Représentant les avocats d'Europe
Representing Europe's lawyers

CCBE response on some of the recommendations made in the report of the Committee Van Wijmen

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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 some of the recommendations made by the Committee Van Wijmen in its analysis of the role and position of the lawyer in the state of law and legal order and the functioning of the Bar. This report, which has been prepared at the request of the Dutch Minister of Justice, constitutes an analysis of the legal services market in the Netherlands, the functioning of the Bar and the profession itself. Although the report is limited to the Dutch legal market, there are a number of observations which can be made more generally and which could also apply to other national markets for the legal profession.

In this paper reference will be made to relevant CCBE position papers that have already been issued. The CCBE will address more specifically its concerns with regard to some recommendations in the report and the order of the report will be followed.

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. Preliminary comments[1]

Reference is made to a number of international and European instruments which recognise the role of the legal profession within society and the values which are inherent to the legal profession: Council of Europe Recommendation Nr. R Rec(2000) 21 on the freedom of exercise of the profession of lawyer (and the Explanatory Memorandum thereto) adopted by the Committee of Ministers on October 25, 2000, the United Nations Basic Principles on the Role of Lawyers endorsed by the General Assembly of the United Nations in December 1990, 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; 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 2001 (B5-0247/2001); European Parliament resolution on "Market regulation and competition rules for the liberal professions" of 16 December 2003 (P5_TA(2003)0572) and especially the European Parliament resolution on the legal professions and the general interest in the functioning of legal systems of 23 March 2006 (P6_TA-PROV(2006)0108). The CCBE views its following comments to be in conformity with these documents.

<u>The role of a lawyer in society</u>

Lawyers have a vital role in the administration of justice and in maintaining the rule of law, both of which are essential foundations of a democratic society. The CCBE wishes to describe such role by following the Explanatory Memorandum of the Council of Europe Recommendation and quoting Article 1.1 from the CCBE Code of Conduct for Lawyers in the European Union:

1.1 The Function of the Lawyer in Society

In a society founded on respect for the rule of law the lawyer fulfils a special role. His duties do not begin and end with the faithful performance of what he is instructed to do so far as the law permits. A lawyer must serve the interests of justice as well as those whose rights and liberties he

[1] See the CCBE response on the Clementi consultation paper: www.ccbe.org/doc/En/ccbe_response_clementi_040604_en.pdf.

is trusted to assert and defend and it is his duty not only to plead his client's cause but to be his adviser. A lawyer's function therefore lays on him a variety of legal and moral obligations (sometimes appearing to be in conflict with each other) towards:

- the client;
- the courts and other authorities before whom the lawyer pleads his client's cause or acts on his behalf;
- the legal profession in general and each fellow member of it in particular; and
- the public for whom the existence of a free and independent profession, bound together by respect for rules made by the profession itself, is an essential means of safeguarding human rights in face of the power of the state and other interests in society.

This vital role of a lawyer in the administration of justice, and in maintaining the rule of law, is the reason why in most, if not all, countries in Europe, and in many countries outside Europe, lawyers are referred to as an instrument of justice or 'instrument de justice' or officer of the court or similar term. Seen historically, lawyers have in many such countries been instrumental in creating a free, democratic society that is based on the rule of law and that recognises the fundamental rights of its citizens vis-à-vis their government. This is why in a number of these countries the principle of "free advocacy" – meaning that, as a matter of principle, there should be no government interference in the activities of a lawyer – and the core values of the legal profession (see below) are protected by the constitution itself.

III. Core Values

As already mentioned in various CCBE-position papers[2], some of the core values of the legal profession are: independence, absence of conflicts of interest, and professional secrecy/confidentiality. This list 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 so-called 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 the before-mentioned European and international instruments which relate to the legal profession.[3]

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

[2] CCBE-position paper on Non-Lawyers Owned Firms (www.ccbe.org/doc/En/ccbe_position_on_non_lawyer_owned_firms_en.pdf), Regulatory and Representative Functions of Bars (www.ccbe.org/doc/En/ccbe_position_on_regulatory_and_representative_functions_of_bars_en.pdf and Multi-Disciplinary Partnerships (www.ccbe.org/doc/En/ccbe_position_on_mdps_en.pdf).

