European Company Lawyers Review 2024/25

40th Anniversary Edition

Company Lawyers: Independent by Design

The European Company Lawyers Review provides a comprehensive overview of the status of the profession of company lawyers and the status of professional confidentiality for lawyers across Europe. It shares valuable data and details on the situation of company lawyers in more than 25 countries. Renown experts share their opinions on recent developments in various European jurisdictions.

As a yearbook for the European Company Lawyers Association (ECLA) it also offers insights on the work of the umbrella association and its member associations.

European Company Lawyers Review 2024/25

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40 YEARS
EUROPEAN COMPANY
LAWYERS ASSOCIATION

Marcus M. Schmitt
Jonathan Marsh

European Company Lawyers Review 2024/25

co-edited by
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Legal Professional Privilege in the European Union

Jonathan Marsh
President of the European Company Lawyers Association

Protecting the confidentiality of professional legal advice is one of the core principles underpinning the rule of law. However, legal professional privilege (LPP) as we know it from common law jurisdictions like the United Kingdom or the United States, is not formally enshrined in the EU treaties, but almost entirely based on the case law of the Court of Justice of the European Union (ECJ).

However, the Court has long recognised that certain communications between outside counsel and their clients may be protected by LPP under certain conditions and cannot be used as evidence in infringement investigations, meaning that the concept of LPP is being applied at EU level, too. The ECJ has nonetheless explicitly excluded in-house lawyers from the protection of legal professional privilege, the most pertinent ruling in this respect being the Akzo Nobel v. Commission case of 2010. Later judgments have provided some exceptions, but the regime as a whole has remained static.

What is legal professional privilege?

It is worth noting that the term "legal professional privilege" is specific to common law jurisdictions, and indicates a long-standing legal principle that protects communications between a professional legal advisor and their client from being disclosed to third parties, including investigative and judicial authorities. Civil law jurisdictions on the other hand usually refer to the principle of "professional secrecy", which designates the obligation on the part of legal professionals to ensure that their clients' confidential information is kept from disclosure to third parties.

While both principles serve the same general purpose of protecting an individual's right to access to the justice system by encouraging clients to disclose all relevant information to their counsel without fear of repercussion, some differences between the two concepts should still be taken into account.

Notably, while legal professional privilege in common law countries usually finds its footing on judicial precedents tracing back several centuries, in civil law jurisdictions the duty of professional secrecy is normally regulated by current laws governing the activities of legal professionals and/or by national criminal and procedural regulations.

Moreover, as its name indicates, professional secrecy is an obligation borne by legal advisors as a direct result of their professional statute, while under traditional LPP doctrine the privilege is that of the client and not of the lawyer, meaning that it is usually a client's prerogative to forgo protection should they wish to do so.

Having said this, because the purpose of this Yearbook is not to analyse the various interpretations of legal confidentiality, but rather to provide a comprehensive overview of the current status of the in-house profession across Europe, the terms "legal professional privilege", "in-house professional privilege", "professional secrecy" and "professional confidentiality" will hereinafter be used interchangeably to indicate the general possibility – or lack thereof – for internal counsel to have their legal advice and communications protected from disclosure to investigative and judicial authorities.

Similarly, terms such "company lawyer", "corporate counsel", "internal counsel" and "in-house lawyer" will be used synonymously to indicate individuals employed by a company for the sole or main purpose of providing legal advice.

As the developments presented in this ECLA Yearbook show, the lack of consistency in how in-house lawyers are perceived and regulated across Member States' jurisdictions has resulted in a fragmented regulation of in-house legal privilege both at the national and European level, with particular regard to the field of antitrust and competition law. However, recent developments in key EU Member States, such as Spain and France, have shown that countries have started to realise the negative economic implications that the current regime bring - this was exemplified by the rationale that the French Government put forward in its proposal to amend their regime and to extend LPP to in-house counsel, subject to conditions.

No privilege for in-house lawyers at the EU level

In February 2003, the Commission raided Akzo offices in the UK as part of a cartel investigation. Investigators took copies of numerous documents, including emails between managers and an in-house lawyer. In 2010, the ECJ upheld the Commission's right to review these documents. It notably concluded that only "independent", i. e. external lawyers can enjoy protection of the legal advice they provide. These lawyers must be properly registered in one of the EU Member States.

In-house counsel – even those who are registered with a bar association or law society and are therefore subject to ethical obligations, notably the provision of independent and accurate legal advice – are not protected by LPP. In the Akzo v. Commission ruling, the ECJ concluded that in-house counsel, due to the nature of their employment relationship, were less able to deal with potential conflicts of interest than external counsel.

The European Company Lawyers Association and other interested parties have long advocated for in-house lawyers to be covered by LPP on a European level as well – so far without success. Nevertheless, the significant progess made on national level in the past decade has shown that a pragmatic approach to reform the rules is currently underway.

Moreover, in its rulings, the EU's top court has imposed a further, crucial condition: Client-lawyer communications are only protected if and where they serve the client's right to defend themselves. This means that in antitrust cases, only information that is exchanged after the Commission has initiated its investigation is protected from being used as evidence.

Apart from the communications sent by, or from, the external lawyer to the company, internal notes summarising these exchanges, or working documents drawn up for the purpose of seeking legal advice from an attorney, are also subject to LPP. However, the ECJ held that merely discussing a document with an external lawyer is not sufficient to afford it protection.

In practice, the European Commission applies the case law on LPP in both antitrust and merger control cases, although so far most of the ECJ's jurisprudence refers only to the former field.

In November 2018, the Commission issued a working paper which summarises its application of legal privilege. Every company lawyer should study this document because it contains essential guidance on what to expect and what not to expect if your company becomes the subject of an EU procedure.

Best practices

In the paper, the Commission lawyers make it clear that a number of communications are not considered privileged, including a company's communications with the lawyers of a third party as well as documents that would have otherwise been considered privileged but are discovered by investigators on the premises of a third party. Advice given by other external lawyers (e.g. accountants or patent attorneys) that is not directly related to the rights of defence also does not enjoy protection.

It is also important to highlight that a document containing legally privileged information is not automatically protected; only the sections covering pertinent legal advice are covered. The remaining sections can be used by Commission investigators as evidence.

LPP needs to be proactively claimed vis-à-vis the Commission, and the author and recipient of a document containing legal advice must be notified. It is crucial to make note that the EC working paper on LPP also states that the Commission may share evidence obtained in an antitrust or merger control investigation with member state authorities, thereby bringing this information to the attention of national investigators including in jurisdictions where legal privilege also extends to in-house lawyers and covers non-litigation cases.

The Commission has announced that it is working on a best practice manual for requests for internal documents under the EU Merger Regulation in order to enable companies to comply with the rules in place for claiming legal privilege during investigations. So far, this manual has not been published.

Conclusion

For company lawyers, the current situation regarding legal professional privilege at the European level is not legally certain nor satisfactory, and particular care is needed when advising management on antitrust or merger-related aspects.

Where EU-related competition issues arise, e.g. with respect to trade associations or to joint ventures with other companies, in-house counsel must remain vigilant to the fact that their legal advice could be seized and exploited by EU investigators.

It is high time that EU policymakers address the deficiencies of the current protection of legal professional privilege at the European level and, at the very least, consider extending LPP coverage to qualified in-house counsel who by virtue of their professional qualifications and bar membership status are committed to upholding the highest standards of the legal profession.

The Profession of Company Lawyers in Europe

Marcus M. Schmitt
General Manager of the European Company Lawyers Association

Introduction

The European Union's edifice rests upon the rule of law, a cornerstone and an intrinsic aspect of its sovereignty. At the heart of this principle lies the Legal Professional Privilege (LPP). Through LPP, clients are encouraged to disclose all pertinent information, thus obtaining comprehensive legal counsel without inhibitions. This promotes a "full and frank communication", essential for the effective functioning of the justice system.

However, the universal applicability of LPP, especially for in-house lawyers, remains a topic of contention within the European legal realm. While a significant majority of the European Economic Area (EEA) member states and most Organization for Economic Co-operation and Development (OECD) countries acknowledge LPP, discrepancies persist, notably in key European nations such as France and Italy. It should be noted however, that France, with its July 2023 governmental proposal for an amendment, seeks to remove itself from this list.

This disparity can potentially undermine the EU's overarching commitment to the rule of law, impacting not only its sovereignty but also its competitive stance in the global marketplace.

Constitutionally, the rights to defense, a fair trial, and the liberty to select one's trusted legal counsel are enshrined in the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights. These documents do not discriminate between external and internal legal counsel, suggesting that LPP should be universally applicable irrespective of the lawyer's position. This stance is further supported by the acknowledgment of LPP in significant legal jurisdictions, such as the UK and the US. Both nations offer equal protection to legal communications, regardless of whether they originate from a law firm or a company's legal department – the most important aspect instead concerns membership in a regulatory body and adherence to the relevant ethics and guidelines.

However, there is a divergent perspective within EU jurisprudence. Cases such as AM&S and Akzo delineate that LPP can only be exercised if the advice stems from an "independent lawyer" – one not bound by employment ties to the client. Over time, this stance has been challenged due to evolving definitions of "independence" and an increasing acknowledgment of the critical role that in-house lawyers play within corporations. Their advisory roles, grounded in intellectual and ethical independence, are pivotal for businesses in navigating complex legal terrains.

One cannot understate the current challenges posed by the lack of universally recognized LPP. The ambiguity surrounding the protection of legal communications across EEA member states has created an intricate web of inconsistencies. This uncertainty exacerbates business costs and hampers their growth potential in the global arena. More so, the denial of LPP at the EEA level creates economic inefficiencies without any discernible benefits.

In-house legal departments have emerged as effective units managing companies' frequent legal challenges. Their intrinsic knowledge of company operations and strategic relationships positions them uniquely to guide businesses. The lack of LPP can potentially inhibit these departments from functioning optimally, either pushing them to engage external law firms for sensitive issues or to forgo addressing smaller issues altogether.

Moreover, in the global legal arena, EU-based companies find themselves at a significant disadvantage in litigation scenarios, especially when pitted against their US counterparts. US-based firms, protected under their robust LPP framework, can shield their internal legal communications, whereas EU firms might find themselves exposed due to regional LPP disparities.

In essence, for the EU to achieve a truly harmonized legal framework, in-house lawyers should function under the same protections as their external counterparts. Establishing a standardized LPP throughout the EU will not only foster transparency and trust but also promote an environment where businesses can operate with agility, security, and confidence. Ultimately, it will also accommodate the significant evolution of the in-house counsel's profession in the last two decades and especially since the Akzo Nobel decision towards a trusted advisor to the companies' boards and an ambassador of national and European legislation, ethics, and political goals to the European economy.

Historical Origins

LPP can trace its origins back to Roman times when advocates were prohibited from testifying against their clients. The concept made its way to the British Isles by the 16th century, with common law discussions about it becoming prominent in the 17th century. Originally in the common law system, privilege was an entitlement of the lawyer, not necessarily the client. By the 18th century, LPP evolved into an instrumental part of the common law system. This evolution was driven by the realization that clients often couldn't discern between what might incriminate them or absolve them. LPP ensured that lawyers could craft the best possible defense, promoting trust and fostering thorough and honest discussions.

The 1833 Greenough v Gaskell judgment by the Court of Chancery in England underscored the foundation of LPP. This rule wasn't due to the specific importance of legal professionals but instead, the overall interests of justice. Without such a privilege, individuals might be hesitant to fully consult or confide in professionals, jeopardizing the justice system.

Fast forward to the present day, the European Union's Code of Conduct for Lawyers reinforces this age-old principle. The code emphasizes the essence of confidentiality and trust between a lawyer and their client, recognizing it as a primary and fundamental right.

LPP's historical preservation isn't merely based on trust and confidentiality but also centers on the principle of process fairness. This principle encompasses:

1. Assuring everyone has access to legal assistance to recognize and enforce their rights.

2. Making sure that seeking legal advice doesn't put one at a disadvantage or risk.

3. Preventing any breach of the first two principles through maintaining LPP.

On a broader scale, LPP receives protection at the supranational level, particularly in Europe. Articles 6 and 8 of the European Convention on Human Rights (ECHR) serve as sentinels for legal assistance, privacy, and correspondence. The ECtHR has been unwavering in its stance, recognizing that the relationship between a lawyer and their client is intrinsically privileged, echoing sentiments from centuries past.

Independence and Equivalence: Company Lawyers and External Counsel

The legitimacy of the company lawyer's privilege, comparable to that of external counsel, especially in law firms, has often been contended based on their alleged lack of independence, both on national levels and within the European Union's institutions. The assertions made during landmark cases such as AM&S and Akzo Nobel indeed echoed this sentiment. Remarkably, an in-depth White Paper published by the European Company Lawyers Association in 2012 highlighted the flawed reasoning behind these judgments, emphasizing that the courts' views on in-house counsel were outdated and did not resonate with current corporate realities.

Company lawyers are legal advisers with the highest specific expertise for economic feasibility; they are strategic partners ingrained within the fabric of modern corporations. These legal professionals understand the intricacies of their respective organizations both in business related as well as political aspects, enabling them to give precise and rapid advice to the advantage of the company. The boom in the number of company lawyers, especially in fields like environmental law, safety, and governance, underscores this necessity for corporations.

