



Représentant les avocats d'Europe
Representing Europe's lawyers

CCBE Position on Multi-disciplinary Partnerships (MDPs)

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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 multi-disciplinary partnerships 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 multi-disciplinary partnerships (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 interest, and professional secrecy/confidentiality – and also found that these core values do qualify as

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>.

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.

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 –

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.

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 Multi-disciplinary Partnerships (MDPs)

The questions which are related to multi-disciplinary practices, i.e. practices which bring together lawyers and other professionals (non-lawyers) to provide legal and other services to third parties, have been considered by the CCBE on several previous occasions, with the CCBE being aware that the regulation of MDPs requires a delicate balancing of interests, economic and non-economic, made more difficult by the fact that the interests concerned are serious and legitimate.

The CCBE would like to take this opportunity to reaffirm its views as set out in its position on “integrated forms of co-operation between lawyers and persons outside the legal profession” of 12 November 1999¹³, and also refer to the CCBE Code of Conduct (2002) rule on fee sharing with non

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.

¹³ The CCBE position on MDPs is available at the following website address: <http://www.ccbe.org>.

lawyers. Besides, the CCBE would like to recall the main import of the European Court of Justice decision in the case *Wouters* (C-309/99) of 19 February 2002.

In its position of 1999, the CCBE held that, whilst recognising in principle the freedom of economic activity and provision of services, the lawyers' duties to maintain independence, to avoid conflicts of interests 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 degree of control over the affairs of the organisation. Interests conflicting with the stated duties of lawyers, arising from the concerns of the non-lawyers involved, may directly influence the organisation's aims or policies. The CCBE came to the conclusion that the problems inherent in integrated co-operation between lawyers and non-lawyers, with substantially differing professional duties and different rules of conduct, present obstacles which cannot be adequately overcome in such a manner that the essential conditions for lawyer independence and client confidentiality are sufficiently safeguarded. In those countries, however, where such forms of co-operation are permitted, the CCBE notes that this is only possible because the other professions which are part of the co-operation have compatible core values. Lawyer independence, client confidentiality and disciplinary supervision of conflicts-of-interests rules must be safeguarded.

In addition to the MDP position, the CCBE provides in its Code of Conduct (2002) for fee sharing with non-lawyers. According to Article 3.6 of the CCBE Code of Conduct, a lawyer may not share his / her fees with a person who is not a lawyer except where an association between the lawyer and the other person is permitted by the laws of the Member State to which the lawyer belongs.

Finally, the CCBE would like to refer to the European Court of Justice judgment in the case of *Wouters* of 19 February 2002 already referred to above, where the Court found that the Dutch Bar rules prohibiting MDPs between members of the Bar and accountants were compatible with the treaty. In the view of the Court, the obligations of professional conduct imposed on lawyers, who must advise and represent their clients independently, may militate against that kind of partnership. The Court found that there may be a degree of incompatibility between the 'advisory' activities carried out by a lawyer and the 'supervisory' activities carried out by an accountant. Accountants, who perform a task of certification of accounts, are not, in the Netherlands, subject to a duty of secrecy comparable to that of members of the Bar. That being so, it was reasonable for the Netherlands rules to impose binding measures, despite the effects entailed which are restrictive of competition, because those measures are necessary for the proper practice of the legal profession. The CCBE welcomed the decision as the right one to protect both the public and good governance under the rule of law.