

HANDBOOK

European Lawyers Day 2020

- 25 October 2020 -

Continuity of justice and respect of
human rights in times of pandemic

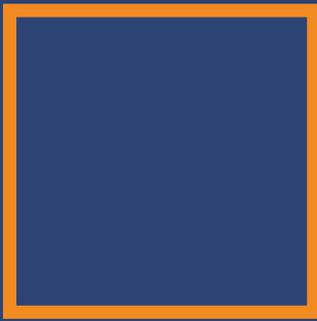


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I. Foreword



The COVID-19 crisis did not leave us much space for hesitating about the topic of the 2020 edition of European Lawyers' day.

The COVID-19 crisis and its consequences towards human rights, access to justice and other basic principles of modern democracy all over Europe and wider are the main areas of the scope of activities of our liberal profession, be it while defending legitimate interests of private persons, of small and medium-sized enterprises or the ones of larger national and international firms. It goes without saying that in a situation of crisis such as the COVID-19 crisis, when not only public health but unfortunately even many lives are at stake, executive powers and sometimes even legislative powers in most countries have succeeded in narrowing almost all civil and democratic rights, including narrowing human rights and rights of access to justice. Very often, like every power, the executive power and legislative power tend to unproportionally constrain the human and democratic rights by bringing to power "temporary" measures and/or sometimes forget to release appropriate measures on time, immediately after the peak of the crisis passes.

Inevitably, we are witnessing these measures constraining democracy in these times of COVID-19 crisis in social and professional life, which is in the scope and is the "core business" of all lawyers. Enabling and ensuring proper legal

and democratic surroundings for the essential work of lawyers defending rights of individuals and enterprises is the core activity of the CCBE and of the each of its members.

In reaction to the COVID-19 crisis, the CCBE has undertaken several initiatives, including the ones listed below:

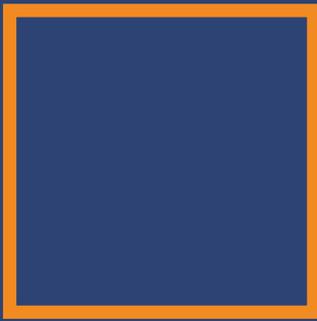
- ▷ Publishing the widely acknowledged survey conducted among our member bars and law societies on the impact of the pandemic on national judicial systems, the provision of legal services, and on individual colleagues.
- ▷ Sending letters to Commission President Ursula von der Leyen, Commission Vice-President Věra Jourová in charge of values and transparency and to Commissioner Didier Reynders in charge of justice, calling for:
 - a) Additional measures to facilitate access to justice, particularly for cases affecting liberty, the rights of families and other urgent matters.
 - b) Innovative technical solutions to support courts in ensuring that citizens are not exposed to unreasonable delays in the determination of their civil or criminal liabilities;

- c) The removal of unnecessary costs on access to justice, in particular through addressing value-added tax
- d) The provision of economic protection to lawyers excluded from mechanisms and aid schemes introduced by national governments.
- ▷ Issuing a strong statement to request the complete reactivation of judicial systems and access to justice, calling for investment in the justice systems and financial support for citizens through legal aid.
- ▷ Establishing a task force to examine the positive and negative impacts of the crisis towards the application of new technologies in the judiciary.
- ▷ Providing real-time best practice information on all the above aspects to help our member bars actively contribute in discussions at national level.
- ▷ Issuing a statement concerning contact tracing apps.
- ▷ Issuing a statement dealing with potential misuse of special powers.
- ▷ Publishing a regular bulletin on developments at national level.

Readers, lawyers who are taking part in the 2020 edition of European Lawyer's day and all lawyers in Europe and around the world can find all the above-mentioned and much more on our website.

To conclude, I would like to remind everyone that European Lawyers' day is celebrated for citizens and enterprises that are clients of lawyers and not for lawyers themselves.

Ranko PELICARIĆ
CCBE President



II. Essential information about European Lawyers' Day

PURPOSE

European Lawyers' Day (ELD) is a day that highlights the essential role that lawyers play as actors in the judicial system and their contribution to the protection of the rule of law. ELD has been celebrated since 2014. Lawyers defend the rule of law by acting against unlawful situations and defending citizens' rights. The rule of law is, together with human rights, a cornerstone of European democracy.