The global and digital spheres of business have transformed how companies operate, leading to more cross-border engagements and international legal challenges. Furthermore, the increase of uncertainty in the last years, especially with the pandemic, collapsing supply-chains, a war in Europe, inflation and the challenging economic environment has surged the demand for legal advice. These evolutions have, in turn, seen an uptick in the number of legal professionals across Europe. The data speaks volumes: Company lawyers have become the fastest growing segment within the legal domain in many European jurisdictions. While the overall numbers of lawyers plateaued or even decreased in various European countries in recent years, the number of company lawyers increased remarkably by approximately 165 % in the last 17 years.

With time, corporate legal entities have not only grown in size but also in influence and have become vastly more sophisticated. Structures now exist to ensure their independence eithin their companies. General Counsel or Chief Legal Officers (CLOs) now routinely report directly to the executive management and to the board, ensuring that their departments remain separate from business units they may advise. This direct involvement of CLOs in company strategy, with over three-quarters reporting directly to the CEO, denotes the rising importance of legal counsel in corporate strategy. The perception of legal departments within corporate structures changed from a unit to react to legal crisis only 25 years ago to a strategic part within the company to prevent legal crisis in the first place.

Furthermore, the career of an individual lawyer has also transformed. The boundary between external and in-house counsel has become increasingly porous. Nowadays, external lawyers can also be hired by big law firms and sometimes serve a very limited number of clients. Lawyers now transition between roles at law firms and corporate legal departments with regularity, reflecting the flexibility and adaptability of today's legal profession. The legal world has also witnessed the rise of alternative legal service providers and legal technology providers, blurring the lines between in-house and external counsel even more. Such providers, either by outsourcing certain legal functions or by providing "secondments" where external lawyers operate within companies, showcase the dynamic nature of today's legal service delivery models.

Moreover, globalization's impact on business translates directly into how companies seek legal advice. Legal teams, regardless of their size or location, now cater to a broader international audience, thereby shaping the trajectory of in-house legal practice.

The legal profession's evolution in Europe over the past few decades underscores the necessity of revisiting the outdated distinction between company and external lawyers. Germany's 2014 episode, which revolved around a judicial ruling against company lawyers, illustrates the potential market upheavals such distinctions can cause.

Recognizing the paramount role of the 165 000 company lawyers across Europe in this dynamic ecosystem is not just beneficial but vital for the seamless functioning of the corporate world the justice system and ultimately the rule of law in Europe alike.

An Open Letter to a Sceptical Mind

Philippe Coen
Honorary President of the European Company Lawyers Association

An open letter to a sceptical mind convinced that a company lawyer cannot be viewed as truly independent

To Whom It May Concern:

If – like in the AM & S and the Akzo Nobel cases – you think that a company lawyer is not able to inherently provide advice with an independent mind,

If you think that a company lawyer can twist or forge their legal advice in order to preserve their job,

If you believe that the arm of a company lawyer is easier to twist than any other lawyer's arm,
If you believe that a company lawyer is hired to close their eyes when facing a violation of the rules,

If you think that a company lawyer, abiding by the rules of the profession could be tempted to be less compliant with the rules of professional conduct and ethics because they work for a company and not a law firm,

If you can convince yourself that any responsible, accountable and serious company client would be willing to remunerate a company lawyer who is capable of providing advice against their firm professional conviction,

If you believe that any lawyer's code of ethics would allow a company lawyer to think dependently,

If you have the mere impression that a company lawyer is not a fully-fledged lawyer and could fall into a sub-category of lawyer,

If you think that a company lawyer is a professional that can afford not to be independent by design and that independence is not a term that describes the distinct nature of all lawyers on earth,

If you think that company lawyers' output does not deserve legal privilege,

If you think that company lawyers are more independent in jurisdictions where they can be part of a bar association or equivalent than the ones working in countries (like France), where they are not allowed to be or remain admitted to the bar,

If you feel that being distant and remote from your client (i. e. in a law firm as opposed to a law department) grants the lawyer additional independence,

If you find it nuanced and not overly simplistic to think that a law firm achieves greater independence from its clients – without whom it could not run a business – than a company lawyer is from their only client,

If you really believe that a company lawyer could look at themselves in the mirror while feeling that they cannot take an objective approach to advising the company they work for,

Then:

We anticipate that you have not really been exposed to the reality of what a company lawyer does. It may also mean that you have barely encountered, had little interaction or not worked with a company lawyer, or in any event, not the quality of the ones you will find within the community of ECLA's members.

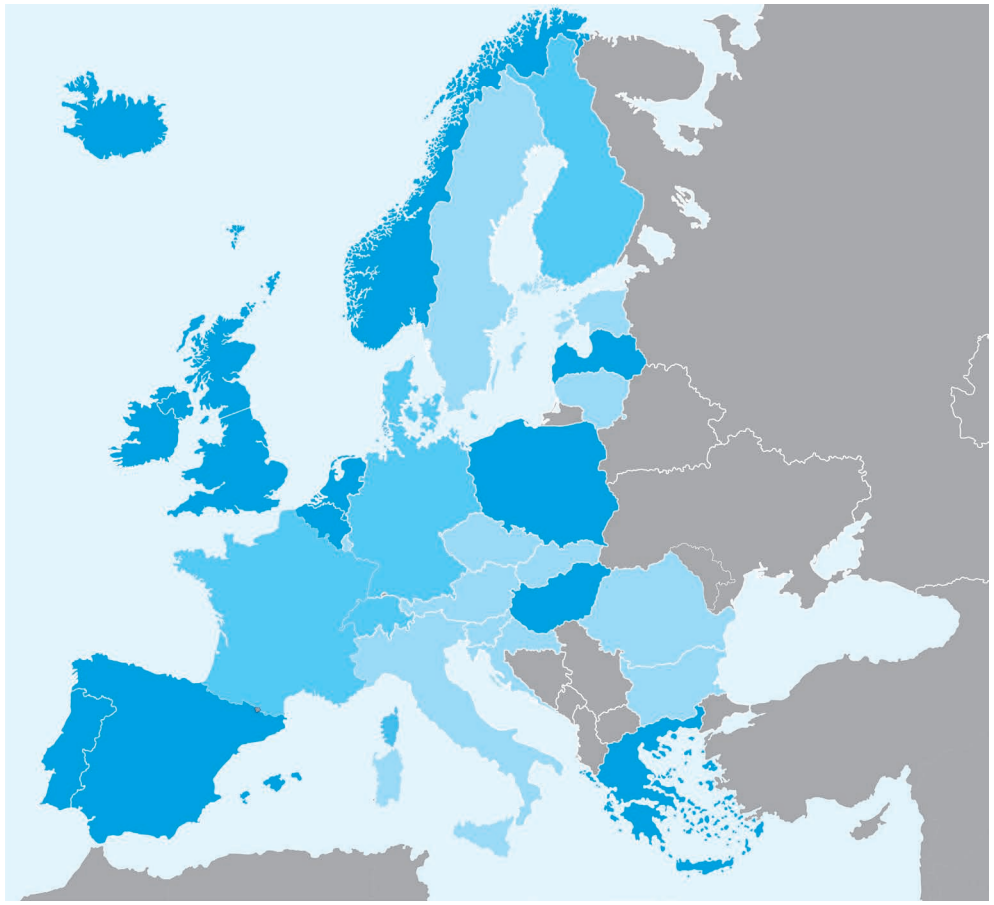
Therefore:

You are very much invited to read this ECLA Yearbook, to try to see another approach, and to ask us any questions you may have. And also you are encouraged to break the ice, talk to and meet a real company lawyer near you. You are also invited to question company lawyers' employers and ask their opinions to clear up any misunderstandings of how company lawyers operate, work, advise and practise law within companies with professionalism, integrity, passion, freedom of thinking and joy on a daily basis.

Most independently yours,
Philippe Coen

In-house Legal Professional Privilege in Europe

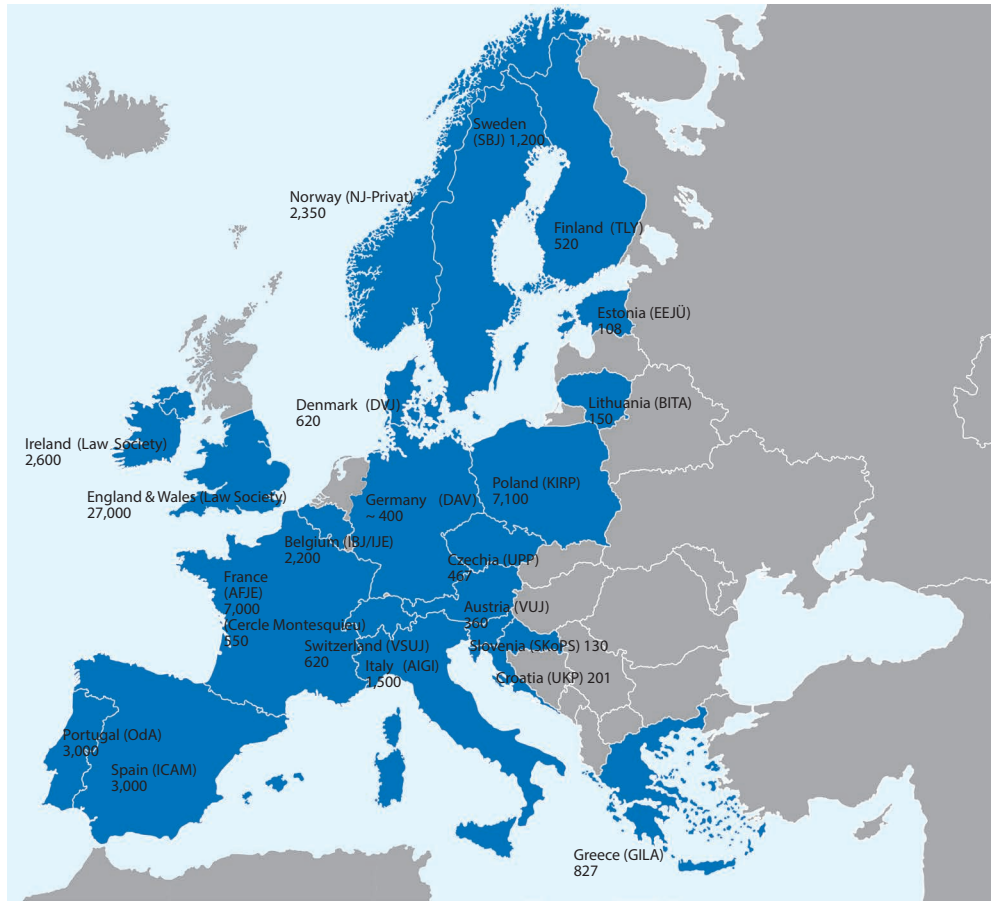
Although regulations vary across European jurisdictions, the matter of in-house professional privilege appears closely linked to the duty of professional secrecy, to which lawyers who are members of a bar association are generally bound, and in-house counsel are more likely to benefit from LPP when they share the same professional obligations and rights as external counsel, i. e. when they are allowed to be registered to a local or national bar association.



- In-house lawyers enjoy full legal professional privilege
- In-house lawyers enjoy legal professional privilege to some extent
- In-house lawyers have no legal professional privilege
- Not covered

ECLA Member Associations in numbers

As of February 2024, the European Company Lawyers Association is composed of 22 national member associations, representing close to 70,000 in-house lawyers from all over the continent. For the purposes of this graphic, only the sections of each association specifically dedicated to in-house lawyers have been taken into account.



