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Representing Europe's lawyers

CCBE RESPONSE TO THE CLEMENTI CONSULTATION DOCUMENT

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The Council of the Bars and Law Societies of the European Union (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 some aspects of the Consultation Document.

As a first and most important step in its response, the CCBE wishes to refer to the Council of Europe Recommendation Nr. R (2000) 21 on the freedom of exercise of the profession of lawyer (and the Explanatory Memorandum thereto) adopted by the Committee of Ministers on October 25, 2000, as well as to the United Nations Basic Principles on the Role of Lawyers endorsed by the General Assembly of the United Nations in December 1990. Both these documents are attached to this response as an annex. The CCBE views its following comments to be in conformity with these two documents.

The role of a lawyer in society

Lawyers have a vital role in the administration of justice and in maintaining the rule of law, both of which are essential foundations of a democratic society. The CCBE wishes to describe such role by following the Explanatory Memorandum of the Council of Europe Recommendation and quoting Article 1.1 from the CCBE Code of Conduct for Lawyers in the European Union:

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. His duties do not begin and end with the faithful performance of what he 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 is trusted to assert and defend and it is his duty not only to plead his client's cause but to be his adviser.

A lawyer's function therefore lays on him 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 his client's cause or acts on his behalf;*
- *the legal profession in general and each fellow member of it in particular; and*
- *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.*

This vital role of a lawyer in the administration of justice, and in maintaining the rule of law, is the reason why in most, if not all, countries in Europe, and in many countries outside Europe, lawyers are referred to as an instrument of justice or 'instrument de justice' or officer of the court or similar term. Seen historically, lawyers have in many such countries been instrumental in creating a free, democratic society that is based on the rule of law and that recognises the fundamental rights of its citizens vis-à-vis their government. This is why in a number of these countries the principle of "free advocacy" – meaning that, as a matter of principle, there should be no government interference in the activities of a lawyer – and the core values of the legal profession (see below) are protected by the constitution itself.

The objectives and principles of regulation

All EU Member States recognise the so-called core values – independence, absence of conflicts and professional secrecy/confidentiality – as major objectives and principles of regulation for the legal profession.

Another objective and principle is to ensure access to justice and to maintain the rule of law. In fact, the core values of the legal profession can be seen as an instrument of how access to justice and the maintenance of the rule of law can be achieved. More specifically, in a number of EU Member States lawyers are obliged to engage at reduced fees or for free in legal aid activities so as to ensure access to justice for those who do not have the means to pay for such access.

A lawyer, of course, is also a service provider to clients, and this is recognised, too, in Article 1.1 of the CCBE Code of Conduct, quoted above. The term ‘clients’ in this context is very broad and encompasses not only individual consumers but also industrial corporations and all other types of clients.

However, the function of a service provider has its limits. If there is a conflict between the function of service provider and the function of instrument of justice, the latter function prevails. The obligation of a lawyer as service provider to follow instructions of his or her client as a principle therefore finds its limits in the lawyer’s function as instrument of justice. The independence of a lawyer thus also means, beyond a certain point, independence from the client.

As a service provider, a lawyer is an undertaking in the meaning of competition law, and, therefore, competition considerations are also to be taken into account. However, the anti-competitive effects of regulation under European law may be justified by public interest considerations, and the European Court of Justice in the *Wouters*¹ case has acknowledged that the core values of the legal profession already mentioned – independence, absence of conflicts and professional secrecy/confidentiality – do qualify as public interest considerations for such purpose. This means nothing less than that, in a given regulation, the core values of the legal profession can take priority over competition considerations. The same would apply in the opinion of the CCBE to a regulatory provision that serves access to justice and the maintenance of the rule of law, since both are public interest aspects, too.

These comments on competition considerations are also relevant when looking at professional regulation from the viewpoint of the individual lawyer and his or her personal freedoms under European law. A regulation that restricts such freedoms can also be justified if it serves the core values of the profession or access to justice and maintenance of the rule of law as public interest aspects.

The CCBE notes that the consultation document does not specifically list the avoidance of conflicts of interest as one of the objectives or principles of regulation. The CCBE strongly suggests that this should be included. Most of the financial scandals from which stock markets and investors have suffered so badly during the last few years have been characterised by conflicts of interest on the part of the various market participants (e.g. directors, auditors, analysts, and occasionally lawyers, too). It appears inconsistent to the CCBE that after this experience the consultation document does not specifically mention avoidance of conflicts of interest as an objective and principle of regulation, even though in Europe at the national and EU level strict conflict of interest rules either have in the meantime been introduced, or are being introduced, for the various market participants.

The core values of the legal profession should be seen primarily not as rights of the lawyer but rather as obligations. A lawyer is under the obligation to see to it that his or her independence is not interfered with either by government or client; he or she is under the obligation to avoid conflicts of

¹ C309/99 *Wouters* / Algemene Raad van de Nederlandse Orde van Advocaten of 19 February 2002.

interest and to protect professional secrecy/confidentiality. Violation of such core obligations is, in some Member States, not only a professional violation but also a criminal offence.

