



*Research and Documentation
Directorate*

RESEARCH NOTE

Scope of the requirement of independence of lawyers

[...]

Subject: Study on the national rules relating to the requirement of independence of lawyers

[...]

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[...]

SUMMARY

1. This research note covers 11 national legal systems, namely the laws of **Austria, Germany, Denmark, Spain, France, Italy, Ireland, Latvia, the Netherlands, Poland** and the **United Kingdom**,¹ and concerns the national rules relating to the requirement of independence of lawyers in the exercise of their profession.
2. It should be noted at the outset that the principle of independence of lawyers is provided for in the legislation of most of the legal systems studied² and is often also laid down in a code of professional conduct.³

¹ [...]

² **Germany:** Articles 1 and 3(1) of the Bundesrechtsanwaltsordnung (Federal Lawyers' Act; 'the BRAO').

Austria: Articles 9(1) and 33(1) of the Rechtsanwaltsordnung (Lawyers' Code; 'the RAO').

Denmark: Article 122(2) of the Retsplejeloven (Code of Procedure).

Spain: Article 542 of the Ley Orgánica 6/1985 del Poder Judicial (Organic Law No 6/1985 on the judiciary) of 1 July 1985; Article 1 of Real Decreto 658/2001 por el que se aprueba el Estatuto General de la Abogacía Española (Royal Decree No 658/2001 approving the general rules of the Spanish legal profession) of 22 June 2001 ('the General rules of the legal profession').

France: Article 1(I), paragraph 3, of loi n° 71-1130, portant réforme de certaines professions judiciaires et juridiques (Law No 71-1130 reforming certain judicial and legal professions) of 31 December 1971; see also Articles 2 and 3 of décret No 2005-790, relatif aux règles de déontologie de la profession d'avocat (Decree No 2005-790 on the rules of conduct governing the legal profession) of 12 July 2005.

Italy: Article 3 of legge n° 247, Nuova disciplina dell'ordinamento della professione forense (Law No 247 laying down new rules for the organisation of the legal profession) of 31 December 2012 ('the Law on the organisation of the legal profession').

Latvia: Articles 3 and 6 of the Latvijas Republikas Advokatūras likums (Law on Lawyers).

Netherlands: Article 10a(1)(a) of the Advocatenwet (Law relating to Lawyers).

United Kingdom: Articles 1(3) and 188 of the Legal Services Act 2007.

³ **Austria:** Article 1(1) of the Richtlinien für die Ausübung des Rechtsanwaltsberufes 2015 (Guidelines on the performance of the profession of lawyer 2015; 'the RL-BA').

Denmark: paragraph 1 of the Advokatetiske regler (Code of ethics for lawyers).

Spain: Article 2 of the Código Deontológico (Code of deontology).

France: Articles 1.1 and 6.1, paragraph 4, of the Règlement intérieur national de la profession d'avocat (National rules of procedure for the legal profession; 'the RIN').

Italy: Article 9(1) of the Codice deontologico (Code of deontology).

Ireland: for barristers: Articles 1.1 and 2.5 of the Code of Conduct for the Bar of Ireland ('the Code of Conduct'); for solicitors: Article 1.3 of the Rules of Professional Conduct.

Latvia: paragraph 2.1 of the Latvijas Zvērinātu advokātu Ētikas kodekss (Code of deontology).

3. Furthermore, it should be noted that the Council of Bars and Law Societies of Europe (CCBE)⁴ adopted a Code of Conduct for European Lawyers in 1988, which is intended to be binding in the context of cross-border activities and lays down rules on the requirement of independence of lawyers,⁵ the avoidance of conflicts of interest that could impair that independence,⁶ and the possibility of defining occupations that are incompatible with the profession. The CCBE adopted a Charter of Core Principles of the European Legal Profession in 2006, which include independence and avoidance of conflicts of interest.⁷
4. It is therefore clear that, in all the legal orders analysed, the principle of the independence of lawyers is regarded as an essential principle of the profession. However, that principle is not expressed in the same way from one Member State to another. In that regard, the purpose of this research note is to determine whether, in situations where national law provides for the compulsory representation of a party by a lawyer, it also lays down additional conditions alongside the requirement to have been admitted to a bar association or law society, and in particular the absence of any link between the lawyer and the client (other than the contractual link concerning the representation itself). If so, the question arises as to which entity monitors compliance with those conditions and what are the consequences of non-compliance. In order to answer these various questions, after two brief introductory remarks (Part I.), this note will review the limitations imposed by the Member States on the exercise of the

Poland: Article 7 of the Kodeks Etyki Adwokackiej (Code of ethics for advocates); Article 7(1) and (2) of the Kodeks Etyki Radcy Prawnego (Code of ethics for legal counsels).

United Kingdom: Rule rC3 of the Bar Standards Board Handbook ('the BSB Handbook'); Principle 3 of the Solicitors Regulation Authority Handbook ('the SRA Handbook').

- ⁴ The Council of Bars and Law Societies of Europe (CCBE), founded in 1960, is an international association made up of the bars and law societies of 45 countries from the European Union, the European Economic Area, and wider Europe. The CCBE is recognised as the voice of the European legal profession (<https://www.ccbe.eu>).
- ⁵ See Article 2.1, 'Independence'. This article states, in particular, that 'the many duties to which a lawyer is subject require the lawyer's absolute independence, free from all other influence, especially such as may arise from his or her personal interests or external pressure. [...]'
- ⁶ See Article 2.5, 'Incompatible Occupations', and Article 3.2, 'Conflict of Interest'.
- ⁷ See Principles (a), 'the independence of the lawyer, and the freedom of the lawyer to pursue the client's case', and (c), 'avoidance of conflicts of interest, whether between different clients or between the client and the lawyer'.

profession of lawyer (Part II.) and will then analyse the consequences of a failure to observe those limitations (Part III.).

I. INTRODUCTORY REMARKS

5. First of all, two preliminary clarifications should be made, first, concerning the existence of a number of professions for legal representatives in certain Member States (Part A.) and, second, concerning compulsory representation (Part B.).

A. DIFFERENT PROFESSIONS FOR LEGAL REPRESENTATIVES

6. In common law systems, which include the legal orders of **Ireland** and the **United Kingdom**, the profession of lawyer is divided into two groups: barristers and solicitors. For some years now, solicitors have been permitted to represent clients before the courts⁸ whereas traditionally only barristers had the authority to do so.
7. Moreover, in **Poland**, there are two types of legal representatives, namely advocates (*adwokaci*) and legal counsels (*radcowie prawni*). Following the 2015 reform, the status of these two regulated professions was harmonised and representation may still be provided by a legal counsel. The main difference that remains concerns the modes of practice of the profession, which are more diversified for legal counsels.

B. COMPULSORY REPRESENTATION

8. As indicated above, this research note focuses on situations where legal representation is compulsory. However, while this tends to be the rule in **Germany, Spain, France** (except in criminal cases, with some exceptions) and **Italy**, it is not the case in other legal orders. In **Austria, the Netherlands and Poland**, situations involving compulsory representation are more limited.⁹ In the **Danish, Irish, Latvian and United Kingdom**

⁸ However, in the **United Kingdom**, while solicitors may represent clients before any court of first instance in civil proceedings, they must obtain an additional qualification to be able to represent clients in criminal matters or before higher civil courts (Article 19 of the Solicitors Act 1974).