Number of individual members in each ECLA member association

Number of Lawyers and In-house Counsel

Country	Population	GDP in mn	Total Lawyers	Lawyers per Capita (per 100 000)	In-house Counsel	Share of In-house Counsel	GDP in mn per In-house Counsel
Albania	2.775.630	$ 18.882	3.664	132,0	100	3%	$ 189
Austria	9.042.530	$ 471.400	6.879	76,1	4.000	37%	$ 118
Belarus	9.208.700	$ 72.793	1.650	17,9	100	6%	$ 728
Belgium	11.669.450	$ 578.604	21.023	180,2	3.250	15%	$ 187
Bosnia & Herzegovina	3.233.530	$ 24.528	572	17,7	50	8%	$ 491
Bulgaria	6.465.100	$ 89.040	13.994	216,5	1.000	7%	$ 89
Croatia	3.845.000	$ 70.965	4.854	126,2	950	20%	$ 75
Cyprus	1.251.490	$ 28.439	4.273	341,4	500	12%	$ 57
Czechia	10.526.070	$ 290.924	12.189	115,8	2.100	15%	$ 139
Denmark	5.903.040	$ 395.404	6.848	116,0	1.100	16%	$ 359
Estonia	1.344.770	$ 38.101	1.085	80,7	350	24%	$ 109
Finland	5.556.880	$ 280.826	3.100	55,8	1.250	29%	$ 225
France	67.935.660	$ 2.782.905	70.800	104,2	18.000	20%	$ 155
Germany	84.079.810	$ 4.072.192	165.186	196,5	35.000	21%	$ 116
Greece	10.566.530	$ 219.066	42.091	398,3	6.000	14%	$ 37
Hungary	9.683.500	$ 178.789	12.790	132,1	1.100	9%	$ 163
Iceland	381.900	$ 27.842	1.056	276,5	100	9%	$ 278
Ireland	5.086.990	$ 529.245	13.882	272,9	2.812	20%	$ 188
Italy	58.856.850	$ 2.010.432	247.173	420,0	8.000	3%	$ 251
Latvia	1.883.380	$ 41.154	1.366	72,5	350	20%	$ 118
Lithuania	2.833.000	$ 70.334	2.254	79,6	650	22%	$ 108
Luxembourg	650.770	$ 82.275	3.034	466,2	650	18%	$ 127
Malta	523.420	$ 17.765	800	152,8	150	19%	$ 118
Moldova	2.592.480	$ 14.421	2.800	108,0	100	3%	$ 144
Montenegro	616.160	$ 6.096	947	153,7	50	5%	$ 122
Netherlands	17.703.090	$ 991.115	17.964	101,5	3.600	20%	$ 275
North Macedonia	2.057.680	$ 13.563	2.864	139,2	100	3%	$ 136
Norway	5.457.130	$ 579.267	8.306	152,2	1.240	15%	$ 467
Poland	37.561.600	$ 688.177	48.119	128,1	9.600	20%	$ 72
Portugal	10.379.010	$ 251.945	32.759	315,6	5.800	18%	$ 43
Romania	18.956.670	$ 301.262	23.162	122,2	1.500	6%	$ 201
Serbia	6.760.090	$ 63.502	10.930	161,7	950	8%	$ 67
Slovak Republic	5.431.750	$ 115.469	6.266	115,4	900	13%	$ 128
Slovenia	2.108.730	$ 62.118	1.834	87,0	950	34%	$ 65
Spain	47.615.030	$ 1.397.509	149.415	313,8	9.500	6%	$ 147
Sweden	10.486.940	$ 585.939	6.571	62,7	3.000	31%	$ 195
Switzerland	8.769.740	$ 807.706	7.317	83,4	2.100	22%	$ 385
Ukraine	38.000.000	$ 160.503	58.999	155,3	8.000	14%	$ 20
United Kingdom	66.971.410	$ 2.716.704	193.628	289,1	31.437	16%	$ 86
total/average:	**594.771.510**	**$ 21.147.198**	**1.212.444**	**167,6**	**166.239**	**14%**	**$ 179**
USA	333.287.560	$ 25.462.700	1.352.030	405,7	150.000	11,09%	$ 170
Russia	143.555.740	$ 2.240.422	82.126	57,2	8.000	9,74%	$ 280
Australia	25.978.940	$ 1.675.419	76.303	293,7	12.132	15,90%	$ 138
Canada	38.929.900	$ 2.139.840	125.000	321,1	32.500	26%	$ 66

Annotations

Population

Data provided by the World Bank 2023

GDI in mn

Data provided by the World Bank 2023

Total Lawyers

Data provided by national bar associations or the Council of Bars and Law Societies of Europe (CCBE). Data ranging from 2020 to 2022.

Lawyers per Capita (per 100 000)

Data provided by national bar associations or the Council of Bars and Law Societies of Europe (CCBE). Data ranging from 2020 to 2022.

In-house Counsel

Data provided by ECLA's member associations or estimated, based on research within respective countries. In-house counsel as shown here are individuals who completed their formal legal education and are employed by a non-legal employer (no law firm).

Share of In-house Counsel

Calculation depending on national conditions. For countries in which in-house counsel are members of bar associations or law societies the percentage indicates the share of column "Total Lawyers". For countries in which in-house counsel are not eligible to become members of the bar association or law societies, the percentage indicates the share of the culmulated total numbers of lawyers and in-house counsel.

40 Years of ECLA

A history of the European Company Lawyers Association (ECLA) needs to be preceded by some explanatory words on the company lawyers, the company legal departments and the organisations of company lawyers in Europe.

Company lawyers

Jurists working in Europe for a company under an employment contract, providing legal advice in a legal department to the company are considered company lawyers. It should be noted that not every individual with a legal background, employed by a company, can be seen as a company lawyer. There are employees with legal training who work in sales, HR and finance that fall outside the scope presented.

The terms house counsel, in-house counsel, corporate counsel, in-house lawyer, business lawyer, and juriste d'entreprise in the French language, are used synonymously. Association Européenne des Juristes d'Entreprises, AEJE, is the official statutory French name of ECLA.

Company legal departments

The development of company legal departments occurred more or less simultaneously in the USA and in Europe.

In the USA, company legal departments began to develop at the end of the 19th century. One of the first legal departments was established in 1882 at Standard Oil, New Jersey. Railroad, insurance and public utility companies began to employ lawyers in their business. The period since 1930 has brought a great expansion of legal departments in size, number and influence. World War II brought numerous new governmental agencies. Full-time legal counsel proved to be a necessity to cope with the myriad of new rules, regulations and directives. Legal departments which had existed earlier grew and even smaller companies established their own legal departments.

In Europe the law of the 1 July 1878, regulating the German Bar, provided already in its paragraph 5 that a jurist could be admitted to the Bar even if permanently employed by a company. A similar development of the legal departments occurred in many other industrialised European countries. It should be noted here, however, that only in very few of those countries may the company lawyers be admitted to the Bar (or to other professional organisations like the Law Society in England and Wales and the Law Society of Ireland). Reference is particularly made, in addition to the UK, Ireland and Germany, to Norway, the Netherlands (limited to advocates), Poland, Spain and Portugal.

Organisations of company lawyers

Professional organisations of company lawyers have been established across the world. As far as the European countries are concerned, the the Netherlands N.G.B. (Nederlands Genootschap van Bedrijfsjuristen) dates from 1930 and is the oldest such professional organisation in Europe, if not in the World. The Swedish organisation

Colm Mannin takes office, 1998

was founded in 1954, the Belgian in 1968, the French in 1969, the Italian in 1976 and the German ASDA in 1978, all reuniting the lawyers in permanent employment. In England and Wales, as well as Scotland and Ireland, the company lawyers belong to the Law Society (and on a voluntary basis, to the Commerce and Industry Group of the Law Society) if they are solicitors, or to the Bar Association for Commerce, Finance and Industry if they are barristers.

The Founders and the constitution of ECLA

But how and why was ECLA born? In 1980, an organisation of company lawyers in Belgium took the initiative to contact other similar organisations in the Netherlands, England and Wales, Germany, Italy and France. These organisations began exchanging experiences and best practice on legal matters with particular reference to the international business and the European laws affecting the activities of their respective companies. In addition, the company lawyers were realising that the legal status of their profession varied greatly. 1980 saw the beginning of regular meetings between these organisations of company lawyers. In 1983, ECLA was formed in Belgium as a private non-profit international association following the A.M. & S. case decided in 1982 by the Court of Justice (more below) and the appointment of John Boyd as the first Secretary General.

The first ECLA President was appointed in September 1984: Prof. Dr. Walter Kolvenbach, who authored the landmark book The Company Legal Department (Kluwer, 1979) who remained in office until October 1987 and who dedicated much of his efforts to designing the route to be followed towards the recognition of the company lawyer profession across Europe.

Under the presidency of Barry O'Meara (October 1987–May 1990) the cooperation among the European organisations of company lawyers became more and more integrated, not only on the scientific level, but also with respect to the ethical principles (exercise of the profession respecting harmonised deontology rules, as well as honesty and fairness). Therefore, it was decided to reinstate the constitution of ECLA in Brussels as a scientific-oriented international association under Belgian law, which was then publicly recognised by Royal Decree of 25 June 1990.

The purpose of ECLA as laid down in the 1990 by-laws:

- the representation of its members at the international level, principally in Europe;
- the creation of centres for studies, documentation and contacts for the purpose of improving the exchange of professional information among the members;

- the organisation of meetings, conferences or seminars relating to legal matters; and
- the promotion of legal research.

By 1990, ECLA's membership had grown significantly and included the organisations of company lawyers in Belgium, Denmark, Germany, Finland, France, Italy, the Netherlands, Scotland, England and Wales (The Bar Association for Commerce, Finance & Industry and The Commerce and Industry Group of the Law Society of England and Wales). From May 1990 to May 1992, ECLA's president was George Carle from Belgium, who was involved in the above mentioned A.M. & S case of 1982. The vice presidents were Marco Allegra, Italy and Daniel Froessel, France. The secretary general was Anne Scheltema Beduin, the Netherlands, who remained in office for eleven years; and the treasurer was Francoise Sweerts, Belgium.

General Assembly, Prague, 1999

The governance and organisation

The by-laws provided for two governing bodies: the General Assembly constituted by one representative of each member organisation and the board of directors composed by one nominee director of each member organisation. General Assembly meetings were held once a year within six months of the beginning of the year. For the board of directors, they were held twice per year – the first at the same time of the General Assembly and the second in autumn.

The by-laws were amended in 2010 providing for a General Assembly which now meets twice a year, and an Executive Board elected by the General Assembly and composed by the president, one or more vice presidents, a secretary general and a treasurer. The General Assembly also elects an internal auditor.

The A.M. & S. case and the beginning

The first few years of ECLA's life consisted of many major events and milestones. The years running between the foundation in 1983 to the renewed foundation in 1990 were mostly dedicated to a thorough discussion of the basic differences which existed among the legal status of company lawyers in each member organisation.

In fact, ECLA's birth arrived directly after (and with all probability was caused by) the famous A.M. & S. case decided in 1982 by the European Court of Justice which denied the legal professional privilege (LPP) to the company lawyers in an antitrust case. That decision could affect all the company lawyers, even those of the UK, Ireland and the USA where the LPP was recognised. Therefore, ECLA's efforts were mostly

General Assembly, Dublin, 2007

directed at making contacts with the European Institutions such as the European Commission in Brussels, other international bodies such as the Council of the Bars and Law Societies of the European Community (known as CCBE) and with the company lawyers' organisations of other European countries not yet members of ECLA, as well as organisations of other continents.

ECLA's code of conduct and position papers

In 1993, under the presidency of Alan R. Boyd (May 1992–October 1994), ECLA adopted the CCBE code of conduct. Therefore, from that year on, ECLA requires each organisation of company lawyers to:

- verify the professional qualifications of their members (minimum degree in law);
- have a code of professional ethics and disciplinary rules; and
- look after the continuous legal education of their members.

At that time ECLA was already organising annual conferences on themes relevant to company lawyers, mostly in cooperation with the CCBE. In 1992 ECLA received support from the European Commission. Later on, ECLA started cooperating with ERA (Academy of European Law) of Trier, Germany, for the organisation of annual conferences in Brussels.

ECLA also had non-member organisations of company lawyers participating to the board meetings as observers, such as those of Luxembourg, Sweden and Switzerland. The last two later became full members of ECLA.

Under the presidency of Pio Cammarata (October 1994–May 1996), ECLA initiated working on a position paper released in November 1996 during the presidency of Philippe Marchandise entitled The Company lawyer in Europe.

The words of Pio Cammarata, as reported in the minutes of the board meeting of June 2, 1995, reflect very clearly ECLA's most important role:

ECLA Website goes online, Edinburgh, 1999

ECLA Law & Technology Congress, Toulouse, 2000

"ECLA's priority is the non-uniformity of the status of the company lawyer. As long as there is this discrimination, legal privilege will be very difficult to obtain".

In 1996, two other organisations of company lawyers had joined in ECLA as members: Norges Juristforbund, Norway and Asociacion Espanola de Abogados de Empresa, Spain (this organisation also includes private practitioners). The Law Society of Ireland became a member at the beginning of 1997. During Philippe Marchandise's presidency (May 1996–June 1998), ECLA multiplied its efforts towards the recognition of the legal privilege for company lawyers. To this end, at the board meeting of 23 May 1997 a new position paper was approved specifically dedicated to the legal privilege issue: Legal Privilege for in-house lawyers. Quoted from the conclusion: "it is time for the institutions of the European Union to begin the process of exploring with ECLA the steps which might be taken to remove this anomaly" (e.g. denial of the legal privilege for in-house lawyers).

At the board meeting of 11 October 1997 the members of ECLA discussed the request made by the Commissioner of the DGIV, Mr Faull, regarding the importance of taking measures for the verification of the professional qualifications of the members, to have a code of ethics and to look after the continuous legal education. Therefore, the members were asked to implement an efficient procedure to verify the professional qualifications of their members and also the code of ethics and the continuous legal education.

This became an official requirement for all ECLA members, for implementation in their by-laws and no new member could since then be admitted until fully complying with these requirements.

European Parliament's approval of an ECLA amendment

Under Colm Mannin's presidency, a significant impulse to the lobbying activity at the European Commission was given even though the position of the DGIV, at that time headed by Mario Monti, remained unchanged against the recognition of the legal privilege: "because the in-house lawyers are not independent..." (letter dated 11 April 2000 from Mario Monti to the president of ECLA, Colm Mannin).

However, ECLA managed to obtain a favourable vote by the European Parliament in 1999 at the time of the revision of Regulations 17 and 19 concerning Vertical Restraints. In fact, the Parliament approved an amendment proposed by ECLA with the effect of protecting, with the legal professional privilege, communication between a client and in-house counsel, provided that the legal counsel is properly qualified and complies with adequate rules of professional ethics and discipline which are laid down and enforced in the general interest by the professional associations to which the legal counsel belongs.

It should be mentioned at this point the untiring work which Jettie Van Caenegem, vice president and later general secretary of ECLA, put into the privilege issue over the years.

