

To the attention of  
Commissioner McCreevy  
DG Internal Market & Services

Brussels, 10 March 2009

Dear Commissioner,

The Council of Bars and Law Societies of Europe (CCBE), which represents more than 700,000 European lawyers through its member bars and law societies of the European Union and European Economic Area, has been following very closely current initiatives of the European Commission in tackling the recent financial crisis.

The CCBE welcomes these efforts, but we are extremely concerned that some of these initiatives do not take account of the lawyer's special position within the administration of justice, and the rules of professional secrecy and legal professional privilege to which lawyers across Europe are subject. Professional secrecy and legal professional privilege, as they are called - although they describe rights of clients to protect and enable them to consult a lawyer with guaranteed confidentiality - are known in both the civil and common law systems, and indeed in every democratic system run under the rule of law around the world.

The recently proposed Regulation on credit rating agencies, for instance, which vests public authorities with extensive powers, seems to ignore the confidentiality of the client-lawyer relationship and illustrates very well the CCBE's concerns. Article 20 of the proposed Regulation would make it impossible for a credit rating agency as client to consult a lawyer in full confidence. Through the Regulation, credit rating agencies would become subject to supervisory action by regulators across Europe, and also increasingly by regulators around the world. If privileged material is not immune from disclosure, then the EU regulators could, for example, demand production of legal advice that a credit rating agency receives on how to respond to a regulatory investigation, inside or outside the EU. This outcome would be unacceptable: agencies must be permitted to take legal advice on how to comply with the Regulation, without fear that their regulators will try to demand access to that advice.

The CCBE is anxious that other initiatives yet to come will have a similar impact. We hope that the Commission's consultation on hedge funds, for instance, will not lead to proposals similar in this respect to what has been proposed in the area of credit rating agencies. We are also aware that the Commission is carrying out a review of the Prospectus Directive. This, again, is an area where the CCBE would like to draw the Commission's attention to the fact that regulatory bodies are given powers which would affect the professional secrecy and legal professional privilege of lawyers. The Mifid and Transparency Directives raise similar concerns within the CCBE.

The CCBE would like to emphasise that this is not about defending the interests of lawyers but rather about safeguarding the administration of justice and the rule of law. The right to consult a lawyer in order to ask advice should always be provided on the basis that the client is assured that what is said to the lawyer, and the advice of the lawyer whether in writing or orally, remain confidential. This is part of fundamental freedoms and rights. As stated above, the concept is found everywhere in the European Union as a fundamental value of the rule of law, and is recognised in judgements of the European Court of Justice and the European Court of Human Rights (such as Akzo Nobel, Joined Cases T-125/03 and T-253/03; Wouters, Case C-309/99; Niemietz v Germany decided by the ECtHR of 16/12/1992).

The CCBE therefore urges you to consider seriously our concerns and to include the protection of professional secrecy and legal professional privilege in any future proposals, particularly in relation to powers that might be given to regulatory bodies over hedge funds etc so as to continue to guarantee this safeguard.

We are happy to discuss this with you in person if you wish.

We look forward to hearing from you.

Yours sincerely,



Anne Birgitte Gammeljord  
CCBE President

Copies to:

Jacques Barrot, Vice-President of the European Commission

Eddy Wymeersch, Chairman of the Committee of European Securities Regulators