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European Court of Human Rights
Council of Europe
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FRANCE

Via fax in advance: + 33 (0)3 88 41 27 30

21.10.2021

App Nos. 1022/19 and 1125/19

In the matter

Martin KOCK and Others/JONES DAY v. Federal Republic of Germany

– having received the letter of 30 August 2021 from the Court – the following comments are submitted on behalf of the Council of Bars and Law Societies of Europe (CCBE) to the European Court of Human Rights, Third Section.

Introduction

These observations are submitted on behalf of the Council of Bars and Law Societies of Europe ("CCBE"), with particular support from Iain G. Mitchell, QC, a Scottish advocate and English barrister, and Vice Chair of the CCBE's surveillance committee, in response to the invitation by the Vice-President of the Section given by letter dated 30 August 2021. The submission focuses exclusively on the particular interests of the CCBE in the case before the Court.

The CCBE represents the bars and law societies of 45 countries, and through them more than one million European lawyers. Its purpose is, in particular, to represent the European national bars and law societies in all matters of common interest relating to the practice of the legal profession, respect for the rule of law and the proper administration of justice, as well as representing those bars and law societies in relation to legal developments at both European and international levels.

The CCBE also aims to act as an advisory and intermediary body amongst its members, whether full members, affiliates, associates or observers, and between its members and the institutions of the European Union, the European Economic Area and the Council of Europe respectively, in all cross-border matters of common interest, but also to ensure respect for the rule of law, human rights and the protection of fundamental rights and freedoms, including the right of

access to justice and the protection of clients, as well as the protection of the democratic values intimately linked to the exercise of these rights. In June 2021 the CCBE signed a Memorandum of Understanding with the Council of Europe which aim is to create a framework of cooperation for the purpose of promoting the rule of law by supporting and strengthening the independence of lawyers to exercise their profession freely, to provide effective and high-quality advice, assistance and representation to their clients, and to enjoy public confidence in their profession. The CCBE has intervened in numerous landmark cases also relating to lawyers' human rights and freedoms, including before this Court in case of *Morice v. France* (App. No. 29369/10), *Michaud v. France* (App. No. 29369/10), *Mor v. France* (App. No. 28198/09), and, lately, in the still pending case of the lawyer *Härting v. Germany* (App. No. 81996/17).

A particular interest of the CCBE as an organisation representing European lawyers is to defend actively the rule of law, to ensure access to justice, and to promote respect for the law, including the protection of human rights. In this context the CCBE seeks to ensure the protection of legal professional privilege and professional secrecy (hereinafter jointly referred to as "**LPP**"). This Application raises issues of considerable public importance which touch on the fundamental rights of all natural and legal persons who find themselves requiring to seek legal advice, and the LPP which attaches to that advice. In these written comments, the CCBE restricts itself to addressing only the general principles applicable to searches and seizure by state actors, whether police, prosecutors of regulatory authorities where such actions trespass upon the principle of LPP.

The relevant Convention Rights

The first convention right which is primarily engaged by such searches and seizures is Article8:

> "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 wellbeing 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."

Where general legal advice is sought or given, the species of LPP which applies is known as "advice privilege" and Article 8 will be engaged. Where the communications concern criminal proceedings or civil or other litigation, although article 8 will also be engaged, of more significance is likely to be article 6:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law..."

It will be noted, that, unlike article 8, article 6 is an unqualified right.

The Jurisprudence of the European Court of Human Rights

The European Convention on Human Rights is a living instrument, the interpretation and application of which requires constantly to evolve in order to respond to changes in society.

This is particularly the case for the protections of the right to respect for private and family life, home and correspondence (Article 8 of the Convention). According to the case law of the ECtHR, the private sphere protected by Art. 8 ECHR is to be understood in a comprehensive sense, so that neither is the term "home" limited to the private residence nor is the term "correspondence" limited solely to intra-family communication, extending, also, to business and other correspondence.

In particular, communications (whether in paper or electronic form) between clients and their lawyers, falls within the scope of the article 8 protection.

As required by Article 8 itself, any infringement of article 8 rights, for example, as a consequence of search or seizure of such documents, in order to be justified, requires to be executed according to law, to respect the principle of proportionality, and to be necessary in a democratic society for one of the purposes specified in the article.

In the case of *Niemietz v. Germany* (App. No. 13710/88) the Court affirmed that the protection of Article 8 extended to the Applicant's Law Office, and, further, held that a search of his office constituted an infringement of his article 8 rights, was not *proportionate* (§37). The Court observed that the search warrant had been drawn in broad terms, in that it ordered a search for and seizure of "documents", without any limitation, a point of special significance where, as in Germany, the search of a lawyer's office is not accompanied by any special procedural safeguards, such as the presence of an independent observer. The Court placed special importance on the circumstance that the search impinged on professional secrecy to an extent that was disproportionate. Of note was the Court's observation *(ibid)*:

> "it has, in this connection, to be recalled that, where a lawyer is involved, an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by Article 6 (art. 6) of the Convention."

In *Petri Sallinen and Others v. Finland* (App. No. 50882/99) a search of a lawyer's office and his residence, leading to the seizure and subsequent copying of a hard disk which contained, among other things, private details of three of his clients, was found to be an infringement of article 8. In considering whether that search was justified, the Court determined that the domestic law of Finland afforded insufficient safeguards to afford applicants the minimum degree of protection to which they were entitled under the rule of law in a democratic society, and that, in consequence the Search was not conducted "according to law" (§92). The Applicants had also alleged a violation of article 6, but the Court declined to determine this matter, stating (at §102):

> "In view of the above finding of a violation of Article 8 based on the lack of foreseeability of the domestic law the Court considers that in the circumstances of this case there is no need to examine separately the additional complaints under Article 6 of the Convention."

In *Iliya Stefanov v. Bulgaria* (App. No. 65755/01), a case involving a search of a lawyer's office, the Court restated the principles which govern searches and seizures by state actors, with particular reference to the presence of documents protected by LPP. The Court affirmed that a search of a lawyer's office constituted an infringement of Article 18. It then considered the minimum requirements for such a search to be justifiable as being in *accordance with the law* and to be *necessary in a democratic society.* These requirements are, first, a **legitimate aim** for

the searches and seizures, namely the prevention of crime in the context of a criminal investigation or a possible threat to national security (§37). Then, at §38, the Court stated:

> 38. To determine whether these measures were "necessary in a democratic society", the Court has to explore the **availability of effective safeguards** against abuse or arbitrariness under domestic law and check how those safeguards operated in the specific case under examination. Elements taken into consideration in this regard are the **severity of the offence** in connection with which the search and seizure have been effected, whether they have been carried out pursuant to a **warrant issued by a judge or a judicial officer** – or subjected to **after-the-fact judicial scrutiny** – whether the warrant was **based on reasonable suspicion** and whether **its scope was reasonably limited**. The Court must also review the **manner** in which the search has been executed, and – where a lawyer's office is concerned – whether it has been carried out in the presence of an independent observer to ensure that material subject to legal professional privilege is not removed. The Court must finally take into account the extent of the possible repercussions on the work and the reputation of the persons affected by the search (see *Camenzind v. Switzerland*, judgment of 16 December 1997, Reports of Judgments and Decisions 1997-VIII, pp. 2893-94, § 45; *Buck v. Germany*, no. 41604/98, § 45, ECHR 2005-IV; *Smirnov v. Russia*, no. 71362/01, § 44, ECHR 2007-...; and Wieser and Bicos Beteiligungen GmbH, cited above, § 57).

The need for such protections of Article 8 rights assumes heightened importance where the material which is subjected to a search includes communications between lawyers and clients. Such communications will normally be subject to LPP. In common law jurisdictions, LPP protects all communications between a professional legal advisor (a solicitor, barrister or attorney) and his or her clients from being disclosed without the permission of the client. In some civilian jurisdictions, Professional secrecy has such importance, that material protected by it cannot be disclosed, even with the consent of the Client. LPP is a fundamental component of the rule of law. The lawyer is a representative of interests but also an independent actor in the administration of justice. It is part of the nature of the lawyer's professional activity that his clients entrust him with secrets and that he receives other confidential communications. If confidentiality is not guaranteed, trust cannot develop. Confidentiality is therefore a primary and fundamental right and duty of the lawyer and an essential basis for the exercise of his profession. The lawyer's obligation of confidentiality serves the interest of the administration of justice as well as the interest of the client. It is therefore entitled to special protection by the Convention. This receives particular recognition in terms of Article 8 (which is a qualified right). However, an infringement of LPP is likely to have repercussions on the proper administration of justice and hence on the rights guaranteed by Article 6 of the Convention, which is an absolute, and not a qualified right. This is reflected in the comments quoted above in *Niemietz v Germany* at §37. In the context of Article 8 "*strengthened protection*" of exchanges between lawyers and their clients is required. The maintenance of trust in the confidentiality of such communications is essential to the fundamental role of lawyers in a democratic society and for the rule of law.

The Court will recall that it articulated this principle of strengthened protection in the landmark case of *Michaud v. France* (at §§118 and 119). The Court rightly stated that lawyers cannot carry out their essential task if they are unable to guarantee to their clients that their exchanges remain confidential. In the context of LPP "the notion of necessity implies that the interference

corresponds to a social need and, in particular, that it is proportionate to the legitimate aim pursued" (*Foxley v. UK* (App. No. 33274/96 §43)). The search and seizure of law firms' offices also affects the lawyers of the law firm who exercise their professional activity within it in their own right (see *Sérvulo and Others v. Portugal* (App. No.27013/10), at §79). Considering these facts, the searching of lawyer's offices is subject to especially strict scrutiny and proportionality (see *Kolesnichenko v. Russia* (App. No. 19856/04), at §31).

The Court has expanded on these rules concerning lawful searches and seizures of lawyer's offices in particular in the landmark case *André and Another v. France* (App. No. 18603/03). This case concerned a search of the offices of the applicants, both lawyers, by the tax authorities in the hope of discovering incriminating evidence against a client company of the lawyers which was suspected of tax evasion. At §41, the Court stated again that it:

> "considers that searches and seizures at the premises of a lawyer undoubtedly breach professional secrecy, which is the basis of the relationship of trust existing between a lawyer and his client. Furthermore, the safeguarding of professional secrecy is in particular the corollary of the right of a lawyer's client not to incriminate himself, which presupposes that the authorities seek to prove their case without resorting to evidence obtained through methods of coercion or oppression in defiance of the will of the "person charged" (see *J.B. v. Switzerland*, no. 31827/96, § 64, ECHR 2001-III; see also, among other authorities, *Funke v. France*, 25 February 1993, § 44, Series A no. 256-A)."

