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WEARING TWO HATS:

EXPLORING THE COMPATIBILITY OF THE ROLES OF COMPLIANCE OFFICER AND IN-HOUSE COUNSEL UNDER SPANISH LAW

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ABSTRACT

In today's business world, compliance is essential for organizations to operate ethically and sustainably. As regulations become more complex and enforcement becomes stricter, having strong compliance programs and independent compliance officers overseeing them is crucial. Due to the absence of detailed legal regulations on this new phenomenon and the limited size and resources of some entities, it is common to see in-house counsels taking on dual roles, simultaneously serving as compliance officers. However, the specific tasks, duties, responsibilities and intrinsic guarantees associated with each role may collide, leading to potential conflicts of interest. This can impede their ability to act efficiently, objectively and in the best interests of the company and its stakeholders.

This dissertation will study the figure of compliance officer and the interplay with the role of in-house legal counsel. It will examine how they intersect, complement, or conflict with one another, with a special focus on the attorney-client privilege and conflicts of interest.

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GLOSSARY AND LIST OF ABBREVIATIONS

CDAE	Code of Ethics of the Spanish Advocacy (*Código Deontológico de la Abogacía Española*)
CJCGAE	Legal Commission of the General Counsel of Spanish Advocacy (*Comisión Jurídica del Consejo General de la Abogacía Española*)
CO	Compliance Officer
EGAE	General Statue of the Advocacy (*Real Decreto 135/2021, de 2 de marzo, por el que se aprueba el Estatuto General de la Abogacía*)
LECrim	Law of Criminal Proceedings (*Real Decreto de 14 de septiembre de 1882, por el que se aprueba la Ley de Enjuiciamiento Criminal*)
LOPJ	Organic Law of the Judiciary Power (*Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial*)
LSAPAP	Law on access to the professions of Attorney at Law and Court Attorney (*Ley 34/2006, de 30 de octubre, sobre el acceso a las profesiones de Abogado y Procurador de los Tribunales*)
TJUE	Court of Justice of the European Union (*Tribunal de Justicia de la Unión Europea*)

1. INTRODUCTION

The concept of criminal liability of legal entities involves holding a legal entity[1] liable for the commission of certain crimes through a criminal procedure, when their legal representatives or employees have perpetrated one of these crimes for the potential benefit of the company.

The introduction of the criminal liability of legal entities by means of Spanish law by OL 5/2010, of 23 June, which amended the Criminal Code inserting a new article 31 bis, entailed a major legislative change. The legislator had, on the one hand, to implement the assumption of such liability and, on the other, to establish the criminal charges and the rights that should back the entities throughout the criminal proceedings[2].

Some years later, the reform operated by OL 1/2015 aimed at encouraging the collaboration of entities in the clarification of the facts during the criminal investigation. Article 31 *bis* offered them the possibility of exoneration and mitigation of liability, whenever they had previously established effective compliance programs. In order to do so, these programs should be capable of identifying the origin of the infringement and the performers thereof, and should be supervised by a specific responsible body, a Compliance Officer (hereinafter, "**CO**") or a Compliance Committee.

This responsible body lacks detailed regulation within the Spanish legal system and thus many questions have arisen regarding its composition, its internal or external character, the professional backgrounds it should have, the specific scope of its functions and, most importantly, its compatibility with other roles within the company.

This dissertation will focus on the potential incompatibility of the roles of in-house legal counsel and CO, and will be organized as follows. First, a review is made of the evolution of the criminal liability of legal entities in Spain, pointing out the most important features of its

[1] With some exceptions provided for in Article 31 *quinquines* of the Criminal Code: "1. The provisions relating to the criminal liability of legal persons shall not be applicable to the State, territorial and institutional public Administrations, Regulatory Bodies, Agencies and public Business entities, international organizations under public law, or others exercising public sovereign or administrative powers. 2. In the case of public corporations that execute public policies or provide services of general economic interest, only the penalties provided for in Article 33.7 a) and g) may be imposed on them. This limitation will not be applicable when the judge or court appreciates that it is a legal form created by its promoters, founders, administrators or representatives with the purpose of avoiding a possible criminal liability." Additionally, Article 35 of the Spanish Civil Code defines legal entities as "1. Corporations, associations and foundations of public interest recognized by law, 2. Associations of particular interest, whether civil, commercial or industrial, to which the law grants their own personality, independent of that of each of the associates".

[2] Prieto, Benjamín. (2019) "*Cómo acertar en la designación del compliance officer desde una perspectiva procesal*", Diario La Ley Nº 9532 - Sección Tribuna - Wolter Kluwer, p. 1.

past and current regulation. Next, a brief analysis of the function of compliance programs and COs is carried out, followed by the specific arguments against the consolidation of both roles. Finally, some conclusions are drawn and some recommendations for effective risk management in entities are made.

2. COMPLIANCE PROGRAMS

2.1 Evolution of the criminal liability of legal entities

As mentioned, OL 5/2010, of June 22, introduced criminal liability of legal entities for the first time in Spain, later amended by OL 1/2015, of March 30. However, the notion of attributing such liability dates back to earlier times and its historical evolution has been characterized by a continuous change of criteria regarding its admissibility or rejection[3].

The Spanish legal system had always been ruled by the Roman law principle "*societas delinquere non* potest", a latin aphorism by virtue of which it was unthinkable that legal entities could commit crimes and be responsible for them. This was mainly based on the belief that legal entities were uncapable of carrying out a criminally relevant action, because they either lacked a psychological will or were not capable of acting at all[4], as reinforced by jurists and philosophers such as Engisch, Schmitt, Niese and Hartung[5]. Thus, only natural persons within the legal entity could be held criminally liable. However, as early as 1980, authors such as Zugaldía Espinar[6], highlighted the need for a Criminal Code reform to introduce the criminal liability of legal entities, primarily to combat organized economic crime[7] and structural irresponsibility.

Accordingly, the 1983 Criminal Code incorporated criminal liability for "acting on behalf of another" to punish an entity for acts committed by the natural persons in their organization. Later on, the 1995 reform changed the status of the perpetrator of the crime from a natural person to the director or administration body of the legal entity, and added new penalties as "accessory consequences". Successively, the 2003 reform added the direct and joint liability of

[3] Cuadrado Ruiz, Mº Ángeles. (1994) "*¿Hacia la erradicación del principio "societas delinquere non potest?*", 2008, p. 1-2; Berber Santos, Marino, "*Responsabilidad penal de la empresa?*", p. 1081.
[4] García Cavero, Percy. (2005) "*La responsabilidad penal de las personas jurídicas*", p. 2.
[5] *Idem, op. cit.*
[6] Full Professor of Criminal Law at the University of Granada, in his book Zugaldía Espinar, José Miguel. (1980). "*Conveniencia político-criminal e imposibilidad dogmática de revisar la formula tradicional societas delinquere non potest"*, p. 79-81.
[7] Zugaldía Espinar, José Miguel. (2016) "*Aproximación teórica y práctica al sistema de responsabilidad criminal de las personas jurídicas en el derecho penal español"*, p. 1.

legal entities when the crime was committed through their organizational structure. Finally, the preliminary draft of the 2006 reform incorporated the basic requirements of the criminal liability of legal entities. Although this text was not approved, its content was practically identical to the reform of OL 5/2010, whose article 31 *bis* introduced the criminal liability of legal persons for the first time in Spain[8]. The 2010 reform also included the catalog of penalties which a legal entity may currently be sentenced to. Finally, OL 1/2015, amended article 31 *bis* and introduced articles 31 *ter* to *quinquies*, incorporating two causes of exemption from liability[9].