The development of in-house legal practice in Central and Eastern Europe

With the opening of the Eastern Bloc, following the collapse of the Berlin Wall in 1989, the development of in-house legal practice in Central and Eastern Europe became one of ECLA's major priorities. A dedicated programme designed to achieve this objective was adopted at a board meeting held in Cordoba, Spain in autumn 1998. Under what became known as the Cordoba Initiative, ECLA resolved to provide advice to existing organisations of company lawyers in the countries of the former Eastern Bloc while encouraging company lawyers where none yet existed to establish such organisations with the active support of ECLA. The Cordoba Initiative thus enabled the national organisations of the Czech Republic (1999), Estonia (2000),

General Assembly, Brusssels, 2018

Poland (2000) and Bulgaria (2001) to meet the ECLA standards and be admitted to full membership. Other Central and Eastern European organisations were subsequently admitted.

Not only legal professional privilege

President Erik Vilen (May 2001–September 2003) saw the need for ECLA to expand its activities beyond the issue of legal professional privilege for company lawyers. Investing a lot of time and efforts in preparing questionnaires and through the use of other means of communications to the members, the ECLA board tried to align the future activities of ECLA to the desires and needs of its members. This democratic process was very successful and members felt that they had a real opportunity to influence the future work of ECLA. They simply appreciated and used this opportunity to voice their own opinion. The result of the member survey was that members agreed with and consented to the opinion that ECLA was running the risk of becoming a "one question" association unless its activities were expanded.

In September 2003 ECLA decided to intervene in the AkzoNobel case with the pro bono

Legal Disruption Roadshow, Dublin, 2021

General Counsel Roundtable, Rome, 2021

General Assembly, Milan, 2022

assistance of John Temple Lang and Maurits Dolmans of Cleary Gottlieb Steen & Hamilton and of Christine Nordlander of Sidley Austin. Under the presidency of Colin Anderson (September 2004–August 2005), ECLA continued changing focus from a single item interest group to an organisation focused on benefits for organisations and individuals.

In 2005, president Bengt Gustafson (August 2005–November 2007) continued on the avenue set by his predecessors Erik Vilen and Colin Anderson. Bengt Gustafson introduced a new programme aiming at providing "visible and real benefits" to all the individual members of the member organisations. A new operating model was introduced: an executive board for the daily administration of ECLA, whose members were the president, two vice presidents, the secretary general and the treasurer (this board was formally instituted, as reported earlier, under the revised by-laws of 2010). Each member of the executive board was assigned their area of responsibility. The increased focus on education led ECLA, together with the Italian member organisation (AIGI) and the Italian company ADR Centre, to hold several conferences in Milan and Rome on alternative dispute resolution. The general manager then supported ECLA to become a working partner of UNIDROIT in its work on the new edition of the Principles of International Commercial Contracts (UPICC).

In 2008, ECLA obtained observer status at the UNCITRAL through the efforts of the general manager who represented ECLA at the session held in New York in February 2009.

In 2010, after the unfortunate appeal decision of the Court of Justice in the AkzoNobel case, Peter Kriependorf took over the presidency (October 2010–November 2012) and dedicated many efforts to reaffirm ECLA's future activity also beginning the preparation of a white paper on the professional profile of the company lawyers.

Philippe Coen was elected president in November 2012. He envisioned an ambitious programme, aimed at raising the profile of company lawyers, their image, influence, interactivity and prerogatives. This included: a thorough rebranding; a European Code of Ethics; a white paper named "Company Lawyers: Independent by Design"; an ECLA Advisory Council; major partnerships with international legal organisations; and the celebration of ECLA's 30th anniversary with a major international Forum at the Palais d'Egmont in Brussels, together with its then-nineteen member organisations representing tens of thousands company lawyers.

On 29 May 2014, the ECLA White Paper: "Company Lawyers: Independent by Design", was published. The influential text, still available on ECLA's website, underlines the core identity of the association and tries to provide clarity onto the profession, its activities and responsibilities, and overturn the notion that company lawyers lack independence due to their employment relationship.

In 2014, Sergio Marini was elected president. His tenure continued the activities of the previous collective, with the primary aims being to increase visibility and activity of the organisation. During this time, increased efforts were made to study legal professional privilege and how these discussions could be implemented Europe-wide. Similarly, the issue surrounding a lack of recognition of the profession in most European countries was highlighted as a point of contention. Contemporary developments such as the (now-defunct) TTIP were discussed and position papers were produced. ECLA was admitted as a stakeholder in the TTIP register which enabled ECLA to attend the sessions where the negotiators engaged with stakeholders on made progress. During this time, much deliberation was also made concerning a potential professional card, available for company lawyers.

ECLA Today

In October 2016, Jonathan Marsh was elected president. During his tenure, the association has undergone a significant shift towards increasing the association's visibility and increasing the number of activities that ECLA conducts. This has been enabled by a partnership with dfv European Corporate Counsel Group, which

General Counsel Roundtable, Hamburg, 2022

provides full-time services to ECLA, including organising conferences, managing advocacy and providing educational content for company lawyers. Under this agreement, Marcus M. Schmitt took over as General Manager of ECLA in 2017.

There are several points to emphasise concerning ECLA's accomplishments in the last 7 years. Starting with advocacy, Jonathan's tenure has coincided with increased developments within national jurisdictions on expanding recognition and LPP for corporate counsel. Several European Member states have undertaken further research and subsequent policy decisions to understand the true economic value that the extension of LPP brings to jurisdictions. Most recently, the French government has put forth a significant proposal in the right direction, aiming to extend LPP for corporate counsel under certain conditions. While progress has primarily been steered by ECLA's national member organisations and other local actors, the documentation produced by ECLA in recent years, in particular by providing a comparative assessment of jurisdictional differences that corporate lawyers in different European jurisdictions have, has been paramount in bolstering the arguments put forth in light of independence and the recognition of the profession. Such developments have also reinforced the core values that ECLA was founded upon.

As part of ECLA's advocacy initiatives, it has also been, together with ACC Europe, in close contact with the European institutions, to effectively communicate the interests of the company lawyer profession and to avoid future judgments that could have such a potentially negative impact on the profession as the Akzo Nobel case has had. Similarly, it has provided opinions on proceedings in national jurisdictions, such as the Shell Etosha case decided in the Netherlands in 2021.

ECLA has also seen a considerable increase in the number of conferences and events that it organises. This has, notwithstanding the COVID-19 pandemic, included several full-day

General Assembly, Lisbon, 2022

conferences on topical legal discussions, such as the Legal Disruption series, started in 2018. This has provided corporate lawyers with an opportunity to participate in events tailored to their interests and has enabled them to liaise and discuss legal developments with their European counterparts. Such events have provided participants with the necessary legal analysis on ground-breaking technological developments, currently most notably on Large Language Models and other AI-related topics.
Furthermore, its annual conferences, paused by the COVID-19 pandemic, has provided corporate lawyers a platform to express legal viewpoints and developments in a longer format. Such conferences have typically covered an array of legal themes, in particular on antitrust, digitalisation, leadership, and much more.

Since 2018, the association has also organised several meetings each year specifically for high-ranking legal executives under the General Counsel Roundtable event series. This has included a half-day gathering in European capitals and large cities for the purpose of discussing a specific legal topic, from M&A related subjects to ESG. Such activities have again provided corporate lawyers unique opportunities to further liaise with their European counterparts in a truly European setting.

As of 2020, ECLA has also provided fully digital services to its members. In light of the COVID-19 pandemic, this digital transformation has enabled the association to organise new initiatives and also reinforce existing ones, with the sole purpose being to provide value to its member associations in a frictionless and convenient manner. This has included over 50 online lecture series on legal technology, digitalisation, leadership and much more and has included bringing existing activities online – most notably the General Counsel Roundtable series. Furthermore, since 2021, ECLA has, together with its partners, provided accredited educational content online under the Corporate Counsel Academy title. This has covered a variety of themes, in particular on legal conduct in negotiation settings, legal English and its utilisation in different environments, and on particular

General Assembly, Zurich, 2023

legal topics, such as on compliance. In its first 2 years, the Academy has received over 50 participants with glowing feedback on the content and methodology provided.

ECLA has also provided several publications since 2020, together with its corporate partners. In 2020, it published Legal Departments in a Digital Era, a pan-European study on building the modern, digitised legal department. A joint effort by ECLA and Wolters Kluwer, the publication provided a detailed look into the digital status of corporate legal departments across Europe and highlights the priorities of in-house teams in the digital realm and showcases, how far along the digital journey legal departments in Europe had come. In 2022, ECLA published a follow-up report titled Legal Departments on the Move, which assessed the impact that the COVID-19 pandemic had had on European legal departments. Also in 2022, ECLA published, together with Osborne Clarke, Data-Driven Business Models: The Role of Legal Teams in Delivering Success. The highly detailed publication explored data strategies across Europe and the related legal implications and offered an in-depth guide on how to successfully overcome such legal challenges.

Such publications, together with this Yearbook are just some of the highlights of the overall media output that ECLA has provided since 2017. It has additionally consistently produced articles relevant to corporate counsel and has provided updates on the developments of the company lawyer profession and on LPP specifically. Today, ECLA has a comprehensive overview of the status of the profession across Europe, what the key developments in each jurisdiction are, and how will legislation progress. This is a significant achievement has enabled it to provide clarity on a subject that, outside of ECLA and its relevant national member associations, very few organisations in Europe have gained such a holistic overview.

Future outlook

These are just a handful of examples of ECLA's activities in recent years. The COVID-19

General Counsel Roundtable, Rome, 2023

pandemic encouraged it to digitise, which has opened new opportunities to engage with its national association members on specific legal topics and developments. Similarly, its publications have enabled the association to gain a wider range of audience and recognition.

Fortunately, the company lawyer profession has, at least on the national level in Europe, steered towards a regime that recognises the profession and that extends legal professional privilege to them. Ultimately, what has been the main point of argument for national authorities has concerned the positive economic impact that the extension of privilege and the expansion of the profession provides – this has also been highlighted, for example, by the French Government in their recent developments.

The flexibility that the free movement of labour and capital provides, in conjunction with the competitiveness that participation at the global economy requires from its actors, has, at least for now, established a key requirement for national regimes – company lawyers must enjoy privilege in their legal tasks. Otherwise, businesses will move (and have moved) their legal teams to more favourable jurisdictions. Litigation in a global economy is too critical for any margin of error and a substandard regime covering company lawyers has become too disadvantageous for companies that operate in jurisdictions where privilege has not been extended, if their counterpart in the proceedings operates in a jurisdiction that has done so.

One can only imagine what ECLA will look like on its 50th anniversary or on its 60th one. However, one can say with confidence that by its 40th anniversary, ECLA has made significant progress – both in its core objectives, by directly and indirectly supporting relevant motions in national jurisdictions; and by its rate of engagement, in which the association has produced high-value reports and conferences for corporate lawyers to express their views.

1.1 Historical Basis for Legal Professional Privilege

Historical Basis for Legal Professional Privilege

Legal Professional Privilege (LPP) dates to the Roman times.[1] Under Roman law, advocates could not be called as witnesses against their clients during legal proceedings.[2] It has been documented in the British Isles since at least the 16th century.[3] Discussions on privilege within the common law system started a century later. Cases before common law courts based the necessity of LPP on the need to protect their client's secrets. At its inception before the common law courts, privilege was thought to belong to the lawyer rather than to the client.[4]

By the 18th century, LPP had gained noticeable traction in the common law system as a necessity for the effective administration of justice. As clients themselves were often unaware of whether specific information is inculpatory or exculpatory in law, LPP enabled their lawyers to prepare a defence to the best of their abilities.[5] By encouraging individuals to share information that they subjectively had concluded to be of sensitive value, lawyers, trained in law, could give an objective defence in front of the court. In addition, since legal advice is also given ex-ante, lawyers could then advise their clients on the legality of their planned actions.

Nor is understanding of the role that LPP plays in compliance with the law new. The Court of Chancery in England clearly explained in Greenough v Gaskell in 1833 what the foundation of the protection of confidentiality of legal communications is:

"The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection, though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers.

But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, everyone would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skillful person, or would only dare to tell his counsellor half his case.

If the privilege were confined to communications connected with suits begun, or intended, or expected, or apprehended, no one could safely adopt such precautions as might eventually render any proceedings successful, or all proceedings superfluous."

The essential role that confidentiality plays in guaranteeing the provision of appropriate legal assistance is also recognised nowadays in the Code of Conduct for Lawyers in the European Union:

"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."

The strongest historical justification for the preservation of LPP a novel concept amongst professions, has concerned the principle of process fairness.[6] This has three major reasonings:

- Access to legal assistance is vital for the recognition and enforcement of legal rights;
- A client must not be deprived of their legally entitled procedural rights and safeguards, by virtue of seeking legal advice;
- The absence of any of the five elements mentioned below on legal professional privilege would encourage the judicial process to violate the first two points raised above.

Historical analysts have concluded legal professional privilege to contain five key elements:

- Third parties should not have the right to compel a client to disclose privileged communication;
- Regarding privileged communication, the client should be relieved from the general duty of disclosure;
- The lawyer is under an obligation to the client not to disclose privileged information, unless the client has waived the privilege;
- The client has the right to block the lawyer from disclosing privileged communication;
- A third party does not have the right to compel a lawyer to disclose privileged communication unless the client has waived the privilege.

Due to the complexity of the legal system, a layman must have safe and fair access to legal assistance and representation to uphold their legal rights. A client should not be in a position where the act of seeking legal advice would put them in a compromising position, one in which they would not have been, had they not sought legal advice.

