CCBE response to SEC proposed rule: 'Implementation of Standards of Professional Conduct for Attorneys'

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1. INTRODUCTION

The Council of Bars and Law Societies of the European Union (CCBE) is the representative body of over 500,000 European lawyers through its member bars and law societies. In addition to membership from EU bars, it has also observer representatives from a further 13 European countries' bars. The CCBE responds regularly on behalf of its members to policy consultations which affect European lawyers.

The present document is the CCBE's response to the proposed rule of the Securities and Exchange Commission (SEC) on 'Implementation of Standards of Professional Conduct for Attorneys'. There are a number of issues in the document that concern the CCBE, which are first summarised below, and then outlined in greater detail in the sections that follow.

In general, the CCBE believes that the 180 days permitted by Section 307 of the Sarbanes-Oxley Act for implementation of the rule are not sufficient for proper consultation and consideration of the complex issues involved in such novel matters as the extra-territorial regulation of foreign lawyers and the possibility that the rule might require foreign lawyers to breach their local codes of practice. Hasty decisions might be taken which overlook important principles, creating future problems.

2. SUMMARY

The CCBE is seeking the exclusion of European lawyers from the proposed rule, on the following grounds:

- Extra-territoriality - extra-territoriality of professional regulation of foreign lawyers (which is a new concept) fails to take account of the sovereignty of nations and legal systems, undermines local regulation by bars, and creates - in this case unnecessary - conflicts in applicable professional rules for lawyers, in particular in relation to the issue of 'noisy withdrawal';

- Authority of the SEC under Section 307 - nothing in Section 307 of the Sarbanes-Oxley Act (or in any other Section of the Act) specifically permits the SEC either to regulate foreign lawyers or to require any lawyer to breach professional laws and codes, as would happen to foreign lawyers with 'noisy withdrawal', and the SEC should not take such major steps without an express mandate;

- Existing Member State regulation - EU lawyers are already strictly regulated in their home jurisdictions, as outlined below, and this should be recognised by the SEC as substantially equivalent;

- Reporting up-the-ladder - European lawyers are already under a similar duty to report-up-the-ladder on discovering wrongdoing in a corporate client, on the basis that the client is the company and not the officials in the company with whom the

lawyer is dealing; the SEC should recognise this ethical and contractual requirement, but at the same time note that European lawyers may have differently defined triggers which require them to make such reports; the CCBE believes that it would be disproportionately burdensome to require European lawyers working outside the US to have a detailed knowledge of the specific US reporting trigger;

- Extent of foreign lawyer practice - nothing in the wrongdoing which the Sarbanes-Oxley Act seeks to correct has occurred, or is likely to occur, through the intervention of a foreign lawyer undertaking work before the SEC, and so the extension of the proposed rule to foreign lawyers is disproportionate;

- 'Appearing and practicing' - EU lawyers who are not US attorneys nor practising in the US should not be considered to be 'appearing and practicing before the Commission' since they will usually be acting in conjunction with a US lawyer who will be subject to the control of the SEC.

The CCBE has the following further comments on the details of the proposal, to be considered if, despite what is said above, the SEC proceeds to apply its proposed rule to European lawyers:

- 'Noisy withdrawal': the CCBE totally opposes any breach of European lawyers' professional secrecy, on the grounds that the duty to uphold secrecy is a cornerstone of the administration of justice in a free and democratic society; in addition, being required to breach their home rules in this way may subject some European lawyers to criminal penalties in their home jurisdiction.

- Disciplining of European lawyers: if the SEC proceeds to discipline European lawyers for a breach of the proposed rule, it should adopt the model of Article 7 of the European Establishment of Lawyers Directive 98/5/EC, which requires that the home bar is informed and consulted for its views when one of its lawyers is being disciplined elsewhere.