DATE

ELD is celebrated on **25 October**, in conjunction with the **European Day of Justice**, which aims to inform citizens about their rights and strengthen confidence in judicial systems.

THEME

An annual theme is chosen to illustrate how a specific aspect of law affects citizens and their rights. The chosen theme for 2020 is "**Continuity of justice and respect of human rights in times of pandemic**".

The themes of previous years were as follows:

- » **2019:** Your right to legal aid in criminal matters & a focus on access to a lawyer when detained in prison
- » **2018:** Why lawyers matter: Defending the defenders of the rule of law
- » **2017:** E-volving lawyers: How digital transformation can enrich the relationship between the citizen and the lawyer
- » **2016:** Access to justice
- » **2015:** Freedom of speech
- » **2014:** Lawyer-client confidentiality

ACTIVITIES

Bars and Law Societies are encouraged to organise events, publish educational materials and/or conduct other programmes to promote citizens' awareness of the European Lawyers' Day theme.

RESOURCES

In addition to the handbook, you will find on the CCBE European Lawyers' Day webpage <https://www.ccbe.eu/actions/european-lawyers-day/> the poster of the 2020 event which you can use for your communication.

You will also find an overview of the events organised by the Bars and Law Societies in previous years, which can serve as a source of inspiration for the type of events that can be organised.

Concerning the 2020 theme “**Continuity of justice and respect for human rights in times of pandemic**”, several documents are available on the CCBE webpage specially created in the wake of the COVID-19 pandemic: <https://www.ccbe.eu/actions/covid-19/>

This page gathers information at the international, European and national level concerning the impact of COVID-19 on justice. It also includes initiatives carried out by the CCBE such as surveys conducted on the basis of information provided by the delegations, declarations adopted, letters sent to the institutions of the European Union, etc.

CONTACT

If you have questions regarding the 2020 theme, please contact Karine Métayer (metayer@ccbe.eu).



III. Information about the theme

DESIGNING A RESILIENT JUSTICE

By Thierry Wickers,

Chair of the CCBE Future of the Legal Profession and Legal Services Committee

The data collected by the CCBE from its members, or those on the e-Justice portal, confirm that the functioning of justice has been seriously disrupted, or even practically interrupted, everywhere in Europe by the coronavirus crisis.

This is not surprising. Such a crisis had not been anticipated by those involved in the judicial world, and it could hardly have been.

Justice is dispensed in a multitude of physical locations, which are necessary for the storage and monitoring of cases. Hearings are organised in the very same premises, where parties to cases meet. The functioning of justice becomes almost impossible when these locations become inaccessible or are deserted by those who conduct them and who usually go there.

The response of justice systems during the lockdown/confinement period was inconsistent as it varied considerably from country to country. However, a number of trends can be identified.

In the civil field, the solution adopted by a vast majority was to close courts and postpone hearings. Where activity was maintained, it focused on the most urgent cases.

The greatest efforts have been made to maintain a criminal response. Priority was given to maintaining the State's ability to exercise its monopoly on legitimate violence. Although this is not the topic of this article, one cannot fail to observe that the exceptional measures taken to achieve this objective may have jeopardised the rights of the defence or contravened the rules of fair trial. The imperatives of health security clearly took precedence over respect for freedoms.

Hearings were quite often sacrificed. Incentives or constraints were adopted to cancel hearings and give the proceedings a purely written nature. Lawyers were invited to file cases and to waive the right to give oral explanations.



Few European countries practiced virtual hearings using videoconferencing. These could be authorised, either by decisions of the courts themselves or by texts published as a matter of urgency. This does not mean that these hearings necessarily took place. The taking of measures to adapt the rules of procedure should not be confused with reality. In practice, the holding of such hearings presupposed, at the very least, that courts were equipped with adequate hardware and videoconferencing software and that they knew how to use them. Apart from cases in which the courts themselves decided to hold such hearings precisely because they had the technical means to organise them, they could obviously not take place.

Given the nature of the crisis, it is in those countries where digitisation is most advanced that justice could be expected to be less vulnerable.

However, the crisis showed that digitisation efforts were not sufficient in themselves. To enable judicial activity to be maintained, the systems should have been designed to be accessible in mobile environments, and therefore remotely. This was obviously not the case everywhere. Where electronic communications by lawyers resulted in deserted justice facilities with no one to deal with them, the continuity of the functioning of justice was not guaranteed.

