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Representing Europe's lawyers

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## **CCBE Position on Non-Lawyer Owned Firms**

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### I. Introduction

The Council of Bars and Law Societies of Europe (CCBE) through its member bars and law societies represents more than 700,000 European lawyers.

In such capacity, the CCBE wishes to comment, from a European perspective, on the issue of non-lawyers owned firms which is of particular importance and concern to the legal profession in Europe and which has been raised in recent months by national competition authorities and/or governments when carrying out a review of the legal profession.

The CCBE will first briefly summarise in this paper some of the core values of the profession (see below II.) and then address more specifically its concerns with regard to non-lawyer owned firms (see below III).

The views set out in the paper should help in the understanding of the functioning of the legal profession and the professional rules which apply to it.

### II. Core Values Of The Legal Profession

#### (A.) General

At the outset, the CCBE wishes to summarise some of the core values of the legal profession – independence, absence of conflicts of interest, and professional secrecy/confidentiality - which should help in the understanding of this paper where the core values are referred to on a regular basis. This list of core values is not to be seen as an exhaustive list; it is rather a reference to core values which have also been referred to on a regular basis at a European level without prejudice to other core values which may exist at a national level.

All EU Member States recognise these core values as major objectives and principles of regulation for the legal profession. They should be seen primarily not as rights of the lawyer but rather as obligations of lawyers to implement rights of clients. Violation of such core obligations is, in some EU Member States, not only a professional violation but also a criminal offence. The core values should also be seen as an instrument of how access to justice and the maintenance of the rule of law can be achieved.

These core values are not only part of the general principles of the CCBE Code of Conduct or CCBE positions but are also referred to in a number of European and international instruments which relate to the legal profession: the UN 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<sup>1</sup>; the Council of Europe Recommendation Rec(2000)21 of the Committee of Ministers to member states on the freedom of exercise of the profession of lawyer of 25 October 2000<sup>2</sup> and the European Parliament resolution on scale fees and compulsory tariffs for certain liberal professions, in particular lawyers, and on the particular role and position of the liberal professions in modern society of 5 April 2001<sup>3</sup>.

Particular reference should also be made to the European Court of Justice decision of February 2002 in the Wouters case relating to the Dutch rules prohibiting partnerships between lawyers and

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<sup>1</sup> The UN Basic principles are available at the following website address: [http://www.unhchr.ch/html/menu3/b/h\\_comp44.htm](http://www.unhchr.ch/html/menu3/b/h_comp44.htm).

<sup>2</sup> The Council of Europe Recommendation is available at the following website address: <http://cm.coe.int/ta/rec/2000/2000r21.htm>.

<sup>3</sup> The European Parliament resolution is available at the following website address: <http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/ce021/ce02120020124en03640366.pdf>.

accountants. Therein, the Court recognised these core values – independence, absence of conflicts of interest, and professional secrecy/confidentiality – and also found that these core values do qualify as public interest considerations<sup>4</sup>. The Court stated that the Dutch Bar could reasonably consider that the regulation at stake in this case, despite the effects restrictive of competition that might be inherent in it, is necessary for the proper practice of the legal profession. This means nothing less than that, in a given regulation, the core values of the legal profession, as recognised by a Member State Bar, can take priority over competition considerations.

The CCBE considers the core values of paramount importance to a democratic society based on the rule of law. The CCBE would like to underline the importance of these values being safeguarded in states across Europe.

## **(B.) The core values**

### **Independence**

The many duties to which a lawyer is subject require his/her absolute independence, meaning that the lawyer has to be free from all influence, especially such as may arise from his/her personal interests or external pressure<sup>5</sup>. The idea of lawyer independence is deeply held both within and outside the legal profession across Europe. Such independence is considered as necessary to trust in the process of justice as is the impartiality of the judge. A lawyer must therefore avoid any impairment of his/her independence and be careful not to compromise his/her professional standards in order to please his/her client, the court or third parties when handling legal matters be it non-contentious or contentious.