At §42 the Court held that, although domestic law might make provision for searches of lawyers' premises, for example, where a lawyer has been involved in the commission of an offence, it is essential that such searches should be accompanied by special guarantees. The Court noted that in the context of a tax inspection into the affairs of the applicants' client company the tax inspectorate had targeted the applicants for the sole reason that it was finding it difficult to carry out the necessary checks and to find documents capable of confirming the suspicion that the company was guilty of tax evasion, although at no time had the applicants been accused or suspected. This was disproportionate to the aim pursued.

Reflections on the Jurisprudence

Certain aspects of the Court's jurisprudence may require further clarification. There has been a consistent tendency on the part of the Court to view infringements of LPP as being governed solely by Article 8 without considering fully the protections afforded to some, even if not all, documents protected by LPP by article 6. The Court (as in *Michaud*) has articulated the principle of "heightened protection", but without developing fully what that phrase may mean, and how it relates to the protection afforded under article 8.

In approaching this matter, it may be of assistance to consider the following comments.

Special Concerns of the CCBE concerning LPP

The foregoing discussion demonstrates that the confidentiality of communications between clients and lawyers is accorded particularly high importance by the ECtHR. Confidentiality is seen not only as the lawyer's duty, but as a fundamental human right of the client. Without the certainty of confidentiality there cannot be trust, which is key to the proper functioning of the administration of justice and the rule of law.

Lawyers, whether retained by an individual, a corporation or the state, play several crucial roles in a state governed by the rule of law: as the client's trusted adviser and representative, as a professional respected by third parties, and as an indispensable participant in the fair administration of justice. By embodying all these elements, the lawyer, who faithfully serves his or her own client's interests and protects the client's rights, also fulfils the functions of the lawyer in society. The lawyer ought to forestall and prevent conflicts, to ensure that conflicts are resolved in accordance with recognised principles of civil, public or criminal law and with due account of rights and interests, to further the development of the law, and to defend liberty, justice and the rule of law. Respect for the lawyer's professional function is also an essential condition for a democratic society, which only functions if the rule of law is respected.

The lawyer's obligation of confidentiality serves the interest of the administration of justice as well as the interest of the client. It is therefore entitled to special protection by the state. As recalled above, in some jurisdictions in Europe, that is achieved by attaching to those communications the protection of legal professional privilege, and in other jurisdictions by treating them as professional secrets. Both approaches, however, seek to achieve the same end: the protection of information generated within the lawyer-client relationship for the purpose of giving or receiving legal advice (in both contentious and non-contentious matters) and/or representation in any type of legal proceedings, whether civil or criminal in nature. The only exception to that rule should be where credible evidence is found of the participation of a lawyer in an offence. In common law jurisdictions, this is usually referred to as "the iniquity exception", though it is important to note that it is not truly an exception: rather it is a matter which does not, in the first place, fall under the scope of LPP.

For lawyers to be effective in defending their clients' rights, there must be confidence that communications between lawyers and their clients are kept confidential. Without that trust, the client would not have the assurance that he can be full and frank with his lawyer, which is essential for providing full and accurate legal advice and support and is a crucial guarantee for the fair trial process.

With regard to information protected by LPP, the CCBE has created a Charter of Core Principles of the European Legal Profession and a Code of Conduct for European Lawyers that affirm certain rules that states must be required to provide in law for explicit protection of LPP. These rules, which are attached hereto as

Appendix 1

are not binding for the ECtHR, yet they provide useful insight in how cases might be influenced by LPP and therefore decided. The purpose of the CCBE's papers is to inform legislators and policy makers about standards that should be upheld in order to ensure that the essential principles of LPP are not undermined by practices undertaken by the state, involving the interception of communications and access to lawyer's data for the purpose of searches and seizures. The "Charter of Core Principles of the European Legal Profession" contains a list of ten principles common to the whole European legal profession. Respect for these principles is the basis of the right to legal defence, which is the cornerstone of all other fundamental rights in a democracy. The principles of the Charter and the Code of Conduct provides the following legal requirements:

> "Principle (b) – the right and duty of the lawyer to keep clients' matters confidential and to respect professional secrecy: It is of the essence of a lawyer's function that the lawyer should be told by his or her client things which the client would not tell to others – the most intimate personal details or the most valuable commercial secrets – and that the lawyer should be the recipient of other information on a basis of confidence. Without the certainty of confidentiality there can be no trust. The Charter stresses the dual nature of this principle – observing confidentiality is not only the lawyer's duty – it is a fundamental human right of the client. The rules of "legal professional privilege" prohibit communications between lawyer and client from being used against the client. In some jurisdictions the right to confidentiality is seen as belonging to the client alone, whereas in other jurisdictions "professional secrecy" may also require that the lawyer keeps secret from his or her own client communications from the other party's lawyer imparted on the basis of confidence. Principle (b) encompasses all these related concepts – LPP, confidentiality and professional secrecy. The lawyer's duty to the client remains even after the lawyer has ceased to act."

It is important to note that the CCBE Charter is not conceived as a code of conduct. It is, however, aimed at applying to the whole of Europe, reaching out beyond the member, associate and observer states of the CCBE. The CCBE Code of Conduct for European Lawyers also contains a provision on confidentiality in its Code under point 2.3.1.). The rules comprehensively prohibit communications between lawyer and client from being used against the client. They encompass all related concepts – legal professional privilege, confidentiality and professional secrecy. The lawyer's duty remains even after the lawyer has ceased to act.

Suggestions for Clarification

As noted above, the tendency of the ECtHR has so far been to approach the question of interception of lawyer-client communications mainly by looking through the lens of Article 8, albeit affording those communications a "higher degree of protection". Although this has led to a consistent recognition by the Court of the need for strengthened protection of communications between lawyers and their clients, there have been occasional comments from the Court that exceptions may be permissible, though the nature and extent of any such exceptions has not been a matter which has been explored by the Court in detail. This leaves unanswered the precise question: What are the respective contributions which Article 6 and Article 8 of the ECHR can make to ensuring the protection of LPP?

It is suggested that the starting point may be to identify what is, and what is not, protected by LPP. No system of LPP protects communications where the lawyer is involved in the furtherance of a criminal purpose (the so-called "iniquity exception"). The proper concern of legal protection should be ensuring the inviolability of material which falls within the scope of LPP or of an obligation of LPP. In this regard, Article 6 certainly provides a useful filtering mechanism, though it cannot be relied upon to protect every communication comprehended within LPP. This is because, although the scope of Article 6 is wide (concerning as it does the right to a fair trial in both criminal and civil matters, with the Article 6 protection extending back to the time of first consultation), it is not all-embracing as there will be legally privileged or secret communications which do not fall within the scope of Article 6 – for example communications regarding contract negotiations, advice, and other non-contentious matters.

However, it should be recalled that LPP is protected in respect of both litigation/defence work and also in respect of the giving of legal advice, and according to the court, correspondence between a lawyer and his client, **whatever its purpose**, enjoys privileged status (*EKİNCİ and AKALIN v. TURKEY*, 77097/01, §47; *MICHAUD v. FRANCE*, §117).

The Court of Justice of the European Union has recognised that all written lawyer-client communications exchanged after the initiation of competition proceedings are protected. Furthermore, the Court held that such protection extends to any earlier communications that have a relationship to the subject-matter of the procedure (AM&S, 18/05/1982, C-155/79, §24). This way, **in order not to discourage any undertakings from taking legal advice at the earliest opportunity, legal advice is regarded as a preparatory step in the undertaking's defence** (see, p.12, CCBE recommendations on the protection of client confidentiality within the context of surveillance activities).

In these circumstances, there is a case for parity of treatment of LPP material whether in the ambit of Article 6 (which gives absolute protection from interception), or in the ambit of Article 8 only. It is recognised that article 8 is expressed in qualified terms, but it is suggested that the "heightened protection" afforded to LPP under Article 8 ought, so far as practicable, to be equal to the protection afforded under Article 6.

Therefore, in the CCBE's view, **if information is passed on to the lawyer in the context of a client-attorney contract, it should be subject to special and absolute protection**. The lawyer's office may not be searched in order to look for any information relating to the lawyer's clients. It should not matter whether the client is already an "accused", or has already commenced litigation, for there is no reason for unequal treatment. The relationship of trust between lawyer and client and the importance of confidentiality are equally important in criminal and civil matters.

Special considerations related to Internal Investigations

In the context of internal investigations the necessity for absolute protection of LPP is at least as high as in the context of other mandates.

Internal investigations are a means employed by companies to anticipate, discover or mitigate compliance violations, and acts constituting criminal offences, or to combat such violations at an early stage by means of proactive compliance measures. In this process companies give their lawyers access to confidential documents, allow them to lead interviews with employees and to collect confidential information from all available sources. The companies' lawyers carry out these investigations in order to collect all information which is necessary to ascertain the legal position of the client. This access to confidential information is given to the lawyers based on the client's confidence that communications between lawyers and their clients are kept confidential, just as in any other mandate in which the lawyer is entrusted with the representation and/or defence of the client and has to ascertain the legal position based on the information he gets from the client.

It is easy to understand that states profess interest in obtaining the results of such internal investigations, as it presents to them the comprehensive results of investigations which they normally would have to undertake themselves. This, however, is the mischief that was identified in *André and Another v. France.*

This interest of the state should not prejudice the ability of companies to seek legal advice in relation to their practices, especially as part of an internal investigation having as its purpose the identification and remediation of regulatory failures.

In these circumstances, even if one does not follow the above view of the CCBE that LPP should receive absolute protection, not only under Article 6, but also under Article 8 of the Convention – at least in the context of internal investigations conducted by lawyers, the protection of LPP should be so comprehensive that any interference does not pass the test of proportionality. Internal investigations are carried out by clients in order comprehensively to identify and address violations committed by them. Such investigation are special means to anticipate or mitigate violations or criminal offences or to address violations at an early stage by means of proactive compliance measures. Within the framework of these private investigative activities, lawyers are granted access to the entire company's knowledge including its most secret documents and data, and all of this material is then collected and evaluated by the lawyers. Employees are questioned about the facts of the case and corresponding interview protocols are drawn up. At the end of the internal investigation there is a final report in which the results of the investigation are processed.

