

Mr. Zaza Tavadze,  
President of the Constitutional Court

**Copy to:**

Mr. Archil Talakvadze,  
Chairman of the Parliament of Georgia

Mr. David Asatiani, Chairman of the  
Georgian Bar Association

Brussels, 18 May 2020

Dear Mr. President,

The Council of Bars and Law Societies of Europe (CCBE) is recognised as the voice of the European legal profession representing the Bars and Law Societies of 45 countries (including Georgia), and through them more than one million European lawyers.

The CCBE acts as a consultative and intermediary body between its Members and between the Members and different institutions on matters of mutual interest. The regulation of the profession, the defence of the rule of law, human rights and democratic values are the most important missions of the CCBE. The CCBE always places great emphasis on respect for the rule of law, access to justice, democratic principles and fundamental rights, the protection of the client through the promotion and defence of the core values of the profession.

The CCBE is in favour of strong Bars to guarantee a strong and professional representation of the rights of the clients. Therefore, the CCBE opposes any attempts and intentions to undermine the Rule of Law and the position of lawyers in general.

The CCBE would like to stress that the self-regulation of the legal profession by an independent bar is a prerequisite to guarantee the independence of individual lawyers regulated in the Recommendation No R(2000)21 on the freedom of exercise of the profession of lawyer of the Council of Europe as well as in the Basic Principles on the Role of Lawyers adopted by the United Nations Congress in 1990.

The CCBE has been informed by its observer member, the Georgian Bar Association, about a lawsuit submitted to the Constitutional Court of Georgia requesting the abolition of several provisions in the Law on Advocates of Georgia (constitutional case *Lasha Janibegashvili vs. the Parliament of Georgia*). According to our information, the current law explicitly guarantees the existence of one, unified Bar in Georgia.

In this regard, the CCBE decided to file an *amicus curiae* brief in the constitutional case *Lasha Janibegashvili vs. the Parliament of Georgia*. The *Amicus curiae* brief is attached to this letter.

**Overall conclusions of the *Amicus curiae* brief**

After analysing the case law of the Constitutional Court of Georgia, the relevant Georgian legislation as well as European practices, a list of conclusions was developed (*Chapter X* of the *Amicus curiae* brief).

1. The Constitutional Court of Georgia recognises that lawyers' activity is not entrepreneurial activity (based on direct provisions of the Law on Entrepreneurs);
2. In accordance with the case law of the Constitutional Court and the relevant Georgian legislation, the GBA cannot be considered as a monopoly since it does not carry out either entrepreneurial or economic activity;
3. The unique form of the GBA (a legal entity of public law of special nature) is presupposed by its purposes, i.e. the fulfilment of legitimate public functions, and therefore mandatory membership to the GBA is justified from a constitutional point of view;
4. The GBA is a legal entity of public law of special nature possessing a very high level of independence from the State;
5. In accordance with the case law of the Constitutional Court and relevant Georgian legislation, monopolies may exist in the area of entrepreneurial activities; both the previous as well as the current Articles of the Constitution protect only economic agents, i.e. persons who carry out economic activities;
6. From a European perspective, the profession of lawyer is not an entrepreneurial one. This is clearly stated in the laws governing the legal profession in different countries in Europe;
7. The legislators of European countries clearly understood the special status of the legal profession and clarified its non-entrepreneurial nature in their laws;
8. From a European perspective, the purpose of anti-monopoly laws is to prevent predatory business practices. In this regard, the Bar Association cannot be considered simply as a business entity and cannot be compared with any other undertaking since it acts as the regulatory body of a profession. In all European countries, the Bar Association is a body incorporated under public law, established by an Act of Parliament in order to fulfil vital public functions, both in the justice system and in society at large.
9. Autonomy and independence are primarily ensured through an autonomous association of lawyers through Bar Associations;
10. The abolition of mandatory Bar membership would have many serious negative impacts, and the transfer of public authority to the state would be an unacceptable interference with the independence of lawyers and the independence of the Bar;
11. From a European perspective, mandatory Bar membership is usually also a mean for lawyers to meet their professional obligations.

## **Conclusion**

Taking into consideration all the above-mentioned, also as explained in more details in the *Amicus curiae* brief, it can be concluded that the constitutional lawsuit can be considered as groundless as there is a great deal of arguments – developed not only in the legislation but also in the case law of the Constitutional Court of Georgia and in relevant European practices.

