

Challenging The Bar: Legal Constraints For Legal Clinics



iLINC
ICT Law Incubators
Network

Digital start-ups are developing a better understanding of their legal surroundings. Yet, at the initial start-up phase, knowledge concerning the applicable legal framework is lacking. Additionally, early starters are less likely to anticipate regulatory changes. This is highly problematic. The majority of digital start-ups are active in the ICT and Media sector, two areas where regulatory changes are on the horizon: the long-awaited data protection regulation, the proposed revision of the payment services directive, the intended copyright reform, the planned common European sales law, etc. However, due to limited resources, start-ups are often unable to pay for professional legal advice. Therefore legal clinics, i.e. students providing free legal advice, serve a real market and societal purpose. Yet, setting up a clinic can be an extremely arduous task, not only from an organizational point of view. One of the key barriers relates to the questions: what constitutes legal advice and what are the implications thereof? This Policy Brief addresses these themes and hopes to convey the following messages: a) legal clinics serve an important societal and educational purpose and b) legal clinics should be allowed to perform their activities. In particular, iLINC believes that the provision of legal advice should not be monopolised by lawyers or bar associations and should remain open to alternative service providers, such as legal clinics.

I. The Added Value of Legal Clinics

The Legal Needs of Start-ups

The services offered by legal clinics address a veritable market need. **Our research indicates that, even though start-ups are developing a better understanding of their legal surroundings, many start-ups, especially those having little revenue or no turn-over, lack legal awareness.** Moreover, these start-ups are also **less likely to anticipate regulatory changes.** Consequently, digital start-ups are often in need of qualitative legal advice. First, the tech industry undergoes rapid changes and transforms constantly. For start-ups, this often results in uncertainty concerning their legal surroundings. The end-result is a patchwork of legal grey zones. Although this could be interpreted as both a blessing and a curse, legal advice is often needed in order to effectively navigate across legal ambiguities. Second, technological developments are often greeted with regulatory initiatives. Similarly to technology, law evolves as well. It is imperative for start-ups to have a good understanding of future changes, as it may impact

the legality of their business models. This seems particularly true within the fields of ICT and Media Law.

The need for adequate and qualitative legal advice has also been recognized by the start-up community. Of the 80 start-ups participating in our iLINC survey, around 90% wish to know more about potential legal obstacles and 95% consider legal advice very important. Almost all start-ups participating in our survey also perceive legal compliance as a crucial element to their success. Start-ups which lack legal guidance fear that: a) their business may suffer financially and is more likely to fail (58%) and b) they would be less attractive to potential funders (41%). Moreover, receiving legal advice would allow them to once again regain focus on other business priorities (47%). Nevertheless, the willingness and awareness of ICT start-ups of potential legal boundaries did not necessarily entail that they had actually sought legal counselling.

The Importance of Legal Clinics...

The majority of start-ups participating in our survey have sought legal advice (51%). Yet, considering that 100% of participating start-ups deem legal advice as important/very important, this number remains rather low. In the majority of cases, when advice was given, this was done on an ad-hoc basis. Presumably, the main reason why start-ups seek ad-hoc, rather than on-going advice, is a budgetary one: on-going advice tends to be far more expensive. For start-ups not having received any legal advice, budgetary considerations were also a root cause. Whether this is purely a perception of start-ups or actually grounded in truth remains undetermined by our survey. **Nevertheless, it does appear that 'cost' is the main determining factor when seeking legal counselling.** Moreover, when advice was given to start-ups, the majority of start-ups had to pay the standard rate, with only 18% receiving a special fee for start-ups. Given that many start-ups did not obtain legal advice due to the monetary aspect, it appears that many start-ups will not seek legal advice within the first stages of their development, or, if they do get advice, will only be able to pay on an ad-hoc basis, which often negatively affects the quality of advice given. Indeed, start-ups have to continuously adapt to the changing technological environment. This means that their legal needs may alter drastically over short periods of time.