Internal investigations in this sense are the prime example of a lawyer fulfilling his duty not only as a representative of interests but also as a fair administrator of justice. By embodying all these elements, especially in trying to solve systemic problems, the lawyer fulfils the functions of the lawyer in society in an exemplary way. Information that companies hand over to lawyers to investigate for them for possible criminal offences must therefore fall under Article 6 of the Convention. Even if they fall under Article 8, there is no room for meaningful balancing. Therefore, there should not be a need for a formal act of inculpation by the law enforcement agency in order for information to be fully protected. The client does not have to be an "accused" and the lawyer does not have to be a criminal defence lawyer. If one holds the contrary opinion, that such searches are permitted, there would be no incentive at all for clients to instruct their lawyers to conduct investigations. Rather, clients would then have an interest in keeping such information secret for as long as possible. This, however, would tend to frustrate, rather than facilitate the achievement of the goals of the state.

In this context, the CCBE once again points out the central role of lawyers, as restated in its "Code of Conduct":

> "In a society founded on respect for the rule of law the lawyer fulfils a special role. The lawyer's duties do not begin and end with the faithful performance of what he or she is instructed to do so far as the law permits. A lawyer must serve the interests of justice as well as those whose rights and liberties he or she is trusted to assert and defend, and it is the lawyer's duty not only to plead the client's cause but to be the client's adviser. Respect for the lawyer's professional function is an essential condition for the rule of law and democracy in society." – the CCBE's Code of Conduct, Article 1.1

To comply with increasingly complex legal obligations, including corporate governance obligations, companies must be able to seek candid legal advice and promptly and effectively address allegations of misconduct. These requirements are becoming even more complex in a global and connected economic and legal market. As the CCBE has pointed out, the lawyer-client relationship alone is sufficient to provide protection. This must especially be true in cases of internal investigations. After all, their purpose is precisely that clients, working with their

lawyers, seek to uncover criminal offences. Since they pursue a goal of the common good, any search and seizure of LPP material, from wherever it is seized, must be unlawful, as constituting a disproportionate interference of Convention rights.

Conclusion

The revelations of new prosecutorial search and seizure possibilities has led the Court, as set out above, to develop a restated framework for testing Convention compliance of searches and seizures. The balancing of the perceived state interest in obtaining information and/or evidence against the protection of fundamental rights requires that interferences with Article 8 rights be fenced with proper procedural safeguards at every stage. In the absence of such legal safeguards, the intrusions are unlikely to pass the test of proportionality. The CCBE emphasises the need to have clear rules for search and seizure regimes in all signatory states of the Convention. Proper legal protection is essential in any search and seizure regime and the CCBE emphasises that any legal protection must involve supervision and control by an independent judicial body, and must be effective, which is to say that it must be designed in such a way that the client's rights are protected in a comprehensive and verifiable manner ex-post factum. To this end, the independent body judging the search needs to be equipped with personnel, material and professional means to deal with search and seizure regimes, regardless of whether the seizure is "digital" or "analogue".

The safeguards need to be even stricter when the communications subject to searches and seizures are afforded special protection by the law. This is the case with legally privileged communications. The ECtHR holds the opinion that LPP requires heightened protection under Article 8. Nevertheless, the ECtHR has not yet fully defined the scope of protection. From the point of view of legal certainty and legal clarity, it would be desirable for the Court to define the **precise protection of LPP** within the ambit of Articles 8 and 6. The Court should, as set out before, clarify that materials protected by LPP should not be searched for at the lawyer's office or elsewhere. The protection of LPP should take effect as soon as the lawyer's contract of engagement is concluded. Especially in the case of internal investigations, a search for such material should not take place under any circumstances.

In summary, in 2008, the rules generally applicable to the protection afforded by Article 8 in the context of searches and seizures were articulated in the case of *Iliya Stefanov v. Bulgaria,* taking into account the nature, scope and extent of the search and seizure regimes, the existence of proper controls and the availability of effective *ex post facto* remedies. Following this, the case of *Michaud v France* articulated the principle of "heightened protection". However, the Court has not yet defined this protection precisely. The CCBE believes that the time has now come for it to do so.

In that regard, the CCBE proposes that the protection afforded to LPP material under article 8 should be equal to that afforded under article 6, and, to that end, lawyer's offices should never be allowed to be searched, unless the lawyer himself is accused of criminal acts. In particular, this general principle should also be applied in the case of internal investigations.

Dr. Sebastian Cording
Rechtsanwalt

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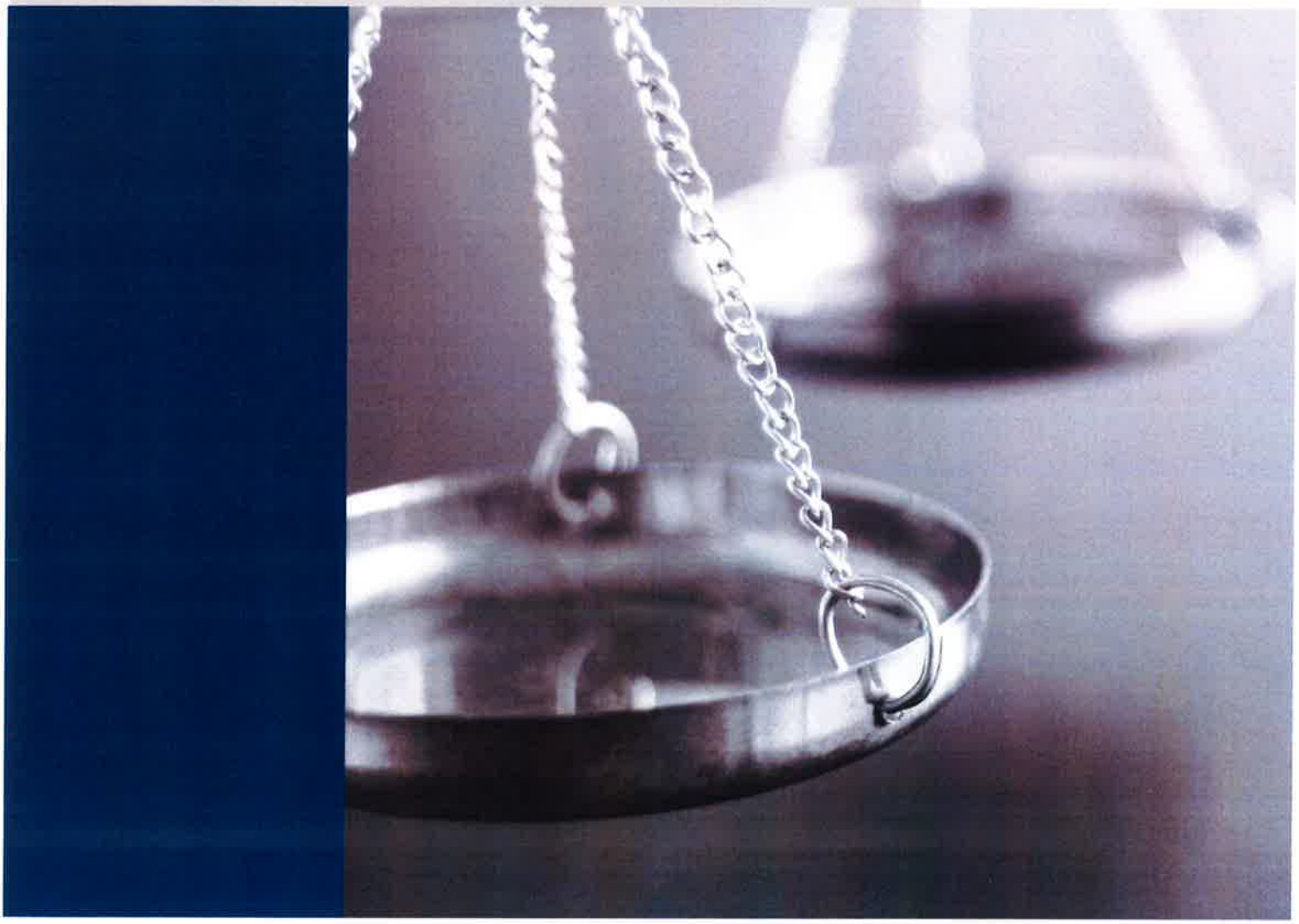
Charter of core principles of the European legal profession & Code of conduct for European lawyers



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The 2019 edition includes the amendments to the commentary on Principle (g) of the Charter approved by the Plenary Session on 17 May 2019.

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The Council of Bars and Law Societies of Europe (CCBE) has as its principal object to represent its member Bars and Law Societies, whether they are full members (i.e. those of the European Union, the European Economic Area and the Swiss Confederation), or associated or observer members, on all matters of mutual interest relating to the exercise of the profession of lawyer, the development of the law and practice pertaining to the rule of law and the administration of justice and substantive developments in the law itself, both at a European and international level (Article III 1.a. of the CCBE Statutes).

In this respect, it is the official representative of Bars and Law Societies which between them comprise more than 1 million European lawyers.

The CCBE has adopted two foundation texts, which are included in this brochure, that are both complementary and very different in nature.

The more recent one is the ***Charter of Core Principles of the European Legal Profession*** which was adopted at the plenary session in Brussels on 24 November 2006. The Charter is not conceived as a code of conduct. It is aimed at applying to all of Europe, reaching out beyond the member, associate and observer states of the CCBE. The Charter contains a list of ten core principles common to the national and international rules regulating the legal profession.

The Charter aims, inter alia, to help bar associations that are struggling to establish their independence; and to increase understanding among lawyers of the importance of the lawyer's role in society; it is aimed both at lawyers themselves and at decision makers and the public in general.

The ***Code of Conduct for European Lawyers*** dates back to 28 October 1988. It has been amended three times; the latest amendment took place at the plenary session in Oporto on 19 May 2006. It is a binding text on all Member States: all lawyers who are members of the bars of these countries (whether their bars are full, associate or observer members of the CCBE) have to comply with the Code in their cross-border activities within the European Union, the European Economic Area and the Swiss Confederation as well as within associate and observer countries.

These two texts include a commentary for the first one, and an explanatory memorandum for the second one.

It is unnecessary to emphasise the importance of the set of norms set out in these two documents, which are the basis of the deontology of the European legal profession, and which contribute to shaping the European lawyer and the European bar.

31 January 2008

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CHARTER OF CORE PRINCIPLES OF THE EUROPEAN LEGAL PROFESSION

"In a society founded on respect for the rule of law the lawyer fulfils a special role. The lawyer's duties do not begin and end with the faithful performance of what he or she is instructed to do so far as the law permits. A lawyer must serve the interests of justice as well as those whose rights and liberties he or she is trusted to assert and defend and it is the lawyer's duty not only to plead the client's cause but to be the client's adviser. Respect for the lawyer's professional function is an essential condition for the rule of law and democracy in society."

