COURTESY TRANSLATION

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RULES OF PROFESSIONAL CONDUCT & GENERAL ORGANISATION OF THE PROFESSION OF COMPANY LAWYER

Theory and case studies

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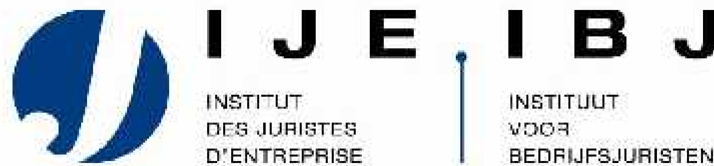

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You will find the documents referred to in this course and marked with an (*) in the Yearbook and on the Institute's website, www.ije.be.

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Foreword

As company lawyers, we are professionals who are expected to act in our clients' best interests, and to serve society and the common good by promoting respect for and adherence to the law. We are regulated by statute that protects our rights and grants us authority to issue opinions and provide advice on a confidential basis to our clients. Moreover, our behaviour and our actions are governed by our Institute which issued a Code of Professional Conduct in 2001. The Institute's disciplinary rules were established by royal decree in 2006, and disciplinary committees composed of elected members and judges are authorized to discipline those lawyers who violate the rules.
In 2009, the General Meeting of the Institute made the professional conduct course compulsory for our members.

Importantly, recent case law has just confirmed that our confidential opinions cannot be subject to seizure.

The statutory guarantee of our confidential opinions and the fact that they cannot be seized, as confirmed by recent case law, means that is we must fulfill our responsibilities with the utmost of discretion, bringing credit to our title and the role we play as company lawyers. It bears emphasizing that our behaviour must be worthy of the trust and confidence placed in us, and our actions beyond reproach.

I sincerely hope you will all take the course voluntarily and that you will play an active part in it. It would most rewarding for those who have given their time and effort to create this course and to ensure its content is both informative and inspiring. As you can imagine, the course reflects the collective efforts of a working group who prepared the syllabus by compiling and analysing 2000 pages of written materials. . It has just been updated to take account of recent changes in the case law.

The authors have very wisely taken a comprehensive approach to this important topic. First, they have preceded their discussion of the rules of professional conduct with an analysis of the company lawyer's powers, roles and responsibilities, as well as the important relationships and duties with respect to a company's board, executive committee and other stakeholders. They have rounded off their Belgium-based study with analyses of comparative and European law.

This work serves as a critical guide for our profession, and as such should be referred to frequently. It not only sheds light on the extraordinarily complex requirements of practicing law in the global economy; it helps us define our place alongside the other regulated professions who support the rule of law and the betterment of communities in which we live and work.

I would like here to give very warm thanks on behalf all the members of the Institute to the authors, and to all those who have assisted them in their outstanding work. While there is always more to do, this is a great foundation for future work on these important topics.

I would therefore remind you that the Institute and its President are at your disposal for any questions relating to professional conduct or responsibilities.

Hugues DELESCAILLE
President

I. THE STATUTORY FRAMEWORK OF THE PROFESSION

Bibliography:
Anne BENOIT-MOURY and Eric JACQUES, Bienvenue à l'Institut des juristes d'entreprise, JT, Larcier, Brussels, 2000, p. 725.

In Belgium, the profession of company lawyer is governed by legislation, the Act of 1 March 2000 creating an Institute of Company Lawyers (IJE Act) **(*)** (*Moniteur Belge* of 4 July 2000, p. 23252), the "Act"[1], as amended by the Act of 19 May 2010 (*Moniteur Belge* of 7 June 2010, p. 35846).

Company lawyer: A profession regulated by public-law statute.

As for other professions regulated by public-law statute, the title "company lawyer" ("*juriste d'entreprise*")[2] is protected by statute and reserved exclusively, on pain of a criminal penalty, for the members of the Institut des juristes d'entreprise alone.

The Institut des juristes d'entreprise (the "Institute") is a body corporate governed by public law. It possesses all of the characteristics of a **true professional "order"[3].** It is federal and has legal personality. It is bilingual. As an administrative authority, it is subject to the authority of the Council of State[4].

The Act mandates that the Institute perform the following: (Article 2 of the Act):

(a) draw up a list of its members;
(b) **establish the rules of professional conduct governing the work of company lawyers and ensure compliance with those rules**;
(c) promote the work of company lawyers;
(d) ensure that its members are provided with training in legal topics; giving opinions, at its own initiative or at the request of public authorities or public or private institutions, on the matters within its competence.

A list (or member register) of the 1.712[5] members of the Institute is set out in the Yearbook published each year (with their respective professional contact details), and is also available online (and therefore in real time) in the public area of the Institute's website[6].

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1 The not-for-profit Association Belge des Juristes d'Entreprise (ABJE), founded on 18 May 1968, was wound up on 26 January 2001.
2 The Institute strongly recommends "company lawyer" as the translation for this term. As for the German translation, the Institute strongly recommends "Betriebsjurist".
3 A. Benoit-Moury and N. Thirion, *Secret professionnel, confidentialité et juriste d'entreprise: la nouvelle donne*, J.T., Larcier, Brussels, 2001, p. 785.
4 Similarly, other institutes such as the Institut des Experts-Comptables (IEC) and the Institut des Reviseurs d'Entreprises (IRE) are subject to the authority of the Council of State.
5 Figure as at 1 July 2013.
6 To access the Institute's website, go to www.ibj.be. On admission to the Institute, company lawyers are given a personal password giving them access to the private areas of the site, which are reserved exclusively for members.

The four (4) bodies of the Institute are:

(a) the General Meeting,
(b) the Council,
(c) the Disciplinary Committee, and
(d) the Appeals Committee.

The Institute is run by a Council elected every three (3) years, composed equally of 10 Dutch-speaking members and 10 French-speaking members. The Council elects officers from amongst its members, who are responsible for day-to-day management. The officers include a president, two vice-presidents, two secretaries and one treasurer. The official language of the president alternates every three years. The president is assisted by a director.

The President, together with the Council, plays a key role in leading and setting the strategic direction of the Institute and in its policies. The Council is charged with adopting policies and authorizing their implementation by the President and the elected officers.

II. THE STATUTORY FRAMEWORK OF PROFESSIONAL CONDUCT

The purpose of this act is amongst other things to ensure, by means of protecting the title, that company lawyers are competent and fit to practise and have intellectual and technical independence.
Marc VERWILGHEN
Minister of Justice[7]

As for other professions regulated by statute[8], the Institute is obliged, *by statute*, to establish the rules of professional conduct for company lawyers (Article 2 of the Act).

Those rules **(*)** were drawn up by an internal working group of the Institute and approved by the General Meeting on 19 June 2001, 30 January 2002, 23 June 2005 and 22 May 2010.

By resolution of the General Meeting of the Institute of 28 May 2009, every member of the Institute must follow the professional conduct course of which this text is the basis.

As in the other professions regulated by statute which have issued rules of professional conduct, company lawyers must obey the rules of professional conduct issued by the Institute.

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7 Preamble, *in* Report delivered by Claude Desmedt on behalf of the Justice Commission to the Chamber of Representatives on 31 January 2000 (*Parliamentary Document*, 50 0385/004, Session 1999-2000, p. 3).

8 We are referring here to the professions regulated by public-law statute, that is to say, by the express provisions of public law (as opposed to the professions organised under private law such as not-for-profit or *de facto* associations)
Judges, for their part, were given a Guide for Judges – Principles, Values and Qualities (*Guide pour les magistrats – Principes, valeurs et qualités*) in August 2012, produced at the initiative of the Conseil Supérieur de la Justice and the Conseil Consultatif de la Magistrature. That Guide is designed to be a synthesis of the principles and guidelines of conduct intended to clarify for Belgian judges the values fundamental to their role, defined as the bases of statutory professional conduct.
It consists of two parts:
-(1) the first part describes the values inherent in judicial authority: independence, impartiality, integrity, reserve and discretion, respect and the ability to listen, equal treatment and competence; and
- (2) the second defines the qualities required of judges: wisdom, fairness, humanity, courage, gravity and prudence, capacity for work, the ability to listen, communication and openness of mind.
One completely unprecedented factor included in the Guide warrants analysis, as it concerns the contours of the duty of reserve to which judges are subject.
The guide points out first of all that "Judges' reserve and discretion imply a balance between their rights as citizens and the constraints of office. Judges behave in such a way as to avoid creating the impression that their decisions are inspired by motives other than a fair and reasoned application of the law. Judges do their utmost, in exercise of their office and in their private life, not to offend the confidence which those subject to the law place in them and in the administration of justice in general ".
Then, something which was much less predictable, a clause inserted in the discussion of the duty of reserve, entitled "Democratic rule of law", provides that "where democracy and fundamental freedoms are in peril, reserve gives way to the right of indignation".
Judges are recommended to have courage, now defined explicitly as a quality required of a judge, "on both physical and moral levels, in order to conduct certain procedures, deal with internal and external pressures, and respond to the challenges of the new society".
Courage and indignation –are two concepts which are likely to bring about considerable change, to say the least, in the understanding of the professional conduct expected of members of the judiciary, most particularly the understanding of their duty of reserve. (M. Cadelli, *Du devoir de réserve des magistrats aux vertus d'indignation et de courage*, JT, Larcier, Brussels, 2013, p. 297).

Failure to comply with those rules gives rise to the following disciplinary penalties, in order of severity, in relation to the acts subject to discipline:

(a) warning,
(b) reprimand,
(c) suspension for not more than one year (with a prohibition on using the title of company lawyer and enjoying the attached rights), or
(d) removal from the list of members.

Penalties are imposed by the disciplinary bodies. The Act establishes two forums responsible for monitoring discipline:

(a) The Disciplinary Committee is composed of a President, a court of first instance judge appointed by the King and two company lawyers (appointed by the Council other than from amongst its members). The Committee has disciplinary authority as a matter of first resort. Matters are brought before it by the Council, acting at its own initiative or on a complaint by any interested party. Its decisions must provide reasons and can be objected to or appealed. An appeal suspends the effect of the decision. The Disciplinary Committee has both a French-speaking Committee and a Dutch-speaking Committee.

(b) The Appeals Committee is composed of a President, who is a court of appeal judge, a commercial court judge and an employment court judge, all appointed by the King, and two company lawyers (elected by the General Meeting). Its decisions must state reasons and can be appealed. Appeal suspends the effects of the decision. The Appeals Committee has both a French-speaking Committee and a Dutch-speaking Committee.

Company lawyers can refer decisions of the Appeals Committee to the Court of Cassation. Where the cassation appeal is upheld, the matter is referred back to the Appeals Committee, but with a different composition of members.

The Council notifies the employer of the company lawyer in question of final decisions to suspend or remove the lawyer. However, if a final decision is based on facts not related to the company lawyer's duties or actions within his or her company, the Council cannot notify those decisions to the employer unaltered. In such a case, the Council must confine its disclosure to the employer to notification of the penalties imposed.

The members **(*)** of the Disciplinary Committees and Appeals Committees are published in the Yearbook and on the Institute's website.

The disciplinary rules have been established by a royal decree (Article 14 of the Act): this was the Royal Decree of 19 April 2006 enacting the disciplinary rules of the Institut des juristes d'entreprise (*) (*Moniteur Belge* of 3 May 2006, p. 22894).

All disciplinary proceedings are covered by professional secrecy.

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III. THE POSITION OF THE COMPANY LAWYER

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René CARTON de TOURNAI, Les responsabilités du juriste d'entreprise dans la Société, Journal des Tribunaux, 1968, p. 17.
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E. Norman VEASEY, Christine T. DI GUGLIELMO, The tensions, stresses, and professional responsibilities of the lawyer for the corporation, Business Lawyer, November 2006, Vol 62, N° 1, p. 1-36.
Académie de l' Institut 5/2009, Le rôle du juriste d'entreprise dans le management de la conformité.

It is worth dwelling a little on an important aspect of the practice of company lawyers – their position in the company.

We shall not expand here on what company lawyers do, that is, their day-to-day activities. Numerous academic articles have done that.

We shall simply start from three characteristics inherent in the profession of company lawyer, characteristics which make it a profession clearly complementary to but also different from that of outside counsel. Company lawyers:

(a) **help the company's business develop**[9]: they are *creators* of legal solutions that are aligned with and designed to support company strategy (or the roadmap of the business federation);
(b) **help identify risks to which the company is exposed,** participate in risk management activities, including support of the risk management process, and, in particular, provide analysis of **legal risks**[10]; and
(c) **are proactive**, anticipating and providing counsel concerning future risks, possible changes in the law or cultural values, and related business challenges: they initiate changes in behaviour, suggest ways to modify business practices .

- To illustrate the third characteristic inherent in the company lawyer's role, that is to say, their forward-looking action, creating and promoting new concepts, in short, their

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[9] The drafting history of the Act of 1 March 2000 creating an Institute of Company Lawyers mentions this expressly: "The work done must [...] contribute to achievement of the company's aims". Parliamentary Document, Senate, 1995-1996, 1-45/2, p. 13.

[10] A number of international bodies of legislation define "legal risks": O. Goffard, *Le risque juridique: cadre légal, définition et principes de gestion*, Cahier du juriste, Larcier, Kluwer, Brussels, no 5-6/2007, p. 59 (see in particular no 30 et seq). The custom has spread in sizeable companies of mapping the principal legal risks. That mapping is generally steered by the legal department.

role as heralds, as catalysts even, and without going all the way back to Incoterms[11], we underscore the vital role that company lawyers provide in support of the rule of law, and the system of justice. Notably, company lawyers: are the guardians of self-regulation: they are the drafters, and indeed often the promoters of, codes of conduct, integrity guidelines, diversity guidelines, charters of governance, charters of ethics, quality charters, environmental charters, the internal rules of committees set up within boards of directors, etc.;

- promote evolving concepts of sustainable development and corporate social responsibility, seeking to translate the principles into words and actions;
- provide oversight in establishing and ensuring effective compliance programmes;
- train non-lawyers in the Company to ensure that business is conducted in accordance with contracts, and other principles of commercial law; and

ensure that certain company assets (real and personal property, patents, trademarks, licenses, etc.)are legally protected and in order (title documents, and rights to exploit or use),).

In sum, Company lawyers afford the company a degree of legal certainty, that is, the knowledge that its assets and employees are protected, and that it has the right to conduct its business without interference.

Section 1: The powers and role of company lawyers

It is important for a company to define the "powers" of its company lawyers (what *can* the company lawyer do?), their fields of competence and the tasks conferred on them (what *must* the company lawyer do?) from the outset, preferably at the time they are appointed, in consultation with management. A company lawyer's areas of competence will often be set out in a memorandum referred to as a "memorandum of mission", "organisational note" or "mission statement".

The initiative in doing so lies with company lawyers, who should be ambassadors for their role to their employers and spokespersons for their role within their companies.

1.1. The powers of company lawyers

As for every job in the company, company lawyers are advised to have a job description alongside their contract of employment. In quoted companies or companies subject to the US Sarbanes-Oxley Act of 2002*,* they are obliged to do so.

The contract of employment, or at least the job description, will include the expression "company lawyer". It is also worth mentioning in the contract that, as provided for in Articles 4 and 5 of the Code of Professional Conduct, company lawyers are expected to act honourably, and with dignity and intellectual independence.

On the other hand, it is not crucial that there be an express term in contracts of employment between employers and company lawyers assuring company lawyers that they will be able to exercise their profession, whilst complying with the rules of professional conduct imposed by the profession, as is the case in the Netherlands and Germany for company lawyers who are

[11] Ph. Marchandise, Preface to *La coopération entre entreprises/De samenwerking tussen ondernemingen*, Bruylant, Kluwer, Brussels, pp. 18-19.

members of a bar[12]: *advokaat in dienstbetrekking* (Netherlands) or *Syndikusanwalt* (Germany).

The Dutch clauses are annexed by way of example, as are the German model clauses (Annex I).

1.2. The role of company lawyers acting together as a legal department or function

It is also important that the legal department, like any other functional or support department, has a memorandum of mission or "mission statement" **(*)**. This mission statement[13] will define what is expected of lawyers in the department, and will also describe the competences and responsibilities reserved to the company lawyer, such as selecting outside counsel, notaries, arbitrators, and other vendors of legal services, conducting litigation, and negotiating settlements.

In 2002, the Institute published a recommendation on this topic which is reproduced in the Institute's Yearbook. It gives useful practical advice for drawing up a mission statement.

By way of further examples to those published in the Yearbook, you will find annexed four standard form memoranda of mission (of varying length) for a company or group of companies, in French, Dutch and English. In all four cases they are for quoted companies (Annex II).

The memorandum of mission is sometimes supplemented by a roadmap (or strategic plan) in which the company's management, in dialogue with its lawyers, defines the objectives of the legal department for the next few years (these are generally 1, 3 or 5-year plans).

Section 2: Who should company lawyers report to?

If company lawyers are to be in a position to do their job *normally*, they must have immediate and direct access (with no intermediary) to the person who runs the business or undertaking on a day-to-day basis[14]. In an organization with more than one company lawyer, a general counsel—or chief legal officer—should be appointed, and all company lawyers should preferably report directly to the General Counsel. The General Counsel should report to head of the company, the managing director, general manager or chief executive officer), but may wear two hats, and also serve as the Company's General Secretary and report to the Chairman of the Board of Directors, who is usually a non-executive director.

If a company lawyer reports administratively or organizationally to another function, whether this be the finance director, the executive secretary (unless the latter is a company lawyer) or an operational director, there should be no impediment to his or her access to the most senior lawyer in the Company—the general counsel—who should report to the Chief Executive Officer of the Company.

[12] In Belgium, the professions of outside counsel and of company lawyer are mutually exclusive: an outside counsel cannot be a member of the Institute and a company lawyer cannot be a member of a bar. This is not the case in other jurisdictions, notably the United States, where company lawyers are required to be licensed, active members of at least one state bar.

[13] The memorandum will be drafted in consultation with the general management. It will have all the more weight if it is issued by or signed by the managing director or the general manager.

[14] P. Bodson, *Le juriste d'entreprise, un atout pour la gestion?*, J.T., Larcier, Brussels, 1989, p. 282.

Company lawyers are executives of the business, and senior lawyers are considered senior executives. Whether they are relatively new to the practice of law, or they have many years of experience, company lawyers are deeply connected to the business pulse—and serve as loyal business partners. Despite being "inside" the company, company lawyers must retain their independence and should be able to talk one-to-one about any legal or compliance matter with the head of the company. And likewise, business leaders must be able to rely on company lawyers to maintain confidentiality, and to provide legal opinions and recommendations for courses of action. The Company lawyer must, however, remember that the Company, not the business leader, is the "client" to whom a duty of loyalty and confidentiality is owed. If the business leader fails to act in a manner consistent with his or her duties of loyalty and good faith, the lawyer must take the matter "up the ladder" to the most senior lawyer in the Company. If the most senior lawyer is absent, has a conflict of interest, is personally compromised, does not have the requisite expertise or fails to take appropriate action, the company lawyer should have direct access to the most senior executive or non-executive chairman. .

What about lawyers outside the legal department? We are thinking of tax lawyers or lawyers specialising in insurance (often attached to the finance department) and employment lawyers (often attached to the human resources department). They should ideally be part of the legal department. There are three clear and compelling reasons for this:

(1) to make certain that their advice is independent, and not unduly influenced by the opinions and concerns of the operational staff;
(2) to ensure that the opinions of company lawyers are heard directly by the company's decision makers (with no intermediary); and
(3) to ensure that consistent legal advice is provided across the entire business, and in compliance with legal policies.

In sum, it is important that company lawyers speak with one voice, and that business people recognize that company lawyers represent the Company, not functions or employees in the Company.

In larger, multinational companies, legal departments are often regionalized, with a general counsel heading a team of lawyers in each of the regions. In a global structure, with regional CEOs, the regional general counsel may "report" to the regional CEO. By region, company lawyers may be co-located with operations in various countries. There may be company lawyers who specialize in certain areas of the law, and support specific departments or functions, such as human resources, finance, tax, insurance, or R&D. They are nonetheless company lawyers. Their opinions and advice are ultimately the responsibility of the most senior lawyer in the organization, and therefore recommended, for the reasons outlined above, that they be "functionally" attached to the chief legal officer[15].

This is something which does occur in international groups – one finds company lawyers who report hierarchically to the local manager and functionally to the group chief legal officer who is in a different country and a different company in the same group.

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[15] This person is naturally best placed to know the company lawyers in the group and to evaluate their work or performance.

There are of course also small companies with only one lawyer. The legal role in a small company may require the lawyer to wear many hats, but he or she must remember to maintain perspective and independence while providing expert advice. Sometimes this "solo" lawyer has difficulty being recognised. The Institute is keeping an eye on this. It has set up a working group to provide support for the some 250 "solo" lawyers who are now members of the Institute.

The Institute has also developed a mentoring programme for its new members[16].

Section 3: The company lawyer as peacemaker

The company lawyer is often asked to step in when there is a dispute with a customer, a client, a vendor, or even with an employee. A word or two here about litigation—not how litigation has flared up in recent years, in certain countries, internationally, and in new or increasingly complex fields, but to highlight another of the key roles of a company lawyer, that of mediator[17] or – more exactly – as "conciliator", or peacemaker.

Company lawyers did not wait for the Mediation Act of 21 February 2005 to jump into the fray. No doubt it was the other way round – the legislation was inspired in part by the work of company lawyers, some of whom have taken the initiative to include mediation or arbitration clauses in their companies' contracts, or codes of conduct.

Settling both internal and external disputes is in fact one of the main skills and responsibilities of company lawyers. They are amongst the very first called when something goes wrong. They are also among the first to observe the risks, challenges and potential monetary exposure of the dispute. Company lawyers search for solutions that are commercially reasonable, financially prudent and do not set bad precedents for similar disputes in the future. A good outcome is a "fresh start" for both sides, particularly when the parties will need to work together in the future for their own or the company's benefit. Lawyers are naturally mediators[18]. They know how difficult, time consuming and costly litigation can before the company.

There is no real need[19] for a contractual clause requiring amicable conciliation before bringing proceedings[20]: company lawyers will generally prefer to reach a settlement with a competitor, supplier or customer, at every stage of litigation (from the pre-litigation stage to the Supreme Court stage). They are constantly on the alert for opportunities to find solutions in which each party will be given a reasonable or considered response to its claims, without having the solution imposed by a third party, mediator, arbitrator or judge.

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16 The purpose of the Mentoring Programme is to offer members who so wish ("mentees") the opportunity to establish privileged contact with more experienced members ("mentors"), to share experiences and also to ask questions. The Mentoring Programme lasts a year. At the start of the Programme, the Institute organises a general introduction meeting for all the mentors and mentees taking part. The mentors and mentees then freely decide how often they will meet after that. The aim, however, is to organise regular meetings, although there is nothing to prevent the mentors and mentees from continuing their contact beyond that period if they so wish. See Annex III to this course.

17 S. Brejon de Lavergnée and Ph. Marchandise, *L'entreprise entre guerre et paix*, Cahier du Juriste, no 1/2002, Bruylant, Kluwer, Brussels, p. 8.

18 A practice group on mediation practice is in the process of being created at the Institute.

19 A clause providing that companies will resort to mediation (before bringing proceedings) can be useful in several circumstances, for instance, where it is imperative to resolve the dispute quickly to avoid business interruption, where the parties are in a long-term contractual relationship (a joint venture, supply agreement, etc.), where they will still have to work together for many years or where they wish to resolve an impasse in negotiations of a transaction or new contract.

20 These clauses can also be problematic to implement, in particular when they impose precise time-limits for attempts to reconcile points of view before proceedings can be brought.

This no doubt explains why, especially in companies where there is at least one company lawyer, many fewer cases are brought before the commercial or employment courts. Admittedly there are cases where the involvement of a judge who issues a ruling or court order is inevitable (for example, in a case where there is a fundamental principle in dispute), or necessary because the parties will not consider a settlement. This is, or should be, the exception rather than the rule.

Company lawyers are often emissaries, reaching out to government authorities to avoid prosecution, penalties or fines. In the alternative, when a company is faced with adverse or mandatory decisions by an authority, or with a statutory or regulatory instrument voted upon by a State power, the company lawyer must indeed bring proceedings – often quickly – before the competent courts.

In these circumstances, where a court appearance is necessary, the choice of outside counsel is one of the most important responsibilities of a company lawyer. That choice, often made in consultation with the business leaders, falls naturally within the exclusive sphere of competence[21] of the company lawyer [22] or, as the case may be, falls equally naturally to the company lawyer of a business federation where the matter concerns more than one member of the federation.

Who is better placed to do this than company lawyers, knowing as they do their colleagues at the bar, their "soul mates" as chairman of the bar, Lambert Matray, liked to put it? Carrying out this task, however, is not easy. After identifying the real legal issue raised by the dispute – and there may be several – and well aware that one case is never the same as another, the company lawyer must (often quickly) find the outside counsel with the necessary training and abilities, who is respected by the judges, and in whom the company lawyer can place his or her full faith and trust. In the end, success is often dictated by the ability of the company lawyer to work collaboratively with outside counsel and operational staff, from the earliest fact-finding stages to commencement of litigation and ultimately to the last stage of proceedings.

When engaging outside counsel, the company lawyer should specify and agree with outside counsel on the exact terms of the engagement, its mission, scope, the type and number of resources to be mobilised (levels and degree of intervention at the various stages of the case) and, of course, the overall, reasonably detailed, budget for the matter. Company lawyers will regularly oversee the fees and expenses incurred by the Company for outside counsel, since they are best placed assess whether they are appropriate and reasonable, and therefore to approve them.

Contact between the outside counsel and the company should therefore be only with the involvement of the company lawyer responsible for the matter or project or through the intermediary of that company lawyer.

There is another, even more important, reason, why outside counsel's reports should be addressed preferably to the company lawyer – confidentiality. Both are subject to Article 458 of the Criminal Code. Furthermore, the company lawyer will also be the best person to

[21] It may be that the choice is left (in part) to operational staff for less important matters, such as monitoring debt recoveries.

[22] The same applies to the choice of the notary.

disseminate within the company the whole of the report received or parts of it (in the form of extracts).

Section 4: The company lawyer's role in relation to compliance

Compliance management consists of "organising and implementing processes to promote compliance with rules or principles (originating from the legislature, bodies with power to issue rules, professional federations or internal bodies[23]) within an organisation. Its purpose is to shield the undertaking and its workers from legal penalties (disqualification from carrying on activities, invalidity of contracts, contractual, civil or criminal liability)".

This is the definition which Mr Joost Maes gave on the occasion of the half-day seminar organised on the topic by the Institute in 2009.

Compliance management is a broad concept which can mean several things. As lawyers, we think for example of the monitoring of regulations on good corporate governance, criminal law and data protection, money-laundering rules, financial regulations, competition and environmental law and product rules and standards. Non-lawyers understand compliance more as the monitoring of commercial practices or technical standards in the fields of accounting and taxation, health, safety, etc.

Compliance management is not a new phenomenon which has been imported from the United States[24]. Concern for compliance in Belgium and in Europe generally has a long and rich history. Banks and insurance companies have been highly regulated for nearly a century, and are obligated to appoint compliance managers. Similarly, companies in the product manufacturing sector are subject to extensive regulations, country, European and even international provisions and standards, and are obligated to self-report non-compliance with product standards and quality controls (product compliance).

The importance of compliance (broadly speaking) has increased dramatically since 2000, as a result of, amongst other reasons, an increase in the number of statutes and regulations, globalisation (such as the OECD anti-corruption treaties) and more proactive monitoring and scrutiny by the regulating authorities. Companies can no longer assume that any activity not explicitly prohibited by statute or regulation is permitted, especially when such activity may ultimately harm consumers, or the environment, and expose companies to liability for damages to third parties.

A number of recent developments, such as those imposing an obligation on boards of directors to define the company's risk profile and to implement a prevention policy, have continued to highlight the need for an effective structured compliance policy (Eighth EU Directive and 2004 OECD Principles of Corporate Governance).

We find also that the compliance phenomenon has continued to evolve, from a simple instrument intended to avoid infringements and penalties, into a resource intended to enhance the company's integrity, which companies regard as an asset in and of itself. Companies must take into account the importance of complying with unwritten rules for which the penalty is

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[23] Developments in the markets calling in question certain practices which are not formally prohibited should clearly be added here.

[24] After Enron, Tyco and other scandals (see Ph. Marchandise, *Les assemblées générales: nouveaux lieux du pouvoir?*, *in* L'organisation du pouvoir dans la société anonyme, CRDVA [Commission Royale Droit et Vie des Affaires], Bruylant, Brussels, 2004, p. 162).

"undeniable shame" (as Thucydides proclaimed in the History of the Peloponnesian War) or of avoiding actions or inaction which jeopardise the company's image or reputation. Companies have learned that integrity is a core value that helps attract and retain talented workers and that helps to build a solid reputation with their customers and with regulators. Compliance today means that employees are encouraged to do the "right thing" every day, and this ultimately results in a company that conducts itself in an ethical and responsible manner.

