

Association Européenne des Juristes d'Entreprise

EUROPEAN COMPANY LAWYERS ASSOCIATION

Confédération
d'associations nationales

Confederation
of national associations



Internet: www.ecla.org

September 2007

The

IN-HOUSE COUNSEL

Newsletter to the member associations of ECLA

ECLA AND LAW EUROPE SIGN LONGTERM SPONSORING AGREEMENT

ECLA and Law Europe have signed a three-year Sponsoring Agreement. The agreement was signed on September 1, 2007 and expires in 2010. Law Europe has the right to exit the Sponsorship agreement after the first year and one half.

“It is very pleasing that we now have come to a mutually acceptable and rewarding agreement” says Bengt Gustafson, President of ECLA. Both Law Europe and ECLA are determined to make this Sponsorship a success and for both parties to benefit from the Sponsorship arrangement.

Law Europe will provide revenues to ECLA which will be used for the development of ECLA to the benefit of all ECLA members. The first part of the sponsoring money will be paid in the fall of 2007.

Law Europe has been invited to the upcoming ECLA board meeting in Dublin on November 16, 2007 and all ECLA members will have a chance to meet and discuss with Law Europe various events in which Law Europe could participate.

Law Europe name will appear on ECLA's website as “ ECLA Sponsor” and there will be a link to Law Europe's web site from the ECLA web site.

“I would like to emphasise that the expertise and experience that exists in Law Europe and which is now available to ECLA member organisations - as participants or organisers of seminars, conferences, evening gatherings and other events - will all benefit our member associations,” concludes Bengt Gustafson.

ASSOCIATION OF COMPANY LAWYERS OF CROATIA NEW MEMBER

At the next meeting of the Board in Dublin the Association of Company Lawyers of Croatia shall be voted to become the 18th Member of ECLA. This association participated as observer at the Board meeting in Berlin of November 2006 and on June 1 2007 has been registered by the Croatian authorities. Even though a young association it has already 100 members.

IDI –INTERNATIONAL DISTRIBUTION INSTITUTE AND ECLA AGREE TO COOPERATE

IDI, International Distribution Institute and ECLA have signed a three year cooperation agreement. IDI, an association established in 2004, offers specialized services in the fields of international distribution law and practise, to the members.

More information is now on ECLA's website and on IDI www.idiproject.com The individual members of the member associations of ECLA shall have the right to become members of IDI with a 20% discount on the official fee, as well as to participate to the annual conference with the same discount on the fee for IDI's members.

Representatives of IDI shall make a presentation at the forthcoming Board meeting in Dublin.

THE THIRD "FORUM FOR IN-HOUSE LAWYERS" CONFERENCE IN BRUSSELS, 24-25 APRIL 2008

The second "Forum for In-house Counsel, which was held in Brussels on 10-11 May, was attended by 46 persons coming from 16 different European countries and 80% among them where In-house Counsels, compared to only 20% in the 2006 edition.

Academy of European Law (ERA) and ECLA shall organize the third "Forum for In-house Counsel" conference in Brussels on 24-25 April 2008. The program shall soon be finalized with the contribution of ECLA. The program of the 2008 conference, as in the previous editions, should focus on European Competition Law, European Company Law and European Private Law, depending on the novelties relevant for the In-house Counsel. The conference will have speakers from the academic world, law firms and In-

house Counsels. The 2008 conference shall be held in English, French and German. Information on the conference shall soon be found on the ECLA website www.ECLA.org.

ECLA PRESIDENT INVITED TO THE BAR ASSOCIATION IN PORTUGAL TO INFORM ABOUT ECLA

Following an invitation by the Portuguese Bar Association Bengt Gustafson, ECLA President, held a speech to more than 300 members of the Portuguese Bar at their Conference for In-house Counsel in Portugal. Bengt Gustafson was invited to the conference to inform about ECLA and its many activities. "The conference was very well organised and covered many areas of interest to In-house counsel and the attraction of the conference was well shown by the high number of participants", said Bengt Gustafson.

The In-house Counsels' Chapter of the Portuguese Bar Association is particularly interested in ECLA's work for legal privilege said Joao Lourenco chairman and President of the Chapter.

"Portugal is presently not a member of ECLA but ECLA would certainly like to see the In-house counsels Chapter of the Portuguese Bar Association a member of ECLA ", says Bengt Gustafson.

The President of the Chapter has been invited to the ECLA Board of Directors meeting in Dublin on November 16, 2007.

UNIDROIT AND ECLA COOPERATION

UNIDROIT and ECLA have agreed to cooperate in a project aiming at revising the "Unidroit Principles of International Commercial Contracts" (UPICC). Francesco Benigni, who has

been appointed ECLA's representative with UNIDROIT, was introduced by Prof. Joachim Bonell, the chairman of the UNIDROIT working group for the revision of the UPICC, to the members of the working group on the occasion of the second meeting held in Rome in the first week of June.