For all these reasons, the CCBE has reservations about the notion of “legal services industry” frequently found in the consultation document. To ensure access to justice and to maintain the rule of law is not an industrial process. The term industry may be appropriate for financial services. Used for legal services, it misses the function of the legal profession in society. Someone who is accused of murder and stands trial in court would almost certainly fail to understand if his or her defence lawyer were referred to as a member of the “legal services industry”. The CCBE fully understands the function of a lawyer as a service provider and as an undertaking engaged in competition. However, having the possibility of a lawyer being referred to as a “legal services industrialist” is to misunderstand the relative importance of the different roles of a lawyer.

The independence of a lawyer is, of course, not absolute. A lawyer is not above the law. For instance, a lawyer is subject to the general provisions of criminal law e.g. on aiding and abetting, and therefore, although he or she is an instrument of justice, he or she must not knowingly aid and abet in a criminal activity of the client. It goes without saying, too, that a lawyer in court work is subject to the applicable procedural provisions and to the directions of the court. Therefore, independence only means that there should not be undue interference from any branch of the government (legislative, executive and judicial), and whether the interference is due or undue will depend on which branch is interfering and which right of the lawyer is being interfered with. It is generally recognised, in most if not all European countries, that even if there is interference from the legislative or judicial branch, there can be a violation of the rights of a lawyer under the national constitution or under the European Charter on Human Rights.

In conclusion, the core principle of independence of a lawyer is embedded in a complex system of different considerations, and its application in a given concrete case may require a difficult balancing act.

The structure of regulation

The regulatory structure of the legal profession in Europe varies from country to country. As a matter of fact, brief research undertaken by the CCBE has shown that there is no country among its membership which has the so-called Model A as structure of regulation. A few countries have models close to (although not identical with) Models B or B+. Most countries have models that correspond neither to Model A nor to Model B or B+. No country has total and unrestricted self-regulation of the legal profession. However, there is in all European countries which are members of the CCBE a significant extent of self-regulation.

Self-regulation, conceptually, must be seen as a corollary to the core value of independence. The comments above have circled around independence in the exercise of the profession by the individual lawyer. Self-regulation addresses the collective independence of the members of the legal profession. The principle of self-regulation is nothing less than a structural defence of the independence of the individual lawyer. After all, such individual independence can be unduly interfered with not only by individual measures but also by regulation. Thus, individual and collective independence are twin values which serve to ensure the role of a lawyer in society as outlined above.

Of course, the principle of self-regulation in the sense of collective independence is not absolute, but has the limits set by the national laws. Where these limits are, and how far regulation by government may go, is different from country to country. The extent of government regulation in some countries is greater, in others it is smaller. However, all countries which are members of the CCBE respect that there must be due scope for self-regulation of the profession. Thus, the principle of self-regulation, i.e. collective independence, is embedded in a complex system of different considerations, too, just like the principle of individual independence. Careful attention must be given that the balance is not turned over too far in the direction of government regulation, since otherwise the role of the legal profession in society would be endangered.

These comments apply not only to government regulation but also to regulation by third parties authorised by government to regulate or to participate in regulation. This alternative is not different from government regulation so far as the principle of self-regulation of the legal profession is concerned: The risks for independence – both collective and individual – are the same. Indeed, the involvement of third parties in regulation of the legal profession poses an additional and serious problem with regard to the role of a lawyer in society. The government, when regulating the profession, is bound by the directions given by parliament, and is responsible to parliament as the ultimate democratic sovereign elected by the electorate. It is necessary that when third parties also participate in regulation, these principles are complied with, i.e. directions must be given to them by parliament, and they must ultimately be accountable to parliament. Otherwise, there would be a serious deficit in representative democracy.

Diligent attention should be given to the level at which self-regulation of the profession is subjected to oversight. There would be no problem if oversight is limited to legality. However, if oversight is not merely an oversight for legality but also an oversight for suitability and (political) appropriateness, risks for the (collective) independence of the legal profession are likely. If self-regulatory power is given to the profession only “on probation”, and if the recall of such power is left to the political decision of the overseeing governmental body without parliament being involved, such regulatory structure would be difficult to reconcile with the role of a lawyer in society and with the principle of free advocacy.

The CCBE finds support for the foregoing comments in Principle V (Associations) of the Council of Europe Recommendation and in the Explanatory Memorandum thereto where it is stated that lawyers can only fully play their role in a State based on the Rule of Law if bar associations are independent, in particular from the State and economic pressure groups. In addition, the United Nations Basic Principles on the Role of Lawyers, in Article 24, say that lawyers are “entitled to form and join self-governing professional associations to protect their professional integrity” which term encompasses independence. The Explanatory Memorandum of the Council of Europe Recommendation, on the other hand, recognises that there is also a role for government to intervene in the regulation of lawyers where that is really necessary in order to safeguard the public interest. However, it is the opinion of the CCBE, as stated above, that in this respect a careful balance must be established so that the core values of the legal profession are not put at risk through the regulatory structure, and that the principle of democratic representation is complied with.