4.1. How compliance is organised within companies.

Today, companies emphasize that every employee is ultimately responsible for complying with the law, policies and a code of conduct. Each company organises its program to best suit its culture, size, and business needs. Typically, several functions within a company play an active part in ensuring that the compliance program is effective, and well communicated. Ultimately, the company's leaders—chief executive officer, managing director and his or her management team, including the finance director, internal audit and the company lawyers, are responsible for oversight of the company's compliance program, and report regularly to , the board of directors and its audit committee.

Some multinationals have a separate compliance department in order to achieve a more systematic and integrated overview of the issues. The more regulated the sector in which a company operates, the greater the need for a specific compliance department, which will be assigned the task of developing and implementing specific processes.

However, there are many companies, (including large ones) which do not have their own compliance department. [Is there data to support this? Is this true in Belgium, and if so, what is considered large? This is not true for publicly listed companies.]

There is no one-size-fits-all solution, but the need to have a consistent and systematic approach to compliance seems increasingly crucial to a company's long-term success[25].

4.2. The company lawyer's role in compliance

An effective compliance program is an integral part of an overall culture of ethics, integrity in business relationships and respect for the law. Company lawyers play an important role in ensuring that the compliance program is functioning effectively. This means, at the very least, leading investigations into alleged violations of the law, and being part of the communication efforts to provide advice to management concerning the appropriate course of action to address concerns. In some companies, the most senior lawyer in the company—the general counsel—or someone who reports to the general counsel—serves as the chief compliance officer. In other companies, the compliance is led by a non-lawyer who may be specifically trained as a compliance specialist. In this case, when a compliance concern is surfaced, the company lawyer is involved to provide legal advice and liaise with regulators if necessary.

It is sometimes claimed that company lawyers are "responsible for compliance." This is not the prevailing point of view, as it is now widely held that compliance has become an integral part of leaders' responsibilities. A compliance program is designed to ensure that employees

[25] The Belgian Corporate Governance Code is moving in this direction in so far as it now requires companies adhering to the Code to publish a description of the main principles of their internal control and risk management systems in their corporate governance declaration.

understand their responsibilities, explained in a simple way, in accessible language, usually in a Code of Conduct and related policy handbooks. The compliance program establishes processes for reporting concerns—typically through a 24 hour/seven day a week hotline, and for investigating those concerns. A robust program also provides for auditing and appropriate remediation of internal controls if it is discovered that a breakdown in those controls led to the compliance failure.

If an allegation proves to be substantiated, lawyers are responsible for assessing the appropriate next steps, including whether the board must be informed, and whether external regulators must be notified. Company lawyers often work with finance leaders to design the audit protocols for compliance with various laws, such as competition laws or anti-bribery laws, .Ideally, there is a post (in English, that of a compliance officer, in French, that of a *responsible conformité* or *déontologue*) or a specific compliance department which undertakes such tasks, with the support of other people in the company such as, for example, the internal auditor (control and monitoring), the quality control department (drawing up processes), the corporate communications manager and the personnel department (for training).

Implementing a compliance programme should be preceded – and this is a major requirement if the programme is to be effective – by a preliminary risk analysis[26]. This is a topic beyond the scope of this treatise, but is worthy of a separate discussion that highlights to the role of a company lawyer is developing an enterprise risk management program.

A number of companies have expressly chosen to locate the compliance department within the legal department or to appoint a company lawyer to head the compliance department (in which case that person will be the chief compliance officer), because this is a matter above all of comparing and contrasting situations on the ground with legal texts.

In companies where there is a specific body responsible for compliance, the company lawyer is often involved in drawing up policies and in investigations (for example, accusations of fraud, infringements of competition law or other investigations with a significant legal backdrop or where legal professional privilege is important). The compliance body is responsible for developing and steering specific processes. Close collaboration not only between the company lawyer and compliance managers but also with all other roles in the company is decisive in achieving an effective approach to the risk profile specific to the company.

In companies without a specific compliance body, there is a risk that the company lawyer's role in relation to compliance is less clear and less well defined. There may be fewer processes for systematically handling certain infringements. It is done instead on a case-by-case basis, and progress depends primarily on priorities or on the time which management sees fit to give to it, itself or through the company lawyer. This problem will undoubtedly be appreciable in the case of a solo company lawyer, who must therefore carefully establish priorities for compliance, by agreement with management. Note this section seems redundant.

However compliance is organised, it is nevertheless important to highlight the tasks and responsibilities of the various roles involved in it.

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[26] Fr. Vincke, *La mise en place d'un programme effectif d'intégrité*, D.A.O.R. [Le droit des affaires - Het ondernemingsrecht], Larcier, Brussels, March 2010, no 93, p. 12.

The company lawyer's role in relation to compliance quite clearly varies depending on the company's type and sector, its risk profile (such as exports to markets with different cultures), and the compliance bodies which do or do not already exist in the company.

* * *

Whatever the compliance bodies, the sector and the size of the company, company lawyers are expected to be "guardians of integrity", and integrity goes hand-in-hand with an appropriate corporate culture and processes. Such processes include hotlines[27], ombudsmen, internal auditors and well-defined internal controls.

Being guardian of the company's integrity means that company lawyers must be involved in ensuring that internal investigations are conducted properly, in cooperation with the compliance department, the finance department, internal audit, external audit, and possibly external legal advisors.[28]

Company lawyers have a duty, working with other functions, to identify and correct significant deficiencies in internal processes to the chief legal officer or general counsel.

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[27] P. Van Eecke, *Klokkenluiden in het bedrijfsleven: privacyaspecten*, D.A.O.R., Larcier, Brussels, March 2010, no 93, p. 21.

[28] For investigations involving US regulatory authorities, and potential violations of law in the US, it is adviseable to engage external legal advisors to assure that the internal investigation is conducted appropriately, under attorney-client privilege, and independently.

IV. THE COMPANY LAWYER AND THE COMPANY BODIES

Bibliography:
Bernard NYSSEN, Le secrétaire général: du "notaire" au conseiller du prince, in *Droit des Affaires en évolution, Bruylant, Kluwer, Brussels, 1993, p. 189.*
François VINCKE, Le secrétaire général, in *Droit des Affaires en évolution, Bruylant, Kluwer, Brussels, 1993, p. 205.*

Company lawyers have a dual role in relation to the company bodies:

- the lawyer will oversee or help oversee the smooth functioning of the company bodies (this is the company lawyer's role in organising the running of the company); and
- the opinion issued by the company lawyer will be taken into consideration through or by the company bodies (this is the company lawyer's role in running the company).

Section 1: The company lawyer's role in organising the running of the company

1.1.Corporate governance and internal governance

Company lawyers' primary role relates to the corporate governance and the internal governance of the companies or groups where they work. The notions of "corporate governance" and "internal governance" are closely related. The first refers to a series of rules, good practices and custom in relation to how companies are organised. They are usually contained in corporate governance codes, in which the "comply or explain" method is applied. Corporate governance rules are however increasingly embodied in legislation. Corporate governance trends reflect an increasingly proactive group of shareholders, demands for transparency and focus on access to information

Given the penalties associated with violating those rules, and of enhanced reputational risk for the company’s board of directors, the role of the company lawyer is expanding further.

Internal governance refers not only to the internal organisation of the company, but also to that of a group. What are the relationships between parent companies and their subsidiaries? Who decides what? How is internal control organised within the company and the group?

The company lawyer has a key function in organising both corporate governance and internal governance.

1.2. The company lawyer as legal advisor on corporate governance

A company's decision-making process takes place through its bodies and through delegations of power at the decision of the company bodies. Company lawyers share responsibility for implementing corporate governance. They act as "guardians" of how the company is run. This applies to the organisation of the compulsory company bodies, such as the board of directors and the general meeting. Company lawyers, working with the company secretary or serving as company secretary[29] will ensure that each of the different companies in the group for which they are responsible holds an annual general meeting and regular meetings of the board of

[29] See section 1.4 below.

directors. In other words, company lawyers are responsible for the company's corporate compliance.

1.3. The company lawyer as strategic advisor in devising corporate governance

On a more fundamental level, at the formation of a new company, the company lawyer will also be involved in devising the structure of the company and of the group and the company's decision-making structure.

Within the company, the actual organisation, which usually takes place via business lines and production sites, etc., must be reconciled with the legal position. This raises various questions, such as:

- What company vehicle should be used for the undertaking?
- Should the business be carried on in a single company or more than one company set up in line with the activities of the various business lines?
- Should the company establish a branch or even a subsidiary to carry on its activities abroad?

This concerns the internal governance of the group. What form should the group take? What is the best group structure for the continuing development of the company's activities?

The company lawyer's responsibilities also include issuing opinions on the internal organisation of the various company bodies.

- Does the board of directors have several committees[30]? What are their powers? How are they composed?
- Is the office of chairman of the board of directors combined with that of managing director or carried on by two different people?
- What measures can be taken so that the board of directors has a balanced composition?
- Has a management committee been set up alongside the board of directors?
- If one has, is the management committee an executive committee within the meaning of Article 524 of the Companies Code? What are its powers and responsibilities?
- How is the reporting of information to the board of directors organised?
- How is day-to-day management organised? Are there several managing directors?
- How are the decision-making levels in the various departments organised and how is the board of directors kept informed?
- How does the company organise its auditing and internal control?

Company lawyers also share responsibility for the internal organisation of the various company bodies. This means that they will actually wield the pen or at least will be closely involved in the drafting and, if necessary, implementation of the internal rules of the board of directors, the management committee, the executive committee and other committees set up by the board of directors[31.] They must have an opportunity to review and provide input into the agenda for those meetings, which they must be able to alter, if necessary, primarily in relation to items they feel should be included on the agenda. They are also clearly responsible for the minutes or, if the minutes are drawn up by someone else, for reviewing them.

[30] Quoted companies must set up an audit committee and, since the 2011 financial year, a remuneration committee.
[31] Those internal rules are often called "terms of reference".

So that they can give the best possible advice about those various aspects of the governance of the group and its operational companies, company lawyers must be able to combine a purely legal opinion – for example, how do I structure a limited partnership with shares (*société en commandite par actions*)? –with in-depth knowledge of the strategy and ambitions of the company, the parent company, the controlling shareholder, etc.

What is the company's strategic intent? In which country does it wish to expand? How does it want to be seen by investors? Is it desirable that separate assets be utilised for start-up activities? If there is a foreign establishment of the company, when is it expected that the foreign establishment will become profitable? Will there be a management team based abroad? Various factors, partly legal but above all economic, financial and strategic, will therefore guide the company lawyer in choosing the best group structure.

If company lawyers are to be able to perform their role properly and not be limited simply to being consulted for technical legal opinions, they must be closely involved, both formally[32] and informally, in the day-to-day business of the company, its operational planning, strategic choices, etc.

1.4.The relationship between the company lawyer and the company secretary

Many companies appoint a company secretary or "executive secretary" or "general secretary." A significant part of the role described above will be performed by this executive secretary.

The tasks of a company secretary may include other administrative matters, and, in practice, the position is not always held by a company lawyer. As a rule, the executive secretary is responsible for the practical organisation of management meetings required to operate the company, including drawing up the timetable and agendas for the company bodies. Besides this, the company secretary may also have overall responsibility for one or more operational departments (corporate communications, for example) and will then usually be in a position of trust vis-à-vis the chairman and the managing director. In some companies, an executive secretary will not have a clearly defined job description, and the personality of the secretary will significantly influence how his or her tasks are defined. Organising corporate governance, and even internal governance, is clearly an important part of the secretary's responsibilities. It is in this sphere that the executive secretary's role overlaps with the general counsel's role, and why these roles are often discharged by one person.

- In practice, the relationship between the company lawyer and the executive secretary may take various forms. As just mentioned, they are the same person. However, in some companies, the roles are split and these are two completely independent jobs, with separate line managers. In other companies, the executive secretary reports to the chief legal officer, or, the company's legal department reports to the executive secretary.

Each situation is different and probably no single structure is best. Admittedly, the fourth scenario seems to us inadvisable, unless the executive secretary is a company lawyer (which is the same as the first scenario). In our opinion the fourth scenario offers fewer safeguards with respect to the independence of the company lawyer, and may not provide for direct access to the Board or the chief executive officer. This access is a prerequisite if the company's legal department is to function properly.

[32] By being familiar with and participating in the decision-making process – see below.

Whatever the structure,
In sum, there always needs to be good, close cooperation between the company lawyer and the secretary. The Belgian Corporate Governance Code[33] provides on this point:

> "The board of directors shall appoint a company secretary responsible for advising it on governance. Where necessary, the company secretary shall be assisted by the company lawyer. The directors may, on an individual basis, call on the services of the company secretary". (Recommendation 2.9)

Section 2: The relationship between the company lawyer and the various company bodies[34]

The company lawyer's opinions will usually be delivered through the various company bodies. This advisory role is by nature as much verbal as in writing. The company benefits in terms of the confidentiality of the company lawyer's opinions (Article 5 of the Act of 1 March 2000). It is the company lawyer's obligation, if necessary, to inform the board of directors about this fact.

2.1.The board of directors

As described above, company lawyers are closely involved in the running of the company, and therefore in drawing up the agenda for meetings of the board of directors and above all in validating the minutes.

In addition, company lawyers will regularly attend board meetings to provide advice or clarifications regarding legal matters, and to provide analysis and updates concerning litigation or regulatory compliance matters. Company lawyers will also assist the board of directors prepare the annual report, as well as annual, periodic or specifically required filings with regulatory bodies, and will work with the finance function and the external auditors to provide an overview of significant litigation, and recommend provisions which should be set aside for potential or contingent liabilities in the company's accounts. If an audit committee (or a risk committee) has been established by the board of directors, a summary of significant litigation will usually be forwarded to that committee.

Company lawyers must be able to speak freely to the board of directors. He or she is in that regard very much part of the company's senior staff and, in larger companies, will be a member of the company's management team general counsel or chief legal officer. Importantly, the chief legal officer should not represent management's views, as for all intents and purposes, the company lawyer represents the company and its board of directors who are charged with oversight. It is incumbent on the company lawyer to highlight and properly identify to the board of directors the legal risks associated with proposals made by the general management. This means that those risks cannot be minimised and must be properly assessed.

If the company's general counsel or chief legal officer feel that they have not been given an opportunity to express his or her legal opinion, they must mention this to the managing

[33] 2009 version. The Royal Decree of 6 June 2010 (*Moniteur Belge* of 28 June 2010, p. 39622), designated that Code as a reference code. Quoted companies are obliged to indicate this reference code as the code referred to in Article 96, Section 2(1) of the Companies Code.

[34] This chapter will also look at the relationship between the company lawyer and the chairman of the board of directors, the works council and the external auditor, although these are not all company bodies in the strict sense.

director or, if the managing director is part of the problem, to the chairman of the board of directors or the chairman of the audit committee.

2.2. The chairman of the board of directors

Although the Companies Code does not refer specifically to the role of the chairman of the board of directors, it plays a crucial part in the running of the company. That role is clearly defined in the Belgian Corporate Governance Code, in Recommendations 2.5, 2.6., and 2.7.

> **"2.5. The chairman [of the board of directors] is responsible for running the board of directors. The chairman takes the necessary measures to develop a climate of trust within the board of directors, thereby contributing to open discussions, the constructive expression of differences of opinion and adherence to decisions made by the board of directors.**
>
> **2.6. The chairman sets the agenda for meetings after consulting the CEO and ensures that the procedures relating to preparation, deliberations, decision making and the implementation of decisions are correctly followed. The minutes summarise the discussions, set out the decisions made and indicate, where applicable, any reservations expressed by directors.**
>
> **2.7. The chairman ensures that the directors receive sufficient accurate information in good time before and, where necessary, between meetings.**
>
> **In relation to the board of directors, the same information is sent to all directors."**

The chairman must ensure that the directors receive the necessary information and are properly informed. If company lawyers believe that the directors are receiving inaccurate or incomplete information from management, they must obviously point it out first of all to the chief legal officer or corporate (or general) secretary or to general management. If this does not, in their opinion, have the desired effect, they must go to the chairman of the board of directors. The fact that company lawyers are hierarchically subordinate to the managing director must not be any barrier to their doing so – a company lawyer must be able to take that step to protect the interests of the company.

Where the managing director is also the chairman, company lawyers may choose to contact an independent director on the board in order to voice their concerns.

In companies which have an audit committee, lawyers may also approach of the chairman of the audit committee. In quoted (publicly-held) companies, that person is an independent director, since securities and bank regulators require such boards of directors to have an audit committee comprised of independent members.

It is also good for the chief legal officer or general counsel to have regular contact with the chairman of the board and to establish a relationship of trust with that person, outside of the formal hierarchical channels.

2.3.Management

The company "management" refers equally to the general manager, the managing director, the manager, the management committee and the executive committee within the meaning of Article 524bis of the Companies Code.

By virtue of their role, company lawyers will have frequent and varied contact with management. While it may seem like management is the “client,” it is important that company lawyer remember its duty is to the Company. This comes into play when there is a potential or actual conflict or disagreement between management’s intentions or recommendations, and that which is in the best interests of the Company. In the event of such a conflict or disagreement, the company lawyer must remember its duty to the Company as the client and raise his or her concerns directly with the board of directors.

Within the company structure, company lawyers must have direct access to general management and must have the trust of management. It is only on those terms that company lawyers can fully perform their role. Company lawyers cannot confine themselves to their line manager – often the managing director –, but must also develop close collaboration with other senior managers, with "confidentiality" a key factor in that collaboration. Management must often regard company lawyers as the “conscience” of the company. Although company lawyers are usually within easy reach, via email or telephone, it is recommended that they foster regular formal and informal face-to-face contact, and if possible, locating their offices in the headquarters buildings.

Must company lawyers be members of the management committee? Or, to put the question differently, can company lawyers give their opinions independently where they participate in decision making? The simple answer is yes, as there is no inherent (legal) reason why company lawyers should not be members of the management team and therefore serving in an executive role in the company. However, given the importance of maintaining their independence and their specific role in the company, company lawyers must weigh the pros and cons before agreeing to be members of the management team. Even if they are not members of the management team, they should be present at regular management meetings and should, at the very least, be aware of all the proposals and decisions made at them. If necessary, company lawyers must be able to add items to the agenda and must be able to intervene.[35]

2.4. Works council

In companies which have a works council, the works council can, in the context of its tasks, put questions to company lawyers, or request information from them. In the context of their relationship with the works council, company lawyers will always act in the interests of the company, the corporate interest.

[35] A judgment of the *High Court of Australia* (*Peter James Shafron v. Australian Securities and Investment Commission*) of 3 May 2012 (no 2012 HCA 18) found in that regard that Mr Shafron's dual role as general counsel and as company secretary was an indivisible whole and therefore placed him under Article 180(1) of the Corporations Act 2001 applicable to company management, that is to say, to the directors and officers.
The beginning of that Article reads as follows:
"180 Care and diligence – civil obligation only
Care and diligence – directors and other officers
(1) A director or other officer of a corporation must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they:
(a) were a director or officer of a corporation in the corporation’s circumstances; and
(b) occupied the office held by, and had the same responsibilities within the corporation as, the director or officer." [...]

2.5.The general meeting

Company lawyers will obviously be present at general meetings and are often appointed as secretary to the meeting.

At the instigation of the chairman of the meeting, the chief legal officer or general counsel, or other specialist lawyers, may be called upon to reply to questions from the shareholders present, within the limits of Article 540 of the Companies Code. Company lawyers will, by virtue of their role, be aware of matters which should not be disclosed, and will be in the best position to respond to inquiries at general meetings. Importantly, communications by company lawyers to shareholders at general meetings are not covered by the confidentiality of opinions within the meaning of Article 5 of the Act of 1 March 2000.

2.6.The auditor

In the context of periodic audits of the company's books and records, the company's auditor (appointed for the purposes of finalising the annual accounts, or the half yearly or quarterly accounts if the company publishes them), will make contact with the company's more senior lawyer.

In the context of a procedure such as that required under Article 524 of the Companies Code (intragroup conflicts of interest in quoted companies), the company lawyer and the auditor will have meetings.

Auditors, who are often *réviseurs d'entreprises*, have their own code of professional conduct[36]. The relationship between company lawyers and the company auditors is therefore based on reciprocal confidentiality. The company lawyer must be in a position to report to the auditor with professionalism on the company's legal matters, including significant litigation, compliance concerns, and other governance matters. It is also important that the company lawyer share any concerns relating to the adequacy of the company's disclosures to shareholders.

In many cases, the auditors will request what are known as "lawyer's letters" from the external lawyers who are managing a legal dispute or litigation for the company. In those letters, the external counsel describes his or her view of the progress of the dispute, and the likelihood of success on the merits of the case. It is recommended that the company lawyer continues to play a central role in facilitating this process since it is, after all, the company lawyer who manages the litigation portfolio:

- the list of cases for which lawyer's letters are requested must be discussed and approved in advance jointly by the auditor and the company lawyer;;
- the company's auditor requests lawyer's letters using a standard form prepared by the company lawyer;
- the external counsel's response must be addressed first and foremost to the company lawyer;
- external counsel simply has to advise the auditor that it has sent a reply to the company lawyer;
- the contents of the letters are discussed verbally by the auditor and the company lawyer;

[36] *Le secret professionnel du reviseur d'entreprises*, ICCI, Centre d'information du revisorat d'entreprises, Die Keure, Bruges, 2009, no 2.

- any follow-up correspondence or contact must always take place through the company lawyer.

There is a duty of confidentiality in the relationship between the outside counsel and the company lawyer on the one part, and between the company lawyer and the auditor on the other.

Section 3: Disputes in the running of the company – the company lawyer's approach

As described above, the company lawyer serves several masters. Usually this poses no problem whatsoever because the company lawyer must have regard for the paramount interests of the company. However, what approach must a company lawyer take when there is a difference of opinion between management and shareholders? The company lawyer is advisor to the company, not to management, or to the board of directors, or to the shareholders:

- The company lawyer must ensure that opinions are given exclusively in the company's interests.
- Where there is a difference of opinion in respect of the company's business strategy, it is recommended that company lawyers remain detached, although obviously continuing to perform their role as legal advisors, and draw the attention of both management and the board of administration to the legal risks of the various positions.
- However, if the interests of management and of the board of directors are not reconciled, sometimes it may not be possible for the company lawyer to remain detached. This is the case, for example, when there is a squeeze-out in an unquoted company. During the squeeze-out process, which may last some time, the selling shareholders will be anxious to maximise the sale price, whereas management is going to feel increasingly bound to the purchaser. It may be in management's interests to keep the price as low as possible and to draw the purchaser's attention to all the risks, integration difficulties, market circumstances, etc. In such a case, it is recommended that the company lawyer recommend that the shareholders and, where applicable, the board of directors and management, should seek separate legal advice from different external outside counsel. By organising legal support for the specific transaction at hand, the company lawyer ensures that the (different and divided) interests of the company are properly protected, whilst avoiding any conflict of interest.
- Urging that separate legal advice be obtained by the shareholders, and arranging for external counsel for the board of directors and management is particularly helpful when there is a squeeze-out bid over a quoted company. At the time of such a bid, the board of directors has a specific responsibility for publishing a memorandum in response to the bidder's proposal, expressing its point of view on the bid. In that regard the board of directors can only be guided by the corporate interest which may not be completely aligned with the interests of shareholders or management. It is therefore the company lawyer's responsibility from the outset to arrange legal support in a way which gives the various actors in the process access to appropriate independent (legal) opinions.

Section 4: Opinions given on the role and responsibilities of company officers and agents.

The company lawyer will provide legal advice on the rights and duties of the various people closely linked with the running of the company. This applies primarily to the members of the board of directors and management.

The company lawyer should therefore periodically inform the executive and non-executive directors of their responsibilities and their potential liability as directors.
If, at the company's request, members of management take up office as directors in foreign subsidiaries, the company lawyer will gather the necessary information to report properly to the people in question, the company lawyer's colleagues, about local customs and the professional and personal risks they may run when performing their respective roles.

It is recommended that company lawyers not give any advice to directors or managers on purely personal matters. This may of course be done exceptionally, in a completely informal way, but for opinions concerning the private realm, the company lawyer should direct the person to external counsel or a notary.

V. RULES OF PROFESSIONAL CONDUCT

<u>*Bibliography*</u>*:*
Pierre LAMBERT, Le secret professionnel, Bruylant, Brussels, 2005, p. 311; R.P.D.B. [Répertoire pratique du droit belge], Supplement, volume X, Bruylant, Brussels, 2007, p. 743, no 419.
Georges CARLE, Commentaires du Code de déontologie approuvé par les assemblées générales de membres de l'Institut des juristes d'entreprise des 19 juin 2001 et 30 janvier 2002 in *Cahier du Juriste no 3/2004, p. 145.*

With the Act of 1 March 2000 creating an Institute of Company Lawyers, Belgium embodied in law statutory recognition of the title of company lawyer, thereby giving an adequate response to the needs of today's business concerns.

The number and complexity of regulations, the speed with which decisions have to be made and the numerous and ever-changing factors on which they are based make company lawyers indispensable. They are the link between the company and its management on the one hand (knowledge of the company), and the legal environment (legal instincts, contact with other legal professions and administrative institutions) on the other. The company lawyer holds a key position of trust[37] in the company and, even more so, within management.

That position of trust means that the company lawyer must act with complete independence of mind, notwithstanding the position of subordination inherent in an employment relationship. That is why the legislature found it necessary to give the Institute the task of drawing up a code of professional conduct, and of setting up disciplinary bodies to oversee its implementation (Articles 2 and 7 of the Royal Decree of 19 April 2006).

<u>*Section 1: Legal framework*</u>

We refer in this regard to Chapters II and VIII. It is worth summarising a few concepts here by way of introduction.

1.1. Individual and collective employment provisions

Company lawyers are prima facie employees[38]. This means that they are covered by all employment legislation concerning both the collective and the individual which is usually of mandatory application.

As an employee, the company lawyer clearly also falls under the Act of 3 July 1978 on contracts of employment. That Act establishes a relationship of subordination in practice (compliance with employment rules and the legitimate instructions of line managers in the practical aspects of the employment relationship, such as adherence to a work schedule or providing evidence of absences), which does not in any way diminish the intellectual independence of the company lawyer (entitlement to comprehensive information about everything which may affect an opinion to be given, the right to give a completely independent opinion, even if it calls into question or discredits all or part of a strategy envisaged by management).

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[37] Obviously, other people, such as the various directors and managers, will also be in positions of trust in their specific fields.
[38] They may also exist by virtue of the articles of association to the extent that their employer fulfils the definition of an undertaking under the legislation.

For company lawyers, the principle of mutual respect between employer and worker, under Articles 16 and 17 of the Act of 3 July 1978, has to undergo the influence of professional conduct rules.

1.2. The Act of 1 March 2000

This Act creates the Institut des juristes d'entreprise (hereinafter the Institute). The profession of company lawyer is therefore recognised in statute and use of the title "company lawyer" implies the satisfaction of certain requirements (Article 6 of the Act).

Company lawyers must retain their intellectual independence. The relationship of subordination between company lawyers and their employers (contract of employment or articles of association) must not be allowed to blur the intellectual and functional independence which, as has been accepted for a long time, employees can also have, in practice, in performance of their work (see Chapter VI, Section 2).

Company lawyers also enjoy protection for the confidentiality of their legal opinions as embodied by the Act (Article 5 of the Act).

When company lawyers give opinions to their employers, they are subject to an obligation of professional secrecy (Article 458 of the Criminal Code).

The Act establishes the premises for organisation of the Institute, the profession, its professional conduct and the disciplinary rules and bodies.

1.3. Royal Decree of 19 April 2006

The disciplinary rules are embodied in the Royal Decree of 19 April 2006 (which came into force on 3 May 2006). Those rules specify the organisational arrangements for the disciplinary procedure and the appeals relating to it.

1.4. Code of Professional Conduct

The Code is established under the Act and was approved by the General Meeting (specifically the General Meetings of 19 June 2001, 30 January 2002, 23 June 2005 and 22 May 2010). It is systematically commented upon in this Chapter.

1.5. Agreements

An agreement was entered into on 16 June 2004 with the Ordre Néerlandophone des Avocats de Bruxelles.

Two agreements were concluded on 12 and 22 June 2006 between the Ordre des Barreaux Francophones et Germanophone (OBFG) and the Institute[39]. A third agreement was entered into between the Fédération Royale du Notariat Belge and the Institute. They apply directly to all members of the Institute. The agreements can be obtained on request from the Institute's secretariat. You can also find them on the Institute's website.

[39] Discussions are taking place with the OVB (Orde Vlaamse Balies) with a view to concluding agreements on similar terms.

The first agreement envisages the possibility of reciprocal training periods for junior company lawyers in counsels' chambers and for trainee counsel[40] in the legal departments of companies or business federations. The second agreement establishes a contractual duty of confidentiality for written communications and negotiations between company lawyers and outside counsel who are members of the OBFG. Its terms will be discussed further in our comments on Article 8 of the Code of Professional Conduct. The third agreement, with the body of notaries, is a partnership and cooperation agreement. Exchanges of correspondence and data between company lawyers and notaries will be covered by confidentiality (Article 4)[41].