These principles have, in essence, been protected on the supranational level in Europe under Articles 6 and 8 of the ECHR, which concern

1 Max Radin, 'The Privilege of Confidential Communication between Lawyer and Client' [1928] 16(6) California Law Review 487-497.
2 When prosecuting the Roman governor of Sicily, Cicero lamented the fact that he was unable to summon the governor's patronus, Hortensius, as a witness.
3 Berd v Lovelace [1576] 21 ER 33 (E). Though the Roman rationale concerned the inviolability of uberrima fides, it is unclear as to what the initial purpose of legal professional privilege in England was. The concept however did not emerge from the common law courts, but rather in equity (Ho Hock Lai, 'History And Judicial Theories Of Legal Professional Privilege' [1995] Singapore Journal of Legal Studies 558-596, p. 560).
4 Geoffrey C. Hazard Jr, 'A Historical Perspective on the Attorney-Client Privilege' [1978] 66(5) California Law Review 1061-1091.
5 Ho Hock Lai, 'History And Judicial Theories Of Legal Professional Privilege' [1995] Singapore Journal of Legal Studies 558-596, p. 579.
6 Idem, p. 592, p. 596.

respect the right for legal assistance of one's own choosing, and the right to respect for private and family life, including correspondence thereof.

Article 6(3)(b) and (c) ECHR guarantees the right to have adequate time and facilities for the preparation of one's defence, and the right to defend oneself through legal assistance of one's own choosing (or in person). The European Court of Human Rights ("ECtHR") has ruled that the assistance of a lawyer would lose much of its usefulness without legal privilege,[7] and that "[i]t is clearly in the general interest that any person who wishes to consult a lawyer should be free to do so under conditions which favour full and uninhibited discussion. It is for that reason that the lawyer-client relationship is, in principle, privileged."[8]

The ECtHR has extended the protection of private life under Article 8 ECHR to communications with legal counsel and emphasised that such communications should enjoy strengthened protection.[9] Subsection 2 restricts public authorities from infringing upon this right, subject to exceptional circumstances. Both the European Court of Human Rights and the Court of Justice of the European Union have reaffirmed the paramount importance of legal professional privilege in numerous rulings.[10]

For correspondence to fall outside the scope of LPP enshrined in EU law, interference by authorities, pursuant to Subsection 2 of Article 8 ECHR, must amount to be necessary in a democratic society. This entails a principle of proportionality when assessing the restrictions of LPP, for which the ECHR does note that only exceptional circumstances can restrict this right.[11]

LPP should be seen as the foundation for a trustworthy relationship between a lawyer and their client, safeguarding the individual right to not incriminate oneself and the right to a fair trial. In addition, the ECtHR has held that it is clearly in the general interest that any person who wishes to consult a lawyer should be free to do so under conditions which favour full and uninhibited discussion. It is for this reason that the lawyer-client relationship is, in principle, privileged.[12]

7 Judgment of the European Court of Human Rights of 28 November 1991, S. v. Switzerland, no. 12629/87; 13965/88, CE:ECHR:1991:-1128JUD001262987, paragraph 48. Judgment of the European Court of Human Rights of 13 March 2007, Castravet v. Moldova, no. 23393/05, CE:ECHR:2007:0313JUD002339305, paragraph 50.

8 Judgment of the European Court of Human Rights of 25 March 1992, Campbell v. United Kingdom, no. 13590/88, CE:ECHR:1992:-0325JUD001359088, paragraph 46.

9 Judgment of the European Court of Human Rights of 6 December 2012, Michaud v. France, no. 12323/11, CE:ECHR:2012:1206JUD001232311, paragraph 118: "The result is that while Article 8 protects the confidentiality of all "correspondence" between individuals, it affords strengthened protection to exchanges between lawyers and their clients. This is justified by the fact that lawyers are assigned a fundamental role in a democratic society, that of defending litigants. Yet lawyers cannot carry out this essential task if they are unable to guarantee to those, they are defending that their exchanges will remain confidential."
See also judgment of the European Court of Human Rights of 25 March 1998, Kopp v. Switzerland, 13/1997/797/1000, CE:ECHR:1998:-0325JUD002322494, paragraph 50 et al., and Judgment of the European Court of Human Rights of 24 August 1998, Lambert v. France, 88/1997/872/1084, CE:ECHR:1998:0824JUD002361894, paragraph 21.
See also judgment of the European Court of Human Rights of 27 October 2015, R.E. v. United Kingdom, no. 62498/11, CE:ECHR:2015:-1027JUD006249811, paragraph 131: "The Court therefore considers that the surveillance of a legal consultation constitutes an extremely high degree of intrusion into a person's right to respect for his or her private life and correspondence; higher than the degree of intrusion in Uzun and even in Bykov. Consequently, in such cases it will expect the same safeguards to be in place to protect individuals from arbitrary interference with their Article 8 rights as it has required in cases concerning the interception of communications, at least insofar as those principles can be applied to the form of surveillance in question."

10 In judgment of 19 February 2002, Wouters and Others, C-309-99, EU:C:2002:98, paragraph 182, Advocate-General Philippe Léger considered the following: "Professional secrecy forms the basis of the relationship of trust between lawyer and client. It requires the lawyer not to divulge any information imparted by the client and extends ratione temporis to the period after the lawyer has ceased to act for the client and ratione personae to third parties. Professional secrecy also 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."
See also judgment of the European Court of Human Rights of 24 July 2008, Andre and Another v. France, no. 18603/03, CE:ECHR:2008:-0724JUD001860303.

11 Idem, paragraph 52.

The Company Lawyer Profession Today

A major argument against extending legal professional privilege to company lawyers and equating the profession to the same level of professional standards as external counsel concerns the alleged lack of independence that company lawyers experience.[13] This argument was raised at the AM&S case and repeated in Akzo Nobel. However, no real investigation into the alleged lack of independence was made when deciding on that case. This argument, made in light of competition law investigations, has been expanded under many national jurisdictions to cover all civil litigation matters, largely reflecting the authority of the Court of Justice rather than their reasoning within the cases.

This paints corporate lawyers as meek operatives, holding company lawyers to be mere dutiful followers of the business interests who lack any sense of legal ethics, rather than qualified professionals with years of training and experience. It is worrying that such a legal position has resonated within the broader European legal community.

A decade ago, ECLA produced an in-depth White Paper on the topic of independence of company lawyers.[14] The publication provides a critical assessment into the notion of independence supported by a vast number of highly acclaimed legal professionals. In short, the White Paper stresses that the Court's reasoning for the lack of independence of the in-house counsel profession in AM&S and Akzo Nobel does not reflect reality and is an uninformed position, which does not comprehend how company lawyers operate within their businesses. Specifically, the Court

12 Judgment of the European Court of Human Rights of 9 April 2019, Altay v. Turkey (No, 2), no. 11236/09, CE:ECHR:2019:0409JUD001123609, paragraph 50.

13 The company lawyer profession is a relatively novel development. Modern forms for corporations were beginning to be introduced in European and American legislation in the 19th century - Examples in Europe being the introduction of the Joint Stock Companies Act 1844 in the United Kingdom in 1844 and the introduction of the Gesellschaft mit beschränkter Haftung in Germany in 1892. Furthermore, Prussia introduced legislation on stock corporations already in 1843, followed by the ADHGB in 1861, the first German-wide codification of commercial law. This development of corporate legal departments occurred simultaneously on both sides of the Atlantic (ECLA, 'About ECLA: A European Lawyers' History' (European Company Lawyers Association, 26 September 2013) https://ecla.online/wp-content/uploads/2017/12/about-ecla-30-years.pdf accessed 4 December 2023). Following the conclusion of the Great Depression and World War II, which completely upended the legal requirements that companies must follow, the employment of a full-time legal staff in-house became an increasing necessity.

At its inception, the company lawyer profession was not seen as differing from an external counsel. This can be highlighted, for example, by the legal framework of the German Bar of 1 July 1878, whereby §5 allowed lawyers to be admitted, even when they were under an employment contract with a company. Nevertheless, in practice, the current legal framework in a number of European countries distinguishes between external an in-house counsel, whether it concerns their rights and obligations or the barrier to entry.

Organisations for company lawyers have been established globally, the majority of which having been founded in the second half of the 20th century. In Europe, the oldest organisation is the the Netherlands N.G.B. (Nederlands Genootschap van Bedrijfsjuristen), founded in 1930. A similar organisation for Swedish corporate lawyers was founded in 1954, a Belgian one in 1968, a French one in 1969, a Italian one in 1976 and a German one in 1978. In England and Wales, as well as Scotland and Ireland, the company lawyers belong to the Law Society (and on a voluntary basis, to the Commerce and Industry Group of the Law Society) if they are solicitors, or to the Bar Association for Commerce, Finance, and Industry if they are barristers. Many European countries have additional organisations dedicated for company lawyers, either for a specific sector or for select seniority.

14 Philippe Coen and Christophe Roquilly (eds), Company Lawyers: Independent by Design - An ECLA White Paper (LexisNexis 2012), https://ecla.online/wp-content/uploads/2017/12/ecla-white-paper-independent-by-design.pdf accessed 4 December 2023.

of Justice failed to comprehend the importance and function of the legal department and neglected to understand how business and legal interests are intertwined within a company. This failure is exacerbated in the case of multinational corporations, where a strong economic advantage for jurisdictions that have extended rights to corporate legal departments has been created – something that recent legal developments in countries such as Spain, France, and Switzerland reflect strongly.

Restricting the activities of the in-house counsel and creating a contrast between external and internal legal advisers creates divisions between different European jurisdictions, which enables expanding companies to jurisdiction shop, but also decreases the competitiveness of the Internal Market as a whole, given the lack of any such divisions in the United States or in the Commonwealth. The Akzo judgment must be seen as "…a huge missed opportunity to costlessly improve competition compliance across Europe."[15]

A categorical distinction between in-house and external lawyers is even more pointless today than it was before. In this context, Advocate General Bobek provided in the REA case[16] a number of correct observations questioning which underlying principles serve to differentiate the relationship between an in-house lawyer and his employer from the relationship between an external lawyer and his (potential sole or main) client, and whether lawyers employed by a corporation that gives them full freedom in terms of how they advise should be deemed 'independent lawyers'.

Moreover, today companies consider having legal departments as a vital part of their functioning. Choosing between in-house or external legal support is not always a viable choice in the current dynamic and competitive business environment, which requires companies to act and react quickly and efficiently. In-house counsel are immediately available to provide legal advice to the business, as individuals who are aware of the company's operations and business processes on an intimate level. This enables them to provide legal advice of the highest quality in an efficient way without having to seek assistance externally each time it is needed.

Due to the increasing complexity of the regulatory, cultural, and sectoral requirements that companies must follow; the company lawyer profession has been an increasingly growing profession in Europe. Furthermore, commercial risks and potential public fallout due to non-compliance with the relevant regulatory requirements or cultural expectations have increased the legal activities in companies even further. This growth of company lawyers will continue, given the increasing developments in numerous fields where corporate legal advice is considered vital, most notably currently in areas concerning the environment, safety, and governance.

Another crucial impact in recent years was the ongoing and even accelerating internationalization of legal challenges, which are a result of both the globalisation and the digitalisation of contemporary business models. This can be illustrated by the global exposure that smaller corporate legal departments as well as mid-size and smaller law firms, experience in contrast to a decade prior.

As a direct result of these changes to the legal environment of companies, the number of lawyers in Europe increased constantly in the last 10-15 years.[17] Today most bar associations report that company lawyers are the fastest growing segment within the legal profession.[18] A statistical approach by the European Company Lawyers Association (ECLA) of 2021 reports that there are approximately 150 000 company lawyers in Europe.

There is not only a heavier weight of the company lawyers as part of the legal profession, but it is fair to say that the profession of lawyer, both in-house and external, and the needs of companies to get legal assistance, have changed substantially since the Court of Justice assessed the differences between in-house and external lawyers in AM&S and Akzo. Corporate legal departments have become much more sophisticated, with reporting structures that enable them to safeguard their independence and effectively cope with conflicts of interests. Today, Chief Legal Officers (CLOs) typically report to the highest-corporate level of management, with in-house lawyers generally having a solid reporting lines into their own legal-function line of command up-to the CLO, with no "structural, hierarchical or functional" dependency from the business units to which they may legally advise.[19]

An increasingly complex regulatory framework and the necessity to be compliant thereof has rapidly raised the business needs for legal assistance. Furthermore, the proportion of budgets that businesses have allocated to legal departments, in contrast to external legal advice, has risen in the last decade.[20]

These trends have also lead to the increasing mobility of legal workforce across law firms and corporate legal departments, as well as across European borders. Changing jobs between law firms and corporate legal departments has normalised, with the move by external counsel to in-house being the predominant direction that lawyers undertake.[21] Furthermore, as law firms are organising not only by practice but by business sectors/industries, it has become more common to see in-house lawyers moving to law firms to act as experts in their respective fields.

Ultimately, globalisation has transformed how companies seek legal advice from their legal departments for their global business activities. This is true not only for large multinational groups of companies, but for any businesses competing in a global marketplace. As a result

15 Julia Holtz, 'Legal Professional Privilege in Europe: A Missed Policy Opportunity' [2013] 4(5) Journal of European Competition Law & Practice 402-412.
16 See opinion of 24 September 2019, University of Wrocław and Poland v Research and Development Agency (REA), Joined Cases C515/17 P and C561/17 P, EU:C:2019:774, paragraph 62.