2.2 Compliance programs and CO figure

As above-mentioned, the current Spanish Criminal Code provides that legal entities may be held liable in the terms established by its article 31 *bis* 1, when crimes are committed in two distinct scenarios. Firstly, crimes committed by entity directors or representatives of the legal entity, when acting on behalf and for the benefit of the entity. Secondly, crimes committed by subordinates or employees in the exercise of their corporate activities and for the benefit of the entity, due to a breach of the duties of supervision, monitoring and control of the individuals mentioned in the first scenario.

The same article states that entities will be exempted from criminal liability when the administration body has adopted and effectively implemented, prior to the commission of the crime, organization and management models that include surveillance and control measures suitable to prevent crimes or to significantly reduce the risk of the commission thereof. This is namely a compliance program, which may be defined as a protocol that legal entities voluntarily implement, integrating it into their statutory, organizational and hierarchical structures, which aim at exercising due control and preventing undesirable conducts by managers or employees that involve criminal liability[10]. Effective compliance programs include several tools, such as Code of Ethics, whistleblower channels and internal investigation protocols, among others[11].

Moreover, article 31 *bis* 2.2nd provides that the supervision of the compliance program should be entrusted to a body of the legal entity with autonomous powers of initiative and control or

[8] Landecho Velasco, Carlos María y Molina Blázquez, Concepción. (2015). "*Derecho Penal Español. Parte General*", Undécima Edición, Tecnos, , p. 697.
[9] Zugaldía Espinar, José Miguel. (2016). "*Aproximación teórica y práctica al sistema de responsabilidad criminal de las personas jurídicas en el derecho penal español"*, p. 5.
[10] Rayón Ballesteros, María Concepción. (2018). "*Los programas de cumplimiento penal: origen, regulación, contenido y eficacia en el proceso*", Anuario Jurídico y Económico Escurialense, p. 14.
[11] *Idem, op, cit.*

legally entrusted with the function of supervising the effectiveness of the internal controls of the legal entity. This is namely a responsible body. Section 2.3 of such article 31 *bis* provides that in small legal entities, the supervisory functions of this body may be assumed directly by the administration body.

In spite of this new regulation, a significant doctrinal sector criticized it for being incomplete and confusing in many essential aspects[12], especially in the matter of the responsible body.

a. Functions

On one hand, the responsible body must participate in the development of risk organization and management models and ensure their proper functioning. This process involves evaluating the risks in the environment of the firm and determining which policies need to be implemented for that organization[13]. The risks are those related to non-compliance with mandatory legal obligations, as well as those that it voluntarily chooses to comply with[14]. Then, when the policies are in place, it is responsible for creating awareness of such, which can take the form of education and training initiatives. Additionally, it should establish appropriate audit and surveillance systems as insufficient performance of its functions would prevent the exemption from being appreciated[15].

It should not be overlooked however that, while its main function is related to mitigating risks, it is also responsible for maintaining the ethical culture of the entity[16]. It takes care, for instance, of the moral conscience and integrity of the firm as well as its reputation, both matters being of great importance for the entity's relationships with regulators and stakeholders[17].

On the other hand, the responsible body has the duty to report, both internally and externally, offences committed within the entity by any of the individuals contained in article 31 *bis* 1. Internally, in the sense that it must report it to the management body of the entity. It is most frequently the Board of Directors or the Auditing Committee, even though in some companies

[12] Matos Expósito, Gustavo Adolfo. (2018). "*La responsabilidad civil del compliance officer en la aplicación de los programas de prevención de delitos y la nueva eximente de responsabilidad penal de las personas jurídicas*", World Compliance Association, p. 1-2.
[13] C. Bird, Robert and K. Park, Stephen. (2016). "*The Domains of Corporate Counsel in an Era of Compliance*", American Business Law Journal, Volume 53, Issue 2, 203-349, p. 10
[14] Asociación Española de Compliance (ASCOM). (2017). "*Libro blanco sobre la función de Compliance*", p.10
[15] *Idem, op. cit.*; Article 31 *bis* 2.2.4º of the Criminal Code
[16] Heineman, Benjamin. (2010). "*Don't Divorce the GC and Compliance Officer*", Harvard Law School, p.1.
[17] C. Bird, Robert and K. Park, Stephen. (2016). "*The Domains of Corporate Counsel in an Era of Compliance*", American Business Law Journal, Volume 53, Issue 2, 203-349, p. 3.

the CO reports to the Chief Financial Officer, the CEO or the Secretary General[18]. Externally, as it has a positive legal-criminal duty of reporting offences, provided for in article 450.2 of the Criminal Code[19], or a legal-procedural duty, provided in Article 262 of Law of Criminal Proceedings (*Real Decreto de 14 de septiembre de 1882, por el que se aprueba la Ley de Enjuiciamiento Criminal,* hereinafter, "**LECrim**")[20]. The responsible body must be ready to defend the compliance program when accused by regulators of noncompliant behavior, as the existence and robustness of the compliance program plays an important role for mitigation and exemption of liability[21].

All of the abovementioned functions should be carried out with the highest levels of independence and autonomy[22] and the body should be equipped with all the necessary means and resources to achieve them[23].

b. Composition and internal or external character

The responsible body may consist of one or more individuals[24]. The structure of this body, whether collegiate or individual, may vary depending on the resources available to the company. In the case of a collegiate body, it typically operates as a delegated committee appointed by the administration body, often referred to as the Compliance Committee[25]. It is recommended that this committee performs with the utmost autonomy and independence from the administration body, emphasizing the advisability of including individuals beyond executive directors for a more balanced composition. The Committee may, in turn, designate individuals to fulfill compliance functions such as a Chief Compliance Officer, CO, or delegates; and will identify the individual who represents it. On the other hand, if the responsible body is formed by a single individual, we refer to it as a CO.

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[18] Asociación Española de Compliance (ASCOM). (2020). "*Study on the Compliance Function in Spanish Companies"*, p. 15.

[19] "Those who, by reason of their offices, professions or trades, learn of any public crime, shall be obliged to report it immediately to the Public Prosecutor's Office, to the competent court, to the examining magistrate and, failing that, to the municipal or police officer nearest to the place if it is a flagrant crime"

[20] Turienzo Fernández, Alejandro. (2020) "*La responsabilidad penal del Compliance Officer"*, Universidad de Barcelona, p. 361.