1.6. Other instruments

Lastly, the Internal Rules (*), which do not of themselves have regulatory force, but rather the force of a membership instrument forming part of the normal functioning of a regulated profession, lays down the operational rules of the Institute and its bodies and the conduct of its members.

In addition to the sources referred to above, it is worth mentioning the recommendations, on the subject of the confidentiality of opinions. Those recommendations can be found in the Institute's Yearbook (*) which comes out each year. They are intended to indicate good practices for specific cases.

1.7. Other sources

Case law on professional conduct cases and the Council's position on certain questions can be found on the Institute's website or in its 2005 Annual Report.

Section 2: The concept of professional conduct

The concept of professional conduct is at the boundary between ethics and rules. The Van Dale dictionary defines it as "*de leer der plichten*" (the discipline dealing with duties). That definition, concise in the extreme, seems too general. In Larousse, on the other hand, we find a definition which fits perfectly:

> "All the rules and duties which govern a profession, the conduct of those who practise it, the relationships between those practitioners and their clients and the public".

That latter definition, however, pertinent though it may be, only poorly reflects the diversity of the professional conduct regimes of the various legal professions, in so far as certain professional conduct provisions, sometimes imposed by statute, go back to a sometimes centuries-old tradition. This is true of the professional conduct of outside counsel, notaries, court bailiffs and, furthermore, that of doctors. For each of those professions, in common with the profession of company lawyer, the rules of professional conduct are associated with the fact that in certain cases the client has to confide openly in a professional, and there is therefore a need, in the general interest, to protect what will be said under the cover of confidentiality. The drafting history of the Act bears this out.

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[40] The months of the training period spent in a company are taken into account for the three years' compulsory training for the bar.

[41] Article 4 of the Agreement: "Correspondence and data will be exchanged between the notary and the company lawyer in accordance with the custom and rules of confidentiality of the two professions, irrespective of the means used."

> "The intended aim [...], out of a concern for the general interest and public policy, is to ensure that citizens are protected whilst guaranteeing recourse to the services of professionals holding recognised qualifications."

Like more recent professional conduct regimes (*réviseurs d'entreprises*, *experts-comptables* [external accountants]), this professional conduct regime relates primarily to protecting "internal clients", whether enthusiastic or even reckless entrepreneurs, or merely economic operators who want to ensure that they act fully within the law.

Management's requirements in terms of reliable information on legal topics, combined with a knowledge of the company itself, call for a working relationship which in intellectual terms goes far beyond a mere relationship of subordination.

This is crucially important. Whilst even the European case law on the subject (see Chapter X), has taken the approach that intellectual independence is necessarily accompanied by economic independence, the Belgian legislature, following the legislature in the Netherlands, has broken new ground by uncoupling those two aspects of independence. That situation already existed for doctors or dentists who provide services under a contract of employment. They are subject to the disciplinary rules of their professional body and must be able to gather all the information enabling them to issue an appropriate diagnosis, from the very bottom to the very top of their employer's hierarchy, even though they must "submit" to the subordination inherent in a contract of employment.

Section 3: Commentaries on the Code of Professional Conduct

The Institute's 2005 Annual Report contains five case studies. They relate only to company lawyers' relationship with the Institute and their relations with other legal professions (primarily outside counsel).

Both the concise nature of the Code of Professional Conduct and the paucity of case law are explained, on the one hand, by the fact that it is a new profession, which appeared during the XX century and developed more widely after the Second World War, and on the other hand by the fact that company lawyers work under contracts of employment, as a rule for a single client, namely their employer, as a result of which they escape the goad of competition with fellow lawyers. They also do not encounter at all the issues relating to fees, characteristic of self-employed professions, nor do they encounter the procedural issues arising as counsel before the courts.

In addition, in contrast to other professions organised in the form of professional bodies, admission as a member of the Institute is not under any circumstances a requirement to carry on legal work for an employer. In such a case, however, the people in question cannot use the title of company lawyer, their legal opinions are not covered by confidentiality, and they will not be subject to an obligation of professional secrecy when giving legal advice to their employers. Such persons will however be bound by an obligation of discretion and to comply with business secrecy[42].

Article 1: Compliance with the rules applicable to company lawyers

[42] Article 307 of the Criminal Code and Article 17(3) of the Act of 3 July 1978 on contracts of employment.

In the course of their work as company lawyers, company lawyers shall comply with the laws, internal provisions and the disciplinary rules laid down by the Institute, as well as the decisions of the various bodies of the Institute and this Code of Professional Conduct.

It would seem to go without saying that company lawyers are bound to comply with the laws, in the course of practising their profession or not, but it is good to repeat it incessantly.

Promoting application of the law within companies is less a stating of the obvious than it may appear, and this will be addressed in the commentary on Article 5 below.

This first part of the Code of Professional Conduct must therefore be interpreted *a contrario*, taking the view that company lawyers can never be tradesmen who make their employers feel that they can infringe the law and go unpunished. Conversely, the company lawyer's forte will be to find, in a body of formal rules which may be diffuse or silent on certain matters, the legal solution which will enable management to achieve its objective with complete legality and with as much certainty as can possibly be achieved[43]. In that sense, company lawyers can be regarded as "engineers who use the rules of law in place of mathematics".

In this first sentence of the Code of Professional Conduct, the Institute unconsciously prefigured the terms of a paragraph of the Order of the President of the Court of First Instance of the European Community of 30 October 2003 in the Akzo Nobel case.[44] This case provides insight into the possibility of assigning company lawyers the rank of "lawyers collaborating in the administration of justice" in the same way as outside counsel:

> *[The evidence submitted to the Court] appears prima facie to be capable of showing that* ***the role assigned to independent lawyers of collaborating in the administration of justice*** *by the courts, which proved decisive for the* ***recognition of the protection of written communications*** *to which they are parties (AM & S v Commission, cited at paragraph 66 above, paragraph 24),* ***is now capable of being shared****, to a certain degree, by certain categories of* ***lawyers employed within undertakings on a permanent basis where they are subject to strict rules of professional conduct.*** (Paragraph 125).[45]

That order was set aside on appeal[46], solely on the grounds that there was no urgency (which is the primary requirement for any interim measure). More specifically, the rules set out in the sources of the professional conduct regime, referred to above (namely the Act, the Royal Decree, the Code of Professional Conduct and the Internal Rules) are imposed on all company lawyers (Article 10(1) of the Internal Rules). The same applies to decisions made by the bodies of the Institute.

Some of those rules are practical in nature and are contained in Article 6 of the Code of Professional Conduct, such as the payment of subscriptions within the prescribed time limit, spontaneous notification by each member of a change in their professional circumstances and cooperation with the Institute (that is to say, the response to be given to requests for information.

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[43] As we stated in Chapter III (page 5), company lawyers deal with legal risks, but when dealing with unclear texts or new or original situations, they cannot exclude all risk. Nor is there any such thing as zero risk.

[44] Order of the President of the Court of First Instance of 30 October 2003, Akzo Nobel Chemicals Ltd v Commission, Joined Cases T-125/03 R and T-253/03 R, ECR Page II-4771.

[45] Emphasis added.

[46] Order of 27 September 2004 of the Court of First Instance of the European Communities, Commission v Akzo Nobel Chemicals Ltd., Joined Cases C-7/04 P(R) ECR Page I-8739.

Members can at any time put questions to the President of the Institute about the interpretation and application of those instruments or about the confidentiality of opinions (Article 10(2) of the Internal Rules).

Are members bound to inform the Institute of legal or administrative proceedings brought against them personally? That question requires a nuanced answer.

A duty of disclosure exists where there are proceedings connected with practice of the profession of company lawyer or where the subject matter of the proceedings is such as to damage the dignity of the profession (see below, Article 6, paragraph 2).

There was such a duty on a number of company lawyer members on several occasions, when their employers were prosecuted by the prosecutor's office, where searches took place (including at the company lawyer's office), where the company lawyer was interviewed by the investigating magistrate and where it was decided to bring charges against the company lawyer.

	Case studies:
	- Can company lawyers turn a blind eye to a backdated document?[47]
	- What should company lawyers' approach be to practices of which they are aware by foreign intermediaries, acting in accordance with other cultural norms, virtually indispensable in the context of negotiations, but reprehensible under the existing Belgian law?
	- What should company lawyers' approach be if their employer asks them to take a step which is illegal or contrary to the Institute's Code of Professional Conduct?

[47] Appeal, Ghent, 20 September 2010: agreements backdated by the finance director.

Article 2: __Title of company lawyer__

In accordance with the Act of 1 March 2000, the title of company lawyer can only be used by persons satisfying the requirements stipulated in Article 4 of that Act. The company lawyer therefore undertakes to inform the secretariat of the Institute as soon as possible of any new information that might affect their status as a company lawyer.

Company lawyers shall use their title every time they act in the capacity of company lawyer.

On the other hand, company lawyers shall refrain from abusing their title, especially with regard to actions relating to personal matters or other professional activities.

The title "company lawyer" is protected by statute. This means that only company lawyers, members of the Institute, are entitled to use it in relation to their professional activities as company lawyers. Any unlawful use of the title is therefore a criminal offence, punishable by a fine.
Since this is a matter of expressing pride in belonging to a legally recognised profession, as a rule there are no restrictions on its use, although, as set out below, they may be imposed to avoid inappropriate uses.

The title must in any event always be used in the following situations:

(i) whenever the company lawyer acts in that capacity;
(ii) whenever the company lawyer issues a legal opinion (Article 5 of the Act);
(iii) when the company lawyer enrols in a professional seminar (job description);
(iv) where company lawyers give lectures on legal topics to their colleagues (applying the last part of Article 5 of the Act, see below).

On the other hand, the title may not be used where company lawyers write letters *not forming part of their professional activity as legal advisors to their employers* (for example a private dispute concerning a member of the company's management).

Similarly, if they act under a different authority (e.g. as a director or as a member of a works council), they must likewise refrain from using their title of company lawyer.

Lastly, if a company lawyer wants to contact a colleague for a reason not directly related to their job, they are free to use their title or not.

Company lawyers are therefore required to use their title wisely whatever the circumstances.

The title is used without additions: in French, *juriste d'entreprise*; in Dutch, *bedrijfsjurist*; in German, *Betriebsjurist*.

The recommended English translation is *company lawyer*.

Scrupulous care will be taken to avoid any other title, such as "legal advisor", "employment lawyer", senior lawyer", "legal counsel", etc.

However, there is nothing to prevent the employer's name from appearing next to it.

Nor is it prohibited to add a second title, namely the title given within the company (e.g., an officer's title, such as vice president, senior vice president, executive vice president, executive secretary, secretary to the board, attorney, chief legal officer).

Use of the title, although strictly reserved for the practice of the profession, is also permitted in relation to the writing of articles or legal works, appearances in the media, or in connection with election to public office.

On ceasing to practise, and, provided honorary membership has been granted by the Council, the company lawyer can use the title "honorary company lawyer".

It is also a matter of professional conduct to inform the Institute's secretariat immediately of any new information that may affect the company lawyer's status. Career developments and changes within a company are normal and relatively frequent. It is important, in particular, for company lawyers to notify the Institute's secretariat when they stop performing legal functions within their company or group as their principal activity, and that they immediately apply to be removed from the Institute's member register.

This is all the more important in so far as the up to date list of members (the Institute's member register) appears in the public area of the Institute's website, with the first name and surname of all members. That area is accessible by any third party wishing to know if a particular person is (still) a company lawyer. It is important that this list is accurate and that any change in the status of a member is made in real time.

	Case studies:
	- Where a company lawyer, on behalf of his or her employer, writes a letter threatening legal proceedings to the golf club of which the employer is a member and with whom the employer has a serious dispute, can he or she use the title of company lawyer?
	- Can company lawyers continue to use their title when they have applied for temporary removal from the register?
	- Must company lawyers automatically inform the Institute of a supplementary activity (whether law-related or otherwise) which they perform, whether paid or otherwise? Must they inform the Institute (in advance) of their intention to seek political office or office on the bodies of corporations?

Article 3: __Honour and dignity__

The company lawyer shall act at all times in keeping with the honour and dignity of the profession and shall refrain from any act or behaviour which may adversely affect the profession.

This article[48] is aimed prima facie at what is generally applicable and, therefore, penalised by the criminal law (e.g. slander and defamation, racist or xenophobic etc. remarks) and extends, as the case may be, to situations harmful to the honour and dignity the profession. That does not concern only the professional dimension – personal and civic life also come into play. The rule indeed states "at all times". The rule is to avoid any act which attracts adverse attention.

However, the Institute is not an authority which lays down moral strictures. Changes in morals and customs have in fact meant that the notions of honour and dignity are interpreted less strictly for the professions in question than, for example, half a century ago (when it would have been unimaginable, for example, for a judge to be found in a casino).

The bar suspended a counsel for a year and imposed five years' ineligibility to vote for signing an openly anti-Semitic song disrespectful of the Holocaust in the presence of several people while the counsel was on holiday.[49]

However, company lawyers act both as guardians of values in relation to their company and as its spokesperson for the ethical profile the company presents to the outside world. It must not be overlooked therefore that company lawyers base their credibility on generally accepted professional conduct rules closely linked to their behaviour, both in their professional and civic lives.

Their professional behaviour must be guided by probity[50].

	Case studies:
	- Can company lawyers publicly take a different stance from those officially adopted by the Institute?
	- Can they work in sensitive fields (the sale of near narcotics in contexts which are not fully controlled, the sale of arms for dubious political purposes)?
	- Is an alcohol problem *prima facie* contrary to the dignity of the profession?

48 The requirement for "dignity" also applies to outside counsel (see in particular Articles 437 and 456 of the Judicial Code).
49 French and German-speaking Disciplinary Committee of Appeal, judgment of 18 May 2011.
50 Probity is defined as the "virtue consisting of scrupulously observing the rules of social morality, the duties imposed by honesty and justice" (Le Petit Robert, 2008).

Article 4: __Intellectual independence__

Company lawyers shall practise their profession with complete intellectual independence. They are aware that the value of their opinions relies on absolute intellectual objectivity and integrity and undertake to uphold those principles, whatever the circumstances or influences to which they may be subject.

Intellectual independence is the cornerstone of any legal profession regulated by public law and therefore of the professional conduct of company lawyers. Intellectual independence must be understood as the fact that the position of subordination inherent in an employment relationship cannot under any circumstances compromise the objectivity or intellectual integrity of a company lawyer.

That intellectual independence is associated, as described above, with the need for a strong relationship of trust between employers (understood here as both management and colleagues) and their company lawyers, which means that company lawyers must be kept informed of all relevant information so that they can identify the issues and give objective legal opinions. In other words, the employer has a duty of transparency and sincerity to its company lawyer in respect of anything which may be relevant to analysing the matter entrusted to the lawyer.

In respect of their opinions, company lawyers are also expected to show absolute objectivity and intellectual integrity[51], and therefore complete intellectual honesty, as well as strength of character and resistance to anything which may compromise those qualities. In that light, it is clear that applying the rules relating to professional secrecy is inherent in the work of a company lawyer.

This also means that company lawyers must identify their internal client in advance (an opinion may be written differently according to whether it is addressed to the chairman of the board of directors, the chairman of the General Meeting, the chairman of the executive committee or the chairman of the works council, to a colleague on a professional level or to a member of a business federation).

The company lawyers of business federations may sometimes be confronted with a conflict of interest if several of its members have diverging or contradictory interests. Several business federations have for that reason drawn up their own codes of professional conduct to assist their company lawyers in resolving those conflicts. In the opinion they give, company lawyers belonging to one of those federations will do well to refer expressly to the statutes of their federation.

Company lawyers will also avoid having to face direct personal moral dilemmas when they have to issue a legal opinion.

Lastly, that objectivity should be understood as the fact that company lawyers should keep their own interests at a distance. This concerns, for example, an employment law case affecting an individual in which company lawyers have to advise their employers on the options for dismissing one of their colleagues in the company.

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[51] The Judicial Code (Article 456) uses the term "probity" (*probité*) in respect of outside counsel.

In September 2009, the disciplinary committee of the association of company lawyers in the Netherlands (*Nederlandse Genootschap van Bedrijfsjuristen*) had to rule on the following case:

--the case file relating to the motivated dismissal[52] of a senior executive contained a written statement by the company lawyer (in that case, the chief legal officer) – a declaration which the company lawyer had taken the initiative to write--testifying to facts on which the decision to dismiss could be based.

The dismissed person brought proceedings against the company lawyer before the disciplinary committee criticising the lawyer for making a spontaneous statement and for having "rushed to help" the employer in order to facilitate the dismissal.

The disciplinary committee drew attention to the professionalism, quality and objectivity required of any company lawyer and pointed out that the utmost discretion is required in case files relating to individuals, adding that it was preferable not to give an opinion unless one was requested.

However, in the case under analysis, the committee found the complaint to be admissible but unfounded and that there was no infringement of Articles 2, 3 and 4 of the Code of Professional Conduct (*Gedragregels*).

The facts set out in the statement were scrupulously true (Article 3), the company lawyer had acted with integrity (Article 2), and had demonstrated complete intellectual independence (Article 4). The lawyer had given a legal opinion to the employer in the properly understood interests of the company as a company.

	Case studies:
	- Are opinions given spontaneously by company lawyers to their employers, with no request whatsoever from the employer, automatically covered by confidentiality?
	- Can company lawyers give legal opinions to their employers as to whether or not a fault committed by one of their own co-workers is serious?
	- Can company lawyers give favourable opinions to their employers (assuming that there is full compliance with the law), whereas they would have given an unfavourable opinion had it concerned their own affairs?

[52] The dismissal of an employee under a contract of employment must be motivated in the Netherlands.

Article 5: Practice of the profession

Company lawyers are aware that the objectivity and quality of their opinions depend on a thorough knowledge of the law as well as of the company in which they work and of the sector in which the company operates. They are aware that continuing training is indispensable to keeping them informed about all new developments concerning the company in which they operate.

They shall practise their profession with discernment, diligence and prudence. They shall fairly and in good faith protect the interests of their company and of associated companies, and, where they are employed by a business federation, the interests of the companies which are members of that federation.

Company lawyers shall promote implementation of the law in their company. They shall therefore inform their colleagues as soon as possible about the consequences of new legislation concerning their company or the sector in which it operates. Aware of the technical complexity of some legislation, they shall endeavour to use clear language in the opinions and advice they give, and shall ensure that the meaning of their opinions is well understood by those to whom they are addressed.

Emphasis here is on the need for an excellent knowledge of the company or of the group of which it forms part (or of the business federation and its members, as the case may be) as well as of the law. That objectivity corresponds to the image of a nonpartisan, dispassionate "bird's eye view". That vantage point generally distinguishes managers and senior executives from the technical experts who work under their instructions. Furthermore, by distancing themselves, the prerogative of a wise advisor, company lawyers see what decision- makers should see, without necessarily being involved in the decision-making.

The requirement to keep a distance makes particular sense for lawyers employed by business federations, whose role is to be the voice of their sector and to consult and gather opinions from their member businesses. As a result of that specific consultative role, company lawyers employed by the federation will sometimes be faced with conflicts of interest between various member businesses. It will be particularly important that company lawyers show discernment, diligence and prudence and take a step back from the individual stances adopted by the member businesses, and go back to the corporate objects of their federations (reference to its instrument of association). This does not prevent company lawyers employed by federations from defending in fairness and good faith not only the interests of their federations but those of the businesses which are members of those federations, although in performance of their tasks they must be transparent and explicitly inform the member businesses that they are acting for an individual business. The principles relating to intellectual independence looked at in this study are clearly of vital importance here for the company lawyers of business federations.

Company lawyers also have to ensure their ongoing legal training. With the exception of this professional conduct course (by virtue of a resolution of the General Meeting of the Institute of 28 May 2009) there is no requirement for a minimum number of hours' training, nor any test, of any kind whatsoever in order to obtain or keep the title of company lawyer. Should that obligation be made into a more specific duty, for example by giving the relevant company lawyers an opportunity to be given a quality mark for taking training and refresher courses?

It is nonetheless important for company lawyers, in the course of their work, to avoid being taken by surprise by a fundamental change in the legislation of whose existence and impact they were unaware (an obligation to monitor the law and to be aware of developments in statute law by regular reading of the *Moniteur belge,* the Official Journal of the European Communities and relevant legal journals and by attending training courses, because the rules change constantly), or by events within or around the company which have a decisive effect on how information is assessed[53]. This is of course an obligation of means. It is for company lawyers themselves, with that aim in mind, to put in place the resources enabling them to correctly assess at all times on the one hand what they know and on the other hand what they do not but should know, in order to be in a position to give good advice. The Institute can facilitate that task, through networking and organising many regular training courses.

The Brussels Criminal Court attempted, in its judgment of 1 December 2010[54], wrongly, in so far as it was overturned on appeal[55], to use alleged poor knowledge of the applicable law as a basis on which to convict two lawyers (one of whom was a member of the Institut des juristes d'entreprise [IJE]).

The Mons Court of Appeal did the same thing in its judgment of 28 June 2011[56].
In order to diminish the liability of architects (whose duty to advise varies according to whether they are dealing with a layperson or a professional developer), the Court wrote:

> "[...] In this case, the developer had the help both of an experienced technical advisor (K. S.), and of the legal department of an international company." (p. 212 of the judgment)

The Court of Appeal added:

> "Assuming, therefore, that [the architect] did breach his duty to give 'legal' advice, which is not clearly discernible from the case file in the investigation, it must be found that the developer had its own legal department which was perfectly capable of providing it with all the necessary clarifications and details, in particular as regards its obligations in the context of setting up G's site." (page 212 of the judgment)

When it then analysed the developer's liability, the Court stated:

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[53] See the judgment of the French Court of Cassation of 14 May 2009 (J.T., Larcier, Brussels, 2009, p. 631) which states in relation to outside counsel: "[...] bound to perform, in compliance with the professional conduct rules, all procedures relevant to protecting their client's interests and with a duty of competence, outside counsel, although not subject to liability for not predicting an unforeseeable change in statute law, <u>must draw attention to a change occurring in the case law which if transposed or extrapolated to the case for which they are responsible could realistically increase its chances of success</u>." (Our underlining).

[54] Brussels Court of First Instance, 1 December 2010:
"[...] With regard to the defendants X and Y, these two lawyers by training heading the bank's legal department are supposed to keep up to date with changes in the legislation, in particular in relation to consumer protection. However, it is apparent from the criminal case file that they did not take even elementary precautions to ensure that the few people employed in their department were kept informed of developments in the legislation applicable to commercial practices. [...]
Indeed, it emerges in particular from hearing Z on 20 May 2009 that the latter, a lawyer in the "Legal" department, did not have sufficient knowledge of the law on commercial practices.
The members of the "Legal" department delegated to examine whether the promotional documentation complied with the Law on Commercial Practices failed in their task by issuing legal opinions of inadequate quality. The defendants X and Y themselves acknowledge that they delegated in its entirety the review of legality in the strict sense. It was however their responsibility to ensure minimal supervision of how that task was carried out within the department [...]."

[55] Court of Appeal, Brussels, 21 May 2012: "No structural fault could therefore be alleged [against them] [...]"; "... is not such as to render [them] criminally liable." The Prosecution Office of the Court of Appeal brought a cassation appeal.

[56] Court of Appeal, Mons, 28 June 2011, RGAR [Revue Générale des Assurances et des Responsabilités] no 7/2011, p. 14768.

> "From all the statements by those responsible for the "G." project within the [developer's] management structure, it is apparent that none of them, or any of the employees, knew the legislation applicable to temporary or mobile sites, and specifically the rules on the developer's obligations.
> [...]
> Such organisational and functional shortcomings cannot be tolerated in a developer which, as in the present case, has the assistance both of an experienced technical advisor (K. S.), and of the legal department of an international company." (page 340 of the judgment)

Giving advice in disregard of a statutory or regulatory instrument, or even of a development in the case law, has been treated as a fault within the meaning of Article 1382 of the Civil Code[57].

A little more than that can no doubt be expected of company lawyers, that is to say, they should know the draft instruments which will be law the next day (something which company lawyers in business federations do more naturally), by attending either study days or working groups within trade federations or sitting on the committees which prepare and draw up instruments of "soft law".

Here too company lawyers must be proactive. They must assert this right to training within their companies and their companies must give them the resources to receive training.

The drafting history of the Act of 1 March 2000 creating an Institute of Company Lawyers indicates precisely that, where it provides that:

> "[...] company lawyers are those who play a part in legal liability within the company. This involves a two-way process – responding to the advice and legal tasks requested and <u>taking the initiative in relation to the company (reporting on new legislation)</u> [58], remedying critical situations, […]"[59]

The **qualities of company lawyers** are threefold:

- intellectual qualities: perceptiveness, involvement and prudence,
- moral qualities: fairness and good faith, both towards internal clients and outside the company,
- teaching qualities: following legal news of significance to employers, asking employers for time to undertake their own professional development, and reporting on it to the employers proactively and in comprehensible language. This requires a fair degree of teaching ability.

How is the expression "shall promote implementation of the law in their company" to be understood?

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[57] P. Lambert, *L'aspect déontologique et disciplinaire de la responsabilité civile de l'avocat*, in *La responsabilité des avocats*, Ed. du Jeune Barreau, Brussels, 1992, p. 27 et seq. Court of Appeal, Ghent, 20 September 2010: case Lernout & Hauspie (the outside counsel knew that the financial figures which were going to be published were fraudulent).

[58] Our underlining.

[59] Parliamentary Document, Senate., 1995-1996, 1-45/2, p. 13.

We must be clear about this. This is an obligation of means like the obligation of a doctor when treating and advising a patient, or of outside counsel advising clients.

It is under no circumstances an obligation of result in so far as it is not the company lawyer who makes the final decision.

Company lawyers are not members of the prosecutor's office, investigating magistrates, or policemen. . Company lawyers must not be confused with the authorities responsible for uncovering infringements. This does not prevent them from being ambassadors for the law within their companies by disseminating, to the extent possible, to their colleagues in the company, the rules of the existing law and those of the law in the making.

	Case studies:
	- Can a company lawyer be criticised for not knowing the terms of a Court of Appeal judgment published three months previously, in general, or where that ignorance prevented the lawyer from giving an opinion in the best interests of the company?
	- How can company lawyers prove to their clients that they are effectively up to date with the most recent changes in the law in the field on which they are invited to give legal opinions?
	- When should a company lawyer request a second opinion from an outside counsel or legal academic?
	- Can company lawyers give legal opinions to their employers where their conscience tells them that it is not a just cause?

Article 6: <u>Relations with the Institute</u>

The company lawyer shall ensure that the annual subscription laid down by the General Meeting of the Institute is paid within the payment period established.

A company lawyer shall inform the chairman of the Council of the Institute in writing as soon as any proceedings are brought against him or her concerning the profession or which could damage the dignity of the profession.

The company lawyer shall provide the Council as soon as possible with all relevant information requested by it so that the Council can effectively exercise its statutory powers.

This Article combines purely administrative provisions with a second, key, paragraph (already referred to above).

The administrative limb includes the first and third paragraphs, that is to say, payment of the subscription on time, spontaneous disclosure by each member of a significant change in their professional circumstances, cooperation with the Institute (replying to its requests for information).

Those obligations are founded on administrative public mindedness. The efforts which the extremely small team at the Institute has to make to compensate for non-compliance with those obligations are to the detriment of other work much more useful to the Institute. It is also worth pointing out that, in contrast to other legal professions created by statute, the Institute does not currently receive any State subsidy.

Of a less prosaic nature is the duty of company lawyers to inform the Institute in writing of any legal or administrative proceedings brought against them in relation to the profession or which may adversely impact the dignity of the profession. This point has already been referred to in the commentary on Article 1. Although company lawyers have to inform the Institute immediately of any such proceedings, it is the Institute itself which will determine the details of the information requested based on the individual case.

	Case studies:
	- Must company lawyers automatically inform the President of the Institute of any criminal proceedings brought against them?
	- Must company lawyers inform the President of the Institute when they are convicted of speeding (with loss of their licence)? Should a distinction be made between work-related activity and activity not related to work?
	- What should company lawyers do when they are "dragged through the mud" by the press, whether it relates to the profession or not?
	- Where there are legal proceedings against company lawyers, is it recommended that they also engage personal outside counsel, different from the company's? Who should pay outside counsel's fees?
	- What approach should company lawyers take when their legal opinions are

	not followed and the company (knowingly) commits a criminal offence?

Article 7: ***Relations between company lawyers***

Company lawyers shall treat other company lawyers as their colleagues. They shall endeavour to promote constructive contact and exchanges of experience with other company lawyers.

They shall refrain from deprecating other company lawyers. If they believe that another company lawyer is failing to comply with this Code, they shall notify that person initially by letter or in a confidential meeting.