⁹ Representation is only compulsory: in **Austria**, in civil proceedings (except for small claims), in certain cases in criminal proceedings and before the supreme courts; in the **Netherlands**, in civil cases (except for small claims); in **Poland**, before the Sąd Najwyższy (Supreme Court) (in administrative and civil proceedings), and in criminal proceedings in certain cases.

legal systems, this is even an exception,¹⁰ which diminishes the value of this analysis.

9. Furthermore, it should be noted that even where representation is generally compulsory, some Member States, such as **Spain**¹¹ and **Poland**,¹² make room for cases in which the parties may represent themselves or in which representation may be provided by a person other than a lawyer.
10. It should also be added that, in **France**, compulsory representation before the Cour de cassation (Court of Cassation) and the Conseil d'état (Council of State) (supreme courts) must be provided by specially qualified lawyers admitted to a separate specialised bar association. These lawyers, referred to as 'advocates with a right of audience before the Conseil d'État and the Cour de cassation' or 'avocats aux conseils', therefore form an independent professional order.¹³

II. THE LIMITATIONS ON THE EXERCISE OF THE PROFESSION OF LAWYER

11. After reviewing the general position of the Member States in this respect (Part A.), this note will undertake a more detailed discussion of the limitations on the exercise of the profession of lawyer provided for in the various Member States (Part B.).

A. GENERAL POSITIONS OF THE MEMBER STATES

12. The analysis of national laws shows that there are two types of rules that may limit the

¹⁰ Representation is only compulsory: in **Denmark**, if the court so requires and, furthermore, in certain specific cases (Article 259 of the Code of Procedure provides that representation by a lawyer is not compulsory in principle); in **Ireland**, in criminal proceedings and for the representation of legal persons; in **Latvia**, in certain cases in criminal proceedings; in the **United Kingdom**, in criminal proceedings.

¹¹ Lawyers who are civil servants or have employment contracts with the public administration may act on behalf of public authorities and government agencies (Article 544(2) of the Organic Law on the Judiciary, Spain). For example, according to the case-law a university can be represented in court by its head of legal services or by a professor who is a civil servant.

Furthermore, lawyers may represent themselves or their relatives without having to be admitted to the bar association or law society. A one-off authorisation is sufficient (Article 17(5) of the General rules of the legal profession, Spain). The same applies to civil servants on personnel matters.

¹² In **Poland**, the rules on compulsory representation do not apply if the party, by virtue of status, has legal expertise (a limited list of persons has been established and includes, in particular, judges, notaries, professors and PhDs certified in law, advocates and legal counsels). In addition, representation may be provided in industrial property cases by patent agents and, in tax cases, by tax advisers.

¹³ While they have their own code of conduct, it also lays down independence requirements (General Rules of Conduct of 2 December 2010, Principles 1, 2 and 6 to 12). The remainder of this summary does not focus on these lawyers.

exercise of the profession of lawyer, in order to guarantee his or her independence: rules on incompatible occupations and rules relating to the avoidance of conflicts of interest.

13. First, the rules on incompatible occupations make it impossible to combine the profession of lawyer with certain other professions, roles or activities. These rules generally prevent a lawyer from being admitted to the bar association or law society (where the incompatibility occurs before admission) or from continuing to be able to practise (where the incompatibility occurs after admission). Thus, incompatible occupations affect the very exercise of the profession of lawyer, as a whole, and not legal representation in a specific case.

14. In terms of how these incompatible occupations appear in the legal orders studied, first of all, the majority of Member States provide for both specific incompatible occupations, as detailed below (see Part B.1.), and a general rule, whereby the profession of lawyer is not compatible with any activities that could impair the independence of the lawyer or the dignity of the legal profession, although these prohibited activities are not determined by national law (**Austria**,¹⁴ **Denmark**,¹⁵ **Spain**,¹⁶ **Italy**,¹⁷ **Latvia**¹⁸ and **Poland** with regard to lawyers¹⁹). These activities are then assessed *in concreto*. Next, **Germany** has only a general, indeterminate rule,²⁰

¹⁴ Under the general rule, laid down residually in Article 20(c) of the RAO (Austria), the profession of lawyer is not compatible with ‘any other activity that is contrary to the reputation of the profession of lawyer’.

¹⁵ Under the general rule, laid down in Article 126 of the Code of Procedure (Denmark), a lawyer must behave in a manner consistent with ‘good practice’ in the exercise of the profession. Furthermore, he or she must not behave in a manner unworthy of a lawyer in the context of economic activities outside his or her profession.

¹⁶ The general rule is laid down in Article 21 et seq. of the General rules of the legal profession and in Article 2 of the Code of deontology (Spain).

¹⁷ The general rule is laid down in Article 6(2) of the Code of deontology (Italy).

¹⁸ The general rule, laid down in Article 15(10), of the Law on Lawyers (Latvia), states that ‘a person cannot be admitted as a lawyer if his or her professional activity is recognised by the lawyers’ council as incompatible with the status of a lawyer, due to ethical considerations’.

¹⁹ The general rule, laid down in Article 9 of the Code of ethics for advocates (Poland), states that lawyers are not permitted to combine activities where: ‘(a) they would undermine the dignity of the profession, (b) they would limit the independence of the lawyer, (c) they would diminish public confidence in the bar’.

²⁰ Under Article 7(8) of the BRAO (Germany), ‘a person may not be admitted to the law society if he or she carries out an activity that is not compatible with the exercise of the profession of lawyer and with the dignity of the profession’.

while **France**, conversely, only has rules expressly identifying prohibited incompatible occupations. However, these rules may, in themselves, be very general since there is, in particular, a fundamental incompatibility with the exercise of any other profession.²¹ Lastly, it seems that **Ireland**, the **Netherlands** and the **United Kingdom** do not identify any incompatible occupations *stricto sensu*.

15. Second, the rules on conflicts of interest are aimed at avoiding, in particular, situations where the professional assignment entrusted to a lawyer comes into conflict with his or her own interest, such that the lawyer's independence is impaired. The conflict of interest may be objective (based on family or economic relationships) or subjective (based on a friendship or a disagreement).²² Thus, unlike those governing incompatible occupations, the rules on conflicts of interest do not affect the exercise of the profession as a whole but will, in practice, restrict the possibility of a lawyer taking on a case in specific circumstances. In some cases the conflict of interest situation may not be relevant, if the lawyer has informed the parties and the parties do not mind (**Spain**, **France** subject to written agreement,²³ **Poland** for legal counsels²⁴). It is also interesting to note that an obstacle to the representation of a party due to a conflict of interest concerning one lawyer may apply to all the other lawyers in the same firm.²⁵
16. Rules on the avoidance of conflicts of interest exist in all of the legal orders studied and are most often general, thus leaving room for an *in concreto* assessment of problematic situations. However, certain of these rules, while remaining generic, identify the nature of the relationship that could generate a conflict of interest, such as an economic link between the lawyer and the client (**Danish**,²⁶ **Irish** and **United Kingdom**²⁷ law). In

²¹ Article 115(1) of décret No 91-1197, organisant la profession d'avocat (Decree No 91-1197 organising the legal profession) of 27 November 1991 (France).