The risk of having the judicial system being blocked due to a phenomenon such as the pandemic is therefore now fully identified. The recurrence of such episodes is also considered to be likely. In a more general way, the weaknesses revealed by COVID-19 should lead to a reflection on the best way to guarantee, in times of crisis, the continuity of a public service as essential to the functioning of society as justice. In many countries, the impact of the crisis is moreover likely to be felt for a long time, because of the disorganisation caused and the backlog accumulated.

Justice, according to Richard Susskind's formula, can be thought of as a place or as a service (but also as a right and a need). When, as is still the case today, such service cannot be rendered other than in a specific place, it ceases to function when the place becomes unavailable.

It is therefore necessary to imagine a service which is operational, regardless of the physical place in which it is normally provided. Conceiving a resilient justice therefore requires us to determine the conditions that a justice system must meet to continue to function, without having a physical location.

The spontaneous tendency is to focus on hearings. This is naturally the most spectacular moment, which often becomes confused with the functioning of justice. It is therefore the one that attracts all the attention.

However, it is not just a question of whether virtual hearings are conceivable in order to create a resilient judicial system, capable of withstanding an event as unprecedented as the confinement of a population. All phases of the judicial process must be addressed. Probably five can be identified:

- ▷ Referral to the court
- ▷ Management of the case from the referral to the hearing
- ▷ Conduct of the hearing
- ▷ Deliberations
- ▷ Production of the decision

Moreover, there is little doubt about the tools to be mobilised. They are, in any case, digital tools. The starting hypothesis is indeed that the crisis makes places of justice partly or totally inaccessible to the public, lawyers, judges, and registrars.

Each of the phases identified is likely to pose daunting issues.

Therefore, while it is probably relatively simple to imagine a remote referral to a jurisdiction, opening this possibility already means that all stakeholders have a unique and robust digital identity. The establishment of a universal digital ID system is not the only condition to be met. Enabling anyone to access a justice system from anywhere implies a high level of security. However, the most complex task is still to ensure the delivery of court summons when the only means still available is electronic. All European citizens do not yet have an "electronic home" where they can be served with documents.

Continuity of the public service of justice also implies that it is possible to continue to manage court cases without access to the court. The ambition therefore goes far beyond electronic exchanges between parties to proceedings and the court. It is no longer just a question of enabling lawyers to communicate with their court without having to travel during the pre-trial phase. Registrars and magistrates must all be able to work remotely, accessing files and making the necessary changes to them. How can data as sensitive as judicial data be made accessible from anywhere and at any time, while fully guaranteeing their integrity?

Hearings certainly raise special problems. We already know enough today to be able to say that a virtual hearing will never be the equivalent of a real hearing. Virtual communications allow only impaired interactions between human beings. The ceremonial surrounding hearings is not meaningless; but it loses its meaning when it takes place onscreen and is witnessed remotely, from a dining room or a bedroom.

We will therefore have to choose between two paths. Should we try at all costs to make virtual hearings a pale copy of what lawyers know, or should we instead imagine a new type of hearings which can build up on the benefits of virtual hearings?

The dilemma over hearings makes it clear that justice, where it becomes virtual, will not be able to render the very same services as justice in person. On the other hand, its implementation may have significant advantages.

Besides, we probably no longer have a choice. There is certainly nothing worse than this eclipse of justice with which the vast majority of citizens and lawyers in the European Union have just been confronted.

The development of a virtual justice system, capable of functioning in times of crisis, will undoubtedly be one of the induced effects of the health crisis. Lawyers must participate in this movement, so that justice can give them the place they can claim. It is time to act.



The 17th century philosopher, Thomas Hobbes, posits a primitive society in which men pursue their selfish aims and life is “nasty, brutish and short”. He explains that society becomes ordered and prosperous through the creation a Christian Commonwealth, Leviathan, composed of all of its members conferring their authority on Leviathan, to be exercised for their common good. It is a poetic expression of the hard political reality that an ordered society depends upon the citizens ceding power to the state, but it is significant also that Hobbes’ Commonwealth was one in which the state is not only powerful but also altruistic.

It is not always in the way of the powerful to exercise their power for the common good. When there is power imbalance, even if the state purports to exercise its power in the name of the people, that power imbalance may lead to tyranny. That tendency was seen at its most perverse in the Führer Princip of Nazi Germany. The Führer embodies the spirit of the people and so, the will of the Führer is the will of the people.