There are three prongs to this article:

- *Other company lawyers are* **colleagues**. This means that every company lawyer will treat other company lawyers on an equal footing[60] and that in contacts between fellow company lawyers the aim should be to exchange knowledge and experiences. Networking is in that regard one of the main (indirect) benefits of being a member.

  Within the same legal department, to the extent that two company lawyers are in a hierarchical relationship to each other, the intellectual independence of the less senior colleague must not be fettered, but it is at the same time important, both as regards the company and externally, that the stance adopted by the legal department and embodied in its chief officer should be consistent. According to G. Carle,

  > "There must be a form of rendering of accounts by less senior colleagues to the person who, because he or she has responsibility for the department, monitors the cases which they normally allocate themselves."

  This enables the legal department to present itself as united, multi-skilled and in solidarity, qualities vital to providing the company with legal certainty, whilst preventing contradictory opinions. It also enables the legal department to develop coherent legal policies.

- *The duty to refrain from deprecating another company lawyer*. Even if opinions diverge sharply on fundamental issues, company lawyers have a duty of mutual respect and courtesy. They must show respect for the ideas and opinions of other company lawyers, in so far as there are very often several possible approaches to the same question of law, particularly if it is complex. The overall credibility of the profession depends on this. There is less temptation for company lawyers to behave disrespectfully, because colleagues are not direct competitors.

- *Recommendation on how to inform a colleague of a deliberate breach of the Code of Professional Conduct*: the colleague in question must first of all be approached discreetly and in confidence, either verbally or in writing.

	Case studies:
	- What should one do when an internal client consults you, and once the

[60] Obviously with respect for the bodies of the Institute and the people who have undertaken or will in the future undertake responsibilities within the Institute.

	opinion has been given, that client tells you that it has received a different opinion from one of your colleagues?
	- Should the behaviour of colleagues who do not comply with the Code of Professional Conduct be reported to the Institute?

Article 8: __Relations with other legal professions__

The company lawyer shall treat the members of other legal professions with courtesy and respect.

Courtesy, respect and, without the slightest doubt, sensitivity, are crucial to the proper practice of the profession. This requires constant effort by company lawyers to take into consideration the roles and characteristics of each legal profession and to adapt their actions accordingly.

This does not in any way restrict company lawyers' freedom to sit as commercial court judges or judges in employment courts or employment appeal courts, or to participate in study groups alongside representatives of other legal professions, although there must be a clear separation between the role as company lawyer and any other role.

It is with outside counsel (whom the company lawyer or legal department will have chosen in the best interests of the company) that contact will be most frequent. Company lawyers and outside counsel act as successive links in the chain of preparing legal matters or resolving disputes in court or by arbitration. Whilst company lawyers will create and monitor cases on the basis of their knowledge of the company, external counsel will represent the company before the courts in the event of litigation, or will enrich the case file with their external point of view and specific or specialist experience in the topic, with confidentiality laid down by statute and mutual respect for professional secrecy.

As regards more particularly outside counsel who are members of the Ordre des Barreaux Francophones et Germanophone (OBFG), one of the two agreements signed with the Institute, that of 22 June 2006 (*Agreement on the confidentiality of written communications and negotiations*) embodies the right of outside counsel and company lawyers to conduct negotiations and to exchange documents between each other confidentially, provided the following requirements are satisfied:

(i) the contact involves only company lawyers and counsel who belong to a member bar of the OBFG;

(ii) the company lawyer and the "OBFG" outside counsel have previously entered into an agreement to the effect that their future negotiations and written communications will be confidential;

(iii) company lawyers enclose with their request for acceptance of confidentiality a copy of the document, "*Confidentiality undertaking relating to written communications and negotiations,*" signed by an authorized company representative, under which the company undertakes to acknowledge that those negotiations and written communications are confidential.

For the OBFG's part, that agreement was the basis of a set of rules which officially establish its terms as obligation of professional conduct on every "OBFG" counsel.

Notaries are frequent partners of company lawyers. Together, they form successive links in a chain with a common aim – compliance with legal and formal requirements for legal acts where the law requires the intervention of a notary (in particular for general meetings amending articles of association, transfers of property, mergers and divisions of companies, spin-offs and the winding up of companies). Here too, there is a requirement to comply with

the obligation of professional secrecy. Article 4 of the agreement mentioned below provides that "written communications and data will be exchanged between the notary and the company lawyer in accordance with the custom and rules of confidentiality of the two professions, irrespective of the means used."

An agreement was indeed concluded on 17 June 2008 between the Fédération Royale du Notariat Belge and the Institute, aimed at strengthening cooperation between the two regulated professions, emphasising the following points:

"1. Publicising and communicating the role of notaries and the function of company lawyers;
2. Creating the conditions for fostering better communication and the circulation of information between the two professions;
3. Making it possible to exchange confidential information;
4. Setting up a cooperation committee responsible for dealing with the resolution of any disputes between the two professions."

Lastly, a protocol was signed on 27 September 2010 between the Institute and the French and Dutch Orders of the Brussels Bar. That protocol defines the professional conduct framework in which outside counsel temporarily posted to companies provide their services.

	Case studies:
	- The notary has received a duly signed power of attorney by fax, email or as a PDF attachment, but is refusing to execute the document until he or she has sight of the original. What should the company lawyer do?
	- Outside counsel sends 25 pages of additional and summarising appeal submissions the day before they are to be filed at the court registry and the final deadline for filing is the next day. What should the company lawyer do?

Article. 9: ***<u>Confidentiality of information</u>***

Company lawyers shall keep confidential all information given to them subject to confidentiality or as a consequence of their capacity, both whilst they are in post and after it has ended, unless stipulated otherwise by law.

This upholding of confidentiality is one of the key duties of company lawyers. Only strict confidentiality will allow them to gain the trust of operational staff. To use the expression dear to Jean Van Uytvanck who was an outside counsel and then a company lawyer, "a company lawyer is like the grave".

The duty to keep confidential information given to company lawyers extends *prima facie* beyond the end of their engagement (that is to say, their status as company lawyer), *unless the legislation provides otherwise*.

The cases to which this relates are those where, separately from any opinion given, company lawyers have information which they are asked to disclose in the context of an inquiry by a court or prudential or administrative authority. As with outside counsel, they will decide as their conscience tells them whether to speak or not. There is a compulsory derogation from the obligation of professional secrecy and a duty to disclose, in certain circumstances, where particular professionals are aware of a transaction apparently involving money laundering or suspected of being connected with terrorist activity.

Article 10: Confidential character of opinions

In accordance with the law, opinions given by company lawyers in their capacity as legal advisors, on behalf of their company and associated companies shall be confidential. The opinions given by the company lawyer of a business federation in the capacity of legal advisor, on behalf of the federation and the members of that federation shall also be confidential.

Company lawyers shall ensure that the appropriate measures are taken to guarantee that confidentiality, in particular by promoting within their company the recommendations with regard to the "Confidentiality of opinions" made by the Institute. The text of those recommendations is annexed to this Code.

Where third parties breach or threaten to breach the confidentiality of the opinions given by the company lawyer, the latter will inform the Institute immediately in order to agree the actions to be taken to remedy the situation.

This article expands on Article 5 of the Act which deals with the confidentiality of company lawyers' opinions to their employers and gives details for its implementation. First of all, a few clarifications as to its scope: both associated companies and business federations are included in the notion of an employer under Article 5.

The article then establishes that company lawyers must ensure that they take the necessary measures to guarantee confidentiality, in particular by promoting within their companies the *Practical recommendations to ensure effective protection of the confidentiality of the opinions of company lawyers* approved by the Council of the Institute on 13 March 2012 and ratified by the Institute's General Meeting on 24 May 2012. Article 10 also refers to where those recommendations can be found, that is to say on the area of the Institute's website reserved for members or in the Institute's members' Yearbook, published every year and also annexed (Annex VI) to this course.

In essence:

- the opinion should be identifiable as being a legal opinion addressed by a company lawyer to his or her employer;
- the opinion should state prominently, for example as a header: "CONFIDENTIAL – Company lawyer's opinion";
- it should be signed by a company lawyer registered in the Institute's member register on the date on which the opinion is issued, and identified by the expression "company lawyer";
- it should refer to Article 5 of the Act, for example as a first page footer: "Under Article 5 of the Act of 1 March 2000 creating an Institute of Company Lawyers (*Moniteur Belge*, 4 July 2000, 23252), opinions given by company lawyers for the benefit of their employers in the context of their work of providing legal advice, are confidential. This note is such an opinion. Neither this note nor its contents may therefore be disclosed, passed on, reproduced, copied or amended by any means whatsoever without the prior authorisation of its author, whether within [company] or outside, including vis-à-vis public authorities";
- it should only be disclosed to a single person (or an extremely limited and verifiable number of people).

Lastly, the Code contains a duty on company lawyers to inform the Institute where third parties act or threaten to act in breach of the confidentiality of opinions issued by that lawyer.

In other respects, we refer to Chapter VI below.

	Case studies:
	- Can a legal opinion be given by email?
	- How can it be ensured that a legal opinion is confidential where it is sent to a principal recipient with one or more recipients copied in?
	- Can the addressees of legal opinions unilaterally waive their confidentiality and disseminate them or cite them internally as they wish?

Article 11: Confidentiality between company lawyers

Non-public information exchanged between company lawyers shall be confidential unless there is a prior written unilateral declaration or agreement to the contrary.

Company lawyers shall take all necessary steps to ensure that this confidentiality is upheld in their company.

This article relates to the exchange of information in the public domain between company lawyers from more than one company.

This is a significant extension of the principle of confidentiality to information in the public domain exchanged between company lawyers, without a prior written unilateral declaration or agreement to the contrary. The company lawyers in question must also take every appropriate measure to ensure that this confidentiality is upheld within the company. It is important to understand the rationale behind this article. Unlike outside counsel, company lawyers have a duty to mediate, to actively seek solutions to disputes to the greatest extent possible (with certain exceptions) without the involvement of the courts and tribunals. In the interests of attempts to find an amicable settlement, it has been thought necessary to allow a propitious climate to be created. It was thereby decided that as a basic premise (unless, therefore, one of the two company lawyers refuses at the outset to accept this rule), nothing said between company lawyers, assisted by outside counsel as the case may be, can be used subsequently in legal proceedings if the settlement attempt fails. That rule is justified by the fact that it is only if company lawyers put their cards on the table, that is to say, that they acknowledge both the strengths and weaknesses of their case in fully transparent language (in so far as both, by definition, have complete mastery of legal language) that the circumstances can be created which are favourable to a settlement being reached.

Litigation is not the only possible scenario, however. There are practice groups within the Institute – just as there are specialised committees in business federations – in which, in complete confidence, lawyers exchange views on how new legislation should be interpreted or the approach to be taken in response to new case law. In this context too, the best practices of the profession are analysed and developed.

Where one of the two company lawyers is a non-national (from a country other than Belgium) it will be necessary to examine in advance the terms on which the courts of that company lawyer's country of origin recognise this confidentiality.

	Case study:
	- When attempting to reach a settlement to the dispute between their companies, each lawyer is accompanied by a member of the operational staff. (a) Is this a good idea? (b) Does it jeopardise the confidentiality of what is exchanged?

Article 12: Confidentiality between company lawyers and other professions

The company lawyer shall uphold the confidentiality of the members of those professions with which the Institute concludes agreements relating to the confidentiality of documents exchanged between them[61]. The Institute will inform its members in advance of the conclusion of such agreements.

Confidentiality depends here on there being agreements entered into by the Institute with other professions. In that regard, we refer to the agreement entered into by the Institute on 22 June 2006 with the OBFG and the agreement entered into on 17 June 2008 with the Fédération Royale du Notariat Belge, the terms of which were described in the context of the commentary on Article 8 above.

Section 4: Penalties

Disciplinary penalties are necessary in order to ensure that the rules of professional conduct are effective, with the proviso that they must operate in a framework of procedures which safeguard impartiality and the rights of defence. This is governed by the Act and the Royal Decree and is commented upon in detail in Chapter VIII below.

Section 5: Two case studies

Since it is not yet based on abundant case law, the professional conduct of company lawyers, if it is to develop proactively, is obliged to resort to the Scholastics' (Socratic?) case-by-case method (studying moral dilemmas) in order to pose certain questions and sketch out responses to them on the basis of conjecture.

We have chosen a number of topics common in the life of company lawyers, and propose to make a structured analysis of the response to be given to them.

First case study: the prohibition on backdating documents: absolute or relative – that is to say, can it be influenced by the need to balance competing interests?

Giving a document a date of signature prior to the date on which it is actually signed can be, depending on the case,

- forgery of documents (special intent consisting of intent to falsify documents or to obtain financial benefits by fraud);
- a device making the subject matter of the backdated document susceptible to incurable nullity;
- a device making the subject matter of the backdated document susceptible to being disputed by administrative or prudential bodies (NBB [Nationale Bank van Belgie], FSMA [Financial Services and Markets Authority], CREG [Commission de Régulation de l'Électricité et du Gaz], the tax authorities, ONSS [Office Nationale de Sécurité Sociale], etc.);
- a device making the subject matter of the backdated document voidable;

[61] Even if there is no such agreement with certain legal professions, the company lawyer is obviously at liberty to agree with a member of such a legal profession that written communications between them will be confidential.

- a device enabling the company, without any of the risks described above, to avoid a significant penalty, in particular in the case of statutory time-limits not attracting a penalty.

Whilst it goes without saying that in the first four situations, there is no question that they should be ruled out by any company lawyer, it is interesting to think about the fourth in the following illustration.

EXAMPLE

It was resolved, for reasons indisputably due to economic circumstances, that it was strategically advantageous for company A to absorb company B, both for the companies themselves and for their two shareholders, C and D, who hold the companies in equal shares.

The register of A's shareholders is kept at the premises of C, who will deal with the arrangements for the merger.

The register of B's shareholders is kept at the premises of D, who has not only expressed his or her agreement to the merger, but is actively cooperating in carrying it out (choosing the notary, deciding that the auditors' report on the merger will be drawn up by a panel of auditors comprising C's auditor and D's auditor).

Under the Companies Code, the auditor or panel of auditors must send the registered shareholders a report on the merger proposals.

"**Article 695,** Section 1**,** In each company, a written report on the merger proposal shall be drawn up by the auditor or, where there is no auditor, by a *réviseur d'entreprises* or an external *expert-comptable* appointed by the directors or managers.

The auditor, *réviseur d'entreprises* or *expert-comptable* appointed must amongst other things formally state whether or not, in their opinion, the exchange ratio is appropriate and reasonable. [...]

Article 697, Section 1. In each company, the merger proposal and the reports referred to in Articles 694 and 695 and the right of members of the company to obtain those documents free of charge shall be announced in the agenda for the general meeting called to resolve on the proposed merger.

A copy shall be sent to the holders of shares or registered units at least one month before the general meeting".

As it happens, the panel of auditors has indeed drawn up its report in good time, but in order to publish it in accordance with the rules of professional conduct for *réviseurs d'entreprises* (to which each of the members of the panel of auditors has subscribed), copies of the registers of shareholders of the company taken over and of the resulting company have to be annexed to the report. One of the two registers, however, cannot be found immediately, with the effect that the text of the report, which is known to and has been approved by each of the shareholders in good time by electronic means, has not been sent as an official version within the time limits.

The following options are therefore open to the company lawyer:

- to wait until the official report is actually sent to the shareholders, with the date of posting (email or fax) serving as good evidence, and to postpone the date of the general meetings to approve the merger proposals by the corresponding period of time, at the risk of losing the tax benefit of retroactive consolidation because the merger will have become effective;
- to agree that the report can arrive later than the date on it, delivered to the lawyer personally, given that the consent to its (unamended) terms by each of the two shareholders can be proven by electronic means, and the date indicated will therefore be that of the consent of both shareholders.

Argument for 1 -: the strict terms of the legislation (the Dutch version uses *toegezonden* for "addressed") – the consideration that this fact could be raised at the time of a tax inspection as an argument to be used against it (even if it has no direct basis in law).

Argument for 2-: the provision is intended only to protect the registered shareholders, who have manifestly given their consent to the draft report which they must in fact have received. Although one of them could go back on their word, it would serve no practical purpose. Furthermore, to postpone the merger and thereby lose the tax and accounting benefits of retroactive consolidation would give rise to a sizeable additional tax liability.

Which argument should prevail?

Second case study: should a director of a quoted company, with a majority shareholder, be required to complete the formalities relating to conflicts of interest in respect of a piece of information concerning the director's private life which, without any immediately appreciable danger to the company, imposes an additional burden of formalities on the director?

Article 523 of the Companies Code provides:

Article 523

"Section 1.
If a director, directly or indirectly, has a financial interest in conflict with a decision or transaction within the competence of the board of directors, the director must inform the other directors before deliberation by the board of directors.

The director's declaration, and the reasons justifying the conflicting interest of the director in question, must be included in the minutes of the meeting of the board of directors at which the decision is to be made.

The director must, also, where the company has appointed one or more auditors, inform them of that declaration and those reasons.

With a view to its being published in the management report [...], or, where there is no report, in a document which must be filed at the same time as the annual accounts, the board of directors shall describe in the minutes the nature of the decision or operation referred to in paragraph 1 and the grounds for the decision made and the financial consequences to the company.

The management report shall contain the minutes referred to above in full.

The auditors' report [...], must include a separate description of the financial consequences to the company resulting from the decisions of the board of directors which involved a conflicting interest within the meaning of paragraph 1.

For companies which have made or are making public offerings, the director referred to in paragraph 1 may not attend deliberations of the board of directors relating to those transactions or decisions, or vote on them.

Section 2. The company may bring proceedings to set aside decisions made or transactions carried out in breach of the rules set out in this article [...], if the other party to those decisions or transactions was or should have been aware of that breach."

In the case under analysis, a company lawyer has just involuntarily learned that a family member of a director holds a significant number of shares (albeit of which the lawyer has no tangible evidence) in a group which envisages taking over the company advised by the lawyer, whereas the company is envisaging taking anti-takeover measures. The director in question has never questioned that the anti-takeover measures are appropriate, and to set in motion the procedure under Article 523 other than at the initiative of the director

- would be psychologically inappropriate, or
- would be (pointlessly?) burdensome for the executive secretary's office.

Moreover, it appears that a decision not to raise this conflict would not involve any risk in so far as only the company can bring proceedings to set aside the decision, something which it would definitely never do.

What approach should the company lawyer take in such a case?

VI. COMPANY LAWYERS' OBLIGATION OF PROFESSIONAL SECRECY

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See also the various addresses given at the official inauguration of the Institute (Cah. Jur., 6/2001, p. 69), and the bibliography to Chapter X, p. 87.

*FOR READING: The Recommendations on the subject of the confidentiality of opinions **(*)**, issued by the annual General Meeting of 20 June 2002.*

Section 1: Legislative basis

There are three seminal provisions: Article 5 of the Act, Article 458 of the Criminal Code and Articles 6 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (see Annex IV).

Article 5 of the Act reads as follows: "The **opinions given by company lawyers** for the benefit of their employers in the context of their work of providing legal advice are **confidential**"[62]

Article 458 of the Criminal Code, which is a rule of public law, provides: "physicians, surgeons, health officials, pharmacists, midwives and all other **persons who**, as a result of their status or **profession, hold secrets entrusted to them and** who, with the exception of situations where they are called to give evidence in court or before a parliamentary commission of enquiry and the situation in which they are obliged by law to disclose those secrets, <u>have revealed those secrets</u>, shall be punished by imprisonment of between eight days and six months and a fine of between one hundred francs and five hundred francs."[63]

[62] Our bold and underlining.
[63] Our bold and underlining.

For its part, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR in short), and in particular Articles 6 and 8 (see Annex IV), became part of the primary law of the European Union from the entry into force of the Lisbon Treaty on 1 December 2009 (see below).

This is not the place to discuss the foundations of professional secrecy. We would simply stress that it is intrinsic to the need to ensure complete confidence in the discretion of certain persons whose ministry or profession is indispensable, and that it has been held to be of great importance by the legislature which has criminalised its breach (Article 458 of the Criminal Code).

As emphasised quite correctly in the judgment of the Constitutional Court (formerly the Court of Arbitration) of 13 July 2005[64], referring to outside counsel:

> "If the rights of the defence of any person subject to the law are to be effective it must be possible to establish a relationship of trust between that person and the counsel who advises or defends him or her. That necessary relationship of trust can only be established and maintained if defendants have a guarantee that what they confide to their counsel will not be disclosed by the latter. This means that the rule of professional secrecy, breach of which is penalised in particular by Article 458 of the Criminal Code, is a fundamental component of the rights of the defence."

The concept of confidentiality is so bound up with that of professional secrecy that the case law sometimes uses the two interchangeably.[65] [66]

If one looks closely at these three provisions, in addition to the expression "respect for private life", there are two other key words – "confidentiality" and "secrecy". These are the two sides of a single concept which case law and academic thinking in Belgium in particular refer to as "professional secrecy" ("*secret professionnel*")[67].

Professional secrecy is generally defined as "the obligation not to disclose confidential facts learned during practice of the profession"[68].

It is striking that the code of conduct of the CCBE[69], issued in Porto on 19 May 2006, speaks of "professional secrecy" (*secret professionnel*) in the French version (Article 2.3) and of "confidentiality" in the English version (the same Article 2.3)[70].

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[64] Constitutional Court, judgment no 126/2005, 13 July 2005, J.T., Larcier, Brussels, 2005, p. 787. The Court was to reiterate that paragraph in its judgment no 10/2008 of 23 January 2008 (consideration B.7.1.), J.T., Larcier, Brussels, 2008, p. 102.

[65] A. Jansen and N. Thirion: *Le cas du juriste d'entreprise*, *in* Les obligations d'information, de renseignement, de mise en garde et de conseil, CUP, Larcier, Brussels, 03/2006, Vol 86, p. 375; ECHR, Da Silveira judgment, 21 January 2010 (J.T., Larcier, Brussels, 2010, p. 309).

[66] A minority school of academic thought does distinguish between the two notions and places them on different levels.

[67] For our company lawyer colleagues who are also judges [commercial court judges (commercial courts), employment judges (employment courts) or employment appeal judges (employment appeal courts)], there is a similar concept – the secrecy of deliberations. We refer to the excellent study by Professor J. Englebert, *Le secret du délibéré: rappel de quelques principes de base à l'usage des délibérants*, D.A.O.R., 2009/91, Larcier, Brussels, p. 276.

[68] Ph. Hallet, *Le secret professionnel de l'avocat en Belgique*, *in* Le secret professionnel de l'avocat dans la jurisprudence européenne, Larcier, Brussels, 2010, p. 71.

[69] This is the European bar, called in English the Council of the Bars and Law Societies of the European Union *(CCBE)* and in French "La Commission Consultative des Barreaux Européens" (CCBE). It brings together the national bars of the 27 Member States of the European Union and of three Member States of the European Economic Area (Norway, Liechtenstein and Iceland) and also of Switzerland.

The definitions of those concepts (*Le nouveau Petit Robert de la langue française* (PR) 2008, *Le Petit Larousse* (PL) 2008) also show this.

"**Confidential**: what is said or done bound by **secrecy** (PR); what is said or done in confidence; containing **secret information** (PL)".[71]

"**Confidence**: disclosure of a **secret** concerning oneself (PR); a statement made **in secrecy** to someone (PL)".

"**Confidant:** a person who receives the **most secret thoughts** of someone (PR and PL)".

"**Secret**: all the knowledge and information which should be reserved to certain persons and which **the holder must not disclose** (PR); what **must be kept hidden**".

We would add that professional secrecy, which is no longer regarded as absolute, generally poses conflicting obligations, which have to be resolved by assessing the values and issues at stake. The obligation of professional secrecy must give way where there is an imperative need or where it is in conflict with a value considered superior.

Today, human rights and the rights of the defence are increasingly invoked as the grounds for professional secrecy (see the judgment of the Brussels Court of Appeal of 5 March 2013 which refers to Article 8 ECHR). In the question referred by the Court of Arbitration for a preliminary ruling by the Court of Justice in Luxembourg in 2005 concerning the money laundering Directive and its repercussions for outside counsel in connection with the Act of 11 January 1993 on the prevention of the use of the financial system for the purposes of money laundering and the financing of terrorism, Advocate General Poiares Maduro gave a twofold basis for professional secrecy: Article 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (right to a fair hearing – here the context is litigation) and Article 8 of the same Convention (right to respect for private life – where a client confides in a lawyer other than in connection with proceedings) (see Annex IV). This reflects the settled case law of the European Court of Human Rights on the topic.

Lastly, alert readers will have noticed that only the medical professions are expressly listed in Article 458 of the Criminal Code. In relation to the legal professions regulated by public-law statute, such as outside counsel and company lawyers, one has to refer to the expression "persons who, as a result of their status or profession, hold secrets entrusted to them".

In Belgium, when company leaders consult their company lawyers or outside counsel, that consultation and the opinion which is given are confidential, and that lawyer – in performance of the function of providing legal advice – will be subject to an obligation of professional secrecy, punishable in criminal law, whether that person is the in-house lawyer (company lawyer) or the external lawyer (outside counsel).

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[70] One can continue to draw parallels: the concept of "**legal privilege**" in Anglo-Saxon law correlates to the Scottish law concept of the "**confidentiality of communications**" (UK Competition Act 1998, section 30(3)(b).

[71] In Dutch, "*vertrouwelijk" = wat niet algemeen bekend mag worden;* "geheim*" = iets dat verborgen gehouden wordt of moet blijven* (Van Dale 2006).

Two obvious truths come together here.

The first is that a professional (in this case a legal professional) whose activity is regulated by statute[72] and from whom an opinion is sought can only give that opinion if the person requesting it freely discloses to the professional every last detail of their request, even in its most sensitive aspects, whether civil or criminal. The professional thus becomes the "involuntary confidant".

The second is that the persons who request those opinions will not disclose every last detail of their request (even the most sensitive or the least favourable to them) unless they can be certain that everything they communicate to the professional in question will be communicated confidentially, that is to say, bound by secrecy, and therefore – here we are getting to the true purpose of professional secrecy – will not be disclosed[73]. Professional secrecy can therefore be regarded as coterminous with the work of company lawyers when they give legal opinions.

Those two truths are all the more applicable to the case of company lawyers in so far as the legislature, in the general interest (that is to say, of promoting the consultation of lawyers by companies) intervened. By the Act of 1 March 2000 creating an Institute of Company Lawyers, it laid down the arrangements for the profession and, in Article 5, guaranteed the confidentiality of the opinions of company lawyers[74].

The Brussels Court of Appeal, in its judgment of 5 March 2013, expressed that confidentiality as follows:

> "Employers who turn to company lawyers in the circumstances contained in Article 5 of the IJE Act must be certain that they can confide their request for an opinion with no danger of disclosure to third parties."

Specifically, requests for advice and opinions, as a general rule, cannot be seized, nor produced, nor disclosed and obviously not used in the context of proceedings brought before the Belgian courts or administrative forums (regulators, national competition authorities[75] and government authorities, for example)[76].

Case law is beginning to emerge which confirms that company lawyers' opinions which have been seized should *not be admitted in legal proceedings*, so held by virtue of Article 5 of the Act of 1 March 2000.

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[72] The judgment of the Brussels Court of Appeal of 5 March 2013 refers in that regard to "enhanced protection" (consideration no 55).

[73] Article 13 of the Finnish Code of Administrative Procedure has a fitting wording: "An attorney or a counsel shall not without permission disclose any confidential information given to him/her by the client for the purposes of taking care of the matter." (Our underlining.)

[74] Particular emphasis is laid here on the difference between ordinary "lawyers" (without statutory protection) and "company lawyers" (members of the Institute, subject to specific professional conduct rules going beyond their obligations to their company and whose legal opinions given in the context of their work of providing legal advice are, in common with those of outside counsel, confidential by virtue of statute).

[75] A. Burnside & H. Crossley, *Co-operation in Competition*: A New Area?, European Law Review, Thompson Sweet & Maxwell, Issue 2, 2005, p. 241.

[76] We are not dwelling here on the private international law aspects, that is to say, recognition of that confidentiality by foreign courts or the recognition by Belgian courts of a legal opinion issued by a company lawyer abroad. In those areas, the principle of reciprocity generally applies.

The Brussels Court of Appeal (judgment of 5 March 2013) [77] constructed its reasoning on Article 5 of the Act of 1 March 2000 in conjunction with Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) rather than on Article 458 of the Criminal Code[78] [79].

Section 2: *The scope of the obligation of professional secrecy*

The judgment of the Constitutional Court of 23 January 2008[80] identified, in detail, the activities of outside counsel, which were now divided into three groups – acting in proceedings, activities to prepare and pursue cases; legal advice– what the money-laundering Directive refers to as ascertaining the legal position for a client; and "extra-legal" activities[81].

The first two activities are considered core activities and must be covered by professional secrecy. The third activity is ancillary and falls outside the obligation of professional secrecy because, as Advocate General Poiares Maduro writes, the lawyer is now acting only as a "business agent"[82].

