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Over There: The ECLA's Sergio Marini Talks About Privilege and Cybersecurity in Europe

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While the in-house bar may seem to be peculiarly U.S.-oriented to some, there's actually a lot of movement and organization around the globe. One group, the European Company Lawyers Association, serves as the umbrella organization for 20 company lawyer associations in Europe and represents common interests of European company lawyers.

According to its website, ECLA was created in 1983 and is an international nonprofit association governed by Belgian law. Membership is open to national associations only. While individuals are not members of ECLA directly, each company lawyer, who is a member of a national association, can share the benefits ECLA negotiates. These include discounts to conferences, legal education, training, free publications and more.

Corporate Counsel's Editor-in-Chief Anthony Paonita recently interviewed ECLA's President Sergio Marini, who is based in Rome, via email. Marini is general counsel of Fendi, The LVMH Group and previously was GC of Shell Italia S.p.A. Paonita and Marini chatted virtually about the role of in-house counsel in Europe, and such hot-button issues as privilege, privacy and cybersecurity.

Describe the mission of the ECLA.

ECLA's mission is the recognition of the profession of the company lawyers at the highest level in all European countries. Today, the development of the company lawyers' profession varies significantly from country to country. Therefore, we seek to enhance the profession of the company lawyers in all countries by the identification and exploitation of regulatory opportunities and achieve the status it deserves; at the same time, we try to identify and, when possible, eliminate potential threats that may arise due to different regulation.

How many members does ECLA have?

The members of ECLA are national in-house lawyer associations, not individuals. In this respect ECLA counts 19 member associations gathering around 42,000 in-house lawyers.

Do they come from all over Europe?

Yes, most of the countries are represented and we are receiving admission requests from new potential members, which is very important to enlarge the community and to increase our mission's strength.

Do individuals work at small legal departments or large? Small or large companies?

ECLA has the privilege to represent, through the national associations, most of the European company lawyers, no matter the size of the company they work for. Each national association sets their own rules for membership, which are mostly based on the curriculum studiorum and job description/role in the company.

I get the impression that the notion of an in-house or corporate counsel is a relatively new concept in Europe. Is this true?

In most European countries the profession of the company lawyer strengthened after World War II and became stronger and stronger first in the North and Central European countries, where the industrial activity was more developed, then the profession became more popular also in the commercial and services companies. Nowadays the profession of the company lawyer has spread all over Europe although with a different degree of recognition and independency. This represents one of ECLA's main goals: to ensure that the profession is recognized at the highest level in all the European countries.

I attended a conference of in-house counsel in Copenhagen two years ago. There was a lot of emphasis in the sessions on "selling" the legal department's usefulness to senior executives. Is that still the case? Do in-house counsel still feel a little insecure about their role in their companies?

I would put it this way: The economic development of the last decades has drastically increased the demand for an ethical behavior in business. This is not only in the interest of the company itself, but also in the interest of the shareholders and the whole market. It is more and more important for a company that acts in the international market to behave in accordance with an ethical code and share business principles. In all complex structures, such as big companies, the professional in charge of enforcing the company's internal rules and the laws in general is the company lawyer. He or she is the best ally of the company's top management not only to do business but also to create the correct company culture in respect of the law.

Coming back to your question, I believe it is all about the companies' awareness for the demand of legality: the more the top management perceives such a need, the more it would require the presence of an internal lawyer. Of course, not everywhere in Europe is the situation the same.

What are the biggest issues facing in-house counsel in Europe?

There is a main issue that ECLA is facing since its foundation in 1983: This is the equal recognition of the legal profession of the company lawyer, all around Europe in the same way, at the highest level. As said, there are differences from country to country in Europe. In some countries the company lawyer is fully recognized and has the same privilege and duty of the outside counsel; in others the company lawyer is facing a form of discrimination of his profession and role and, although he or she has the same curriculum and has followed the same professional path of an outside counsel, if he or she joins a company, the lawyer automatically gets the bar membership as well as the legal professional privilege where applicable.

The legal professional privilege means that communications between a company and its

internal lawyer, whose legal advice is sought and offered, are confidential and cannot be used against the company itself. In some countries the legal professional privilege is granted to company lawyers, while in others it is not, and even at European level it is not. These different regulations are causing discrimination between members of the same profession: It is like saying that the same engineer who is working for a company in England can build a bridge but if he/she is working in the same company in Italy he/she cannot.

On the other hand, it is also creating an unequal market because the companies based where the company lawyers' profession is recognized, as well as the legal privilege, benefit from a substantial advantage vis-a-vis their competitors based in countries where the legal privilege is not recognized. Legal professional privilege should apply just as much to a company communication with its company lawyer as it does to its outside counsel. This is what we strive to achieve.

Looking across the ocean, do U.S. rules figure prominently in the work corporate counsel and their departments do? I'm thinking of U.S. securities regulations, anti-bribery laws.

Given the globalization of the market, even a small company willing to compete internationally, it is inevitably exposed to the rules of the international markets so to those of the U.S. too. Fortunately, the main rules to which the compliance is required go in the same direction, therefore it is not difficult to be compliant to most of them. Of course, there are peculiarities in every country that is why a continued update on the norms of the relevant markets is required. Given the importance of the American market, it is impossible to think to act at an international level without a thorough knowledge of the U.S. regulations. Another ECLA goal is promoting the exchange of information over the regulatory development in the other continents.

How do your members deal with the differences in privacy laws between the continents?

Regarding the differences at EU level, fortunately the new forthcoming EU regulation will solve this problem, since it eventually establishes a harmonized data protection framework across the whole EU countries.

Indeed, according to European Commission studies, more than 90 percent of Europeans say they want the same data protection rights across the EU—and regardless of where their data are processed.

The regulation is an essential step to strengthen citizens' fundamental rights in the digital age and facilitate business by simplifying rules for companies in the Digital Single Market.

Furthermore, according to the European Commission, this new regulation will sweep away the current fragmentation and costly administrative burdens, leading to savings for businesses of around 2.3 billion euros (just under \$2.6 billion) a year.

Is data security as much of a worry as it is to U.S.-based in-house counsel?

Yes, indeed it is. We all know that cyberattacks are no longer the creation of bored teenagers playing for bragging rights. With global organized crime behind cyberattacks, the nature of their attacks to networks is changing. All the businesses, all over the world, could face external and internal digital threats that can corrupt hardware and compromise data. And that is valid for U.S. companies as well as for EU companies. Even more with cloud computing, that opens up a new set of data-security concerns, mainly because it means that companies must relinquish control on security and entrust it to an outside party, often based

in a different country.

The role of the company lawyer is crucial in this scenario considering that liability issues surrounding cybersecurity continue to evolve.

What about attorney-client privilege? A couple of years ago, that was a big concern, since some countries didn't consider in-house counsel to be full members of the bar (hence, no privilege). Is this a concern? If so, how are you advocating change?

As explained above, the legal privilege recognition is mainly and directly connected to the bar admission of the company lawyers and the differences inside the EU countries have generated the lack of recognition of the legal privilege to all company lawyers at EU level.

In a few EU countries, company lawyers are still prevented from remaining enrolled in the Bar when they start working in a company. This is the case, e.g., of Italy and France, at the moment. The Local In-house Associations are actively working on this issue at the local level while ECLA is playing the same effort at EU level.

Hopefully, when the company lawyers will be allowed to enroll/remain in the Bar in all countries the legal privilege will be fully recognized to them at EU level. ECLA is working to anticipate this as soon as possible.

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