The Market Gap

By providing start-ups a cost-friendly alternative to

legal advice and students a practical learning experience, legal clinics fulfil both a market and educational gap. The establishment of university-based legal clinics should therefore be further promoted.

This clear need for legal advice, but the inability to obtain, qualitative, on-going advice, has created a market gap, which legal clinics can fill. Above all, legal clinics serve both a societal and educational purpose. Therefore, most legal clinics provide their services either for free or at a minimal fee. Consequently, legal clinics can also serve a real market purpose: they give free legal advice, aiding start-ups who can't afford professional legal counselling, whilst also providing law students with a solid, practical learning experience. Moreover, through interaction with the start-ups, **legal clinics raise technological awareness and equip students with a digital skill-set**. The need for digital skills has long been considered a major goal of the European Commission.

II. Legal Constraints

The Importance of the 'Legal Advice' Qualification

Legal clinics are not law firms, nor should they be. Whereas a law firm is a business, a university, above all, serves an educational purpose. However, many clinics face challenges because the services they present could be qualified as 'legal advice'. In some countries, this qualification may have severe consequences. The legal definition of what constitutes legal advice could prevent the roll-out of university-based clinics because:

- In some instances, legal advice can only be provided by qualified lawyers. Thus students and universities are excluded from certain types of legal counselling services.
- The provision of 'legal advice' is often governed by local bar associations. Their guidelines must be taken into account by legal clinics. As legal clinics may be considered by some to be in competition with professional lawyers, the position of the bar on clinics may not always be welcoming.

Jurisdictional Differences – Country Report

Although not all-encompassing, this section of the policy brief aims to outline the jurisdictional differences with regard to the legal constraints faced by legal clinics in the EU. This comparison among Member States will allow us to discern the major legal barriers of university-based incubators. This will ultimately enable us to draw some general

conclusions and formulate policy recommendations - The information used for this part of the policy brief has been provided by iLINC's Core and Active Network Partners. Some countries however do not have a legal framework concerning the provision of legal advice. This makes it difficult to determine whether or not legal advice can be given by third-parties.

I. Belgium

The Belgian Judicial code makes a distinction between first-line and second-line legal aid.

First-line legal aid refers to legal aid that is offered in the form of practical information, legal information, a first legal opinion or a referral to a specialized authority or organization.

Second-line legal aid has been defined legal aid that is offered to a natural person in the form of a detailed legal opinion, aid whether or not in the context of legal proceedings, or aid in a lawsuit, including representation in court.

Even though the judicial code assumes that only lawyers are able to provide second-line legal aid, in practice, such aid does not require any specific legal qualification. There is one exception though: **only lawyers shall have the right to plead in any court, barring the exceptions provided for by law.**

The Belgian legal environment allows university-based clinics to perform all the necessary incubator activities. Indeed, only the right to plead in court is exclusively reserved to qualified lawyers. However, to our knowledge, no clinic performs this type of service yet.

II. United Kingdom

The UK Legal Services Act of 2007 refers to legal advice as a 'legal activity.' A further distinction is made between reserved and unreserved legal activities.

The **reserved activities** are closely related to the public function of a lawyer. They should be understood as: i) the exercise of a right of audience, ii) the conduct of litigation, iii) reserved instrument activities, iv) probate activities, v) notarial activities and vi) the administration of oaths.

Unreserved legal activities are defined as any other legal activity which consists out of: i) the provision of legal advice or assistance in connection with the application of the law or with any form of resolution of legal disputes and ii) the provision of representation in connection with any matter concerning the application of the law or any form of resolution of legal disputes.

Under the Legal Services Act 2007 it is an offence for a person to carry out a reserved legal activity unless that person has been entitled to perform that activity. This requires the service provider to obtain an entitlement in relation to the relevant activity. Those entitlements are issued by an approved regulator, such as the Law Society or the General Council of the Bar. In other words, in order for one to perform reserved legal activities, one has to be authorised to do so.

