary commission, on the initiative of no less than one third of its members.*" The Draft Law confers to the qualifications and disciplinary commission, the power of initiating a disciplinary action. In this case, **the members who initiated the disciplinary action should not vote on the proposal or take part in the decision made by the qualifications and disciplinary commission.**

89. Article 51 on the hearing in a disciplinary case does not stipulate whether the hearing is public or not. However disciplinary proceedings in which what is at stake is the right to continue to practise one's profession as a private practitioner give rise to "contestations (disputes) over civil rights" within the meaning of Article 6 § 1 and therefore these proceedings should be in conformity with the guarantees provided by Article 6 of CEDH. In particular disciplinary cases should be heard "in public". It is recalled that the holding of court hearings in public constitutes a fundamental principle enshrined in Article 6 § 1. This public character protects litigants against the administration of justice without public scrutiny; it is also one of the means whereby people's confidence in the courts can be maintained.

Section VIII Organisation of the Bar of Ukraine

90. Article 54.1 states that the bar of Ukraine comprises all of the advocates of Ukraine, united through membership in the National Bar Chamber of Ukraine. However, it is unclear in the Draft Law whether membership in the National Bar Chamber of Ukraine is compulsory or not. The obligatory membership to the Bar should be explicitly stated.

91. Article 54.6 sets forth that the advocate's right to self-government shall be exercised through the Congress of Advocates of Ukraine and the meetings/conferences of the bar members of the Autonomous Republic of Crimea, the oblasts, and the cities of Kyiv and Sevastopol. Probably the intensions of the drafters of this law were positive, but the wording of this provision is defective and might lead to a very narrow understanding of self-governance of advocates. The right to self-governance of advocates cannot be narrowed to the right to participate in regional meetings and national congress of advocates. Everyday activities of the National Bar Chamber of Ukraine in safeguarding the independence and interests of advocates is also the execution of the right to self-governance of advocates and every advocate has the right to participate in these processes directly (e.g. as a member of regional bar council) or indirectly (e.g. submitting suggestions to Bar Council of Ukraine). The provision itself is more of declarative nature and the need for it is not that big as long as other provisions of the law consolidate the self-governance of advocates. Therefore it is recommended to either changing the wording of this paragraph or to delete it.

92. Article 55 provides for the setting up of two commissions: the qualifications commission and the disciplinary commission. This dual structure of qualifications and disciplinary commissions satisfy European standards.

93. Article 55.1 et 2 sets forth that the qualifications and disciplinary commissions of the bar shall be elected by the meetings/conferences of the bar members. Article 55.2 specifies that qualifications and disciplinary commissions are composed of an attestation chamber and a disciplinary chamber. Members of the chambers are not only advocates, but also judges and representatives of the territorial body of justice.

94. It is not clear why a representative of the territorial body of justice is a member of these chambers. Why not having, instead, in the disciplinary chamber, a representative of clients? And in the qualifications chamber, an academic ?

95. In any case the representatives of the territorial body of justice and the judges cannot be elected by meetings/conferences of the bar members. It is strongly recommended to amend Article 55 paragraph 2 and to **specify how non-advocate members of qualifications and disciplinary commissions are appointed**. The specification of the appointment of non-advocate member can be regulated by the Regulations on a Qualifications and Disciplinary Commission of the Bar (mentioned in Article 55 paragraph 8).

96. According to Article 55.3, the Chair of the qualifications and disciplinary commissions is elected for one year by the Bar members. It should be clarified whether the Chair is elected among the members elected for three years or among the members of the Bar. If elected among the members elected for three years, the situation of the Chair after the expiration of the one year term of office should be explicitly stated.

97. The law remains silent on the amount of work expected from members of the qualifications and disciplinary commissions and from the High Qualification and Disciplinary Commission (Article 56). Although a high level of professionalism is no doubt necessary to become a member of these chambers or commission, being a member of them should not become a profession in itself. In order to allow the members to pursue their professional activity as advocates, the term of office in these Commission should be adapted: either it is expected to be a full time job and the term of office should be very short (one year) and the office be remunerated decently/properly or it is not a full time job and the term can remain 3 years and, according to the amount of work, it could be decided to allow fees for this work.

98. Article 57 sets out the independence guarantees for the decisions of the qualifications and disciplinary commissions of the bar. The principle of independence of qualifications and disciplinary commissions set forth in this article is in compliance with European standards. However the name of the article is somewhat misleading.

99. First of all, the name of the article implies independence principle in general, while the text of the article only provides for independence of bodies of self-government of advocates from the influence of other bodies of bar self-government. The essence of the principle of independence of bar self-governance is the independence from authorities and public. Therefore the name of the article should be amended.