[21] C. Bird, Robert and K. Park, Stephen. (2016) "*The Domains of Corporate Counsel in an Era of Compliance*", American Business Law Journal, Volume 53, Issue 2, 203-349, p. 7

[22] Circular 1/2016 of the Public Prosecutor's Office, p. 25

[23] Asociación Española de Compliance (ASCOM). (2017). "*Libro blanco sobre la función de Compliance*", p. 13.

[24] *Idem, op. cit*.

[25] Circular 1/2016 from the Public Prosecutor's Office, p. 24

In relation to its internal or external character, the wording of the Criminal Code, by referring to "an organ of the legal entity", might seem to indicate that the compliance functions and responsibilities may only be carried out by an internal body. However, the practical interpretation of this provision has not been so restrictive. Some authors argue that the Compliance Committee or CO must necessarily be a body of the legal entity, which does not imply that it must itself perform all of the tasks entrusted[26]. Some functions may be carried out by external professionals, such as the training of managers and employees or whistleblowing channels, which may guarantee higher levels of independence and confidentiality when managed by external service providers[27]. Nevertheless, complete outsourcing is not a valid option since the provisions of the Criminal Code emphasize the need of possessing in-depth knowledge of the organization and maintaining daily contact with its operations, conditions that a completely external body may not fulfill[28].

Nevertheless, on the other hand, there's been subsequent non-binding recommendations[29] which, contrarily to article 31 *bis* 2.2nd of the Criminal Code, argue that the responsible body may be external to the company. This is because if it were a body of the legal entity appointed by the management body, which it must also be supervised, it would be difficult for it to enjoy full autonomy in its functions. Therefore, being an external body would ensure independence since it enjoys a genuine external position to the corporate organization.

c. Selection and appointment

Neither Spanish regulators nor subsequent non-binding recommendations have established specific requirements, qualifications or professional backgrounds to serve as CO[30]. However, there is general consensus that there are many candidates for the position of CO within a company. As compliance is a tailor-made suit, the CO that may be more convenient in some companies, might not be advisable in others[31]. Therefore, they should be appointed upon the necessary knowledge and skill sets it should possess in the specific entity.

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[26] *Idem, op. cit.*

[27] *Idem, op. cit.* p. 25.

[28] De la Mata Barranco, Javier. (2017). "*Cumplimiento normativo penal, órgano de cumplimiento y despacho de* abogados", 2018, p.1-2; Blanc López, Clara, "*La responsabilidad penal del Compliance Officer*", p. 238.

[29] Report4/2018 from the CJCGAE, p. 2-10.

[30] Rodríguez-García, Nicolás. (2023). "*El proceso penal ante una nueva realidad tecnológica europea*", Capítulo 11 "*Compliance y sistema penal español: potencialidades y retos*", Thomson Reuters Aranzadi, p. 326.

[31] Prieto, Benjamín. (2019). "*Cómo acertar en la designación del compliance officer desde una perspectiva procesal*", Diario La Ley Nº 9532 - Sección Tribuna - Wolter Kluwer, p. 2.

Some believe that the task may be assigned to risk experts, auditors, or even interdisciplinary teams of consultants and economists[32]. This is because such professionals possess wide expertise in different sectors and valuable technical and analytical skills that make them suitable. On the other hand, other authors claim that individuals with background on business economics or business operation experience fit with compliance training programs. This has led to the establishment of colleges or associations for compliance professionals and the creation of specialized training courses[33].

Nevertheless, even though there are many professional backgrounds that may fulfill the role of CO, lawyers tend to be the preferred candidates[34]. This is because lawyers constitute a guarantee in the elaboration of compliance programs since only they understand properly the reasons for the existence of the plan; which requires the capacity for analysis and legal discernment, the criminal consequences that derive from it and the remedies that may be put in place[35]. Similarly, they argue that there is no better option than an absolute independent lawyer serving as a CO to apply that plan.

3. WEARING TWO HATS: CONSOLIDATION OF THE ROLES OF CO AND IN-HOUSE LEGAL COUNSEL

In practice, it appears that the corporate CO often carries out a dual-hatted or multifunctional role rather than a stand-alone function[36]. Evidence shows that this is especially a frequent business practice in small companies[37], as larger companies are more likely to have a stand-alone CO on account of their larger resources and budgets[38].

Authors have very different opinions about the convenience of this system. On one side, evidence highlights that holding multiple functions besides the compliance function may lead to inefficiency, as having a CO with a "two or more hats" role could result in difficulties and

[32] Rodríguez-García, Nicolás. (2023). "*El proceso penal ante una nueva realidad tecnológica europea*, *Capítulo 11 - Compliance y sistema penal español: potencialidades y retos*", Thomson Reuters Aranzadi, p. 326.
[33] De la Mata Barranco, Javier. (2018). "*Cumplimiento normativo penal, órgano de cumplimiento y despacho de* abogados", p.1-2
[34] Report 5/2017 from the CJAE, p. 10-17; Report4/2018 from the CJCGAE, p. 11-16.
[35] *Idem, op. cit.*
[36] Kanzenbach, Katrin,. (2017). "*The roles of the CO – a comparison of US, UK and General law and practice*", Universidad Católica San Antonio, p. 257.
[37] *Idem, op. cit.* p. 352.
[38] *Idem, op, cit,* p. 334.

conflicts of interest[39]. On the other side, others argue that it provides the entity with some advantage such as enhanced power, early risk detection and cost saving[40].

In fact, the most common scenario is that legal entities rely on their in-house counsel as CO, making them wear two hats[41]. This is either due to insufficient size, a reluctance to resort to new lawyers, or any other reason. This has been a debated key point, since despite the fact that in-house counsels and COs should collaborate closely, combining the two functions, however, could cause conflicts[42]. This is because in-house counsels have responsibilities and intrinsic guarantees with respect to the entity that may collide with those of CO[43]. There have been several opinions on the matter, which offer non-binding guidance into best practices.

3.1 Report 4/2018 of the CJCGAE

Report 4/2018 of the Legal Commission of the General Counsel of Spanish Advocacy (*Comisión Jurídica del Consejo General de la Abogacía Española*, hereinafter, "**CJCGAE**") states that the reason why in-house counsels are the preferred professionals is because the best knowledge of the company's activities with legal repercussions is held by them. It will not be difficult for them to identify the places of particular criminal risk when taking decisions because they must be used to dealing with them. Nevertheless, to appoint them there should be certainty about their ability to meet the requirements of both functions. For this purpose, the individual must evaluate "*ex-ante*" whether they are in a position to assume the role of CO or if it is recommendable to delegate it to a third party. Three considerations are important.