The obligation of professional secrecy of outside counsel and company lawyers would therefore now require justification on two levels: *ratione personae* and *ratione materiae*.

Ratione personae: the person must be an outside counsel (member of a bar) or company lawyer (member of the Institute), and

Ratione materiae: the person must either defend clients in proceedings or provide legal advice.

The Constitutional Court took care to define that latter activity in detail:

> "[...] the activity of giving legal advice [...] is intended to inform clients of the current legislation applicable to their personal circumstances or to the transaction they envisage performing or to advise them on how to perform that transaction in the context of the law. It is therefore intended to enable clients to avoid legal proceedings relating to that transaction (consideration B.9.5.).

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77 Brussels Court of Appeal, 5 March 2013, no 2011/MR/3, no 44 et seq.

78 The Brussels Employment Appeal Court (5 April 2011, no 2010/AB/234-239, p. 15.) based its reasoning on Article 458 of the Criminal Code to uphold a *geheimshoudingsplicht* on the part of company lawyers the same as that on the part of outside counsel. An appeal to set aside has been brought against that judgment.

79 It is interesting to point out that the Dutch Supreme Court (*Hoge Raad*) uses exactly the same term *geheimhoudingsplicht* to uphold the confidentiality of the legal opinions of employed company lawyers who are also members of a bar (Hoge Raad, Netherlands, 15 March 2013, LJN: BY6101, 12/02667, p. 3).

80 Constitutional Court, judgment no 10/2008, 23 January 2008, J.T., Larcier, Brussels, 2008, p. 102.

81 Such as the buying and selling of real property or business entities, managing of client money, securities or other assets, opening or management of bank, savings or securities accounts, organising contributions necessary for the creation, operation or management of companies, creation, operation or management of trusts, companies or similar structures.

82 P. Martens, *Secret professionnel: divergences et convergences des droits continentaux et anglo-saxons*, *in* Le secret professionnel de l’avocat dans la jurisprudence européenne, Larcier, Brussels, 2010, p. 13.

2.1. What is covered by confidentiality?

In its judgment of 5 March 2013, the Brussels Court of Appeal uses in that regard the broad functional interpretation of the word "opinion" contained in Article 5 of the Act of 1 March 2000.

> "Although in everyday parlance expressions of opinions or advice are regarded as 'opinions', in the light of the intention of the legislature, it must be found that Article 5 also covers written communications containing the request for an opinion, written communications exchanged about the request, draft opinions and preparatory documents relating to the opinion."

First of all there is the **request for an opinion**, whether made verbally, by email, fax or sent in hard copy. Both the request and the documents annexed to it (such as a draft note or draft agreement, provided that information is reiterated in the opinion) are covered by confidentiality.

Any signed agreements or documents which constitute an administrative offence or a minor or serious criminal offence, annexed to the request, are not covered.

Then there are **opinions issued by company lawyers**, whether conveyed verbally, by email, fax or in hard copy. Those opinions usually reiterate the information in the request for an opinion.

The opinion must be "legal", that is to say, given "in the context of their work of providing legal advice", for the benefit of their employer, replying to the points of law raised by the request. The opinion may be issued in connection with proceedings or may equally be unconnected with any proceedings. The Act draws no distinction in that regard, which makes complete sense, in so far as the consultation of legal professionals by companies, in the general interest, is promoted precisely in order to prevent disputes from arising.

The opinion must be given "for the benefit" of their employer[83]. The term "employer" must be understood in the widest sense – the company with whom the company lawyer has a contract of employment, any company in the same group (as that in which the company lawyer works), and the members of staff of those companies (therefore not only the board of directors or management). For the company lawyers of business federations, the employers are the companies affiliated to their federation (that is to say, the members of the federation).

That opinion (as well as working documents and draft opinions) is covered by confidentiality. Legal opinions given *spontaneously* by company lawyers to their employers, particularly on publication of a new law or regulation or when facts come to light, in which company lawyers explain what, in their view, the company should do to comply with that new law or regulation, are also covered by confidentiality.

[83] It needs pointing out here that the Act of 1 March 2000 does not say "to" their employers, but "for the benefit of" their employers.

The following are as a rule not covered:

- anything drafted by company lawyers unconnected with their work of "providing legal advice",
- a business opinion,
- a draft contract drawn up by a company lawyer[84],
- the minutes of board meetings or general meetings,
- an opinion given by the company lawyer to a person outside the company (subject to Article 11 of the Code of Professional Conduct),
- notes taken by company lawyers at working meetings (with the exception of notes taken at the time of a conversation with a person or persons who have requested their opinion,
- written exchanges between company lawyers and other companies (subject to Article 11 of the Code of Professional Conduct),
- an opinion which would conceal or encourage criminal conduct or conduct contrary to legislation and regulations,
- an opinion given by a company lawyer to a colleague for the purposes of a personal or private matter; or
- anything which company lawyers learn other than in connection with practising their profession.

Confidentiality therefore covers the opinions given by company lawyers to their clients (the employer). There is no difference whatsoever here from the situation of outside counsel who gives legal opinions to their clients[85].

As pointed out by the outside counsel Pierre Lambert[86], on the basis in particular of the drafting history of the Act[87], "in terms of professional secrecy, the role of company lawyers is in all respects similar to that of outside counsel[88] (… which likewise is not referred to expressly in Article 458 of the Criminal Code), and the relationship of legal subordination between company lawyers and their employers must not be allowed to blur the intellectual and functional independence which, as has been accepted for a long time, employees can also have, in practice, in performance of their work; this is the case with doctors and pharmacists [...]. A recent line of cases has even been inclined to treat certain trainee outside counsel as employees. [...] The scope of application of Article 458 of the Criminal Code is nevertheless still limited, as regards company lawyers, to the legal opinions they give to their employers. That is the correct scope of Article 5 of the Act of 1 March 2000."

2.2. What is the position regarding the disclosure of administrative decisions?

This question arises for company lawyers who work for federal or non-federal administrative authorities: does Article 5 of the Act of 1 March 2000 creating an Institute of Company Lawyers have to give way to the principle that administrative decisions must be disclosed?

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[84] Nothing prevents the company from marking documents or draft documents sent to third parties as "confidential".

[85] Versailles, 28 April 1982, JT, 1983, p. 45: letters containing legal opinions sent by outside counsel to their clients are confidential; their seizure (in the present case by the French competition authorities) constitutes substantive grounds for nullity, in so far as it infringes the rights of the defence.

[86] P. Lambert, *Secret professionnel*, Bruylant, Brussels, 2005, no 420, p. 312. This counsel also refers to a minority school of academic thinking which takes the opposite line.

[87] *Parliamentary Document*, Senate, Session 1998-1999, 45/5, pp. 1 and 2.

[88] On the complementary nature of the professions of company lawyer and outside counsel, see Ph. Marchandise, *Frères en droit*, *in* Quel avocat pour le 21e siècle?, Bruylant, Brussels, 2001, p. 123.

It would seem that it does not – it is Article 5, and therefore the obligation of confidentiality, which prevails.

Article 32 of the Constitution provides that "Everyone has a right to consult every administrative document and to be sent a copy of it, save in the situations and subject to the requirements set by the legislation, decree or rule referred to in Article 134".

Article 6, Section 2(2), of the Act of 11 April 1994 on administrative publicity, as amended by the Act of 26 June 2000, provides that "[...] the federal or non-federal administrative authority will reject the request for inspection, explanation or disclosure in the form of a copy of an administrative document sent to it under this Act if publication of the administrative document would infringe [...] an obligation of secrecy imposed by the legislation"[89].

That duty of secrecy is imposed, as regards company lawyers, by Article 5 of the Act of 1 March 2000 creating an Institute of Company Lawyers, which expressly provides that legal opinions given by company lawyers for the benefit of their employers will be confidential.

The right contained in Article 32 of the Constitution is therefore not absolute[90] since it can be restricted by the legislature, which did so by means of the Act of 11 April 1994, and in particular, specifically and in detail as regards company lawyers, with the Act of 1 March 2000.

The federal commission on the publicity of administrative decisions has not yet issued an opinion on that very specific topic.

2.3.Should legal opinions be in writing?

One of the major advances achieved with the Act of 1 March 2000 is indeed that company lawyers can put their opinions in writing without fear of them being seized afterwards. It is nonetheless worth pointing out that any professional will think long and hard before committing his or her opinion to paper[91].

Lawyers cannot use Article 458 of the Criminal Code as an excuse for writing down everything and anything, the professionalism of this branch of the profession fostered by the Act of 1 March 2000 now requires company lawyers to ask themselves *each time* whether or not it is helpful and appropriate to write down their opinion. They will act each time with prudence, discernment and intelligence, having regard in particular for the recommendations we discuss in Section 3 below.

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[89] Article 12 of the Flemish Decree of 26 March 2004 (*Decreet betreffende de openbaarheid van bestuur)* refers expressly to the Act of 11 April 1994.

[90] Judgment of the administration section of the Council of State, no 116.752 of 7 March 2003.

[91] Readers could profitably look at the readability advice given by the Association Syndicale des Magistrats, *Dire le droit et être compris*, Vademecum pour la rédaction d'actes judiciaires, Volume II (Criminal), Brussels, Creadif and Bruylant, 2010 of which B. Dejemeppe (J.T., Brussels, Larcier, 2010, p. 167) highlights the following: keeping to the chronology, giving all the relevant information and nothing else, writing to the point and limiting oneself to one idea per sentence, knowing that an adverb must be a rare commodity and that one "who" or one "which" per sentence is enough, avoiding too many participles, finding the right word rather than adding adjectives to a word, removing impersonal expressions.

2.4. Are there any exceptions from the obligation of professional secrecy?

Professional secrecy can only be lifted in extremely specific circumstances[92].

There are exceptions dictated by necessity such as that relating to oversight of company lawyers by their disciplinary authorities or to ensure a fair debate when company lawyers have to act in their own defence in relation to practising their profession.

There are exceptions dictated, in certain exceptional circumstances, by conflicting demands such as necessity and the rights of the defence.

Section 3: *What should be done if the prosecutor's office comes round?*

The Institute has published recommendations **(*)** to give greater assurance that opinions will be confidential. We refer the reader to those recommendations.

We will confine ourselves here to emphasising six aspects:

3.1. The first is what the legal opinion looks like – a lawyer's letter is obvious at first glance. The same should apply to legal reports sent by company lawyers in that capacity to their employers. Clear indications such as: "LEGAL DEPARTMENT", "CONFIDENTIAL OPINION (ARTICLE 5, ACT OF 1 MARCH 2000)" are more than merely helpful. This point is much more important than it may seem. It must be obvious, at first sight and *without having to read its contents*, that it is a legal opinion given by a company lawyer.[93]

3.2. The second aspect is, when signing, to state your surname and first name, followed by the expression "Company lawyer".

3.3. The third aspect is that the opinion should preferably be addressed to *a single addressee* (as doctors do to their patients). The more addressees company lawyers add to their recipient lists, the more difficult it will be for them to prove that their opinions are confidential. The more copies there are of the text in circulation, the more difficult it will be physically to ensure in practice that it will be confidential.

3.4. The fourth is to favour [94] sending the opinion *by hand* rather than electronically, unless the electronic communication can be encrypted.

3.5. The fifth is to *file legal opinions separately* and to keep them together in *special* filing cabinets or in an electronic folder marked clearly to indicate that the folder contains confidential opinions.

3.6. Company lawyers will also make sure that they are the addressees of *reports sent by outside counsel to their company* (and therefore that the reports are centralised) (see Chapter III, Section 3 above).

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[92] N. Colette-Basecq, *La correspondance échangée entre l'avocat et son client: la règle du secret professionnel et ses dérogations*, JT, Larcier, Brussels, 2011, p. 542 (Observations on the judgment of the Brussels Chambre des mises en accusation [Chamber for Indictments] of 26 January 2011).

[93] In international companies, it would no doubt be worth harmonising the design and layout of legal advice from company lawyers in the various countries where the group is present.

[94] One needs only cite the Enron case in the United States and Royal Dutch/Shell in the Netherlands.

Those latter two points will be of great assistance in the event of the company lawyer's office being searched. The lawyer will then immediately be able to show the investigators the few filing cabinets or electronically stored folders which cannot be seized.

How should the search be conducted? Here again, the practice developed by the various bars[95] in conjunction with the prosecutor's office should be followed. (The various chambers of notaries have developed an identical practice in relation to notaries,):

Company lawyers will require the presence of the President of the Institute or his or her representative[96], company lawyers will object to the seizure of their legal opinions, company lawyers will draw up a note drawing the attention of the investigating judge to the fact that their legal opinions are confidential, and shall have any documents whose confidentiality is disputed placed in a sealed envelope and it will then be the court which will decide whether or not the document is confidential.

That practice, now accepted by the courts in Strasbourg and Luxembourg[97] is crucial. As soon as a document covered by confidentiality is read by a person other than its author or addressee, it automatically ceases to be confidential, even if the reader declares that he or she will not use it subsequently. That is why the company lawyer (or the President of the Institute or his or her representative) must object to it being read and seized by the prosecutor's office or the investigating judge (unless of course the company lawyer is a suspect, as joint principal offender or accomplice).

The company lawyer must require that the document in question be placed under seal so that a judge of the relevant forum (court or appeal court) can determine whether or not the document is covered by confidentiality. It would be preferable, as is done in France in criminal cases[98], to be able to put the matter before a "secrecy judge", that is to say, a judge who does not hear the substance of the case but whose sole function is to examine and determine whether or not the document is covered by secrecy[99].

In its Yearbook, the Institute publishes the names of company lawyers familiar with this matter and on its website the names of outside counsel who are knowledgeable in this field on whom company lawyers can profitably call if they need assistance.

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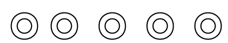
[95] Following the Niemitz judgment delivered by the European Court of Human Rights (judgment of 16 December 1992 (*Rev. Trim. dr. h. 1993, p. 467 and observations of P. Lambert)*), all academic authorities require that the initial selection of files and the preliminary reading of documents should be carried out by the president of the bar association alone: Ph. Hallet, *Le secret professionnel de l'avocat en Belgique*, *in* Le secret professionnel de l'avocat dans la jurisprudence européenne, Larcier, Brussels, 2010.

[96] Article 173 of the draft law containing the Criminal Procedure Code (sometimes known as the "Grand Franchimont" code), requires the presence of a representative of the professional body, and provides that this person alone should decide whether or not the document examined is confidential. See also to that effect M. Franchimont, A. Jacobs and A. Masset, *Manuel de procédure pénale*, 2nd edition, Larcier, Brussels, 2006, p. 462.

[97] Court of First Instance of the European Communities, 17 September 2007, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. Commission*, Joined Cases T-125/03 and T-253/03, paragraphs 82-85; ECHR, Da Silveira judgment, 21 January 2010 (J.T., Larcier, Brussels, 2010, p. 309).

[98] Article 56-1 of the French Criminal Procedure Code which provides, in the case of searches by investigating judges, that the presence of the president of the bar association or his or her representative is mandatory, the placing in sealed envelopes of documents whose confidentiality is disputed, and above all the fact that the final decision as to whether or not the document is confidential will be made by an ad hoc judge, the freedoms and detention judge. A draft law setting out the broad outlines of the proposed reform of criminal procedure in France was put before the Council of Ministers in February 2010. That proposal includes in particular abolition of the investigating judge and the advent of a new judge, the "enquiry and freedoms judge".

[99] That solution has been advocated in Belgium by counsel P. Lambert, recommending that to determine whether or not a document is confidential the matter should be referred to an "independent judge, that is to say, one who should have no link whatsoever with the investigation and must keep the information of which he or she becomes aware confidential": P. Lambert, *Le secret professionnel de l'avocat et les conflits de valeurs*, J.T., Larcier, Brussels, 2001, p. 621, no 4, observations on Brussels Criminal Court, (49th ch.), 29 March 2001.



VII. THE LIABILITY OF COMPANY LAWYERS

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Like any profession connected with the legal field – and here we are thinking more specifically of judges, notaries, outside counsel and bailiffs – company lawyers are liable for acts they commit and omissions they cause.

However, imposing on company lawyers a professional third party liability regime applicable to the other legal professions we have just mentioned would be neither appropriate nor sufficient because that approach would disregard the specific characteristics of the profession of company lawyer.

Section 1: The eligibility requirements

It is worth briefly summarising the requirements to be a member of the Institute. As for the other legal professions referred to above, those requirements are now defined in statute, in this case Article 4 of the Act of 1 March 2000 creating an Institute of Company Lawyers.

There are four requirements which must all be satisfied. Applicants must:

(1) hold the formal qualification of doctor, master, or bachelor of law[100] or of notarial matters, or an equivalent foreign qualification;

[100] Act of 30 December 2009 establishing equivalence between the degree of master in law, master in notarial matters, master in employment law and a bachelor's degree or doctorate in law, a bachelor's degree in notarial matters and a bachelor's degree in employment law respectively as regards the qualification requirements for the legal professions in the legislation and regulations governing a matter under Article 77 of the Constitution, (*Moniteur Belge*, 18 January 2010, pp. 2004-2005). That Act came into force on 1 July 2009. Holders of a qualification of "doctor in law" within the meaning given to that term by the legislature before the Act of 31 May 1972 on the legal consequences of the degree of bachelor in law, can also be members of the Institute – Act of 19 May 2010, Article 2, 1 (*Moniteur Belge*, 7 June 2010, p. 35846).

(2) be employed, under a contract of employment or articles of association, by an employer pursuing an economic, social, administrative or scientific activity in the public or private sector in Belgium. That employer may be a company, a business federation or an organisation with legal personality[101];
(3) provide studies and reports, draft documents, give advice and provide legal assistance for the benefit of that employer or companies or organisations associated with it, business federations or members of those business federations[102]; and
(4) have responsibility for matters primarily in the legal field.

Attentive readers will have noticed that the four criteria contain no nationality requirement, save that the employer (whose nationality may be other than Belgian) must pursue an activity in Belgium.

The Institute, which is barely a few years old, already has more than 1500 members listed in the Institute's member register. For the purpose of deciding on applications, the Council has drawn up detailed rules implementing the four statutory criteria set out above. Each application undergoes a preliminary examination by the "Applications Examination Committee" created within the Council. That Committee studies the application, where applicable asks the applicant to complete it, and sends an opinion to the Council which makes the decision. Several dozen applications have been refused[103], where the Council found that the four statutory conditions were not satisfied in the application.

Applicants must be natural persons. They complete a detailed registration form (although obviously compliant with the Act of 8 December 1992 on the protection of private life in relation to the processing of personal data and its implementing decree of 13 February 2001) which they submit to the Council of the Institute.

We set out here, by way of illustration, some of the rules the Council has identified over the years:

- Company lawyers are those who play a part in responsibility for legal matters within the company. This involves a two-way process – responding to the requests for advice and legal tasks requested and taking the initiative vis-à-vis the company (reporting on new legislation, overseeing compliance with the Companies Code, remedying critical situations, etc.). The tasks performed must retain a certain margin of autonomy and must contribute to achieving the company's aims.
- The role performed by company lawyers is sometimes mixed. Legal activities exist alongside management and administration activities which in themselves do not require the involvement of a lawyer as lawyer. Determining whether or not the person is a company lawyer is a question of distinguishing the main function from ancillary tasks.
- Applications from lawyers whose activity is focused on external clients are not granted.

[101] Act of 19 May 2010, Article 2(2) (*Moniteur Belge*, 7 June 2010, p. 35846). D. Pasteger, La qualité de juriste d'entreprise après l'entrée en vigueur de la loi du 19 mai 2010, JT, Larcier, Brussels, 2010, p. 732, no 6 et seq.
[102] Act of 19 May, Article 2(3) (*Moniteur Belge*, 7 June 2010, p. 35846). D. Pasteger, *ibidem*, no 10.
[103] In the case of a negative decision, the applicant can request a hearing by the Council. The applicant may be assisted by a fellow company lawyer or outside counsel. If the Council finds that the refusal to register should be confirmed, it delivers a reasoned decision. The decision may be appealed to the Institute's Appeals Committee, something which has already occurred several times.

- The Institute also admits executive secretaries whose responsibilities also include heading or at least being responsible for a legal department or significant legal responsibilities.

Section 2: *Contracts of employment*

Like their colleagues who are engineers, finance professionals, accountants, economists, technicians and similar, company lawyers are usually employed[104]. In what follows we shall confine ourselves to the position of company lawyers under contracts of employment.

As Professor Ch. del Marmol points out[105], company lawyers are independent and subordinate, and therefore have a "separate" role in the company.

That is why Article 18 of the Act of 3 July 1978 on contracts of employment also applies to company lawyers, with no difference whatsoever from their other employed colleagues. Their liability for the legal opinions they give, the steps they take or omissions they cause is that of an employee.

Since whole volumes have been written by eminent specialists on that Act and in particular on the circumstances in which Article 18 applies, we will merely recall the terms of its first two paragraphs:

> "In the event of damage caused by workers to their employer or to third parties in performance of their contract, workers shall only be liable for fraud and serious faults committed by them.
> Employees shall not be liable for minor faults unless the fault is habitual rather than accidental."

The third party liability of an employee and the professional third party liability as applicable to a "self-employed worker" (within the meaning of the term for tax purposes), that is to say, to a liberal profession not pursued under a contract employment, are mutually exclusive. Company lawyers therefore do not need to take out insurance covering their professional third party liability in so far as, with the aforementioned exceptions, third party liability will lie with the employer. The employer can of course take out insurance to cover its liability.

If that "liberal" profession is practised under a contract of employment, and we are thinking here of doctors or dentists employed by a hospital or clinic, employed architects, pharmacists under contracts of employment or, as in France or the United Kingdom, in-house lawyers [*avocats salariés*], there is no reason to distinguish between that situation and that of a company lawyer under a contract of employment.

As Messrs Cornélis and Claeys point out[106], the company lawyers' intellectual freedom and the fact that their profession is regulated could well, however, in a specific case, directly or indirectly influence how a court assesses whether a fault is serious and could lead more readily to a finding that it is.

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[104] There are also company lawyers under articles of association: A. Benoit-Moury and E. Jacques, *Bienvenue à l'Institut des juristes d'entreprise, Commentaire de la loi du 1er mars 2000 créant un Institut des juristes d'entreprise*, J.T., Larcier, Brussels, 2000, p. 725.

[105] Ch. del Marmol, *Bienvenue au juriste d'entreprise*, Bulletin de la Classe des Lettres et des Sciences morales et politiques (Académie Royale de Belgique), 1986, nos 10-11, pp. 424 to 456.

[106] L. Cornélis & I. Claeys, *De burgerlijke aansprakelijkheid van de bedrijfsjurist en van zijn onderneming*, *in* Tendensen in het bedrijfsrecht, Larcier, Kluwer, Brussels, 2001, no 24, p. 25.

That third-party liability on the part of the employee clearly does not mean that the employee in question personally cannot be criminally liable in the event of a criminal offence[107].

That third-party liability must also be distinguished from the liability of company lawyers who have been granted powers for day-to-day management and representation of the company, as is often the case with the executive secretary or the head of the legal department, in the course of that management – the liability of persons to whom day-to-day management is delegated as a result of that management is determined under the general rules applicable to the agency.

Article 18 of the Act of 3 July 1978 – does it need saying? – governs the employee's liability both to the employer and to third parties, including other employees. The liability of the employer itself to third parties is addressed in Article 1384, third paragraph, of the Civil Code, which establishes a non-rebuttable presumption that the principal is liable for damage caused by its servants or agents in the course of the tasks for which they were engaged[108].

The principal must therefore be answerable for faults committed by its servants and agents in the course of the tasks for which they were engaged and whilst they are so engaged. The wrongful act must have at least an indirect link with performance of those tasks, without which the principal is not liable.

In contrast to primary school teachers and parents, the principal cannot avoid liability by proving that it was not at fault in the supervision or selection of the servant or agent or that it could not have prevented or foreseen the damaging act. It can only dispute that its servants or agents were at fault or the link between that fault and the tasks for which they were engaged, or invoke fault on the part of the victim.

Where there is minor or occasional fault, injured third parties are not however deprived of a remedy. They can hold the company liable if it was negligent (Article 1382 of the Civil Code) or committed a breach of contract, if the third party has a contract with the company. Furthermore, as stated above, they can hold the company liable on the basis of the principal's liability for acts by its servants or agents (Article 1384, third paragraph, of the Civil Code).

Section 3: *Compliance with professional conduct rules*

Added to that liability as employees is their liability, which since the Act of 1 March 2000 creating an Institute of Company Lawyers has become the principal liability, as "company lawyers" in the sense of members of a profession regulated by public-law statute. As soon as they are included in the Institute's member register of company lawyers, company lawyers must comply with the professional conduct rules imposed by the Act[109] and will be held liable for non-compliance with those rules, and will be vulnerable to disciplinary penalties, likewise defined by the Act (Article 14).

[107] In relation to the risk of criminal liability run by company lawyers, on 29 November 2012 the IJE organised a half day seminar on the topic **"Is the company's criminal risk also the company lawyer's criminal risk?"**, looking at the important principles and concepts with emphasis on certain specific offences. In terms of practice, four company lawyers presented a number of organisational techniques (delegation of powers, company policy, identifying criminal risk and a process-oriented approach by the legal department). The documentation can be obtained from the IJE secretariat.

[108] See in particular Tongres commercial court, 30 January 2007, *R.D.C.*, Larcier, Brussels, 2007/9, p. 916.

[109] A. Benoît-Moury and E. Jacques, *ibidem*, p. 725.

As for outside counsel, those professional conduct rules have their basis in statute. Statute has left it to the Institute, specifically the General Meeting of its members, to define those rules.

Company lawyers are, in fact, subject to the professional conduct rules issued by the General Meeting of the Institute on 19 June 2001, 30 January 2002, 23 June 2005 and 22 May 2010. The Institute has instigated compulsory training in professional conduct for its members.

Compliance with those professional conduct rules is paramount for company lawyers, in so far as in the event of a conflict between those professional conduct rules and the interests of the company, company lawyers must give priority to the rules of professional conduct. The company lawyer's contract of employment sometimes contains an express clause to that effect (see Chapter III, Section 1.1 above).

In other respects we refer to Chapter above.

Section 4: *Company lawyers collaborating in the administration of justice*

The Act of 1 March 2000 did more than that, however, and it was the President of the Court of First Instance of the European Communities in Luxembourg, in an order of 30 October 2003[110] who described strikingly what it did as follows:

> "Without it being possible at this stage to ascertain and to embark upon a thorough and detailed analysis of the evidence adduced by the applicants and the interveners, that evidence none the less appears prima facie to be capable of showing that **the role assigned to independent lawyers of collaborating** in the administration of justice by the courts, which proved decisive for the recognition of the protection of written communications to which they are parties (*AM & S* v *Commission*, cited at paragraph 66 above, paragraph 24), is now capable of being shared, to a certain degree, by certain categories of lawyers employed within undertakings on a permanent basis where they are subject to strict rules of professional conduct."

Like outside counsel, company lawyers play an important part in the administration of justice in Belgium, in particular by giving objective, high quality legal opinions, practising their profession with complete intellectual independence, dignity and integrity, being able to keep a certain distance from a case and the issues at stake, by promoting application of the law within the company through constant reminders of legal rules, by participating in the preparation of guidelines and procedures in the company, and being proactive in the company, seeking honest and reasonable solutions in the event of dispute, whilst being a conciliator and peacemaker and ensuring their own continuing training. That is why the requirements for accessing and pursuing the profession of company lawyer require compliance with specific rules.

Being officers of the law means also, for company lawyers, ensuring that nothing in their legal opinions encourages criminal behaviour or behaviour contrary to statute and regulations; it also means not being accomplices to any such behaviour. It means not doing anything which could hinder the effective administration of justice; it also means, in proceedings

[110] *Akzo* case (T-125/03 R and T-253/03 R), paragraph 125. That order made in interim measures proceedings was set aside on appeal by an order of the Court of Justice of the European Communities of 27 September 2004, solely on the grounds that there was no urgency (a prerequisite in any interim measures proceedings).

brought before the courts, that they must refrain from misleading judges and uphold the rights of the defence.

VIII. THE DISCIPLINARY PROCEDURE

Bibliography:
2002 Rapport annuel, Institut des juristes d'entreprise, p. 9 and 10.
Jean du JARDIN, Rechtspraak in tuchtraden door de beroepsordes: Toetsing van de wettigheid door het Hof van Cassatie, R.W. 2000-2001, p. 785.
Pierre LEFRANC, Advocatentucht, in *X., Tuchtrecht, Antwerpen, Maklu 2000, pp. 71-130.*
Ingrid OPDEBEEK., Tuchtrecht in locale besturen, Die Keure, 1992, pp. 5-24.

Disciplinary law and procedure for company lawyers are different from the law and procedure in the hands of public authorities in that they concern only members of certain professions or groups of professions. It is a body of law reserved to a group of people and subscribed to on an egalitarian contractual basis – membership of a professional group implies acceptance of the disciplinary law and procedure of the relevant public-law legal person, whether it is an order or an institute.

