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Representing Europe's lawyers

CCBE Response to the Green paper of the European Commission on European Transparency Initiative

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

association internationale sans but lucratif

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1. INTRODUCTION

The Council of Bar and Law Societies of Europe represents more than 700,000 European lawyers through its member bars and law societies of the European Union and the European Economic Area. In addition to membership from EU bars, it has also observer representatives from a further seven European countries' bars. The CCBE responds regularly on behalf of its members to policy consultations which affect European lawyers.

The CCBE is registered in CONECCS (Consultation, European Commission and Civil Society).

Following the Green Paper on a European Transparency Initiative presented by the European Commission setting out its proposed next steps in this area, this paper is the response of the CCBE to some of the questions raised¹. Our comments follow the order of questions of the Commission.

The CCBE welcomes the initiative of the European Commission for more transparency in the view of the "partnership of European renewal" and believes that both the European Institutions and relevant interest representatives should work together as partners in consultations and in legislative participation processes to aim for a high level of transparency

As far as the role of individual lawyers or law firms as potential lobbyists is concerned, the CCBE would however like to draw the attention of the Commission to the fact that the legal profession is already regulated by strict deontological principles. The CCBE itself has issued the CCBE Code of Conduct² which regulates the legal profession at European level and is respected as binding in the Member States. One of the most important elements of lawyers' professional rules is professional secrecy which applies to lawyers when acting in a professional capacity.

In continental Member States, professional secrecy rule has different origins, sometimes the constitution, sometimes the criminal law as well as statutes. In common law countries, legal professional privilege and confidentiality are common law principles stated by the Courts in their decisions to be a fundamental feature of the administration of justice and the rule of law.³

In this respect and on a preliminary basis, the CCBE would like to draw the attention of the Commission to the extremely wide definition of lobbying it suggests.

In the CCBE's view, this definition is too wide and catches activities which should not be considered as lobbying. As a matter of fact, lawyers are involved in two kinds of activities in their relations with European institutions.

- On the one hand, they are involved in individual cases for clients regarding the direct application of existing Community law, in particular in the area of competition law.

As these activities are already governed by numerous procedural rules, and for lawyers they are governed by their deontology, it does not seem appropriate that they are covered by the definition of lobbying proposed by the Green Paper.

- On the other hand, lawyers intervene before institutions in the framework of the legislative process. This type of activities is likely to be considered as lobbying under the definition of the Green Paper though it is performed by lawyers.

¹ There was one vote against this response, from the UK Delegation. Its views can be found at <http://www.lawsociety.org.uk/documents/downloads/dynamic/greenpapertransinitiative220906.pdf>

² Please see: http://www.ccbe.org/en/documents/code_deonto.htm

³ Please see the CCBE update on the Report by D.A.O. Edward, QC "The professional secret, confidentiality and legal professional privilege in Europe", http://www.ccbe.org/doc/En/update_edwards_report_en.pdf

The CCBE would like to insist on the fact that lawyers are subject in all Member States to their code of conduct which is strictly applied. Their deontology must be respected in the framework of their defence and advising activities as well as in their lobbying activities.

The CCBE would like the definition of lobbying to take account of this distinction.

If this request modifying the definition is not considered, the CCBE would like at least this distinction to apply to lawyers.

The proposals in the Green Paper must not contradict lawyers' deontological rules, but must on the contrary take account of them to the extent that they are stricter than those which lobbyists obey.

Responses of the CCBE to the questions of the Green Paper on the European transparency initiative

Question complex A: The way forward

- ***Do you agree that efforts should be made to bring greater transparency to lobbying?***

The CCBE believes that transparency of lobbying activities is an important concept to ensure that the European Union is "open to public scrutiny and accountable for its work".

However, reinforcing transparency rules must be done while respecting lawyers' ethical rules, and in particular professional secrecy.

- ***Do you agree that lobbyists who wish to be automatically alerted to consultations by the EU institutions should register and provide information, including on their objectives, financial situation and on the interests they represent?***

This question combines different issues which need to be separated for a proper answer to be given.