²² See the definition provided in: Cornu, G., *Vocabulaire juridique*, PUF, 10th Edition, p. 234.

²³ Article 7, paragraph 2, of the décret relatif aux règles de déontologie de la profession d'avocat (Decree on the rules of conduct governing the legal profession) and Article 4.1 of the RIN (France).

²⁴ Article 29(2) of the Code of ethics for legal counsels (Poland).

²⁵ This is specifically the case in **France** (see Article 4.1 of the RIN and Notice No 2013-012 of the conseil national des barreaux (the French National Bar Council) of 25 April 2013).

²⁶ The rules of ethics adopted by the lawyers' council (Denmark) (*Advokatrådet*), which help to define the concept of 'good practice' in Article 126 of the Code of Procedure, include the following rule: 'a lawyer must not represent a client in situations where there is a conflict of interest or an imminent risk of conflict of interest. Such situations exist where: [...] a lawyer has commercial or other links or contractual links with the client such that there is a risk that the lawyer will not be able to provide advice to the client without being influenced by considerations that are not relevant' (Rule 12.2., paragraph 5).

addition to these generic rules, national legislation or the code of professional conduct may expressly lay down specific restrictions on representation, which are then clearly binding on lawyers (see Part B.2.).

17. In view of the various existing national rules on incompatible occupations, conflicts of interest and other restrictions, it is possible to identify several categories among the Member States studied, based on the degree to which the profession is regulated. Thus, **France** and **Italy** can be considered as imposing the most limitations on the exercise of the profession of lawyer, whereas **Germany**, **Ireland**, the **Netherlands** and the **United Kingdom** seem to be the most liberal. Furthermore, it is interesting to note that the logic of the national legislation is sometimes the opposite from one Member State to another. For example, in **France**, as stated above, there is a fundamental incompatibility with the exercise of any other profession (subject to special provisions) whereas, conversely, in **Germany** and **Latvia**, even though exceptions exist, the general principle is that the exercise of another profession or activity is permitted.²⁸

B. DETAILED PRESENTATION OF THE LIMITATIONS

18. It is necessary to provide a more detailed examination of both the occupations incompatible with the profession of lawyer, which form an obstacle to the exercise of the profession in general (1.), and the conflicts of interest and specific restrictions, which prevent representation in specific cases (2.). This presentation is not intended to be exhaustive but, rather, to provide an overview of the issue, based on the categories of activities identified in most Member States.

1. OCCUPATIONS INCOMPATIBLE WITH THE PROFESSION OF LAWYER

a) SALARIED EMPLOYMENT

19. The exercise of salaried employment is strictly incompatible with the profession of

²⁷ Unlike most of the national legal frameworks studied, in **Ireland** and the **United Kingdom** the rules on conflicts of interest are very detailed. In particular, they mention several situations relating to economic links, which are set out below in Part B.2. under (b), entitled ‘Other limitations on representing a party’.

²⁸ Thus, according to the Bundesverfassungsgericht (Federal Constitutional Court, Germany), it follows from the fundamental right to free exercise of a profession (Article 12 of the Grundgesetz (Basic Law)) that a person may exercise more than one profession (*doppel-oder Zweitberufstheorie*). In **Latvia**, it follows from paragraph 2.1 of the Code of deontology that a lawyer theoretically has the right to choose to carry out another economic, political, creative or other activity in addition to his or her profession of lawyer.

lawyer in **Austria**,²⁹ **France**,³⁰ **Italy**³¹ and **Poland** (for advocates³²). Nevertheless, in **Austria** and **France**,³³ a lawyer may be an employee of another lawyer or of an association or a firm the purpose of which is the practice of the legal profession.

20. Moreover, in **Latvia**, according to a decision by the council of the lawyers' association (*Latvijas Zvērinātu advokātu padome*), while a lawyer may be in salaried employment, such employment must not be with a company, association or foundation involved in activity related to the legal profession. In addition, if a lawyer is employed as a salaried lawyer (in a company, association or foundation offering other types of services or products), that person must then suspend his or her activities as a lawyer during that time.³⁴
21. Conversely, in **Germany**, **Denmark**, **Spain**, **Ireland** (for both solicitors and barristers), the **Netherlands**, **Poland** (solely for legal counsels³⁵) and the **United Kingdom** (for both solicitors and barristers³⁶), a lawyer may be in salaried employment, in particular within a company. On this point, in **Germany**³⁷ and the **Netherlands**,³⁸ the situations in which a lawyer may be in paid employment are listed exhaustively by law but in practice cover a very wide variety of circumstances.

²⁹ Article 21g of the RAO (Austria).

³⁰ In **France**, this incompatibility follows from the general rule prohibiting the exercise of any other profession. However, it should be noted that the status of salaried lawyer has been the subject of numerous proposals for reform, even recently, but none has so far been successful.

³¹ Article 18 of the Law on the organisation of the legal profession (Italy).

³² Article 4b(1)(1) of the Ustawa Prawo o adwokaturze of 26 May 1982 (Law on the bar, Poland).

³³ Article 7 of the Law reforming certain judicial and legal professions and Article 14.1 of the RIN (France). Salaried collaboration is a mode of professional practice in which there is an employer-employee relationship solely for the determination of working conditions, and the independence of the lawyer is therefore considered to be preserved.

³⁴ Respectively, paragraphs 4.1, 4.2 and 5 of Decision No 190 by the lawyers' council (*Latvijas Zvērinātu advokātu padome*, Latvia) of 17 October 2017.

³⁵ Article 8(1) of the Ustawa o Radcach Prawnych of 6 July 1982 (Law on legal counsels, Poland).

³⁶ In the **United Kingdom**, barristers are classified as one of three types: those who are self-employed, those who are employed and those who are unregistered, who provide legal services but do not have a practising certificate. They do not all have the same powers before the courts.

³⁷ Articles 46(1) to (5) and 46a of the BRAO (Germany). For example, a lawyer may practise with the status of a lawyer of another lawyer or as a *Syndikusrechtsanwalt* (salaried in-house counsel). It should also be noted that it is not impossible for a lawyer to be also in salaried employment that is completely separate from his or her profession as a lawyer.

³⁸ Article 5.9 of the Besluit van het college van afgevaardigden van 4 december 2014 tot vaststelling van de verordening op de advocatuur (Verordening op de advocatuur) (Regulation on the profession of lawyer, Netherlands).

b) SELF-EMPLOYED ACTIVITIES AND CONTRACTS UNDER CIVIL LAW

22. The exercise of a self-employed activity is prohibited in **Italy**, except for activities of a scientific, literary, artistic or cultural nature.³⁹ In **France**, this prohibition derives from the rule that there is a fundamental incompatibility with any other profession. Similarly, in **France** and **Italy**, a lawyer may not be bound by a contract for the provision of services to the party he or she is deemed to represent, except in cases expressly provided for.⁴⁰
23. However, in the other Member States analysed, it seems that lawyers may conclude contracts for the provision of services. This is the case, in particular, in **Austria**⁴¹ and **Poland** (for advocates⁴²), provided that such a contract is not intended to replace an employment contract, which is prohibited.

c) ACTIVITIES RELATED TO PUBLIC SERVICE AND POLITICAL OFFICE

24. In **Austria**,⁴³ **Denmark**,⁴⁴ **France**⁴⁵ and **Latvia**,⁴⁶ the profession of lawyer is not compatible with public employment. It is also clear from **German**⁴⁷ case-law that such employment could potentially pose an obstacle to the exercise of the profession of lawyer if the independence of the lawyer concerned could no longer be guaranteed

³⁹ Article 18 of the Law on the organisation of the legal profession (Italy).

