



Mr. Koen Lenaerts
President of the Court of Justice of the European Union
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Luxembourg

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Proposal to extend CJEU practice rights to in-house counsel

Dear President Lenaerts,

The Association of Corporate Counsel (ACC) and the European Company Lawyers Association (ECLA) would like to congratulate you on your recent election as President of the Court of Justice.

ACC Europe (ACCE) is the European chapter of the Association of Corporate Counsel, a global bar association for in-house counsel.¹ ECLA is the umbrella organization for 19 company lawyer associations in Europe and represents common interests of European company lawyers.² We are looking forward to your leadership at the highest judicial authority of the European Union.

ACCE and ECLA would like to use the opportunity of your election to raise an important matter with regard to in-house counsel to your attention. It touches upon the fundamental right of the freedom of choice of companies concerning their representation in court. The

¹ The ACC is a global bar association that promotes the professional and business interests of in-house counsel who work for corporations, associations and other private-sector organizations through information, education, networking opportunities and advocacy initiatives. We have more than 40,000 members representing over 10,000 organizations in more than 85 countries. ACC Europe has more than 2200 members throughout Europe. ACC through ACC Europe has engaged in various efforts to elevate the role and status of in-house counsel in Europe.

² ECLA was created in 1983 as a non-profit association. ECLA's primary goal is to enhance the acceptance of company lawyers by identifying regulatory threats and monitoring the status of the profession for all European countries. In order to achieve its goals, ECLA also encourages cooperation with other legal international associations that promote its position, as well as the networking and debates on freedom of the professionals among its members.

Court of Justice's current practice is that in-house lawyers may not represent and plead on behalf of their companies in front of the Court. We invite the Court to review this practice and consider amending Article 19 of the Statute of the Court of Justice of the European Union³ to provide that parties can be represented by a lawyer of their choice, including an in-house lawyer (provided that such lawyer is authorized to practice before the courts of the relevant Member State).

Since the Charter of Fundamental Rights of the European Union became binding with the entry into force of the Treaty of Lisbon on 1 December 2009, the Court of Justice has engaged strongly with and given prominence to the Charter in all its judicial activity. Your Court is widely acknowledged as having extended its role to become a trustfully fundamental rights protector.

From that perspective, and taking into consideration Article 16 of the Charter, we suggest that the Court of Justice may want to review Article 19 of the Statute of the Court, which weakens the freedom of choice of companies concerning their representation in court.

We believe such an amendment to Article 19 would undoubtedly align representation before the Court of Justice with the freedom to conduct a business set out in Article 16 of the Charter of Fundamental Rights of the European Union. Many EU Member States already grant businesses the ability to utilize their in-house lawyers in national courts under their national laws and practices. We believe allowing an equivalent right before the Court of Justice (for those in-house lawyers that enjoy such a right in their home jurisdictions) can be achieved without undermining the important objective of maintaining the independence of the lawyer's role in the legal order of the European Union.

Rights under Article 16 to include choice of counsel for businesses

Article 16 of the Charter of Fundamental Rights of the European Union recognizes the right to conduct a business in accordance with "Community law and national laws and practices." As we will elaborate further, national laws and practices within a number of EU Member States allow companies to utilize their in-house lawyers in proceedings before national courts. This court has recognized that the freedom under Article 16 "*includes, inter alia, the right of any business to be able to freely use, within the limits of its liability for its own acts, the economic, technical and financial resources available to it*" (judgment in *UPC Telekabel*, C-314/12, paragraph 49). In our view, lawyers – either internal or external - retained by business clients may be deemed to be included among those technical resources. In many cases, companies may prefer to utilize their in-house lawyers because it is more efficient to do so, especially from a financial perspective, and

³ Article 19 states that parties must be represented by a lawyer. The Court's interpretation of Article 19 is that the lawyer must be independent. Independence is interpreted by the Court as the absence of an employment relationship between the lawyer and his client (see *EREF v Commission*, paragraph 53 and the case-law cited therein). The Court defines the concept of the independence of lawyers not only positively, that is by reference to professional ethical obligations, but also negatively, that is to say, by the absence of an employment relationship (*Akzo Nobel Chemicals and Akcros Chemicals v Commission*, paragraph 45).

the in-house lawyers may be more effective due to their better knowledge of the companies' business practices, in particular for certain proceedings in front of the Court of Justice, as in the case of prejudicial questions proceedings, where in-house lawyers are much better positioned than outside counsel to respond to the questions that the Court may raise to the parties during the hearing.

Thus, it seems to us that the rights granted under Article 16 merit an interpretation to include the ability to utilize in-house lawyers in Court of Justice proceedings if those in-house lawyers are otherwise authorized to practice before courts in their home jurisdiction. In such regard, we would like to point out that a number of EU Member States, especially those countries that take a lead role in advancing the legal profession, already follow legal traditions that authorize in-house lawyers who are admitted to the bar to plead on behalf of their companies at national courts with the understanding that independence of those in-house lawyers is comparable to the independence attributable to lawyers in private practice.⁴

In addition, many in-house lawyers – in particular all those authorized to plead in front of their national courts - are members of national bar associations. In the United Kingdom, Ireland and Spain, for example, in-house lawyers and barristers, in conjunction with their private practice colleagues, are members of the same professional associations and subject to the same statutory regulations that include the possibility for disciplinary sanctions. Those in-house lawyers who are members of a bar association are deterred, both by the rules of their professional body and by their duties (in several jurisdictions) as officers of the court, from misusing their role of collaborating in the administration of justice. Moreover, they operate under the umbrella of their bar association that protects them against any potential attacks to their independence by their employers.