– the CCBE's Code of Conduct for European Lawyers, article 1.1

There are core principles which are common to the whole European legal profession, even though these principles are expressed in slightly different ways in different jurisdictions. The core principles underlie the various national and international codes which govern the conduct of lawyers. European lawyers are committed to these principles, which are essential for the proper administration of justice, access to justice and the right to a fair trial, as required under the European Convention of Human Rights. Bars and Law Societies, courts, legislators, governments and international organisations should seek to uphold and protect the core principles in the public interest.

The core principles are, in particular:

(a) the independence of the lawyer, and the freedom of the lawyer to pursue the client's case;

(b) the right and duty of the lawyer to keep clients' matters confidential and to respect professional secrecy;

(c) avoidance of conflicts of interest, whether between different clients or between the client and the lawyer;

(d) the dignity and honour of the legal profession, and the integrity and good repute of the individual lawyer;

(e) loyalty to the client;

(f) fair treatment of clients in relation to fees;

(g) the lawyer's professional competence;

(h) respect towards professional colleagues;

(i) respect for the rule of law and the fair administration of justice; and

(j) the self-regulation of the legal profession.

A COMMENTARY ON THE CHARTER OF CORE PRINCIPLES OF THE EUROPEAN LEGAL PROFESSION

1. On 25 November 2006 the CCBE unanimously adopted a "Charter of Core Principles of the European Legal Profession". The Charter contains a list of ten principles common to the whole European legal profession. Respect for these principles is the basis of the right to a legal defence, which is the cornerstone of all other fundamental rights in a democracy.
2. The core principles express the common ground which underlies all the national and international rules which govern the conduct of European lawyers.
3. The Charter takes into account:
   - national professional rules from states throughout Europe, including rules from non-CCBE states, which also share these common principles of European legal practice[1],
   - the CCBE's Code of Conduct for European Lawyers,
   - the Principles of General Application in the International Bar Association's International Code of Ethics[2],
   - recommendation Rec (2000) 21 of 25 October 2000 of the Committee of Ministers of the Council of Europe to Member States on the freedom of exercise of the profession of lawyer[3],
   - the Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana (Cuba), 27 August to 7 September 1990[4],
   - the jurisprudence of the European Court of Human Rights and the European Court of Justice, and in particular the judgment of 19 February 2002 of the European Court of Justice in *Wouters v. Algemene Raad van de Nederlandse Orde van Advocaten* (C-309/99)[5],

1 The national codes of conduct can be found on CCBE web site.
2 General Principles of the Legal Profession, adopted by the International Bar Association on 20 September 2006.
3 Recommendation No. R(2000)21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer (Adopted by the Committee of Ministers on 25 October 2000 at 727th meeting of the Ministers' Deputies).
4 Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.
5 Case C-309/99 *J.C.J Wouters, J.W. Savelbergh, Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Avocaten,* [2002] ECR I-1577.

- the Universal Declaration of Human Rights[6], the European Convention on Human Rights[7], and the European Union Charter of Fundamental Rights[8],
- the European Parliament resolution on the legal professions and the general interest in the functioning of legal systems, 23 March 2006[9].

4. The Charter is designed to serve as a pan-European document, reaching out beyond the member, associate and observer states of the CCBE. It is hoped that the Charter will be of help, for instance, to bar associations that are struggling to establish their independence in Europe's emerging democracies.
5. It is hoped that the Charter will increase understanding among lawyers, decision makers and the public of the importance of the lawyer's role in society, and of the way in which the principles by which the legal profession is regulated support that role.
6. The lawyer's role, whether retained by an individual, a corporation or the state, is as the client's trusted adviser and representative, as a professional respected by third parties, and as an indispensable participant in the fair administration of justice. By embodying all these elements, the lawyer, who faithfully serves his or her own client's interests and protects the client's rights, also fulfils the functions of the lawyer in society - which are to forestall and prevent conflicts, to ensure that conflicts are resolved in accordance with recognised principles of civil, public or criminal law and with due account of rights and interests, to further the development of the law, and to defend liberty, justice and the rule of law.
7. The CCBE trusts that judges, legislators, governments and international organisations will strive, along with bar associations, to uphold the principles set out in the Charter.
8. The Charter is prefaced by an extract from the preamble to the Code of Conduct for European lawyers, including the assertion that: "Respect for the lawyer's professional function is an essential condition for the rule of law and democracy in society." The rule of law is closely associated with democracy as currently understood in Europe.
9. The Charter's introductory paragraph claims that the principles in the Charter are essential for the fair administration of justice, access to justice and the right to a fair trial, as required by the European Convention on Human Rights. Lawyers and their bar associations will continue to be in the forefront in campaigning for these rights, whether in Europe's new emerging democracies, or in the more established democracies where such rights may be threatened.

6 The Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on 10 December 1948.
7 Convention for the Protection of Human Rights and Fundamental Freedoms, signed by the members of the Council of Europe on 4 November 1950 in Rome.
8 Charter of Fundamental Rights of the European Union, signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission at the European Council meeting in Nice on 7 December 2000.
9 European Parliament resolution on the legal professions and the general interest in the functioning of the legal systems, adopted on 23 March 2006.

Principle (a) – the independence of the lawyer, and the freedom of the lawyer to pursue the client's case:

A lawyer needs to be free - politically, economically and intellectually - in pursuing his or her activities of advising and representing the client. This means that the lawyer must be independent of the state and other powerful interests, and must not allow his or her independence to be compromised by improper pressure from business associates. The lawyer must also remain independent of his or her own client if the lawyer is to enjoy the trust of third parties and the courts. Indeed without this independence from the client there can be no guarantee of the quality of the lawyer's work. The lawyer's membership of a liberal profession and the authority deriving from that membership helps to maintain independence, and bar associations must play an important role in helping to guarantee lawyers' independence. Self-regulation of the profession is seen as vital in buttressing the independence of the individual lawyer. It is notable that in unfree societies lawyers are prevented from pursuing their clients' cases, and may suffer imprisonment or death for attempting to do so.

Principle (b) – the right and duty of the lawyer to keep clients' matters confidential and to respect professional secrecy:

It is of the essence of a lawyer's function that the lawyer should be told by his or her client things which the client would not tell to others - the most intimate personal details or the most valuable commercial secrets - and that the lawyer should be the recipient of other information on a basis of confidence. Without the certainty of confidentiality there can be no trust. The Charter stresses the dual nature of this principle - observing confidentiality is not only the lawyer's duty - it is a fundamental human right of the client. The rules of "legal professional privilege" prohibit communications between lawyer and client from being used against the client. In some jurisdictions the right to confidentiality is seen as belonging to the client alone, whereas in other jurisdictions "professional secrecy" may also require that the lawyer keeps secret from his or her own client communications from the other party's lawyer imparted on the basis of confidence. Principle (b) encompasses all these related concepts - legal professional privilege, confidentiality and professional secrecy. The lawyer's duty to the client remains even after the lawyer has ceased to act.

Principle (c) – avoidance of conflicts of interest, whether between different clients or between the client and the lawyer:

For the proper exercise of his or her profession, the lawyer must avoid conflicts of interest. So a lawyer may not act for two clients in the same matter if there is a conflict, or a risk of conflict, between the interests of those clients. Equally a lawyer must refrain from acting for a new client if the lawyer is in possession of confidential information obtained from another current or former client. Nor must a lawyer take on a client if there is a conflict of interest between the client and the lawyer. If a conflict of interest arises in the course of acting for a client, the lawyer must cease to act. It can be seen that this principle is closely linked to principles (b) (confidentiality), (a) (independence) and (e) (loyalty).

Principle (d) – the dignity and honour of the legal profession, and the integrity and good repute of the individual lawyer:

To be trusted by clients, third parties, the courts and the state, the lawyer must be shown to be worthy of that trust. That is achieved by membership of an honourable profession; the corollary is that the lawyer must do nothing to damage either his or her own reputation or the reputation of the profession as a whole and public confidence in the profession. This does not mean that the lawyer has to be a perfect individual, but it does mean that he or she must not engage in disgraceful conduct, whether in legal practice or in other business activities or even in private life, of a sort likely to dishonour the profession. Disgraceful conduct may lead to sanctions including, in the most serious cases, expulsion from the profession.

Principle (e) – loyalty to the client:

Loyalty to the client is of the essence of the lawyer's role. The client must be able to trust the lawyer as adviser and as representative. To be loyal to the client, the lawyer must be independent (see principle (a)), must avoid conflicts of interest (see principle (c)), and must keep the client's confidences (see principle (b)). Some of the most delicate problems of professional conduct arise from the interaction between

the principle of loyalty to the client and principles which set out the lawyer's wider duties – principle (d) (dignity and honour), principle (h) (respect towards professional colleagues) and in particular principle (i) (respect for the rule of law and the fair administration of justice). In dealing with such issues the lawyer must make it clear to the client that the lawyer cannot compromise his or her duties to the court and to the administration of justice in order to put forward a dishonest case on behalf of the client.

Principle (f) – fair treatment of clients in relation to fees:

A fee charged by a lawyer must be fully disclosed to the client, must be fair and reasonable, and must comply with the law and professional rules to which the lawyer is subject. Although professional codes (and principle (c) in this Charter) stress the importance of avoiding conflicts of interest between lawyer and client, the matter of the lawyer's fees seems to present an inherent danger of such a conflict. Accordingly, the principle dictates the necessity of professional regulation to see that the client is not overcharged.

Principle (g) – the lawyer's professional competence:

It is self-evident that a lawyer cannot effectively advise or represent his or her client unless the lawyer undertakes the appropriate professional education and training. A lawyer should be encouraged to undertake appropriate post-qualification training (continuing professional development) in order to keep abreast of changes in law and practice, including changes in the relevant technological and economic environment in which he or she works. A lawyer should be aware of the benefits and risks of using relevant technologies in his or her practice. Professional rules often stress that a lawyer must not take on a case which he or she is not competent to deal with.

Principle (h) – respect towards professional colleagues:

This principle represents more than an assertion of the need for courtesy – although even that is important in the highly sensitive and highly contentious matters in which lawyers are frequently involved on behalf of their respective clients. The principle relates to the role of the lawyer as intermediary, who can be trusted to speak the truth, to comply with professional rules and to keep his or her promises. The proper administration of justice requires lawyers to behave with respect to each other so that contentious matters can be resolved in a civilised way. Similarly it must be in the public interest for lawyers to deal in good faith with each other and not to deceive. Mutual respect between professional colleagues facilitates the proper administration of justice, assists in the resolution of conflicts by agreement, and is in the client's interest.