⁴⁰ In **France**, a lawyer may act, inter alia, on an occasional or ancillary basis, as a portfolio or property management agent, an agent in property transactions, or even as a sports agent or insurance broker (Article 6.3 of the RIN). The exercise of activities of a commercial nature remains civil as long as they are exercised on an occasional or ancillary basis within the framework of the activities of a lawyer who has been retained in civil matters.

⁴¹ See, for an example of a freelance contract (*freier Dienstvertrag*), Oberster Gerichtshof (Supreme Court, Austria), judgment No 8 Ob A 264/95 of 13 July 1995.

⁴² Clearly there are no restrictions for legal counsels in this respect either, as they are able to exercise their profession much more freely.

⁴³ Article 20(a) of the RAO (Austria).

⁴⁴ Article 122(2) of the Code of Procedure (Denmark). In addition, there is an express provision of incompatibility with certain justice-related positions, namely a legal post in a court, in the prosecution service or in the police (Article 122(1) of that code).

⁴⁵ In France, this prohibition is derived from the rule prohibiting the exercise of any other profession.

⁴⁶ Article 15(11) of the Law on Lawyers (Latvia).

⁴⁷ See, for example, Bundesverfassungsgericht (Federal Constitutional Court, Germany), decision 1 BvR 2912/11 of 23 August 2013 (BVerfGE 87, 287); Bundesgerichtshof (Federal Court of Justice, Germany), decision AnwZ (B) 43/86 of 23 February 1987 (BGH NJW 1987, 3011).

because of his or her links with the State. The compatibility of the occupation is therefore assessed *in concreto*. Furthermore, in **Spain**, the profession is not compatible with the status of civil servant, in the cases provided for by law.⁴⁸

25. However, there is an exception to the rules described above for teachers⁴⁹ (**Austria**, **France** and **Latvia**), contractual jurists (**Latvia**⁵⁰), certain justice-related posts or offices (**Denmark**⁵¹ and **France**⁵²) and the exercise of certain political offices (**Austria**,⁵³ **France**⁵⁴ and **Latvia**⁵⁵). Furthermore, in **Denmark**, the Minister for Justice may grant an exemption for a lawyer to take up a position in the public service that would otherwise be prohibited. It should also be noted that in **Italy** the law provides, as an exception to the prohibition on salaried employment, that a lawyer may have an employment contract with a public administration.⁵⁶ In this case, the lawyer concerned is entered on a special register.

d) TEACHING ACTIVITIES

26. It is interesting to note that, as an exception to certain rules governing incompatible occupations, several legal systems permit lawyers to undertake teaching activities alongside their activities in the legal profession (**Austria**, **Italy** subject to authorisation from the head of the institution or within the limits imposed by the university, **France**,

⁴⁸ Article 21 et seq. of the General rules of the legal profession (Spain).

⁴⁹ This exception is discussed in more detail below. See paragraph (d) of this section, entitled ‘Teaching activities’.

⁵⁰ Article 15(11) of the Law on Lawyers (Latvia).

⁵¹ Under Article 106 of the Code of Procedure (Denmark), a lawyer may be an assistant prosecutor or authorised to act as a prosecutor.

⁵² The profession of lawyer is compatible, in particular, with the posts of deputy district court judge, industrial tribunal member or even arbitrator (Articles 115, paragraph 2, of the décret organisant la profession d’avocat (Decree organising the legal profession) and 6.3 of the RIN, France).

⁵³ This is not valid for the most important political offices.

⁵⁴ This is valid for lawyers employed on the staff of members of the French Parliament or as assistants to senators, and for the posts of MEP, member of the French Parliament, senator, member of regional, departmental and municipal councils and mayor (Articles 115, paragraph 2, to 122-1 of the Decree organising the legal profession, France). Conversely, a member of the French Parliament may not start exercising the profession of lawyer unless it was his or her profession before the term of office began or continue exercising that profession if he or she started in that profession in the year before the term of office began (Article LO146-1 of the code électoral (Electoral Code)).

⁵⁵ This relates solely to the post of municipal councillor (see lawyers’ council, Latvia, Decision of 17 October 2017, paragraph 6).

⁵⁶ Article 23 of the Law on the organisation of the legal profession (Italy).

Latvia, Poland for advocates).⁵⁷ For **Austria** and **Poland**, this relates solely to teaching activities at university level.

e) COMMERCIAL ACTIVITIES AND POSITIONS WITHIN COMPANIES

27. First, the profession of lawyer is generally incompatible with activities of a commercial nature in **France**,⁵⁸ **Italy**⁵⁹ and, solely for certain activities, **Spain**⁶⁰ and **Poland** (for advocates⁶¹). Furthermore, in **Germany**, the case-law establishes that, following an assessment *in concreto*, the exercise of the activities of insurance and financial services broker or a position as an investment and wealth management adviser in a banking institution may represent an obstacle to registration with the bar association or law society.⁶²
28. Second, the profession of lawyer may also be incompatible with the performance of certain roles within companies, in particular executive roles conferring commercial status or partnership roles involving liability beyond financial contributions (**Italy**,⁶³

⁵⁷ In **Austria**, under Article 20(a) of the RAO.

In **France**, under Article 115, paragraph 2, of the Decree organising the legal profession. Furthermore, the subject taught and the status (salaried employee, civil servant, self-employed) are not relevant. However, for civil servants, the administration has its own rules on incompatible occupations, which involve legal teaching.

In **Italy**, under Article 19 of the Law on the organisation of the legal profession.

In **Latvia**, under Article 15(11) of the Law on Lawyers.

In **Poland**, under Articles 107 and 108 of the Prawo o szkolnictwie wyższym of 27 July 2005 (Law on higher education).

⁵⁸ With the exception, since 2016, of the marketing, on an ancillary basis, of goods or services related to the exercise of the profession of lawyer if these goods or services are intended for clients or other members of the profession (Article 111 of the Decree organising the legal profession, France).

⁵⁹ Article 18 of the Law on the organisation of the legal profession (Italy).

⁶⁰ A lawyer may not act, inter alia, as a business agent (*agente de negocios*) or auditor (Article 21 et seq. of the General rules of the legal profession, Spain).

⁶¹ A lawyer may not act as an intermediary in commercial transactions, except in the case of advice on concluding contracts and carrying out commercial and financial activities not related to the practice of the legal profession (Article 9 of the Code of ethics for advocates, Poland).

⁶² See, for example, Bundesgerichtshof (Federal Court of Justice, Germany), decisions of 21 March 2011 (AnwZ (B) 36/10 (BGH NJW-RR 2011, 856)) and of 15 May 2006 (AnwZ (B) 41/05 (BGH NJW 2006, 2488)).

⁶³ Under Article 18 of the Law on the organisation of the legal profession (Italy), a lawyer may not be classified as a partner with unlimited liability, a director of a partnership whose purpose is to carry out a commercial activity, a sole director or deputy officer of a capital company, the chair of a board of directors with individual management powers or a general partner.