The equal and opposite tendency is towards a state in which each individual has complete and unfettered autonomy, doing what he or she wants, irrespective of the harm to others – a reversion to the primitive atomised society seen by Hobbes as existing before the construction of Leviathan.



It is the genius of law to depersonalise power – rule is neither by the tyrant nor the mob: rather, it is by the rule of law. After the Second World war, it was understood that there was a need to ensure a clear legal statement of the fundamental rights over which the perverse doctrines of Nazism and Fascism had trampled. Drawing on a long tradition of thought going back even before the Enlightenment, there was crafted a number of statements of fundamental rights, including the UN Universal Declaration on Human Rights and the European Convention on Human Rights, all intended as a means of ensuring that governance should never again be about the naked exercise of power.

At root, human rights law is about balancing competing interests – my liberty is restrained where it causes harm to others, (for example, my right of free expression is tempered by your right not to suffer verbal injury). These balances are not always easy to strike, even when society functions normally, but when society is faced with a threat which is seen to be existential, the more liberty people may be prepared to surrender for the common good. Such a surrender by individual citizens may be wholly appropriate in order to promote the common good of all – that is the process of power-shifting which was discussed by Hobbes - but the danger is that such a shifting of power can be taken too far, can be appropriated by an over-powerful state even for the best of motives and what was temporary may become permanent and irreversible. A familiar example of this tension is in relation to the threat to the ECHR Article 8 right to respect for private and family life posed by surveillance measures in the context of “National Security”. This is a matter discussed by the CCBE in its [Recommendations on the Protection of Fundamental Rights in the context of “National Security”](#).

However, the perceived threat posed not only to society, but to life itself, by COVID-19 is seen as being both greater and more immediate than supposed threats to national security, not least because of the absence of either immunisation or cure. People are therefore rightly tolerant of even greater surrenders of liberty as they see such rebalancing as necessary in the interests of the greater common good.

This brings with it the obvious risk that mandatory measures may tip the balance too far, or that it habituates people to the erosion of their rights, in much the same way that CCTV has become invisible, not because it is concealed, but because it is so universal that people cease to notice it any more. However, there are other and more insidious challenges to fundamental rights.

It is instructive to look at some fundamental rights and how they are challenged by COVID-19.

On one side of the balance is the ECHR Article 2 right to life. The protection of life is the root justification for limitation of the other rights on the opposite side of the balance.

Faced with COVID-19, a disease for which there is no vaccine, which is highly contagious, transmitting exponentially, and which can, in a significant proportion of cases be, literally, deadly, the obvious strategy is for governments to seek to impose lockdown. That was the strategy adopted by the majority of nations when the pandemic hit – and, obviously, this requires a careful balancing against the Article 5 right to liberty – just how far is it proportionate to go?

Further, in lockdown, much of normal life ceases to function. In this regard, it has become increasingly apparent that one of the casualties has been the severe restriction on access to the courts, with a consequent challenge to Article 6 rights to a fair trial within a reasonable time.

The lockdown led in many jurisdictions to a period where the courts effectively shut down, criminal trials and civil hearings could not take place, and time limits which were there to protect accused persons or civil defendants had to be waived or extended. Although justice is gearing back up again around Europe, it tends to be on the basis of a patchwork of *ad hoc* arrangements, some more satisfactory than others, ranging from videoconferencing on various platforms to written submissions combined with telephone conferences.

The CCBE has highlighted just how unsatisfactory this state of affairs is in its [Statement on the Reactivation of Justice in Europe](#) and its [Further Observations on the Reactivation of Justice](#).

An example of the tensions involved in just how to respect the right to a fair trial can be seen, for example, in Scotland. Criminal trials with a single judge are easier to manage with a combination of social distancing and videoconferencing than accommodating a jury trial with 15 jurors in court in person, so, in an attempt to address the delays caused by lockdown, the Scottish Government proposed that criminal jury trials should, instead, take place before a judge sitting alone. This proposal was met with almost universal opposition, as trial by jury is seen as a fundamental element of the Scottish legal system. The Government withdrew the proposal, but, more than two months after lockdown began, jury trials have not resumed. These are the sorts of challenge to article 6 rights that every jurisdiction must face – what is more important in securing a fair trial: respect for the perceived fundamental role of the jury, or the need to deliver justice in a reasonable time? There are, of course, no easy answers.