[3] Council of Europe Recommendation Nr. R Rec(2000) 21 on the freedom of exercise of the profession of lawyer (and the Explanatory Memorandum thereto) adopted by the Committee of Ministers on October 25, 2000, the United Nations Basic Principles on the Role of Lawyers endorsed by the General Assembly of the United Nations in December 1990, 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; 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 2001 (B5-0247/2001); European Parliament resolution on "Market regulation and competition rules for the liberal professions" of 16 December 2003 (P5_TA(2003)0572) and especially the European Parliament resolution on the legal professions and the general interest in the functioning of legal systems of 23 March 2006 (P6_TA-PROV(2006)0108).

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 core values of the legal profession should be seen primarily not as rights of the lawyer but rather as obligations. A lawyer is under the obligation to see to it that his or her independence is not interfered with either by government or client; he or she is under the obligation to avoid conflicts of interest and to protect professional secrecy/confidentiality. Violation of such core obligations is, in some Member States, not only a professional violation but also a criminal offence.

The CCBE would like to underline the importance of these values being safeguarded in states across Europe and therefore fully approves the recommendation of the Committee to include core values in the Dutch Act on Advocates.

IV. CCBE Views on regulatory functions of bars[4]

In chapter III of the report it is recommended that a Regulatory Council for the Advocacy will be entrusted with the regulation of the lawyers. The General Council and the Assembly of Delegates will only have an advising role. The CCBE would like to comment on this recommendation as follows.

Self-regulation is most often used to describe systems where an industry or profession regulates its own affairs. Hence the rules which govern the market are developed, administered and enforced by the people whose behaviour is to be governed. The regulatory structure of the legal profession in Europe varies from country to country, but self-regulation is characteristic for the legal profession in Europe, even though no country has total and unrestricted self-regulation of the legal profession. However, there is in all European countries which are members of the CCBE a significant extent of self-regulation. 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. The principle of self-regulation is nothing less than a structural defence of the independence of the individual lawyer which requires a lawyer to be free from all influence, especially such as may arise from his/her personal interests or external pressure. After all, such individual independence can be unduly interfered with not only by individual measures but also by regulation. Thus, individual and collective independence are twin values which serve to ensure the role of a lawyer in society as outlined above.

Of course, the principle of self-regulation in the sense of collective independence is not absolute, but has the limits set by the national laws. Where these limits are, and how far regulation by government may go, is different from country to country. The extent of government regulation in some countries is greater, in others it is smaller. However, all countries which are members of the CCBE respect that there must be due scope for self-regulation of the profession. Thus, the principle of self-regulation, i.e. collective independence, is embedded in a complex system of different considerations, too, just like the principle of individual independence. Careful attention must be given that the balance is not turned over too far in the direction of government regulation, since otherwise the role of the legal profession in society would be endangered.

These comments apply not only to government regulation but also to regulation by third parties authorised by government to regulate or to participate in regulation. This alternative is not different from government regulation so far as the principle of self-regulation of the legal profession is concerned: The risks for independence – both collective and individual – are the same. Indeed, the involvement of third parties in regulation of the legal profession poses an additional and serious problem with regard to the role of a lawyer in society. The government, when regulating the

[4] These views are mentioned in the CCBE-response on the Clementi consultation paper (see under footnote 1), in the CCBE-position paper on regulatory and representative functions of the bar (see under footnote 2) and in the CCBE economic submission to commission progress report on competition in professional, see: www.ccbe.org/doc/En/ccbe_economic_submission_310306_en.pdf

profession, is bound by the directions given by parliament, and is responsible to parliament as the ultimate democratic sovereign elected by the electorate. It is necessary that when third parties also participate in regulation, these principles are complied with, i.e. directions must be given to them by parliament, and they must ultimately be accountable to parliament. Otherwise, there would be a serious deficit in representative democracy.

Diligent attention should be given to the level at which self-regulation of the profession is subjected to oversight. There would be no problem if oversight is limited to legality. However, if oversight is not merely an oversight for legality but also an oversight for suitability and (political) appropriateness, risks for the (collective) independence of the legal profession are likely. If self-regulatory power is given to the profession only "on probation", and if the recall of such power is left to the political decision of the overseeing governmental body without parliament being involved, such regulatory structure would be difficult to reconcile with the role of a lawyer in society and with the principle of free advocacy.

