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Representing Europe's lawyers

CCBE RESPONSE TO THE EUROPEAN COMMISSION DRAFT CODE OF CONDUCT FOR INTEREST REPRESENTATIVES

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 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 six European countries' bars. The CCBE responds regularly on behalf of its members to policy consultations which affect European lawyers.

Following the request of the European Commission to propose specific amendments to their Draft Code of Conduct for Interest Representatives, this paper begins with a general explanation of the CCBE position, and specific amendments to the draft Commission text follow.

II. The CCBE Position

1. The code of conduct for Interest representatives

A code of conduct for interest representatives will raise problems for the legal profession, since lawyers are already regulated by national codes of conduct which are widely acknowledged to impose high standards on lawyers, particularly in relation to confidentiality and professional secrecy. We believe that any code for lobbyists which might apply to lawyers would inevitably be subordinate to lawyers' own codes. For example, in some EU jurisdictions, client confidentiality cannot be waived at all by law. In addition, the existing problem of conflict of rules for lawyers providing services in more than one jurisdiction would be worsened if a new code would apply additionally to those lawyers who are already bound by codes of conduct from different jurisdictions.

It should further be noted that a cross-border Code of Conduct already exists for European lawyers (see CCBE Code of Conduct for European lawyers http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/2006_code_enpdf1_1182240432.pdf) Further reference needs to be made to the CCBE Charter of core principles of the European legal profession (http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/Charter_of_core_prin1_1183986811.pdf) which contains a list of ten principles which have been identified as common to the whole European legal profession. Among the principles figure lawyers' independence, confidentiality and avoidance of conflicts of interest, all of which the European Court of Justice recognised notably in the *Wouters* case (C-309/99). The Charter is intended to encapsulate principles which apply both domestically and cross-border.

We are pleased to note that the Commission has already indicated that any set of professional rules for the activity of interest representation would be subordinate to professional codes of conduct for lawyers deriving from statute or other delegated power from national government.

2. The definition of lobbying

It is generally acknowledged that client confidentiality is a core value of the professional code of conduct for all lawyers in the EU, and recognised by the European Court of Justice (see *Wouters*, Case C-309/99). Client confidentiality is enforced in different ways in the Member States, but its breach could involve criminal sanctions for the lawyer concerned.

It appears that the European Commission and public at large share the view that post-law interest representation by lawyers - i.e. all activities where lawyers are involved in individual cases for clients regarding the direct application of existing Community law - is subject to lawyers' deontological rules only, and should not be considered as falling within the European Transparency Initiative. This includes every representation of a client by a lawyer in a matter which may proceed before a court,

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tribunal, enquiry or in litigation: in other words, both cases before EU institutions, and transactional work. Casework activities are already governed by numerous procedural rules, and lawyers are governed by their own strict deontology and in particular by the rules on client confidentiality and professional secrecy. The CCBE also firmly holds that these exemptions should apply to all lawyers, including in-house counsel who are members of a Bar or Law Society and therefore subject to professional obligations of confidentiality under national rules.

As regards the distinction between pre-law and post-law actions, the CCBE has certain hesitations, because judicial review before the European Court of First Instance of a Community act may well lead to an on-going debate with the European Commission as to whether new acts can be taken which mitigate the alleged negative effects of the original act.

However, the CCBE would like to underline that even if it were to accept a definition of pre-law interest representation which includes lawyers, certain activities should be exempted, namely those which are the ordinary duties of a lawyer in carrying out individual casework on behalf of a client, or those which are carried out in the public interest and not on behalf of a particular client. The CCBE believes that the exemption proposed by the Commission (*“exclude activities performed by independent members of the professions providing legal advice, such as lawyers, insofar as such activities relate to the exercise of the fundamental right to a fair trial of a client, including the right of the defence in administrative proceedings”*) is far too narrow, and does not cover all the relevant professional activities of lawyers which should be exempted.

Accordingly, the CCBE would propose the following changes to the preamble of the Draft Code of Conduct for Interest Representatives with regard to

- the application of the code to professions which are already regulated by a high standard of specific professional rules and
- the definition of lobbying.

DRAFT CODE OF CONDUCT FOR INTEREST REPRESENTATIVES

Interest representation is a legitimate part of the democratic system. The European Commission, as part of its effort to enhance public confidence and trust, has established a voluntary register to bring more transparency to interest representation, its actors and their activities.

The present Code of Conduct contains a set of basic rules, specifying how interest representatives should behave when representing their interests.

For the purposes of this Code, "interest representation" is defined as the activities carried out with the objective of influencing the policy formulation and decision-making processes of the European institutions. This definition excludes ~~activities performed by independent members of professions providing legal advice, such as lawyers, in so far as such activities relate to the exercise of the fundamental right to a fair trial of a client, including the right of the defence in administrative proceedings.~~

- a) all activities carried out by a lawyer in the sense of Directive 77/249/EEC and Directive 98/5/EC in connection with any representation of a client in judicial, quasi-judicial, administrative, disciplinary and other proceedings;
- b) all activities concerning legal advice in the context of the political and decision making processes of the European Institutions;
- c) all responses following a request by the European Institutions.

Lawyers who are already bound by codes of conduct which aim to uphold high standards of integrity on the part of the professional are subject to this Code only to the extent that it is not inconsistent with their existing code of conduct.

PRINCIPLES

Interest representatives are expected to behave in line with the principles of openness, transparency, honesty and integrity, as expected of them by the citizens in a democratic system. The Commission considers that those who register in its public register accept to comply with these principles.

Similarly, Members of the Commission and the staff of the European institutions are bound by strict rules ensuring their impartiality. The relevant provisions are contained in the Treaty establishing the European Communities and the Staff Regulations.

RULES

In their representation activities as defined above, interest representatives shall:

1. identify themselves by name and by organisation.
2. declare the clients and the interests they represent to the members of the European institutions they meet.
3. ensure that information provided to the EU institutions is accurate, complete and up to date to the best of their knowledge.
4. not obtain or try to obtain information dishonestly from the EU institutions.
5. not induce EU officials to contravene standards of behaviour applicable to him or her.
6. if employing former EU officials, respect their obligation to abide by the rules and confidentiality requirements which apply to them.

OTHER PROVISIONS

- **Registration:** Registration implies the acceptance of this Code.
- **Breaches of the Code:** Registrants are informed that breaches of the above rules may lead to suspension or exclusion from the Register.
- **Complaints:** Signatories should be aware that the citizens have the possibility to lodge a complaint about a suspected breach of the rules set out in this Code.
- **Publication of contributions and other documents:** Interest representatives are informed that their contributions to public consultations will be published on the internet together with the identity of the contributor, unless the contributor objects to publication of the personal data on grounds that such publication would harm his or her legitimate interests. Upon request on the basis of Regulation (EC) No 1049/2001 on access to documents, the Commission may have to disclose correspondence and other documents surrounding the interest representatives' activities.