However, though the majority response, lockdown was not the universal response. The problem is that, in the absence of a vaccine, if the disease becomes sufficiently widespread it will not simply disappear (though certain countries which acted early and had the geographical advantage of being islands, such as New Zealand, were able to declare the disease eradicated in their territory, at least for the time being). It is always there and can resurge. In that sense, complete lockdown can only ever temporarily halt the spread. There is no exit strategy, beyond postponing the evil day.

That is why certain countries, including the United Kingdom, initially pursued a strategy of allowing the disease to spread (damped only enough that, it was anticipated, it would not overwhelm the Health Service) with the aim that sufficient of the population would catch the disease and recover and thereby develop immunity. This, it was thought, would allow, in the long term, a return of society to full function once herd immunity had been developed. It may or may not have been that running as an undercurrent in such a policy was a desire to be less intrusive in relation to article 5 rights.

That policy decision was impeccably logical, based on the disease modelling available to the UK government at the time that it was taken, and it was proportionately less intrusive in relation to article 5, but, at an individual level, it was more intrusive in relation to the article 2 right to life, at least in the short term. Put crudely, how far is an individual prepared to go, or should be expected to go, in putting his own life on the line in pursuit of the greater good?

In the event, when the modelling made it clear that the disease was both more transmissible and more serious than had been thought, the balance tipped the other way and the UK adopted the lockdown approach.

The European Convention on Human Rights does not contain a fundamental right to work (though some have argued that it should), but one effect of lockdown is the virtual shutting down of the economy and a consequent threat to people's livelihoods and, consequently, health. This is an issue which is acutely engaged as nations seek to develop a strategy to emerge from lockdown; nor has the balancing exercise involved in the search for herd immunity gone away. Perhaps, it is suggested in some quarters – not only some politicians but also a few epidemiologists – if effective means can be found to shield the most vulnerable, it could be justified to allow the disease to spread amongst the rest of society with a view to developing herd immunity. This would entail an earlier return to full economic activity, though at the expense of some deaths in the short term, but leading to a much better outcome in the long term. Thus, the battle between cold logic and individual compassion.

These are immensely difficult political questions, but viewing them through the lens of fundamental rights – the balancing of the right to work, the right to liberty and the right to life - lays bare the awful logic of a world where there is no single “good” outcome.

Whichever strategy is adopted for coming out of lockdown, there is a near-universal consensus that it is essential to have an effective track and trace mechanism to map and control the spread of the disease and to move from mass lockdown to individual quarantine. Such a policy in any event entails an impingement upon the article 8 right to respect for private and family life. However, many states have sought to improve the effectiveness of such systems by supplementing them by the use of an app which maps contacts with persons who are infected. Such apps necessarily entail electronic surveillance of the individual. The question then becomes one of the proportionality of such surveillance.

The use of such apps is fully discussed in the [CCBE Statement on COVID-19 Tracing Apps, dated 15th May, 2020](#). Apps are no substitute for manual tracing techniques, but can significantly increase the effectiveness of such techniques. However, the challenge is to design and deploy the apps and process the data gathered in a proportionate manner. There is some discussion as to whether this necessarily requires a distributed database, or whether a centralised database might be used consistently with data processing principles and article 8 rights. Although there is less opportunity for data to be misapplied and privacy disproportionately affected in using a distributed model, there is no reason why a fully compliant central database cannot be devised. Indeed, whichever model is used, the core questions are, first, whether such systems actually work, and, second, assuming that they do, is the intrusion upon privacy no more than is strictly necessary?

The particular challenges which arise, whichever model is adopted, include whether the data is kept secure and used only for public health purposes. Is the data under the control only of public health authorities, or might it be shared with other government departments? Once the data is collected, there is a huge risk of mission creep, with pressure to use the data for wider surveillance purposes such as enforcement of restrictions on movement, or even law enforcement purposes having nothing to do with public health. Might it be used (as in some Asian countries) to award a green status to individuals permitting movement not permitted to those who have not got such a status? These are not fanciful concerns. In China and South Korea, for example, the infringements of privacy are considerable, and in Israel, the system is based on mobile phone tracking and is operated by the Shin Bet, the Israeli Intelligence agency.

