



CCBE POSITION

EUROPEAN COMMISSION PROPOSAL FOR A DIRECTIVE ON ALTERNATIVE INVESTMENT FUND MANAGERS

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European Commission proposal for a Directive on Alternative Investment Fund Managers

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 concerned that some of the initiatives do not take account of lawyers' 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 - they describe rights of clients to 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 Directive on Alternative Investment Fund Managers, 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 41 of the proposed Directive would make it impossible for clients involved in alternative investment funds to consult a lawyer in full confidence.

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.

The CCBE therefore supports the following amendment to recital 22 of the proposed Directive:

Commission proposal	CCBE proposed amendment
Recital (22)	Recital (22)
It is necessary to clarify the powers and duties of competent authorities responsible for implementing this Directive, and to strengthen the mechanisms needed to ensure the necessary level of cross-border supervisory cooperation.	It is necessary to clarify the powers and duties of competent authorities responsible for implementing this Directive, and to strengthen the mechanisms needed to ensure the necessary level of cross-border supervisory cooperation. <i>Competent authorities will need to observe national rules on professional secrecy and legal professional privilege.</i>

	<p><u>Justification</u></p> <p>Professional secrecy/legal professional privilege of lawyers is a generally recognised principle in all Member States (1). Everyone has the right to consult a lawyer in order to ask advice which is provided on the basis of strict confidentiality. The obligation of a lawyer to professional secrecy serves the interest of judicial administration. The European Court of Justice in the AM&S case (2) and the Wouters case (3) expressed the importance of professional secrecy/legal professional privilege for the maintenance of the rule of law. A competent authority with the powers specified in Article 20 would seriously undermine professional secrecy/legal professional privilege.</p> <p>(1) Judgement of the Court of 19 February 2002, Case C-309/99, Wouters and others v. Algemene Raad van de Nederlandse Orde van Advocaten, [2002] ECR 1577.</p> <p>(2) Judgement of the Court of 18 May 1982, Case 155/79, Australian Mining and Smelting Europe Ltd. (AM and S Europe Ltd.) v. Commission, [1982] ECR 1575.</p> <p>(3) See footnote 1 above.</p>
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