

Evaluating the Independence of In-House Counsel – Making Sense of Judicial Pronouncements

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Suzanne Le Mire, *Testing Times: In-House Counsel and Independence*, 14 **Legal Ethics** (forthcoming 2011), available at [SSRN](#).

Particularly for those of us who live in Europe, Suzanne Le Mire's new paper on in-house counsel independence is an interesting addition to the existing literature. In September 2010, the European Court of Justice (ECJ) gave its final ruling in the [Akzo Nobel Chemicals and Akcros Chemicals v Commission](#) test case regarding the availability of legal privilege for corporate counsel in relation to European Union competition investigations. In the course of its judgment, the Court made some fairly forthright assertions about the lack of independence of in-house lawyers – notwithstanding that the lawyer at the centre of the case was a member of their country's national bar association.

While the [controversial](#) ECJ judgment is discussed in Le Mire's paper, the case is not central to the issue she wishes to discuss. Instead, Le Mire goes back to first principles: in her introduction, she briefly discusses the pros and cons for companies employing independent in-house counsel – what are the specific challenges those lawyers face? what are their advantages? Here, Le Mire cites [Lewis A Kornhauser](#) when she argues that that “independence is not a goal in itself, but a pathway to another goal, such as credibility, or breadth of knowledge”.

Importantly, this topic is not a matter of idle academic curiosity. Rather, as Le Mire illustrates, the question of whether an in-house counsel has, in fact, behaved “independently” of their employer tends to form an important part of the judges' decision-making processes in specific cases (the [Akzo Nobel](#) judgment being just one of four cases discussed in this paper). As Le Mire also illustrates, the fact that different courts in different jurisdictions have assessed in-house lawyer independence (or lack of) using different criteria means there is a lack of commonality in different jurisdictions. Yet, because many in-house legal teams routinely operate on a cross-border basis, courts' inabilities to assess the independence of in-house lawyers in a globally-consistent way is, arguably, unhelpful.

Just as importantly, as Le Mire points out, inconsistencies appear between what factors different courts will consider, when evaluating whether an in-house lawyer has behaved independently, when compared with their private practice equivalents. In light of this inconsistency, it is perhaps not surprising that Le Mire has included one test case for assessing independence: “that could be equally informative regardless of the employment situation of the lawyers concerned.”

After providing illustrative examples of apparent failures of in-house lawyer independence during an early part of her report, Le Mire sets out several different concepts of independence: capacity, status, power and relational. Briefly, these concepts can be described thus: *Capacity* essentially means the “ability to engage in independent judgment”; *Status* may mean that the opinions of in-house lawyers are listened to, possibly because they are the “conscience of the company”; *Power* appears to relate to in-house lawyers' ability to actively “do” things (or stop things being done) with the company; and *Relational* means that structural barriers are erected to minimize the risk that undesirable external factors may influence a in-house counsel's advice.

Although the concepts of independence that Le Mire provides are useful, I find myself challenging the argument, which is good response to an article. Most importantly, not all theories of independence that Le Mire outlines are consistently defined and explained. For example, the concept of “Capacity”, which she states is the most serious aspect of an in-house counsel's independence is, in fact, developed within the section of the paper headlined “The political concept of

independence” – rather than explicitly signposted in its own right, as are the related concepts, “Status” and “Power”. In a different vein, “Power” is cited as a theory defining in-house independence, in both the explanatory text and summary table – but not then explicitly mentioned in her illustrative court rulings.

Perhaps one of the most challenging conclusions reached by Le Mire is that her most valued concept of independence – capacity – is arguably the most difficult to assure. Ms Le Mire may rightly be critical of courts’ over-reliance on in relational mechanisms as for protecting the independence of lawyers. However, while relational mechanisms may not, in reality, be the panacea for guaranteeing in-house lawyers’ independence that some courts appear to consider they are, they at least have the value of providing clarity and predictability. By contrast it would, perhaps, be inevitable that any case relating to the independence of in-house lawyer that was determined by capacity alone would be wholly-facts specific. Justice in individual cases may well be served by such a development. Legal certainly would not.

In light of this, it is perhaps therefore not surprising that Le Mire is in favor of a combined approach for ensuring the independence of in-house lawyers. She advocates that the most important factor for assessing independence should be capacity, but this should then be supported by other factors such, such as relational, status or power considerations.

Of course, if the courts were, globally, to adopt Ms Le Mire’s approach to assessing the independence of corporate counsel, there would still be a degree of uncertainty of about whether in-house lawyers had behaved independently in specific scenarios. However, if courts could agree to use the same considerations, around the world, then at least in-house lawyers in many countries would, for the first time, enjoy the possibility of potentially being recognized as being “independent” by their own courts. And that development would, on a global basis, probably represent progress for many in-house lawyers, when compared with their status today.

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