

# Employed lawyers: another European case

Monday 24 August 2009 by **Jonathan Goldsmith**

Another day, another case before the European Court of Justice on the practice of law. This one is interesting because it concerns rules that prohibit lawyers who are employed in other functions from being members of the bar.

The case – Case C-225/09 – arose out of a €200 claim for damage to a car by a man out walking with his dog in Italy. The plaintiff hired the services of two lawyers, who both happened to be part-time civil servants. The Perugia Bar subsequently removed them from the list of lawyers, because there is an Italian law forbidding part-time civil servants from also being lawyers. The plaintiff protested, and out of her €200 claim the European Court of Justice has now been brought in to settle whether Italian law on this is compatible with European law. From the brief summary available so far, it appears to be about not being able to be employed, even part-time, and a member of the Italian Bar at the same time. But is it also because of incompatible occupations? At any rate, it is part of recent Italian judicial activism, bringing Italian bar rules to the attention of the European Court (see, for instance, Case C-35/99 Arduino, and Joint Cases C-94/04 and C-202/04 Meloni and Cipolla).

If the case touches on the great in-house counsel debate, we are entering territory where those on either side cannot understand why the backward conservatives/irresponsible liberals (take your pick) on the other side behave as they do. In the one corner are about half the bars of Europe, which permit lawyers to be employed – in other words, to remain as members of the bar even when they work in-house. The Law Society is among this group. And in the other corner are the remaining half who strike lawyers off when they go in-house. The latter say that you cannot be independent if you work in-house, because your employer has too much control over your working conditions.

All the arguments have been tried on each side, and failed to budge many minds. That is because the state of independence of any lawyer, whether self-employed or in-house, is not something objective that can be measured. It is more an act of faith on behalf of the bars who either permit or do not permit them to practise. Those who permit in-house practice doubtless know that there are dangers in a lawyer having only one client, whether that client is your employer or another large private client, and they try to manage the risk. Those who do not permit in-house practice doubtless acknowledge the existence of in-house counsel who deliver fearless advice to their employers, even at the risk of being sacked. Yet neither side budges all the same.

There is an existing in-house counsel case still awaiting the final decision of the European Court of Justice. That is Akzo Nobel (Joint Cases T-125/03 and T-253/03), on the question of whether in-house counsel should have the benefit of legal professional privilege, or professional secrecy as it is called in much of Europe. The facts arose out of a European Commission raid, and an ensuing dispute as to which documents could be seized or read by the commission. The case is interesting because the lawyer in question was Dutch, and the Dutch Bar already has special rules to

guarantee the independence of in-house counsel (who are then subject to professional secrecy): the employer has to sign an undertaking to respect the lawyer's independence, which is not a step required in the UK.

The in-house counsel issue generates much emotion. I have noticed that whenever the identity of lawyers is at stake, the temperature of debate rises – and here it is about independence. So much emotion is generated that, in the case of Akzo Nobel, it attracted a large number of potential interveners in the case. They were not only in-house counsel organisations, but also the International Bar Association, the American Bar Association – and the Law Society itself.

That is why I write about this case at an early stage, before its shape and consequences can be easily foretold. All you in-house counsel addicts out there: another case is looming. (And you can find the references to European cases affecting the legal profession [here](#).)