Firstly, the CJCGAE asserted that the individual would have dual functions. On the one hand, as lawyers, to advise on legal matters, and as COs, to adhere to the provisions of the prevention plan and reporting when necessary, while never abandoning their legal expertise. While this functions might seem different, they are easily intertwined, as it is difficult to draw the fine lines between legal practice and law-related services.

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[39] Richard D. Marshall. (2015). "*BNA Insights: Compliance Officer Liability-- Sec Judge Sides With The Compliance Profession Bloomberg Law*", p. 3.

[40] Marcu, Eden. (2020). "*One Person, Two Hats: Combining the Roles of Chief Compliance Officer and Chief Legal Officer"*, Florida State University Law Review – Volume 48 Issue 3, p. 21.

[41] Report4/2018 from the CJCGAE, p. 11.

[42] Tabuena, José A. (2006). "*The Chief Compliance Officer vs the General Counsel: Friend or Foe?"*, Society of Corporate Compliance and Ethics, p. 3.

[43] Prieto, Benjamín. (2019) *"Cómo acertar en la designación del compliance officer desde una perspectiva procesal*", Diario La Ley Nº 9532 - Sección Tribuna - Wolter Kluwer, p. 1-2.

Secondly, the individual must be diligent enough to know that, far beyond the contractual obligations as a CO, it is bound by its duties as a lawyer, established in the General Statute of the Advocacy (*Real Decreto 135/2021, de 2 de marzo, por el que se aprueba el Estatuto General de la Abogacía Española,* hereinafter, "**EGAE**"). Its article 1.3 establishes that the guiding principles and superior values of the practice of law are those of independence, freedom, dignity and integrity, as well as respect for attorney-client privilege. The report clarifies that it may not therefore be the case of an-in house lawyer assuming the position of compliance officer in collision with its privilege or endangering the avoidance of the conflict of interest.

Thirdly, the CJCGAE deemed necessary to examine the limitations that lawyers face when acting as in-house counsels, in light of the Court of Justice of the European Union's (*Tribunal de Justicia de la Unión Europea*, hereinafter, "**TJUE**") judgment of 14 September 2010 in the *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission* case. Nevertheless, they affirm that the judgement's conclusions pertain to competition law, and therefore see no significant issues for the variant of criminal risk prevention plans.

After these considerations, the CJCGAE reached the conclusion that, while this is the most common scenario, the ideal CO is an external professional designated exclusively to be responsible for regulatory compliance. As mentioned before, there are differing opinions on the internal or external character of the CO, but, in my view, two reasonings are behind this recommendation. In the first place, that the appointment of a CO should guarantee the absence of conflict of interest and the privileges attached to its status as a lawyer. Additionally, it recommended that the role that is generally carried out exclusively, and even more when the individual is a lawyer due to the mentioned intrinsic guarantees. While the figure is still relatively scarce, the CJCGAE claims that this new role for lawyers external to companies is highly desirable to be professionalized and gradually become a specialization within the legal profession.

4. ARGUMENTS AGAINST CONSOLIDATING THE ROLES

4.1 Application of attorney-client privilege

a. Introduction

Attorney-client privilege is collected in different regulations, such as in article 5 of the Code of Ethics of the Spanish Advocacy (*Código Deontológico de la Abogacía Española*, hereinafter, "**CDAE**"), article 21 of EGAE and article 542.3 of Organic Law of the Judiciary Power (*Ley*

Orgánica 6/1985, de 1 de julio, del Poder Judicial, hereinafter, "**LOPJ**"). It consists in the right and the duty to keep secret of all the facts, communications, data, information, documents and proposals of the client, those of the adverse party, and those of the colleagues, that a lawyer knows by reason of any of the modalities of its professional performance[44]. This limits the use of the information received from the client to the needs of its defense, not being able to be obliged to declare about them[45].

It is of importance for the matter to analyze its applicability in the field of COs, either carried out as a stand-alone function or in a dual-role capacity.

b. Applicability to a stand-alone CO

To analyze its applicability to stand-alone COs, it is crucial to understand the scope of the privilege. To do so, we need to clarify the premise "by reason of any of the modalities of their professional performance". Article 542.1 of the LOPJ claims that the name and function of lawyer corresponds exclusively to the graduate in Law who professionally exercises the direction and defense of the parties in all kinds of proceedings, or gives legal advice and counsel. It is intuitive to assume, therefore, that the role of CO is not a modality of a lawyer's professional performance[46], since its functions merely consist in monitoring and supervising a compliance program as well as reporting misconducts. Therefore, a lawyer acting exclusively as a CO would not be, under my point of view, bound to the privilege.

As clear as this scenario might seem, there are authors that defend that the function of CO is, or may be, a form of legal practice, and must be subject to the attorney-client privilege[47]. They argue that the entity entrusts the CO with the management of its criminal risks, and it would not be logical that it should be obliged to disclose what has been learned in the course of its compliance function[48]. This way, the privilege would prevent it from providing information in its possession to a proceeding. Nevertheless, there are, in my view, three arguments against this position.

Firstly, it would be unreasonable to impose the duty of attorney-client privilege on the CO, given that some authors argue that the information to be disclosed in a proceeding would

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[44] Article 5.2 of CDAE

[45] Article 542.1 of LOPJ

[46] Prieto, Benjamín. (2019). "*Cómo acertar en la designación del compliance officer desde una perspectiva procesal*", Diario La Ley Nº 9532 - Sección Tribuna - Wolter Kluwer, p. 1-2.

[47] Cabezuela, Diego. (2019). "*El secreto profesional del Compliance Officer*", Expansión, p. 1.

[48] *Idem, op. cit*.

necessarily be related to the commission of an offence. Such information does not pertain to personal or corporate privacy but is, instead, an issue of significant public interest, warranting discovery and prosecution by the State[49]. Imposing a duty to the CO to report while simultaneously impeding it to provide the documentation concerning the reported act would be contradictory[50]. Secondly, as convenience does not mean exclusivity, there are other professional backgrounds that may fulfill the role of CO[51]. It would not be reasonable not to equip an economist, auditor or consultant acting as CO with the same privileges and guarantees than if it was a lawyer.

Thirdly, having all of the internal investigation of the CO protected under the privilege would attempt against the basis of compliance as a whole[52]. If the company really wants to be protected against conviction, it must give full autonomy and freedom of internal and external action to the CO. When legal proceedings are initiated, the CO must be able to present to the judge all the documentation that demonstrates a robust system of controls, as its declaration will often be decisive to determine whether or not there is criminal responsibility of the legal entity[53].