As the mere reason of registration is to be alerted automatically to consultations, then it should be open to all (European citizens and organisations) upon simple registration. That should be considered no less than a right for all in a transparent governmental system.

In the perspective of a functioning and transparent democracy, the intention of the Commission to restrict access to information to a limited, registered circle of persons is consequently very problematic. After all, not only lobbyists could be interested in receiving early information on consultations, but any citizen who wants to keep themselves posted on developments at EU level.

Indeed, it seems that to be alerted to consultations of EU institutions, giving one's name and address to the Commission should be enough.

However, with regard to lobbying activities themselves, the CCBE thinks that registration of lobbyists could be useful to create the desired transparency.

This registration could be done in the same way as that of lobbyists registered with the European Parliament.

Regarding the information which is required for the registration, the CCBE would like to point out that lawyers should not be obliged to disclose such information they obtain where this could be a breach of professional secrecy or other professional rules.

Furthermore, the term "financial situation" and its application to law firms and legal professionals is unclear.

- ***Do you agree that this information should be available to the general public?***

As mentioned above, the CCBE is not against the establishment of a registry with names and addresses of lawyers.

Any additional information in a publicly accessible register should be in compliance with the ethical rules of the legal profession.

- ***Who do you think should manage the register?***

The CCBE would accept the registry be managed by the European Commission, but cannot envisage it being managed by a lobbying association, even if the latter is recognised by the Commission.

If the registration was to be with a private lobbying organisation, member bars might have problems in registering because their statutes might prevent their becoming members of private organisations.

In the CCBE's view, the management of the register should be done in the same way as that of the European Parliament.

- ***Do you agree to consolidating the existing codes of conduct with a set of common minimum requirements?***

The CCBE would like to emphasise that lawyers are already subject to their own code of conduct whose requirements are equal to or even higher (i.e. : requirement of professional indemnity insurance) than minimum requirements proposed by the Commission or included in the SEAP and EPACA codes of conduct.

The CCBE would also like to emphasise that the European Code of Conduct for Mediators recognises that: "*Adherence to the code is without prejudice to national legislations or rules regulating professions*"⁴.

Finally, the CCBE considers that minimum conduct rules should be drafted in common to enable uniform transparency with the European Union so that there are not different codes for each institution.

- ***Who do you think should write the code?***

In case, it would seem necessary to draft a code common to all institutions, the CCBE is willing to contribute to the development of such a code, particularly to ensure that its own ethical rules are respected in the new code.

- ***Do you agree that a new, inclusive external watchdog is needed to monitor compliance and that sanctions should be applied for any breach of the code?***

The CCBE thinks that lawyers and any other profession regulated by similarly strict professional codes should not be subject to an additional code for their lobbying activities.

For lawyers, bars already apply strict ethical rules.

However, lobbyists who are not subject to a binding code of conduct should be subject to external supervision and possible sanctions to avoid any discrimination.

Question complex B: Feedback on application of the minimum standards of consultation

In your view, has the Commission applied the general principles and minimum standards for consultation in a satisfactory manner? You may refer to the individual standards (provided, for ease of reference, in Annex 2 – attached to this response)

In the CCBE's view, the minimum period of eight weeks for a consultation and twenty days for a meeting is not enough for European organisations like the CCBE.

These extremely short periods are not satisfactory while the input of European organisations like the CCBE on numerous issues of consultation is important.

⁴ Please see : http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf

Please give reasons for your reply and, where appropriate, provide examples.

The CCBE is a member of the network on the Common Frame of Reference in the area of the harmonisation of European Contract Law.

The response times to draft papers in these workshops were too short to enable the CCBE to consult its members.

The CCBE has therefore been unable to respond to this consultation, though it is an organisation capable of delivering expertise on the questions raised in these drafts. Therefore, the European Commission might want to structure its internal work in a way that allows more time for stakeholders to respond to consultation documents.