

ACC and ECLA recommend inclusion of data from in-house counsel in the 2021 Justice Scoreboard

The Association of Corporate Counsel (ACC) is a global association representing the common professional interests of more than 40 000 in-house counsel in more than 85 countries. The European Company Lawyers Association (ECLA) is a pan-European umbrella association advocating and advancing the professional status of lawyers in companies and representing 68 000 inhouse counsel in 22 European countries. ACC and ECLA welcome the European Commission's consultation on the 2021 Justice Scoreboard, and its broadened scope to support the achievements of the European Semester and the implementation of the Recovery and Resilience Facility. Given in-house lawyers role as providers of legal services, both our associations believe that including them as a distinct category of justice stakeholders, will provide a more accurate picture of the state of the rule of law, as well as useful data points for implementation of the Recovery and Resilience Facility.

The work of in-house lawyers generally aims to foster legal compliance, avoid future litigation and resolve disputes in a commercially reasonable manner without recourse to the court system, in all legal fields (commercial, civil, administrative and others). This in turn advances the efficiency and quality of justice, by conserving judicial resources and speeding the delivery of justice to other stakeholders -- the timeliness of judicial relief being an important element in the quality of justice. In-house counsel's unique position also constitutes a substantial factor that advances the rule of law within the European market and beyond. ACC and ECLA therefore propose that the European Commission add the research questions described below to the 2021 Justice Scoreboard survey, to fully understand the ways in-house counsel contribute to the functioning of justice systems in the European Union.

Because in-house counsel are mostly fully-qualified lawyers, their views are likely already included in that of some lawyers who contributed to previous scoreboards. However, in countries where in-house counsel are not considered full members of the bar, their role and input may not have been factored in. Thus, the special role of in-house counsel and their contribution to the justice systems of their respective countries have not been adequately considered in previous scoreboards. Moreover, national rules around the status of in-house counsel lead to different definitions and calculations of the overall number of lawyers in each country. We believe that this inconsistency has led to underestimating the real impact of in-house counsel on the justice system.¹

In-house counsel are crucial to the efficient administration of a quality, independent justice system, and they play a unique role at the junction of the business and legal realms as ambassadors of the rule of law in their respective companies. As providers of legal services, in-house counsel furnish cost-effective legal advice to businesses seeking to compete on the global scene. As procurers of outside legal services, they are key to lowering costs without sacrificing quality for companies. As trusted advisors to their organizations, they provide a bridge between public policy and business interests. And as officers of the court, in-house counsel promote a culture of compliance within their organizations.

¹ France, for instance, does not let in-house counsel join the bar. In Germany, in-house counsel may join the bar and most of the time do. Hence previous scoreboard figures include all German lawyers (external and internal) whereas they exclude all French in-house counsel.

In-house counsel are key contributors to efficient justice systems

Today's complex, competitive business environment requires many companies to have employed in-house lawyers, often across multiple jurisdictions. Fully qualified in-house lawyers who are members of professional bar associations have the same training and are subject to the same ethics and discipline rules as external lawyers. In half of the EEA countries² as well as in numerous other jurisdictions³, there is no distinction between in-house and external lawyers in the application of legal privilege and requirements of independence and professional discipline, even if formalistic differences may exist in some of these countries in terms of membership in the national bar⁴. However, regardless of the status of their lawyers, in-house legal departments are uniquely positioned to promote efficient administration of justice, by contributing to cost-effective dispute resolution solutions and enforcement while reducing recourse to judicial resources and, importantly, before the need for litigation arises.

Moreover, in-house legal departments increase access to justice by lowering the cost of obtaining legal advice – an issue of particular relevance and key to global competition, especially for small and medium enterprises.

Another major contribution of in-house counsel to the efficiency of the justice system is their role in promoting compliance within their organizations. Internal lawyers typically build relationships of trust with their company's business teams and develop a deep understanding of the business as well as of the internal functioning of their organization. This allows in-house lawyers to develop in-depth knowledge of the activities, plans and governance of the company, and to advise the business teams pro-actively regarding legal implications, in order to ensure that the company navigates efficiently the increasingly complex regulatory arena and operates within the confines of the law.

Rules governing the in-house counsel profession differ between EU Member States. Some countries impose the same ethics obligations and disciplinary rules on in-house lawyers as on law firm practitioners by virtue of their membership in the bar and make attorney-client privilege available to both outside and in-house counsel. Others restrict bar admission for in-house counsel, exempt them from the stringent ethical and disciplinary regimes imposed on members of the bar, and on this basis do not extend attorney-client privilege to their work. Where in-house lawyers benefit from legal privilege, their business knowledge and relationships of trust combined with their legal training and experience put them in a unique position to guide the organization in compliance matters and to act quickly and effectively to remedy deviations.⁵ These interventions thus advance the rule of law, contribute to the attractiveness of the European market, and promote legal efficiency by conserving judicial and prosecutorial resources, thus speeding up the delivery of justice for others.

Without being able to provide accessible, candid, and above all confidential legal advice, in-house counsel are far less likely to be consulted candidly by their company's teams about potentially risky

² In 15 of 30 Member States of the EEA (plus UK): Belgium, Cyprus, Finland, Germany, Greece, Hungary, Ireland, Iceland, Latvia, Malta, the Netherlands, Norway, Poland, Portugal and Spain (differences may exist depending on the field of law).

³ Particularly within the OECD, for example, in the United States, Canada, Australia, New Zealand, Mexico, Chile and Israel.

⁴ For example, in-house counsel in Belgium are members of an *ad-hoc* professional bar association.

⁵ In-depth overview: https://www.acc.com/sites/default/files/resources/vl/membersonly/PracticeProfile/1465319_1.pdf and <https://ecla.online/wp-content/uploads/2017/12/ecla-white-paper-independent-by-design.pdf>

courses of action, discover violations after the fact, be in a position to swiftly correct them, or timely engage experts where needed (including outside counsel), thus diluting their ability to contribute to judicial efficiency and quality. In such circumstances, the companies they represent are therefore more likely to engage in unlawful practices (such as anticompetitive conduct) or let them unaddressed, which ultimately harms the markets and increases the pressure on judicial dockets.

Conclusions: Research questions to be included in the Justice Scoreboard questionnaire

Both ACC and ECLA strongly recommend that the European Justice Scoreboard assemble data on the role of in-house counsel in the justice system, and how the profession can contribute to the efficiency, quality, and independence of justice. We propose that questions focus on the following topics:

- a) the role of in-house counsel in promoting a culture of compliance within their companies;
- b) the role of in-house counsel as officers of the court⁶ in the administration of justice, independence of in-house counsel, and their relationship with legal privilege; and
- c) the contribution in-house counsel to the efficiency of justice by resolving issues cooperatively and cost-effectively before they reach litigation, thus reducing pressure on the judicial system.

Both our associations have a vast array of research tools and prior research material on these matters and stand ready for further discussion and contributions to the scoreboard.

About ACC: *ACC is a global association that promotes the common professional and business interests of in-house counsel who work for corporations, associations, and other private-sector organisations, through education and professional development opportunities. ACC includes more than 40 000 members employed by more than 10 000 private organisations in 85 countries.*

About ECLA: *The European Company Lawyers Association (ECLA) was founded in 1983 and is the umbrella organization for 22 company lawyer associations in Europe and represents the common interests of European company lawyers and inhouse-counsel. Through its member associations, ECLA represents more than 68 000 inhouse counsel across Europe.*

⁶ In a number of jurisdictions, attorneys who are members of the bar have an ethical and legal obligation to cooperate with the courts in the proper administration of justice