France,⁶⁴ **Poland**,⁶⁵ and, to a much lesser extent, **Latvia**⁶⁶). The incompatibility rules laid down do not apply if the purpose of the company is the management of personal or family property (**France** and **Italy**) or the exercise of the profession of lawyer (**France**) or if the company is a public body (**Italy**).

2. RESTRICTIONS ON REPRESENTATION AND CONFLICTS OF INTEREST

a) LIMITATION ON REPRESENTATION FOR SALARIED IN-HOUSE LAWYERS

29. In the Member States where lawyers are permitted to work in-house as salaried employees, two types of restrictions may be imposed in terms of possibilities of representation.
30. First, such lawyers may be prohibited from representing their employers in court. This is the case in **Germany** for in-house lawyers (*Syndikusrechtsanwalt*), in the vast majority of legal proceedings.⁶⁷ This is also currently the case in **Ireland** for salaried barristers.⁶⁸ However, this prohibition can be lifted by an authorisation of the Bar Council. Moreover, the Irish Government voted in 2015 to repeal this prohibition and

⁶⁴ A lawyer may not act as a partner in a general or limited partnership, a manager in a limited liability company, the chair of a board of directors, a member of a management board or a managing director of a public limited company, or a manager of a civil company. Conversely, if he or she is able to demonstrate having had seven years' experience in a regulated legal profession, he or she may serve as a member of the supervisory board of a commercial company or as a company director (Article 6, paragraph 2, of the Law reforming certain judicial and legal professions and Articles 111 and 112 of the Decree organising the legal profession, France).

⁶⁵ A lawyer may not act as an officer in a company, a member of a management board, an agent of a commercial company or a member of a supervisory board delegated to the management board of such a company, unless this is a temporary role to execute a specific and limited client order (Article 9 of the Code of ethics for advocates, Poland).

⁶⁶ A lawyer may not serve as a member of the board of directors or shareholder or be involved in the executive management of a company whose purpose is to provide legal services (lawyers' council, Latvia, Decision of 17 October 2019, paragraph 4.1.).

⁶⁷ Under Article 46c(2) of the BRAO, a *Syndikusrechtsanwalt* may not represent his or her employer, for example, before the Landgericht (Regional Court, Germany), the Oberlandesgericht (Higher Regional Court, Germany) and the Bundesgerichtshof (Federal Court of Justice, Germany) in civil proceedings; before the Landesarbeitsgericht (Higher Labour Court, Germany) and the Bundesarbeitsgericht (Federal Labour Court, Germany); or as defence counsel in criminal proceedings or relating to administrative fines (*Straf-oder Bußgeldverfahren*) against the employer or its employees linked to the company's activities.

⁶⁸ Furthermore, Article 3.15 of the Code of Conduct (Ireland) also lays down certain limitations relating to previous activities: 'Barristers may not accept instructions in any matter with which they have previously been concerned in the course of another profession or occupation or from any firm or company in which they have been [...] engaged in part-time occupation.'

replace it with a new rule permitting barristers to act for their employers,⁶⁹ which is expected to enter into force soon. Conversely, in **Denmark**,⁷⁰ **Spain**,⁷¹ **Ireland** (for solicitors), the **Netherlands**, **Poland** (for legal counsels) and the **United Kingdom** (for barristers and solicitors), a salaried lawyer may represent his or her employer.

31. Second, a salaried lawyer may be prohibited from having a personal clientele and therefore from acting for third parties other than his or her employer, to whom he or she is exclusively bound. Thus, in the **United Kingdom**, barristers and solicitors may provide legal services only to their employer, and to certain persons who have a relationship with that employer (for example, other employees and, for salaried barristers, the employer's clients and, for solicitors, the other entities in which the employer has interests).⁷² Similarly, in the **Netherlands**, salaried lawyers may act only for their employer or, where applicable, for other legal persons within the group to which that employer belongs. Conversely, in **Denmark** and **Spain**, lawyers may also represent third parties when they exercise the profession of lawyer on a self-employed basis alongside their salaried employment. This is also the case in **Germany**, with regard to lawyers who are in salaried employment unrelated to their profession as lawyers.

b) OTHER LIMITATIONS ON REPRESENTATION OF A PARTY

32. Where a lawyer is permitted to engage in other activities alongside his or her profession, national legislation or codes of conduct may, nonetheless, expressly provide for restrictions on the possibilities of representation. In addition, beyond the existing rules, professional bodies are also called upon to rule, *in concreto*, on the existence of conflicts of interest that theoretically prohibit a lawyer from dealing with a case.

⁶⁹ Article 212 of the Legal Services Regulation Act 2015 (United Kingdom). This rule is included in the draft version of the new Code of conduct (Article 1.10).

⁷⁰ This is expressly laid down in Article 260(3)(4) of the Code of Procedure (Denmark).

⁷¹ By way of illustration, we should note a case in which a university was represented by a lawyer working as a lecturer at that university (see Tribunal Supremo (Supreme Court, Spain), judgment No 596/2018 of 30 October 2018, RJ 2018/4735).

⁷² This is imposed, for barristers, by rules rS32, rS36 and rS39 of the BSB Handbook and, for solicitors, by rules 4.4, 4.5 and 4.7 of the SRA Practice Framework Rules 2011 (United Kingdom). However, salaried solicitors and barristers may provide advice and represent a client other than their employer on a pro bono basis (for solicitors, on condition that providing legal services to the public is not part of the employer's activities (*ibid.*, rules 4.10 and 4.11)).

33. First, with regard to restrictions on the exercise by lawyers of certain public or political offices, in **France**, lawyers who were formerly civil servants are prohibited from acting against the administrations to which they belonged for a period of five years from the date on which they left that employment.⁷³ Furthermore, in **Italy**, lawyers employed by public bodies may only act in cases concerning the bodies that employ them.
34. Moreover, in **France**, lawyers holding political office, or linked to a person holding such office (members of the staff of members of parliament or assistants to senators), may not carry out professional acts against the public body to which they are attached, or against the other persons listed (or indeed for persons dealt with in the context of such office, which in practice cannot be verified).⁷⁴ This prohibition is sometimes extended after they have left office. In **Ireland**, the code of professional conduct prohibits barristers from acting for or against local authorities of which they are members.⁷⁵
35. Finally, and more generally, some legal orders expressly state that a lawyer may not represent a client in a case in which he or she has already acted in another public capacity, for example as a judge or notary (**Germany** and **Poland**, for both advocates and legal counsels).⁷⁶ Furthermore, in the **United Kingdom**, solicitors who are also justices of the peace may not represent a client in proceedings before a justice of the peace.⁷⁷
36. Second, with regard specifically to teachers, the rules are more or less strict. In **Italy**, the case-law establishes that the head of the institution may prohibit teachers from acting for or against the administration to which they belong. In any case, the rules on conflicts of interest prevent lawyers from acting against that administration. In **Poland**,

⁷³ Article 25-*septies*(I)(3) of the loi n° 83-634, portant droits et obligations des fonctionnaires (Law No 83-634 on the rights and obligations of public officials of 13 July 1983; the Le Pors Law, France) and Article 122 of the Decree organising the legal profession.