The CCBE proposes to the Constitutional Court of Georgia to dismiss the lawsuit of *Lasha Janibegashvili* as ungrounded, and to preserve a strong and independent legal profession in Georgia as guaranteed by the Georgian Bar Association.

## **Representation**

The CCBE will be represented by [REDACTED] on the basis of the position stated in the attached *Amicus Curiae* brief.

In case the Constitutional Court of Georgia requests some additional information or clarifications regarding the position of the CCBE expressed in the filed *Amicus curiae* brief, the CCBE [REDACTED], Chair of the PECO Committee, Head of the Slovenian delegation, to prepare and provide the relevant written information alongside the CCBE position explained in this proposal and *Amicus Curiae* brief accordingly.

In attachment to this letter, please find an *Amicus curiae* brief of 13 pages.

Yours sincerely,



Ranko Pelicarić  
President



Registration N \_\_\_\_\_

Date of Receipt: \_\_/\_\_/\_\_

## „Amicus Curiae“ Brief

In case of questions or recommendations related to this form, you can contact us at +995 422-27-00-99 or by e-mail: [const@constcourt.ge](mailto:const@constcourt.ge); Webpage: [www.constcourt.ge](http://www.constcourt.ge)

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## I. Formal Part

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### 2. Name of the case regarding which the Amicus Curiae brief is drafted <sup>1</sup>

N1/13/1424

Lasha Janibegashvili vs. The Parliament of Georgia

<sup>1</sup> Note 1 In the below field the following should be indicated: the number of the constitutional claim, name of the applicant or defendant or any other information that will allow the court to identify the case regarding which the Amicus Curiae Brief is submitted

## II. “Amicus Curiae” Brief<sup>2</sup>

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The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 45 countries, and through them more than 1 million European lawyers.

In this paper the CCBE wishes to provide its views in relation to constitutional claim N1/13/1424, *Lasha Janibegashvili vs. the Parliament of Georgia* as far as the review of the claim has direct impact over strong and independent legal profession in Georgia.

### (I). Facts of the Case

1. According to its Ruling dated 26 December 2019, the Constitutional Court of Georgia admitted the Constitutional Lawsuit of Mr. Janibegashvili (a member of the Georgian Bar Association, hereinafter GBA) to be heard on merits in two aspects of that lawsuit – of the words included in Article 1.2 of the Law of Georgia on Advocates “*and who is a member of the Georgian Bar Association*” in relation to the first and second sentences of Article 26.4 of the Constitution of Georgia according to which “*Freedom of enterprise shall be guaranteed. Monopolistic activities shall be prohibited except in cases permitted by Law*”. Mr. Janibegashvili also claimed the unconstitutionality of other provision of Article 1.2 (for example, of the words “*and professional ethical norms*”) but this and some other aspects of his lawsuit has been refused to be admitted by the Constitutional Court.

Note: Article 1.2. of the Law of Georgia on Advocates reads as follows “*A lawyer is a professional who answers only to the law and professional ethical norms and who is a member of the Georgian Bar Association*”.

### (II). Arguments of the claimant

2. The claimant maintains that the words of Article 1.2 of the Law of Georgia on Advocates “*and who is a member of the Georgian Bar Association*” are in breach of sentence two of Article 26.4 of the Constitution of Georgia, according to which “*Monopolistic activities shall be prohibited except in cases permitted by Law*”. Claimant states that the “*creation of professional unions is a part of freedom of association and not a separate and independent right. The State is obliged to allow persons in accordance with their interests to create professional unions. As it is stated in his Lawsuit “it is especially impermissible to establish only one professional union where the membership shall be mandatory.” As he further notes “the court practice made it clear that it is impermissible to monopolize professional unions and there should be alternative for those who, for some reasons, does not want to be enrolled in this or that union”.*

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<sup>2</sup> Note 2 - In the field below the following should be indicated: arguments of the “amicus curiae” and evidences based on which author substantiates the position regarding the case

### **(III). Case law of the Constitutional Court of Georgia whether or not lawyers' activity is entrepreneurial activity**