If this documentation eventually reveals control lapses that could result in conviction, the CO could exercise its right not to testify, as provided in article 786 *bis* of LECrim[54], since everyone, including legal entities, have the right not to testify against themselves, the right not to confess guilt and the presumption of innocence[55]. This article clarifies that when the accused is a legal entity, it may be represented by a specially designated individual vested with representation powers, to testify on its behalf. The CO might then testify without prejudice to the right to remain silent[56]. Some could argue then that a client's refusal to waive its CO from attorney-client privilege, is similar to the client's right to remain silent[57]. However, the differences are

[49] Ragués i Vallès, Ramon. (2015). "*La trascendencia penal de la obtención y revelación de información confidencial en la denuncia de conductas ilícitas*", Indret - Revista para el Análisis del Derecho, p. 16.
[50] *Idem, op. cit*.
[51] Prieto, Benjamín. (2019). "*Cómo acertar en la designación del compliance officer desde una perspectiva procesal*", Diario La Ley Nº 9532 - Sección Tribuna - Wolter Kluwer, p. 1-2.
[52] Copeland, Katrice Bridges. (2017) "*The yates memo: looking for individual accountability in all the wrong places*", Iowa law review. Vol 102, p. 6-8.
[53] Prieto, Benjamín. (2019). "*Cómo acertar en la designación del compliance officer desde una perspectiva procesal*", Diario La Ley Nº 9532 - Sección Tribuna - Wolter Kluwer, p. 1-2.
[54] *Idem. op. cit.*
[55] Article 24.2 of the Spanish Constitution (*Constitución Española*)
[56] Rayón Ballesteros, María Concepción. (2018). "*Los programas de cumplimiento penal: origen, regulación, contenido y eficacia en el proceso*", Anuario Jurídico y Económico Escurialense, p. 21.
[57] Prieto, Benjamín. (2018). "*El alcance del secreto profesional en el nuevo Estatuto General de la Abogacía: luces, sombras y penumbras*", Diario La Ley Nº 9846, Sección Tribuna - Wolters Kluwer, p.1

notable since the right to remain silent is a procedural conduct adopted by the person under investigation, whereas attorney-client privilege affects specific documentation or facts within the lawyer-client relationship that are considered relevant to the proceedings[58]. Consequently, not waiving the privilege on the CO being called to the proceedings may create reasonable doubt about the veracity of the entity's testimony, because the entity does not allow it to be compared with the CO´s statement on the same facts, a statement the latter would be obliged to provide truthfully[59].

Conversely, the CO would not be able to rely on its right to remain silent when called to testify as a witness, rather than a representative[60], as witnesses don't have the right to remain silent and have the duty to tell the truth[61]. Nevertheless, in my view, this would not be possible since, according to doctrine, a witness is any person who is summoned to the case on the assumption that they have knowledge related to the fact under investigation, for the purpose of explaining what they know about it[62]. Additionally, according to jurisprudence, it is a third party who, by means of a statement of knowledge, informs the judge of facts which is aware of and are the subject of discussion in a proceeding[63]. Both definitions suggest that a witness is a third party, unrelated to the individual or entity under investigation. However, the CO is quite the opposite, as it is a legal body of the investigated entity especially responsible for reporting misconducts.

Having said this, in my view, a stand-alone CO is, or should not be, bound by attorney-client privilege, when exercised by any kind of professional. However, the situation is less clear when the figure is dual-hatted, when an individual is acting simultaneously as the in-house counsel and CO of the same entity. This is mainly because it is not clear how the individual wears or balances the two hats, whether at the same time, one at a time, or fluctuating and dynamically blending both depending on the circumstances[64]. There are two main opinions on this matter.

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[58] *Idem, op. cit.*

[59] Prieto, Benjamín. (2018). "*El alcance del secreto profesional en el nuevo Estatuto General de la Abogacía: luces, sombras y penumbras*", Diario La Ley Nº 9846, Sección Tribuna - Wolters Kluwer, p.1.

[60] Rayón Ballesteros, María Concepción. (2018). "Los programas de cumplimiento penal: origen, regulación, contenido y eficacia en el proceso", Anuario Jurídico y Económico Escurialense, p. 21.

[61] Article 458 of the Criminal Code

[62] López Barja De Quiroga, Jacobo. (1999). "*Instituciones de Derecho Procesal Penal*", Editorial Akal/ Iure, Madrid, p. 259.

[63] STC 775/1992, of 6th of April 1992, Number 1992/2857.

[64] Hutchens, Amy E. (2011). "*Wearing Two Hats — In-house Counsel and Compliance Officer",* Westlaw - Thomson Reuters, p. 2.

c. Applicability on double-hatted COs

In the first place, analyzing the provisions literally, only the information obtained in the capacity of legal counsel will be subject to attorney-client privilege[65]. Therefore, some believe that it may be distinguished whether an in-house lawyer is offering privileged legal advice or when is acting in a compliance capacity[66]. A general criteria is that the dual-hatted individual is not consulted in a professional legal capacity if the work may be done by someone without legal training[67], refuted by other authors who consider it implausible[68]. Others defend that two standards may be applied to determine if its communications are legally protected: i) if the primary aim is seeking or providing legal advice and ii) if there are multiple objectives in the communication, whether obtaining or providing legal advice is one of the significant purposes of the communication. Lastly, others argue that compliance programs should determine the specific guidelines for in-house counsel's actions that intertwine with those of the CO, excluding from this privilege in-house lawyers when not performing the functions that deserve such protection[69].

In the second place, under my point of view, the joint performance of both roles automatically implies the application of the attorney-client privilege in all the extent of its activity. This is because it is unreasonable and practically impossible to discern when it is acting in its capacity as in-house counsel or CO. It is difficult to tell where legal advice ends and compliance begins[70], as both legal and compliance professionals rely on legal expertise to fulfill their tasks[71]. There would otherwise be a permanent risk of opportunely mislabeling business advice

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[65] Goena Vives, Beatriz. (2019). "*El secreto profesional del abogado in-house en la encrucijada: tendencias y retos en la era del compliance*", Revista electrónica de Ciencia Penal y Criminología, p. 15.

[66] *Idem, op. cit*, p. 20.

[67] Unger, Jacqueline Kate. (2013). "*Maintaining the Privilege: A refresher on Important Aspects of the Attorney-Client Privilege"*, American Bar Association - Business Law Today, p. 3.

[68] Prieto, Benjamín. (2019). "*Cómo acertar en la designación del compliance officer desde una perspectiva procesal*", Diario La Ley Nº 9532 - Sección Tribuna - Wolter Kluwer, p. 1-2. "To claim that the functions of Compliance Officer are not protected by professional secrecy because such a position could be held by an employee of a non-legal department is as absurd as claiming that there is no exemption from testifying in criminal proceedings for a lawyer who provided legal advice to a client in cases where such advice could also have been provided by an economist or social worker"

[69] Goena Vives, Beatriz. (2019). "*El secreto profesional del abogado in-house en la encrucijada: tendencias y retos en la era del compliance*", Revista electrónica de Ciencia Penal y Criminología, p. 20.

[70] Langevoort, Donald C. (2012). "*Getting (Too) Comfortable: In-house Lawyers, Enterprise Risk and the Financial Crisis*", Wisconsin Law Review, p. 12.