⁷⁴ Articles 118 to 122-1 of the Decree organising the legal profession, Article 20 of the Decree on the rules of conduct governing the legal profession and Articles LO149 and LO297 of the Electoral Code (France).

⁷⁵ Article 3.13(b) of the Code of Conduct (Ireland).

⁷⁶ In **Germany**, under Article 45 of the BRAO, and in **Poland**, under Article 22 of the Code of ethics for advocates and Article 27 of the Code of ethics for legal counsels.

⁷⁷ Article 38 of the Legal Services Act (United Kingdom).

a lawyer with an employment contract with a university may not represent that university in court. In **France**, university lecturers who are lawyers (and civil servants) may not act in disputes against any public entity.⁷⁸

37. Third, with regard to the prohibition of certain economic links, in **Ireland**, the code of professional conduct states, in particular, that a barrister may not act for or against a company or organisation in which he or she has held a significant administrative or decision-making role (for example, as an officer or partner), or in which he or she has a significant financial interest.⁷⁹ This is also valid, to a certain extent, for previous roles.⁸⁰ However, these prohibitions can be lifted by authorisation of the Bar Council. In **France**, the National Bar Council has issued several opinions along the same lines. For example, it has held that a lawyer who is an officer of a company or a member of the supervisory board of a commercial company may not generally act for that company.⁸¹ More generally, it has indicated that, where a lawyer is a shareholder or partner of a company and is also responsible for that company's legal affairs, he or she may potentially be in a situation of conflict of interest and the council of the professional order is then responsible for determining whether such a situation exists. The assessment of this risk of lack of independence is made in the light of the purpose and substance of the advisory role entrusted to the lawyer and the size of his or her stake in the company's capital.⁸² In addition, in the **United Kingdom**, the Code of conduct for solicitors indicates that, where a client plans to invest in a company in which its solicitor has an interest – an economic interest, for example – that solicitor

⁷⁸ For example, it has been held that a law professor cannot argue against the tax authorities (Council of State, France, judgment No 72708 of 6 November 1992).

⁷⁹ Under Article 3.13 of the Code of Conduct (Ireland): 'Barristers may not appear as counsel: (a) in any matter in which they themselves are a party or have a significant pecuniary interest; ... or (c) either for or against any person, company, firm or other organisation of which they are an officer, director, partner, engaged in part-time occupation or in which they have directly or indirectly a significant pecuniary interest.' Article 3.35 of the draft new Code of Conduct includes a similar provision.

⁸⁰ Under Article 3.15 of the Code of Conduct (Ireland): 'Barristers may not accept instructions [...] from any firm or company in which they have been a partner or director [...]'

⁸¹ National Bar Council (France), Opinion No 2001-002 of 2 April 2001. The council has also asserted that a lawyer who is a member of the board of directors of a company may not act in defence in court for that company and the majority shareholder in a dispute between the latter and the minority shareholder (Opinion No 2014-011 of 28 February 2014). Similarly, a lawyer may not represent the interests of an association where he or she is also its deputy chair or, more generally, a member of the board of directors (Opinion No 2012-048 of 26 November 2012).

⁸² National Bar Council (France), Opinion No 2011-003 of 16 March 2011.

should refuse to represent the client concerned where that interest is such as to affect his or her ability to provide impartial advice. However, this is a proposal for indicative professional behaviour that does not constitute a rule as such.⁸³

III. THE CONSEQUENCES OF FAILURE TO OBSERVE THE LIMITATIONS

38. In all Member States, lawyers are generally required to make the assessment as to whether an incompatibility or conflict of interest that threatens their independence exists or arises. In the case of an incompatible occupation, they must then request to be removed from the bar association or law society (suspension or dismissal) and in the case of a conflict of interest, they must recuse themselves from or subsequently abandon the case in question, in line with their duty of care. If they have any doubts about a situation, they can usually ask the professional order to which they belong. However, if they do not follow this approach, personal consequences can be expected (Part A.). By contrast, in the vast majority of legal systems the validity of procedural acts carried out in disregard of the rules on the requirement of independence is not likely to be challenged (Part B.).

A. CONSEQUENCES FOR THE PERSON OF THE LAWYER

39. In all Member States, a person who fails to comply with the national rules on incompatible occupations may not be admitted to the bar association or law society. Moreover, when an incompatibility subsequently arises in **Germany, France, Italy and Latvia**, this automatically jeopardises the status of the lawyer concerned.⁸⁴ In fact, as a matter of course and independently of any disciplinary procedure, the professional order authority must initiate an administrative procedure aimed at ordering the withdrawal⁸⁵ of the lawyer from the register of lawyers admitted to the bar association or law society. This withdrawal has the effect of forcing the lawyer to cease practising

⁸³ IB(3.9) of the SRA Handbook (United Kingdom).

⁸⁴ Under, for **Germany**, Article 14 of the BRAO; for **France**, Articles 104 and 106 of the Decree organising the legal profession; for **Italy**, Article 17(9)(a) of the Law on the organisation of the legal profession; for **Latvia**, Article 16(8) of the Law on Lawyers.

⁸⁵ In **France**, this is an '*omission*' (temporary removal), which results in the temporary removal of the lawyer's name from the register of lawyers of the lawyers' association. In other Member States, reference is made to expulsion.

his or her profession, so that that lawyer will no longer be able to use his or her title, carry out any acts associated with the profession or act before the courts. However, this withdrawal is not permanent, in so far as the lawyer can theoretically be readmitted to the bar association or law society if the reason for the incompatibility is resolved.

40. Moreover, in these Member States, as in the others analysed, failure to comply with the rules relating to the requirement of independence, whether in terms of incompatible occupations or conflicts of interest, may result in disciplinary sanctions.⁸⁶ Indeed, the fact of being admitted to a bar association or law society implies, by its very nature, that the lawyer is subject to professional discipline and sanctions. These sanctions can be more or less severe (warning, reprimand, financial penalties) and can go as far as a ban on practising as a lawyer, either on a temporary basis (three months to five years depending on the Member State) or permanently.
41. Disciplinary sanctions are imposed directly by the professional order authority (**Spain, Italy, Latvia and Poland**, for example) or by a disciplinary body attached to that entity (**Germany** (*Gerichte in Anwaltssachen*), **Austria** (*Disziplinartrat*), **Denmark** (*Advokatnævnet*), **France** (*conseils de discipline*), **Netherlands** (*Raden van discipline*)). In addition, judges who have doubts about independence can report this to the professional order authority concerned so that such sanctions can be imposed (specifically in **Austria** and **Latvia**). In the **United Kingdom**, the situation is a bit unusual because of the division of competences between two separate entities. While the least severe sanctions are imposed directly by the professional order authority, the most severe sanctions are imposed by a disciplinary tribunal (the Solicitors' Disciplinary Tribunal for solicitors and the Bar's Disciplinary Tribunal for barristers). **Spain** is an exception here, in that, without prejudice to disciplinary proceedings being initiated, an ordinary court may also impose a sanction, noted in the lawyer's personal file, where the breach of the duty of independence contravenes the procedural principle of good faith.⁸⁷ However, this action remains fairly rare in practice.