3. The Constitutional Court of Georgia had dealt with several cases on profession and on the Law on Advocates, where it stipulated a number of significant principles about the legal profession. The Law of Georgia on Entrepreneurs directly excludes lawyers' activities from entrepreneurial activity, underlining in its Article 1.2 that "*Artistic, scientific, medical, architectural, lawyer's or notary, audit, consulting (including tax consultants), agricultural or timber-industry activities of natural persons shall not be considered as entrepreneurial activity*".
4. In its Judgment in case #1/1/107 dated 25 January 2000, the Constitutional Court of Georgia dealt with the taxation of notaries under the Tax Code which (the Code) declared that notarial activity was non-entrepreneurial economic activity. The Court admitted that the "*term "economic activity" should have been treated as a "conditional taxation term, which was based on the economic results of the activity of this or that person*". In the same Judgment, the Court touched upon lawyers' activities as well (since both are liberal professions as per Article 1.2 of the Law on Entrepreneurs) and noted that "*the protection of human rights by a lawyer is much greater value in the process of building a rule of law state than the results of taxation of income received through his/her activities*".
5. In its Judgment in case #2/10/256 dated 2 December 2004, the Court dealt with the constitutionality of carrying out professional testing of lawyers for enrollment at the GBA. In its reasoning, the Court noted that "*As regards to setting the necessity of testing of advocates by the State, the Chamber of the Court considers that it (i.e. testing) is a minimal standard to provide qualified protection of human rights by advocates*". Furthermore, the Court also noted that the "*appropriate norm of the Constitution should not be understood in a way that the state cannot define the main principles of private service, especially when we talk about advocates' activities during which, unlike other types of so-called "liberal professions", advocates have to carry out professional activities within a contractual framework*".
6. The two above-mentioned Judgments inevitably recognize advocates as a liberal profession and as non-entrepreneurial activity carried out mainly within a contractual framework – i.e. not within the terms stipulated by the state but agreed between an advocate and the party whom he/she represents.
7. In another case concerning the constitutionality of sanctioning advocates (Case #1/6/319, 7 March 2005), three lawyers thought that it was unacceptable to impose sanctions on lawyers and terminate their memberships according to the Law on Advocates as there was no other body allowed to do so while the Ethics Commission and the Executive Council of the GBA should not have been authorized to have such rights. They argued that "*in such manner, the Ethics Commission and the Executive Council assumed the functions of courts*". They also underlined that "*termination of membership was almost the same as crime envisaged by the Criminal Code and it should have been imposed only by a Court*". The Constitutional Court refused to admit the lawsuit because the *claimant "failed to show why the GBA should not have a right to terminate membership to its members"*. According to the Court, the argument that "*there is no alternative association for carrying our legal activity cannot be considered as an argument a contrario to such situation*". The Constitutional Court also noted that "*neither from lawsuit nor from claimants'*

*explanations was it shown that the sanctions envisaged by the disputable article were a sanction for crime that excluded the claimants' assessment in relation to Article 40 of the Constitution".*

Note: Article 40 of the Constitution (older version) used to read as follows: "1. *Each individual is considered innocent until proven guilty through the due process of law.* 2. *No individual is obliged to prove his innocence.* 3. *A person can only be proven guilty if the evidence is incontrovertible. Every suspicion or allegation not proven by the right established by law must be decided in favor of the defendant".*

8. This Ruling dated 7 March 2005, is a very interesting Ruling since, as mentioned above, the Court actually upheld the Law under which the right of the GBA to be the sole body imposing sanctions against lawyers is guaranteed.
9. A key case regarding the rights emerging from the Law of Georgia on Advocates is Case #1/5/323 decided by the Constitutional Court on 30 November 2005. The claimants were six lawyers who thought that the following stipulations of the above-mentioned law were unconstitutional: a) the words of Article 1.2 "and who is a member of the Georgian Bar Association" and b) the words in Article 20.1 "under public law". They maintained that those articles were in breach of Article 26 of the Constitution, according to which "*every individual has the right to create and join any association, including trade unions*". The claimants noted "*they had to be members in order to carry out legal activity and if they are not members, they would not be able to practice i.e. to earn funds*". The Constitutional Court disagreed with their arguments and rejected their lawsuit on merits. The Court underlined that "*The GBA was not an association but a legal entity of public law established by a special law (Act of Parliament) and in this regard, the principle of voluntary membership could not be applied to it since it was not a private association*". The Court also indicated "*it was up to the legislator to decide which organizational form it would select for establishment of this or that profession, which could not be subject of Article 26 of the Constitution*".
10. The Constitutional Court also clarified in that Judgment that "*lawyers' activities were very close to the functions of the authorities and this fact presupposed the reasonableness of selecting a form of public law entity as an organizational form. However, the Bar Association was a separate organization from state governance, and it carried out its functions in this way*". According to the Court, "*because at some point lawyer performed public activities, the legislator in comparison with other persons of liberal profession, set higher standards and established mandatory membership in special professional union. Mandatory membership to GBA was justified from constitutional point of view because the state established it for fulfillment of legitimate public functions*". The Court invoked a case of the European Court of Human Rights, *Le Compte, Van Leuven and De Meyere v. Belgium*, in which the ECtHR decided that "*doctors in Belgium could be imposed to be members of the Medical Association of Belgium*".
11. The Constitutional Court further noted that "*peculiarities of the purposes of the establishment of the GBA presupposed a non-ordinary legal status for this organization – taking into consideration the specificities of the legal profession, the GBA was established as a legal entity of public law of special nature possessing a very high level of independence from the state*".
12. In the next key case concerning the Bar Association (Case #2/13/391, 10 July 2006), a lawyer claimed that Article 680<sup>2</sup> of the Criminal Procedural Code of Georgia violated Article 26.6 of the