3. DETAILED COMMENTS

(1) Extra-territorial regulation

In general, the CCBE is opposed to extra-territorial regulation of members of its bars, where those members are resident in Europe (it accepts local regulation where its lawyers have gone abroad to practise). Even in fields such as crime and tort, the exercise of an extra-territorial jurisdiction arises only exceptionally. It is wholly unknown in the field of professional regulation. The CCBE does not accept its extension to professional regulation, for the following reasons:

- it undermines the principle of sovereignty of nations and legal systems, which is part of the foundation of international law;

- it breaches the principle, acknowledged in the US and elsewhere, that lawyers should be regulated locally by their own bars (unless they leave their jurisdiction, where it is accepted that local regulation means that the new host bar should have the power to regulate as well);

- it leads to a risk of conflict in professional rules, creating unnecessary difficulties for lawyers who become subject to two sets of rules which may conflict (as they do in this case – see under 'Noisy withdrawal' below). Although such conflicts may be unavoidable when lawyers leave their jurisdiction, they should not be brought about when lawyers are practising within their own jurisdiction.

The CCBE understands that globalisation has led to lawyers crossing borders to a far greater extent than before, and to carrying out more work in jurisdictions in which they are not qualified. This has inevitably thrown up issues relating to regulation. However, the CCBE does not believe that these issues are best solved by individual countries trying to regulate beyond their borders. If all countries tried to do that, it would lead to bewildering layers of regulation, often conflicting. Instead, the CCBE prefers to see an international response, where countries come together to agree at the international level how best to regulate lawyers who carry out work outside their own jurisdictions.

(2) Authority of SEC under Section 307

The CCBE has been concerned to see that the SEC does not appear to have the authority either specifically to introduce a rule which would regulate foreign lawyers, or to require in the rule reporting outside the client in general (whether by US or foreign lawyers).

In relation to foreign lawyers, the CCBE believes that the SEC should have a specific mandate in the Sarbanes-Oxley Act before seeking extra-territorial effect in professional regulation for lawyers, particularly given the likelihood of serious conflict of rules.

Regarding outside reporting, the SEC itself concedes in the 'General Overview' that outside reporting provisions 'are not explicitly required by Section 307'. The CCBE believes that such a major breach of an important element in the administration of justice, such as a requirement to report the client's conduct in breach of the duty to uphold secrecy, should only be introduced where the legislature has expressly mandated it, and all the more so where the obligation is sought to be imposed on lawyers outside the jurisdiction.

The CCBE, accordingly, earnestly requests the SEC to recognise the significance of what it is seeking to do, and to withdraw both foreign lawyers from the proposed rule, and also and in any case the requirement for 'noisy withdrawal', on the basis that such important steps should not be undertaken without an express requirement in the statute.

(3) Exemption in general

Although clearly foreign issuers which are public in the United States have obligations under US securities laws, none of the cases of wrongdoing which gave rise to the Sarbanes-Oxley Act, occurred, or are likely to occur, by reason of the intervention of a foreign lawyer. In general, foreign lawyers do not and would not practise on their own before a regulatory body in another country. EU lawyers who are not US attorneys nor practising in the US should not be considered to be 'appearing and practicing before the Commission', since they will usually be acting in conjunction with, or under the supervision of, a US lawyer who will be subject to the authority of the SEC. The extension of the proposed rule to foreign lawyers is, therefore, disproportionate.

In relation to the application of Part 205 on whether the law firm is principally based inside or outside the US or has a multi-jurisdictional practice, the rules should look to the status of the individual lawyer. Foreign lawyers based in the US, whether they have US attorneys as partners or associates or not, will likely be locally regulated and can be expected to be subject to local ethics and local law. This is not the case with foreign lawyers outside the US. They should not be subject to the extra-territorial reach of Part 205. It is unreasonable to expect European lawyers to have to comply with US requirements, which may be different to their own, when they are based outside the US. This is even the case with foreign lawyers in law firms which have US partners.