Independence is required, in principle, to permit lawyers to serve the interests of their clients, without being influenced by other interests to which the lawyer might either legally or factually be bound<sup>6</sup>.

The independence of lawyers is also recognised in the Council of Europe Recommendation on the freedom of exercise of the profession of lawyer; the Council of Europe therein notes that it is “conscious of the need for a fair system of administration of justice which guarantees the independence of lawyers in the discharge of their professional duties without any improper restriction, influence, inducement, pressure, threats or interference, direct or indirect, from any quarter or for any reason”. Furthermore, the Council of Europe recognises the role of bars in defending their independence against any improper restrictions or infringements and also encourages the bars to ensure such independence. Also the European Parliament resolution and the UN Basic Principles relating to lawyers recognise the importance of the independence of lawyers in exercising their profession.

The European Court of Justice in the *Wouters* case notes that “independence is an essential guarantee for the individual and for the judiciary, with the result that lawyers are obliged not to get involved in business or joint activities which threaten to compromise it”<sup>7</sup>.

### **Avoidance of conflicts of interest**

With a view to the duty of lawyers to serve only the interests of their clients, the legal profession has always maintained strict rules on the avoidance of conflicts of interest. These rules concern situations where a lawyer might be bound to serve the interests of more than one party in a matter where those interests are significantly different.

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<sup>4</sup> European Court of Justice, *Wouters*, C-309/99, point 180: In order to enable lawyers to carry out their “public service tasks, as I have defined them, the State authorities have them certain professional powers and duties. These include three attributes which in all the Member States form part of the very essence of the legal profession. They are duties relating to the independence of lawyers, respect of professional secrecy and the need to avoid conflict of interest.”

<sup>5</sup> Article 2.1 of the CCBE Code of Conduct.

<sup>6</sup> Article 2.7 of the CCBE Code of Conduct states that a lawyer must always act in the best interests of his / her client and must put those interests before his / her own interests or those of fellow members of the legal profession

<sup>7</sup> Point 181 of the *Wouters* decision referred to above.

The Council of Europe Recommendation on lawyers referred to above lists the avoidance of conflicts of interest as one of the principle duties of lawyers towards their clients. The European Parliament in its resolution recognises that certain rules which are necessary in the specific context of a profession – including the avoidance of conflicts of interest – are not to be considered restrictions of competition within the meaning of Article 81(1) EC Treaty.

### **Professional secrecy/confidentiality**

A further duty of lawyers recognised as crucial to the proper provision of legal services is the duty to maintain confidentiality with respect to all information professionally received in confidence. If the right of the citizen to safeguard professional secrecy/confidentiality, i.e. the right of the citizen to be protected against any divulging of his/her communication with his/her lawyer, would be denied, people may be denied access to legal advice and to justice.

The CCBE hereby reaffirms its previous positions relating to legal professional privilege, in particular the CCBE statement of February 2001<sup>8</sup> and the CCBE position of December 2004<sup>9</sup>. The principle of confidentiality is also enshrined in the CCBE Code of Conduct (2002)<sup>10</sup>.

The Council of Europe Recommendation on lawyers states that *“professional secrecy should be respected by lawyers in accordance with internal laws, regulations and professional standards. Any violation of this secrecy, without the consent of the client, should be subject to appropriate sanctions”*<sup>11</sup>.

The European Court of Justice in the Wouters case states with regard to professional secrecy / confidentiality that it *“constitutes an essential guarantee of the freedom of the individual and of the proper working of justice, so that in most Member States it is a matter of public policy”*<sup>12</sup>.

### **III. CCBE Views On Non-Lawyer Owned Firms**

The question whether firms offering purely legal services to the public should be allowed to be owned by non-lawyers has raised some concern amongst the members of the CCBE.

The CCBE recognises that the term “non-lawyer owned firms” covers a range of situations from the case where a non-lawyer inherits the shares of his/her dead spouse/parent in a law firm (which is not a situation covered by this paper) to where a finance or IT director is made a partner in a firm to the full listing of the firm on the stock market. There are also further distinctions to consider such as management/ownership and minority/majority participation in the firm.

