



Mr. Mustafa Mujezinović
Prime Minister of the Government of the Federation of Bosnia and Herzegovina
GOVERNMENT OF THE FEDERATION OF BOSNIA AND HERZEGOVINA
Alipasina 41
71000 Sarajevo
Bosnia and Herzegovina
E-mail: info@fbihvlada.gov.ba

Brussels, 12 April 2010

Re: Fiscal systems and envisaged sanction for non-compliance against lawyers

Dear Prime Minister,

Please allow us to address you on behalf of the International Association of Lawyers (Union Internationale des Avocats - UIA) and the Council of Bars and Law Societies of Europe (CCBE). The UIA was established in 1927 and is the oldest international organization of lawyers. The UIA represents more than 200 bar associations, organisations and federations of 2,000,000 lawyers in 110 countries worldwide and both promotes and defends the basic principles of the legal profession. For its activity, it has been granted consultative status at the United Nations and at the Council of Europe. The CCBE was founded in 1960. The CCBE is the representative organization of around 1,000,000 European lawyers through its member bars and law societies from 31 full member countries, and 11 further associate and observer countries. The CCBE is recognised as the voice of the European legal profession by the national bars and law societies on the one hand, and by the EU institutions on the other.

We are writing with respect to the Law on Fiscal Systems in the Federation of Bosnia and Herzegovina that was adopted on 28 December 2009 and which entered into force as of 1 January 2010 (hereinafter referred to as the "**Act**"). As you know, the Minister of Finance of the Federation of Bosnia and Herzegovina has an obligation under the Act to pass a number of pieces of secondary legislation, which effectively means that the Act has not yet come into force.

It is paramount to emphasize that lawyers are guardians of fundamental rights, freedoms, liberties and the rule of law principle. Lawyers therefore ensure the essential foundations of a democratic society and play a vital role in the administration of justice and the maintenance of the rule of law. The UIA and the CCBE share the common values enshrined in 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 1990; hereinafter referred to as the "**UN Basic Principles**"), the Council of Europe Recommendation Nr. R (2000) 21 on the freedom of exercise of the Profession of lawyer of 25 October 2000 (hereinafter referred to as "the CoE Recommendation"), as well as in a number of the UIA's and CCBE's own resolutions.

Pursuant to the UN Basic Principles, "*adequate protection of the human rights and fundamental freedoms to which all persons are entitled be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession*". Effective legal assistance, confidential communication with counsel, and improvement of access to justice are all basic tenets of the UN Basic Principles. It is only possible to achieve these

basic tenets if the legal profession remains wholly independent and lawyers are free from interference by individuals or the government. Such tenets are in turn founded upon and are indispensable parts of the rule of law, without which a modern society cannot exist. Pursuant to principle I of the CoE Recommendation "all necessary measures should be taken to respect, protect and promote the freedom of exercise of the profession of lawyer without discrimination and without proper interference from the authorities or the public, in particular in the light of the relevant provisions of the European Convention on Human Rights".

In this context, it is worth mentioning that the UIA has adopted the Turin Principles of Professional Conduct for the Legal Profession in the 21st Century (hereinafter referred to as the "**Turin Principles**"), pursuant to which, "*Lawyers are entitled to recognition and protection of their role by society and any authority, be it legislative, executive or judicial, as their role must be considered an essential instrument in the administration of justice and the organisation of Society.*" Pursuant to article 1.1 the CCBE's Code of Conduct for European Lawyers, "Respect for the lawyer's professional function is an essential condition for the rule of law and democracy in Society".

The independence of lawyers is strongly enshrined in the Turin Principles, pursuant to which "*Lawyers have the right to practise their profession freely and independently, without being subjected to pressure or discrimination of any kind whatsoever.*" In a similar way, article 2.1.1 of the CCBE's Code of Conduct for European Lawyers emphasizes that "the many duties to which a lawyer is subject require the lawyer's absolute independence, free from all other influence, especially such as may arise from his or her personal interests or external pressure". Lawyers, therefore, are guided solely by the interests of their clients, and must strive to avoid situations where these interests could be compromised.

Some of these freedoms are seriously threatened by the abovementioned measures. We would like to comment thereon as follows:

Compulsory usage of a fiscal cash register

Pursuant to the Act (Arts. 4 and 5 thereof) and the secondary legislation which has yet to be passed, the obligation to record transactions via fiscal devices will extend to lawyers when they give legal advice or represent a client. They will therefore be obliged to register each and every legal service they render by way of a fiscal device, such as a fiscal cash register (Arts. 5 (2), 7 of the Act).