The Code of Professional Conduct is the law within the meaning of Article 608 of the Judicial Code, and is therefore subject to review by the Court of Cassation.

The Act of 1 March 2000 creating an Institute of Company Lawyers (the "Act") effectively gave the Institute the task of drawing up a code of professional conduct.

In its judgment of 11 April 1991 (Arr. Cass., 1991, no 423) the Court of Cassation confirmed that when a provision gives a professional body the task of establishing its own rules and duties and of supervising those rules and duties, the legislature gives that body power to issue regulatory decisions with the force of law in accordance with Article 608 of the Judicial Code.

It must also be remembered that, in disciplinary proceedings, the criminal law principle of *nullum crimen sine lege* does not apply. This is because it is impossible to exhaustively define all possible imaginable professional shortcomings.

The disciplinary authority therefore judges or evaluates, using its discretion, possible infringements of, on the one hand, the Code of Professional Conduct and, on the other, under Article 3 of that Code, infringements of the principles of the honour and dignity of the profession.

The criminal law principle of *nulla poena sine lege*, under which no penalty can be imposed unless it is established by legislation, remains valid in disciplinary law, although it is sufficient that the disciplinary measure be established by or by virtue of legislation.

Disciplinary judges, on the other hand, are not bound by the rules relating to the setting of penalties.

That breadth of discretion is however tempered by application of the principle of proportionality upheld by the case law[111] based on the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[111] Cass., 17 September 1992, RG 9411, *Bull. and Pas.,* 1992, I, no 620, p. 1043; Cass., 8 November 1996, RG D.95.0041.N, *Bull. and Pas.*, 1996, no 428, p. 1101.

There is virtually no connection between disciplinary proceedings and any associated civil or criminal proceedings.

The instigation of disciplinary proceedings has no effect on the fact that other proceedings may be brought or vice versa. There is therefore no impact on any rules of limitation. Criminal proceedings do not suspend disciplinary proceedings any more than disciplinary proceedings suspend civil proceedings.

Nor does the general legal principle of *non bis in idem* apply.

Given the limited resources of disciplinary investigations, it is, however, sometimes recommended that disciplinary proceedings be suspended whilst criminal proceedings are pending because the enquiries to establish facts are more effective in the context of the criminal investigatory proceedings.

Disciplinary judges are, on the other hand, bound by the findings of facts by the criminal court (but not those of the investigatory proceedings). Those findings of fact by the criminal court have absolute authority as *res judicata*.

The disciplinary judge may however classify those facts from a strictly disciplinary point of view and find at its discretion that they should be penalised.

If the criminal court finds the facts to be unproven, the disciplinary judge will be bound by that decision. Any disciplinary penalty imposed previously is therefore groundless, becomes unlawful, and must therefore be withdrawn.

Section 1: The regulatory framework

The disciplinary provisions were established by the Act.

Article 2 provides that one of the Institute's core tasks is to establish the rules of professional conduct governing the activity of company lawyers and to ensure that they are complied with. (Our emphasis and underlining).

That oversight is entrusted to the bodies of the Institute referred to in Article 3, and the Institute is organised on the basis of Articles 13 to 21 of the Act.

Those provisions govern the composition of the Disciplinary Committee (Article 13 of the Act) and of the Appeals Committee (Article 17 of the Act).

Article 14, Section 1 defines four disciplinary penalties – warnings, reprimands, suspension for not more than one year (with a prohibition on using the title of company lawyer and enjoying the attached rights) and removal from the list of members.

Article 14, Section 2 of the Act confers on the Council the task of putting draft disciplinary Rules before the King. The draft in question was enacted in the Royal Decree of 19 April 2006 (referred to below as "RD"), and establishes the disciplinary procedure whose key features are contained in Articles 15 to 21 of the Act. These regulate issues relating to how proceedings are brought, their conduct, appeals against decisions and their publication.

The Act and the RD must therefore be read in parallel and supplement each other.

Section 2: The disciplinary bodies

A distinction needs to be made between the disciplinary investigation and disciplinary proceedings. The disciplinary investigation takes place prior to proceedings, either at the initiative of the Council or on the basis of a complaint made by any interested party.

The Council appoints one or more members of the Council as rapporteurs (Article 2 of the RD). The rapporteurs conduct the enquiry and send a report to the Council.

It is the Council which, at first instance, judges whether the case will be referred to the Disciplinary Committee. In a certain sense, the Council is therefore the initial disciplinary body (Article 4 of the RD).

There are three instances comprising the disciplinary proceedings per se.

The case is referred at first instance by the Council to the Disciplinary Committee (Article 13 of the Act). The Disciplinary Committee has a Dutch-speaking chamber and a French-speaking chamber. The linguistic choice made by the member at the time of applying for inclusion in the Institute's member register is decisive in that regard (Article 13 of the Internal Rules).

Each chamber is composed of a President, a court of first instance judge appointed by the King at the proposal of the Minister of Justice and two company lawyers who are appointed by the Council who are not members of the Council and have been in the Institute's member register for more than five years. Their term of office is three years and is renewable once.

The Appeals Committee is the appeal forum competent to hear appeals against decisions of the Disciplinary Committee (Article 17 of the Act). Here too there is a Dutch-speaking chamber and a French-speaking chamber.

The President of the Appeals Committee is a court of appeal judge assisted by a commercial court judge and an employment court judge. Those judges are appointed by the King at the proposal of the Minister of Justice. The Appeals Committee is then completed by two company lawyers who have been in the Institute's member register for 10 years[112] and are not members of the Council. Those two company lawyers are elected by the General Meeting of members of the Institute. Their term of office likewise is three years and is renewable once.

The composition of the chambers of both the Disciplinary Committee and the Appeals Committee can be found in the Institute's annual report and on the Institute's website www.ije.be.

A cassation appeal can be brought against any decision of the Appeals Committee. The appeal is heard by the civil chamber of the Court of Cassation (Article 19 of the Act).

[112] In the first years of existence of the Institute, a member's period of membership of the Association Belge des Juristes d'Entreprise was also taken into account for the purposes of satisfying the statutory requirement of ten years' membership.

Section 3: Proceedings

Disciplinary proceedings comprise two stages – the disciplinary investigation and the proceedings per se.

During the disciplinary investigation, the Council acts successively as investigating magistrate and then as prosecutor.

The Council becomes aware of an act of misconduct either by means of a complaint or by other means[113]. In the latter case, the Council acts ex officio (Article 15, Section 1 of the Act). Complaints may be filed by any interested parties. Complainants do not have to be company lawyers. They must however demonstrate an interest.

There is no time limit or prescribed form for the complaint.

At this stage, the Council is an investigatory body. It appoints one or more rapporteurs from amongst its members (Articles 2, 3 and 4 of the RD). Those rapporteurs, as established in the disciplinary rules, perform all the tasks relevant to discovering the truth. They can therefore request documents and hear interested parties. This investigation accordingly involves the voluntary collaboration of the person concerned. Even at this stage there is nothing to prevent the company lawyer from being assisted by an advisor (a fellow company lawyer or outside counsel) (Article 5 of the RD). Neither the detailed arrangements nor the maximum periods for this investigation are predetermined, but the maximum periods are limited by the statutory limitation periods generally applicable to such matters.

The company lawyer concerned (and the complainant where applicable) are notified in writing by the Institute's secretariat of the commencement of the disciplinary investigation and the identity of the rapporteur or rapporteurs within ten days of the Council's decision.

The rapporteurs report to the Council if they consider the investigation to be concluded. That report is not subject to any formal requirements.

Clearly, however, the investigation can only relate to the original complaint, whether made by an interested third party or ex officio. If the rapporteurs discover other facts, during the investigation, they will inform the Council separately of those facts. The Council may then decide ex officio to institute a second disciplinary investigation.

It is for the Council, without the presence of the rapporteur or rapporteurs, to decide what should happen after the investigation. Here, then, the Council performs the role of prosecutor.

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[113] The Council should no doubt develop a procedure and mechanisms to ensure that it is effectively made aware of any acts of misconduct which occur.

There are two possible outcomes:

- the Council can decide not to follow up the disciplinary investigation and close the case without further action, or
- the Council can refer the case to the Disciplinary Committee. In this situation, the Council prepares a report in which it sets out the facts alleged and references to the statutory, regulatory or disciplinary provisions concerned.

If the Council decides not to take the complaint further, the complainant has no further possible remedy. Curiously, the Act does not provide that the complainant should be informed of that decision. It is nevertheless desirable for the Council to do so, in accordance with the general principles of law applicable to the case.

The following stage, then, is the disciplinary proceedings per se. The case is brought before the Disciplinary Committee by the Council sending its report to that effect (Article 15, Section 1 of the Act). The President of the Disciplinary Committee has the initiative from that moment and will use the Institute's secretariat as a court registry.

A copy of the case file containing all the pleadings and evidence filed in the case is sent to the Disciplinary Committee (Article 5 of the RD).

The President of the Disciplinary Committee calls the company lawyer to attend, by registered letter, at least 30 days before the hearing (Article 15, Section 2 of the Act; Article 5 of the RD).
That letter must contain the following:

- the account of the facts alleged;
- the time, date and place of the hearing at which the case will be examined;
- the practical arrangements for inspection of the case file;
- the last date by which written evidence (reports or documents) produced in support of the positions asserted before the Committee must reach it; and
- the last date by which the company lawyer must notify the Disciplinary Committee of a waiver of the right to be heard or the intention to call his or her employer or a representative or fellow company lawyer indicated by the company lawyer concerned to be heard on the facts alleged.

The company lawyer concerned and any advisor who may be appointed by that lawyer (a fellow company lawyer or an outside counsel) can have access to the case file at the Institute's secretariat or, on payment, may obtain a copy.

Application may be made to remove a member of the Disciplinary Committee in accordance with the procedure in Article 818 of the Judicial Code.

The decision on that application for removal is made by the Disciplinary Committee with a different composition, as established in Article 15, Section 3 paragraph 2 of the Act.

However, it is not clearly established what that "Disciplinary Committee with a different composition" should be. One could, for example, replace the two company lawyers on the board with their deputies. Would it not make more sense to provide that the Appeals

Committee or, where applicable, if the application for removal is made on appeal, the Court of Cassation, should rule on that application?

Prima facie, the hearing is public, unless the Disciplinary Committee, at its own initiative or on application by the company lawyer concerned, decides to hear the case *in camera* (Article 6 of the RD). Since it is nowhere provided that this application must state grounds or that it is subject to any requirements, a simple request should suffice.

The company lawyer may, at his or her election, mount a defence orally or in writing. The company lawyer may act in person or be assisted by a fellow company lawyer or an outside counsel.

In the absence of case law on the matter, by analogy with the case law of the European Court of Human Rights, it could be held that the company lawyer may decline to appear and be represented by a fellow company lawyer or an outside counsel[114].

It is however recommended that the person concerned should him or herself be heard, so that any applications for adjournment may be examined with due benevolence.

The Council is represented by one of its members. The initial complainant is not in any way involved in this stage of the proceedings. Nor – which may seem surprising – is the complainant informed of the decision. Since the Council is a party in the proceedings, it is reasonable that it may wish to call the initial complainant as a witness.

The President of the Disciplinary Committee conducts the proceedings and appoints a clerk for the hearing from amongst the members of the Disciplinary Committee.

The hearing takes place as follows:

- first of all the identity of the company lawyer is verified;
- a representative of the Council then sets out the complaint;
- the company lawyer or the fellow company lawyer or outside counsel appointed, sets out the case in defence and produces the exhibits; and
- provided the application has been made, the company lawyer's employer or another company lawyer concerned may be heard.

On conclusion of the first hearing, the Disciplinary Committee may request additional information from the accused company lawyer or their advisor (Article 6 of the RD).

That information must be provided within the time limits set by the Disciplinary Committee.

If requested by the Disciplinary Committee or the accused company lawyer, a second hearing may be arranged on the basis of that additional information.

The decision is made by the Disciplinary Committee at the hearing or on a different date which must be notified at the hearing (Article 15, Section 4 of the Act, Article 7 of the RD).

[114] *European Court of Human Rights,* 21 January 1999, *Van Geyseghem v. Belgium,* Application no 26103/95.

Following deliberations covered by professional secrecy[115], the decision of the Disciplinary Committee must:

- state reasons;
- be delivered no later than two months following the last hearing;
- be made by a simple majority. In the case of parity of votes, the President shall have a casting vote; and
- be served by registered letter on the accused company lawyer and on the Council.

The decision shall take effect from service.

The decision served must mention the appeals available against the decision and shall otherwise be invalid.

There are three possibilities at this stage in the proceedings:

(a) If the accused company lawyer accepts the decision, it is included under the company lawyer's name in a register kept for that purpose at the Institute's secretariat. That register is public and may be consulted by all members at the Institute's secretariat (Article 8 of the RD).

(b) If the accused company lawyer failed to appear, he or she may object to the decision (Article 16 of the Act, Article 9 of the RD). That objection must be made within one month from service of the decision, by registered letter to the Disciplinary Committee. The Committee shall inform the Council. The objection procedure shall be conducted in accordance with the rules set out above. There is no second right of objection against a new decision by default.

(c) Where the accused company lawyer or the Council is not satisfied with the decision made by the Disciplinary Committee, they can bring an appeal against it (Articles 17 and 18 of the Act, Article 10 of the RD).

    That appeal must be brought by registered letter to the Appeals Committee within 30 days from service of the decision.

    If the appeal is brought by the company lawyer, the Act provides that the Appeals Committee shall inform the Council. Notification is not required in the opposite direction; however, perhaps because the accused company lawyer is invited to the appeal hearing, as is the Council, by registered letter at least one month in advance. It is however desirable for the Appeals Committee to inform the accused company lawyer if an appeal is brought by the Council.

    The appeal proceedings follow the same course as the first instance proceedings. There is no additional time limit in the event of an interlocutory appeal.

    The objection procedure likewise is conducted in accordance with the objection procedure at first instance.

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[115] J. Englebert, *Le secret du délibéré: rappel de quelques principes de base à l'usage des délibérants*, D.A.O.R., 2009/91, Larcier, Brussels, p. 276.

A cassation appeal can be brought either by the Council or by the accused company lawyer against decisions of the Appeals Committee, complying with the formalities and requirements for cassation appeals in civil cases (Article 19 of the Act).

Nothing is provided for as regards the costs of the proceedings. It can therefore be assumed that the costs will be borne by the party which has incurred them, and that the costs of the secretariat (or registry) should be borne by the Institute.

If the Appeals Committee's decision is set aside on cassation appeal, the Court of Cassation refers the case back to an Appeals Committee with a different composition. That Committee concurs with the decision made on cassation appeal. Here likewise, it is not specified what constitutes that Appeals Committee "with a different composition".

Appeals against decisions by the Disciplinary Committee and the Appeals Committee suspend the effect of those decisions, in accordance with Article 20 of the Act.

If there is no longer a possibility of a decision being appealed, the Council may decide to publish it in full or in part, although without indicating the identity of the accused company lawyer or the company where he or she works. Although this is only expressly envisaged for decisions of the Disciplinary Committee, decisions on appeal or on cassation appeal are also included under the name of the accused company lawyer in a register kept for that purpose at the Institute's secretariat. No provision has been made for a rehabilitation procedure.

If the company lawyer is suspended or removed from the register, in relation to activities which the company lawyer performs in his or her company, the Council shall draw the whole of the decision to the attention of the employer. If, on the other hand, the decision does not relate to those activities, the Council shall merely notify the fact of the suspension or removal.

Section 4: Other powers of the Council relating to professional conduct

Lastly, a few words about three powers of the Council relating to professional conduct.

(a) The Council also has power, irrespective of the disciplinary provisions, to refuse registration or re-registration (Article 3 of the Internal Rules). It can issue such a refusal where:

- the requirements of Article 4 of the Act are not satisfied;
- the Council has compelling information that the applicant has committed acts fundamentally incompatible with the rules of professional conduct applicable to company lawyers; or
- the applicant has made inaccurate or incomplete declarations.

The refusal decision is notified by registered letter within sixty days from the time the Institute's secretariat receives the complete file relating to the application for registration in the Institute's member register. The refused applicant may object to that decision in writing to the Institute's secretariat, applying to be heard by the Council. No time limit is established for that objection.

The Council invites the refused applicant to a meeting of the Council. At that meeting, that person's application is re-examined. The invitation to that meeting is notified to the applicant by registered letter at least fifteen days before the meeting.

The refused applicant can be assisted by a fellow company lawyer or an outside Council.

The Council's reasoned decision is then served on the applicant by registered letter.

An appeal may be brought against a negative decision to the Appeals Committee. That procedure follows the rules for ordinary proceedings before the Appeals Committee.

The registration or re-registration is suspended during the objection or appeal proceedings.

(b) The Council also has power to withdraw authorisation to use the title of honorary company lawyer (Article 5 of the Internal Rules) if the requirements for its grant are no longer satisfied. The person concerned is informed of that decision by ordinary letter.

The person concerned can request to be heard in accordance with the procedure under Article 3 of the Internal Rules applicable to members in the Institute's member register.

(c) A final power of the Council is that to remove members from the Institute's member register.

i. If, during a period of five years from their temporary removal, company lawyers have not requested extension of that period or re-registration in accordance with Article 8 of the Internal Rules, they will be deemed to have resigned.

ii. If company lawyers are unable to express their intention or fail to do so, the President of the Institute in person shall act ex officio in their defence (Article 9 of the Internal Rules).

iii. If company lawyers fail to pay their subscriptions within fifteen days of a second payment reminder sent by the Institute's secretariat, they shall be deemed to have resigned and shall be informed of that fact by registered letter.

iv. If company lawyers' professional circumstances have appreciably changed and it appears to the Council that the requirements under Article 4 of the Act are no longer satisfied, they shall be deemed to have resigned and shall be informed of that fact by registered letter.

* * *

To date, the Council's disciplinary powers have given rise to frequent refusals to admit members, sometimes with an appeal brought by the rejected applicant to the Appeals Committee, and to removal for non-payment of subscriptions or for failure to notify changes of circumstance (where it appears that the company lawyer concerned no longer satisfies the requirements of Article 4).

In contrast, in their first 10 years of existence, the disciplinary bodies have not yet been called upon to hear any purely professional conduct cases.

This does not mean, however, that there have never been any cases. Indeed, the President of the Institute is regularly contacted, informally, by company lawyers faced with questions of professional conduct and each time it has been possible to find a solution, in a constructive dialogue, to the situations arising.

It has also occurred several times that the prosecutor's office has requested the presence of the President of the Institute when it was preparing to search the offices of a company lawyer. This is a procedure modelled on that involving the presence of the president of the bar association during searches of the offices of outside counsel.

The profession is also by nature less prone to disputes than other legal professions, which encounter many issues concerning fees, relations between colleagues or discourteous behaviour in court.

However, changes are to be expected, given the increasingly important position of company lawyers in companies and the expansion of their role and responsibilities. One can think of compliance, mediation, corporate governance, integrity, ethics, corporate social responsibility, the fight against all forms of fraud and competition – all which increasingly fall within the scope of company lawyers’ activities.

Attention should also be drawn to the consultative role of the Institute which, in the interests of preventing disputes and on an informal request, gives opinions to its members about issues of professional conduct.

IX. ASPECTS OF COMPARATIVE LAW

Within the European Union, with its 28 Member States[116], Belgium is in a unique position. It is in fact the only country in which the profession of company lawyer and that of outside counsel correspond to *two different parallel sets of public-law regulations*. In Belgium, the two professions are organised by the legislature which has ensured that clients receive high quality legal advice, with an Institut of Company Lawyers, separate from the bars and on an equal footing with them. In Belgium, in addition to outside counsel and company lawyers, notaries are also qualified to give legal advice to clients.

In simplified terms, the 28 Member States of the European Union (with 24 official languages and 508 million inhabitants) can be divided into two categories:

(a) the **11** countries in which company lawyers can be members of a legal profession regulated by public law (a bar or institute) and in which company lawyers have legal professional privilege (LPP) (see Chapter X)*:* Germany, Belgium, Denmark, Spain, Finland, Greece, Ireland, Malta, the Netherlands, Portugal and the United Kingdom.

(b) the **17** countries in which company lawyers cannot be members of a legal profession regulated by public law (a bar or institute) and in which company lawyers do not have legal professional privilege (LPP): Austria, Bulgaria, Cyprus, Croatia, Estonia, France, Hungary, Italy, Latvia, Lithuania, Luxembourg, Poland, Romania, the Czech Republic, Slovakia, Slovenia and Sweden.

It is also interesting to note that in 20 countries, and therefore the vast majority of the 27 Member States, company lawyers are subject to rules of professional conduct: Germany, Belgium, Bulgaria, Croatia, Denmark, Spain, Finland, France, Greece, Ireland, Italy, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, the United Kingdom and Sweden.

There is a European Company Lawyers Association (ECLA) / *Association Européenne des Juristes d'Entreprise (AEJE)*, set up in 1983 (as a result of the AM&S ruling, see Chapter X**Fout! Verwijzingsbron niet gevonden.**), bringing together the national bodies to which company lawyers belong (bars, institutes and associations). The AEJE/ECLA thus unites some 33000 company lawyers in 22 countries (Germany, Belgium, Bosnia-Herzegovina, Bulgaria, Croatia, Denmark, Spain, Estonia, France, Ireland, Italy, Lithuania, Norway, the Netherlands, Poland, Portugal, the Republic of Macedonia, the Czech Republic, Romania, the United Kingdom, Sweden and Switzerland).

[116] We will not address here the situation of company lawyers in the two EU accession countries – the former Yugoslav Republic of Macedonia and Turkey.

GERMANY[117]

All company lawyers, provided they are in a senior position in their company and their schedule enables them to practise as outside counsel on a more than occasional basis, can become members of a bar and can be outside counsel (*Rechtsanwalt*).

These company lawyers who are also outside counsel then use the name *Syndikusanwalt*: they cannot plead in court for their own employers and are subject to an obligation of professional secrecy and the same rules of professional conduct as outside counsel.

AUSTRIA

The profession of company lawyer is not regulated by statute. Company lawyers cannot be members of a bar.

Company lawyers can represent their employers in small-scale cases (less than EUR 4000) and before the first tier of civil courts.

BELGIUM

See Part I: The statutory framework of the profession of company lawyer.

BULGARIA

The profession of company lawyer is not regulated by statute. Draft legislation to that effect has been put to the parliament in Sofia.

An association of company lawyers (*National Union of Jurisconsults*) has existed for over a decade, and has a code of professional conduct.

In civil or administrative proceedings and arbitration, company lawyers can represent their employers before the lower courts and appeal courts.

Bulgarian competition law recognises the confidentiality of documents exchanged between an outside counsel and a company lawyer.

CYPRUS

The profession of company lawyer is not regulated by statute. Company lawyers cannot be members of a bar.

CROATIA

The profession of company lawyer is not regulated by statute. Company lawyers cannot be members of the bar but they can take the bar examination. A number of associations represent company lawyers, some open only to company lawyers who have taken the bar examination. The main national association is called *Hrvatska Udruga korporativnih pravnika*. Members of that association must comply with its code of professional conduct. The association is a

[117] We have set out the countries in alphabetical order underlining the 11 countries referred to on the previous page (point (a)).

member of the ECLA. Company lawyers who have taken the bar examination are free to alternate between work as company lawyers and as outside counsel (once registered at the bar). Lawyers do not have to be registered at the bar or with an association to practise in-house. Company lawyers are authorised to represent their employers before the lower courts, where they perform the same role as outside counsel. According to the civil procedure legislation, lawyers representing their employers before lower courts enjoy professional secrecy.

DENMARK

All company lawyers who are members of a bar use the title *advokat* and have legal professional privilege (LPP) save in relation to competition law. The Danish competition authorities claim that this LPP cannot be relied on against them, but there is no case law on the topic.

They can represent their employers before the lower courts.

An association founded in 1988 (*Danske Virksomhedsjurister*) brings together these company lawyers who are members of the bar (two thirds of its members) and also company lawyers who have not wanted to be members of the bar (one third of its members).

SPAIN

All lawyers, whether company lawyers or outside counsel, belong to a bar (*colegio de abogados*), which enables them to practise as legal advisors.

Company lawyers and outside counsel share the same rules of professional conduct and disciplinary penalties. Both professions are subject to an obligation of professional secrecy[118].

They can represent their employers before the lower courts.

ESTONIA

The profession of company lawyer is not regulated by statute. Company lawyers cannot be members of a bar.

Company lawyers can represent their employers before the lower civil courts.

FINLAND

Although they cannot be members of a bar, company lawyers do have legal professional privilege (LPP) although only when (as *oikeudenkäyntiasiamies*) they are representing their employers in proceedings before the lower civil and administrative courts (including the Finnish competition authorities) or before arbitrators (and therefore not in criminal proceedings), and therefore not when they are giving legal opinions.

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[118] A decision of 22 July 2002 of the administrative competition authority, the *Tribunal de Defensa de la Competencia*, relating to gaseous drinks bottling companies, caused slight uncertainty in Spain because the judgment expressly upheld the legal professional privilege (LPP) of the outside counsel (basing itself on that point on European case law) but said nothing about the position of company lawyers. (*Resolucion* Expte. r 508/02 v, Pepsi-Cola v Coca-Cola). The case concerned documents exchanged between a company lawyer and an outside counsel.

There is an Industrial Lawyers Association, created on a voluntary basis in 1995, which brings together lawyers working in industrial companies.

FRANCE

The profession of company lawyer is *not adequately* regulated by statute. Article 58 of Act no 71-1130 of 31 December 1971 expressly mentions, "company lawyers" (*juristes d'entreprise*), as persons qualified to give legal opinions to their employers: "Company lawyers carrying out their tasks, in performance of a contract of employment[119], within a company or group of companies, can, in performance of those tasks and exclusively for the benefit of the company which employs them or any other company in the group to which it belongs, give legal advice and draft documents under hand relating to the activity of those companies". On a literal interpretation, that Act suggests that company lawyers, when giving legal opinions, are in the same position as outside counsel and are therefore subject to the same obligation of professional secrecy. However, no public-law legal person has been created as a framework for the profession.

Article 98-3 of French decree no 91-1197 of 27 November 1991 opened up a "fast track" enabling all company lawyers who have practised the profession for eight years to be admitted to the bar, expressly exempting them from the theoretical and practical training and the requirement for a certificate of eligibility for the profession of outside counsel (*certificat d'aptitude à la profession d'avocat* or CAPA). For company lawyers wishing to use that fast track, Decree no 2012-44 of 3 April 2012 has increased the obligation which used to be to take the bar's professional conduct course, and now requires company lawyers to take and pass the examination testing knowledge of professional conduct and professional rules.

The Association Française des Juristes d'Entreprise (AFJE), founded in 1969, has some 4000 members. Company lawyers are subject to rules of professional conduct but are not subject to an obligation of professional secrecy.

Company lawyers cannot at present be members of the bar as company lawyers. Company lawyers who become members of a bar (in particular using the fast track referred to above) lose their title of company lawyer, but the Darrois Report on the legal professions (*Rapport Darrois sur les professions du droit*), published in March 2009, proposes the creation of a profession of *avocat en entreprise*, that is to say, employees, with a contract of employment with a company, who would enjoy confidentiality for their opinions and, like any independent outside counsel, would be subject to an obligation of professional secrecy.

The Prada Report (*Rapport Prada*), published on 19 April 2011, advocates the creation of a broad legal profession including outside counsel and company lawyers, based on the imperative need to give internal lawyers confidentiality for advice issued for the benefit of the companies which employ them. Company lawyers would be registered at the bar in a specific table (Table B).

Company lawyers can represent their employers before courts of first instance.

[119] Our underlining.

GREECE

Greece makes no distinction between outside counsel and company lawyers – both must be members of the bar and uphold a code of professional conduct, and both are subject to an obligation of professional secrecy and have legal professional privilege (LPP).

Company lawyers can represent their employers before the courts.

HUNGARY

The profession of company lawyer is *not adequately* regulated by statute. Although there is an Act relating to them (the 1983 Legal Counsel Act), they cannot be members of the bar and do not have legal professional privilege (LPP).

Company lawyers can represent their employers before civil and administrative courts.

IRELAND

Ireland makes no distinction between company lawyers ("in-house/employed solicitors") and outside counsel ("solicitors in private practice" or "barristers"): both have legal professional privilege (LPP).

Company lawyers are members of the Law Society of Ireland.

> "Privilege applies to: (a) confidential communications connected with the defence or prosecution of apprehended, threatened, or actual litigation; and (b) confidential communications connected with the giving or seeking of legal advice (even where litigation is not pending or likely). These rules also apply before the Irish Competition Authority (including investigations by the Competition Authority).
>
> The test for whether a particular document is privileged is the "dominant purpose" test, i.e., did the document come into existence for the dominant purpose of either (a) or (b) above.

ITALY

The profession of company lawyer is not regulated by statute. Company lawyers cannot be members of the bar. There is however an exception for company lawyers in the public sector who can therefore be members of the bar.