Constitution (which reads as follows: “*the prohibition of activities of public and political parties or groups is possible only by a court decision in cases and rights determined by organic law and established rights*”), because Article 680<sup>2</sup> set two rules in order to make it possible for a person to represent someone in criminal proceedings: a) A lawyer should have had a certificate of lawyer and b) at the same time, he had to be member of GBA. In addition, the Claimant maintained that “*above-mentioned Article 680<sup>2</sup> also contradicted Article 30.2 of the Constitution (which reads as follows: “The state is obliged to foster conditions for the development of free enterprise and competition. Except cases envisaged by law, the monopolization of activity is prohibited. Consumer rights are protected by law”)* because it put the GBA in monopolistic conditions in breach of competition and consumers’ rights”. The Constitutional Court did not admit this lawsuit, stating i.e. that “*above-mentioned Article 30.2 of the Constitution provided assistance to freedom of entrepreneurial activity and guarantees to consumers’ rights while the disputable Article of the Criminal Procedural Code regulated lawyers’ activities which did not belong to entrepreneurial activities (Article 1.2 of the Law of Georgia on Entrepreneurs)*”.

13. Summing up, we can make the following comments – according to the case law of the Constitutional Court of Georgia:

- a) It is admitted that lawyers’ activity is no entrepreneurial activity (based on direct stipulation of the Law on Entrepreneurs);
- b) There is no evidence why the GBA should not be that sole body authorized to use sanctions in relation to lawyers;
- c) Mandatory membership to the GBA is justified from a constitutional point of view since the state established it for the fulfillment of legitimate public functions;
- d) The GBA is a legal entity of public law of special nature possessing a very high level of independence from the state.

#### **(IV). Case law of the Constitutional Court of Georgia about monopolistic activities**

14. The Constitutional Court of Georgia discussed a number of cases about monopolistic activities, where it identified certain principles about such activities.

15. The Constitutional Court of Georgia, in its Judgment on Case #1/3/136 dated 30 December 2002, when dealing with the constitutionality of consumer tariffs on electricity set by the Georgian National Commission of Regulation of Energy (hereinafter GNERC), recognized that the Tbilisi power distribution company “AES Telasi” was a natural monopoly. However, this issue itself was not used as a basis for recognition of the above-mentioned tariffs as unconstitutional.

16. Another case dealing with the issue of monopoly was Case #2/2/245 dated 22 June 2004 which dealt with consumer tariffs on natural gas also set by the GNERC. In this case, the Constitutional Court underlined that the *Tbilisi gas distribution company was a natural monopoly, but Article 30.2 of the Constitution (See p. 11 above) did not exclude monopolistic activity in cases stipulated by law while the Law of Georgia on Monopolistic Activity and Competition (N.B. this law was abolished in 2005), in its Article 5, allowed the possibility that the law did not cover fully or partially certain aspects of monopolistic activities*”.

