



In-House lawyers issues of ethics and independence

The role of the lawyer:

The role of a lawyer in the European Union will fall very broadly into one of two categories, adviser or advocate. Not all lawyers perform both functions, but many do, and the functions themselves overlap.

Examples of the two functions could be:

Adviser :

- Advice on the interpretation of a land lease where the landlord is seeking an increase in rent.
- Advice on the interpretation of a purchase agreement where the seller has apparently, failed in performance.

Advocate :

- Representing a Client who wishes to recover damages for a tort (delict) committed by another party.
- Representing a Client who is affected by what he/she perceives to be the unfair or unlawful decision of a public authority.

In all these cases the Client, i.e. the person seeking/receiving the advice could be either a large multi-national corporation or a private party living on a modest income. The role of the lawyer is the same in each instance.

The specific role of the In-House lawyer

The In-House lawyer is bound to the Client (or to a part of the Client's organisation) by a contract of service (employment), and not, generally, by a contract for services (which is the case for the relationship between the lawyer in private practice and his/her client). However the role and function are in all other respects similar to those of a lawyer in private practice (see above).

This position is true in principle, and in practice in a number of Member States. Where the In-House lawyers role is restricted (e.g. in matters requiring advocacy in front of the Court in his/her role as lawyer) by rules of the local Bar, the position may, of course, be different.

What is meant by "Independence" when speaking of a lawyer ?

ECLA subscribes to the Code of Conduct for Lawyers in the European Community, adopted by the Council of the Bars and Law Societies of the European Community ("CCBE") in 1988 ("the CCBE Code"), and all ECLA member associations subscribe to similar principles. Paragraph 2.1.1 of the CCBE Code states:

"The many duties to which a lawyer is subject require his absolute independence. free from all other influence, especially such as may arise from his personal interests or external pressure."

The first duty of a lawyer is to strive, within the framework of his/her personal and professional ethics, to give the very best advice of which he/she is capable to his/her Client. "Best", in this context, means that the advice will reflect the lawyer's best judgment of the legal consequences flowing from the facts presented to him/her. The lawyer will show "independence" in the sense that in the course of giving advice or arriving at this judgment he/she will be:

- unswayed by any interest other than that of the Client, whether that be his/her own or that of any third party.
- without fear for the consequences for himself/herself, i.e. in a truthful and frank manner (this is particularly apposite where a lawyer / advocate is at some personal risk in representing a client in this way).

Independence of thought and judgment are expected of In-House lawyers, as they are of their external colleagues. Such independence of thought and judgment are in no way incompatible with the existence of an employment contract, and this principle has been affirmed by the Appellate Courts in a number of EU jurisdictions both for lawyers and for other professions (Cour de Cassation France, 29/03/1996; Cour de Cassation Belgique, 27/3/1968 (pas 1968,1,916); Hof van Discipline Nederland, 18/12/1974, (Advokatenblad 1975,p 366 et seq)). In this last case the Court decided that the employment contract of X (the lawyer) did not endanger his freedom and independence even when acting for his employer. The principle has also been confirmed by the French law of December 31, 1990 concerning certain legal professions, which introduces the possibility for "avocats" to be employees.

The key rules of "professional ethics" which are relevant to lawyers

To state, without more, that lawyers should behave "ethically" is unhelpful. It is more helpful to examine, which specific aspects of professional behaviour are properly governed by a code of ethics coupled with sanctions (approved by the legislature) for breach. Only when that question has been answered, is it possible to examine whether InHouse lawyers would be unable, by reason of their contracts of employment, to behave "ethically".

The following are areas where it is possible to imagine a lawyer (whether in private practice or In-House) facing issues of "ethics":

* False or misleading information

A lawyer shall never knowingly give false or misleading information to the Court or the Public Authorities.

* "A lawyer has a duty not knowingly to help Clients break the law.

Whatever the precise scope of this duty, it is clear that there is no reason why the duty in this regard placed on an In-House lawyer should be more onerous than the duty placed on a lawyer in private practice.

* "A lawyer has a duty not to help the Client to conceal a past breach of the law."

There are two separate points here:

- The Code of the CCBE already includes a duty not to mislead the Court. Leaving aside whether the Commission is a "Court", the duty not to take any active step to mislead the Court is capable of being fulfilled as completely by an InHouse lawyer as by a colleague in private practice.

- It is the case in a number of Member States that In-House lawyers have an express obligation to comply with this duty. It should be noted that the duty may be circumscribed by another duty placed on a lawyer, which is to refuse to answer questions if that is necessary to preserve the confidentiality of lawyer-client communications, which is generally considered to be an exception to this rule. However, this duty never extends to a positive obligation to inform the Public Authorities of past wrong-doing or of facts which would suggest such wrong-doing. There is certainly no such rule in the Competition Laws of the European Union binding on undertakings: there is no reason why such an obligation should be imposed on the lawyer (in private practice or In-House) if it is not borne by the Client.

"A lawyer has a duty not to help the Client to conceal a breach of the law which the Client is contemplating"

The lawyer in most Member States, has the right to breach his ordinary obligation of confidentiality in order to prevent a crime being committed. No distinction arises as between the position of an In-House Lawyer or a lawyer in private practice.

Accordingly there is no reason to suppose that compliance with any of the ethical standards set out above is in any way incompatible with the status of employment.

Conclusion

The principle behind the decision in A.M. & S. is that lawyers bound by a relationship of employment to their client are not "independent". It was said to follow that they cannot therefore be allowed to give advice protected from disclosure to Commission's Inspectors in the course of an inspection under Regulation 17.

This Paper has examined the principles which lie behind the concepts of "independence" and of "professional ethics" for lawyers relevant in this context.

The conclusion is that there is no obligation either of independence or of ethical behaviour which is incompatible with the status of employment.