17 Statistics of the Council of Bars and Law Societies of Europe (CCBE) https://www.ccbe.eu/actions/statistics/ accessed 4 December 2023.
18 Exemplary: Membership statistics of the joint offices of the Law Societies in the United Kingdom and statistics of the Bundesrechtsanwaltskammer in Germany https://www.brak.de/presse/zahlen-und-statistiken/statistiken/ accessed 4 November 2023.
19 This contradicts the premise considered by the General Court (see paragraph 168 of its judgment) and the Advocate General Kokott (see paragraph 62 of her Opinion) that considered that an in-house lawyer is "structurally, hierarchically and functionally" dependent on his employer.
20 ACC Chief Legal Officers 2020 Survey: *"It shows an incremental trend in favor of internal resources, which moved from prior year average 53% to 56% of the budget spend, whilst spending on outside counsel declined from 40% to 36%. The rest is dedicated to other third-party service providers"*
21 ACC Survey "Global Perspectives: ACC In-House Trend Reports" (June 2017) reports that 83% of in-house lawyers worked in private practice before (or as a lawyer for the Government, or in academia).

of this global reach, legal departments are increasingly required to navigate a complex web of international laws and regulations, making their role both more challenging and crucial. This necessitates a deeper understanding of cross-border legal issues, cultural nuances, and compliance requirements, which in turn demands a more diverse and internationally experienced team of in-house lawyers. Additionally, the rise of international trade agreements and transnational regulatory frameworks has further intensified the need for legal departments to be agile and well-informed, ensuring that their companies not only comply with the law but also leverage legal insights to drive strategic business decisions on a global scale.

Secondary Legislation and the GDPR - an analogous precedent of independent employees.

The law of the EU has evolved to recognise in its secondary legislation that professional independence can exist even in situations where the concerned professional is bound by a relationship of employment and that, contrary to what was also defended by the Court in Akzo,[22] the performance of other additional duties by a professional for his employer is not deemed to affect their ability to exercise professional independence or disregard his eligibility for professional secrecy.

In particular, the General Data Protection Regulation[23], in effect since 24 May 2016 and applicable from 25 May 2018, foresees that the data protection officer (DPO) may perform their professional activity with independence notwithstanding being bound by an employment relationship and performing additional unrelated duties.

In such regard, the GDPR provides that the data protection officer "may be a staff member of the controller or processor, or fulfil the tasks on the basis of a service contract" and "whether or not they are an employee of the controller, should be in a position to perform their duties and tasks in an independent manner".[24] Moreover, the GDPR specifically contemplates that employed data protection officers may perform other functions on top of their tasks as data protection officer and that, notwithstanding such situation, they will be eligible and subject to professional secrecy "in accordance with Union or Member State law", concerning the performance of his specific tasks as data protection officer.[25]

Notwithstanding the existence of all same circumstances that were referred by the Court in Akzo to deny protection of confidentiality for the communications between a client and its in-house lawyer, the EU legislator has understood that their ability to exercise professional independence and avoid conflicts of interests is not disregarded because of being bound by a relationship of employment to the company or performing any additional tasks, but is guaranteed by adopting other structural measures to put them in a position to perform their functions in an independent manner, such as not receiving instructions from their employer regarding the exercise of their professional duties, not being dismissed or penalised for performing their duties and reporting directly to the highest corporate level of management.[26]

The evolution of the jurisprudence of the Court towards a new concept of "independent lawyer"

A judgement delivered by the Grand Chamber of the CJEU on 4 February 2020, University of Wroclaw and Poland v Research and Development Agency (REA) (Joined Cases C-515/17 P and C561/17 P) provided an insightful overview of the complexity of the issue and a shift on the concept of "independent lawyer".

This case arose in the narrow context of interpretation of who is included in the term 'lawyer' as authorised to represent a party before the CJEU under the third and fourth paragraphs Article 19 of the Statute of the Court of Justice of the European Union, and resulted from a separate action brought by the University of Wrocław before the General Court, where the University was represented by a lawyer working at a law firm and admitted to practice as a lawyer under Polish law, but who was also connected to the University under a civil law contract (not an employment contract) to teach as an external lecturer.

The General Court declared by Order of 13 June 2017 (T-137/16) that the action filed by the University of Wrocław was manifestly inadmissible under the third and fourth paragraphs of Article 19 of the Statute, and Article 51(1) of the Rules of Procedure of the General Court. In particular, following prior CJEU case law, the General Court provided that, although the legal representative of the University of Wrocław was formally qualified as a lawyer under Polish law, he failed to satisfy the required condition of 'independence' attached to the concept of 'lawyer', because there was a risk that the professional opinion of the legal representative might be influenced, at least in part, by his professional environment.

This Order was appealed against before the CJEU by the University of Wrocław and by Poland.

Advocate General Bobek explained in its Opinion how European law often operates via "jurisprudential transfer" – the mechanism by which a concept developed in one area of law is applied to another, unrelated area -, saying that such transfer often "fosters predictability and the coherence of a legal system as a whole"; however, he had to admit that such jurisprudential transfer of the concept of independent lawyer has not resulted in "exemplar clarity".[27]

Moreover, following the Opinion of Advocate General Bobek[28], the Court no longer relies only on the traditional role of the lawyer as a

22 Judgment in Akzo, paragraph 48: "(...) an in-house lawyer may be required to carry out other tasks, namely, as in the present case, the task of competition law coordinator, which may have an effect on the commercial policy of the undertaking. Such functions cannot but reinforce the close ties between the lawyer and his employer."
23 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). *OJ L 119, 4.5.2016.*
24 GDPR, see recital 97 and Article 37.6.
25 GDPR, see Article 38.5
26 GDPR, see Article 38.3.
27 See opinion of 24 September 2019, University of Wrocław and Poland v Research and Development Agency (REA), Joined Cases C-515/17 P and C-561/17 P, EU:C:2019:774, Paragraphs 51 and 52.
28 See supra note 6, REA, paragraph 104.

collaborator of the court who is called upon to provide legal assistance 'in the interest of the sound administration of justice'[29], but on a broader concept and emphasises that, above all, the objective of the task of representation by a lawyer is to protect and defend the interests of the client, acting in full independence and in line with the law and professional ethics rules.

Following Advocate General Bobek's observations in its Opinion about the false dichotomy between in-house and external lawyers by providing that "as regards employment relationships, it is unclear what underlying principles serve to differentiate the relationship between an in-house lawyer and his employer from the relationship between an attorney and his (potentially sole or main) client"[30], the Court deviated from its interpretation of "independence" in the AM&S and Akzo cases, where LPP was generally denied for in-house lawyers – whether or not they were members of a national bar - under the assumption that in-house lawyers are not "independent" simply because they are linked by an employment relationship.

In its REA judgment, the Court made a similar reference to negative and positive factors that determine the concept of independence, and enumerated several situations previously addressed by the Court where lawyer independence was compromised. These include when the lawyer is vested with extensive administrative and financial powers that place him or her at a high executive level within the repre sented organisation; when holding a high-level management position within such legal entity; or when holding shares and chairing the board of administration of the company represented.[31]

In this context, the Court provided a new definition of the lawyer's duty of independence which does not merely rely on whether the lawyer is linked by an employment relationship, which is 'to be understood not as the lack of any connections whatsoever between the lawyer and his or her client, but the lack of connections which have a manifestly detrimental effect on his or her capacity to carry out the task of defending his or her client while acting in that client's interest to the greatest possible extent'.[32]

With this new definition, the classic dichotomy between external vs. in-house lawyer for the purposes of potentially triggering LPP protection may no longer be deemed valid, but the general requirement of independence is to be examined on a case-by-case basis to determine whether the concerned lawyer is deemed to be independent or not. Therefore:

- On the one hand, even the communications with an external lawyer 'made for the purposes and in the interests of the "client's rights of defence"' could be eventually excluded from LPP protection if the concerned lawyer is deemed for whatever reasons not to be an 'independent lawyer'.

29 See supra note 61, AM&S, paragraph 24 and supra note 62, Akzo, paragraph 42.
30 See supra note 6, REA, paragraph 62.
31 See supra note 6, REA, paragraph 65.
32 Idem, paragraph 64.

- On the other hand, the conditions under which an in-house lawyer admitted to the national bar performs their work would be relevant to determine whether he or she is an 'independent lawyer'. Therefore, the mere existence of an employment relationship should not be sufficient to automatically exclude an in-house lawyer from the definition of an 'independent lawyer' such that his or her legal communications are ineligible for LPP protection.

However, from a practical standpoint, it can be easily understood that a concept of a (in-house or external) lawyer's independence that requires a case-by-case assessment to determine the applicability of LPP creates unwelcome legal uncertainty.

Situations and Examples of Disadvantage for EU Companies

There are significant issues of sovereignty and competitiveness affected by LPP. Companies operating in EU jurisdictions not protected by LPP run the risk of having their in-house legal opinions seized by foreign judicial authorities, particularly the US, by foreign civil opponents or in criminal or regulatory proceedings in a discovery process. These disclosures can result in negative legal, financial, and reputational consequences on EU companies, with potential adverse political and sovereign impact, and loss of legal credibility and economic competitiveness.

These risks vis-à-vis US companies were well documented in the Gauvain Report. It observed that due to those risks, French companies tend to refrain from requesting written opinions from their in-house lawyers, which weakens the legal department and excludes lawyers from strategic discussions (which as discussed above are essential to allow lawyers to provide appropriate advice). French companies are also an easy target for foreign judicial authorities which can more easily prosecute absent LPP, thereby increasing legal risk and reducing competitivity. Finally, French companies were left with the option of recruiting non-French qualified lawyers outside France or relocating legal departments outside France, solely to benefit from LPP. The report has been a primary push of momentum towards France modernising the regulation of the in-house legal profession.

Competitive disadvantage against other global companies: litigation between US and EU Companies

Global companies headquartered in the US and some other relevant economies[33] do not face LPP-related issues in front of their national authorities where in-house legal privilege is widely recognized as a matter of course, under same conditions than outside counsel legal privilege. This has produced obvious organisational differences, as companies in these jurisdictions can decide whether and when to rely on in-house advice without considering legal privilege questions.

LPP protection for in-house lawyers is a criteria of business competitiveness not to be disregarded,

33 In addition to the U.S., other jurisdictions such as UK, Canada, Australia, or New Zealand take the same position on the question of the in-house's legal privilege. Many jurisdictions have no explicit rule or precedent on this area, but do not explicitly distinguish between lawyers depending on the nature of their employer.

in particular in current business world where international litigation is a risk to factor. In the context of international litigation, a general recognition of LPP for in-house lawyers in EU jurisdictions, in similar terms as it is recognized for external lawyers, would put firms operating across the EU on a more level playing field against companies in jurisdictions where LPP is protected for legal communications with in-house lawyers.

Take the example of international litigation in front of US courts, where the parties may request the other party to disclose any documents that are related to the litigation, including communications exchanged in other jurisdictions, apart from documents protected by legal professional privilege.

In order to determine whether a document is subject to privilege-protection, the US Courts follow the "touch base" choice-of-law analysis, under which when deciding on whether the communications are to be disclosed, the Court will apply the law of the country that has the predominant or the most direct and compelling interest in whether the communication should be treated as confidential, being that law typically the law of the country where the relationship or communication took place. Basically, if the parties could expect confidentiality under laws of that country because the communication was deemed to be protected under legal professional privilege, then no disclosure will happen; otherwise, the materials will be subject to discovery in the US, even if similar US materials of the counterparty are not discoverable.

Consider a European company headquartered in Italy that files a patent litigation against a US company in front of US courts to protect their R&D investments that are exploited without its authorisation in a major market, such as the US. In this situation, the US defendant may legitimately require to the Court that the plaintiff discloses all the communications exchanged within the company between their research team and their in-house patent counsel in Italy in connection with the equivalent patent filed in Italy and the European Patent Office. The US court will rely on Italian law to determine whether there was an expectation of confidentiality of the communications. And given that Italian law does not recognize LPP to communications with in-house counsel, such communication will be likely subject to disclosure in the US litigation, enabling the US company to access to the assessment made about meeting the requirements for the patentability of the invention, and providing the US company with extra-ammunition to exploit any weakness it finds. However, the similar communication of inventiveness and novelty whilst equivalent communication that took place at the US company will not be subject to disclosure, as the communications with US in-house lawyers admitted to the Bar are protected by legal professional privilege.

This was the precise outcome suffered by the Swiss pharmaceutical corporate group Novartis in its Rivastigmine patent litigation faced before the US District Court, Southern District New York, where the Court adopted a decision on August 8th, 2006 providing that communications exchanged between Swiss in-house counsel and patents agents had to be produced given that Swiss law did not protect communications

either with in-house counsel and patent agents. Moreover, the Court assessed the national legal regime about professional privilege in more than 35 jurisdictions[34] and concluded that most of the documents were to be discovered, as it was not proved that they were protected in accordance with the law of the jurisdictions involved in the communication, with the exception of UK-related documents, inasmuch as sufficient evidence of privilege protection under national laws was provided.

And this example is not unique, but it is present quite often for European firms facing litigation in the US.[35]

Rotterdam Case

Another example concerns the restrictions for a company to allocate their internal legal resources and have their in-house counsels to practice law in other EU member states while maintaining their LPP.

The Rotterdam case[36] demonstrates the practical difficulties for in-house counsel working in various jurisdictions within the EEA and the impossibility for in-house counsel residing in a non-LPP jurisdiction (in this case was Switzerland, but a similar rule would have applied if in-house lawyer was based in Italy for instance) to obtain protection in an LPP jurisdiction, such as the Netherlands, whereas an in-house lawyer original from the UK would have LPP protection in the Netherlands.