Principle (i) – respect for the rule of law and the fair administration of justice:

We have characterised part of the role of the lawyer as acting as a participant in the fair administration of justice. The same idea is sometimes expressed by describing the lawyer as an "officer of the court" or as a "minister of justice". A lawyer must never knowingly give false or misleading information to the court, nor should a lawyer ever lie to third parties in the course of his or her professional activities. These prohibitions frequently run counter to the immediate interests of the lawyer's client, and the handling of this apparent conflict between the interests of the client and the interests of justice presents delicate problems that the lawyer is professionally trained to solve. The lawyer is entitled to look to his or her bar association for assistance with such problems. But in the last analysis the lawyer can only successfully represent his or her client if the lawyer can be relied on by the courts and by third parties as a trusted intermediary and as a participant in the fair administration of justice.

Principle (j) – the self-regulation of the legal profession:

It is one of the hallmarks of unfree societies that the state, either overtly or covertly, controls the legal profession and the activities of lawyers. Most European legal professions display a combination of state regulation and self-regulation. In many cases the state, recognising the importance of the core principles, uses legislation to buttress them – for instance by giving statutory support to confidentiality, or by giving bar associations statutory power to make professional rules. The CCBE is convinced that only a strong element of self-regulation can guarantee lawyers' professional independence vis-à-vis the state, and without a guarantee of independence it is impossible for lawyers to fulfil their professional and legal role.

CODE OF CONDUCT FOR EUROPEAN LAWYERS

This Code of Conduct for European Lawyers was originally adopted at the CCBE Plenary Session held on 28 October 1988, and subsequently amended during the CCBE Plenary Sessions on 28 November 1998, 6 December 2002 and 19 May 2006. The Code also takes into account amendments to the CCBE Statutes formally approved at an Extraordinary Plenary Session on 20 August 2007.

1. PREAMBLE

1.1. The Function of the Lawyer in society

In a society founded on respect for the rule of law the lawyer fulfils a special role. The lawyer's duties do not begin and end with the faithful performance of what he or she is instructed to do so far as the law permits. A lawyer must serve the interests of justice as well as those whose rights and liberties he or she is trusted to assert and defend and it is the lawyer's duty not only to plead the client's cause but to be the client's adviser. Respect for the lawyer's professional function is an essential condition for the rule of law and democracy in society.

A lawyer's function therefore lays on him or her a variety of legal and moral obligations (sometimes appearing to be in conflict with each other) towards:

- the client;
- the courts and other authorities before whom the lawyer pleads the client's cause or acts on the client's behalf;
- the legal profession in general and each fellow member of it in particular;
- the public for whom the existence of a free and independent profession, bound together by respect for rules made by the profession itself, is an essential means of safeguarding human rights in face of the power of the state and other interests in society.

1.2. The Nature of Rules of Professional Conduct

1.2.1. Rules of professional conduct are designed through their willing acceptance by those to whom they apply to ensure the proper performance by the lawyer of a function which is recognised as essential in all civilised societies. The failure of the lawyer to observe these rules may result in disciplinary sanctions.

1.2.2. The particular rules of each Bar or Law Society arise from its own traditions. They are adapted to the organisation and sphere of activity of the profession in the Member State concerned and to its judicial and administrative procedures and to its national legislation. It is neither possible nor desirable that they should be taken out of their context nor that an attempt should be made to give general application to rules which are inherently incapable of such application.

The particular rules of each Bar and Law Society nevertheless are based on the same values and in most cases demonstrate a common foundation.

1.3. The Purpose of the Code

1.3.1. The continued integration of the European Union and European Economic Area and the increasing frequency of the cross-border activities of lawyers within the European Economic Area have made necessary in the public interest the statement of common rules which apply to all lawyers from the European Economic Area whatever Bar or Law Society they belong to in relation to their cross-border practice. A particular purpose of the statement of those rules is to mitigate the difficulties which result from the application of "double deontology", notably as set out in Articles 4 and 7.2 of Directive 77/249/EEC and Articles 6 and 7 of Directive 98/5/EC.

1.3.2. The organisations representing the legal profession through the CCBE propose that the rules codified in the following articles:

- be recognised at the present time as the expression of a consensus of all the Bars and Law Societies of the European Union and European Economic Area;
- be adopted as enforceable rules as soon as possible in accordance with national or EEA procedures in relation to the cross-border activities of the lawyer in the European Union and European Economic Area;
- be taken into account in all revisions of national rules of deontology or professional practice with a view to their progressive harmonisation.

They further express the wish that the national rules of deontology or professional practice be interpreted and applied whenever possible in a way consistent with the rules in this Code.

After the rules in this Code have been adopted as enforceable rules in relation to a lawyer's cross-border activities the lawyer will remain bound to observe the rules of the Bar or Law Society to which he or she belongs to the extent that they are consistent with the rules in this Code.

1.4. Field of Application *Ratione Personae*

This Code shall apply to lawyers as they are defined by Directive 77/249/EEC and by Directive 98/5/EC and to lawyers of the Associate and Observer Members of the CCBE.

1.5. Field of Application *Ratione Materiae*

Without prejudice to the pursuit of a progressive harmonisation of rules of deontology or professional practice which apply only internally within a Member State, the following rules shall apply to the cross-border activities of the lawyer within the European Union and the European Economic Area. Cross-border activities shall mean:

(a) all professional contacts with lawyers of Member States other than the lawyer's own;

(b) the professional activities of the lawyer in a Member State other than his or her own, whether or not the lawyer is physically present in that Member State.

1.6. Definitions

In this Code:

"Member State" means a member state of the European Union or any other state whose legal profession is included in Article 1.4.

"Home Member State" means the Member State where the lawyer acquired the right to bear his or her professional title.

"Host Member State" means any other Member State where the lawyer carries on cross-border activities.

"Competent Authority" means the professional organisation(s) or authority(ies) of the Member State concerned responsible for the laying down of rules of professional conduct and the administration of discipline of lawyers.

"Directive 77/249/EEC" means Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services.

"Directive 98/5/EC" means Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained.

2. GENERAL PRINCIPLES

2.1. Independence

2.1.1. The many duties to which a lawyer is subject require the lawyer's absolute independence, free from all other influence, especially such as may arise from his or her personal interests or external pressure. Such independence is as necessary to trust in the process of justice as the impartiality of the judge. A lawyer must therefore avoid any impairment of his or her independence and be careful not to compromise his or her professional standards in order to please the client, the court or third parties.

2.1.2. This independence is necessary in non-contentious matters as well as in litigation. Advice given by a lawyer to the client has no value if the lawyer gives it only to ingratiate him- or herself, to serve his or her personal interests or in response to outside pressure.

2.2. Trust and Personal Integrity

Relationships of trust can only exist if a lawyer's personal honour, honesty and integrity are beyond doubt. For the lawyer these traditional virtues are professional obligations.

2.3. Confidentiality

2.3.1. It is of the essence of a lawyer's function that the lawyer should be told by his or her client things which the client would not tell to others, and that the lawyer should be the recipient of other information on a basis of confidence. Without the certainty of confidentiality there cannot be trust. Confidentiality is therefore a primary and fundamental right and duty of the lawyer.

The lawyer's obligation of confidentiality serves the interest of the administration of justice as well as the interest of the client. It is therefore entitled to special protection by the State.

2.3.2. A lawyer shall respect the confidentiality of all information that becomes known to the lawyer in the course of his or her professional activity.

2.3.3. The obligation of confidentiality is not limited in time.

2.3.4. A lawyer shall require his or her associates and staff and anyone engaged by him or her in the course of providing professional services to observe the same obligation of confidentiality.

2.4. Respect for the Rules of Other Bars and Law Societies

When practising cross-border, a lawyer from another Member State may be bound to comply with the professional rules of the Host Member State. Lawyers have a duty to inform themselves as to the rules which will affect them in the performance of any particular activity.

Member organisations of the CCBE are obliged to deposit their codes of conduct at the Secretariat of the CCBE so that any lawyer can get hold of the copy of the current code from the Secretariat.

2.5. Incompatible Occupations

2.5.1. In order to perform his or her functions with due independence and in a manner which is consistent with his or her duty to participate in the administration of justice a lawyer may be prohibited from undertaking certain occupations.

2.5.2. A lawyer who acts in the representation or the defence of a client in legal proceedings or before any public authorities in a Host Member State shall there observe the rules regarding incompatible occupations as they are applied to lawyers of the Host Member State.

2.5.3. A lawyer established in a Host Member State in which he or she wishes to participate directly in commercial or other activities not connected with the practice of the law shall respect the rules regarding forbidden or incompatible occupations as they are applied to lawyers of that Member State.

2.6. Personal Publicity

2.6.1. A lawyer is entitled to inform the public about his or her services provided that the information is accurate and not misleading, and respectful of the obligation of confidentiality and other core values of the profession.

2.6.2. Personal publicity by a lawyer in any form of media such as by press, radio, television, by electronic commercial communications or otherwise is permitted to the extent it complies with the requirements of 2.6.1.

2.7. The Client's Interest

Subject to due observance of all rules of law and professional conduct, a lawyer must always act in the best interests of the client and must put those interests before the lawyer's own interests or those of fellow members of the legal profession.

2.8. Limitation of Lawyer's Liability towards the Client

To the extent permitted by the law of the Home Member State and the Host Member State, the lawyer may limit his or her liabilities towards the client in accordance with the professional rules to which the lawyer is subject.

3. RELATIONS WITH CLIENTS

3.1. Acceptance and Termination of Instructions

3.1.1. A lawyer shall not handle a case for a party except on that party's instructions. The lawyer may, however, act in a case in which he or she has been instructed by another lawyer acting for the party or where the case has been assigned to him or her by a competent body.

The lawyer should make reasonable efforts to ascertain the identity, competence and authority of the person or body who instructs him or her when the specific circumstances show that the identity, competence and authority are uncertain.

3.1.2. A lawyer shall advise and represent the client promptly, conscientiously and diligently. The lawyer shall undertake personal responsibility for the discharge of the client's instructions and shall keep the client informed as to the progress of the matter with which the lawyer has been entrusted.

3.1.3. A lawyer shall not handle a matter which the lawyer knows or ought to know he or she is not competent to handle, without cooperating with a lawyer who is competent to handle it.

A lawyer shall not accept instructions unless he or she can discharge those instructions promptly having regard to the pressure of other work.

3.1.4. A lawyer shall not be entitled to exercise his or her right to withdraw from a case in such a way or in such circumstances that the client may be unable to find other legal assistance in time to prevent prejudice being suffered by the client.

3.2. Conflict of Interest

3.2.1. A lawyer may not advise, represent or act on behalf of two or more clients in the same matter if there is a conflict, or a significant risk of a conflict, between the interests of those clients.

3.2.2. A lawyer must cease to act for both or all of the clients concerned when a conflict of interests arises between those clients and also whenever there is a risk of a breach of confidence or where the lawyer's independence may be impaired.