17. The Law of Georgia on Free Trade and Competition adopted in 2005 defines monopoly as a *condition of a market where there is only one seller of a product and the product does not have any other interchangeable product.*
18. In case #1/2/411 dated 19 December 2008, the Constitutional Court reviewed the constitutionality of the Law on Electricity and Natural Gas as well as the Order of the Ministry of Energy about abolishing the license of distribution for those companies which realized less than 120 million kvth annually. In this judgment, the Court gave very significant and interesting definitions of issues (not exactly covering monopolistic activity, but mainly competition). The Court noted that *“the first sentence of Article 30.2 envisaged the positive obligation of the state to assist to the development of free entrepreneurial activity and competition while free entrepreneurial activity was an important expression of freedom of civil turnover, as well as a basis for economic order, healthy and durable market economy”*. The Court emphasized that *“the support of the state to entrepreneurial activity did not mean only institutional recognition of such activity in normative acts, what was important was those guarantees offered to the main player, namely, to the entrepreneur”*. Furthermore, it was noted *“assistance to the development of competition was a constitutional obligation of the state even in those spheres where there were natural monopolies. Distribution of electricity was a regulated economic activity presupposed by the existence of the dominant subjects in that area, therefore the establishment of regulations served the interests of consumers as well as the proprietary interests of other entrepreneurs within a market dependent upon natural monopolies”*. The Court considered that *“by setting tariffs, the state protected consumers and such interferences served to balance interests of consumers and entrepreneurs, and to avoid setting unfair tariffs by natural monopolies”*. Eventually, the Court decided *“sending small companies off the electricity market should be considered as a non-adequate method for achieving the goals set by the legislator”*.
19. After ten years, on 14 December 2018, the Constitutional Court, in Case #2/11/747, when hearing the constitutionality of the Law on Private Security Activities and the Order of the Ministry of the Interior on the Approval of the Regulation on the Security Police, underlined that *“freedom of entrepreneurial activity and competition guaranteed by Article 30.2 of the Constitution protected economic agents from ungrounded interference of the state in their activities, including giving certain preferences to such or such economic agents”*.
20. In Case #1/1/655 dated 18 April 2019, the Court noted that *“Article 30.2 of the Constitution (due to adoption of a new Constitution) was corresponded by the first and second sentences of Article 26.4 of the new Constitution”*. In this case, the Court was deliberating on the constitutionality of Article from Law of State Procurement, which excluded Georgian Post LLC from the necessity to participate in state procurements when purchasing postal and courier services by governmental agencies. The Court was of the opinion that *“for considering a person to be an economic agent, the nature of their economic activity was the most important element. For the purposes of Article 26.4 of the Constitution, any person could be deemed to be an economic agent who **carried out economic activity** while economic activity was offering services and products on such or such market”*.
21. In conclusion, the following assumptions can be made regarding the case law of the Constitutional Court of Georgia about monopolistic activities

- a) The Constitutional Court mostly dealt with issues related with natural monopolies;
- b) Monopolies may exist in the area of entrepreneurial activities;
- c) The Law defines monopoly as a condition of a market where there is only one seller of a product, and the product does not have any other interchangeable product.
- d) Both the previous as well as the current Articles of the Constitution protect only economic agents i.e. persons who carry our economic activities.

## **(V). Overall Conclusions regarding the Case Law of the Constitutional Court of Georgia and Relevant Regulations**

22. After discussing the case law of the Constitutional Court as well as relevant regulations, we can make the following assessments:

- a) The Constitutional Court recognizes that lawyers' activity is not entrepreneurial activity (based on direct stipulation of the Law on Entrepreneurs);
- b) The GBA cannot be considered as a monopoly since it does not carry out either entrepreneurial or economic activity;
- c) The unique form of the GBA (a legal entity of public law of special nature) is presupposed by its purposes, i.e. the fulfillment of legitimate public functions and, therefore, mandatory membership to the GBA is justified from a constitutional point of view;
- d) The GBA is a legal entity of public law of special nature possessing a very high level of independence from the state.
- e) Monopolies may exist in the area of entrepreneurial activities;
- f) Both the previous as well as the current Articles of the Constitution protect only economic agents i.e. persons who carry out economic activities.