On 28 January 2021, the Rotterdam District Court delivered a judgment in an appeal brought by Shell against a ruling issued in October 2019 by an examining magistrate. In such judgement, the court overruled the prior decision of the examining magistrate and clarified the applicability of legal professional privilege for in-house lawyers pursuant to Dutch law. In their ruling concerning in-house lawyers employed by Shell, the Court affirmed the applicability of legal professional privilege for in-house lawyers in various

34 In particular in Australia, Austria, Belgium, Botswana, Brazil, Czech Republic, Cyprus, Denmark, Germany, Greece, Europe, Finland, France, Hong-Kong, Hungary, Ireland, Israel, Italy, Japan Luxemburg, Malaysia, The Netherlands, New Zealand, Pakistan, Philipines, Poland, Portugal, Romania, Singapore, Slovakia, South Africa, South Korea, Spain, Sweden, Taiwan (Rep. Of China), Republic of Trinidad and Tobago and United Kingdom.

35 The following additional litigations are also illustrative examples of the "touch base" choice of law analysis:
Judgment of the United States District Court Southern District of New York of 22 August 2014, Veleron Holding v. BNP Paribas, Morgan Stanley Credit Suisse and others, 12-CV-5966 (CM) (RLE) (S.D.N.Y. 2014): No protection granted to communications exchanged with Dutch in-house counsel (because he was not a member of the bar and therefore no LPP existed under Dutch law) and Russian in-house counsels (because no LPP available in Russia for in-house counsel).
Judgment of the United States District Court Southern District of New York of 29 July 2015, Pasha S. Anwar v. Fairfield Greenwich Ltd, 118 F. Supp. 3d 591 (S.D.N.Y. 2015): No privilege for Dutch in-house lawyer, because he was not a member of the bar and confidentiality of his communications was therefore not protected under Dutch law.
Judgment of the United States Court of Appeals, Second Circuit of 30 June 2006, Louis Vuitton Malletier v. Dooney & Bourke Inc., 454 F.3d 108 (2d Cir. 2006): No LPP because communications of French in-house lawyer were not protected under French law, so there was no expectation of confidentiality. Thus, internal legal communications with in-house counsel were to be disclosed.
Judgment of the United States District Court Southern District of New York of 29 September 2006, Kiobel v. Royal Dutch Petroleum, 456 F. Supp. 2d 457 (S.D.N.Y. 2006),: England (and not Nigeria) as the jurisdiction with the predominant or most direct interest; therefore, communications were protected against disclosure because English law recognizes LPP for the concerned communications.
Judgment of the United States District Court Southern District of New York of 6 February 2002, Aktiebolag v. Andrx Pharmaceuticals, Inc., 99 Civ. 9887 (BSJ), 99 CIV. 8926, M-21-81, MDL Docket No. 1291 (S.D.N.Y. Feb. 6, 2002): Patent advice related communications in Germany and Korea are not subject to disclosure for similar reasons.
- Judgment of the United States District Court Southern District of New York of 10 August 1992, Golden Trade v. Lee Apparel, 143 F.R.D. 512 (S.D.N.Y. 1992): The communications with (external) patent agents in Norway, Germany and Israel were not subject to disclosure because these countries protected the confidentiality of those communications with patent agents.

36 Judgment of the Rotterdam District Court of 28 January 2021, Shell and others v. Dutch Public Prosecution Service, 10/997376-16, NL:R-BROT:2021:527.

scenarios – both for in-house lawyers who reside and practice in the Netherlands and for those who do not.

The case concerned a search and seizure by the Dutch public prosecutor of documents and digital data carriers sent or received by fifteen Shell in-house lawyers that were registered in jurisdictions outside the Netherlands (whilst some were permanently residing in the Netherlands and some others abroad). In response, Shell submitted an initial notice of complaint concerning the seizure, contesting that such a seizure was unlawful under Dutch law. The public prosecutor of this case had the examining magistrate concerned with this case decide on the lawfulness of this seizure.

The conclusion of the initial examining magistrate was that none of the fifteen in-house lawyers concerned in this seizure enjoyed LPP protection, as they were not considered to be holders of confidential information pursuant to Section 218 of the Code of Criminal Procedure in the Netherlands:

- The magistrate designated a number of in-house counsels who were registered as lawyers outside the Netherlands but were employed and provided their legal services in the Netherlands, as non-eligible for LPP protection, because they had not signed the Professional Charter required under Section 5.12 of the Dutch Legal Profession Regulations and because no other measures were put in place by Shell to guarantee their independence.
- Then, the magistrate designated a number of in-house lawyers established outside the Netherlands, who may be eligible for LPP in the Netherlands if they were similarly eligible for that in their home jurisdictions. However, the magistrate denied such protection under the argument that the head of the legal department was part of Shell Executive Committee and therefore the independence of all the lawyers working for it was not sufficiently guaranteed. In other words, this decision put in question the paramount matter of whether the general counsel and, by extension, the entire legal department, is independent and therefore is entitled to legal professional privilege if they are also a member of the executive board within the company.

These conclusions were disputed by Shell, leading up to the judgment before the Rotterdam District Court, with essentially three main questions in dispute:

1. The specific requirements for companies (the client) to benefit from legal professional privilege regarding the advice provided by Dutch in-house counsels.

2. If a foreign in-house counsel is entitled to benefit from legal professional privilege (depending on whether they are established in the Netherlands or abroad); and

3. If a general counsel, who is also member of the executive board of the company, is independent and therefore will be able to assert the legal professional privilege.

The District Court saw the dispute concerning the definition of Section 218 of the Code of Criminal Procedure[37] concerning legal professional privilege in the Netherlands.

The District Court began by noting that it is up to countries to decide the rules and regulations under which the status of lawyer can be acquired in that country and establish the requirements as to how lawyers can practice their profession, regardless of whether they are employed or self-employed. This freedom also extends to the privileges that the specific country can grant lawyers and the requirements that must be satisfied thereof.

In their assessment, the District Court did make a distinction between external counsel and in-house counsel. For in-house counsel, the Court draws attention to the Cohen Advocat, the designated concept under which salaried lawyers have been permitted to join the Bar Association in the Netherlands since 1997. Because the professions have already been interpreted differently under Dutch law, the Court extends this distinction to the court proceedings at hand as well.

This distinction is further reaffirmed in the District Court's view under the Legal Profession Regulations of the Netherlands Bar Association, which emphasizes that in-house counsel in the Netherlands must commit themselves to a professional statute signed between themselves and their employers. The statute is meant to protect the independence of the in-house counsel against undue influence.

The District Court also leans on the opinion of the Dutch Bar Association regarding the separation of the independence and confidentiality of lawyers, which has held that for the proper fulfilment of confidentiality and partiality, the independence of a lawyer is inseparable from these core values.

The District Court stressed that these rules and regulations apply only to lawyers residing and working in the Netherlands, whereas the dispute at hand concerned lawyers employed by a Dutch employer, but who are foreign and follow their own national requirements for lawyers in their home jurisdictions and who either resided in the Netherlands at some point in their employment and those who did not. Thus, the main question of the dispute concerned whether foreign in-house lawyers concerned in this dispute enjoy the same rights and obligations as Dutch qualified in-house counsel residing and employed in the Netherlands. The Court, in their assessment, separated its decision into two categories of foreign in-house counsel: (a) those established abroad and (b) those who at least at some point during their employment where resident and worked (were established) in the Netherlands.

For the former, the District Court found that the mere fact that such foreign qualified in-house counsels established abroad were either employed by a company established in the Netherlands or worked for the benefit of a Dutch

37 The article reads as follows: "Those who, by reason of their status, profession or office, are under an obligation of secrecy, but only in respect of that knowledge which has been entrusted to them as necessary, may also be excused from giving testimony or answering certain questions."

company was insufficient for them to fall under the scope of the Dutch legislation and the subsequent requirements of lawyers in the Netherlands. This means that such in-house counsel must prove to be eligible for legal privilege protection on the basis of their local jurisdictions and demonstrate that they fulfil the criteria set forth. Hence, the District Court confirmed that foreign in-house lawyers could benefit from LPP under Dutch law if the regulations of the country where they are registered as lawyers pro vide such protection. For example, an in-house counsel subject to Swiss law, where in-house counsel cannot invoke legal privilege, cannot be obligated to observe client confidentiality rules under Dutch law either, whereas an in-house counsel from the United Kingdom would benefit from legal professional privilege under Dutch law.

Regarding foreign in-house counsels who were established in the Netherlands or had worked as lawyers in the Netherlands during the course of their employment for a certain time, the Court saw the situation as fundamentally different. Here, the Court stressed the obligation to sign a professional statute with the employer, which Dutch in-house lawyers are required to do, as being essential to them. The Court saw this obligation acting as a safeguard for the independence of in-house counsel working in the Netherlands and entailing more than just a mere formality. As such in-house counsel have registered with their own national bar associations, they should be treated equally under Dutch law. Due to this, such in-house counsel should have signed a professional statute affirming their independence as well.

However, since such statute had not been signed by those foreign lawyers established in the Netherlands, the District Court considered that they could not have complied with the requirement of properly safeguarded independence that is imposed on in-house counsel pursuant to Dutch law.

The District Court found this professional statute to be more than just a formality and stressed it to be as one of the most important core values of the lawyer, namely independence in practicing the legal profession. This is the reason why the Court sees that the requirement to sign such a statute is enshrined in Dutch law in the first place. Due to the absence of this professional statute, in-house counsel failing to sign it cannot enjoy legal privilege under Dutch law either.

Finally, the District Court did not provide any relevance to the argument that the presence of the General Counsel on a company's Board or Executive Committee compromises the independence and undermines the LPP protection of the whole legal department.

This judgment has been appealed both by the public prosecutor and Shell, but it is welcome because:

- Recognises that legal advice provided by in-house lawyers established in another jurisdiction may be subject to LPP protection.

- Provides legal certainty on the requirements to be met by any in-house lawyer (national or foreign) that is established in the Netherlands.

- Disregards the argument that the position of the General Counsel may compromise the independence of all the members of the Legal Department.

At the same time, this case illustrates the legal uncertainty that companies operating in the EEA face and the different standing they may have depending on where they establish their legal departments hubs for in-house counsels to provide legal advice to the company across the EEA.

Multinational Corporate Legal Departments

The laws of some EEA members states grant a certain degree of legal professional privilege to company lawyers, while others do not, or it is unclear whether or to what extent they do.

As a result of the disparity and/or lack of clarity of the LPP situation across Europe, businesses have to make choices and face unnecessary costs, administrative burdens and comparative disadvantages within the EEA. The following examples are illustrative of such situation:

1. Difficulties to establish branches in another Member State. If a company considers the establishment of a branch or subsidiary in a Member State in which it is not previously established, it must consider how it will provide legal advice to such branch or subsidiary. The structures that may already be in place (in-house counsel in the headquarters serving various Member States) may not be suitable and the company will have to budget for greater legal expenses to obtain external legal advice to be covered by LPP.

2. Limits to establish internal investigations in small and medium cases. Although typically in significant cases a company will systematically engage external counsel, in smaller cases this will not necessarily be the case given that budgets for legal costs are constrained and it does not seem reasonable to engage external resources for each single allegation of wrongdoing received. In those cases, the possibility of engaging in meaningful internal investigations where the company can be safe in the knowledge that the materials produced within the investigation will be impacted inf this investigation cannot be carried out by in-house counsel with the certainty that the materials produced to assess the case and provide legal advice are subject to the same protections than when engaging outside counsel.

3. Legal uncertainty. There are no clear answers on many of the legal questions that arise within the context of in-house legal professional privilege. For example, it is not clear whether an in-house counsel registered with the bar association of a Member State that recognises in-house legal professional privilege retains this privilege if relocated or travelling to provide legal advice (even on harmonised EU law) to an affiliate company in a Member State that does not recognise in-house legal professional privilege. Similarly, it is not clear whether the legal-related communications with in-house counsel made in a Member State which does recognise LPP to in-house lawyers still benefits from it if such communications are requested by an authority or court in a Member State which does not. The Rotterdam case involves this question and provides some responses for the Netherlands – at least by the time being –, but in the understanding that the

Court of Appeal may reverse the decision and ruled under other principles, or even another District Court that is presented with a similar case may rule differently.

4. Comparative disadvantage with other global companies. There is a real absence of a level playing field insofar as these issues do not arise in front of their national authorities, or even foreign authorities, in the case of companies whose headquarters are in the US or the UK or other countries where in-house LPP is widely recognized as a matter of course, under the same conditions as external counsel's legal professional privilege. This produces obvious organisational differences between companies in these jurisdictions which can decide whether and when to rely on in-house advice without considering legal professional privilege questions, and companies in the EU which cannot. In addition, this produces significant disadvantages in complex international litigation and arbitration, where extensive discovery requests are usual. In the case of EEA companies, in many cases the communications with in-house counsel will not be protected and will have to be shared, while a company based in an "in-house counsel LPP-friendly country" in the exact same circumstances will be able to avoid such outcome.