[71] Tabuena, José A. (2006). "*The Chief Compliance Officer vs the General Counsel: Friend or Foe?"*, Society of Corporate Compliance and Ethics, p. 3.

as privileged communications and vice versa[72]. This could imply unnecessary administrative burdens, delays in the criminal proceeding and inadequate collaboration with justice. Thereby, entities are consolidating two contradictory roles into a single person[73], in the sense that to fulfill the duty to report, it would inevitably have to breach its privilege, making it impossible to satisfy both obligations simultaneously[74].

d. Exemption cases

Defenders of the applicability of the attorney-client privilege on double hatted COs may believe that the possibility of exemption from the privilege when necessary, could make the conflicts between their dual roles appear less problematic or even potentially manageable. According to article 22.6 of EGAE, the lawyer shall be relieved of this duty on the matters that only affect or refer to its client, provided that the client has expressly discharged them.

There have been several doctrinal interpretations of this discharge. One perspective maintains that the client's consent does not "release" the lawyer from attorney-client privilege[75], in accordance with what is established in article 5.8 of CDAE. However, this is, in my opinion, not a valid interpretation since article 5.8 of CDAE is previous to the introduction of the exemption by the EGAE, which is a higher-ranking regulation[76]. A most adequate perspective argues that the client's consent "empowers" but does not "force" the lawyer to disclose the information protected by professional secrecy [77] since, as mentioned, anyone can invoke the right not to testify against themselves and the privilege is constituted as a right and a duty. The most logical scenario would be that, when exempted, the CO would testify, as invoking its right not to testify would somewhat interfere with the CO's duty to collaborate with justice.

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[72] Marcu, Eden. (2020). "*One Person, Two Hats: Combining the Roles of Chief Compliance Officer and Chief Legal Officer"*, Florida State University Law Review – Volume 48 Issue 3, p. 27.

[73] "X Meetings in Madrid Bar Association" (*Ilustre Colegio de Abogados de Madrid*), April 2018. Under the title "The Role of the Corporate Lawyer in New Organizational Structures," the speakers addressed the latest trends in the field of internal counsel for large companies. María Segimón, Deputy responsible for the International Area of the Madrid Bar Association, led a panel composed of professionals such as the president of the Brazilian Bar Association; the dean of the Barcelona Bar Association (*Ilustre Colegio de Abogados de Barcelona*); the general secretary of Telefónica; the president of the Council of Irish Bar Associations; the, managing partner of Ashurst; and, managing partner of CMS Law.

[74] Turienzo Fernández, Alejandro. (2020). "*La responsabilidad penal del Compliance Officer"*, Universidad de Barcelona, p. 366-364.

[75] Otero González, María del Pilar. (2003). "*Justicia y secreto profesional*", Editorial Centro de Estudios Ramon Areces SA, p. 39.

[76] Since the EGAE is a Royal Decree approved by the Government or Council of Ministers, and the CDAE is a text approved by the Plenary of the General Council of the Spanish Bar.

[77] Otero González, María del Pilar. (2003). "*Justicia y secreto profesional*", Editorial Centro de Estudios Ramon Areces SA, p. 45.

Nonetheless, this possibility still fails to give a satisfactory solution to the problem. This is because the provision stipulates that the waiver of privilege may only be authorized by the client in matters directly concerning “them”. This specificity poses a problem when the matter also affects third parties which might not be willing to waive the CO from the privilege. If the information crucial to the legal proceedings concerns or affects them, yet it cannot authorize disclosure, the CO may be unable to testify, potentially causing a deadlock in the proceedings.

e. Difference among in-house and external lawyers

As this dissertation defends that dual-hatted COs are bound by the privilege intrinsic to their condition of in-house counsels, it is interesting to delve into the historic jurisdictional and doctrinal debate that questioned the application of the privilege to them. This discussion appeared following the case law of the TJEU, that established that the privilege is subordinated to the independence of the lawyer; determined at the same time by whether the lawyer is in-house or external, meaning it depends on the employment relationship linking them to their client.

In 1982, the TJUE outlined, in its *AM&S* E*urope Limited v Commission of the European Communities* judgment, that the application of the principle of confidentiality and attorney-client privilege was contingent upon two cumulative conditions: i) that the client's communication be made for the purpose and in the interest of the client "in the exercise of his rights of defense", and ii) that the specific communication be conducted with an "independent" lawyer, defined as a lawyer qualified to practice law in a Member State of the Union who is not linked to his client by an employment relationship. This was upheld by the ruling of the TJUE in *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission,* issued on September 14, 2010, which denied the attorney-client privilege of in-house lawyers. The rationale behind this decision was that the employment relationship with the entity compromised the independence of in-house lawyers as legal advisors. Consequently, according to these rulings, they are subject to certain positive duties of collaboration with authorities, which are incompatible with the duty of confidentiality. While this ruling was specific to European Union Competition Law, it has faced significant criticism within the Spanish legal system.

Nevertheless, the Spanish legislator did not advocate for this perspective. Article 39 of EGAE expressly establishes that the legal profession may be practiced for a legal entity under a common labor relationship, by means of an employment contract, which should respect the freedom, independence and attorney-client privilege intrinsic to the profession.

Authors argued that this decision wrongly centers on the dual interpretation of legal categories. They defended that the dependence stemming from an employment contract does not necessarily diminish independence since it is intrinsic to the relationship. They argue that any difficulty an in-house lawyer may face to waive the defense stems from personal economic dependence rather than a contractual obligation to a single client[78]. Additionally, attorney-client privilege is not conferred upon lawyers but rather as a fundamental right of the defendant.

Finally, the abovementioned judgments were made in very specific area of law, with respect to very specific obligations, none of them of criminal content, and have not been based on sufficiently solid arguments to force a legislative change in this regard[79]. For all of the aforementioned reasons, a dual-hatted CO is still bound by the attorney-client privilege.

f. Overview

Even though the lack of regulation on COs has created ambiguity, legal uncertainty and diverse doctrinal and jurisprudential viewpoints, it may be concluded, in my view, that: 1) the stand-alone function of CO should not be bound by attorney-client privilege because of the nature of its functions and the fact that it is not exercising any of the modalities of the professional legal performance, as opposed to a dual-hatted CO; 2) significant doubts exist regarding how an individual should balance or wear the two hats, leading to unreasonable or impractical criteria for distinguishing privilege-protected information or documentation; 3) the idea of a general solution to conflicts where entities may exempt their dual-hatted COs from attorney-client privilege remains inadequate, primarily because it doesn't effectively address the potential involvement of unwilling third parties; and 4) there is no basis to assume that in-house counsels are not subject to privilege due to their labor relationship.

Therefore, three general scenarios could be outlined: 1) if a professional graduated in law exclusively holds the position of CO within a company, it is not bound by any form of attorney-client privilege; 2) if a professional graduated in law holds the position of in-house counsel in an entity and the position of CO in a different one, it would only be bound by attorney-client privilege in its role in the former; and 3) if a professional graduated in law simultaneously holds the roles of CO and in-house counsel within the same entity, all of its course of action must fall under the scope of attorney-client privilege.