There has been an association of company lawyers (*Associazione Italiana Giuristi di Impresa*) since 1976 with a code of professional conduct and disciplinary rules (since 1997). With the exception of public sector lawyers, they do not have legal professional privilege (LPP).

Draft legislation has been put before the Italian parliament (references AS711 and AS1198, available on http://www.senato.it/leg/16/BGT/Schede/Ddliter/31520.htm, and http://senato.it/leg/16/BGT/Schede/Ddliter/32726.htm, which aims to extend the duty of confidentiality on outside counsel in proceedings to opinions given outside proceedings.

LATVIA

The profession of company lawyer is not regulated by statute. Company lawyers cannot be members of the bar. They do not have legal professional privilege (LPP).

LITHUANIA

The profession of company lawyer is not regulated by statute. Company lawyers cannot be members of the bar.

There is an association of company lawyers, the Lithuanian Lawyers Association (*Lietuvos Teisininku Draugija*), Company Lawyers Division, which has issued a code of professional conduct and disciplinary rules to which company lawyers are subject. They do not have legal professional privilege (LPP).

Company lawyers can represent their employers before the lower and appeal courts. In doing so, they cannot be obliged to give evidence about information or documents in the case file of which they were aware in their capacity as their employer's representative.

LUXEMBOURG

The profession of company lawyer is *not adequately* regulated by statute. The Act of 10 August 1991 on the profession of outside counsel refers expressly, in Article 2 (3), Section 3, to "company lawyers" (*juristes d'entreprise*) as persons qualified to give legal opinions to their employers. The same Act authorises "company lawyers, carrying on their activities in performance of a contract of employment in an undertaking, company or group of companies, to give any advice and to perform all legal operations necessary for the activity and directly related to the activities of their employer". On a literal interpretation, that Act suggests that company lawyers, when giving legal opinions, are in the same position as outside counsel and are therefore subject to the same obligation of professional secrecy. However, no public-law legal person has been created as a framework for the profession.

Company lawyers cannot be members of the bar.

MALTA

A single body (the Malta Chamber of Advocates) brings together Maltese lawyers, whether independent or employed, under the auspices of the Ministry of Justice (Commission for the Administration of Justice). Company lawyers are subject to the same code of professional conduct as outside counsel, enjoy professional secrecy (Part Four, Chapter II of the *Code of Ethics and Conduct for Advocates*) and can represent their employers before the lower and appeal courts.

THE NETHERLANDS

The Nederlandse Genootschap van Bedrijsfsjuristen (NGB) was founded in 1930 and has 1400 members. Company lawyers are subject to rules of professional conduct (see the case study referred to in Chapter V, section 3, Article 4 of the Code), but not to an obligation of professional secrecy penalised in the criminal law, unless they are also members of the bar, which is today true of 23% of company lawyers in the Netherlands.

Company lawyers can, then, be members of a bar (since 1992). Some 325 members of the NGB have deliberately chosen to join the bar. A regulation (*De Verordening op de Praktijkoefening in Dienstbetrekking van de Nederlandse Orde van Advokaten van 27 november 1996*) governs the requirements for joining the bar. These company lawyers must conclude an agreement (*professioneel statuut*) with their employer including measures to guarantee the independence of company lawyers who are members of the bar. In relation to third parties, they must always indicate that they are acting as outside counsel. They must also comply with the bar's training and traineeship obligations. They use the title *advocaat in dienstbetrekking*. In that capacity they can also represent their own employers. They are subject to an obligation of professional secrecy, including in relation to the Dutch competition authorities (*Nederlandse Mededigingsautoriteit*).

The training courses organised by the NGB also count towards the training required by the bar.

These *advokaten in dienstbetrekking* are subject to the bar's code of professional conduct and disciplinary penalties. Company lawyers (who are not members of a bar) are subject to a similar code and penalties established by the NGB.

POLAND

The profession of company lawyer (*radca prawny*) is not regulated by statute. Company lawyers cannot be members of the bar.

A professional association of company lawyers (*Krajowa Rada Radcow Prawnych*) was set up by an Act of 6 July 1982 and is separate from the bar. Its peculiarity is that membership is compulsory. Company lawyers are subject to rules of professional conduct and disciplinary penalties.

A court ruling of 22 November 2004 (appealable and appealed against) seemed however to suggest that they do not have legal professional privilege (LPP). The professional association of company lawyers fiercely criticised that ruling, underscoring the fact that its members remained subject to an obligation of professional secrecy.

Company lawyers can represent their employers before the civil courts.

PORTUGAL

Company lawyers can be members of the bar. If they are members of the bar (*Ordem dos Advogados*), they are subject to an obligation of professional secrecy and therefore have legal professional privilege (LPP).

Like outside counsel, company lawyers who are members of the bar are subject to rules of professional conduct and disciplinary penalties.

The *Instituto dos Advogados de Empresa* was created within the bar. It brings together the company lawyers who have joined the bar.

CZECH REPUBLIC

The profession of company lawyer is not regulated by statute. Company lawyers cannot be members of a bar.

A number of company lawyers, however, enjoy a degree of protection against seizures – those in State companies and those in regulated economic sectors.

Company lawyers can represent their employers before the civil courts, but not in administrative or criminal proceedings.

ROMANIA

The profession of company lawyer (*consilieri juridici*) is not regulated by statute. Company lawyers cannot be members of the bar.

There are professional associations of company lawyers grouped by sector. Company lawyers in those associations are subject to codes of professional conduct and disciplinary penalties.

Company lawyers can represent their employers before the civil courts.

Settled case law of the Court of Cassation allows company lawyers who have ten years' professional experience to be admitted to the bar, expressly exempting them from the entrance examination, under Act no 51/1995 on the organisation of the profession of outside counsel.

The European Court of Human Rights in Strasbourg drew attention to this in its judgment of 10 July 2012[120].

UNITED KINGDOM

The United Kingdom makes no distinction between company lawyers ("in-house/employed solicitors" or "barristers") and outside counsel ("solicitors" or "barristers in private practice"). Both are subject to rules of professional conduct and disciplinary penalties. Both have legal professional privilege (LPP).

Solicitors are members of the Law Society of England and Wales. Barristers are members of the Bar Council.

> "Privilege applies to: (a) confidential communications connected with the defence or prosecution of apprehended, threatened, or actual litigation; and (b) confidential communications connected with the giving or seeking of legal advice (even where litigation is not pending or likely). These rules also apply before the Office of Fair Trading and the Competition Commission. Where a communication is between a legal advisor and his client (or employer), the communication, where carried out in relation to the advisor's professional capacity, is always privileged, even if no litigation is contemplated, provided that such communication was intended to be confidential. A document prepared for the purpose of such communication is also privileged, even if it is not communicated."

[120] Eur. Court, Strasbourg, judgment of 10 July 2012, *Ilie Şerban v. Romania*, no 17984/04. The judgment is based on Article 6 ECHR.

SLOVAKIA

The profession of company lawyer is not regulated by statute. Company lawyers cannot be members of the bar.

SLOVENIA

The profession of company lawyer is not regulated by statute. Company lawyers cannot be members of the bar.

Company lawyers can represent their employers before the civil courts. In doing so, they cannot be obliged to give evidence about information or documents in the case file of which they were aware in their capacity as their employer's representative.

SWEDEN

The profession of company lawyer is not regulated by statute. Company lawyers cannot be members of the bar.

Company lawyers can represent their employers before the courts (*rättegångsombud*). When they do so and in that very limited context, they have legal professional privilege (LPP) to the extent that they cannot be obliged to give evidence about information or documents in the case file of which they were aware in their capacity as their employer's representative.

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It is worth noting that **SWITZERLAND** intends to regulate the profession of company lawyer. In April 2009 the Ordre Fédéral de la Justice (OFJ) launched a consultation procedure on a preliminary draft federal law on company counsel (*avocats d'entreprise*) (the LAE), aimed at regulating the profession of company lawyer. The Federal Council is seeking to reinforce the bases on which legal advice can be provided within companies with the necessary autonomy and authority. According to the OFJ, this cannot but help encourage companies to act in compliance with the law. That preliminary draft legislation provides for the instigation of professional secrecy (Article 11)[121], which, in the context of civil, administrative or criminal proceedings, will allow companies not to disclose the conclusions reached by their lawyers in the course of providing legal advice.

[121] "Article 11. Professional secrecy
1. Company counsel are subject to an obligation of professional secrecy in relation to the products of their legal advisory activity; that obligation is not limited in time and applies in relation to third parties.
2. They shall ensure that their assistants comply with the obligation of professional secrecy.
3. The supervisory authority may release the company counsel from the obligation of professional secrecy."

X. EUROPEAN COMPETITION LAW & LEGAL PROFESSIONAL PRIVILEGE (LPP)

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Section 1: Legal professional privilege (LPP)

"When legal advice of any kind is sought from a professional advisor in his capacity as such, the communications relating to that purpose made in confidence by the client are in the client's discretion permanently protected from disclosure by the client or by the legal advisor, except the protection may be waived." (John Henry WIGMORE, A Treatise on the Anglo-American System of Evidence in trials at Common Law, third edition, Little, Brown and Company, London, 1940, Section 2292).

Legal professional privilege (LPP), what the Scots translate as "confidentiality of communications", has been acknowledged as a fundamental human right by many national rulings within the European Union and by the European Court of Human Rights in Strasbourg. As yet there is no Strasbourg case law relating to companies and competition law. The only case brought before that Court (SENATOR LINES GmbH, application no 56672/00) came to nothing, since during the proceedings the fine of EUR 13,750,000 imposed on the company by the European Commission on 16 September 1998 was annulled by a judgment of the Court of First Instance of the European Communities of 30 September 2003. The application was therefore declared inadmissible (decision of 10 March 2004).

In the United Kingdom, legal professional privilege (LPP) has protected certain communications between solicitors and their clients for 550 years, including in relation to the courts. It is not subject to criminal penalties.

We shall look briefly at the current position in the Community case law on the topic.

Section 2: The AM&S judgment of 18 May 1982

We are therefore leaving the national sphere (which we addressed in the first eight chapters) to look at the European Community sphere (and therefore that common to the 27 Member States), and Community competition law in particular.

The AM&S case concerned a legal opinion given by a solicitor, that is to say a company lawyer under a contract of employment, in the United Kingdom to his employer.

Could that legal opinion be seized by the European Commission in the context of its powers to investigate companies?

The Court of Justice replied that it could, and refused to grant the benefit of LPP to that British solicitor on the principal ground that he was working under a contract of employment.

In the view of the Court of Justice, only independent legal advisors ("*avocats*" in French and "lawyers in private practice" in English), provided they are also members of one of the bars of the 27 Member States (or of the European Economic Area) and their legal opinions were given "for the purposes and in the interests of the client's rights of defence", can claim LPP.

That surprising decision, delivered contrary to the Opinion of Advocate General Sir Gordon Slynn, gave rise notably to the creation in 1983 of the ECLA, which brings together company lawyers in Europe. It also did not please American lawyers …

By virtue of an order made in the Hilti case[122], confidentiality was extended to a company's internal notes which are confined to reporting the text or the content of communications with independent legal advisors containing legal opinions.

The 1989 judgments in Hoechst[123] have marked out the Commission's rights both in relation to requests for information and in the context of investigation procedures[124].

Section 3: The Order of the President of the Court of First Instance of the European Communities of 30 October 2003

A new scenario arose at the beginning of the 2000s with the Akzo case. This concerned a legal opinion given by a counsel in the Netherlands to his client. The peculiarity was that, as permitted by the Dutch legislation, the lawyer in question was an employee of the company Akzo, his client.

Could that legal opinion be seized by the European Commission in the context of its powers to investigate companies[125]?

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[122] Order of the Court of First Instance of the European Communities, 4 April 1990, *Hilti v Commission*, Case T-30/89 *[1990]*, ECR II-163, paragraphs 13 to 18.
[123] Court of Justice of the European Communities, Hoechst judgment, 21 September 1989, nos 46/87 and 227/88, ECR 1989, p. 2919.
[124] Ph. Marchandise, *L'entreprise face à une enquête administrative en matière de concurrence. Le rôle du juriste d'entreprise*, *in* Revue de droit international et de droit comparé, IV, Bruylant, Brussels, 1992, p. 305.
[125] Those powers are now defined by Council Regulation (EC) No 1/2003 of 16 December 2002, OJ of 4 January 2003, p. 1.

In an order in interim measures proceedings, the President of the Court of First Instance of the European Communities in Luxembourg[126] restored a degree of hope to the victims of the 1982 judgment by holding that the relationship of subordination inherent in any contract of employment was prima facie not such as to impede the lawyer's intellectual independence, above all if the lawyer is subject to rules of professional conduct and liable to disciplinary penalties in the event of not complying with those rules:

> "[the evidence in the file submitted to the Court appears] prima facie to be capable of showing that the role assigned to independent lawyers of collaborating in the administration of justice by the courts, which proved decisive for the **recognition of the protection of written communications** to which they are parties (AM & S v Commission), is now capable of being shared, to a certain degree, by certain categories of **lawyers employed within undertakings on a permanent basis where they are subject to strict rules of professional conduct** (paragraph 125)[127].

That order made in interim measures proceedings was set aside on appeal on 27 September 2004, solely on the grounds that there was no urgency.

Section 4: The AkzoNobel judgment of 17 September 2007

The judgment of the Court of First Instance of the European Communities of 17 September 2007[128] put an end to the legitimate expectations raised by the 2003 interim measures order[129].

The Court of First Instance of the European Communities effectively confirmed that the prerogative of professional secrecy is only justified where the lawyer is independent, "that is to say, not bound to his client by a relationship of employment".

Paragraph 174 reveals an astonishing assumption: "in-house lawyers and outside lawyers are clearly in very different situations, owing, in particular, to the functional, structural and hierarchical integration of in-house lawyers within the companies that employ them". (Sic).

The decision nevertheless provided a few positive developments:

(a) Clarification of the inspection procedure with regard to confidential documents. If a company claims, with evidence, that a document is confidential, the Commission is not entitled to consult that document, even in a cursory manner. If disagreement persists, the confidential document will be placed in a sealed envelope and it is ultimately the court (or the interim measures court) which will open the envelope and decide whether or not the document is confidential.

(b) A timid extension of the scope of application of the confidentiality of communications between lawyers and their clients. Confidentiality now extends to the preparatory

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126 Now, since entry into force of the Lisbon Treaty, referred to as the "General Court".

127 Emphasis added.

128 Judgment of the Court of First Instance (First Chamber, Extended Composition), Akzo Nobel Chemicals Ltd & Akcros Chemicals Ltd v. Commission, joined cases T-125/03 and T-253/03.

129 Following that judgment, the prosecution office of the Belgian Conseil de la Concurrence informed the Institute, by letter of 27 March 2008, that "the prosecutor's office has decided that protection will no longer be granted [in the future, it specified further on] to correspondence from and to company lawyers (other than that covered by the legal privilege of outside counsel) in the context of proceedings commenced under the Act on the Protection of Economic Competition, consolidated on 15 September 2006". The Brussels Court of Appeal (judgment of 5 March 2013) held that the decision of the prosecutor's office was unlawful.

documents drawn up by a company "exclusively for the purpose of seeking legal advice from a lawyer in exercise of the rights of the defence", "even if they were not exchanged with a lawyer or were not created for the purpose of being sent physically to a lawyer".

Section 5: The AkzoNobel judgment of 14 September 2010

The judgment of 17 September 2007 was the subject of a partial appeal, the discussion in which can be summarised in a single (but, oh, so fundamental) question – on what basis could the Luxembourg Court of First Instance deprive a Dutch counsel of one of his essential characteristics, that is to say the confidentiality of his legal opinions and the fact that he was subject to an obligation of professional secrecy?

The arguments advanced on appeal before the Court of Justice by the three intervener States (Ireland, the Netherlands and the United Kingdom) and the five intervener organisations (European Company Lawyers Association (ECLA) – International Bar Association (IBA) – Nederlandse Orde van Advokaten (NOA) – Council of the Bars and Law Societies of the European Union (CCBE) – Association of Corporate Counsel (ACC), European Chapter) centred on the following three issues in particular:

(a) human rights;
(b) the principle of conferral; and
(c) the real independence of lawyers even if they work under a contract of employment.

The first point acquired greater significance with the Lisbon Treaty[130], which (Article 6)[131] integrated the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) into Community law, elevating it to the rank of primary law of the Union[132], specifically Article 6 ECHR (right to a fair trial) and Article 8 (respect for private life). Those two fundamental provisions are set out in Annex IV.

Article 6 ECHR corresponds to Articles 47 to 50 of the Charter of Fundamental Rights of the European Union (2000, amended in 2012), and Article 8 ECHR corresponds to Article 7 of the Charter. Those two articles apply to natural and legal persons[133], and therefore to companies. They are increasingly used in close conjunction with each other.

The second point concerns the competence of the Union.

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[130] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on 13 December 2007, OJ C 306/01 of 17 December 2007. The Lisbon Treaty entered into force on 1 December 2009.

[131] Article 6.1: The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties [...].
Article 6.2: The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.
Article 6.3: Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

[132] N. Cariat, *La charte des droits fondamentaux de l'Union européenne et les juridictions belges*, J.T., Larcier, Brussels, 2010, p. 105: that enactment will mark the start of this Charter being taken into account fully and entirely by the Belgian courts, who will be using it tomorrow to appraise the validity of internal provisions. Persons subject to the law will thereby be able to obtain a refusal to apply a provision of internal law on the grounds that it is contrary to the Charter provisions having direct effect, that is to say, the rights and freedoms it contains.

[133] Eur. Court HR Strasbourg, 16 April 2002, *Société Colas Est and others v France;* Eur. Court HR, 30 March 1989, *Chappel v United Kingdom;* Eur. Court HR, 16 December 1992, *Niemietz v Germany*, series A no 251-B. The definition of the concept of "business premises" in Belgian law is however contested in case law and academic circles: see F. Lugentz, *Les perquisitions en matière économique et financière*, Droit pénal de l'entreprise, Larcier, Brussels, 2009/1, p. 29, no 12.

Article 3a of the Lisbon Treaty provides that "competences not conferred upon the Union in the Treaties remain with the Member States" and Article 3b of the same Treaty provides that "The limits of Union competences are governed by the principle of conferral. [...] Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein".

In the case under analysis, the competence of each Member State to decide who is or who is not a counsel in that Member State has not been conferred on the Union. The Netherlands is therefore free to decide that a Dutch counsel can act under a contract of employment[134]. The same applies to the regulation of professional secrecy which is a matter for national law.

As regards the third point, the interveners pointed out that a long-standing practice of having employed doctors had shown (see Chapter VI above, last part of Section 2) that the legal relationship of subordination must not be allowed to blur the employee's functional and intellectual independence.

The oral hearing took place on 9 February 2010.

Advocate General Kokott's Opinion delivered on 29 April 2010 recommended that the appeal be dismissed on the following two principal grounds: the fact that contracts of employment and independence are prima facie incompatible (paragraph 153), and the fact that company lawyers covered by legal professional privilege are still only found in a minority of countries of the European Union.

It also should be underscored that the opinions in question had been given in the context of a compliance programme put in place by Akzo Nobel throughout the group (parent company and subsidiaries) to satisfy itself – preventively and proactively – that they were acting in compliance with European competition provisions and in order to correct any lacunae or shortcomings revealed by implementation of the compliance programme.

On 14 September 2010 the European Court of Justice, sitting as a full grand chamber (13 judges), issued a ruling in keeping with its AM&S case law, and confirmed the judgment made by the Court of First Instance on 17 September 2007. It even went slightly further, explicitly depriving the in-house lawyer, a member of a Dutch bar, and a member therefore of a profession regulated by public-law statute, of the confidentiality of his legal opinions, and therefore of professional secrecy, *on the sole ground* that he was an employee[135].

In its relatively brief judgment (25 pages) with a short, at times peremptory, statement of reasons[136], the Court of Justice thus held that the Commission was entitled to seize the two legal opinions in question. It was however anxious to clarify at the outset (from paragraph 15) that those two opinions had not been at all helpful to the enquiry carried out by the Commission, in so far as the Commission had not based itself on those two opinions in making its decision of 11 November 2009 imposing a fine on Akzo Nobel.

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[134] N. Forwood, *European Court of Justice case law on legal professional privilege*, *in* Legal professional privilege in European case law, Larcier, Brussels, 2010, p. 61: "It could be held that the issue of whether employed lawyers may benefit from LPP depends on whether under the laws and practice of the Member State concerned they so benefit."

[135] Ph. Marchandise, *L'arrêt Akzo, Que faut-il vraiment en retenir?* , Cah. Jur., 1/2011, p. 31.

[136] By way of example: [...] an in-house lawyer is less able to deal effectively with any conflicts between his professional obligations and the aims of his client" (paragraph 45); "in-house lawyers are in a fundamentally different position from external lawyers." (paragraph 58).

It is important to reiterate that the Court of Justice ruled only on European competition law and, importantly, that the Court took pains to declare expressly, in paragraphs 102 and 103, that the national situations might be different.

The European ruling must therefore not have repercussions nationally in each of the 27 Member States. Respect for the confidentiality of the legal opinions of company lawyers registered on the Institute's member register of company lawyers[137] whose profession is regulated in public law is safeguarded in Belgium by legislation, the Act of 1 March 2000 creating an Institute of Company Lawyers. That fact was confirmed by the judgment of 5 March 2013 of the Brussels Court of Appeal (see Chapter VI).

It is to our mind regrettable, however, that this case law continues to feed sterile polemics between the bars and the associations and institutes of company lawyers in the Member States of the Union[138]. Is it really necessary to encourage company lawyers to favour verbal opinions? Is this really acting in the interests of genuine collaboration in the administration of justice? The two professions are as indispensable as they are complementary. This is a great disappointment for the Kingdom of the Netherlands which is seeing havoc wreaked on the organisation of its legal professions (see paragraph 57), as the United Kingdom did in 1982 with the AM&S judgment.

The Netherlands had in fact carried out an in-depth reworking of legal professional practice in 1992, enabling employed company lawyers who so wished to join the bar and benefit from confidentiality for legal opinions given to their employers and, therefore, to be covered by professional secrecy. Those in-house lawyers can also represent their employers before the courts. The Dutch State had moreover intervened before the Court of Justice, followed by two other States – the United Kingdom and Ireland.

The judgment is all the more surprising in so far as it is within the competence of each Member State and its parliament to decide who is or is not a counsel or company lawyer. That competence was not given to the Union. Articles 3a and 3b of the Lisbon Treaty are clear on this point. The Netherlands, in common with any other Member State, is therefore free to decide that counsel in the Netherlands can practise under a contract of employment[139]. The same applies with the regulation of professional secrecy which is a matter within the sphere of national law. How will they be able in the future to carry on their legitimate activity of giving advice?

That advice-giving activity has been defined with great care by the Belgian Constitutional Court[140]: "[...] The giving of legal advice [...] is intended to inform clients on the current state of the legislation applicable to their personal situation or the transaction they propose to carry out or to advise clients on how to perform that transaction in the legal context. Its purpose is therefore to enable clients to avoid court proceedings relating to that transaction (consideration B.9.5.)"[141].

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[137] P. Lambert, "Secret professionnel", *R.P.D.B.*, Compl. X, Bruylant, Brussels, 2007, p.743,nos 419 and 420.
[138] F. Puel and Th. Bontinck, "La jurisprudence Akzo ou la complémentarité du juriste d'entreprise et de l'avocat dans la protection des droits de la défense de l'entreprise", JT, Larcier, Brussels, 2011, p. 140.
[139] N. Forwood, *European Court of Justice case law on legal professional privilege*, in *Legal professional privilege and European case law*, Larcier, Brussels, 2010, p. 61: "It could be held that the issue of whether employed lawyers may benefit from LPP depends on whether under the laws and practice of the Member State concerned they so benefit".
[140] Belgian Constitutional Court, judgment no 10/2008, 23 January 2008, *J.T.*, Larcier, Brussels, 2008, p. 102.
[141] Our underlining.

In performing that noble activity, legal professionals are allies of all those who seek to further promote implementation of the law, and competition law in particular, in business life. They are not – and cannot be – complicit with those who may decide despite their legal opinions to infringe the law.
Is that how the promotion of the law will be encouraged, in particular in business life and the life of companies?

In the view of the Court of Justice, legal opinions given by in-house lawyers cannot be confidential and those in-house lawyers cannot be subject to an obligation of professional secrecy on the grounds that their contract of employment prevents their "independence". This is the thesis of the judgment, directly in line with Advocate General Kokott's recommendations of 29 April 2010 which, it is worth noting, were the opposite of those made by one of his predecessors, the lamented Sir Gordon Slynn[142], delivered on 26 January 1982 in the AM&S case. That leitmotiv is repeated unrelentingly in paragraph after paragraph (see in particular paragraphs 45, 47, 49, 56, 57, 58 and 94).

Furthermore, a contract of employment deprives counsel – solely in European competition law, one must remember – not only of their professional secrecy, but also of their status as collaborators in the administration of justice.

Because that independence, on which the entire judgment is founded, ultimately concerns only one thing – being certain that the rules of professional conduct put in place by the professional body created by the legislature are effectively complied with by the members of the relevant profession regardless of how that profession is exercised – as a liberal profession or on an employed basis.

Creating different degrees of independence (paragraph 45) is an artificial exercise and opens the way to subjective considerations or considerations in the interests of particular groups.

The only adjective (other than "professional") used in conjunction with the word "independence" in the judgment (paragraphs 49 and 57) is "economic". In that regard we see no difference between a self-employed lawyer and an in-house lawyer – both have a contractual relationship with their client (a contract for services[143] or a contract of employment), and both are paid in good hard cash for the service provided.

To illustrate what we mean about the problem of understanding, we refer to the issue at the heart of the discussion.

The question put to the Court of Justice in unison by Akzo Nobel, the three intervening States and the five intervening parties – the CCBE, the IBA (International Bar Association), the Netherlands bar (*Algemene Raad van de Nederlandse Orde van Advokaten*), and the ACCA (American Corporate Counsel Association), which were joined by the ECLA (European Company lawyers Association) – was as follows: can the Court of Justice withdraw the benefit of confidentiality for his legal opinions from a Dutch in-house lawyer, whereas the Netherlands legislation permits counsel to work under a contract of employment?

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[142] Sir Gordon Slynn, who become Lord Slynn of Hadley when he entered the House of Lords in 1992, died on 7 April 2009.
[143] This service contract is also called an "innominate contract" by some: *R.P.D.B.*, Bruylant, Brussels, 1949, T. I, no 81, p.578.

Advocate General J. Kokott reworded that question as follows, on the first page of his Opinion[144]: "Does the protection of communications between lawyers and their clients ('legal professional privilege (LPP)'), guaranteed as a fundamental right under the law of the European Union, also extend to internal exchanges of opinions and information between the management of an undertaking and an 'en-rolled in-house lawyer' employed by that undertaking?" Two very different approaches …

As regards terminology, the problem is even more striking. We confine ourselves here to the French and the English. In English, there is a single word for legal professionals who give legal opinions – "lawyers" – with a distinction depending on whether they are remunerated under a contract for services ("lawyers in private practice") or under a contract of employment ("in-house lawyers"). In French, the judgment speaks initially of "*avocat indépendant*" in the first case, and in the second of "*avocat interne*" (paragraph 44), "*avocat salarié*" (paragraph 56), "*juriste d'entreprise*" (this latter term appearing only for the first time on page 16 of the judgment in paragraph 71!) or "*conseil juridique*" (paragraph 93).

Fortunately there is more rigour as regards the concept of "*confidentialité*" (in French), translated as "professional legal privilege" (in English). The Court of Justice makes no distinction between these two concepts, which however have different origins. Admittedly the two notions, based on the principle of trust (the involuntary confidant) and respect for the rights of defence have now converged.

The Supreme Court of the Netherlands (*Hoge Raad*) has just responded curtly to the Court of Justice in a judgment of 15 March 2013 finding that it should not once more be permitted to seize the legal opinions of employed company lawyers who are members of a bar.

> "[...] 5.5 Gezien de Nederlandse praktijk en de waarborgen die aldus in Nederland omtrent de wijze van pratijkuitoefening van advocaten in dienstbetrekking bestaan, is geen grond om aan een advocaat het verschoningsrecht te ontzeggen op grond van het enkele feit dat hij in dienstbetrekking werkzaam is."

Section 6: Final considerations?

By way of conclusion[145], it is worth noting that 28 years elapsed between the AM&S and Akzo Nobel cases. There is every reason to believe, however, that it will not be necessary to wait so long to see changes in the case law on the topic.

An increased pace of change could come from an amendment to European legislation, shifts in the Member States which will regulate the national legal landscape more or differently, a harmonisation of terminology, a reaction by the regulated legal professions which give legal opinions under contracts of employment (and even other regulated professions), increased awareness that contracts of employment have no impact on independence, or possibly from an adverse finding by the European Court of Human Rights in Strasbourg in so far as this kind of judgment affects a large number of fundamental rights (freedom to choose a lawyer, the right to a fair trial, respect for private life, etc.).