The CCBE finds support for the foregoing comments in Principle V (Associations) of the Council of Europe Recommendation and in the Explanatory Memorandum thereto where it is stated that lawyers can only fully play their role in a State based on the Rule of Law if bar associations are independent, in particular from the State and economic pressure groups. In addition, the United Nations Basic Principles on the Role of Lawyers, in Article 24, say that lawyers are "entitled to form and join self-governing professional associations to protect their professional integrity" which term encompasses independence. The Explanatory Memorandum of the Council of Europe Recommendation, on the other hand, recognises that there is also a role for government to intervene in the regulation of lawyers where that is really necessary in order to safeguard the public interest. However, it is the opinion of the CCBE, as stated above, that in this respect a careful balance must be established so that the core values of the legal profession are not put at risk through the regulatory structure, and that the principle of democratic representation is complied with.

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. As already mentioned, self-regulation must be seen as a corollary to the core value of independence as it 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 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.

Even though this is not an issue in the report 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". It should be noted that national regulations/systems are embedded in a specific national context.

In the report of Copenhagen Economics it is stated that there are a number of clear advantages which speak in favour of self-regulation of the legal profession.[5] According to Copenhagen Economics, lawyers, given their special knowledge of the profession/business, are in the best position to lay down the requirements for a lawyer's work. Lawyers will feel greater responsibility for regulation if they are involved in the process of regulation. It is also easier to change rules that are adopted via self-regulation than modifying rules via legislation. The results of this are: lower administration costs for professional associations/authorities, greater acceptance of the rules (since they come from within the profession), better compliance and lower compliance costs for the firms. Lawyers are also in the best position both to observe and evaluate professional misconduct and assist the profession in sanctioning it. Lawyers will have an interest in maintaining a good reputation of the profession, and therefore will strive to ensure that lawyers live up to the requirements of the code of conduct.

V. Representation in Court[6]

In chapter III of the report it is recommended that the lawyers' exclusive rights of audience in court, where such rights exist, continue to exist. The CCBE fully approves this recommendation, although the CCBE is aware that the lawyers' exclusive rights of audience in court, where such rights exist, is often seen as limiting competition since it prevents non-lawyers from taking cases to courts.

As with qualification requirements above, the CCBE believes it is important to look at the objective of legislation which provides for such rights. Lawyers who are qualified to appear in court serve the interest of the administration of justice best. They are qualified to deal efficiently with the rules of procedure and representation, which are designed to ensure a smooth functioning of the legal system. This will be of benefit to consumers who are ensured qualified advice on a market where the consumer finds it difficult to assess whether advice is good (asymmetric information), and indeed to society as a whole if cases are brought more efficiently and with a sound outcome.

Copenhagen Economics concluded in their report that *"abolishing the monopoly will only have a limited impact on competition, but it could induce economic losses. The courts' costs will increase when more cases are taken to court, and rulings can distort the case law."* Copenhagen Economics expect that clients would use other advisers in particular for cases of less importance and less complexity whereas lawyers would probably keep the market of large, important and more complex cases. Although at first glance it may be advantageous from an economic point of view, according to Copenhagen Economics, that other advisers come on the market, since the increased competition will lead to lower prices and more choice for consumers, Copenhagen Economics also notes that these advantages are of lesser benefit in a market with asymmetric information where consumers find it difficult to assess the quality of work. In addition, Copenhagen Economics found that there is a risk that clients take more cases to court than optimal for society from an economic point of view, given that only part of the courts' costs are paid by the parties. One would also need to take into account that new and less experienced advisers (compared to lawyers) could mean more errors (unsatisfactory legal representation) and more work for the courts. This could even lead to "wrong judgements". Bad legal precedents affect not only the parties involved in the specific matter, but also have an influence on matters of principle dealt with by the courts.

Competition among lawyers on litigation work is already fierce and there are no signs of 'market failures' in this respect.

5 In Denmark a committee set up by the Ministry of Justice investigates the rules regulating the legal profession. The Danish Bar and Law Society has asked Copenhagen Economics to carry out an economic analysis of the consequences of liberalising the legal profession the investigation in the light of this. See: http://www.copenhageneconomics.com/publications/The_legal_profession.pdf

6 As already stated in the CCBE economic submission to commission progress report on competition in professional services (see under footnote 3).

