

## Introduction

There are various branches of the legal profession in the European Union such as judges, advocates, notaries, academics, bailiffs, etc. Moreover, there are several national variants throughout the Member States. Most of these professions have the following common characteristics:

\* They are very ancient and as such, are organised as monopolistic bodies which govern access to the profession, regulate use of the title ascribed to members of the profession, define the ethical rules which apply to members and also exercise disciplinary powers over them.

\* In Europe, these bodies are frequently private organisations although charged with the duty of providing a public service. This latter feature entails certain particularities such as the use of robes, wigs or other attributes of authority, as well as the possibility of the State becoming involved in the management of the body or council concerned in order to establish rules to safeguard the public interest. Therefore they are not governed by the common law applying to private associations.

\* The members of these professions generally practise in an individual capacity and thus acquire some degree of personal reputation on this basis. The corporate forms in which members of some professions are permitted to organise themselves (notably as a result of recent developments) enable the individuals concerned to enjoy the economic and commercial advantages of being part of a firm while maintaining their individual identities.

\* These traditional professions have a high degree of stability in that members tend to practise throughout an entire career within the same profession and, indeed, frequently do so within the same geographical area.

The profound industrial and economic changes of the post-World War Two era, characterised on the one hand by the globalisation of trade with its accompanying deregulation and, on the other, by the complexity of new sets of regulations protecting citizens and consumers, have progressively lead corporations,' starting with the larger ones and followed by smaller sized companies, to recruit lawyers to work full time for them inhouse.

These are the company lawyers, also called corporate counsel or legal advisers; their profile has gradually taken shape in the 20th century, particularly during recent decades.

The purpose of this memorandum is to describe the role of the company lawyer by reference to its common characteristics within the Member States of the European Union.

## Profile of the Company Lawyer

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The law has also been subject of various noteworthy trends, principally the following:

- The rules of law and of commercial usages have become internationalised;
- There is an increasing degree of complexity resulting from the emergence of new fields of law such as computer law or environmental protection, as well as the increasing sophistication of such traditional fields as finance law or company law. Hence, the level of complexity today is such that no lawyer could, on his own, master the entire sphere of business law;
- The rule of law has replaced morality as a means of organising society;
- There has been a liberalisation of business law, frequently accompanied by deregulation, which, in turn, has resulted in legal creativity being transferred from legislator to businessman through the expedient of the contract;
- As a counter-balance to these trends, there has been a reinforcement of the rights of the public, as consumers and citizens,

In recent decades, these trends have inspired not only changes in the means by which corporate decisions are made, expressed through new management techniques, but also a change in the role of legal services, which have become an integral and essential part of management, just like finance or research & development.

It is this new environment which explains the emergence of this new mode of practice in the legal profession and its gradual spread from the large corporations to middle sized and small companies. This environment also accounts for the specific characteristics of the company lawyer.

The need for an in-house legal service is dictated by the need for businesses to have legal experts of top quality available within their corporate structure at all times.

## The specifics of the practice of the company lawyer

- § Intrinsic characteristics
- § Tasks entrusted to the company lawyer
- § Recruitment
- § Continuing legal education
- § Representation of the profession

### Intrinsic characteristics

The first characteristic of the company lawyer is the absence of a clientele. A company lawyer has many personal contacts, both within his/her company and with other companies but they are not his/her clients because he/she does not defend their private interests, but rather those of his/her company, nor is he/she remunerated by them. Hence, there is no obligation with respect to those individuals, to observe the rules of professional ethics applicable to a lawyer in private practice, such as those relating to fees. As a corollary, the company lawyer gives legal advice exclusively to his/her company and not to third parties.

The second feature is that he/she exercises his/her role under a contract of employment which implies the subordinate relationship characteristic of any salaried function. It also means that his/her activity is governed by labour law and, as the case may be, by the terms of any collective bargaining agreement applicable to his/her company or industry sector.

Exceptionally, the relationship between the company lawyer and the company may take the form of a medium or long-term contract for services. In either case, the company lawyer has full intellectual independence, no more affected by the status of an employee than a doctor employed by a hospital, a pharmacist working under an employment contract or even an employed lawyer in private practice.

That the practice of a profession as an employee is perfectly compatible with intellectual and technical independence has been confirmed by decisions of the supreme courts of several member states of the Union (such as the United Kingdom, Belgium and France). It has recently been confirmed in the Netherlands by a parliamentary commission (the Cohen Commission), charged with re-evaluating the legal professions on the basis of 25 years experience.

It would accordingly be incorrect to infer that the economic dependence of the employee would alter the intellectual independence of the in-house lawyer. On the contrary, that very independence, as chief executives well know, serves the interest of the company and the public interest, by integrating into business practices respect for the law and professional ethics, of which the chief executive is advised from the moment he hires the company lawyer.

The third characteristic is that the function is one of legal expert, very closely related, as much by reason of the lengthy training which it requires as by the nature of the subjects handled, to those of advocate, notary, or judge of a commercial court.

In contrast to an advocate or judge, whose intervention is generally a posteriori, the company lawyer acts a priori: he/she is in effect the first to apply new legislation. In the absence of any learned analysis or commentary, he/she must immediately implement, in the day to day company business, new rules and regulations published that morning in the official journals.

This role "on the front line" describes, almost by itself, the particular function and contribution of the company lawyer to the implementation of law in the European Union.

The fourth characteristic is that a company lawyer is also a corporate executive, perhaps even a company director, a fully integrated member of a multi-disciplinary team in direct relationship with the board. He/she is steeped in the culture and values of his/her company.

