



CCBE GENERAL RESPONSE TO THE EUROPEAN COMMISSION CONSULTATION ON THE TRANSPARENCY REGISTER

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

association internationale sans but lucratif

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CCBE General Response to the European Commission Consultation on the Transparency Register

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 31 member countries and 11 further associate and observer countries, and through them around 1 million European lawyers.

The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers. This document is presented as a response to the European Commission consultation on the operation of the Transparency Register for organisations and self-employed individuals engaged in EU policy-making and policy implementation. The purpose of this document is to express its observations and concerns on the operation of the Register and the possible consequences for lawyers when joining the Register.

The CCBE has repeatedly stressed the importance of professional secrecy (known in some jurisdictions as legal professional privilege) and would point out that the European Court of Justice itself expressly stated in its decision in the AM&S case (case C-155/79): “that confidentiality serves the requirements, the importance of which is recognized in all of the member states, that any person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it” and added that “the principle of the protection against disclosure afforded to written communications between lawyer and client is based principally on a recognition of the very nature of the legal profession, inasmuch as it contributes towards the maintenance of the rule of law and that the rights of the defence must be respected”.

The CCBE would like to emphasise that in many, if not all, member countries of the EU the principle of protection against disclosure is enshrined in national primary law or domestic codes of conduct for lawyers. In some countries it is even protected by the constitution.¹ Moreover, client confidentiality is enforced in different ways in the Member States, but its breach could involve criminal sanctions for the lawyer concerned.

Furthermore, the CCBE has repeatedly emphasised that professional secrecy, avoidance of conflict of interest and independence are core values of the Legal Profession. As the CCBE has noted in its position on regulatory and representative functions of bars², the independence of lawyers is recognized, inter alia, in the Council of Europe Recommendation on the freedom of exercise of the profession of lawyer³. As the Council of Europe states, the Committee of Ministers 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 party or for any reason”. As the Council of Europe further states under Principle V of its Recommendation on the freedom of exercise of the profession of lawyer, “Bar associations or other professional lawyers’ associations should be self-governing bodies, independent of the authorities and the public” and “the role of Bar associations or other professional lawyers’ associations in protecting their members and in defending their independence against any improper restrictions or infringements should be respected”.

As the CCBE already stated in its position on regulatory and representative functions of bars,

- an independent legal profession is the cornerstone of a free and democratic society,
- self-regulation, conceptually, must be seen as a corollary to the core value of independence,

¹ For example, in Germany the Federal Constitutional Court holds that the professional secrecy is protected by Article 12 of the (German) Constitution as well as the principle of the rule of law, and in Portugal such protection is expressly stipulated in the respective constitutions.

² http://www.ccbe.org/fileadmin/user_upload/NTCdocument/ccbe_position_on_reg1_1182254709.pdf.

³ Recommendation N. R(2000)21, <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=533749&SecMode=1&DocId=370286&Usage=2>.

- self-regulation addresses the collective independence of the members of the legal profession, and
- exclusive direct state regulation, without a leading role for the profession in the setting and enforcing of standards of conduct and of service, is incompatible with an independent legal profession.

Considering the importance of professional secrecy and independence as core values of the legal profession and self-regulation by Bars and Law Societies as a corollary of independence, the CCBE has the following comments regarding the operation of the Transparency Register:

I. Scope of the Register

Although the CCBE appreciates the exemption in paragraph 10(a) of some activities concerning the provision of legal and other professional advice, it still has some concerns regarding the scope of the register.

Paragraph 8 of the Interinstitutional Agreement⁴ provides that the scope of the Register “covers all activities, other than those excluded in Part IV, carried out with the objective of directly *or indirectly* influencing the formulation or implementation of policy and the decision-making processes”. The word ‘indirectly’ significantly widens the scope and could lead to a situation where virtually all contacts with the EU institutions are perceived to be covered by the rules of the register. The CCBE would be strongly opposed if e.g. lawyers interacting with the EU institutions for the sole purpose of seeking information on future legislation would be bound by these rules. According to the CCBE, therefore, more clarity should be provided about the exact meaning of the word ‘indirectly’, in particular with regard to lawyers providing advice to a client on future legislation.

Furthermore, paragraph 8 of the Interinstitutional Agreement considers even the preparation of letters, information material or discussion papers and position papers as an activity falling within the scope of the Register. The preparation of such documents is clearly covered by the professional secrecy obligation and this activity, which is inevitably confidential as regards third parties, cannot justify joining the Register and give rise to information requests. Only activities in which there is direct contact with EU institutions’ officials could lead to such registration.

