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March 2019

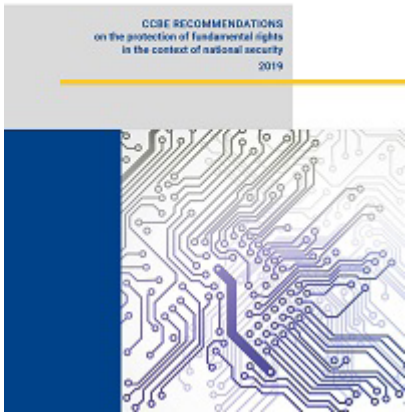
Round table specifically focused on the future of the European Court of Human Rights (ECtHR) on 14 March in Brussels

FUTURE OF THE EUROPEAN COURT OF HUMAN RIGHTS

The CCBE's Permanent Delegation to the European Court of Human Rights, chaired by Piers Gardner, held a round table specifically focused on the future of the European Court of Human Rights (ECtHR) on 14 March in Brussels. A similar round table was organised in October last year on the role of lawyers in the execution of the ECtHR's judgements. The results of these round tables will serve as a basis for the preparation of the CCBE's contribution to the current debate on the future of the ECtHR.

Indeed, in February 2010, the Member States of the Council of Europe began what is now known as the Interlaken process, to reform the mechanisms of the European Convention on Human Rights and to free the European Court of Human Rights from its increasing backlog of pending cases. Various reforms have followed, but after ten years, at the end of this year, the Committee of Ministers is committed to assessing whether these reforms are sufficient, or whether more radical measures are required for the Court to function effectively in the future. In this context, the CCBE intends to make the voice of the legal profession heard by contributing to the debate in the Committee of Ministers about the adequacy of the Interlaken reforms for shaping the Court of the future.

CCBE MAKES RECOMMENDATIONS ON THE PROTECTION OF FUNDAMENTAL RIGHTS IN THE CONTEXT OF NATIONAL SECURITY



The CCBE position paper on the protection of fundamental rights in the context of National Security will soon be available on its website.

The core issue addressed by the CCBE in its position relates to the idea of 'national security' and its indeterminate meaning. At both national and international level, there is no universally accepted definition of national security. As a result, even where domestic law provides a certain degree of definitional clarity, from one country to another this leads to radically different interpretation by the courts as they assess what is, or is not, considered necessary and proportionate when invoking national security as a justification for measures which limit citizens' fundamental rights.

This issue is of specific relevance to the protection of the confidentiality of lawyer-client communication within the context of surveillance activities. For lawyers to effectively defend their clients' rights, there must be confidence that communications between clients and their lawyers are kept confidential. If 'national security' remains entirely undefined in law, then there is no clear basis upon which a court might determine whether the purpose for which an intrusive surveillance power might have been exercised is, or is not, in pursuit of national security.

The protection of the State and its citizens is the primary function of any government. However, as the CCBE argues, this should not be used as a justification for arbitrary or disproportionate infringements of fundamental rights, justified by the call: "exceptional times demand exceptional measures". The CCBE asserts that democracies are States governed by the rule of law. What the rule of law requires as a response to "exceptional times" are not exceptional measures, but measures which are balanced, proportionate and considered.

In view of the above, the CCBE makes several recommendations on how and whether national security, as a justification for surveillance measures and other intrusions upon the fundamental rights of citizens, can be better embedded in national democratic systems. The four recommendations, namely; 1) the need for legislative control 2) judicial and independent oversight 3) legal remedies and sanctions and 4) professional secrecy & legal professional privilege, are expanded upon in the CCBE's paper.

The CCBE stresses that to guarantee a fair balance between considerations of national security and the fundamental rights of the citizen, robust procedures must be established. Through these, democratic societies can respond to the external and internal threats confronting them, whilst upholding the democratic values on which they are founded.