Overall, the CCBE prefers that European lawyers be exempt as a whole from the rule. The alternative of case-by-case exemption would be a cumbersome and expensive process where the same opinion would have to be given repeatedly about the incompatibility of e.g. 'noisy withdrawal' with a bar's professional code.

(4) Reporting up-the-ladder

In principle, European lawyers are required to report up-the-ladder of their corporate clients, and it is their generally accepted practice. This is because all European jurisdictions accept that, when a company is the lawyer's client: first, the responsibility of the lawyer is to the company as a whole, and not just to the instructing officials; and second, it is implied in the acceptance of instructions that material corporate wrongdoings which are uncovered by the lawyer will be reported, as necessary, to the top of the client's ladder.

So far as can be established in the minimal time permitted by the SEC consultation, there is neither an express rule in any European jurisdiction specifically requiring such reporting, nor is there an express rule forbidding it. Instead, the duty is understood to arise from the general ethical and contractual obligation to give the client the best and safest possible advice. Failure to report may indeed lead to a European lawyer being found liable in civil law for damages, or even to being charged with aiding and abetting a criminal offence.

That is not to say that there will not be potential conflicts in European lawyers complying with Part 205, if it were to apply to them. Specifically, the reporting requirement is very likely to be triggered by different requirements in Europe. Again, there has not been time, in the short consultation period, to conduct in-depth research, but it is almost certain that the trigger in European countries would not be 'reasonable belief of a material violation of US securities law', which is a question of US law. In some jurisdictions, 'actual knowledge' may be required. The trigger may in any case depend on the type and weight of the particular violation. Imposing Part 205 on European lawyers would impose on them the duty to know and understand the minutiae of the meaning of the US trigger, even when they are working outside the US. These obligations would impose a disproportionate burden.

(It is interesting to note that, although the practice of US law by a European lawyer without a US qualification would almost certainly be considered to be 'unauthorized practice of law', which is contrary to the criminal law in some US states, and against professional rules in all, the proposed SEC rule deems foreign lawyers without US training to have intimate knowledge of laws which they are precluded from practising without a local qualification – a strange implication.)

Finally, it is of concern to the CCBE that the proposed rule is silent on the complexities inherent in reporting where there are groups of companies with different shareholders or with partial relationships to each other, and on what happens if a reporting lawyer's interpretation of a material violation is not finally supported by the facts.

In those Member States of the EU where in-house counsel are permitted to be members of the bar, it is believed that the same principles apply to them as to external counsel.

(5) 'Noisy withdrawal'

All European lawyers are subject to professional secrecy obligations, which are the European equivalents of (although not always identical to) US attorney-client privilege. The concept varies between Member States. Attached is a copy of a full report prepared 20 years ago by the CCBE into the differences in the concept between Member States. The CCBE is currently up-dating this study.

The CCBE is strongly opposed to the extension of 'noisy withdrawal' to European lawyers for the following reasons:

- European lawyer-client privilege is not the same as US attorney-client privilege, and so the assertion in §205 (d) (3) that 'the notification to the Commission prescribed by paragraph (d) does not breach the attorney-client privilege' has no validity as regards European lawyers, who would be breaching their professional codes if they made a 'noisy withdrawal';

- different Member States have different origins to their professional secrecy rule – sometimes the constitution[1], sometimes the criminal law[2], sometimes statute[3] – the

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[1] Spanish Constitution 1978, Article 20.1 d*):* "...The law shall regulate the right to the clause of conscience and professional secrecy in the exercise of these freedoms" and Article 24.2: "The law shall specify the cases in which, for reasons of family relationship or professional secrecy, it shall not be compulsory to make statements regarding allegedly criminal offences".

[2] In most of the Member States with a continental system, the primary source of law is an Article of the Criminal Code, which provides that it is an offence (punishable by imprisonment or a fine or both) to reveal another person's "secret". These provisions of the Criminal Code are the source of the lawyer's duty and, since the breach of that duty is a criminal offence, the duty is not simply a professional or contractual duty, but a matter of public order.

