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CCBE RESPONSE TO COMMISSION CONSULTATION ON THE AUTHORISATION, OPERATION AND SUPERVISION OF CREDIT-RATING AGENCIES

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The Council of Bars and Law Societies of Europe (CCBE) represents more than 700,000 European lawyers through its member bars and law societies of the European Union and the European Economic Area. In addition to membership from EU bars, it has also observer representatives from a further ten European countries' bars. The CCBE responds regularly on behalf of its members to policy consultations which affect European citizens and lawyers.

The CCBE is concerned by the consequences of Article 20 of the proposed Directive/Regulation in the European Commission consultation on the authorisation, operation and supervision of credit-reference agencies¹, which departs from the principle of respect for privacy and confidentiality of communications (infringements of Articles 7 and 8 of the Charter of Fundamental Rights of the European Union and of Article 8 of the European Convention on Human Rights²). Article 20 of the proposed Directive/Regulation ignores as well the right to the protection of personal data (Article 8 of the Charter of Fundamental Rights of the European Union). It denies the confidential character of the lawyer-client relationship and in general professional secrecy.

Everyone has the right to consult a lawyer in order to ask advice which can be provided on the basis that the citizen is assured that what is said to the lawyer remains confidential. This right is part of fundamental freedoms and rights and derives from the principle of the rule of law. Denying this right would lead to serious infringement of the rights of defendants. The obligation of a lawyer to professional secrecy serves the interest of judicial administration and in general of the State. Professional secrecy is a right for the client and a duty for the lawyer. Without ensuring confidentiality, there cannot be trust and the lawyer cannot play his/her specific role in society.

The European Court of Justice expressly mentioned in its decision in the AM&S³ case: *“that confidentiality serves the requirements, the importance of which is recognized in all of the member states, that any person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it”*. It added that *“the principle of the protection against disclosure afforded to written communications between lawyer and client is based principally on a recognition of the very nature of the legal profession, inasmuch as it contributes towards the maintenance of the rule of law and that the rights of the defence must be respected”*.

This was emphasised again recently in the following paragraphs of the decision of the European Court of Justice in the Akzo Nobel case⁴:

121 *Similarly, it must be pointed out that LPP meets the need to ensure that every person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it (AM & S, paragraph 18). That principle is thus closely linked to the concept of the lawyer’s role as collaborating in the administration of justice by the courts (AM & S, paragraph 24) (see paragraph 77 above).*

122 *However, so that a person may be able effectively to consult a lawyer without constraint, and so that the latter may effectively perform his role as collaborating in the administration of justice by the courts and providing legal assistance for the purpose of the effective exercise of the rights of the defence, it may be necessary, in certain circumstances, for the client to prepare working documents or*

¹ http://ec.europa.eu/internal_market/consultations/docs/securities_agencies/consultation-cra-framework_en.pdf

² ARTICLE 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

³ Judgement of the Court of 18 May 1982, AM & S Europe Limited v Commission of European Communities, case C-155/79

⁴ Judgment of the Court of First Instance (First Chamber) of 17 September 2007, Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v Commission (Joined Cases T-125/03 and T-253/03)

summaries, in particular as a means of gathering information which will be useful, or essential, to that lawyer for an understanding of the context, nature and scope of the facts for which his assistance is sought. Preparation of such documents may be particularly necessary in matters involving a large amount of complex information, as is often the case with procedures imposing penalties for breaches of Articles 81 EC and 82 EC. In those circumstances, the Court holds that the fact that the Commission reads such documents during an investigation may well prejudice the rights of the defence of the undertaking under investigation and the public interest in ensuring that every client is able to consult his lawyer without constraint.

123 Accordingly, the Court concludes that such preparatory documents, even if they were not exchanged with a lawyer or were not created for the purpose of being sent physically to a lawyer, may none the less be covered by LPP, provided that they were drawn up exclusively for the purpose of seeking legal advice from a lawyer in exercise of the rights of the defence. On the other hand, the mere fact that a document has been discussed with a lawyer is not sufficient to give it such protection.

The duty of the lawyer to respect “*strict professional secrecy*” was asserted also by the Court in the Wouters⁵ case as being a generally recognised principle in all Member States and an “*essential rule to ensure the proper practice of the legal profession*” to which the bars should adhere.

The scope of confidentiality and professional privilege includes protection against seizure of documents in a search of the lawyer’s office⁶. In addition, information obtained through traffic and localisation data are important matters, hence the interest of such legislation for governments. The fact of being able to know when, where, how and how many times a person consults his/her lawyer seriously challenges confidentiality of the lawyer-client relationship and even the exercise of the right of defence itself. Therefore, confidentiality of all these matters should benefit from protection by the State, and increased protection should be expected from a European law.

Accordingly, the CCBE submits that Article 20 of the proposed Directive/Regulation in relation to credit-reference agencies should be amended to include protection for lawyer-client confidentiality and legal professional privilege, as recognised in all the European instruments and judgements quoted.

5 Judgement of the Court of 19 February 2002, Wouters, Case C-309/99

6 See, among several cases on this topic, Niemietz v Germany decided by the ECtHR of 16/12/1992 (Application no. 13710/88)