LEGAL SERVICES IN EUROPE

This article is a critical review of a MarketLine publication of the same name, "Legal Services in Europe". MarketLine is an international company that provides market intelligence, data analysis and advice through its network of in-house analysts. It belongs to the same group as Datamonitor, which offers similar services to industries.

Scope

The report covers the legal services market, including practitioners of law operating in commercial, criminal, legal aid, insolvency, labour/industrial, family and taxation law, etc. This does not allow much differentiation between the different types of legal services or practitioners.

Nor does the report specify whether all practitioners are Bar-registered lawyers or whether "unregulated" legal service providers are also included.

In terms of geographical scope, the report covers the countries of Western and Southern Europe as well as the Scandinavian countries and Switzerland. In the central and eastern part of Europe, it includes the Czech Republic, Poland, Russia and Turkey. However, there is no mention of Estonia, Latvia and Lithuania, nor Bulgaria, Croatia, Hungary, Romania, Slovakia, Slovenia, which are all full members of the CCBE. Observer members, such as the Balkan and South Caucasian countries are apparently excluded.

Value and volume of legal services in Europe

The value of the legal services market is defined as the total revenue – including all applicable taxes – collected by law firms for services provided.

According to the 2019 MarketLine Report (2018 figures), the total value of the European legal services market amounted to 143.3 billion euros (169.3 billion dollars) in 2018. This represents a 3% growth compared to 2017. The report forecasts steady growth of 2.6% on average over the next five years, but makes no mention of Brexit and its potential impact on market value.

Globally, the value of the market is estimated at more than 630 billion dollars, of which Europe accounts for about 25% (after the United States at 46.4%). It would be interesting to monitor and compare the growth rates of the different continents in the world.

The market volume mentioned in the report refers to the total number of legal professionals in the geographical area covered by the report. This total number for 2018 is calculated at 1.2172 million professionals, an increase of about 2% compared to 2017. This number is expected to exceed 1.3 million professionals in 2022-2023, which is obviously linked to the positive growth rate of the market value.

In the global legal services market, the total number of legal professionals is estimated at approximately seven million practitioners. We conclude that Europe represents about 17% of the world's population of legal practitioners.

It would be interesting to compare the productivity rate per practitioner across continents or markets (value divided by the number of practitioners) and to compare the performance of European lawyers on a global scale. However, there is not enough adequate data available for this exercise.

If we divide the total value of legal services in Europe (143 billion euros) by the number of European practitioners, the average gross income (before deduction of costs and taxes) per individual legal practitioner would be around 117,748 euros over one year. This undifferentiated average does not give too much information, since it is not linked to the specific conditions of a country or a market.

Geographical segmentation

MarketLine offers a limited geographical segmentation of the legal services market in Europe, only providing figures for the United Kingdom, France, Germany, Italy, Spain and then the "rest of Europe". The report shows a relatively stable percentage of "market shares" in the United Kingdom (around 27%), France (around 17%), Germany (around 15%), Italy (around 13%) and Spain (around 6%). The rest of Europe maintains a market share of around 20-21%.

Five forces analysis

The MarketLine reports always include a risk analysis for the legal services market, which is based on an analysis of five influential or driving factors:

- the "buyer power" (buyers being individuals and companies who pay for legal services);
- supplier power (manufacturers of IT and office equipment, legal data providers and skilled employees);
- substitution risk (other services providers);
- degree of rivalry;
- new entrants.

The main conclusions of this analysis are far from surprising.

Due to moderate growth rates, the degree of rivalry remains bearable and is most often reflected in a continuous trend towards mergers, both for domestic and international firms.

According to the report, the biggest threat to the legal services market lies in the development of in-house lawyers and the desire of some clients to represent themselves to reduce legal costs. For the first time, however, the report acknowledges that the growth of internet legal services is further undermining traditional legal services.

More interestingly, the report highlights the low cost of switching from one legal services provider to another, the increasing independence of buyers and the undifferentiated nature of legal services as drivers of growing rivalry.