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<sup>8</sup> CCBE statement of position on lawyers' confidentiality of 5 February 2001.

<sup>9</sup> CCBE on the « Protection of confidences between European lawyer and client » of December 2004.

<sup>10</sup> CCBE Code of Conduct – Article 2.3 Confidentiality :

#### 2.3 Confidentiality

2.3.1 It is of the essence of a lawyer's function that he should be told by his client things which the client would not tell to others, and that he 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 him in the course of his professional activity.

2.3.3 The obligation of confidentiality is not limited in time.

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

<sup>11</sup> See Principle III, 2 of the Council of Europe Recommendation referred to above.

<sup>12</sup> Point 182 of the Wouters decision referred to above.

## **Conseil des barreaux européens – Council of Bars and Law Societies of Europe**

*association internationale sans but lucratif*

Avenue de la Joyeuse Entrée 1-5 – B 1040 Brussels – Belgium – Tel.+32 (0)2 234 65 10 – Fax.+32 (0)2 234 65 11/12 – E-mail ccbe@ccbe.org – www.ccbe.org

June 2005

The CCBE strongly believes that there are overriding non-economic reasons which go beyond the purely economic arguments and which clearly speak against the introduction of such business structures.

Outside investment in law firms is not generally permitted anywhere in Europe. This is not because no-one has thought of them, but because they bring in their train severe problems, and are generally considered to be in conflict with the core principles of the legal profession, i.e. independence, confidentiality and avoidance of conflicts of interest. Non-lawyers are not per se bound by the same duties as lawyers. The difference of duties which lawyers and non lawyers would be subjected to can effectively lead to conflicts, with lawyers being put under pressure to comply with certain tasks imposed by the outside owners which would be contrary to these core principles and which could eventually be to the detriment of the clients.

As stated above, independence requires a lawyer, in the interest of his/her clients, to be free of all influence, especially such as may arise from his/her personal interests or external pressure. It is thought that the introduction of outside ownership to an otherwise independent law firm would remove that independence, since outside owners might have a specific economic interest in certain cases and try to influence the handling of a case to the detriment of the lawyer's duties versus his/her clients. Outside ownership would also entail a risk for the lawyer's duty to avoid any conflict of interest. The owner might have a specific interest in a case, and the client being represented by a lawyer might have a different one. The lawyer is bound to protect the interest of the client. However, in a situation of outside ownership, there may come pressure from the outside owner which would put the lawyer in a delicate situation with conflicting interests at client/owner level.

The right of an individual for protection of confidences between him/her and the lawyer which may also be at stake, given that there may be a flow of information between the outside owner (who is not subjected to any professional secrecy/confidentiality duty) and the lawyer dealing with this issue.

The CCBE would also like to refer in this context to its position on "integrated forms of co-operation between lawyers and persons outside the legal profession" of 12 November 1999. Although, this position deals with multi-disciplinary partnerships and not non-lawyer ownership the principles might be considered similar. Therein the CCBE held that the lawyers' duties to maintain independence, to avoid conflicts of interest and to respect client confidentiality are particularly endangered when lawyers exercise their profession in an organisation which, factually or legally, allows non-lawyers a relevant degree of control over the affairs of the organisation. This is because lawyers and non-lawyers are subject to differing professional duties and different rules of conduct. In the case of non-lawyer ownership one would be in the presence of such a control over the affairs of the organisation which could cause dangers to professional duties.

Where non-lawyer ownership of law firms is discussed, it has usually been under certain conditions, by establishing some safeguards regarding 'fitness to own' on the part of the non-lawyer. However, the question is whether such safeguards are enough, and indeed whether any safeguards other than an outright ban are enough. Even if lawyers can be trusted, inadvertent disclosures or conflicts cannot be prevented. The experience of such safeguards in the area of press ownership has shown that powerful individuals can circumvent them, and that unhealthy concentrations of power and influence are created over both content and outlets.