More specifically, Article 5(1) of the Act provides for exemptions from the application of the Act. Since this provision does not include the legal profession as being exempted, the obligation to install cash registers would apply to the legal profession as well pursuant to Article 5 (2) of the Act. This provision sets out that a "*person who is not subject to the obligation as defined under Paragraph 1 of this Article and who also carries out business activities not exempted from the obligation to record transactions via fiscal devices and transfer the data via the terminal to the Tax Administration (TA) server as defined under Paragraph 1 of this Article, shall record each transaction involving such business activity via fiscal devices and shall transfer the data via the terminal to the TA server.*"

In our opinion, however, Article 5 (3) of the Act should be applied here to provide for exemptions from the obligation pursuant to Article 5 (2) for the reasons referred to above. Article 5 (3) of the Act reads as follows: "*By way of exception to Paragraphs 1 and 2 hereof, the Government of the Federation of Bosnia and Herzegovina may pass a Resolution, on a recommendation of the Minister, which may take into account specific features of a business activity and on account of that define additional business activities that are exempt from the obligation to record business transactions via fiscal systems.*"

This provision provides the Government of the Federation of Bosnia and Herzegovina with the option of passing a decision, upon the recommendation of a minister taking into account specific features of a business activity, and to define additional business activities that are exempt from the obligation to record business transactions via fiscal systems. It is in this provision that we see an opportunity for the legal profession, which constitutes a specific business activity providing services to citizens and legal entities, to be exempted from the application of the Act.

The UIA and the CCBE, each with reference to their respective members, are not aware of any other country that burdens lawyers with similar duties. Cash registers are only used by commercial enterprises operating mainly with cash transactions, but not by independent professionals.

The provision of independent legal services is one of the fundamentals of the UN Basic Principles and therefore cannot be equated with simple services such as retail services provided by a supermarket. Lawyers play a pivotal role in judicature and therefore deserve a marked position similar to other institutional components of the legal system. Introducing an obligation to register all payments by a fiscal device such as a cash register does not only harm the authority of the profession by degrading the lawyers' duties to "simple services" but also undermines the respect for the judicial system as such.

The Law on Legal Profession in the Federation of Bosnia and Herzegovina defines that the legal profession is an independent professional activity organized and functioning in accordance with the law and regulations passed on the basis of the Law on Legal Profession. The independence of the legal profession is achieved through different means. For one, the provision of legal assistance is not a service provided in a free market. Lawyers who provide legal services in the form of a full-time professional practice may provide such services only after they meet the requirements of the Law on Legal Profession in the Federation of BiH. Furthermore, the installation of fiscal devices such as a cash register has the potential of adversely affecting the lawyers' obligation of professional secrecy for reasons outlined below.

As we do not see any reasons for introducing this measure, we kindly request a justification of its necessity or to pass a resolution pursuant to Art. 5 (3) of the Act.

Potential breach of lawyers' professional secrecy by accounts and tax declarations

We appreciate the need to impose strict and transparent measures for supervising compliance with financial regulations. In most countries around the world, lawyers are obliged to declare their revenues to the authorities. Tax reports are usually provided annually and VAT is applicable to legal services. The information contained in declarations or receipts varies from country to country.

Nevertheless, this must not lead to a violation of the confidential client-lawyer relationship. As far as we understand the Act, the mechanism stipulated allows for unlimited inspection of documentations in the lawyer's office to verify the compliance with financial and/or administrative obligations. In so doing, it cannot be excluded that the authority not only harms the confidential lawyer-client relationship, but also (in extreme cases) gains unauthorized access to information that is subject to professional secrecy. In this context it should be noted that no lawyers in any other country can ever be obliged to hand out any information covered by professional secrecy.

The importance of this relationship is further underlined by the abovementioned UN Basic Principles, namely Principle 22, pursuant to which *"Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential"*, as well as Principle III, 2 of the CoE Recommendation, which states that *"Professional secrecy should be respected by lawyers in accordance with internal laws, regulations and professional standards. Any violation of secrecy, without the consent of the client, should be subject to appropriate sanctions"*.

The lawyer-client privilege is strictly protected by the Turin Principles and is an intangible principle which ensures that the *"legal rights of the citizens are protected"* and guarantees the proper foundation for the relationship between the lawyer and the client. Under this privilege, a lawyer not only has the right but also the duty to keep strictly confidential any fact to which he or she becomes privy in the course of representing or advising a client. The Turin Principles further stress that *"Lawyers have the right to practice their profession without prejudice or restraint, shielded by total professional immunity, which precludes any unlawful search of the Lawyer's office."* Furthermore, lawyers are not compelled to report facts they learn of while practising their profession and therefore have no duty to report to any authority or entity. The right and the duty of the lawyer to keep client's matters confidential figure prominently in the CCBE Charter of Core Principles of the European Legal Profession. Pursuant to article 2.3.1 of the CCBE Code of Conduct for European Lawyers, the

lawyer's obligation of confidentiality serves the interest of the administration of justice as well as the interest of the client and is therefore entitled to special protection by the State.