Finally, the CCBE notes that Finland, which has no restrictions on who can appear in court on behalf of others, is currently considering introducing exclusive rights for lawyers, as it has been recognised that the quality of representation in court has been poor.

VI. CCBE Views On Non-Lawyer Owned Firms

In chapter IV of the report it is recommended that the majority of the board of a law firm should exist of lawyers. The CCBE fully supports this recommendation. In the in June 2005 issued position paper on Non-Lawyer Owned Firms issued in June 2005 the CCBE stated that it strongly believes that there are overriding non-economic reasons which go beyond the purely economic arguments and which clearly speak against the introduction of such business structures.[7]

The CCBE came to the conclusion that non-lawyer owned firms bring in their train severe problems arising out of the potential conflict with the core principles of the legal profession, i.e. independence, confidentiality and avoidance of conflicts of interest. It should be noted that non-lawyers are not per se bound by the same duties as lawyers. The difference of duties between lawyers and non-lawyers could lead to conflicts, with lawyers being put under pressure to comply with certain tasks imposed by the outside owners contrary to these core principles, and eventually to the detriment of the clients and society as a whole.

The CCBE recognises that the term “non-lawyer owned firms” covers a range of situations from the case where a non-lawyer inherits the shares of his/her dead spouse/parent in a law firm (which is not a situation covered by this paper) to where a finance or IT director is made a partner in a firm to the full listing of the firm on the stock market. There are also further distinctions to consider such as management/ownership and minority/majority participation in the firm.

Outside investment in law firms is not generally permitted anywhere in Europe. This is not because none has thought of them, but because they bring in their train severe problems, and are generally considered to be in conflict with the core principles of the legal profession, i.e. independence, confidentiality and avoidance of conflicts of interest. Non-lawyers are not per se bound by the same duties as lawyers. The difference of duties which lawyers and non lawyers would be subjected to can effectively lead to conflicts, with lawyers being put under pressure to comply with certain tasks imposed by the outside owners which would be contrary to these core principles and which could eventually be to the detriment of the clients.

As stated above, independence requires a lawyer, in the interest of his/her clients, to be free of all influence, especially such as may arise from his/her personal interests or external pressure. It is thought that the introduction of outside ownership to an otherwise independent law firm would remove that independence, since outside owners might have a specific economic interest in certain cases and try to influence the handling of a case to the detriment of the lawyer’s duties versus his/her clients. Outside ownership would also entail a risk for the lawyer’s duty to avoid any conflict of interest. The owner might have a specific interest in a case, and the client being represented by a lawyer might have a different one. The lawyer is bound to protect the interest of the client. However, in a situation of outside ownership, there may come pressure from the outside owner which would put the lawyer in a delicate situation with conflicting interests at client/owner level.

The right of an individual for protection of confidences between him/her and the lawyer which may also be at stake, given that there may be a flow of information between the outside owner (who is not subjected to any professional secrecy/confidentiality duty) and the lawyer dealing with this issue. The CCBE would also like to refer in this context to its position on “integrated forms of co-operation between lawyers and persons outside the legal profession” of 12 November 1999. Although, this position deals with multi-disciplinary partnerships and not non-lawyer ownership the principles might be considered similar. Therein the CCBE held that the lawyers’ duties to maintain independence, to avoid conflicts of interest and to respect client confidentiality are particularly endangered when lawyers exercise their profession in an organisation which, factually or legally, allows non-lawyers a relevant

[7] This position has already been issued in the CCBE-position papers on Non-Lawyers Owned Firms (see under footnote 2).

degree of control over the affairs of the organisation. This is because lawyers and non-lawyers are subject to differing professional duties and different rules of conduct. In the case of non-lawyer ownership one would be in the presence of such a control over the affairs of the organisation which could cause dangers to professional duties.

Where non-lawyer ownership of law firms is discussed, it has usually been under certain conditions, by establishing some safeguards regarding 'fitness to own' on the part of the non-lawyer. However, the question is whether such safeguards are enough, and indeed whether any safeguards other than an outright ban are enough. Even if lawyers can be trusted, inadvertent disclosures or conflicts cannot be prevented. The experience of such safeguards in the area of press ownership has shown that powerful individuals can circumvent them, and that unhealthy concentrations of power and influence are created over both content and outlets.