## **(VI). Relevant European Practice with respect to Considering Legal Profession as Entrepreneurial One**

23. From the European perspective and the experience of the Council of Bars and Law Societies of Europe (CCBE), representing the Bars and Law societies of 45 member countries, and through them more than one million lawyers, *none* of the arguments<sup>3</sup> of the claimant in this constitutional claim N1/13/1424, *Lasha Janibegashvili vs. the Parliament of Georgia*, could be considered valid:

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<sup>3</sup> The claimant put forward the following arguments:

- (1) The legal profession should be deemed entrepreneurial;
- (2) The mandatory membership to the Georgian Bar Association stipulated in Art. 1 of the Law of Georgia on Advocates ("Advocate is a professional who...is a member of the Georgian Bar Association") violates the lawyer's right to free entrepreneurship set out in Art. 26.4 ("Freedom of enterprise shall be guaranteed") and freedom of association pursuant to Art. 22 ("Freedom of Association shall be guaranteed") of the Constitution of Georgia; and
- (3) The fact that there is only one Bar in Georgia, namely the Georgian Bar Association, should be considered to indicate that there is a monopoly, hence violating Art. 26.4, sentence 2 of the Constitution of Georgia: "Monopolistic activities shall be prohibited, except in cases permitted by law".

24. The profession is not an entrepreneurial one. This is clearly stated in the laws governing the legal profession in different countries in Europe. Lawyers are independent agents of the area of justice and not mere salesmen of legal advice. They are subject to strict professional laws, such as the obligation to be independent, to be loyal to the client, to observe confidentiality and to refrain from representing conflicting interests, etc. No entrepreneur on any free-market economy is bound by such professional laws and requirements.
25. An entrepreneur's goal is to optimise their income and to sell as many goods or services as possible to customers, even if it is something customers do not need at all. A lawyer is obliged by law and by the Ethics Code not to optimise their income, but to optimise the legal position of their clients. A lawyer must take the safest and the shortest way for a client to assert their rights, even if it means less income for the lawyer themselves. The reason is that the primary duty of a lawyer is to provide access to justice for citizens. Therefore, lawyers are an inseparable part of the justice system in every European country and play the key role in providing access to justice. The legislators of European countries clearly understood this special status of the legal profession and clarified its non-entrepreneurial nature in their laws.
26. The Bar Association is not a company. In all European countries, the Bar Association is a body incorporated under public law, established by an act of Parliament in order to fulfil vital public functions, both in the justice system and in society at large. The Bar fulfils important self-regulatory functions such as admission to the profession, supervision of the lawyers' compliance with professional laws, execution of disciplinary proceedings in cases of breaches of professional laws, mediation of disputes between lawyers and their clients, representation of interests of the profession vis-à-vis politics, courts and third parties, etc. The Bar ensures the high professionalism of its members and protects the citizens' trust in the legal profession and the rule of law. Therefore, self-regulation can only work on the basis of a mandatory membership which makes all lawyers, without exception, subject to the same regulations. Mandatory membership is ensured in the vast majority of European countries and can be considered as a prerequisite for a self-regulated and genuinely independent Bar or Law Society which is essential to guarantee the quality of legal services and the independence of lawyers.
27. Therefore, the Bar is not a commercial enterprise with the objective to generate income. In Europe, Bars are only funded by the contributions of their members. Furthermore, the mandatory membership to a Bar does not prevent lawyers from exercising their constitutional rights and establishing voluntary professional associations. Every European country has many professional associations of lawyers such as criminal lawyers' associations, family lawyers' associations, etc.
28. The Bars are neither enterprises nor business players; they are self-regulatory institutions of the legal profession. The purpose of anti-monopoly laws is to prevent predatory business practices. These laws cannot be applicable to Bar Associations.

## **(VII). Relevant European Practice with respect to the autonomy and independence and mandatory membership of the Bar Association**