Suspension of legal practice

As we understand, the above stated Act would allow the tax/revenue authority to prohibit lawyers from exercising their profession if inspectors of the tax/revenue authority establish a violation of the Act by the respective lawyer. Furthermore, a fine could be imposed on the lawyer (Art. 52 of the Act).

We cannot emphasize enough that these measures can potentially not only impact on the action of the lawyer, but as a side-effect substantially harm the client's rights and interest. Closing an office may leave clients without proper representation and advice in legal proceedings. This can have serious effects on the proper functioning of the administration of justice and violate the right to fair trial as stipulated in Article 6 of the European Convention on Human Rights concluded in Rome on 4 November, 1950 ("*everyone is entitled to a fair and public hearing*").

The above means that everybody has the right to legal assistance - not only theoretical, but also practical and effective. Principles III and XVI of the UN Basic Principles confirm this view by providing that governments shall ensure that everyone has effective and equal access to legal services without suffering or being threatened with prosecution or administrative, economic or other sanctions.

Referring to the Turin Principles once again, we would like to emphasize that it is the lawyer's duty to do everything possible to ensure that the "*clients' rights are protected and that their clients receive a fair trial in any court or before any other authority.*" It goes without saying that this includes a lawyer's freedom and right to choose or reject a client, and vice-versa the freedom of the client to choose or reject a lawyer. Closing an office may prevent the lawyer from fulfilling the obligation under article 3.1.2 of the CCBE Code of Conduct for European Lawyers to advise and represent the client promptly, conscientiously and diligently.

Self-regulatory bodies of the legal profession

We would also like to highlight the importance of the self-regulatory bodies of the legal profession. As described above, an independent legal profession is only possible through a self-governing bar association or law society. This is also recognized by the Turin Principles, pursuant to which a "*Lawyer has the duty or the right to be a member of a Bar or Law Society and to ensure that the profession is governed by rules laid down by the representative bodies of which he or she is a member, and that they are observed.*" The self-regulation of the legal profession is also one of the core principles formulated in the CCBE Charter of Core Principles of the European Legal Profession. Lawyers are obligated to recognize the professional body's right to establish rules that govern their professional conduct and to comply with such rules at all times while exercising their profession.

Self-government also implies that only bar associations or law societies may impose sanctions that may affect the core of the legal practice and prohibit or suspend lawyers from practising their profession. This is further supported by Principle V of the CoE Recommendation, according to which "*Bar associations (...) should be self-governing bodies, independent of the authorities and the public*". If an authority is authorized to apply the same sanctions as the bar association, the bar association's position is weakened considerably, and it will not be able to further perform its tasks.

In a democratic society, any new legislation affecting the legal profession is first the subject of consultation with the self-governing bodies of the profession (in most cases with the bar associations or law societies) and the parties endeavour to find a mutually acceptable solution without detrimentally affecting the core values of the legal profession.

We are therefore of the opinion that both the legislator and the government of the Federation of Bosnia and Herzegovina should take into account the special position of lawyers and reconsider the changes. More specifically, we recommend that the government of the Federation of Bosnia and Herzegovina passes a decision pursuant to Article 5 (3) of the Act ("Official Gazette of F BiH" No. 81/2009) to exempt lawyers from their prospective obligation to record the turnover of their services

through fiscal devices such as cash registers. This decision should have the aim of protecting the position of the legal profession in Bosnia and Herzegovina due to the peculiarities of such profession. We urge the legislator and government of the Federation of Bosnia and Herzegovina to consider our comments on the issue in the course of the ongoing discussions, preferably with the involvement of the Bar Association of the Federation of Bosnia and Herzegovina, with due respect to the core values and basic principles of the legal profession.

The UIA and the CCBE will be pleased to further assist in contributing to a solution of the problem.

Yours sincerely,



Jose-Maria Davó-Fernández
CCBE President



Corrado De Martini
President of the Union Internationale des Avocats

CC.:

Mr Feliks Vidović
Minister of Justice of the Federation of Bosnia and Herzegovina

Mr Vjekoslav Bevanda
Minister of Finance of the Federation of Bosnia and Herzegovina