The next meeting shall be held in Rome from 26 to 30 of May 2008, but the first draft for ECLA's comment should be prepared at the following meeting of the working group of May-June 2009. The members of ECLA shall then be requested to form a working group among their individual members who shall prepare comments to be sent to UNIDROIT. The UNIDROIT target is to complete the revision of the UPICC in 2010. Any information can be requested from Francesco Benigni, ECLA's Secretary General.

LEGAL PRIVILEGE – THE COURT OF FIRST INSTANCE DECISION ON SEPTEMBER 17, 2007

Good and bad news from Luxembourg
After 25 years, the Court of First Instance ("CFI") has extensively addressed the position of in house counsel in the landmark case of AKZO vs the Commission. In its 45-page decision the CFI gave clarity about what the Commission can do in a situation where access to documents is denied by companies in case of dawn raids. Until now the Commission could ask to take a cursory look at such documents and then decide whether such documents are privileged or not.

In the future, this will be different; it is the CFI that will decide whether a document is privileged or not. Therefore the battleground on this issue has been moved from the hectic situation of a dawn raid to the more quiet atmosphere of the Luxembourg court. Parties can better prepare for such disputes and companies are now

well served by the clear guidance given by the court. There are serious downsides to this clarity however and it is too early to cry victory here. Companies are only safe when they follow strict rules and, here is the sticky part, when they prepare documents for communication with outside counsel for defence purposes only. This means far greater involvement of outside counsel where such involvement is not required based on specific expertise. Compliance audits can very well be undertaken by in house counsel. The now required involvement of outside counsel means a higher cost of doing business without reasonable justification.

Companies which see their legal costs rising, now have other reasons to see these costs increase.

The real bad news comes from the opportunity the CFI missed here to overturn the 25-year-old AM&S decision in which the (now) Court of Appeal held that legal privilege is only for outside counsel who are not bound by a relationship of employment.

Although it would be uncommon for the lower court (the CFI) to overturn a decision of the higher court, little was done to give the higher court the building bricks for a fresh look at the extended role of the in house counsel. One of the arguments the court used was that a minority of Member States does not have a developed system Legal Professional Privilege ("LPP") for in-house counsel. This is caused to a large extent by the fact that none of the new Member States that joined the EU since 1982 have addressed LPP in their respective legislations. In view of the centrally organized economies of the majority of these countries, this is not at all surprising. Looking at the pre 1982 Member States however, one sees that the number of countries where LLP is specifically addressed, has grown, e.g.

Belgium has new laws and in The Netherlands has introduced the so-called Cohen advocaat, an in house counsel who is a member of the bar. Instead of taking into account the sophistication of the various legislations the CFI had more attention of the sheer numbers of countries where LPP is accepted and where not. The real sad part of this decision is that the CFI in line with the Commission apparently does not realize that the European in-house counsel is the ally of the Commission in the roll out of the application of competition law in Europe. Ten thousands of (unpaid) allies who can be a true help in making managers aware where the boundaries are of what is permitted and what is not.

Of course there may be a small number of rotten apples who short-sightedly act against the law, however it is my opinion that by far the majority of in house counsel can and will act as show stoppers of illegal behaviour in view of long term best interests of their companies. A message that has long been understood by the US Department of Justice, realizing that their own staff by far is not sizeable enough to police all possible anti trust violations. It is much more effective to attribute that role to the in house counsel. A role he/she can only play when the in-house counsel gets the right tools by the Court of Appeal rescinding the AKZO and AM&S decisions.

ECLA will be active in addressing this issue in Luxembourg and Brussels as it has over 25 years.

ECLA is Europe's leading association of in-house counsel in Europe. ECLA represents more than 22.000 individual in-house counsels and is represented in seventeen European countries

VOXIUS IMPLEMENT ECLA CAREER CORNER

As a new benefit for ECLA members, the ECLA website now features the career corner. Vacancies can be placed at reduced rates for companies with members. Individuals have access to a new source of Europe wide vacancies. The website is regularly updated by ECLA sponsor Amsterdam based Voxius, a recruiting firm for the legal profession, which is part of the global Vedior concern. For more information see www.ecla.org

EVERSHEDS

Eversheds is offering seven free publications to ECLA members. To view the list of titles and for instructions on how to order, please click on the "books and literature" link on the navigation bar of the website.

NEXT MEETING IN DUBLIN ON NOVEMBER 16, 2007

The next ECLA Board of Directors meeting shall be held in Dublin on November 16, 2007 at the premises of the Law Society of Ireland.

For the Executive Board

Bengt Gustafson
President