3.2.3. A lawyer must also refrain from acting for a new client if there is a risk of breach of a confidence entrusted to the lawyer by a former client or if the knowledge which the lawyer possesses of the affairs of the former client would give an undue advantage to the new client.

3.2.4. Where lawyers are practising in association, paragraphs 3.2.1 to 3.2.3 above shall apply to the association and all its members.

3.3. Pactum de Quota Litis

3.3.1. A lawyer shall not be entitled to make a pactum de quota litis.

3.3.2. By "pactum de quota litis" is meant an agreement between a lawyer and the client entered into prior to final conclusion of a matter to which the client is a party, by virtue of which the client undertakes to pay the lawyer a share of the result regardless of whether this is represented by a sum of money or by any other benefit achieved by the client upon the conclusion of the matter.

3.3.3. "Pactum de quota litis" does not include an agreement that fees be charged in proportion to the value of a matter handled by the lawyer if this is in accordance with an officially approved fee scale or under the control of the Competent Authority having jurisdiction over the lawyer.

3.4. Regulation of Fees

A fee charged by a lawyer shall be fully disclosed to the client, shall be fair and reasonable, and shall comply with the law and professional rules to which the lawyer is subject.

3.5. Payment on Account

If a lawyer requires a payment on account of his or her fees and/or disbursements such payment should not exceed a reasonable estimate of the fees and probable disbursements involved.

Failing such payment, a lawyer may withdraw from the case or refuse to handle it, but subject always to paragraph 3.1.4 above.

3.6. Fee Sharing with Non-Lawyers

3.6.1. A lawyer may not share his or her fees with a person who is not a lawyer except where an association between the lawyer and the other person is permitted by the laws and the professional rules to which the lawyer is subject.

3.6.2. The provisions of 3.6.1 above shall not preclude a lawyer from paying a fee, commission or other compensation to a deceased lawyer's heirs or to a retired lawyer in respect of taking over the deceased or retired lawyer's practice.

3.7. Cost of Litigation and Availability of Legal Aid

3.7.1. The lawyer should at all times strive to achieve the most cost-effective resolution of the client's dispute and should advise the client at appropriate stages as to the desirability of attempting a settlement and/or a reference to alternative dispute resolution.

3.7.2. A lawyer shall inform the client of the availability of legal aid where applicable.

3.8. Client Funds

3.8.1. Lawyers who come into possession of funds on behalf of their clients or third parties (hereinafter called "client funds") have to deposit such money into an account of a bank or similar institution subject to supervision by a public authority (hereinafter called a "client account"). A client account shall be separate from any other account of the lawyer. All client funds received by a lawyer should be deposited into such an account unless the owner of such funds agrees that the funds should be dealt with otherwise.

3.8.2. The lawyer shall maintain full and accurate records showing all the lawyer's dealings with client funds and distinguishing client funds from other funds held by the lawyer. Records may have to be kept for a certain period of time according to national rules.

3.8.3. A client account cannot be in debit except in exceptional circumstances as expressly permitted in national rules or due to bank charges, which cannot be influenced by the lawyer. Such an account cannot be given as a guarantee or be used as a security for any reason. There shall not be any set-off or merger between a client account and any other bank account, nor shall the client funds in a client account be available to defray money owed by the lawyer to the bank.

3.8.4. Client funds shall be transferred to the owners of such funds in the shortest period of time or under such conditions as are authorised by them.

3.8.5. The lawyer cannot transfer funds from a client account into the lawyer's own account for payment of fees without informing the client in writing.

3.8.6. The Competent Authorities in Member States shall have the power to verify and examine any document regarding client funds, whilst respecting the confidentiality or legal professional privilege to which it may be subject.

3.9. Professional Indemnity Insurance

3.9.1. Lawyers shall be insured against civil legal liability arising out of their legal practice to an extent which is reasonable having regard to the nature and extent of the risks incurred by their professional activities.

3.9.2. Should this prove impossible, the lawyer must inform the client of this situation and its consequences.

4. RELATIONS WITH THE COURTS

4.1. Rules of Conduct in Court

A lawyer who appears, or takes part in a case, before a court or tribunal must comply with the rules of conduct applied before that court or tribunal.

4.2. Fair Conduct of Proceedings

A lawyer must always have due regard for the fair conduct of proceedings.

4.3. Demeanour in Court

A lawyer shall while maintaining due respect and courtesy towards the court defend the interests of the client honourably and fearlessly without regard to the lawyer's own interests or to any consequences to him- or herself or to any other person.

4.4. False or Misleading Information

A lawyer shall never knowingly give false or misleading information to the court.

4.5. Extension to Arbitrators etc.

The rules governing a lawyer's relations with the courts apply also to the lawyer's relations with arbitrators and any other persons exercising judicial or quasi-judicial functions, even on an occasional basis.

5. RELATIONS BETWEEN LAWYERS

5.1. Corporate Spirit of the Profession

5.1.1. The corporate spirit of the profession requires a relationship of trust and co-operation between lawyers for the benefit of their clients and in order to avoid unnecessary litigation and other behaviour harmful to the reputation of the profession. It can, however, never justify setting the interests of the profession against those of the client.

5.1.2. A lawyer should recognise all other lawyers of Member States as professional colleagues and act fairly and courteously towards them.

5.2. Co-operation among Lawyers of Different Member States

5.2.1. It is the duty of a lawyer who is approached by a colleague from another Member State not to accept instructions in a matter which the lawyer is not competent to undertake. The lawyer should in such case be prepared to help that colleague to obtain the information necessary to enable him or her to instruct a lawyer who is capable of providing the service asked for.

5.2.2. Where a lawyer of a Member State co-operates with a lawyer from another Member State, both have a general duty to take into account the differences which may exist between their respective legal systems and the professional organisations, competences and obligations of lawyers in the Member States concerned.

5.3. Correspondence between Lawyers

5.3.1. If a lawyer intends to send communications to a lawyer in another Member State, which the sender wishes to remain confidential or without prejudice he or she should clearly express this intention prior to communicating the first of the documents.

5.3.2. If the prospective recipient of the communications is unable to ensure their status as confidential or without prejudice he or she should inform the sender accordingly without delay.

5.4. Referral Fees

5.4.1. A lawyer may not demand or accept from another lawyer or any other person a fee, commission or any other compensation for referring or recommending the lawyer to a client.

5.4.2. A lawyer may not pay anyone a fee, commission or any other compensation as a consideration for referring a client to him- or herself.

5.5. Communication with Opposing Parties

A lawyer shall not communicate about a particular case or matter directly with any person whom he or she knows to be represented or advised in the case or matter by another lawyer, without the consent of that other lawyer (and shall keep the other lawyer informed of any such communications).

5.6. (Deleted by decision of the Plenary Session in Dublin on 6 December 2002)

5.7. Responsibility for Fees

In professional relations between members of Bars of different Member States, where a lawyer does not confine him- or herself to recommending another lawyer or introducing that other lawyer to the client but instead him- or herself entrusts a correspondent with a particular matter or seeks the correspondent's advice, the instructing lawyer is personally bound, even if the client is insolvent, to pay the fees, costs and outlays which are due to the foreign correspondent. The lawyers concerned may, however, at the outset of the relationship between them make special arrangements on this matter. Further, the instructing lawyer may at any time limit his or her personal responsibility to the amount of the fees, costs and outlays incurred before intimation to the foreign lawyer of the instructing lawyer's disclaimer of responsibility for the future.

5.8. Continuing Professional Development

Lawyers should maintain and develop their professional knowledge and skills taking proper account of the European dimension of their profession.

5.9. Disputes amongst Lawyers in Different Member States

5.9.1. If a lawyer considers that a colleague in another Member State has acted in breach of a rule of professional conduct the lawyer shall draw the matter to the attention of that colleague.

5.9.2. If any personal dispute of a professional nature arises amongst lawyers in different Member States they should if possible first try to settle it in a friendly way.

5.9.3. A lawyer shall not commence any form of proceedings against a colleague in another Member State on matters referred to in 5.9.1 or 5.9.2 above without first informing the Bars or Law Societies to which they both belong for the purpose of allowing both Bars or Law Societies concerned an opportunity to assist in reaching a settlement.

EXPLANATORY MEMORANDUM

This Explanatory Memorandum was prepared at the request of the CCBE Standing Committee by the CCBE's deontology working party, who were responsible for drafting the first version of the Code of Conduct itself. It seeks to explain the origin of the provisions of the Code, to illustrate the problems which they are designed to resolve, particularly in relation to cross-border activities, and to provide assistance to the Competent Authorities in the Member States in the application of the Code. It is not intended to have any binding force in the interpretation of the Code. The Explanatory Memorandum was adopted on 28 October 1988 and updated on the occasion of the CCBE Plenary Session on 19 May 2006. The Explanatory Memorandum also takes into account amendments to the CCBE Statutes formally approved at an Extraordinary Plenary Session on 20 August 2007. The list of professions in the commentary on article 1.4 is subject to modification.

The original versions of the Code are in the French and English languages. Translations into other Community languages are prepared under the authority of the national delegations.

Commentary on Article 1.1 – The Function of the Lawyer in society

The Declaration of Perugia, adopted by the CCBE in 1977, laid down the fundamental principles of professional conduct applicable to lawyers throughout the EC. The provisions of Article 1.1 reaffirm the statement in the Declaration of Perugia of the function of the lawyer in society which forms the basis for the rules governing the performance of that function.

Commentary on Article 1.2 – The Nature of Rules of Professional Conduct

These provisions substantially restate the explanation in the Declaration of Perugia of the nature of rules of professional conduct and how particular rules depend on particular local circumstances but are nevertheless based on common values.

Commentary on Article 1.3 – The Purpose of the Code

These provisions introduce the development of the principles in the Declaration of Perugia into a specific Code of Conduct for lawyers throughout the EU, the EEA and Swiss Confederation, and lawyers of the Associate and Observer Members of the CCBE, with particular reference to their cross-border activities (defined in Article 1.5). The provisions of Article 1.3.2 lay down the specific intentions of the CCBE with regard to the substantive provisions in the Code.