⁸⁶ In the first instance, such non-compliance may result in a simple warning, which is not a disciplinary sanction. For example, in **Germany**, Article 74 of the BRAO stipulates that the board of the lawyers' association (*Vorstand der Rechtsanwaltskammer*) may issue a reprimand to the offending lawyer. In **France**, the president of the bar association (*bâtonnier*) may issue a reprimand (*admonestation*) where the misconduct is not sufficiently serious to justify the initiation of disciplinary proceedings.

⁸⁷ Article 247 of the Ley de Enjuiciamiento Civil 1/2000 (Code of Civil Procedure, Spain) of 7 January

42. On another note, in terms of the question as to whether a lawyer may be required to withdraw from a pending case, the professional order authorities may advise – or indeed order – a lawyer not to represent a party. In certain Member States, the ordinary courts may in some cases play a role, although, in general, given the self-regulating nature of the legal profession, Member States are very reluctant to have a body other than the professional order authorities intervene. On this point, it is worth noting, for example, that in **Spain**, a judge may issue warnings to a lawyer, allowing that lawyer to withdraw from defending a client so that new counsel can be instructed⁸⁸ and that, in **France**, a judge may become competent to rule on a conflict of interest if the professional order authorities fail to act.⁸⁹
43. It should also be stressed that a lawyer's failure to comply with the rules on independence may, at the same time, result in that lawyer being professionally civilly liable, or even criminally liable where the conduct in question also constitutes a criminal offence.⁹⁰

B. CONSEQUENCES FOR PROCEDURAL ACTS CARRIED OUT BY THE LAWYER

44. As noted above, the vast majority of Member States share the view that the courts should not interfere with the organisation of the parties' defence, as the freedom to choose a lawyer is essential to ensuring a fair trial. Similarly, the courts are not responsible for monitoring the activity of lawyers, which is the remit of the professional order authorities. Thus, a failure to observe the rules relating to the independence requirements does not, *ipso facto*, have any consequences, either on the validity of the power of representation accepted by the lawyer or on the validity of the actions taken on behalf of his or her clients, or, more generally, on the entire proceedings implemented by the offending lawyer. Moreover, in some legal orders, this

2000.

⁸⁸ Tribunal Supremo (Supreme Court, Spain), judgment No 841/2013 of 18 November 2013, RJ 2014/3061.

⁸⁹ Thus, if the decision by the *bâtonnier* has not been acted upon and no disciplinary proceedings have been initiated, the matter may be referred to the court so that the lawyer can be ordered to remove him or herself from the case (Court of Cassation, France, judgment No 98-16.508 of 27 March 2001). However, it should be noted that the opinion of the *bâtonnier* is not binding under normal circumstances and cannot compel the lawyer to remove him or herself (Court of Cassation, judgment No 95-22.242 of 28 April 1998).

⁹⁰ For example, in **Spain**, for an offence of professional disloyalty under Article 467 of the Criminal Code (see the above-mentioned judgment of the Tribunal Supremo (Supreme Court) of 18 November 2013).

has been stated expressly by the courts (**German**,⁹¹ **French**, in relation to incompatible occupations, but only in terms of administrative proceedings,⁹² and in matters of conflicts of interest,⁹³ and **Irish**⁹⁴ legal systems).

45. There are only two Member States (**France** and the **United Kingdom**) in which it seems that a failure to observe the rules on the requirement of independence can – but only in certain cases – have consequences for the actions performed by the lawyer. However, this is not certain in **France** and, in the **United Kingdom**, the situations concerned seem to be very rare.

46. In fact, in **France**, if a breach of the code of conduct is coupled with a breach of the rules of procedure, naturally the sanctions imposed under those rules could apply.⁹⁵ On this point, in civil proceedings, it is stipulated that a lack of capacity or authority of a person representing a party in court constitutes a substantive irregularity affecting the validity of the act.⁹⁶ However, there is some doubt as to whether a document introduced by a lawyer who does not comply with the rules on incompatible occupations could be considered to be tainted by such a substantive defect.⁹⁷ Indeed,

⁹¹ See, for example, Bundesgerichtshof (Federal Court of Justice, Germany), judgments of 14 May 2009 (IX ZR 60/08 (BGH NJW-RR 2010, 67)); of 25 February 1999 (IX ZR 384/97 (BGH NJW 1999, 1715)) and of 19 March 1993 (V ZR 36/92 (BGH NJW 1993, 1926)).

⁹² The Council of State (France) has held that an application lodged before an administrative court (for a taxpayer against the tax authorities), which failed to observe the rules on incompatible occupations theoretically prohibiting a lawyer and university law lecturer from acting against the State is, nevertheless, admissible (Decision No 72708 of 6 November 1992).

⁹³ Court of Cassation (France), judgments No 10-14.012 of 3 March 2011; No 09-12.078 of 21 October 2010; No 01-87.979 of 30 October 2002; No 94-21.924 of 13 November 1996; No 87-15.858 of 24 January 1989 and No 87-18.445 of 30 November 1988.

⁹⁴ Supreme Court (Ireland), decision in *McMullen v Clancy* (No 2) [2005] IESC 10, [2005] 2 IR 445. In particular, the Supreme Court held that: '[...] the Code [of Conduct of the Bar of Ireland] and its provisions are not justiciable. The rules in the Code are enforceable by the disciplinary authorities of the barristers' profession. They do not bind the Courts. Put otherwise, the profession cannot make laws which it is the duty of the Courts to enforce. This does not at all mean that, as a matter of law, there are no parallel obligations ... which the Courts will enforce in an appropriate case. [...].'

⁹⁵ Article 25-1 of the Law reforming certain judicial and legal professions (France).

⁹⁶ Article 117 of the Code of Civil Procedure (France). This defence of invalidity can be put forward in any case and must be accepted without the person invoking it having to demonstrate a cause of action (Articles 118 and 119 of that code).

⁹⁷ The rule relating to the substantive defect based on a lack of capacity or authority on the part of the judicial representative is generally applied to sanction a failure to instruct counsel or the instruction of counsel that does not comply with the territorial rules governing procedural activities (*postulation*), whereby lawyers may only undertake procedural acts on behalf of a party before certain courts, determined on the basis of their place of professional residence (conversely, these rules are valid for

even if the legal doctrine considers that incompatibilities have no bearing on the validity of acts performed by a lawyer in such a situation,⁹⁸ this question has not been clearly settled by the case-law. Admittedly, in a case where the issue was somewhat different, the Court of Cassation has already indicated that the rules governing incompatibility were of an ethical nature and only concerned the lawyer's relationship with the lawyer's professional order.⁹⁹ However, it has already adopted a different position¹⁰⁰ and, above all, a recent case casts real doubt on the possibility of sanctioning – through their being held to be invalid – acts performed in breach of an incompatibility.¹⁰¹ In any event, this defence of invalidity could not be raised of its own accord by the court¹⁰² and that invalidity would not be held to exist if it has been remedied by the time the court rules,¹⁰³ for example by instructing another lawyer.

pleadings) (Article 5 of the Law reforming certain judicial and legal professions, France).

⁹⁸ See, for example, *Règles de la profession d'avocat*, Dalloz Action, 2018/2019, p. 684, Nos 431.41 and 431.42.