29. The Bar Associations of Europe - as part of the judiciary - are autonomous and independent services regulated by law. The Bar is an honorable profession which finds its roots as far back as antiquity and has preserved its good reputation until the present day. Throughout the centuries, the good reputation of lawyers as legal experts has been growing, but the progress and the ways of life have led to a situation where the Bar has become a must. The Bar has been autonomous and independent, practiced by lawyers as legal experts. The principle of lawyers' independence has existed since the 19th century. Lawyers are legal experts, performing their freelance activities autonomously and independently, with due responsibility towards their clients. Lawyers have a duty to strengthen the confidence of the represented parties that even in disputes with the state they are provided with independent professional legal assistance in enforcing their rights and interests.
30. *Autonomy and independence are primarily ensured through an autonomous association of lawyers through Bar Associations.*
31. The abolition of mandatory Bar membership would have many serious negative impacts, and the transfer of public authority to the state would be an unacceptable interference with the independence of lawyers and the independence of the Bar. An independent legal profession is the cornerstone of a free democratic society based on the rule of law - fundamental principles enshrined in the Preamble of the Charter of Fundamental Rights of the European Union. The self-regulation of the legal profession is the corollary to this independence and the collective independence secured by an autonomous Bar is, in turn, the corollary to the necessary independence of individual lawyers required by a state based on the rule of law.
32. Obligatory membership to a Bar Association goes together with an effective regulation of the profession and the enforcement of disciplinary rules. Abolishing mandatory membership would lead to a number of severe disadvantages; it could lead to a decrease of quality and professionalism within the legal profession; the public interest goal to ensure the high quality of the services of a lawyer could be undermined since lawyers could avoid sanctions by cancelling their Bar membership.
33. From the point of view of the state, mandatory membership to one Bar Association is favorable for citizens. Disciplinary proceedings, proceedings for breaching the professional code of conduct, professional development, leading the registries of lawyers and law firms as a basic principle of the transfer of powers are protected.
34. In the case of an abolishment of the mandatory Bar membership or the transfer of the public authorities to two or more Bars, the existing disciplinary system would need to be fully or partially replaced by another one so that clients can complain about all lawyers regardless of whether they are members of one or the other Bar. Implementing such system would not only encroach on the fundamental rule of law principle of necessary independence of the legal profession from the state, but it would probably also lead to higher costs without guaranteed return in terms of higher efficiency or better enforcement.

### **(VIII). Relevant European Practice with respect to the other activities of one Bar Association (register of lawyer, education, insurance)**

35. It should also be noted that currently mandatory bar membership is usually also a mean for lawyers to meet their professional indemnity insurance obligation, which in turn operates in the client's and public interest. A strong and independent self-regulated legal profession is equally an important factor contributing to the economic growth. The Bar can provide collective insurance for all lawyers. Each lawyer is insured against liability for damage that may occur to a client in the exercise of his or her profession. Insurance is urgently needed to provide the client with the highest legal protection. The insurance covers any damage caused by gross negligence, error or omission of professional duty of lawyers and their employees.
36. One Bar Association is also empowered by the state to lead the registry of lawyers and law firms as a primary register. Many facts concerning the status of lawyers are led in the registry. Many facts concerning the status of lawyers or law firms are also publicly available in the register, either upon request or on the public register online. This is the principle of public certainty. The Bar also ensures the update of such registers on a daily basis. Transferring or splitting this power between two or more Bars would definitely cause uncertainty between citizens and clients due to the fact they would need to check for certain changes between many Bars and would not know where to check and which information is correct. The same goes for information on professional liability insurance, declared penalties against lawyers and law firms, certain obligations to monitor the continuing legal education and professional development of lawyers and disciplinary sanctions, including disbarment and termination of the status of lawyers due to different reasons (retirement, health conditions, criminal convictions, etc.).
37. As to professional development, the Bar Association often ensures and monitors how the obligation of continuing legal education is implemented by lawyers, members of the Bar. Therefore, the professional development of lawyers is ensured or closely monitored by the Bar and therefore the Bar safeguards certain standards of education and professional development.
38. The authority to terminate or partially suspend the rights of lawyers to practice when the obligation of continuing legal education is not respected is also one of the responsibilities of the Bar. This procedure is only possible with mandatory membership and if the Bar has the power to decide on standards of professional development and obligations regarding continuing legal education.

### **(IX). Relevant examples of the Case Law regarding the associations in other areas**

39. In 2008 the obligatory membership in Czech Medical Chamber was questioned. According to the judgement of the Constitutional court of the Czech Republic<sup>4</sup> the Czech Medical Chamber cannot be defined as an 'association' specified by Article 20 of the Charter of Fundamental Rights and Basic Freedoms of the Czech Republic, and thus obligatory membership of the same is not capable of aggrieving the right of free association incorporated by the specified Article of aforementioned Charter.

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<sup>4</sup> <https://www.usoud.cz/en/decisions/20081014-pl-us-4006-obligatory-membership-in-czech-medical-chamber/>

It was also noted that the institute of obligatory membership is, under comparable (European) circumstances, nothing exceptional and that this institute is “logical” by organically ensuring the competence of the Czech Medical Chamber towards the persons directly addressed (physicians) by the very fact that the same are members of the Chamber.