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[78] Del Rosal, Rafael. (2010). "*Un secreto a voces. Ética jurídica: Foro de comportamiento autorregulado*", p.1.

[79] Prieto, Benjamín. (2019). "*Cómo acertar en la designación del compliance officer desde una perspectiva procesal*", Diario La Ley Nº 9532 - Sección Tribuna - Wolter Kluwer, p. 1-2.

4.2 Conflicts of interest

The discussion goes further attorney-client privilege, also encompassing conflicts of interest. In the first place, a dual-role may cause inadequate supervision of compliance efforts. In its capacity as CO, it might not be equipped with the necessary independence[80], neutrality and incentives to report misconducts. A doctrinal sector agrees with this viewpoint, admitting that there is a risk that the dual-hatted CO may conclude no offence was committed or deliberately withhold it because it adversely affects or implicates it in its role as in-house counsel[81]. If the CO operates as a stand-alone function, the risk of a violation being intentionally overlooked would, in my view, be significantly reduced.

In the second place, there are theoretical debates about whether, a dual-hatted individual would have the capacity to effectively perform CO duties[82]. This is because of the extensive time, effort, and commitment required by both functions, even the most capable in-house counsel could be unable to effectively oversee both compliance and legal responsibilities [83], assuming the risk that it will dilute its effectiveness in one or more areas. In fact, according to some studies, many double-hatted COs have noted that it may be challenging to find enough time to properly coordinate and handle compliance issues [84]. This raises the question of whether daily urgent legal matters distract the in-house from compliance long-term objectives[85]. This might also be affected by factors such as the magnitude of the legal entity.

4.3 Differing opinions

Another argument against the consolidation is that in-house counsels and CO might have conflicting opinions in the same matters. In the first place because both tend to ask clients different questions and provide different advice. The services of the in-house counsel may be viewed as "enabling", as they inform of which actions are permissible, while the services of

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[80] Intrinsic to the nature of the responsible body, as mentioned by Asociación Española de Compliance (ASCOM), in "*Libro blanco sobre la función de Compliance*", 2017, p. 15. "The Compliance function shall be endowed with maximum independence, so that its judgment and way of proceeding are not conditioned by issues that prevent or hinder it from freely carrying out its essential tasks for the achievement of the Compliance objectives, or by fear of reprisals".

[81] Marcu, Eden. (2020). "*One Person, Two Hats: Combining the Roles of Chief Compliance Officer and Chief Legal Officer"*, Florida State University Law Review – Volume 48 Issue 3, p. 25-26.

[82] C. Bird, Robert and K. Park, Stephen. (2016). "*The Domains of Corporate Counsel in an Era of Compliance*", American Business Law Journal, Volume 53, Issue 2, 203-349, p. 7

[83] *Idem, op. cit.*

[84] Bernstein, Sally and Falcione, Andrea. (2014) "*PWC State of Compliance 2014 Survey"*, p. 1.

[85] Marcu, Eden. (2020). "*One Person, Two Hats: Combining the Roles of Chief Compliance Officer and Chief Legal Officer"*, Florida State University Law Review – Volume 48 Issue 3, p. 25-26.

CO may be viewed as more "limiting the freedom to act", as they advise on what actions should be avoided[86]. Therefore, while compliance programs may mitigate legal risks for corporations, they may clash with short-term business objectives[87], especially when actions that could legally be taken are advised against for compliance and ethics reasons.

This difference in questions and advice is linked to the fact the client base varies for each role. For lawyers, it primarily consists of the company's officers, directors, employees, and shareholders[88], whereas COs may also serve investors, the securities markets, and society at large. Consequently, in-house counsels owe their professional and legal duties to the best interest of the entity[89]. In contrast, the compliance officer could be subject to a broader public interest such as the regulators[90]. The fact they serve different interests may also create another conflict regarding the timeliness of responses[91]. While the CO may aim to delve deeper into issues, the legal team might prioritize solving immediate problems as they arise, driven by their focus on client service, meaning prompt responses to inquiries. But while wearing the hat of CO at first instance, it must ask questions that may slow down the process[92], since it wants to prevent the very mistakes that result in legal battles[93].

4.4 Differing behavior

Some authors have also argued against double-hatted COs, as they question the capacity of lawyers of boosting ethics conscience in entities[94]. There is a strong belief that somewhat in the training, socialization and professional identity of the lawyer interferes with the ability to generate an ethical corporate culture[95]. This is because their background best prepares them to develop legal compliance, not a values approach[96].

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[86] Frankel, Tamar. (2018). "*The Law Office (LO) and Compliance Officer (CO): Status, Function, Liabilities, and Relationship*", Harvard Law School Forum on Corporate Governance, p. 2.
[87] Frankel, Tamar. (2018). "*The Law Office (LO) and Compliance Officer (CO): Status, Function, Liabilities, and Relationship*", Harvard Law School Forum on Corporate Governance, p. 2.
[88] *Idem, op. cit.*
[89] Miller, Geoffrey P. (2014). "*The Compliance Function: An Overview*", No. 14-36 NYU Law and Economics research paper, p. 8.
[90] *Idem, op. cit.*
[91] Hutchens, Amy E. (2011). "*Wearing Two Hats — In-house Counsel and Compliance Officer",* Westlaw - Thomson Reuters, p. 4.
[92] *Idem, op. cit.*
[93] Tabuena, José A. (2006). "*The Chief Compliance Officer vs the General Counsel: Friend or Foe?"*, Society of Corporate Compliance and Ethics, p. 3.
[94] Langevoort, Donald C. (2012). "*Getting (Too) Comfortable: In-house Lawyers, Enterprise Risk and the Financial Crisis*", Wisconsin Law Review, p. 6-7.
[95] Klebe Trevino, Linda. (1999). "*Managing Ethics and Legal Compliance: What Works and What Hurts*", Penn State University, p. 41.
[96] *Idem, op. cit.*

Some explain this by referencing lawyers' emphasis on "lawfulness", which may overshadow compliance influences on decision-making[97]. The common practice of having a double-hatted CO, namely a legal counsel advising on compliance and ethics, may lead to an excessive legalistic approach, obscuring other important considerations, such as cultural influences on employee behavior or programs that genuinely promote desired behavior in a meaningful way[98].

4.5 Other restrictions on the consolidation of roles

Even though there are no explicit prohibitions on combining the roles of CO and in-house counsel, there are restrictions on the joint practice of lawyers with other professional services. Therefore, it is of great interest for the present matter to see the underlying reasoning to identify potential similarities or parallelisms.

In the first place, in 2002, the TJUE ruled in favor of the incompatibility between the legal advisory performed by lawyers and the control performed by auditors[99]. In this context, Directive 2014/56/EU of the European Parliament and of the Council on April 16th, 2014[100], established the obligation to assess threats to auditor independence and to implement safeguards to mitigate those threats. If such safeguards may not effectively address the threats, the auditor must either resign from the audit engagement or refrain from conducting the audit altogether.