⁹⁹ Court of Cassation (France), judgment No 07-40.384 of 19 December 2007. In this case, a lawyer requested that an employment relationship be reclassified as a salaried relationship, notwithstanding the incompatibility applying in this area. The trial judges had considered that this incompatibility alone (salaried activity) was an obstacle to any reclassification, and this conclusion was censured by the Court of Cassation.

¹⁰⁰ See Court of Cassation (France), judgment No 14-22.578 of 24 November 2015 (the rule prohibiting the sudden termination of an established commercial relationship is not applicable to the relationship between a lawyer and his or her client in so far as the profession of lawyer is incompatible with any commercial activity).

¹⁰¹ Court of Cassation (France), judgment No 16-10.525 of 15 March 2017. In this case, a lawyer had been appointed as a judge by decree but had continued to work as a lawyer until the date of her temporary removal (*omission*) from the register of lawyers (which took place the day before she was sworn in as a judge). Between her appointment and her *omission*, she had appealed a judgment for a client. However, that appeal was declared inadmissible, in particular on the grounds that the statement of appeal was vitiated by a substantive irregularity (and therefore null and void), since, from the time of her appointment as a judge – because that status meant she could not practise as a lawyer – she had lost the status of lawyer, even though her *omission* had not yet taken place and she had not taken her oath. The Court of Cassation declared the decision of the Court of Appeal unlawful on the grounds that the entry into office of any judge is subject to taking the oath and that only the simultaneous practice of the profession of lawyer and that of any other profession is prohibited. Thus, if the interested party had already taken an oath, it is possible, through an *a contrario* reading of the grounds for the decision, that the Court of Cassation would have validated the position of the Court of Appeal. However, in such a case, we cannot totally exclude the possibility that the Court of Cassation might rule that only *omission* ordered by the council of the professional order on the grounds of incompatibility can deprive a lawyer of the ability to perform procedural acts on behalf of his or her clients, such that, as long as a lawyer appears in the register of lawyers, the acts he or she performs are legal and valid.

¹⁰² In fact, under Article 120 of the Code of Civil Procedure (France), only a defence of invalidity of a public policy nature may be raised automatically. However, it has been ruled that this is not the case for the substantive irregularity relating to a lawyer's lack of authority to act in court (Court of Cassation, France, judgment No 06-17.408 of 19 September 2007).

¹⁰³ In fact, Article 121 of the Code of Civil Procedure (France) provides that in cases where it may apply, an invalidity will not be held to exist if the cause of that invalidity has been resolved by the time the court

47. In the **United Kingdom**, a statement of case may be struck out by the court, of its own accord or at the request of the parties, in certain circumstances and, in particular, if it constitutes an abuse of the judicial process or is otherwise likely to obstruct the just disposal of the proceedings.¹⁰⁴ It has already been held that a conflict of interest, if serious enough, can be considered as such an abuse of the judicial process. However, this is not the case if the person in a potential conflict of interest situation is able to perform his or her duties while fulfilling his or her regulatory obligations.¹⁰⁵
48. By contrast, the situation would be different in many Member States if the lawyer were to be disqualified from practising the profession by a decision of the professional order, either during pending proceedings or even before he or she initiated such proceedings. In **Germany**, this is even expressly provided for in the legislation.¹⁰⁶
49. In the former case (sanction during proceedings), in **France** and **Italy**, for example, the proceedings in progress would be automatically interrupted and the acts carried out subsequently would be null and void.¹⁰⁷ In the latter case (sanction before any proceedings), in most Member States, the acts performed would be unlawful and subject to sanction on the grounds of invalidity or inadmissibility. For example, in **France**, the sanction would be invalidity on the grounds of a lack of capacity or authority of a person representing a party in court, with a possibility of remedy (described above). Conversely, in **Poland**, the appeal in cassation before the Sąd Najwyższy (Supreme Court) would be dismissed, *in limine*, without the possibility of remedy.¹⁰⁸ However, this solution is not automatic in all Member States. Thus, in **Spain**, the Tribunal Supremo (Supreme Court) has held that, in the case that a lawyer is

rules. It has been held that this is possible for this cause of invalidity, whether it is a lack of authority or a lack of capacity of the judicial representative (see Court of Cassation, France, judgment No 17-28.805 of 10 January 2019).

¹⁰⁴ Rule 3.4(2)(b) of the Civil Procedure Rules 1998 (United Kingdom).

¹⁰⁵ High Court (United Kingdom), judgment of 20 December 2018, *Dumville v Rich*, EWHC 3457. It should be noted, however, that this case concerned a conflict of interest involving liquidators and not lawyers.

¹⁰⁶ Article 156(2) of the BRAO (Germany).

¹⁰⁷ In **France**, under Articles 369 and 372 of the Code of Civil Procedure (more specifically, the acts are deemed to be null and void); in **Italy**, under Articles 298 and 304 of the Code of Civil Procedure (the same rules are valid for administrative proceedings).

¹⁰⁸ Under Article 424(3) of the Kodeks Postępowania Cywilnego (Code of Civil Procedure, Poland). Furthermore, according to the case-law of the Sąd Najwyższy (Supreme Court, Poland), this is a defect that cannot be remedied, since it results from a lack of standing to take procedural steps on behalf of a client before that court.

not admitted to the bar association or law society (or is temporarily disqualified), the proceeding is only invalid if the representation provided by that person would undermine the fundamental right of defence.¹⁰⁹

50. In addition, quite apart from the procedural consequences, criminal sanctions may be incurred in such a situation, in particular for illegal practice of the profession of lawyer or illegal use of the title of lawyer (for example in **France**).¹¹⁰

IV. CONCLUSION

51. This analysis has highlighted the existence of concrete rules on the requirement of independence of lawyers. These rules are intended either to prohibit the exercise of certain professions, roles or activities alongside the profession of lawyer (incompatible occupations) or to prohibit the ability to represent a party in a case (conflict of interest and specific restrictions on representation). However, a lawyer's failure to comply with these rules can only lead to his or her removal from the bar association or law society by the relevant authorities, to disciplinary sanctions, or indeed to civil or criminal liability. By contrast, such non-compliance is generally not likely to affect the validity of the lawyer's power of representation or the validity of the procedural steps he or she has taken for the client.
52. In conclusion, it can be noted that the approaches of the Member States in this respect ultimately correspond to the principle of independence defined in the Charter of Core Principles of the European Legal Profession, adopted by the Council of Bars and Law Societies of Europe and laying down 'ten core principles common to the national and international rules regulating the legal profession'. Under the definition of the principle of independence: 'a lawyer needs to be free – politically, economically and intellectually – in pursuing his or her activities of advising and representing the client. This means that the lawyer must be independent of the state and other powerful interests, and must not allow his or her independence to be compromised by improper pressure from business associates. The lawyer must also remain independent of his or

¹⁰⁹ Tribunal Supremo (Supreme Court, Spain), judgment No 591/2016 of 5 October 2016, RJ 2016/4755.

¹¹⁰ Articles 72 and 74 of the Law reforming certain judicial and legal professions and Article 433-17 of the Criminal Code (France).

her own client [...] The lawyer's membership of a liberal profession and the authority deriving from that membership helps to maintain independence, and bar associations must play an important role in helping to guarantee lawyers' independence. Self-regulation of the profession is seen as vital in buttressing the independence of the individual lawyer. [...]'

[...]