[144] The French text put the question a third way: "is an internal exchange of views and information between the management of a company and an internal lawyer employed by that company covered by the fundamental right to the protection of written exchanges between lawyers and their clients (or 'confidentiality of communications between lawyers and clients') recognised by the law of the European Union?" ("un échange interne de vues et d'informations entre la direction d'une société et un avocat interne employé par cette dernière relève-t-il du droit fondamental à la protection des échanges entre un avocat et son client (ou « confidentialité des communications entre avocats et clients ») reconnu par le droit de l'Union européenne?").

[145] Ph. Marchandise, ibidem.

It should be recalled here that the Lisbon Treaty integrated the European Convention for the Protection of Human Rights and Fundamental Freedoms into Community law, elevating it to the rank of primary law of the European Union. Is it still necessary to highlight the crucial role of prevention performed by legal professionals, that is to say, those whose profession is regulated by public-law statute[146], in their capacity as advisors and collaborators in the administration of justice?

How is it conceivable that legal professionals could give legal opinions worthy of the name without being "independent" of the clients who consult them?
How could one imagine that they could give those opinions without receiving all the relevant information in complete confidence and bound by confidentiality?

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[146] Whether they are members of a bar or an institute, a legal person governed by public law.

ANNEX I: MODEL CLAUSES

(a) Netherlands

"Professioneel statuut voor de advocaat in dienstbetrekking

De ondergetekenden:
1. ....gevestigd te ....
verder te noemen "de werkgever"
2. .... wonende te ....
verder te noemen: "de werknemer"

overwegende:
a. Dat de werknemer sinds .... bij de werkgever in dienst is als ...., welke dienstbetrekking in volledige werktijd/in deeltijd namelijk .... wordt vervuld;
b. Dat partijen het gewenst achten dat de werknemer (voortaan) zijn werkzaamheden binnen de onderhavige dienstbetrekking in de hoedanigheid van advocaat vervult en dat de werknemer wenst te worden ingeschreven/staat ingeschreven op het tableau in het arrondissement .... als advocaat, terwijl hij in dienst treedt/blijft bij de werkgever;
c. Dat de werkgever een algemene en eigen verantwoordelijkheid draagt ten aanzien van de totale gang van zaken binnen zijn bedrijf;
d. Dat het beroep van advocaat in vrijheid en onafhankelijkheid dient te worden uitgeoefend krachtens de voor de advocaat geldende beroeps- en gedragsregels;
en dat de werknemer derhalve een eigen persoonlijke verantwoordelijkheid heeft met betrekking tot zijn beroepsmatig handelen als advocaat;
e. Dat naast de terzake geldende arbeidsovereenkomst/ambtelijke verhouding een nadere overeenkomst noodzakelijk is waarbij de individuele verantwoordelijkheid van de advocaat in relatie tot de hierboven omschreven verantwoordelijkheid van de werkgever, zolang de praktijkuitoefening in de onderhavige dienstbetrekking voortduurt, wordt geregeld;
f. Dat artikel 3, derde lid van de Verordening op de praktijkuitoefening in dienstbetrekking bepaalt dat de praktijkuitoefening in dienstbetrekking door de advocaat in dienst bij een der werkgevers als genoemd in het eerste lid van dat artikel onder b, e, f en g alsmede het tweede lid slechts is toegestaan indien de werkgever conform het als bijlage aan die Verordening gehechte statuut zich schriftelijk heeft verbonden de onafhankelijke praktijkuitoefening te eerbiedigen en de ongestoorde naleving van de beroeps- en gedragsregels van de advocaat te bevorderen, de bepalingen van die Verordening daaronder begrepen.

komen het navolgende overeen:

1. De werknemer behoudt bij alle binnen de dienstbetrekking voorkomende werkzaamheden de hoedanigheid van advocaat en doet die hoedanigheid tegenover derden steeds duidelijk kenbaar zijn. De werkgever vermijdt dat tegenover derden de indruk wordt gewekt dat de werknemer terzake van zijn werkzaamheden binnen die dienstbetrekking in enige andere hoedanigheid optreedt.

2. De werkgever zal de vrije en onafhankelijke beroepsuitoefening van de werknemer eerbiedigen. Als werkgever onthoudt hij zich van al datgene dat invloed kan uitoefenen op het beroepsmatige handelen van de werknemer en de beroepsmatige vaststelling van een in een zaak te volgen beleidslijn, onverminderd het in artikel 7 bepaalde. De werkgever draagt er zorg voor dat de werknemer terzake van het bovenstaande geen nadeel ondervindt waar het

zijn positie als werknemer betreft.

3. De werkgever stelt de werknemer in staat zijn verplichtingen uit hoofde van zijn lidmaatschap van de Nederlandse Orde van Advocaten en zijn plaatselijke Orde te vervullen, de stage- en opleidingsverplichtingen daaronder begrepen.

4. De werkgever stelt de werknemer in staat de voor de advocaat geldende beroeps- en gedragsregels na te leven. Hij staat er voor in dat de werknemer volledig vrij is zich niet met de behartiging van de belangen van twee of meer partijen te belasten indien de belangen van die partijen tegenstrijdig zijn of een daarop uitlopende ontwikkeling aannemelijk is.
De werkgever stelt de werknemer in staat zijn verplichtingen als advocaat na te leven met betrekking tot de geheimhouding van gegevens en de vrije en onbelemmerde uitoefening van het verschoningsrecht terzake van de door hem behandelde zaken en de aard en omvang van daarmee samenhangende belangen. De werkgever onthoudt zich van al hetgeen dat er toe strekt dat anderen dan de werknemer, de cliënt, door de cliënt aangewezen personen of het in de advocatenpraktijk werkzame personeel van die gegevens kennis kunnen nemen. De werkgever past zonodig de organisatie en de inrichting van het bedrijf aan het bovenstaande aan en stelt de werknemer in staat door het verschaffen van toereikende hulpmiddelen zijn advocatenpraktijk naar behoren uit te oefenen.

5. De werknemer is gehouden ten opzichte van de werkgever de aanwijzigingen op te volgen die hem door of namens de werkgever worden gegeven ter bevordering van de orde en de goede gang van zaken binnen de organisatie, de kwaliteit der dienstverlening daaronder begrepen, zolang deze niet strijdig zijn met het in deze overeenkomst bepaalde.

6. De werkgever stelt de werknemer in staat tijdens diens afwezigheid wegens vakantie, buitengewoon verlof of ziekte voor rekening van de werkgever zorg te dragen voor een passende waarneming van zijn werkzaamheden door een andere advocaat.

7. De werkgever kan bepalen dat de werknemer terzake van zijn praktijkuitoefening verantwoording verschuldigd is aan een of meer andere advocaten die de praktijk in dienstbetrekking bij de werkgever uitoefenen.

8. Onverminderd het in het vorige artikel bepaalde zal verschil van inzicht over het beroepsmatige beleid van de werknemer bij de behandeling van hem toevertrouwde zaken geen reden mogen vormen voor eenzijdige beëindiging van de dienstbetrekking door de werkgever, of maatregelen die daartoe kunnen leiden.

9. De werkgever zal de werknemer geen belemmering opleggen ten aanzien van werkzaamheden als advocaat, door hem te verrichten na het beëindigen van de onderhavige dienstbetrekking.

10. Partijen kunnen elk de geschillen die terzake van de toepassing van deze overeenkomst mochten ontstaan conform artikel 5, derde lid van de Verordening op de praktijkuitoefening in dienstbetrekking voor bemiddeling en advies voorleggen aan de Raad van Toezicht in het arrondissement waar de werknemer als advocaat staat ingeschreven. Aan een dergelijk initiatief verleent de andere partij haar volle medewerking.

11. Deze overeenkomst eindigt bij beëindiging van de onder a. bedoelde dienstbetrekking of zoveel eerder als de werknemer de hoedanigheid van in Nederland ingeschreven advocaat

verliest. Deze bepaling laat onverlet de alsdan voortdurende verplichtingen van de werkgever terzake van de geheimhouding van gegevens als omschreven in artikel 4 tweede alinea.

Aldus overeengekomen en in tweevoud ondertekend te ..../..................

....	....
de werkgever	de werknemer"

(b) Germany

Germany has 39 bars and each bar has a different clause for the *Syndikusanwalt*, following a decision by the German Constitutional Court (*Bundesverfassungsgericht*) authorising counsel to work primarily in companies under contracts of employment.

Those clauses draw attention to the fact that the *Syndikusanwalt* is subject to the bar's rules of professional conduct, that they are intellectually independent and must be able to have other clients.

There follows the text of a *Freistellungerklärung* ("freedom to pursue" clause) accepted by the Frankfurt bar, one of the 39 bars in Germany.

> "Frau/Herr ……. wird unwiderruflich die Ausübung des Anwaltsberufs gestattet. Für eilbedürftige und fristgebundene anwaltliche Tätigkeiten wird Frau/Herr ……. auch während der Arbeitszeit freigestellt. Wir haben ferner Kenntnis davon genommen, dass Frau/Herr ……. die Rechtsanwaltskammer ermächtigt hat, von uns jederzeit Auskunft darüber einzuholen, ob sich das Dienstverhältnis in seinem wesentlichen Inhalt, insbesondere hinsichtlich der Aufgabenstellung und Umfang gegenüber dem Zeitpunkt des Antrages auf Zulassung zur Rechtsanwaltschaft geändert hat."

This is the text accepted by the Karlsruhe bar.

> "Zu dem Antrag des/der... auf Zulassung zur Rechtsanwaltschaft erklären wir hiermit unwiderruflich unser Einverständnis,
> - dass Sie neben Ihrer Tätigkeit als Angestellte/Angestellter den Beruf als Rechtsanwalt ausüben,
> - dass Sie nicht gehalten sind, Belegschaftsmitglieder nach der Gebührenordnung oder unentgeltlich zu beraten oder zu vertreten,
> - dass Sie sich auch während der Dienststunden zur Wahrnehmung etwaiger anwaltlicher Termine und Besprechungen jederzeit von Ihrem Dienstplatz entfernen dürfen, ohne im Einzelfall eine Erlaubnis hierfür einholen zu müssen, selbst wenn etwaige für Ihren Arbeitgeber wahrzunehmende Termine mit den in Ihrer Anwaltspraxis anstehenden Terminen kollidieren."

ANNEX II: MODEL MISSION STATEMENTS

MODEL (A)

LEGAL SERVICE MISSION STATEMENT AND STATEMENT OF ORGANISATION

Objectives

(a) To ensure that operations by the company and its subsidiaries are carried out in an appropriate statutory and legal framework.
(b) To provide legal protection for the company and its staff.
(c) To contribute to protecting the assets of the company and its subsidiaries, providing legal management of subsidiaries and holdings, and of property and intangible assets.
(d) To contribute through its work to implementing the Group strategy.

General responsibilities

The legal department, under the authority of the chief legal officer, has been given exclusive responsibility by the Group for the following:

(e) Ensuring that all fields of law are applied in the Group.
(f) Providing legal skills and assistance in preparing, negotiating, implementing and terminating any agreements and contracts, including acquisitions, transfers and financial transactions, binding the company or a subsidiary.
(g) Monitoring civil, criminal and administrative proceedings involving a Group company, executive or employee.
(h) Selecting outside counsel and approving their fees.
(i) Monitoring the procedures to notify the competition authorities and representing the Group companies in administrative or judicial investigations.
(j) Protecting and defending intellectual property rights, and preserving the value of the corresponding assets.
(k) Providing legal management of the Group's companies and holdings [and ensuring compliance with the rules of stock exchange law].
(l) Defining the rules applicable to the delegation of powers in force in the Group.
(m) Drawing up and implementing policies to ensure compliance with the applicable legislation, the Group standards and, in particular, the code of conduct.
(n) Managing the legal aspects of the Group's corporate communications.
(o) Legal monitoring and, where applicable, lobbying actions, directly or through professional bodies, in relation to all national, European or international draft legislation.
(p) For the purposes described above, issuing any provision applicable to the Group companies.

Organisation of the legal service

GENERAL PRINCIPLES

Legal services are provided by the Group's legal department and, to the extent of their competences, by the legal departments of the subsidiaries.

(a) The structure set up is intended to enable lawyers to take an active part in the Group's projects as soon as possible from becoming involved in a matter. The legal department is informed, as soon as possible, of projects being handled by the legal departments of the subsidiaries where those projects have a significant impact on the Group.
(b) The Group's legal department aims to make the best use of all the lawyers in the Group by tailoring their numbers and skills to the changing global requirements of the Group and, in particular, by means of the mobility of lawyers among the various legal departments of the subsidiaries. The Group legal department drives and coordinates performance of legal work within the Group. It sets the rules relating to recruitment, promotion, training, appraisal and transfers of lawyers within the Group. It is involved in setting the lawyers' remuneration policy.
(c) The rules relating to the choice of counsel are set by the Group's legal department.
(d) The centres of expertise, consisting of the sections of the Group legal department, coordinate and develop the legal expertise existing in the Group in the legal departments of the subsidiaries.
(e) With the agreement of the general manager, the Group legal department may take over any matter or project usually handled by other legal departments. This may include, in particular, matters or projects presenting particularly significant difficulties or where particularly significant issues are at stake or which cover several activities. The chief legal officer will make the final decision in legal matters.
(f) The Group legal department defines the rules relating to how the legal departments of the subsidiaries report to the Group legal department.

STRUCTURE

(a) The Group legal department reports to the general manager. It provides functional supervision and coordinates the legal departments of the subsidiaries.
(b) Subject to the terms of this statement, the legal departments of the subsidiaries shall have the responsibilities described in points (a) to (k) of the general responsibilities set out above in respect of the activities of their subsidiary.

DIRECT OPERATIONAL RESPONSIBILITY OF THE GROUP LEGAL DEPARTMENT

The Group's legal department has direct operational responsibility for the following matters:

(a) Providing legal advice and assistance of all kinds to the general management and the functional departments of the parent company.
(b) The legal matters relating to the parent company and to the subsidiaries overseen by the functional departments of the parent company.
(c) Civil, criminal and administrative proceedings to which the parent company and the companies overseen by the parent company's functional departments are parties, and those liable to have an appreciable impact on the Group (with the exception of proceedings conducted, with the agreement of the Group's legal department, by the legal department of a subsidiary in relation to litigation relating to that subsidiary.
(d) Any proceedings commenced in an international forum.
(e) Legal advice and assistance in strategic operations being project managed from the functional departments of the parent company.
(f) Drawing up and implementing policies to ensure compliance with the applicable legislation, the Group standards and, in particular, the Code of Ethics.

(g) *General policies relating to the implementation of competition law within the Group, the legal aspects of purchasing, information technology, data protection, industrial safety, the environment and sustainable development.*
(h) *Defining the policy for protecting and defending intellectual property rights, managing the Group's trademarks and preserving the value of all intellectual property rights.*
(i) *Lobbying actions in the field for which it is responsible.*
(j) *In its capacity as the legal service, issuing provisions and policies applicable to the Group entities.*

IMPLEMENTING ARRANGEMENTS

Specific implementing statements from the Group legal department will specify and supplement this statement of organisation

(signature)
Managing director

MODEL (B)

VISION

To be recognized as trusted counsel, supporting the [name of the company or name of the group] businesses in the [to be specified] region in all their strategic endeavours.

MISSION

As members of the Global Law department, the Law Department [region to be specified] lawyers are committed to provide high quality legal support and ["core values of the company"-based] counsel to all our [name of the company or name of the Group] clients in close partnership with the business. We are committed to do so based on high performing team-culture and in a dynamic and collegial team environment.

MODEL (C)

Juridische Zaken Groep is verantwoordelijk voor de organisatie en de externe representatie van de juridische functie van de XYZ. Ze streeft ernaar het juridische risico te bewaken en te verzekeren dat XYZ de wet naleeft door het stellen van regels, normen en een beleid namens de Groep.

Juridische Zaken Groep is ook verantwoordelijk voor de uitwerking en implementatie van het beleid met betrekking tot de verzekeringsdekking van operationele risico's op groepsniveau.

Daarenboven wil Juridische Zaken Groep kwalitatief hoogstaande juridische ondersteuning aanbieden aan de beursgenoteerde vennootschap XYZ Groep NV en haar Belgische bedrijfsonderdelen. Ze streeft ernaar om hun partner te zijn door hen juridische steun aan te bieden, aangepast aan hun behoeften.

Wanneer het nodig is, biedt Juridische Zaken Groep die diensten aan in samenwerking met juristen die werkzaam zijn in de business, rekening houdend met elkaars bevoegdheden en verantwoordelijkheden.

Juridische Zaken Groep streeft ernaar correct, nuttig en praktisch advies te verlenen binnen de afgesproken timing."

MODEL (D)

1) Business Enabling

Legal provides independent legal support to X Bank's businesses worldwide

- *General and tailor-made, proactive legal advice, engineering and support on transactions, projects, products, marketing and other actions undertaken by the businesses*
- *Legal initiates and manages contacts with all external legal advisors*
- *Legal facilitates international growth and development*
- *Participates in the development and roll-out of new businesses and products, joint ventures, the opening of new branches*

2) Risk Mitigation

Compliance with laws, regulations and best practices

- *Legal, in cooperation with Compliance or Audit Services, reviews business activities*
- *Legal monitors and manages the consistency of legal support in X Bank*

Global legal risk management

- *Legal gives guidance and determines the strategy with regard to all actual or imminent business related litigation initiated by or against X Bank (master of the file)*
- *Legal monitors actual and imminent legal risk exposures (claims, litigations)*
- *Legal collects regularly worldwide reports on legal risks*
- *Legal reports these risks within the organization*

3) Policy Setting

Legal determines the legal policy and

- *strategy across all businesses*
- *Legal is sole interpreter of laws, regulations and best practices*
- *Assesses the impact of existing and new legislation on the businesses and the bank as a regulator entity*
- *Determines X Bank's legal policy and strategy*
- *Assumes full responsibility for all standard and tailor-made documentation; reviews documentation and participates in negotiations.*

ANNEX III: THE MENTORING PROGRAMME

The IJE Mentoring Programme

Introduction

The Institute is ever anxious to bring its members together so that they can exchange their experiences. This applies all the more to young members, those who have recently joined and those who work in small departments, or may even be on their own dealing with their tasks. With that aim in sight, the IJE Council has set up a Mentoring Programme, based on purely voluntary participation.

Purpose

The purpose of the Mentoring Programme is to offer members who so wish ("mentees") the opportunity to establish privileged contact with more experienced members ("mentors"), to share experiences and also to ask questions. The support and advice of a person with long experience in the profession can prove very useful to mentees. The mentors are in a position to give the mentee the help and advice needed, acting as a reference point and sharing their thoughts on the role of company lawyers. The Mentoring Programme enables mentees to ask questions, outside their immediate environment, from which they can draw additional inspiration. The Mentoring Programme is therefore an opportunity for exchanging experiences, for reflexion and for learning. In addition, schooling a mentee in the profession and exchanging points of view will no doubt be a source of satisfaction and mutual enrichment.

Period of the Mentoring Programme

The Mentoring Programme lasts one year. At the start of the Programme, the Institute organises a general introduction meeting for all the mentors and mentees taking part. The mentors and mentees then freely decide how often they will meet after that. The aim, however, is to organise regular meetings, although there is nothing to prevent the mentors and mentees from continuing their contacts beyond that period if they so wish.

Form

IJE members participate in the Mentoring Programme either as mentors or as mentees. Any request to participate in the programme is made using the annexed form. The IJE Council, or the coordinators appointed by the Council, then match mentee applications with mentor applications and make suggested pairings taking into account the types of experience in the profession, fields of activity, the size of the company and where people live.

Mentors

Company lawyers with **more than five years' experience** in the profession who wish to share their knowledge and experience can participate in the programme as mentors. The Mentor must be available to meet the mentee regularly during the present calendar year and to support the mentee as much as possible in his or her development as a company lawyer. The mentor's role varies depending on the needs of the mentee – it may centre on learning or support or the mentor may have a more fundamental role.

<u>Mentees</u>
Company lawyers with **less than three years' experience** in the profession who believe that a mentor would be useful to their development can apply to be mentees. Learning, an essential component in the context of mentoring, can take various forms, such as a better understanding of one's actions and reactions, more in-depth knowledge of the mentee's own sector of activity or a new interest contributing to their personal development. Mentees are therefore encouraged to identify their learning needs and to define their expectations in the initial phase of the programme.

<u>Organisation</u>

If you want to participate as a mentor or mentee, you only need to fill in the following form and send it by email. The Institute will organise an information meeting to give a brief presentation of the Programme and so that mentors and mentees can meet each other.

Application form to participate in the
2010 IJE Mentoring Programme

CONTACT DETAILS

Surname, first name:

Role:
Mentor O Mentee O

Member of the IJE since:

Email address:

Tel.:

Mobile:

MOTIVATION, HOPES AND EXPECTATIONS

In general:

Specifically:

The Mentee expects the following from the Mentor:

- Language:
- Place of work:
- Specialisation:
- Other:

* * * * * * * * * * * *

ANNEX IV: EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

[...]

Article 6: Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
(b) to have adequate time and facilities for the preparation of his defence;
(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

[...]

Article 8: Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[...]

ANNEX V: CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION (OJ 2012/C 326/02)

[...]

Article 7: Respect for private and family life

Everyone has the right to respect for their private and family life, home and communications.

[...]

Article 47: Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Article 48
Presumption of innocence and right of defence

1. Everyone who has been charged shall be presumed innocent until proved guilty according to law.
2. Respect for the rights of the defence of anyone who has been charged shall be guaranteed.

Article 49 Principles of legality and proportionality of criminal offences and penalties

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.

2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles recognised by the community of nations.

3. The severity of penalties must not be disproportionate to the criminal offence.

Article 50 Right not to be tried or punished twice in criminal proceedings for the same criminal offence

No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.

[...]

ANNEX VI: PRACTICAL RECOMMENDATIONS TO ENSURE EFFECTIVE PROTECTION OF THE CONFIDENTIALITY OF THE OPINIONS OF COMPANY LAWYERS

Article 2, paragraph 2, of the Act of 1 March 2000 creating an Institute of Company Lawyers provides that the Institute is tasked, amongst other things, with ensuring the training of its members and expressing opinions on matters within its sphere of competence. Under Article 7, Section 2, paragraph 5, of the Act, the General Meeting expresses its views by means of opinions, proposals or recommendations to the Council on all subjects of importance to the Institute duly put to it. Article 20, paragraph 2, of the Institute's Internal Rules provides furthermore that the Council makes recommendations to its members to ensure the confidentiality of their opinions.

At the general meeting of 20 June 2002, recommendations were proposed concerning "the confidentiality of opinions". Those recommendations are intended to facilitate practical implementation in everyday practice of the principle that opinions given by company lawyers for the benefit of their employers in the context of their work of providing legal advice (Article 5 of the Act) are confidential. Given changes in academic thinking and developments in practice, it has been thought wise to review those recommendations and adapt them, where necessary.

The Council approved those revised recommendations on 13 March 2012.

Since those recommendations go to the core of the profession of company lawyer, the Council wished to put them to the General Meeting so that it could take ownership of them.

On 24 May 2012 the General Meeting stated as follows:

> "The General Meeting has taken note of the 'Practical recommendations to ensure effective protection of the confidentiality of the opinions of company lawyers' approved by the Council on 13 March 2012.
>
> The General Meeting is of the view that those recommendations comply with the law in force, in particular Article 5 of the Act of 1 March 2000 creating an Institute of Company Lawyers, and can form the basis of widespread observance of that confidentiality in the everyday practice of company lawyers and the authorities.
>
> It therefore recommends that they be widely disseminated both to members of the Institute and to interested third parties, including public and judicial authorities and the bars. It invites the Council and each member of the Institute to put them into practice and to ensure that they are promoted and, where it appears necessary, defended."
>
> The Practical recommendations are set out below.

Practical recommendations to ensure effective protection of the confidentiality of the opinions of company lawyers

approved by the Council of the Institut des juristes d'entreprise on 13 March 2012

Opinions given by company lawyers for the benefit of their employers in the context of their work of providing legal advice are confidential (Article 5 of the Act of 1 March 2000 creating an Institute of Company Lawyers). That confidentiality forms part of the principles taught in the professional conduct course which every member of Institute must take.

The purpose of these recommendations is to propose how that statutory confidentiality can be implemented in practice, in order to preserve its effectiveness.

These recommendations are of course not such that they can extend or restrict the scope of application of the law. The fact that they have not been followed or fully followed in a particular case does not and moreover cannot mean that the statutory rule of confidentiality is not applicable, nor can it be interpreted as a waiver of that confidentiality.

Nor do the Recommendations constitute an academic analysis of Article 5 of the Act. A list of case law and academic references can be found on the Institute's website and is regularly updated by the Institute.

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In order to strengthen observance of the confidentiality of opinions issued by company lawyers, it is recommended that the following principles be upheld:

Practical recommendations relating to the preservation of confidentiality

-1-

Opinion shall mean, amongst other things but not exclusively, any appraisal of a factual or legal situation in the light of existing or future statutory (including regulatory) or contractual provisions to which the company and its subsidiaries are subject, and any advice – including commentaries on statutory and contractual instruments, letters, etc. – prepared in that regard and all reporting of such an opinion. It therefore concerns the provision of legal advice within the meaning given by the Constitutional Court in its judgment 10/2008 of 23 January 2008:

> "[...] the activity of giving legal advice [...] is intended to inform clients of the current legislation applicable to their personal circumstances or to the transaction they envisage performing or to advise them on how to perform that transaction in the context of the law."

-2-

Every opinion should include the following **information**:

- prominently, for example as a header: "CONFIDENTIAL – Company lawyer's opinion";
- the name of the company lawyer, followed by "Company lawyer";
- reference to Article 5 of the Act, for example as a first page footer: "Under Article 5 of the Act of 1 March 2000 creating an Institute of Company Lawyers (*Moniteur Belge*, 4 July 2000, 23252), 'opinions given by company lawyers for the benefit of their employers in the context of their work of providing legal advice, are confidential'. This note is such an opinion. Neither this note nor its contents may therefore by any means whatsoever be disclosed, passed on, reproduced, copied or amended without the prior authorisation of its author, whether within [company] or outside, including vis-à-vis public authorities."

-3-

The opinion should be addressed only to the person or persons who have requested it or who need it in the context of their work. Company lawyers should take care to limit the **recipient list** as much as possible.

Recommendation on interaction with the opinions of outside counsel in this regard

-4-

Any intra-company written exchanges relating to, in preparation of or following up an **outside counsel's opinion** should be marked "CONFIDENTIAL – written exchanges relating to an outside counsel's opinion". All written exchanges between an outside counsel with a view to requesting or discussing an outside counsel's opinion, whether made by email, fax or post, should contain the following statement "CONFIDENTIAL – Written exchanges relating to an outside counsel's opinion". Those statements are juxtaposed, where necessary, with the statement "CONFIDENTIAL – Company lawyer's opinion".

Recommendations relating to interaction with the Institute in this regard

-5-

In the event of **difficulty in implementing** these recommendations, company lawyers are invited to contact the President of the Institute, who will provide them with every assistance.

-6-

In general, company lawyers should ensure that they **inform** the Institute promptly of any fact – conduct by a public authority, court order, development in academic thinking – of which they are aware and which is such as to affect or which could affect observation of the confidentiality of opinions.

Measures in the event of searches / a request for a document in the context of an investigation ([147]) ([148])
(at the legal department or elsewhere)

-7-

- Prima facie the lawyer should refuse to produce confidential opinions.
- Where there is a refusal: the lawyer should request that the documents be placed in a closed envelope for a subsequent decision by the competent bodies.
- The lawyer should ensure that the following is indicated in the search record:
  - the fact that confidentiality was claimed, even if the documents were ultimately seized;
  - a list of the documents for which confidentiality is claimed

The company must require that a representative of the legal department be present.

Company lawyers called to give evidence in legal proceedings

-8-

In relation to the confidentiality under Article 5, company lawyers cannot be required to answer questions about the contents of their opinions, the questions put to them or the facts of which they were informed for the purpose of obtaining a legal opinion. Company lawyers cannot refuse to give witness evidence about facts learned by other means (for example, participation on the management committee, presence at meetings of the board of directors, etc.).
It is recommended that they be assisted by an outside counsel.

Civil or commercial proceedings

-9-

Documents meeting the statutory requirements must be ruled out of the proceedings. If they are produced despite that fact, counsel for the party whose company lawyer issued the documents must apply for them to be withdrawn. Company lawyers must ensure that they do not produce in proceedings documents of other company lawyers which satisfy the statutory requirements for confidentiality.

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[147] Prosecutor's office, economic inspectorate, departments of the Belgian Autorité de la Concurrence, and employment inspectorate, environmental inspectorate, etc.
[148] If you find yourself in one of these situations, contact the President or secretariat of the Institute.