Commentary on Article 1.4 – Field of Application Ratione Personae

The rules are stated to apply to all lawyers as defined in the Lawyers Services Directive of 1977 and the Lawyers Establishment Directive of 1998, and lawyers of the Associate and Observer Members of the CCBE. This includes lawyers of the states which subsequently acceded to the Directives, whose names have been added by amendment to the Directives. The Code accordingly applies to all the

lawyers represented on the CCBE, whether as full Members, Associate Members or Observer Members, namely:

Albania	Avokat
Andorra	Advocat
Armenia	Pastaban
Austria	Rechtsanwalt
Belgium	Avocat / Advocaat / Rechtsanwalt
Bosnia and Herzegovina	Advokat / Odvjetnik
Bulgaria	Advokat
Croatia	Odvjetnik
Cyprus	Dikegóros
Czech Republic	Advokát
Denmark	Advokat
Estonia	Vandeadvokaat
Finland	Asianajaja / Advokat
FYROM	Advokat
France	Avocat
Georgia	Advokati / Advokatebi
Germany	Rechtsanwalt
Greece	Dikegóros
Hungary	ügyvéd
Iceland	Lögmaður
Ireland	Barrister / Solicitor
Italy	Avvocato
Latvia	Zvērināts advokāts
Liechtenstein	Rechtsanwalt
Lithuania	Advokatas
Luxembourg	Avocat / Rechtsanwalt
Malta	Avukat / Prokuratur Legali
Montenegro	Advokat
Moldova	Avocat
Netherlands	Advocaat
Norway	Advokat
Poland	Adwokat / Radca prawny
Portugal	Advogado
Romania	Avocat
Serbia	Advokat
Slovak Republic	Advokát / Advokátka
Slovenia	Odvetnik / Odvetnica
Spain	Abogado / Advocat / Abokatu / Avogado
Sweden	Advokat
Switzerland	Rechtsanwalt / Anwalt / Fürsprech / Fürsprecher /Advokat/ avocat / avvocato / advocat
Turkey	Avukat
Ukraine	Advokat
United Kingdom	Advocate / Barrister / Solicitor

It is also hoped that the Code will be acceptable to the legal professions of other non-Member States in Europe and elsewhere so that it could also be applied by appropriate conventions between them and the Member States.

Commentary on Article 1.5 – Field of Application Ratione Materiae

The rules are here given direct application only to "cross-border activities", as defined, of lawyers within the EU, the EEA and Swiss Confederation and lawyers of the Associate and Observer Members of the CCBE - see above on Article 1.4, and the definition of "Member State" in Article 1.6. (See also above as to possible extensions in the future to lawyers of other states.) The definition of cross-border activities would, for example, include contacts in state A even on a matter of law internal to state A between a lawyer of state A and a lawyer of state B; it would exclude contacts between lawyers of state A in state A of a matter arising in state B, provided that none of their professional activities takes place in state B; it would include any activities of lawyers of state A in state B, even if only in the form of communications sent from state A to state B.

Commentary on Article 1.6 – Definitions

This provision defines a number of terms used in the Code, "Member State", "Home Member State", "Host Member State", "Competent Authority", "Directive 77/249/EEC" and "Directive 98/5/EC". The reference to "where the lawyer carries on cross-border activities" should be interpreted in light of the definition of "cross-border activities" in Article 1.5.

Commentary on Article 2.1 – Independence

This provision substantially reaffirms the general statement of principle in the Declaration of Perugia.

Commentary on Article 2.2 – Trust and Personal Integrity

This provision also restates a general principle contained in the Declaration of Perugia.

Commentary on Article 2.3 – Confidentiality

This provision first restates, in Article 2.3.1, general principles laid down in the Declaration of Perugia and recognised by the ECJ in the AM&S case (157/79). It then, in Articles 2.3.2 to 4, develops them into a specific rule relating to the protection of confidentiality. Article 2.3.2 contains the basic rule requiring respect for confidentiality. Article 2.3.3 confirms that the obligation remains binding on the lawyer even if he or she ceases to act for the client in question. Article 2.3.4 confirms that the lawyer must not only respect the obligation of confidentiality him- or herself but must require all members and employees of his or her firm to do likewise.

Commentary on Article 2.4 – Respect for the Rules of Other Bars and Law Societies

Article 4 of the Lawyers Services Directive contains the provisions with regard to the rules to be observed by a lawyer from one Member State providing services on an occasional or temporary basis in another Member State by virtue of Article 49 of the consolidated EC treaty, as follows:

(a) activities relating to the representation of a client in legal proceedings or before public authorities shall be pursued in each Host Member State under the conditions laid down for lawyers established in that state, with the exception of any conditions requiring residence, or registration with a professional organisation, in that state;

(b) a lawyer pursuing these activities shall observe the rules of professional conduct of the Host Member State, without prejudice to the lawyer's obligations in the Member State from which he or she comes;

(c) when these activities are pursued in the UK, "rules of professional conduct of the Host Member State" means the rules of professional conduct applicable to solicitors, where such activities are not reserved for barristers and advocates. Otherwise the rules of professional conduct applicable to the latter shall apply. However, barristers from Ireland shall always be subject to the rules of professional conduct

applicable in the UK to barristers and advocates. When these activities are pursued in Ireland "rules of professional conduct of the Host Member State" means, in so far as they govern the oral presentation of a case in court, the rules of professional conduct applicable to barristers. In all other cases the rules of professional conduct applicable to solicitors shall apply. However, barristers and advocates from the UK shall always be subject to the rules of professional conduct applicable in Ireland to barristers; and

(d) a lawyer pursuing activities other than those referred to in (a) above shall remain subject to the conditions and rules of professional conduct of the Member State from which he or she comes without prejudice to respect for the rules, whatever their source, which govern the profession in the Host Member State, especially those concerning the incompatibility of the exercise of the activities of a lawyer with the exercise of other activities in that state, professional secrecy, relations with other lawyers, the prohibition on the same lawyer acting for parties with mutually conflicting interests, and publicity. The latter rules are applicable only if they are capable of being observed by a lawyer who is not established in the Host Member State and to the extent to which their observance is objectively justified to ensure, in that state, the proper exercise of a lawyer's activities, the standing of the profession and respect for the rules concerning incompatibility.

The Lawyers Establishment Directive contains the provisions with regard to the rules to be observed by a lawyer from one Member State practising on a permanent basis in another Member State by virtue of Article 43 of the consolidated EC treaty, as follows:

(a) irrespective of the rules of professional conduct to which he or she is subject in his or her Home Member State, a lawyer practising under his home-country professional title shall be subject to the same rules of professional conduct as lawyers practising under the relevant professional title of the Host Member State in respect of all the activities the lawyer pursues in its territory (Article 6.1);

(b) the Host Member State may require a lawyer practising under his or her home-country professional title either to take out professional indemnity insurance or to become a member of a professional guarantee fund in accordance with the rules which that state lays down for professional activities pursued in its territory.

Nevertheless, a lawyer practising under his or her home-country professional title shall be exempted from that requirement if the lawyer can prove that he or she is covered by insurance taken out or a guarantee provided in accordance with the rules of the Home Member State, insofar as such insurance or guarantee is equivalent in terms of the conditions and extent of cover. Where the equivalence is only partial, the Competent Authority in the Host Member State may require that additional insurance or an additional guarantee be contracted to cover the elements which are not already covered by the insurance or guarantee contracted in accordance with the rules of the Home Member State (Article 6.3); and

(c) a lawyer registered in a Host Member State under his or her home-country professional title may practise as a salaried lawyer in the employ of another lawyer, an association or firm of lawyers, or a public or private enterprise to the extent that the Host Member State so permits for lawyers registered under the professional title used in that state (Article 8).

In cases not covered by either of these Directives, or over and above the requirements of these Directives, the obligations of a lawyer under Community law to observe the rules of other Bars and Law Societies are a matter of interpretation of any relevant provision, such as the Directive on Electronic Commerce (2000/31/EC). A major purpose of the Code is to minimise, and if possible eliminate altogether, the problems which may arise from "double deontology", that is the application of more than one set of potentially conflicting national rules to a particular situation (see Article 1.3.1).

Commentary on Article 2.5 – Incompatible Occupations

There are differences both between and within Member States on the extent to which lawyers are permitted to engage in other occupations, for example in commercial activities. The general purpose of rules excluding a lawyer from other occupations is to protect the lawyer from influences which might impair the lawyer's independence or his or her role in the administration of justice. The variations in these rules reflect different local conditions, different perceptions of the proper function of lawyers and different techniques of rule-making. For instance in some cases there is a complete prohibition of

engagement in certain named occupations, whereas in other cases engagement in other occupations is generally permitted, subject to observance of specific safeguards for the lawyer's independence.

Articles 2.5.2 and 3 make provision for different circumstances in which a lawyer of one Member State is engaging in cross-border activities (as defined in Article 1.5) in a Host Member State when he or she is not a member of the Host State legal profession.

Article 2.5.2 imposes full observation of Host State rules regarding incompatible occupations on the lawyer acting in national legal proceedings or before national public authorities in the Host State. This applies whether the lawyer is established in the Host State or not.

Article 2.5.3, on the other hand, imposes "respect" for the rules of the Host State regarding forbidden or incompatible occupations in other cases, but only where the lawyer who is established in the Host Member State wishes to participate directly in commercial or other activities not connected with the practice of the law.

Commentary on Article 2.6 – Personal Publicity

The term "personal publicity" covers publicity by firms of lawyers, as well as individual lawyers, as opposed to corporate publicity organised by Bars and Law Societies for their members as a whole. The rules governing personal publicity by lawyers vary considerably in the Member States. Article 2.6 makes it clear that there is no overriding objection to personal publicity in cross-border practice. However, lawyers are nevertheless subject to prohibitions or restrictions laid down by their home professional rules, and a lawyer will still be subject to prohibitions or restrictions laid down by Host State rules when these are binding on the lawyer by virtue of the Lawyers Services Directive or the Lawyers Establishment Directive.

Commentary on Article 2.7 – The Client's Interest

This provision emphasises the general principle that the lawyer must always place the client's interests before the lawyer's own interests or those of fellow members of the legal profession.

Commentary on Article 2.8 – Limitation of Lawyer's Liability towards the Client

This provision makes clear that there is no overriding objection to limiting a lawyer's liability towards his or her client in cross-border practice, whether by contract or by use of a limited company, limited partnership or limited liability partnership. However it points out that this can only be contemplated where the relevant law and the relevant rules of conduct permit - and in a number of jurisdictions the law or the professional rules prohibit or restrict such limitation of liability.

Commentary on Article 3.1 – Acceptance and Termination of Instructions

The provisions of Article 3.1.1 are designed to ensure that a relationship is maintained between lawyer and client and that the lawyer in fact receives instructions from the client, even though these may be transmitted through a duly authorised intermediary. It is the responsibility of the lawyer to satisfy him- or herself as to the authority of the intermediary and the wishes of the client.

Article 3.1.2 deals with the manner in which the lawyer should carry out his or her duties. The provision that the lawyer shall undertake personal responsibility for the discharge of the instructions given to him or her means that the lawyer cannot avoid responsibility by delegation to others. It does not prevent the lawyer from seeking to limit his or her legal liability to the extent that this is permitted by the relevant law or professional rules - see Article 2.8.

