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

dfv European Corporate Counsel Group

40 YEARS
EUROPEAN COMPANY
LAWYERS ASSOCIATION

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Legal Professional Privilege in the European Union

Jonathan Marsh
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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.

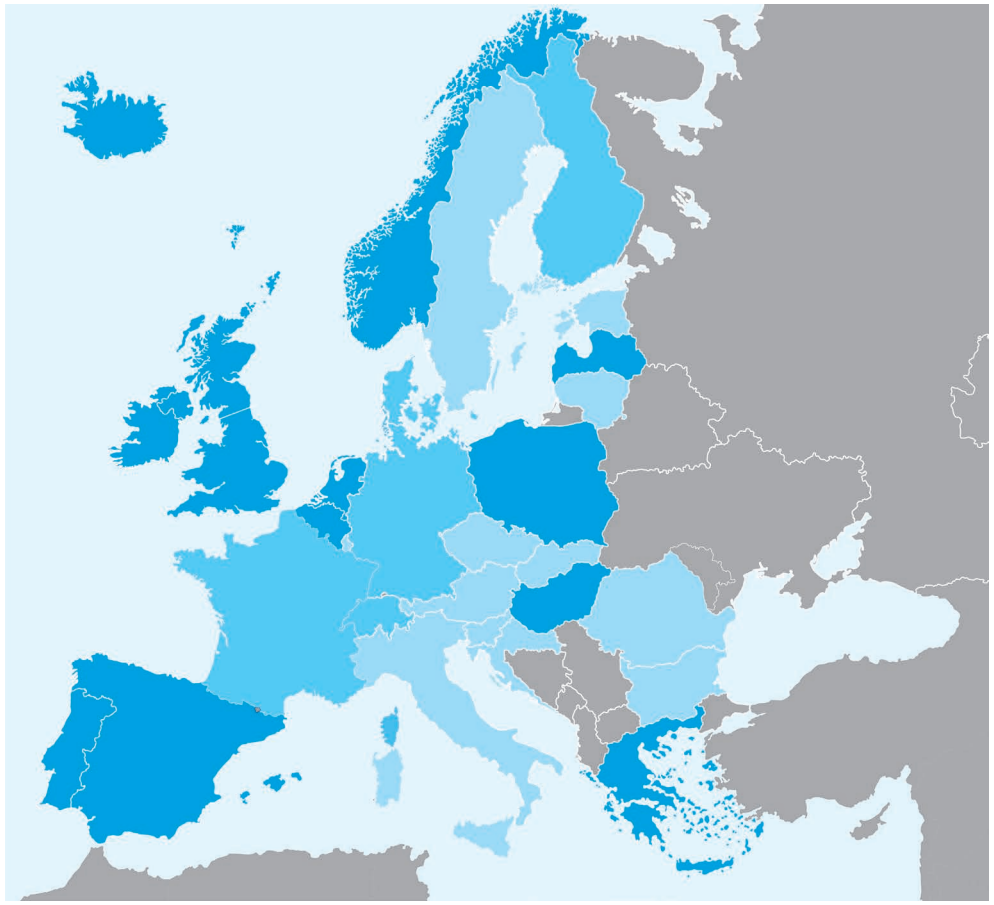
Therefore:

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

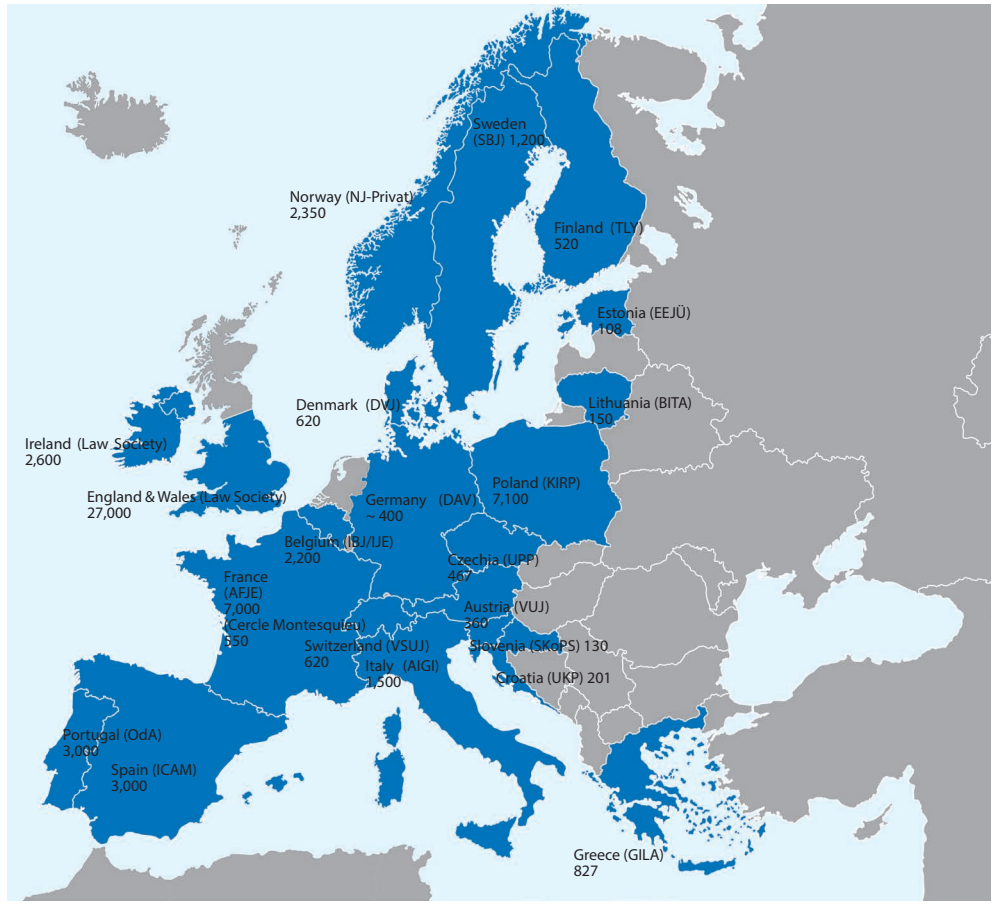
Although regulations vary across European jurisdictions, the matter of in-house professional privilege appears closely linked to the duty of professional secrecy, to which lawyers who are members of a bar association are generally bound, and in-house counsel are more likely to benefit from LPP when they 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