The final principal feature is that of mobility. Whether it be from one subsidiary to another or from one speciality to another or even, in the larger corporations, from one country to another, the company lawyer is accustomed to moving from one company to another. Needless to say, he/she is ready also to move from one branch of the legal profession to another. However, a company lawyer's decision to abandon the practice of law is a grave one which only makes sense when it entails undertaking senior management responsibilities, since the effect of leaving the profession is to cast aside a heavy personal investment in acquiring legal expertise.

### **Tasks entrusted to the company lawyer**

The tasks entrusted to the company lawyer, which are determined by the variety of situations with which his/her corporation is confronted, can be summarised as follows:

The detection, prevention and minimisation of legal risks affecting the company, its officers and its property in the conduct of its business;

The identification of legal means available to the company to achieve its objectives at reasonable cost and minimum legal risk;

The optimisation of legal rights and obligations undertaken by the company vis-à-vis third parties, whether in the public or private sector, while ensuring that those rights and obligations are coherent and consistent, not only in themselves, but also with the company's objectives, and with its ethical code which he has helped to form.

Their enforcement by all appropriate means including litigation;

The administration of the requirements of company law, to which the corporation is subject as a legal entity (such as general meetings and board meetings);

The conduct of contractual negotiations and the drafting of agreements;

The responsibility for litigation and settlement thereof in front of courts, tribunals or arbitrators, in conjunction with advocates or barristers where required;

The issue of legal opinions, not only in relation to contracts but also on any aspect of company life, often in a situation of crisis, or in key moments of decision making.

Informing and advising management and staff of legal developments, actual and anticipated, affecting their activities;

Active and constructive involvement in the drafting of new rules and regulations;

Undertaking the interface of the company with the external legal environment

### **Recruitment**

Corporations recruit the best available legal talent in order to ensure that they have the right experts. Initially, they recruited from among lawyers in private practice who had acquired a specialised knowledge of business law and an experience in advising corporate clients and who were prepared to enter industry by joining a major group.

This source of recruitment is still used and is even compulsory in certain countries of the European Union. However, it has proved inadequate in those countries where the fact of becoming a salaried employee in a commercial or industrial entity causes those lawyers to lose,

not only their clientele, but also their professional status and title.

Hence, business has rapidly extended its field of recruitment to lawyers having a full university degree and who, having intended from the start to pursue careers in business, had therefore supplemented their university education in business law either by further qualifications from a business school or by foreign legal qualifications.

In some countries, the universities identified this new demand at an early stage and devised practical responses to it through the "Erasmus" exchange programme and also by the creation of post graduate diplomas. In France, under the auspices of the "Federation Nationale du Droit de l'Entreprise", and with the active collaboration of the French Company Lawyers Association (a member of ECLA/AEJE) numerous universities have implemented the "DJCE" (diplome de juriste conseil d'entreprise).

Company lawyers take part in the selection of the candidates and, together with university teachers and lawyers in private practice, provide an education directly linked to the day-to-day practice of their profession. Similarly, in The Netherlands, five major universities have implemented, with the active participation of the Dutch Company Lawyers Association (NGB) (also a member of ECLA/AEJE), a degree in business law where senior company lawyers and university teachers teach junior company lawyers desiring to improve their legal knowledge.

The legal departments of corporations of sufficient size have no difficulty in recruiting quality legal talent whether directly from universities, taking graduates whose competence they have been able to verify through in-house training programmes, or through associations of lawyers, head hunters or direct job applications for senior lawyers.

Legal department recruitment criteria differ from those of other branches of the legal profession as they involve specific factors of corporate culture, such as capacity to work within a team, mobility, communication skills, and aptitude for foreign languages.

The concept of independence (see 3.1.2 above) indicates, just as for other lawyers,

- on the one hand, intellectual autonomy founded on the lawyer's technical competence (as in the case of a salaried doctor) which enables him to impart advice, which will be treated by management as being definitive and reliable;
- on the other hand, the courage to state one's opinion and to persuade management to take it into consideration, even at the risk of unpopularity.

### **Continuing legal education**

The emergence of new fields of law together with the proliferation of new regulations, both national and from the EC, mostly dedicated to consumer protection, on the one hand, and deregulation, transferring legal creativity from legislator to the company lawyer, on the other, confer a paramount importance on continuing legal education for the company lawyer

Major companies with a large staff of lawyers can organise their own legal seminars, although a large part of their legal education budgets is also spent on seminars and workshops organised by company lawyers associations, and by external organisations which realising the growing importance of this market, offer an increasing number of seminars and conferences, seeking company lawyers on both sides of the dais.

## **Representation of the Profession**

By reason of its recent origin, the profession of company lawyer is neither distinctly identified nor clearly recognised by the legislator. Accordingly company lawyers are not the subject of a specific set of regulations nor do they have any official representation before the public authorities except in those countries of the European Union where the profession forms part of, or a branch of, the law society or bar council. As a consequence, company lawyers organise themselves through their own national associations.

Unified by ECLA/AEJE, these associations, having a code of professional ethics and disciplinary rules, open their membership to lawyers having legal qualifications equal to other legal professions and who possess executive status within the companies which employ them.

Unlike law societies or bar councils, these associations do not regulate access to the profession or protect the use of the title of company lawyer. They undertake the tasks of education and research, defence of the interests of company lawyers and their representation in dealings with other legal professions and the public authorities when necessary.

These associations are developing constantly. ECLA/AEJE at present represents more than 31,000 European company lawyers, which is significantly more than its American sister association "ACCA" (American Corporate Counsel Association).