100. Second, all bodies of self-government of advocates should not interfere in activities of other bodies unless this is set in their functions. It should be noted that there are no provisions prohibiting interference in the activities for other bodies of self-government of advocates. Such distinction creates ground for misinterpretation of the law – if regional bar councils are not allowed to interfere in the activities of qualifications and disciplinary commissions, but there is no provision in the law prohibiting qualifications and disciplinary commissions to interfere in the activities of regional bar councils, does this mean that qualifications and disciplinary commissions can interfere in the activities of regional bar councils? It is suggested to amend Article 57 Para 1 respectively.

101. This Section (“Organization of the Bar of Ukraine”) provides for numerous elections. It should be specify how an advocate can challenge the elections held according to these provisions.

Section IX Advocate's self government

102. Article 60.2 states that the Congress of Advocates of Ukraine shall be made up of delegates elected by the meeting/conference of the bar members (…) by secret ballot, by a majority of the votes of those attending the meeting/conference. In order to ensure that no post of delegate remains unfilled, it should be specified that the majority is a relative majority.

103. Article 61 The powers of the Congress of Advocates of Ukraine are elaborated in Article 61. The Congress of Advocates of Ukraine besides other powers approves the budget of the National Bar Chamber of Ukraine. But there is no provision on what body approves the budget of the High Qualifications and Disciplinary Commission. The High Qualifications and Disciplinary Commission is also a legal entity (Article 56. 7) and it is formed by the Congress. It is therefore recommended that the law provide, as well, for the approval of the budget of the High Qualifications and Disciplinary Commission by the Congress of Advocates of Ukraine.

104. Article 62.1 provides that the Chair of the Bar Council of Ukraine shall be elected from among the delegates to the Congress of Advocates of Ukraine which are themselves elected by secret ballot by the respective meetings/conferences of the bar members. **The election procedure of the Chair would be more democratic if the list of candidates for the position of the Chair was not limited to delegates to the Congress.**

105. Article 62.9 This Article sets forth that the Chair and his/her deputies, and also the other members of the Bar Council of Ukraine can combine work in the Bar Council of Ukraine with the practice of law and receive remuneration for their work in the Bar Council of Ukraine at the rate determined by the Congress of Advocates of Ukraine. The same rule is set forth for the regional bar councils (Article 66 Para 10). It is recalled that the same provisions should be included in Article 55 and 56.

106. Article 62.4.11 should be modified (see under Article 4).

107. Article 65.1 states that "*The highest body of a regional bar chamber shall be the meeting of the bar – the general meeting of all advocates who practice law, accordingly, in the Autonomous Republic of Crimea, an oblast, or the cities of Kyiv or Sevastopol and who are included in the Unified Registry of Advocates of Ukraine for the respective region. If the number of advocates in a region is more than 300 persons, the highest body of a regional bar chamber shall be the conference of bar members, which shall be composed of authorized delegates. The representational quota for the conference and the procedure for the election of delegates shall be determined by the regional bar council*."
Two important issues have to be raised :

- Even if the number of advocates in a region is more than 300 persons the regional bar chambers should have the right themselves to decide whether meeting of advocates or conference should be organised.
- There seems to be no rule provided for either define the concept of "authorized delegates" or to establish a procedure for such authorisation. In any event delegates should be elected.

108. Article 70 "Decisions of self-government bodies of the Bar" : the same reasoning applies to the wording of this Article than that to the wording of Article 38, 1.4 (see above) and therefore the part of the sentence "within the limits of their competence" should be deleted.

109. Article 71 "Funding of self-government bodies of the Bar" – **the limitations to financing of self-government bodies of the bar does not seem to be justified**. There is no justification why regional bar chambers cannot get advocates' fees meant for organisational and technical support if such support is provided. There is no reason why the High Qualifications and Disciplinary Commission cannot get charitable aid (donations) or why the Bar Council of Ukraine cannot get voluntary contributions by advocates. Annual fees to support advocates' self-government should be deposited in the accounts of the regional bar chambers, but all other means of financing should be available to all self-government bodies of the bar.

110. This Section ("Advocate's self government") provides for numerous elections. It should be specified how an advocate can challenge the elections held according to these provisions

Section X Practice of law in Ukraine by an advocate from a foreign state

111. Article 73 "Limits to the practice of law in Ukraine for an advocate from a foreign state. Specifics of the status of an advocate from a foreign state": There are no provisions on providing legal services on temporary basis by foreign advocates. Therefore it is not clear whether foreign advocates are allowed to provide legal services on temporary basis. **European standards would require allowing foreign advocates to provide legal services on a temporary basis.** It is therefore recommended to include such a provision in the law.

108. This provision sets limits on the possible professional activities of foreign advocates that are too narrow. These limitations (relating to legislation and to clients from the advocate's home state) does not comply with European standards. Moreover, it should also be noted that these limitations are against the real long-term interests of the Ukrainian advocates for whom the cooperation with foreign advocates can contribute to the modernisation and development of their knowledge and skills. These limitations should be deleted.

