

Vienna, 4 May 2020

## Konsultation der Europäischen Kommission zum „Annual Rule of Law Report“

### Horizontaler Fragebogen

*„In this section, you are invited to provide information on general horizontal developments or trends, both positive and negative, covering all or several Member States. In particular, you could mention issues that are common to several Member States, as well as best practices identified in one Member State that could be replicated. Moreover, you could refer to your activities in the area of the four pillars and sub-topics (an overview of all sub-topics can be found below), and, if you represent a Network of national organisations, to the support you might have provided to one of your national members.*

*Overview topics for contribution*

[Stakeholder consultation - topics.pdf](#)

*Please provide any relevant information on horizontal developments here:”*

The ÖRAK (Austrian Bar) thanks the European Commission for the opportunity to comment on the consultation regarding the Annual Rule of Law Report.

Current developments, in the EU, but also in EU neighbouring countries, illustrate, how quickly the **role of independent lawyers** which defend citizens' rights can be undermined to the detriment of the rule of law.

Just recently, a request for a preliminary ruling by the Disciplinary Court of the Bar Association in Warsaw was introduced at the European Court of Justice (case C-55/20). The case illustrates – notwithstanding its later outcome – how **lawyers can be and are targeted in their independence**.

This request for a preliminary ruling concerns once more the Polish Supreme Court Disciplinary Chamber. Despite the rulings of the ECJ and the Polish Sąd Najwyższy (Supreme Court) to the effect that the disciplinary chamber is not an independent and impartial tribunal for the purposes of Article 47 of the Charter of Fundamental Rights, it still seems active regarding disciplinary measures against lawyers.

Whenever lawyers can expect repercussions for defending and counselling clients, may it be by a potentially politically influenced disciplinary body or otherwise, this



seriously undermines their independence. **Only an independent profession however can effectively defend citizens from injustice and arbitrariness of states and ensure the proper implementation of and adherence to European Union law.**

Also, **article 48 of the Charter of Fundamental Rights of the European Union** stipulates: “Everyone shall have the possibility of being advised, defended and represented.”

With regard to the current discussions on the rule of law which seem to focus solely on judges and prosecutors, it has to be pointed out citizens need lawyers for the protection of their rights. This is also clearly reflected in the Charter of Fundamental Rights of the European Union and the European Convention of Human Rights. Judges or prosecutors cannot, for example, talk on a confidential basis with a citizen to advise on his/her rights. In today’s highly complex legal environment, the need for legal counselling cannot be underestimated.

With regard to tendencies that seem to distinguish between lawyers who are deemed to be “human rights defenders” and other categories of lawyers, it has to be noted that politically active persons are often not prosecuted or discriminated on the basis of or with a direct link to their activism, but with regard to alleged wrong-doings, e.g. concerning administrative law, tax law etc. **The legal profession as such acts in the defence of human rights and the rule of law.**

The Austrian Bar (ÖRAK) would also like to point out that **cumulative effects of measures** can in their sum endanger the rule of law. This might be especially dangerous as such kind of rule of law-backsliding would not be labelled as “justice reform” or in any similar way. Lawyers could easily become a target for such measures as they are directly and indirectly governed by a multitude of different laws in their daily practice.

The **independence of lawyers is guaranteed by the bar**, whereas a state can see to it to have formally independent judges and prosecutors, but only allow such individuals in these positions who represent a certain agenda.

Lastly, the Commission should be aware that lawyers and representative bodies of lawyers might refrain from reporting such developments as they are afraid of repercussions. Therefore, the Commission should consider to rely on more sources than this consultation alone.



## Fragebogen zu Österreich (zutreffende Fragen beantwortet)

### Justice System – Austria

#### Independence

##### Independence of the Bar (chamber/association of lawyers)

- The Austrian Bar would like to thank the European Commission for including the independence of bars in their analysis for the rule of law report.

