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Representing Europe's lawyers

CCBE Position on Regulatory and Representative Functions of Bars

Conseil des barreaux européens – Council of Bars and Law Societies of Europe
association internationale sans but lucratif

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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 regulatory and representative functions of bars 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 sets out its views on regulatory and representative functions of bars (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. The 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 1990¹; 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 2000² 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 2001³.

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 accountants. Therein, the Court recognised these core values – independence, absence of conflicts of

¹ The UN Basic principles are available at the following website address: http://www.unhchr.ch/html/menu3/b/h_comp44.htm.

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

³ 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>.

interest, and professional secrecy/confidentiality – and also found that these core values do qualify as public interest considerations⁴. 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 pressure⁵. 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 bound⁶.

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”⁷.

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.

⁴ 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.”

⁵ Article 2.1 of the CCBE Code of Conduct (available at the following website address: <http://www.ccbe.org>).

⁶ 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

⁷ 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 2001⁸ and the CCBE position of December 2004⁹. The principle of confidentiality is also enshrined in the CCBE Code of Conduct (2002)¹⁰.

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”*¹¹.

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”*¹².

III. CCBE Views on Regulatory and representative functions of bars

The debate in this area is a question of how lawyers should organise themselves in the public interest within the context of the authority delegated to them by the state.

At the outset, it should be noted that 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. Self-regulation addresses the collective independence of the members of the legal profession. Exclusive direct state regulation, without a leading role for the profession in the setting and

⁸ CCBE statement of position on lawyers' confidentiality of 5 February 2001 (available at the following website address: <http://www.ccbe.org>).

⁹ CCBE on the « Protection of confidences between European lawyer and client » of December 2004 (available at the following website address: <http://www.ccbe.org>).

¹⁰ 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.

¹¹ See Principle III, 2 of the Council of Europe Recommendation referred to above.

¹² Point 182 of the Wouters decision referred to above.

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enforcing of standards of conduct and of service, is incompatible with an independent legal profession. The many benefits of regulation of the legal profession with a leading role played by the profession itself include: voluntary availability of expertise to regulate the subject matters relating to the legal profession, high level of acceptance of standards set and enforced by professional colleagues, flexibility and cost effectiveness.

The CCBE also believes important to emphasise what is meant by representation through Bars. The Bars are representing the lawyers towards the courts and the government. The Bars, however, do not take care about the business interests of their members but the lawyers' position in society.

In most of the democratic states of Europe it has been traditional for the Bar to represent the interests of the legal profession and to be entrusted by the State with a leading role in the regulation of the profession in the public interest including the enforcement of ethical rules. In these countries, there is not felt to be any conflict between the two roles. Both roles would have the common objective of maintaining high standards of conduct and service by the legal profession to the public. Experience in these countries has shown that any theoretical potential for conflict of interest between the two roles can be managed by structures and systems within bars and external oversight arrangements. Furthermore, in no Member State have lawyers been deemed unfit to balance the various interests which they are faced with (such as duty to the court, duty to the client) in their daily work, and it is the kind of balancing act which members of the legal profession are expected, and indeed trained and regulated, to undertake every day of their professional lives.

That is not to say that the combined function of representation and regulation is the only model. The CCBE would like to recall in this context the European Court of Justice jurisprudence finding that *"the fact that different rules may be applicable in another Member State does not mean that the rules in force in the former State are incompatible with Community law"*¹³. It should be noted that national regulations/systems are embedded in a specific national context.

¹³ See point 108 of the Wouters decision referred to above where the following is stated: *"Furthermore, the fact that different rules may be applicable in another Member State does not mean that the rules in force in the former State are incompatible with Community law (see, to that effect, Case C-108/96 Mac Quen and Others [2001] ECR I-837, paragraph 33). Even if multi-disciplinary partnerships of lawyers and accountants are allowed in some Member States, the Bar of the Netherlands is entitled to consider that the objectives pursued by the 1993 Regulation cannot, having regard in particular to the legal regimes by which members of the Bar and accountants are respectively governed in the Netherlands, be attained by less restrictive means (see, to that effect, with regard to a law reserving judicial debt-recovery activity to lawyers, Reisebüro, paragraph 41)."*