Following this ruling, Spanish legislators introduced the explicit prohibition in article 16.1.b) 4th of Accounting Auditing Law (*Ley 22/2015, de 20 de julio*, de *auditoría de cuentas*) and later in article 18.1.b of EGAE. The former stipulates that it shall be deemed that the auditor or audit firm does not enjoy sufficient independence in the performance of its duties with respect to an entity when they provide legal services simultaneously for the audited entity. This is unless such services are provided by separate legal entities with separate boards of directors, and may not relate to the resolution of disputes on matters that could have a material effect, measured in terms of materiality, on the financial statements for the period or year being audited.

One argument for this has been that both professionals serve different interests. While auditors are tasked with serving the public interest, lawyers primarily serve their clients' interests,

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[97] Langevoort, Donald C. (2012). "*Getting (Too) Comfortable: In-house Lawyers, Enterprise Risk and the Financial Crisis*", Wisconsin Law Review, p. 8.

[98] Greenberg, Michael D. (2010). "*Directors as Guardians of Compliance and Ethics within the Corporate Citadel – What the Policy Community should know"*, p. 44

[99] Judgement of the Court of Justice of the European Communities of 19 February 2002, Case C-309/99, "*J.C.J. Wouters, J.W. Savelbergh, Price Waterhouse Belastingadviseurs BV/Algemene Raad van de Nederlandse Orde van Advocaten".*

[100] Which amends Directive 2006/43/EC regarding statutory audits of annual and consolidated accounts

meaning their objectives may diverge in some matters. In the same sense, if a firm is auditing an entity which it has previously advised legally, they might be reviewing operations they have previously assessed. In essence, they are analyzing a portion of their own past work.

Secondly, there is an explicit prohibition against its simultaneous practice with the profession of *procurador* (court attorney). Article 1.4 of Law on access to the professions of Attorney at Law and Court Attorney (*Ley 34/2006, de 30 de octubre, sobre el acceso a las profesiones de Abogado y Procurador de los Tribunales*, hereinafter, "**LSAPAP**") states that it shall not be possible to simultaneously become a member of a Bar Association and an Association of Court Attorneys or to practice both professions. In the same sense, article 15 of Code of Ethics of Court Attorneys (*Código Deontológico de Procuradores*) and article 24.1.b of the General Statute for Court Attorneys (*Real Decreto 1281/2002, de 5 de diciembre, por el que se aprueba el Estatuto General de los Procuradores de los Tribunales*) also establish that the exercise of the profession of court attorney is incompatible with the simultaneous exercise of the profession of lawyer. This prohibition suffered several criticisms, such as that of the former National Commission for Competition (*Comisión Nacional de la Competencia*), now National Commission for Markets and Competition (*Comisión Nacional de los Mercados y de la Competencia*), which proposed its elimination[101], in exercise of its advisory powers in relation to drafts and proposals of rules affecting competition[102]. However, the prohibition has remained in place until the present day.

This prohibition, is also based on the need to guarantee the impartiality and independence of the exercise of the respective professional activity. This is because, despite the apparent similarity in their roles and a common prior university education[103], the interests represented by the attorney and the lawyer are distinctly different. A lawyer employs all available means and resources to secure a favorable decision from the judge and, conversely, the court attorney

[101] Comisión Nacional de la Competencia. (2013). "*IPN 86/13 on the Draft General Statute of the Collegiate Organization of Court Attorneys*", p. 5.

[102] As provided in former article 25.a) of Ley 15/2007, de 3 de julio, de Defensa de la Competencia (LDC), current article 5.2 of Ley 3/2013, de 4 de junio, de creación de la Comisión Nacional de los Mercados y la Competencia.

[103] Preamble III, of LSAPAP "Law 34/2006, of October 30, 2006, is amended, establishing, in summary, a single access to the legal profession and the legal profession: the same academic degree (bachelor's or law degree) and the same training (the same master's degree) are required for both professions, so that those who pass the evaluation may practice law or the legal profession indistinctly, with no other requirements than membership in the professional association".

acts as an intermediary between the party and the judicial body, aligning more closely with the public nature of the process and the jurisdiction[104], rather than the client.

Both above-mentioned prohibitions are grounded on the principles of independence and avoidance of conflicts of interest. They acknowledge that while their functions may appear similar and demand comparable expertise, they are fundamentally different and serve distinct interests. Consequently, the action within one may significantly affect the other, rendering it impractical to simultaneously fulfill both without creating a conflict of interest. This situation bears resemblance to the challenge faced by dual hatted COs, prompting consideration as to whether the simultaneous practice of COs and in-house counsels should be similarly restricted.

7. CONCLUSIONS

In summary, it becomes evident that the lack of specific regulations on the role of CO has caused confusion and legal uncertainty. After the analysis made in this dissertation, two primary conclusions may be drawn.

In the first place, the legislator should approve a General Statute for COs, to offer clarity in areas where ambiguity currently exists. This General Statute should provide the figure of CO with complete independence and freedom of internal and external action that may allow it to correctly exercise its role.

In the second place, it is important for the legislator to address the simultaneous practice of the CO role with others. In my view, the CO should be a stand-alone position. Combining this role with another has raised concerns about conflicts of interest, effectiveness, and differing priorities. As mentioned, merging these roles may lead to inadequate supervision of compliance efforts due to a lack of necessary independence and objectivity. Additionally, the extensive responsibilities of both roles may overburden even the most capable individuals, reducing the effectiveness of both functions. Overall, this prohibition would benefit entities and the public interest by enhancing the effectiveness of compliance efforts and promoting accountability and integrity within organizations.

However, if this does not happen and the CO remains a dual role, the legislator should at least establish the incompatibility of the CO role with any position that might create a conflict of interest, such as the in-house counsel. Firstly, this is due to attorney-client privilege. Actions

[104] Ilustre Colegio de Procuradores de Madrid. (2013). "*La compatibilidad en el ejercicio de la procura y la abogacía quiebra el principio de eficacia procesal ejercida desde hace más de 600 años en la justicia española*", Revista núm. 26, p. 9-10.

carried out by a dual-hatted individual would be entirely privilege-protected, creating significant doubts about how to balance or distinguish privilege-protected information. Two contradictory roles would be consolidated into a single person, making it impossible to fulfill the duty to report without breaching attorney-client privilege. Additionally, conflicting perspectives and behavioral traits between in-house counsel and COs complicate matters further.

Establishing a stand-alone CO role or ensuring its incompatibility with the in-house counsel position would offer multiple benefits. Firstly, it would likely result in more internal and external reports of noncompliance, given the CO's complete independence and autonomy. Secondly, authorities would have better access to information during investigations, as data may be shared more freely without the constraints of attorney-client privilege. Thirdly, it would boost ethics conscience in entities.

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