40. In 1993 the Constitutional Court of Slovenia did not accept the claim and decided not to initiate the procedure for assessing the constitutionality concerning the obligatory membership of the doctors in Slovenian Medical Chamber. The Constitutional Court considered that the legislature was able to determine the compulsory form of association of doctors and dentists who work directly with patients in the Medical Chamber of Slovenia.
41. In doing so the Constitutional Court of Slovenia referred to the case law of the ECHR (case law on compulsory membership to the Belgian Medical Association<sup>5</sup>) stating that the Medical Chamber is a public-law institution that exercises public control over medical practice. Therefore, Chamber cannot be considered an “association” within the meaning of Article 11 of the Convention of the Protection of Human Rights and Fundamental Freedoms. The Court also noted that the compulsory association within the Medical Association did not constitute a restriction of the rights protected by Article 11 of Convention.
42. In a decision on admissibility dated 12 October 2004 in the case of Bota v. Romania, the ECHR referred to settled case law, according to which chambers of freelance occupations are institutions of public law, regulated by law and pursuing objectives in the public interest, and thus Article 11 of the European Convention on Human Rights does not apply to them.

The Court emphasised that the Romanian Bar Union under evaluation in this case was established by law and pursues an objective in the general interest, which is to support adequate legal aid and, implicitly, support justice.

### **(X.) Overall Conclusions**

43. After discussing the case law of the Constitutional Court, relevant Georgian legislation as well as European standards and practices, we can make the following conclusions:
- (a) The Constitutional Court of Georgia recognizes that lawyers’ activity is not entrepreneurial activity (based on direct stipulation of the Law on Entrepreneurs);
  - (b) In accordance with the case law of the Constitutional Court and relevant Georgian legislation, the GBA cannot be considered as a monopoly since it does not carry out either entrepreneurial or economic activity;
  - (c) The unique form of the GBA (a legal entity of public law of special nature) is presupposed by its purposes, i.e. the fulfillment of legitimate public functions and, therefore, mandatory membership to the GBA is justified from a constitutional point of view;
  - (d) The GBA is a legal entity of public law of special nature possessing a very high level of independence from the state;

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<sup>5</sup> <https://hudoc.echr.coe.int/tur#%7B%22itemid%22:%5B%22001-57522%22%7D>

- (e) In accordance with the case law of the Constitutional Court and relevant Georgian legislation, monopolies may exist in the area of entrepreneurial activities; Both the previous as well as the current Articles of the Constitution protect only economic agents i.e. persons who carry out economic activities;
- (f) From the European perspective, the profession of lawyer is not an entrepreneurial one. This is clearly stated in the laws governing the legal profession in different countries in Europe;
- (g) The legislators of European countries clearly understood the special status of the legal profession and clarified its non-entrepreneurial nature in their laws;
- (h) From European perspective, the purpose of anti-monopoly laws is to prevent predatory business practices. In this regard, the Bar Association cannot be considered simply as a business entity and cannot be compared with any other undertaking since it acts as the regulatory body of a profession. In all European countries, the Bar Association is a body incorporated under public law, established by an Act of Parliament in order to fulfil vital public functions, both in the justice system and in society at large.
- (i) Autonomy and independence are primarily ensured through an autonomous association of lawyers through Bar Associations;
- (j) The abolition of mandatory Bar membership would have many serious negative impacts, and the transfer of public authority to the state would be an unacceptable interference with the independence of lawyers and the independence of the Bar;
- (k) From European perspective, mandatory Bar membership is usually also a mean for lawyers to meet their professional obligations;

44. Taking into consideration all the above-mentioned, it can be concluded that the current lawsuit (See p. 1 of this Opinion) can be considered as groundless as there is a great deal of arguments – developed not only in the legislation but also in the case law of the Constitutional Court of Georgia and in relevant European standards – which give extremely large possibilities to the Court not to uphold the lawsuit.

45. Therefore, and following the reasons stated above, the CCBE proposes to the Constitutional Court of Georgia to dismiss the claim of *Lasha Janibegashvili* as ungrounded, and to preserve the strong and independent legal profession in Georgia as guaranteed by the Georgian Bar Association.

## IV. List of Attached Documents

a. *Documents that are recommended to be attached to this Opinion (please, tick the relevant box)*

1. Text of the normative (legal) act under the question
2. Electronic Version of the Amicus Curiae Brief

b. *Other documents*

1. -
2. -

Signature of the Author:

Ranko Pelicarić  
CCBE President



Date: 18.05.2020