



CCBE RESPONSE TO EUROPEAN COMMISSION PROPOSAL TO AMEND REGULATION (EC) No 1060/2009 ON CREDIT RATING AGENCIES

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

association internationale sans but lucratif

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The Council of Bars and Law Societies of Europe (CCBE) is the representative organisation of around 1 million European lawyers through its member bars and law societies from 31 full member countries, and 11 further associate and observer countries.

The CCBE has been following very closely European Commission initiatives in tackling the financial crisis. The CCBE welcomes these efforts, but we are concerned that some of the initiatives do not take account of lawyers' position within the administration of justice, and the rules of professional secrecy and legal professional privilege to which lawyers across Europe are subject.

Professional secrecy and legal professional privilege, as they are called – they describe rights of clients to enable them to consult a lawyer with guaranteed confidentiality – are known in both the civil and common law systems, and indeed in every democratic system run under the rule of law around the world.

The recently proposed amendments to Regulation (EC) No 1060/2009 on credit rating agencies would make it impossible for clients to consult a lawyer in full confidence¹. It is a step backwards compared to the present Regulation as the person who is subject to supervisory and investigatory procedures by the European Securities and Market Authority (ESMA) is not assured that these procedures are carried out in respect of his or her rights of defence, including guarantees provided by rules on professional secrecy and legal professional secrecy. Regulation (EC) No 1060/2009 makes specific reference to professional secrecy/legal professional privilege in recital 63^[1] and in addition Article 23 of the Regulation, which deals with the powers of competent authorities, requires national authorities to comply with national law when exercising their supervisory powers^[2]. The proposed amendments to Regulation (EC) No 1060/2009 would give ESMA unlimited access to information and documentation. They depart from the principle of respect for privacy and confidentiality of communications (Articles 7 and 8 of the Charter of Fundamental Rights of the European Union and of Article 8 of the European Convention on Human Rights) as well as the right to the protection of personal data (Article 8 of the Charter of Fundamental Rights of the European Union).

The CCBE would like to emphasise that this is not about defending the interests of lawyers but rather about safeguarding the administration of justice and the rule of law. The right to consult a lawyer in order to ask advice should always be provided on the basis that the client is assured that what is said to the lawyer, and the advice of the lawyer whether in writing or orally, remain confidential. This is part of fundamental freedoms and rights.

The CCBE therefore supports the following amendment to recital 12 of the proposed amendments:

1 COM(2010) 289 final

[1] Recital (63) Unless this Regulation provides for a specific procedure as regards registration, certification or withdrawal thereof, the adoption of supervisory measures or the performance of supervisory powers, the national law governing such procedures including linguistic regimes, professional secrecy and legal professional privilege, should apply and the rights of the credit rating agencies and other persons under that law should not be affected.

[2] Article 23 (para 3)

In order to carry out their duties under this Regulation, the competent authorities shall, in conformity with national law, have the power in their supervisory capacity to:

- (a) access any document in any form and to receive or take a copy thereof;
- (b) demand information from any person and if necessary to summon and question a person with a view to obtaining information;
- (c) carry out on-site inspections with or without announcement; and
- (d) require records of telephone and data traffic.

Commission proposal	CCBE proposed amendment
Recital (12)	Recital (12)
<p>In order to effectively exercise its supervisory powers, the European Securities and Markets Authority should have the right to conduct investigations and on-site-inspections. When exercising its supervisory powers, the European Securities and Markets Authority should give the persons which are subject to proceedings an opportunity of being heard in order to respect their rights of defence.</p>	<p>In order to effectively exercise its supervisory powers, the European Securities and Markets Authority should have the right to conduct investigations and on-site-inspections. <i>When exercising its supervisory and investigatory powers, the European Securities and Market Authority should conduct its proceedings with full respect to the rights of defence of the persons and credit rating agencies which are subject to those proceedings and professional secrecy and legal professional privilege applicable in the home Member State of such persons and credit rating agencies should not be affected.</i></p>
	<p>Justification</p> <p>Professional secrecy/legal professional privilege of lawyers is a generally recognized principle in all Member States (1). Everyone has the right to consult a lawyer in order to ask advice which is provided on the basis of strict confidentiality. The obligation of a lawyer to professional secrecy serves the interest of judicial administration. The European Court of Justice in the AM&S case (2) and the Wouters case (3) expressed the importance of professional secrecy/legal professional privilege for the maintenance of the rule of law. A competent authority with the powers provided for in the proposed amendments would seriously undermine professional secrecy/legal professional privilege.</p> <p>(1) Judgment of the Court of 19 February 2002, Case C-309/99, Wouters and others v. Algemene Raad van de Nederlandse Orde van Advocaten, [2002] ECR 1577.</p> <p>(2) Judgment of the Court of 18 May 1982, Case C-155/79, AM & S Europe Limited v. Commission, [1982] ECR 1575.</p> <p>(3) See footnote 1 above.</p>