In the final analysis, the core question is whether it is worth paying the price in civil liberties and fundamental rights for the acquisition of such contribution as an App can make to the wider public health benefit; whether, in other words, the bargain is a Faustian one.

The COVID-19 pandemic also turns the spotlight on the right to freedom of expression, which, in Europe, is enshrined in article 9 of the ECHR. There is the danger of simple abuse – as, for example, when Dr. Li Wenliang, who raised the alarm about COVID-19, was detained by police in Wuhan for “spreading false rumours” and was forced to sign a confession that he had unlawfully “seriously disrupted social order” But there is a legitimate question about balancing human rights when one considers the extent to which there might be legitimate and proportionate limits on the rights of conspiracy theorists to condemn inoculation, or Presidents to advocate the drinking of bleach. Again, such difficult questions can, and should, be viewed through the lens of human rights law which at least provides a tool to enable the decisions to be taken in a rational and structured way.

The conflict between competing rights becomes even more acute in relation to Article 11 rights in relation to freedom of assembly. Many countries have rules forbidding the assembling of groups of more than a limited number of people, for example, in England, no more than six and, in Scotland, no more than eight.

The killing of George Floyd in Minneapolis has provoked an upsurge of anger around the world, and all over Europe, people felt the need to join demonstrations protesting his killing. Some of those demonstrations were unlawful under the public health regulations, yet in, for example, London, Bristol and Paris the police stood aside as the demonstrations proceeded, recognising the disorder which would result if they were to attempt to prevent the demonstrations. One demonstrator, interviewed by the BBC and asked why she was demonstrating in the middle of a pandemic in a manner which was in defiance of rules made to protect public health responded “Racism is a pandemic too.”

Emotion, unreason, the closing of the ranks of the powerful, the temptations towards a surveillance state, unlawful infringements of human rights, wilful defiance of justified rules which proportionately limit certain rights for the good of public health, the world stands at crossroads. The balance maintained by the European Convention on Human Rights and other like documents is under challenge, on the one side by some states who seek to control and to shut down liberty, and on the other by the forces of unreason. These are matters which are addressed in the [CCBE Statement about Systemic Risks for the Rule of Law in Times of Pandemic](#).

That we do stand at a danger point is shown by the viral video of the CNN reporter being arrested for peacefully going about his business of reporting on a demonstration in Minneapolis. “Why am I being arrested, sir” he asked the policeman who led him off in handcuffs. He received no answer. The infringement of his constitutional rights was both self-evident and egregious, but what was truly remarkable was his addressing the policeman as “sir”. The police do a difficult job and deserve our utmost respect, but the police are there to serve the public, and not the other way round. It is the police who customarily address members of the public as “sir”; and in the inversion of that normal order, one senses that the social contract of which Hobbes wrote is fraying at the edges and the balance of power is shifting.

In this time of existential challenge and struggle between the competing forces of the all-powerful surveillance state on the one hand and the atomisation of society on the other, it is for those of us who stand in the middle urgently to affirm this truth: it is respect for the rule of law, and respect for the mechanisms of the UN Universal Declaration and the European Convention on Human Rights, which has maintained, and must continue to maintain the balance.



IV. Promoting your activities and events: #EuropeanLawyersDay

Publicising your European Lawyers' Day events and activities is a key part of making them successful. Here are some ideas on how to promote your European Lawyers' Day events:

» **Send out press releases**

The CCBE will provide an official European Lawyers' Day poster for its members for their use and distribution.

» **Submit articles for publication**

See <http://www.ccbe.eu/actions/european-lawyers-day/> for resources that member Bars can use in their press coverage or communication of the event.

» **Address local groups**

Contact the organisers of upcoming meetings of community groups (e.g. school boards) and ask to be allotted time on the agenda to briefly discuss European Lawyers' Day. If this is not possible, ask the organiser if he or she would be willing to publicise your event.

» **Use the social media**

Get the word out: social networks such as Twitter, LinkedIn, Facebook, YouTube, and Instagram all provide excellent opportunities to advertise an event.

Please use the hashtag **#EuropeanLawyersDay** to give visibility among users looking for European Lawyers' Day-related communications. Provide a link to a page with more detailed information about your event.

If possible, please tag the CCBE in your publications so that we can easily find and share them.