Forum Shopping for the Establishment of Legal Department Impacts Legal Market Growth

Legal communications issued by in-house counsel in many EEA jurisdictions do not benefit from any confidentiality or protection of any kind. The issues resulting from this situation have been frequently noted.[38]

Establishing in writing the legal risks associated with a given transaction is risky given the likelihood that such a document may be seized and reused in the context of litigation proceedings conducted before jurisdictions where the principle of disclosure of evidence is required, such as discovery (US) or disclosure (UK), or in the context of an investigation conducted by a foreign authority. This risk may also apply in specific fields of law, such as private enforcement of competition law, where rules applicable across the EEA provide for the disclosure of relevant evidence which lies in the control of the other party.[39]

Because of this risk, companies are led to adopt unsatisfactory practices: strictly oral exchanges or exchanges limited to what is strictly necessary with the legal department, cases entrusted to outside law firms or legal

38 M. Guillaume, Rapprochement entre les professions d'avocat et de juriste d'entreprise, Report to the Minister of Justice, 2008; J.-M. Darrois, Rapport sur les professions du droit, Report to the President of the Republic, 2009, spec. pp. 30-33; M. Prada, Rapport sur certains facteurs de renforcement de la compétitivité juridique de la place de Paris, March 2011, spec. pp. 18-22; R. Gauvain, Rétablir la souveraineté de la France et de l'Europe et protéger nos entreprises des lois et mesures à portée extra-territoriale, Report to the Prime Minister, June 2019, spec. pp. 45-51; Opinion of the Haut Comité Juridique de la Place financière de Paris (HCJP), «L'avocat en entreprise», October 1, 2019. 2 J.-M. Varaut, Mission de réflexion et de propositions en vue de l'élaboration d'un code des professions judiciaires et juridiques, La documentation française 1998; H. Nallet, Les réseaux pluridisciplinaires et les professions du droit, Report to the Prime Minister, La documentation française, 1999; see also the above-mentioned reports by Messrs Guillaume, Darrois and Prada

39 See Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (*OJ L 349, 5.12.2014), which provides in Art. 5 certain rules to seek disclosure of* relevant evidence which lies in the control in the other party and provides the safeguard that "Member States shall ensure that national courts give full effect to applicable legal professional privilege under Union or national law when ordering the disclosure of evidence."

departments located abroad, recruitment of legal directors (not employed by the company) who are lawyers in their home country, or even relocation of the legal department. In such a context, those in-house lawyers working in the jurisdictions without legal professional privilege are less well positioned in their companies than their foreign counterparts, who benefit from the confidentiality of their advice.

Multinational companies are subject to an increasing body of laws, rules, and regulations in a large number of national and supranational jurisdictions. Their management needs competent legal advice regularly on a range of complex questions.

In-house lawyers perform the role of compliance "gatekeeper" in this context.[40] They can perform this task better where they have an in-depth understanding of the business and how strategic decisions are made. As one in-house lawyer interviewed for a global study by KPMG mentioned, "the more we know about the business […] the more effective we are."[41]

Without generalised LPP protection for in-house lawyers in the EEA, companies with operations in the Internal Market must choose between the benefits of having an empowered and effective legal department in jurisdictions outside the EEA which protect legal privilege or relying more extensively on outside counsel. The latter outcome would result in higher costs and reduced efficiency and competitivity, notably because companies would need to instruct external counsel losing time and money for matters that could effectively be undertaken by the in-house legal team, solely for the purposes of legal privilege. Worse, once a budget is consumed, a company could decide not to seek legal advice at all for certain questions, thus hindering compliance efforts and increasing legal risk for EU companies. Finally, loss of the strategic head offices in the EU in favour of more legal professional privilege favourable jurisdictions adversely affects sovereignty.

In contexts where the risks surrounding the company are increasingly heavy, the foreign investor is naturally led to examine the legal risk when choosing the location of an investment. The lack of confidentiality of opinions thus weighs in his choice. From this point of view, jurisdictions benefiting from LPP for their in-house lawyers offer a competitive advantage over those jurisdictions without.

Over time, the in-house counsel profession has developed and structured itself. These professionals, some of whom are lawyers "suspended" from the bar due to their employment with a company instead of a law firm cannot continue to practice any longer without the indispensable tool of confidentiality of their opinions.

One of the most important reasons for the increased importance of the economic and sovereign implications is the globalisation of trade and the marked tendency of countries, particularly the United States, to organise the extraterritoriality of their rules.

40 Egon Zehnder International, The General Counsel and the Board, p. 12 (2011).

41 KPMG International Cooperative, Beyond the Law: KPMG's Global Study of how General Counsel Are Turning Risk to Advantage, p. 11 (2012).

From this context, which has been widely publicised, comes the need to ensure equal treatment between States regarding documents that may be seized in the context of international investigations conducted by the latter, but also for commercial litigation. Today, a great many countries guarantee the non-seizability of internal legal opinions, thus positioning the regime in the non-LPP countries as archaic and inequitable.

A consequence of this profound anomaly is manifested in the functioning of legal departments. Indeed, the globalisation of trade goes hand in hand with the internationalisation of corporate legal departments. However, the distortion of status between in-house lawyers, whether or not they are assimilated to lawyers within the same legal department, is becoming more and more difficult to manage, with situations that are truly ubuesque, such as, for example the legal manager of a U.S. subsidiary who believes that they cannot share a legal analysis with the French group legal director of the parent company on the grounds that such sharing would expose the said analysis to being seized in France, which, in turn, would put at risk the U.S. subsidiary at which the analysis was nevertheless covered by confidentiality.

Business leaders confronted with these subtleties end up questioning the effectiveness of French law, especially when the financial stakes become significant. This has led some companies to consider re-locating their head office and legal departments to more friendly LPP jurisdictions.

Another topic of concern involves the personal criminal liability of in-house counsel in certain non-LPP jurisdictions, such as France or Italy, as a result of compliance regulations. These compliance regulations require them to ensure the confidentiality of the processing of files, while their writings are not protected. The position is untenable. What legal professional, lawyer, notary or magistrate would accept such a paradoxical situation?

There is a certain urgency in reforming LPP for in-house counsel. The first risk, in the long run, is the loss of influence of European law and the law of member states without LPP for in-house lawyers in international exchanges. The second risk, often neglected but real, concerns the growth or regress of the legal industry in specific jurisdictions. As soon as they feel that the situation is no longer tenable, companies will adapt in their best interests.

The logical conclusion if such country (or the EU) does not reform their legislation to guarantee LPP protection for company lawyers, is that companies conclude that those jurisdictions do not want in-house lawyers employed by their national companies and, this results in a likely relocation of their legal departments and/or maintaining a legal department as slim as possible, and the deployment of in-house legal resources in more friendly jurisdictions.

A key issue is that once the legal department has been relocated, a good number of the assignments that it gave to business external lawyers in the non-protected jurisdiction will likely be transferred to external lawyers in their new country. In a legislative environment where a vast share of national rules are based on EU law, Belgian or Irish external law firms (or

even in-house departments) composed of English or French-speaking lawyers become competent to provide legal advice across the whole EEA, even on national business issues.

In-house lawyers, who are undoubtedly the legal professionals best placed to perceive, at the forefront, the evolution of the legal professions in the business table, must warn of the damaging consequences arising from the lack of a level playing field for LPP throughout Europe".

The status of company lawyers in Belgium

The company lawyers profession has been officially recognised and regulated in Belgium for over 20 years and the legal advice such a company lawyer provides is confidential, including all requests for advice, the internal correspondence relating to such a request, draft advice, and preparatory documents.

90 %

Equality of in-house lawyers with lawyers in law firms

What is the word for "company lawyer" in French and Dutch?

Juriste d'entreprise/Bedrijfsjurist.

Is the title of "company lawyer" officially recognised by law?

Yes, since the year 2000, company lawyers have been officially recognised as a specific legal profession under the supervision of the Belgian Institute of company lawyers (IBJ-IJE).

Are company lawyers required/permitted to register with the national bar?

No, if they are members of the Institute of company lawyers, then they may not register with one of Belgium's regional bar associations.

Are communications and advice provided by company lawyers covered by legal professional privilege?

Yes, the legal advice of any company lawyer who is a member of the Belgian Institute of company lawyers is protected by legal confidentiality.

How many company lawyers are estimated to be in the country?

The Belgian Institute of company lawyers has approximately 2,300 members. It is unofficially estimated that there are approximately 3,250 in-house lawyers practising in Belgium.

Recent case law and developments

In 2023, the status of company lawyer was reinforced under Belgian law by: giving the Belgian Institute of company lawyers broader legal missions, giving company lawyers stronger legal confidentiality, and enacting company lawyers' intellectual independence in the law.

Company lawyers in Belgium

Company lawyers have been officially regulated and recognised in Belgium since 1 March 2000, when legislation was adopted to create the Belgian Institute of company lawyers (IBJ/IJE), a regulatory body responsible for maintaining professional standards and promoting the role of company lawyers through member registration, setting and enforcing a code of ethics, permanent education, and advocating for the profession's fundamental values and interests.

Legal professional privilege

Under Article 5 of the Law of 2000, the legal advice provided by company lawyers to their employer in their capacity as legal counsel is considered confidential. The title of "juriste d'entreprise"/"bedrijfsjurist" is exclusively reserved to IBJ/IJE members under Article 6. In-house counsel in Belgium can only benefit from this legal confidentiality if they are also members of this professional organisation. The protection of confidentiality derives from the right to privacy of communications protected under Article 8 of the European Convention of Human Rights and the right to legal assistance under Article 6 of the European Convention of Human Rights.

The legal confidentiality of company lawyers offers a level of protection similar to legal advice from external counsel registered with the Bar. It applies to all kinds of national authority and court. So, for example, in their procedural guidelines, the Belgian Competition Authority and Belgian Data Protection Authority explicitly state that they respect company lawyers' confidentiality next to external lawyers professional secrecy. Likewise, investigating judges in criminal matters invite the Institute's president to help with identifying confidential documents.

By the laws of 13 March 2023 and 7 April 2023, the Belgian legislator reinforced the legal confidentiality of company lawyers. It clarified the scope, confirming that not only the advice itself is protected, but also the internal correspondence containing the request for advice, internal correspondence exchanged concerning this request, draft advice and internal documents drawn up in preparation for the advice. It also confirmed that company lawyers give advice regarding the "ascertainment of the legal position of the company", making the link, in the preparatory works, with the company's rights of defence.

The breach of the duty of confidentiality by the company lawyer is subject to disciplinary sanction.

European Company Lawyers Association

- Founded in 1983
- 22 member associations
- 21 countries
- 70,000 in-house lawyers
- 57 % female in-house lawyers
- Located in Brussels, Belgium

The European Company Lawyers Association (ECLA) is the umbrella organisation representing the interests of over 70,000 in-house counsel from 21 countries at the European and international level.

History

ECLA was formally established in 1983 following the AM & S decision of the European Court of Justice. However, the history of ECLA as an international consortium of in-house lawyers began three years earlier, when an association of company lawyers in Belgium, the Netherlands, England and Wales, Germany, Italy and France began exchanging experiences and best practices on legal matters, with particular reference to international and European laws affecting the activities of their respective companies. This led to the realisation that the legal status of the in-house profession was not the same in each country. In the Netherlands, the UK and Germany, company lawyers could be admitted to the national bar or other professional associations (such as the Law Society), while in Belgium, France and Italy this was not permitted by law. Following the AM & S decision, which held that lawyer-client communications can only be covered by legal professional privilege if they are exchanged between the client and an "independent lawyer, that is to say one who is not bound to his client by a relationship of employment", ECLA was established as a private non-profit international association under Belgian law, and was publicly recognised by the Royal Decree of 25 June 1990. The Association is governed by a General Assembly comprising one representative of each member organisa tion which meets twice a year, and by an Executive Board with one President, one or more Vice Presidents, a Secretary General and a Treasurer.

Becoming a member

Pursuant to Article 4 of its bylaws, ECLA membership is open to national professional organisations which represent company lawyers within Europe. Aspiring member associations are required to have their own Code of Ethics – or professional code – and must be able to exercise disciplinary and exclusion functions over individual members who fail to adhere to the rules or to maintain the necessary professional qualifications. Membership is granted upon proposal of the President of the Executive Board by decision of the General Assembly, with a three-fourths majority vote of the members present or represented required. Since 2014, ECLA also has its very own Code of Ethics, which sets out a series of common ethical guidelines relating to the company lawyer's profession throughout Europe. Under this set of principles, company lawyers are required to act in a fully independent manner when performing their professional duties and must maintain confidentiality on information they obtain when performing their duties, including after the relationship of employment has ended, except in cases where applicable laws provide otherwise or if confidentiality has been waived by their employer.

Services and benefits for members

As a part of its efforts towards achieving the legal recognition of the in-house profession across the continent, ECLA offers a variety of pan-European services to its members. Most recently, the Association launched the Legal Disruption Roadshow, a series of events which focuses on the topic of legal technology and on the organisational challenges introduced by pervasive digitalisation to the legal profession, with conferences held across Europe. In addition, ECLA encourages networking and best-practice sharing at the highest levels of the legal departments' hierarchy by holding regular General Counsel Roundtables. Decision-makers from various legal backgrounds come together at these events to discuss practical challenges currently affecting their companies and activities.

In.House Legal, the Association's online publication, provides continuous coverage of developments and policy decisions that impact the work of company lawyers, with a focus on fields such as antitrust, legal technology, privacy and public policy. Finally, ECLA actively represents the interests of the in-house profession before European institutions, both at the political level – European Commission, Parliament, etc. – and in the context of legal challenges brought before the European Court of Justice, acting as an intervening party in cases touching on the issue of legal professional privilege.[1]

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1 See ECLA's position on the Akzo Nobel case in 2010