



LEGAL PROFESSIONAL PRIVILEGE FOR IN-HOUSE LAWYERS: AN ESSENTIAL FACILITATOR OF COMPLIANCE AND BUSINESS COMPETITIVENESS

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The existence of professional secrecy or legal professional privilege (LPP) for in-house lawyers has been a controversial issue for years in Spain. Whilst there was already a compelling legal argument that LPP was applicable not only for external but also for in-house lawyers under the former General Statute of the Legal Profession (approved under Royal Decree 658/2001) and article 542.3 of Judiciary Organic Law (LOPJ), regulators had questioned such protection in various legal fields, creating a situation of legal uncertainty. And this, even whilst CJEU provided in its famous AKZO judgment in 2010 that its ruling was confined to competition law investigations

run by the European Commission under Regulation 1/2003.

The report adopted by the General Council of the Judiciary (CGPJ) on 26 September 2019 when dealing with the proposed draft bill to transpose the Directive DAC 6 into Spanish law provided a strong reaction against this controversy by stating that “article 542.3 LOPJ extends the right-obligation of professional secrecy to any Lawyer whichever the modality of his/her professional activity, so that it reaches all forms of professional practice, such as individual practice, practice under the labor regime, collective practice or practice under a

multi-professional collaboration regime. In particular, it is undoubtable that our legal system recognizes professional secrecy for the so-called internal or in house lawyers, which must be therefore respected in the context of the transposition of the DAC 6”. However, even such a clear statement was deemed to be insufficient to settle the controversy.

The new Spanish General Statute of the Legal Profession (EGAE) - approved under Royal Decree 135/2021 and in effect since July 1, 2021 - operates to dissipate any legal uncertainty that might still exist about this controversial matter by providing explicitly under its



article 39 that the professional secrecy, independence and freedom of lawyers practicing the legal profession under an ordinary employment relationship must be respected.

This landmark development for the in-house legal profession is foreseen to play a key role in fostering compliance and increasing competitiveness for businesses.

On the one hand, LPP plays a major role in fostering a culture of compliance within businesses that are subject to strict compliance requirements which have become more sophisticated year after year. If confidential legal advice is easily accessible for companies, it is more likely that they may act without delay and prevent potential legal infringements. In addition, the increased relevance of the role of in-house lawyers within a company, to a certain


extent, goes in parallel with the interest and commitment of the company to guarantee compliance with an increasingly complex and dynamic regulatory framework that allocates to companies the responsibility for making a self-assessment of their compliance in multiple and diverse legal fields.

In such context, it is critical that corporations can decide how to complete this preventive and proactive exercise of responsibility with freedom to engage internal and/or external legal resources to ensure that their preventive compliance plans are real and effective. Regardless of the client's preference for relying on - by reference to the particularities of the situation - either on internal or external legal professionals, or, as is more likely, on a combination of them, in order to foster a corporate culture of compliance it is crucial to set up

an operative environment where free, honest and trusted talks between business management and in-house lawyers are facilitated, and where business management can easily seek legal advice in confidence from lawyers that may be not only legal subject-matter experts but also have an in-depth knowledge about the company's organization, its business activities and the industry in which it operates.

Moreover, in order to facilitate that the culture of compliance becomes an intrinsic part of the company's management policies, it is important that in-house lawyers can "*take a seat at the table*" and participate - in its role as a lawyer - in discussions with company management about proposed business strategies before they are implemented, so that inhouse lawyers can built-in their legal advice to identify and prevent legal risks, what is

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preferable to mere detection of violations once they occurred.

On the contrary, limiting the protection of the confidentiality only to legal communications with external lawyers may have a detrimental effect on the corporate preventive compliance efforts. This does not result from the *cliché* that external lawyers deal primarily with solving a legal problem after it occurs, whilst the primary role of the in-house lawyer is typically preventive but, more importantly, because without accessible confidential legal support, companies are far less likely to more easily discover potential or actual legal violations and react quickly to ensure compliance.

This argument holds particularly true for internal investigations resulting from reports through whistleblowing hotlines set up by a company. Having to hire and instruct a firm of external lawyers to investigate every single whistleblower tip, so that professional secrecy is guaranteed, is not only a non-practical solution, but it is unrealistic. In the context of internal investigations, protecting LPP of in-house lawyers allows to quickly react and more effectively investigate

alleged wrongdoings, given that in-house legal resources are already onboard and can be allocated immediately to investigate the complaint and provide quick legal advice, and employees can freely discuss the facts under investigation without fear that sensitive information will be involuntarily disclosed. All in all, without prejudice of the possibility of retaining in parallel outside counsel to work hand-in-hand with in-house lawyers to deal with the investigation, a higher efficiency is achieved by enabling the engagement of in-house lawyers from minute zero.

The lack of acknowledging LPP for in-house lawyers has a chilling effect on corporate compliance efforts, because company management and employees may try to avoid disclosing sensitive information to in-house lawyers. We wonder how many employees search for legal information via Google, ending up with bad legal advice just because they are concerned about having open discussions with their in-house lawyers, out of fear that such conversation may become public. The outcome of not preserving confidentiality of internal legal communications is likely to be that full and frank conversations that should

have taken place between the business management and the company's in-house lawyers, never take place.

The current business world is significantly impacted by globalization, where companies operate at a global scale. Predictably, this results in an evolution on how companies seek legal advice from their law departments for their global business activities. This is a reality not only for large multinational groups of companies, but also for any businesses competing in a global marketplace, so that the provision of in-house legal services expands its horizon to become cross-border, international or even global, and therefore, where a large share of in-house lawyers are now required to provide legal assistance, not only to the local entity that directly employed them but also to a group of companies operating in a multi-country region or even globally.

At ACC Europe we are confident that the explicit recognition of professional privilege for admitted in-house lawyers under the new EGAE - which materialized thanks to the continuous support provided by the CGAE (General Council of Spanish Lawyers) and the President of the Madrid Bar Association - will not only result in a stronger corporate culture of compliance and increased competitiveness for companies established in Spain, but will promote the Spanish legal market as a whole and support to make more prominent the global practice of in-house lawyers admitted in Spain. 