Therefore, it is ACCE and ECLA's position that where a EU Member State permits in-house lawyers to practice before its courts, the Court of Justice should do so as well. This is particularly relevant in prejudicial questions proceedings, where in-house counsels are representing their companies in front of national courts.

Independence concerns should not presumptively limit the right to choose counsel under Article 16

We are conscious that fundamental freedoms and rights in the EU Charter are subject to limitations. With respect to lawyers, the conception of the lawyer's role in the legal order of the European Union is that of collaborating in the administration of justice and of being required to provide, in full independence and in the overriding interests of that cause, such legal assistance as the client needs. We find such conception - and its inherent limitation on lawyers' advice and therefore on a business' rights under Article 16 - fully legitimate. However, we do not agree that in-house lawyers are unable to carry out representation of their companies in alignment with the requirements of collaborating

⁴ Among those EU Member States are the United Kingdom, Spain, The Netherlands, Denmark, Ireland, Portugal and Greece. We note that there are additional EU Member States in which in-house counsel are permitted to practice in courts of limited jurisdiction.

in the administration of justice and providing legal advice with full independence.

Indeed, we wonder if an irrefutable presumption of in-house lawyers not meeting the requirement of independence because of their employment status does not infringe on the principles contained in Article 52.1 of the Charter, which requires that any limitation on the rights contained in the Charter be necessary and proportionate to achieve a legitimate purpose. Whilst lawyers in private practice are deemed to meet the independence requirement without any question, limiting the activities of all in-house lawyers on the same basis may not be a proportionate response to meeting the objective of requiring independence. The role of the in-house lawyer has evolved within the last years to be comparable in many ways to lawyers in private practice. We believe that in-house lawyers meet the requirement of independence required by the Court of Justice, and that their employment status is not likely to affect their professional opinion.

Both ACCE and ECLA have addressed the issue of independence of in-house lawyers before,⁵ and nowadays such level of independence is higher than ever before. The current role of the in-house lawyer is to provide independent legal advice and services no different from those demanded from an external lawyer. In larger companies, in-house lawyers operate from specialist legal departments and offer advice to in-house clients based in entirely different locations/countries to themselves. In-house lawyers very often have no relationship to the in-house client other than in the context of the legal advice being sought because they may work for a different corporate entity, be located elsewhere and have a separate reporting hierarchy within the corporation.

In contrast, the use of outside counsel does not guarantee independence and certainly does not prevent abuses. In SAS/Maersk, two airline companies had illegally shared markets, and, in order to keep incriminating evidence outside the reach of antitrust authorities, the companies agreed to place such documents in escrow in the offices of outside counsel (Commission Decision 2001/716/EC, SAS/Maersk Air (COMP.D.2 37.444) OJ 2001 L265/15, paragraph 89). The companies had also been advised by their outside lawyers that information concerning market sharing and price fixing should not be included in a written agreement.

The relationship between external counsel and the client company can be as close, or closer – both financially and personally – than that existing between an in-house lawyer and his/her in-house client. Particularly for smaller independent law firms working for very few clients, the pressures to cooperate with management in addressing commercial pressures can be greater for external lawyers than for in-house counsel.

Moreover, the development of new business models for the provision of legal services, such as those provided by firms like Lawyers on Demand (LOD) and Axiom, has blurred

⁵ ACC, through ACC Europe was an intervener in *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission* (case C-550/07 P), as was ECLA. ECLA has also commissioned a whitepaper, “*Company Lawyers: Independent by Design*“, which is available online in ECLA’s website at <http://www.ecla.org/profession/independence>.

the distinction between external and internal counsels. In sum, independence is a function of the role played by the lawyer in a particular matter, not the existence or lack thereof of an employment relationship.

Alternatives to full representation rights

We have noted above our belief that, ideally, the barriers preventing certain in-house lawyers from practicing before the Court of Justice should be lowered because the rule does not seem proportionate to the need for lawyer independence before the Court.

Similarly, if the Court is unwilling to grant full representation rights to the relevant in-house lawyers, we kindly ask the Court to consider whether under Article 52.1 it is necessary to apply the bar against in-house lawyers in all proceedings before the Court. Perhaps a different treatment is advisable in the context of references for preliminary rulings, particularly in instances where in-house lawyers are representing a party already in the national proceedings. Other proceedings of a more contentious nature, such as actions for annulment and appeals, could however maintain the restriction on in-house lawyers if the Court finds it necessary to meet the objectives of maintaining the role of counsel in its proceedings.

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ACCE and ECLA are hopeful that under your presidency, a review of the Statute of the Court of Justice of the European Union can be initiated to remedy this important issue and permit in-house lawyers to represent their clients in front of the Court.

Please feel free to contact ACC Europe's chair of advocacy, Javier Ramirez (javier.ramirez2@hp.com; +34.91.634.9828), if you wish to discuss these matters at greater length, or if we can provide you with any further supportive material.

Thank you very much for your consideration and assistance.

Sincerely,



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