The biggest cost and, therefore, the biggest asset for law firms are the staff, which need to be of high quality to remain competitive. Attracting and retaining suitably qualified legal professionals with relevant expertise remains a high priority. However, the report does not mention investing in legal technology.

For new entrants, the report highlights the low capital intensity of investment in legal services. Together with the low cost of switching from one provider to another, this attracts new entrants (in growing markets). The regulatory framework is also a factor in facilitating entry. The report points out that since the 2015 Macron Law in France and the 2007 Legal Service Act in the United Kingdom, the Big Four companies have entered the market directly.

A final interesting trend to mention is the outsourcing of some legal services to countries such as India where firms are able to undercut the market in terms of operating costs. According to the report, the growth of new business models appears to be continuing, allowing clients to access simple legal services online through virtual law firms. The report states that new entrants with more agile business models can dominate new areas of legal services.

Profiles of "leading companies"

Each annual report ends with a "company profile" of four to five "leading companies". As this is not particularly relevant for the CCBE, we will not comment on them.

Conclusion

It is interesting to compare this MarketLine Report with another "Report on the State of the Legal Market (US)" prepared by a consortium formed of the Georgetown Law University Center in Ethics and the Legal Profession, the Legal Executive Institute, Peer Monitor and Thomson Reuters.

This 2019 report (available on the internet in exchange for your professional data) analyses very interesting key performance indicators (such as demand, labour rates, calculated fees, productivity and lawyer growth), demand growth by area, balance between demand and resources, average daily demand per lawyer, annual growth in (overhead) costs, etc. These figures allow for comparative analysis and give an idea of how each firm can improve its productivity and cost effectiveness.

This report from the United States also comments in more detail on the evolution of market realities, and suggests "responding to changed market realities: what works and what doesn't" by describing the evolution from a monolithic market model to a dynamic market model and the strategic consequences for law firms.

However, such analysis and prognoses require a more developed set of statistical data, with more in-depth (anonymised) data on the different aspects of the management and performance of (European) law firms. Unfortunately, such global statistics are not (yet) available today. Measuring is about knowledge and control, and having such global statistics available would allow lawyers to better manage their firms, clients and staff.

The European Observatory initiative, set up by the French National Bar Council (CNB) with the participation of some other national Bars, is a first step in the development of such a statistical data set. To be truly effective, however, the participation of more CCBE members is necessary and we hope that this article will convince more members to participate in this or similar initiatives.

CCBE SUBMITTED A RESPONSE TO THE COMMISSION'S CONSULTATION ON THE EU'S IMPLEMENTATION OF THE AARHUS CONVENTION IN THE FIELD OF ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS

On 14 March, the CCBE submitted a response to the Commission's consultation on the EU's implementation of the Aarhus Convention in the field of access to justice in environmental matters. In its response, the CCBE sets out why the EU Aarhus Regulation needs to be amended, and which considerations are crucial when considering compliance with the Aarhus Convention.

The CCBE's response highlights:

- The inadequacy of direct access to the EU Courts (Article 263(4) TFEU) and how Article 263(4) TFEU – as currently interpreted and applied by the Court of Justice of the EU - provides insufficient access to justice for private parties, both generally and more specifically in environmental matters.
- The inadequacy of indirect access to the EU Courts (Article 267 TFEU).
- The reluctance of national courts to refer a question for a preliminary ruling.
- The inadequacy of the internal review process as an alternative to access to the EU Courts.

The CCBE response also emphasises the importance for the EU to respect its international obligations, and notes that the role of locus standi rules should never "shield" authorities from appeals.

The CCBE's response, while recognising that the issue of standing is wider than that discussed in the present consultation on environmental matters, also proposes a number of changes that would be necessary in order for the EU to comply with the obligations arising from the Aarhus Convention.

