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Towards the creation of a specific lawyer status for in-house counsels or the planned enf of a french exception

In a press release dated June 21, 2011, the Ministry of Justice announced the introduction in the autumn of a pre-bill on the creation of a lawyer status for in-house counsels.

This pre-bill should take up the proposals set forth in the report delivered in March 2011 to the Minister of Justice and Minister of Economy, Finance and Industry by Mr. Michel Prada, the former chairman of the French Financial Market Regulatory Authority (the Prada report is available on the web site of the French Ministry of Justice).

The assignment entrusted to Mr. Prada by the Minister of Justice and the Minister of Economy consisted in identifying means to improve the attractiveness of the Paris legal market.

At the end of its works, the Prada commission concluded that the *"insufficient significance of the law"* and *"the ill-adapted positioning of in-house counsels in the conduct of French companies"* represented serious obstacles to the competitiveness of the latter vis-à-vis foreign entities in an era where the *"management of legal risks"* and the *"performance of compliance functions"* play a growing role.

In this respect, the fact that the internal correspondence of French in-house counsels does not benefit from the legal privilege that covers the legal consultations drafted by lawyers who are registered with a Bar is a considerable disadvantage. Any written document issued by an in-house counsel alerting his/her company on the breach of a rule or standard is likely to be subsequently used against the latter, following, for example, a seizure of documents by an administrative or legal authority.

The French legal market is, in itself, hampered by the fragmentation of legal professions. The Prada report enumerated ten legal professions (*notaires* (notaries public), *huissiers* (bailiffs), *commissaires priseurs* (auctioneers), *administrateurs judiciaires* (receivers), *mandataires judiciaires* (court-appointed representatives

of creditors in insolvency and bankruptcy matters), *avoués* (lawyers in charge of the procedural steps with Court of Appeals) *avocats au Conseil d'Etat* (lawyers authorized to appear before the French Administrative Supreme Court), *avocats à la Cour de Cassation* (lawyers authorized to appear before the French Supreme Court), etc.), while most of other countries usually have two – if not one – professions.

Many countries, notably common law countries, allow in-house counsels to be registered with the Bar and grant to their written correspondence/documents the same level of confidentiality as legal consultations of lawyers.

The members of the Prada commission thus raised the question of whether French in-house counsels should be granted the status of lawyers and the privilege attached thereto, i.e. the absolute and unlimited in time professional secrecy set forth in Article 2 of the Lawyers' National Internal Rules which underlies the notion of confidentiality that does not apply to correspondence/consultations issued by in-house counsels.

The adoption of these measures aroused vehement opposition from Bars outside Paris. Two main arguments were put forth: (i) the in-house counsel's lack of independence vis-à-vis his/her "client" that is none other than his/her employer, and (ii) the fear that the grant of the status of lawyer would authorize in-house counsels to plead before courts, thereby taking the food off the table of "original" lawyers.

Following in-depth investigation works with the various actors of the French legal market and companies' representatives and after having thoroughly analyzed a comparative study of the solutions applied in other countries, including the USA and Germany, the Prada report suggests the creation of a particular status of in-house lawyers.

The main characteristics of this special status would be as follows:

- In-house lawyers would be registered on a specific ad hoc list kept by the Bar. They would be subject to the ethical code of conduct of the legal profession but not to the public policy personal obligation of professional secrecy reserved to "liberal" lawyers. On the other hand, in-house lawyers would be granted a "privilege of confidentiality" – the exact nature and scope of which to be defined by law – that would preserve the confidentiality of the correspondence/consultations authored internally to the benefit and under the supervision of the employer, as is the case in the UK and in the USA;
- Even though acting as employees of the company, the registration of in-house lawyers with a Bar would serve as a guarantee of integrity and independence in the legal and compliance functions;
- In-house lawyers would work exclusively for their respective company;
- In-house lawyers would not be entitled to appear before courts where the representation by a lawyer is mandatory;
- The privilege of confidentiality would only cover the relationship between the company and its in-house lawyer(s);

- The integration of in-house counsels into the lawyer profession would be achieved through a system of equivalence;
- In case of administrative or criminal investigations or proceedings, a specific mechanism would be created to set aside the privilege of confidentiality, as happens in the UK and in the USA.

Even though the Ministry of Justice has announced the introduction of a pre-bill in the autumn, the strong hostility showed by some lawyers wishing to preserve the status quo, in particular outside the Paris region, is likely to slow down, if not jeopardize, the implementation of these measures.

Yet, as pointed out in the Prada report, this French exception represents a major handicap for companies and maintains French in-house counsels in a position of inferiority compared to their foreign counterparts.

This situation is just another consequence of our archaic organization of certain legal professions, such as the obligation to be granted so-called ministerial “offices” or “charges” (for *notaires*, *huissiers*, *administrateurs judiciaires*, *avoués*, etc.), a system unknown in most other countries.

This fragmentation of duties and roles among the various legal professionals prevents the emergence of a broad legal profession that many consider as essential to allow French lawyers to regain competitiveness vis-à-vis Anglo-American lawyers who already have a strong presence on the Paris market.

Our difficulty to adjust also derives from the persistent hostile climate surrounding the business world and the business community in France that still weights on the quality of national and international business law courses taught in our universities and law schools, despite the demands of the modern world.

Of course, the solutions recommended in the Prada report take into account this specific environment.

In our opinion, granting to in-house counsels an access to the lawyer profession would have effects even more beneficial than those set forth in the report.

French lawyers often do not sufficiently understand the business world. A single profession combining “liberal” lawyers and salaried in-house lawyers would facilitate transfers from one world to another, why not several times in one’s career.

The possibility for US lawyers to successively pursue several career paths – liberal lawyer, general counsel of a large group, judge and even corporate officers – without even changing their status, confers upon them a remarkable authority. In the USA, the image of the lawyer is closely associated with the values of independence, ethics and compliance with law, whatever the position held.

Put in perspective with this system that seems fully satisfactory, the measures advocated by the Prada report may appear timorous and sometimes unnecessarily complicated.

Should in-house lawyers really be registered on an ad hoc list, with the risk that they will be considered as second-class lawyers?



Should we really impose on in-house lawyers the obligation to work exclusively for their company? Might it not be possible to allow a single lawyer to conduct at the same time a liberal activity and to hold a position as general counsel, as is sometimes the case in the USA?

Anything that will contribute to a better connection between the lawyer profession and the business world will be beneficial for a better application of rules of law, a better management of legal risks and a better performance of the compliance functions within French companies.

The reform is also all the more urgent because it would significantly enhance the level of competence, the competitiveness and the place of lawyers in our society, contrary to the fears expressed by some members of the profession.

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