112. The rest of this section should be modified accordingly (in particular Article 74.2 and Article 78.2)

Section XI Concluding and transitional provisions

110. Paragraph 13 : persons intending to acquire the status of an advocate without passing the qualification examination and undertaking a traineeship shall be obliged to submit necessary documents within three months from the coming into force of the Law. Qualifications and disciplinary commissions shall be busy with organizational matters of founding meetings/conferences of bar members during the first months after the Law on the Bar and Practice of Law comes into force. However, the review of the documents and the **granting of the status of an advocate without passing the qualification examination and undertaking a traineeship** shall be performed in accordance with the procedure determined by Article 9, which sets a 2 month deadline to consider the application. As there shall be a big number of persons intending to acquire the status of an advocate without passing the qualification examination and undertaking a traineeship, the work load of the commissions shall be particularly heavy. This might negatively influence organization of founding meetings (conferences) of bar members. Therefore, **the time frame for this procedure seems to be too short and should be extended.**

IV. CONCLUSION

113. The draft Law is coherent and provides a good basis for regulating the profession of the advocate. Nonetheless, the present joint opinion makes a number of recommendations to improve the draft Law, *inter alia*:

1. The draft law is too detailed and a number of provisions should be left to self-regulation, rather than having to ask Parliament to amend the Law in each case.
2. While it could be acceptable to impose an obligation to provide information in particular on state agencies, such a request can be made obligatory only in judicial proceedings and not on the basis of the advocate's request only (Articles 1.3 and 39.13 as well as procedural codes).
3. There should be a single provision regulating the monopoly of advocates (Articles 4.1 and 24.3).
4. The right to practice should not depend on whether an advocate has already selected a legal and organisational form of practice. Once an advocate fulfils the criteria, he or she should be able to exercise the profession in any admissible form and the advocate should be free to change the organisational form at any moment (Article 4.3).

5. The law should refer to the three fundamental ethical principles of advocates: independence, confidentiality and loyalty (avoidance of conflicts of interests - Article 4.4).
6. An advocate who supervises a traineeship should be obliged to make an assessment of the results of the traineeship to be submitted to the Regional Bar Council (Article 12).
7. The form of cooperation, the partners' agreement, its contents, validity and termination should not be mandatory but left to the will of the contracting partners (Article 18).
8. Within the framework of general labour laws, the employer lawyer and the employee lawyer should be free to make any type of labour arrangements they want (Article 19).
9. In addition to the interference by other bar association participants (Article 20), a prohibition of interference by the state and public entities should be introduced (Article 5).
10. The regulation of the "legal assistance agreement" in Article 28 should be left to general contract law.
11. Article 37 provides a very detailed list of advocate's rights. Listing all the rights of advocates in a detailed manner carries the risk of forgetting some of them. It would therefore be advisable to precede the list by a general formula.
12. The draft Law should only set out the main ethical duties (independence, confidentiality and loyalty - avoidance of conflicts of interests) and refer for the rest to a code of ethical obligations. This code should also be the basis for disciplinary sanctions (Article 38).
13. While guarantees for the protection of the professional secrecy and of other rights of advocates have to be provided, the Law also has to provide for exceptions and special proceedings, always involving courts of law (possibly superior courts of law) particularly as concerns surveillance of means of communication and searches. The draft Law should make an explicit reference to the respect due by public authorities to the European Convention of Human Rights and the case law of the Strasbourg Court in this field (Article 39).
14. In disciplinary proceedings, the advocate should first turn to the High Qualification Commission and be able to appeal to a Court only against that decision, thus allowing the Bar to correct any errors internally first (Article 42.4 and Article 43.3).
15. the Law should describe in which cases and for which wrongdoings the disciplinary commission of the bar can make such a decision. Evidently, the wrongdoings must be very serious since it would be disproportionate to apply such serious sanctions for small tax, traffic or civil offences or misdemeanour (Article 42.1.4 and Article 43.1.4).
16. In disciplinary proceedings, the advocate benefit from a fair trial, in particular by giving him or her the time to defend him/herself and present the appropriate evidence in his/her defence and with the necessary transparency.
17. In order to be able to scale penalties, fines should be included in the list of sanctions (Article 45).
18. Members of a disciplinary commission who initiated a disciplinary action should not vote on the proposal or take part in the decision made by the qualifications and disciplinary commission (Article 47.1).
19. It should be specified how non-advocate members of qualifications and disciplinary commissions are appointed (Article 55).
20. The election procedure of the Chair would be more democratic if the list of candidates for the position of the Chair was not limited to delegates to the Congress (Article 62.1)
21. The limitations to financing of self-government bodies of the bar does not seem to be justified (Article 71).
22. Foreign advocates should be allowed to provide legal services on a temporary basis (Article 73).
23. In the procedure for granting the status of an advocate without passing the qualification examination and undertaking a traineeship, the time frame for examining all requests seems to be too short and should be extended (concluding and transitional provisions, paragraph 13).

114. The Venice Commission and the Directorate of Justice and Human Dignity welcome the intention of the Ukrainian authorities to improve the legislation on the bar and express their readiness to assist in this respect.