

QUESTIONING IN-HOUSE LAWYERS' INDEPENDENCE IS DAMAGING EU COMPETITIVENESS

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The European Court of Justice's view on in-house lawyers is splitting the legal profession, and adversely affecting company lawyers' careers, says Philippe Coen

The assertion that in-house lawyers are not independent because they are employees of the company they serve is nonsense. Indeed, the fact that this view is held has severe and negative consequences for in-house lawyers and the companies themselves. The European Court of Justice (ECJ) in the 2010 Akzo case confirmed that, for legal professional privilege to apply at an EU level, a client's exchange with the lawyer must emanate from "independent lawyers". With regard to the independence requirement, the ECJ defines this as "the absence of any employment relationship between the lawyer and his client". Consequently, according to the ECJ, a company lawyer's economic dependence and close ties with the company – that is, as the lawyer's employer – puts the lawyer in a different position to that of an external lawyer.

This stance has an impact on EU competitiveness in relation to the rest of the world and it also undermines the position of legal departments within companies. It means legal privilege cannot protect companies and that they could incriminate themselves. It also means that, in France and Italy for example, you cannot be a member of the bar if you are an in-house lawyer. As a result, companies in, say, France are incentivised to hire a French lawyer in London or Madrid, for example, rather than a French lawyer in Paris.

A total of 17 of the 28 EU countries accept company lawyers as full bar members and therefore legal privilege applies with regard to their clients. However, 15 out of the 40 companies on the France stock market, CAC 40, have foreign lawyers. The view that in-house lawyers are not independent is having an impact on company lawyers' careers and prospects for promotion.

Meanwhile, the rules in Europe are incompatible with those around the rest of the world. In the US, for example, an in-house needs to be part of the bar. Yet, if lawyers join companies in France, for example, they have to technically endure a suspension from the bar. It can have a negative effect in terms of career progression if a lawyer has to effectively drop a qualification. There are more voices from the bar opposing the ECJ's view than supporting it. Many voices think the allegation is groundless, and it is concerning that, in 2014, this belief – that company lawyers are not independent – is held.

EU law on this issue is ill-minded. It increases legal uncertainty when legal professional privilege does not apply because when you want to get advice you have to open your books – how do you perform anti-trust compliance is an element of this is proof of your non-compliance?

A shock for lawyers

This is why we, at the European Company Lawyers Association, produced the white paper, European Company Lawyers: Independent by Design. The aim of this paper is to convince, explain and advocate with regard to the issue of company lawyers and their independence. As yet, we have been unable to persuade people at an EU level of the veracity of our argument. However, the perception that company lawyers are not independent is splitting our profession in two. When I talked about this issue at events in Madrid and Lisbon, lawyers were shocked – they protested: "We are one profession."

It is flabbergasting. Company lawyers are not expected to write what the boss wants us to write. However, we have not been responsive enough in countering this argument, but we are convinced of our view and we are beginning to make progress. All the arguments backing our assertion are found in the white paper – we have proved our position is the correct one.

One day, there will be justice, companies will recover and legal culture will become part of companies. The benefits for companies of in-house lawyers being recognised as independent will be numerous. One day we will prevail and EU companies will be able to compete on a global scale without being encumbered with this heavy burden. The economy needs strong companies, and companies will not be strong without a valued and forceful legal department managing the compliance and citizenship of the company in accordance with a high level of ethics – specifically, this means an independently minded legal department that remains a business partner and close adviser. We must put an end to this ever harming denial of the recognition of the independence of company lawyers in Europe.

Philippe Coen is president of the European Company Lawyers Association