Article 226-13 of the French Criminal Code: "The disclosure of secret information by a person entrusted with such a secret, either because of his position or profession, or because of a temporary function or mission, is punished by one year's imprisonment and a fine of € 15,000" *("La révélation d'une information à caractère secret par une personne qui en est dépositaire soit par état ou par profession, soit en raison d'une fonction ou d'une mission temporaire, est punie d'un an d'emprisonnement et de 15000 euros d'amende").*

Article 458 of the Belgian Criminal Code: "Should physicians… and all others who through their status or profession be in possession of information confided to them reveal such secrets, unless called to testify as a witness in a court of law or compelled by a court or the law to divulge the secret, they shall be punished…" *("Les médecins… et toutes autres personnes dépositaires par état ou par profession, de secrets qu'on leur confie, qui, hors le cas où ils sont appelés à rendre témoignage en justice et celui où la loi les oblige à faire connaître ces secrets, les auront révélé, seront punis…).*

In Article 622 of the Italian Criminal Code the duty is imposed generally upon "whoever has knowledge of a secret by reason of his particular status or office, or of his particular profession or skill" *("Chiunque, avendo notizia, per ragione del proprio stato o ufficio, o della propria professione o arte, di un segreto, lo rivela, senza giusta causa, ovvero lo impiega a proprio o altrui profitto, è punito, se dal fatto può derivare nocumento...")*

In The Netherlands, Article 272 of the Dutch Criminal Code is worded: "He who deliberately violates a secret of which he knows or has reason to suspect, which he is obliged to preserve by reason of his office or profession or a legal

SEC rule would ride roughshod over these provisions, putting European lawyers in the position of having to choose to face sanctions by the SEC if they do not report, or to face sanctions by their home bars or courts if they do report;

- professional secrecy cannot always be waived by the client in Europe – although it can be in common law jurisdictions (UK and Ireland)[4], it cannot be in several civil law jurisdictions (France, Belgium, Luxembourg)[5], meaning that the lawyer is unable to disclose the clients' secrets.

As in the US, professional secrecy is considered to be a cornerstone of justice in a free and democratic society, and the CCBE is utterly opposed to breaches to it.

(6) Disciplining of European lawyers

All the member bars of the CCBE, which include all EU bars, have procedures for disciplining their members. In general, the bars are responsible for enforcing their ethical codes. The sanctions open to bars, depending on the jurisdiction, will include fines and disbarment. Different bars operate in different ways, but the procedure is usually by way of complaint made against the particular lawyer to the bar.

If the SEC is determined to proceed with the proposal regarding foreign lawyers, then the CCBE would draw attention to the Establishment of Lawyers Directive 98/5/EC. This directive permits the free movement of lawyers around the EU, and has provisions for the bar of one Member State disciplining the lawyer of another Member State's bar. Article 7 states:

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regulation, as well as of his former office or profession, shall be punished ..." (Wetboek van Strafrecht, Art.272(1): *"Hij die enig geheim, waarvan hij weet of redelijkerwijs moet vermoeden, dat hij uit hoofde van ambt, beroep of wettelijk voorschrift, dan wel van vroeger ambt of beroep verplicht is het te bewaren, opzettelijk schendt, wordt gestraft..."*)

3 § 43 a II Bundesrechtsanwaltordnung – BRAO (German Lawyers Act): "The lawyer is bound by professional secrecy obligations. This duty refers to information that the lawyer became aware of in the course of the exercise of his profession. This does not apply to facts which are public or do not require secrecy according to their significance." *("Der Rechtsanwalt ist zur Verschwiegenheit verpflichtet. Diese Pflicht bezieht sich auf alles, was ihm in Ausübung seines Berufes bekanntgeworden ist. Dies gilt nicht für Tatsachen, die offenkundig sind oder ihrer Bedeutung nach keiner Geheimhaltung bedürfen")*

Finnish Act on Advocates 1995, paragraph § 5c: "An advocate or his assistant shall not, without due permission, disclose the secrets of an individual or family or business or professional secrets which have come to his knowledge in the course of his professional activity. Breach of the obligation of confidentiality provided for under paragraph 1 above shall be punishable in accordance with chapter 38, section 1 or 2, of the Penal Code, unless the law otherwise provides for more severe punishment for the act."