In addition, the CCBE would strongly welcome if certain exceptions were granted to registrants with major issues of confidentiality, including justified concerns in the course of professional secrecy. Such an exemption could include the condition that some information will not be made public but kept confidential within the European Commission.

II. Procedure for the investigation and treatment of complaints

Paragraph 17 of the Interinstitutional Agreement provides that regardless of any professional code of conduct by which individuals who join the Register are bound – i.e., in case of lawyers, the code of conduct which applies to them – they agree to act in compliance with the code of conduct contained in Annex III of the Interinstitutional Agreement and to be subject to measures provided for in Annex V for non-compliance with this code.

The fact that an administrative body is both a judge and a party and can take sanctions against lawyers without a right of appeal is an issue. In this respect, the CCBE is strongly concerned about the lack of clarity regarding the current procedure for suspension or removal from the register and the absence of a possibility of appeal. More fundamentally, the fact that such a body can impose disciplinary sanctions on a lawyer is inconsistent with the principle of professional self-regulation, and of independence of the members of the legal profession towards public authorities. This principle is based on the consideration that lawyers may oppose such authorities to defend clients who are in a dispute with them, and that one could not conceive, in a democratic society, that lawyers may suffer any pressure from public authorities against which they may have to act or even that there could be

⁴ Agreement between the European Parliament and the European Commission on the establishment of a transparency register for organisations and self-employed individuals engaged in EU policy-making and policy implementation, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:191:0029:0038:EN:PDF>.

the slightest suspicion that any such pressure could be exerted. This is particularly true in the case of the Commission, since lawyers who are engaged in lobbying activities involving the Commission generally do so in the context of a broader EU practice that also involves defending clients in proceedings in which the Commission is the opposing party.

The sanctions that a body of the Commission may be required to take under Annex IV of the Interinstitutional Agreement, which can lead to removing a lawyer from the Register, constitute a disciplinary sanction, the consequences of which could be particularly severe for lawyers practicing EU law, since the prohibition to engage in lobbying activities may lead their clients to seek alternative counsel for their entire range of EU law related assignments.

The CCBE therefore considers it appropriate to provide, that the competence of the European Commission regarding the application of measures laid down in Annex IV in respect of alleged breaches by lawyers of the Register's rules, should be restricted to investigation of such alleged breaches, and the making of a determination as to whether the relevant Bar or Law Society should recommend such measure as is specified in Annex IV, and then to report such determination to the Bar or Law Society of which the lawyer is a member with a view to that Bar or Law Society taking such action as it sees fit.

In relation to the role of the Commission as outlined above, the CCBE fully supports the following recommendations which have been proposed in the draft report of the Legal Affairs Committee of the European Parliament concerning recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024(INI))⁵:

Recommendation 4.4 (on the right to be heard)

The rights of the defence must be respected at every stage of the procedure. If the Union's administration takes a decision that will directly affect the rights or interests of persons, the persons concerned shall be given the opportunity to express their views in writing or orally before that decision is taken, if necessary, or if they so choose, with the assistance of a person of their choice.

Recommendation 4.10 (on the indication of remedies available)

Administrative decisions shall clearly state – where Union law so provides – that an appeal is possible, and shall describe the procedure to be followed for the submission of such appeal, as well as the name and office address of the person or department with whom the appeal must be lodged and the deadline for lodging it.

Where appropriate, administrative decisions shall refer to the possibility of starting judicial proceedings and/or lodging a complaint with the European Ombudsman.

As indicated at the end of the report of the Legal Affairs Committee, these recommendations are based on Article 41 of the Charter of Fundamental Rights and on the European Code of Good Administrative Behaviour, as well as the principles set down in the case law of the Court of Justice and of the General Court that guarantee a fair and impartial administrative procedure and are based on the constitutional traditions of the different Member States. The CCBE urges the European Commission to equally implement these principles with regard to its competences under Annex IV of the Interinstitutional Agreement.

The CCBE considers that the problems identified above should be resolved in order to facilitate the registration of lawyers, and, therefore, hopes that the recommendations presented in this paper are followed when reviewing the operation of the Transparency Register.

⁵ Available at this website:
<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-492.584%2b01%2bDOC%2bPDF%2bV0%2f%2fEN>.