Article 3.1.3 states a principle which is of particular relevance in cross-border activities, for example when a lawyer is asked to handle a matter on behalf of a lawyer or client from another state who may be unfamiliar with the relevant law and practice, or when a lawyer is asked to handle a matter relating to the law of another state with which he or she is unfamiliar.

A lawyer generally has the right to refuse to accept instructions in the first place, but Article 3.1.4 states that, having once accepted them, the lawyer has an obligation not to withdraw without ensuring that the client's interests are safeguarded.

Commentary on Article 3.2 – Conflict of Interest

The provisions of Article 3.2.1 do not prevent a lawyer acting for two or more clients in the same matter provided that their interests are not in fact in conflict and that there is no significant risk of such a conflict arising. Where a lawyer is already acting for two or more clients in this way and subsequently there arises a conflict of interests between those clients or a risk of a breach of confidence or other circumstances where the lawyer's independence may be impaired, then the lawyer must cease to act for both or all of them.

There may, however, be circumstances in which differences arise between two or more clients for whom the same lawyer is acting where it may be appropriate for the lawyer to attempt to act as a mediator. It is for the lawyer in such cases to use his or her own judgement on whether or not there is such a conflict of interest between them as to require the lawyer to cease to act. If not, the lawyer may consider whether it would be appropriate to explain the position to the clients, obtain their agreement and attempt to act as mediator to resolve the difference between them, and only if this attempt to mediate should fail, to cease to act for them.

Article 3.2.4 applies the foregoing provisions of Article 3 to lawyers practising in association. For example a firm of lawyers should cease to act when there is a conflict of interest between two clients of the firm, even if different lawyers in the firm are acting for each client. On the other hand, exceptionally, in the "chambers" form of association used by English barristers, where each lawyer acts for clients individually, it is possible for different lawyers in the association to act for clients with opposing interests.

Commentary on Article 3.3 – Pactum de Quota Litis

These provisions reflect the common position in all Member States that an unregulated agreement for contingency fees (pactum de quota litis) is contrary to the proper administration of justice because it encourages speculative litigation and is liable to be abused. The provisions are not, however, intended to prevent the maintenance or introduction of arrangements under which lawyers are paid according to results or only if the action or matter is successful, provided that these arrangements are under sufficient regulation and control for the protection of the client and the proper administration of justice.

Commentary on Article 3.4 – Regulation of Fees

Article 3.4 lays down three requirements: a general standard of disclosure of a lawyer's fees to the client, a requirement that they should be fair and reasonable in amount, and a requirement to comply with the applicable law and professional rules.

In many Member States machinery exists for regulating lawyers' fees under national law or rules of conduct, whether by reference to a power of adjudication by the Bar authorities or otherwise. In situations governed by the Lawyers Establishment Directive, where the lawyer is subject to Host State rules as well as the rules of the Home State, the basis of charging may have to comply with both sets of rules.

Commentary on Article 3.5 – Payment on Account

Article 3.5 assumes that a lawyer may require a payment on account of the lawyer's fees and/or disbursements, but sets a limit by reference to a reasonable estimate of them. See also on Article 3.1.4 regarding the right to withdraw.

Commentary on Article 3.6 – Fee Sharing with Non-Lawyers

In some Member States lawyers are permitted to practise in association with members of certain other approved professions, whether legal professions or not. The provisions of Article 3.6.1 are not designed to prevent fee sharing within such an approved form of association. Nor are the provisions designed to prevent fee sharing by the lawyers to whom the Code applies (see on Article 1.4 above) with other "lawyers", for example lawyers from non-Member States or members of other legal professions in the Member States such as notaries.

Commentary on Article 3.7 – Cost of Litigation and Availability of Legal Aid

Article 3.7.1 stresses the importance of attempting to resolve disputes in a way which is cost-effective for the client, including advising on whether to attempt to negotiate a settlement, and whether to propose referring the dispute to some form of alternative dispute resolution.

Article 3.7.2 requires a lawyer to inform the client of the availability of legal aid where applicable. There are widely differing provisions in the Member States on the availability of legal aid. In cross-border activities a lawyer should have in mind the possibility that the legal aid provisions of a national law with which the lawyer is unfamiliar may be applicable.

Commentary on Article 3.8 – Client Funds

The provisions of Article 3.8 reflect the recommendation adopted by the CCBE in Brussels in November 1985 on the need for minimum regulations to be made and enforced governing the proper control and disposal of clients' funds held by lawyers within the Community. Article 3.8 lays down minimum standards to be observed, while not interfering with the details of national systems which provide fuller or more stringent protection for clients' funds.

The lawyer who holds clients' funds, even in the course of a cross-border activity, has to observe the rules of his or her home Bar. The lawyer needs to be aware of questions which arise where the rules of more than one Member State may be applicable, especially where the lawyer is established in a Host State under the Lawyers Establishment Directive.

Commentary on Article 3.9 – Professional Indemnity Insurance

Article 3.9.1 reflects a recommendation, also adopted by the CCBE in Brussels in November 1985, on the need for all lawyers in the Community to be insured against the risks arising from professional negligence claims against them. Article 3.9.2 deals with the situation where insurance cannot be obtained on the basis set out in Article 3.9.1.

Commentary on Article 4.1 – Rules of Conduct in Court

This provision applies the principle that a lawyer is bound to comply with the rules of the court or tribunal before which the lawyer practises or appears.

Commentary on Article 4.2 – Fair Conduct of Proceedings

This provision applies the general principle that in adversarial proceedings a lawyer must not attempt to take unfair advantage of his or her opponent. The lawyer must not, for example, make contact with the judge without first informing the lawyer acting for the opposing party or submit exhibits, notes or documents to the judge without communicating them in good time to the lawyer on the other side unless such steps are permitted under the relevant rules of procedure. To the extent not prohibited by law a lawyer must not divulge or submit to the court any proposals for settlement of the case made by the other party or its lawyer without the express consent of the other party's lawyer. See also on Article 4.5 below.

Commentary on Article 4.3 – Demeanour in Court

This provision reflects the necessary balance between respect for the court and for the law on the one hand and the pursuit of the client's best interest on the other.

Commentary on Article 4.4 – False or Misleading Information

This provision applies the principle that the lawyer must never knowingly mislead the court. This is necessary if there is to be trust between the courts and the legal profession.

Commentary on Article 4.5 – Extension to Arbitrators etc.

This provision extends the preceding provisions relating to courts to other bodies exercising judicial or quasi-judicial functions.

Commentary on Article 5.1 – Corporate Spirit of the Profession

These provisions, which are based on statements in the Declaration of Perugia, emphasise that it is in the public interest for the legal profession to maintain a relationship of trust and cooperation between its members. However, this cannot be used to justify setting the interests of the profession against those of justice or of clients (see also on Article 2.7).

Commentary on Article 5.2 – Co-operation among Lawyers of Different Member States

This provision also develops a principle stated in the Declaration of Perugia with a view to avoiding misunderstandings in dealings between lawyers of different Member States.

Commentary on Article 5.3 – Correspondence between Lawyers

In certain Member States communications between lawyers (written or by word of mouth) are normally regarded as to be kept confidential as between the lawyers. This means that the content of these communications cannot be disclosed to others, cannot normally be passed to the lawyers' clients, and at any event cannot be produced in court. In other Member States, such consequences will not follow unless the correspondence is marked as "confidential".

In yet other Member States, the lawyer has to keep the client fully informed of all relevant communications from a professional colleague acting for another party, and marking a letter as "confidential" only means that it is a legal matter intended for the recipient lawyer and his or her client, and not to be misused by third parties.

In some states, if a lawyer wishes to indicate that a letter is sent in an attempt to settle a dispute, and is not to be produced in a court, the lawyer should mark the letter as "without prejudice".

These important national differences give rise to many misunderstandings.

That is why lawyers must be very careful in conducting cross-border correspondence.

Whenever a lawyer wants to send a letter to a professional colleague in another Member State on the basis that it is to be kept confidential as between the lawyers, or that it is "without prejudice", the lawyer should ask in advance whether the letter can be accepted on that basis. A lawyer wishing that a communication should be accepted on such a basis must express that clearly in the communication or in a covering letter.

A lawyer who is the intended recipient of such a communication, but who is not in a position to respect, or to ensure respect for, the basis on which it is to be sent, must inform the sender immediately so that the communication is not sent. If the communication has already been received, the recipient must return it to the sender without revealing its contents or referring to it in any way; if the recipient's national law or rules prevent the recipient from complying with this requirement, he or she must inform the sender immediately.

Commentary on Article 5.4 – Referral Fees

This provision reflects the principle that a lawyer should not pay or receive payment purely for the reference of a client, which would risk impairing the client's free choice of lawyer or the client's interest in being referred to the best available service. It does not prevent fee-sharing arrangements between lawyers on a proper basis (see also on Article 3.6 above).

In some Member States lawyers are permitted to accept and retain commissions in certain cases provided: a) the client's best interests are served, b) there is full disclosure to the client and c) the client has consented to the retention of the commission. In such cases the retention of the commission by the lawyer represents part of the lawyer's remuneration for the service provided to the client and is not within the scope of the prohibition on referral fees which is designed to prevent lawyers making a secret profit.

Commentary on Article 5.5 – Communication with Opposing Parties

This provision reflects a generally accepted principle, and is designed both to promote the smooth conduct of business between lawyers and to prevent any attempt to take advantage of the client of another lawyer.

Commentary on Article 5.6 – Change of Lawyer

Article 5.6 dealt with change of lawyer. It was deleted from the Code on 6 December 2002.

Commentary on Article 5.7 – Responsibility for Fees

These provisions substantially reaffirm provisions contained in the Declaration of Perugia. Since misunderstandings about responsibility for unpaid fees are a common cause of difference between lawyers of different Member States, it is important that a lawyer who wishes to exclude or limit his or her personal obligation to be responsible for the fees of a foreign colleague should reach a clear agreement on this at the outset of the transaction.

Commentary on Article 5.8 – Continuing Professional Development

Keeping abreast of developments in the law is a professional obligation. In particular it is essential that lawyers are aware of the growing impact of European law on their field of practice.

Commentary on Article 5.9 – Disputes amongst Lawyers in Different Member States

A lawyer has the right to pursue any legal or other remedy to which he or she is entitled against a colleague in another Member State. Nevertheless it is desirable that, where a breach of a rule of professional conduct or a dispute of a professional nature is involved, the possibilities of friendly settlement should be exhausted, if necessary with the assistance of the Bars or Law Societies concerned, before such remedies are exercised.