CCBE PECO COMMITTEE MEETING WITH AZERBAIJANI BAR

On 27 February in Vienna, Austria, an informal meeting was held between the CCBE delegation (Margarete von Galen, CCBE Vice-President; Stanislav Balík, Chair of the PECO Committee; Constantin Parascho and Maria Ślązak, Vice-Chairs of the PECO Committee; Indra Bule, CCBE Legal Advisor) and the delegation from the Bar Association of the Republic of Azerbaijan (Anar Baghirov, Chairman of the Bar, and Farhad Najahov, Head of Office).

During the meeting, the delegation from Azerbaijan expressed the importance of starting cooperation and integration within the CCBE since they would like to be closer to the European Bars. The Azerbaijani Bar needs more time to become stronger, more independent and more democratic. They want to become a strategic partner of the CCBE. The CCBE delegation was informed that the intention of the Chairman is to strengthen the independence and prestige of the profession in Azerbaijan.

From left to right: Constantin Parascho, Vice-Chair of the PECO Committee; Margarete von Galen, CCBE Vice-President; Stanislav Balík, Chair of the PECO Committee; Anar Baghirov, Chairman of the Bar Association of the Republic of Azerbaijan; Maria Ślązak , Vice-Chair of the PECO Committee; and Farhad Najahov, Head of Office of the Azerbaijan Bar.

Information on the current situation of lawyers in Azerbaijan was presented during the meeting, including relations with international organisations, the participation of the Bar in international events, the procedure for admission to the Bar, regulatory developments, legal aid and public awareness, the registry of lawyers, information on legal fraud, disciplinary factsheets, etc. The CCBE delegation was also informed about new legislative changes in Azerbaijan that give members of the Bar a monopoly in representing clients before the courts. The increase in the number of members of the Bar (since December 2017) was also mentioned during the meeting.

Once the official application letter with the request of the Azerbaijan Bar is received, the PECO Committee will start the assessment of the potential observer member.

CCBE MEETING WITH THE FUNDAMENTAL RIGHTS AGENCY (FRA) - 1 MARCH 2019, VIENNA

On 1 March 2019, CCBE Vice-President James MacGuill, together with representatives from the CCBE Criminal Law Committee and IT Law Committee, met with representatives from the Fundamental Rights Agency (FRA). This meeting followed previous meetings in 2017 and 2018 and covered a broad range of topics, including access to a lawyer and the European Arrest Warrant, detention, the FRA's work on the Charter of Fundamental Rights (including the Guidance on how to use the Charter of Fundamental Rights) and Charterpedia (Charterpedia is an online tool which provides easily accesible information on the Charter of Fundamental Rights of the European Union), business and human rights/collective redress, and DATA and Artificial intelligence. The meeting was extremely informative and the CCBE appreciates the wonderful cooperation which exists between both organisations.

MIGRATION: REFORM OF THE RETURN DIRECTIVE

On 29 March, the CCBE adopted comments on the Commission's proposal to recast Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals.

The CCBE considers that the proposal does not provide sufficient safeguards for fundamental rights. The CCBE regrets that no impact assessment has been undertaken by the Commission, which has led to the failure to take into account a number of essential elements with regard to the principle of proportionality, the social and human rights of irregular migrants and the fundamental rights protected by the EU Charter of Fundamental Rights.

Several provisions of the proposal introduce a mechanism through which the use of detention would be facilitated, thereby infringing on key principles such as the principles of proportionality and necessity. A broad non-exhaustive list of criteria is being used to justify the use of detention, which can lead to arbitrary decisions without any legal certainty.

Furthermore, the CCBE disagrees with the proposal concerning the possibility of detaining minors with their families, which constitutes a violation of the rights of the child and is in contradiction with the principle of the best interests of the child. The CCBE considers that no discrimination should be made between unaccompanied and separated children and children within families.

UPCOMING EVENTS

17/05/2019 Plenary Session - Porto

28/06/2019 Standing Committee – Brussels