Whilst the bars do not experience an imminent threat with regard to their independence, it has to be noted that the core values of the profession, notably professional secrecy, are under pressure. Through a number of measures **professional secrecy is undermined, recently unfortunately also because of so-called gold plating when transposing EU law.**

For example, whilst the DAC 6 Directive provided for a balanced professional secrecy exemption from reporting obligations, according to the transposing Austrian law (EU-Meldepflichtgesetz) lawyers who are intermediaries must report when relieved of their duty to professional secrecy. However, under deontological rules, an Austrian lawyer has to check whether the release of information covered by professional secrecy interferes with his/her duty to ensure the interests of the client, thus cannot be obliged to automatically transfer information.

Even more worrying is an obligation in § 11 (a) EU-Meldepflichtgesetz which does not derive from the Directive, but has been added in the transposition. According to §11 (4) EU-Meldepflichtgesetz an authority can, on simple request, demand proof from the lawyer whether he/she has informed the obliged person or another intermediary in accordance with the Directive. In order to provide this proof, lawyers have to hand over information which is covered by professional secrecy, this without any court order or other procedure to prevent misuse or abuse of this rule.

##### **Significant developments capable of affecting the perception that the general public has of the independence of the judiciary**

- The Austrian Bar is very concerned about attempts to undermine access to justice for migrants. According to the Austrian BBU-Errichtungsgesetz – BBU-G (BGBl. I Nr. 53/2019) a limited liability company called „Bundesagentur für Betreuungs- und Unterstützungsleistungen Gesellschaft mit beschränkter Haftung“ will be established as of 1st of January 2021. The sole shareholder of this company is the Republic of Austria. One of the competences of this “Bundesagentur” will be to provide legal advice and legal representation for refugees in the procedures before the First Instance Authority and the



procedure before the Asylum Courts. It will also provide interpreters for these procedures. Up to now legal advice in these procedures was provided by private organisations, like Diakonie, Volkshilfe and Verein Menschenrechte, on the basis of agreements between these organisations and the Austrian government. These contracts have already been terminated. There are very serious doubts whether the "Bundesagentur" can provide independent legal advice for citizens which is necessary in order to guarantee fair trial rights.

Another example where rights of refugees are undercut is a decree issued by the Austrian Minister of Home Affairs during the Covid-19 crisis (Ref.-No. 2020-0.183.126, 16.03.2020). It stipulates that migrants crossing the Austrian border arriving from Italy, Switzerland, Liechtenstein, Germany, Hungary and Slovenia who want to apply for international protection are only allowed to enter the country and file their application, if they can show a medical confirmation issued within less than 48 hours proving that they are not infected by Covid-19. As refugees usually are not able to provide such a medical document it is de facto no longer possible to apply for international protection at the Austrian borders.

### **Quality of justice**

(Under this topic, you are not required to give statistical information but should provide input on the type of information outlined under "type of information".)

#### **Accessibility of courts (e.g. court fees, legal aid)**

- Austrian court fees are deemed to be highest in Europe. While they are midrange with regard to low-value litigation, Austrian court fees are excessively high concerning high-value litigation as unlike in other member states no cap/maximum fee is foreseen. This can pose a serious obstacle with regard to access to justice, both for companies and for citizens with high-value claims.

#### **Resources of the judiciary (human/financial)**

- Austrian court fees are deemed highest in Europe (see answer before). The most recent study conducted by CEPEJ on court fees confirms this trend. Nowadays court fees cover 117% of the amount of the budget of the Austrian justice system whilst in most other EU member states they cover one digit or very low two digit values (see here : <https://rm.coe.int/rapport-avec-couv-18-09-2018-en/16808def9c>, p.71). Still, the Austrian judiciary suffers from financial shortcomings. This paradoxical situation is caused by the fact that the judiciary lacks budgetary sovereignty, in other words, the income generated by court fees can and is used for other purposes outside the judiciary itself. This leads, for example, to shortcomings with regard to human and technological resources. The Austrian Bar supports the judiciary in their wish for staff and technological reinforcements with regard to administrative support.



### **Efficiency of the justice system**

(Under this topic, you are not required to give statistical information but should provide input on the type of information outlined under "type of information".)

#### **Other - please specify**

- Despite criticism expressed in other sections of the consultation, the Austrian Bar deems the Austrian justice system to be very efficient. Compared with other member states, the delays when scheduling hearings, but also for the different stages of proceedings seem to be exceptionally short.

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