4 In the UK, legal professional privilege is conferred solely for the benefit of the client concerned, the lawyer's duty is a professional and contractual duty to his client. If the client authorises the lawyer to give evidence or to produce a document, the lawyer's right and duties cease to exist. The privilege, it is said, is the "privilege of the client".

5 In France, the duty to preserve the professional secret is general and absolute, even if his client consents to disclosure of the secret, the lawyer cannot be forced to disclose it*: "[L'obligation] est absolue et … il n'appartient à personne de les en affranchir"* – Crim. 11 mai 1844. S.441.527; cf. Dalloz, loc. cit., §99.

In Belgium, the provisions of the *Code Pénal* are general and absolute. Cass. 2 fév. 1905; Cass. 5 fév. 1985, *Pas*., I, 670; Cass. 23 décembre 1998, *J.L.M.B.*, 1999, p. 61.

The law of Luxembourg is substantially the same as the law of Belgium, since the terms of their respective Criminal Codes are identical.

‘Article 7

Disciplinary proceedings
1. In the event of failure by a lawyer practising under his home-country professional title to fulfil the obligations in force in the host Member State, the rules of procedure, penalties and remedies provided for in the host Member State shall apply.
2. Before initiating disciplinary proceedings against a lawyer practising under his home-country professional title, the competent authority in the host Member State shall inform the competent authority in the home Member State as soon as possible, furnishing it with all the relevant details.
The first subparagraph shall apply mutatis mutandis where disciplinary proceedings are initiated by the competent authority of the home Member State, which shall inform the competent authority of the host Member State(s) accordingly.
3. Without prejudice to the decision-making power of the competent authority in the host Member State, that authority shall cooperate throughout the disciplinary proceedings with the competent authority in the home Member State. In particular, the host Member State shall take the measures necessary to ensure that the competent authority in the home Member State can make submissions to the bodies responsible for hearing any appeal.
4. The competent authority in the home Member State shall decide what action to take, under its own procedural and substantive rules, in the light of a decision of the competent authority in the host Member State concerning a lawyer practising under his home-country professional title.
5. Although it is not a prerequisite for the decision of the competent authority in the host Member State, the temporary or permanent withdrawal by the competent authority in the home Member State of the authorisation to practise the profession shall automatically lead to the lawyer concerned being temporarily or permanently prohibited from practising under his home-country professional title in the host Member State.’

The CCBE would recommend to the SEC that it adopt the same principles for disciplining foreign lawyers as that detailed above – namely, close co-operation with the home bar, informing and consulting the home bar, and permitting the home bar to make representations on behalf of the lawyer concerned.

(7) The haste of the consultation process

The CCBE is alarmed by the short timetable given to respond to the proposed rule. 30 days is not sufficient time in which to muster thoughtful arguments about complex and profound issues. The CCBE is aware that Section 307 must be implemented within 180 days of the date of enactment of the Act. However, given that Section 307 does not specifically mention either the regulation of foreign lawyers or ‘noisy withdrawal’, the CCBE believes that the SEC should not include these new important issues in such haste.

It is not fair to foreign lawyers that the SEC should sweep them into the rule without giving adequate consideration to the issues raised. A consultation period of 30 days, and implementation after that within just a few weeks (which include the Christmas and New Year break) does not give the impression that the views of foreign lawyers are genuinely sought, nor that they will be properly considered once submitted. For that reason, foreign lawyers should be excluded from the proposed rule at any rate for the time being. If the SEC

wants them included, sufficient time should be allowed in the future for a proper consultation and consideration of the issues raised.

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