Unreserved legal activities can be performed by any person, even by individuals who don't have a formal legal qualification or reserved title. However, all unreserved legal activities remain subject to consumer and competition law.

The English and Welsh legal framework seems encouraging to the establishment of legal clinics. First, there is legal clarity as to the activities that can only be carried out by authorised individuals. Second, the provision of general legal counselling is not monopolised, instead the unreserved activities can be performed by every individual, including students, as long as consumer and competition law is taken into account. It therefore provides a climate in which legal clinics can thrive. Indeed, start-ups often required services that would be qualified as unreserved legal activities, such as the draft of a privacy policy or terms & conditions.

III. Germany

In Germany, the legitimacy of specific legal services is governed by the German Legal Services Act. **A legal service has been defined as a service that is provided to a third person who requires the legal assessment of a concrete, particular case. A person who intends to present such a service is required to be a fully qualified lawyer.** A law student can become a fully qualified lawyer after having passed a state examination and being formally admitted into practice.

The qualification of advice as a 'legal service' requires a case-by-case assessment, and should not be based on the totality of services offered. Thus legal clinics will always have to consider whether or not the advice granted, falls under the definition of 'legal service', even if the clinic grants assistance in other areas.

Crucial to the assessment is whether the advice relates to a particular, concrete situation. For instance, MOOCs do not constitute a 'legal service', as they target a broader audience concerning general legal questions. Similarly, one could argue that drafting and providing standardised contracts does not constitute a legal service.

However, legal clinic advice often relates to a concrete question. Indeed, this is often the main goal of a university-based clinic: assist start-ups that have a particular, legal query. As a consequence, the traditional clinic model, in which students guide start-ups, is not in compliance with the German Legal Services Act.

Therefore, German legal clinics are required to seek alternative service models.

- Instead of one-to-one consultations, a clinic could opt for a one-to-many or many-to-many consultations. The public nature of these sessions does not allow to answer a particular question, rather general instructions could be given.
- Clinic sessions could be construed as not to give concrete advice, for instance through the standardisation of service provision. Such an approach could result in start-ups obtaining the necessary tools that enable them to understand their concrete legal problem themselves.
- Legal clinics could also offer start-ups a risk assessment. Rather than examining a particular legal question of start-ups, the risk underlying a start-up's activity could be analysed and weighed. Still, such a risk assessment can't become too concrete. Instead, referral could be made to all relevant corresponding laws.

Although the above-mentioned options do provide German-based legal clinics alternatives to guide start-ups, it is often the case that these solutions are to the detriment of digital starters, who receive less substantial advice.

IV. Israel

In Israel, the **provision of legal advice and legal opinions** are prime examples of **unique activities** that are to be **performed by lawyer only**, according to article 20 of the Israeli Bar Association Law.

Legal advice has been defined as the process of giving a concrete legal response to a question. A lawyer should lead this process. **University based clinics are required to have a lawyer appointed in order to fulfil the majority of clinic services.** Students are responsible in assisting the lawyer of the clinic. The provision of legal advice can include the writing of legal opinions and drafting position papers. In some cases, the clinics do assist in litigation, when the clinic's lawyer believes that the incident may lead to a significant and important legal change.

In addition, the clinic's staff engaged in providing lectures on various topics that do not necessarily constitute legal advice, also fall under the supervision of the clinic's lawyer.

Clinic activity is mainly being limited due to constraints implemented by the Israeli Bar Association Law and the Israeli Legal Ethics Rules. According to the legal framework, **students** - that are not yet lawyers – **are not allowed to offer legal insight. They may only do so under the guidance of the lawyer.** Additionally, charging payment or any refund of courts' reliefs is prohibited, and therefore cannot be considered as a potential source for the clinic's budget.

V. Portugal

In accordance with Portuguese law, legal advice is defined as **any activity involving the interpretation and application of legal rules requested by a third party. This wide interpretation of what constitutes legal advice, in itself is constraining.** Moreover, the Portuguese bar is considered to be rather conservative. Furthermore, there is no tradition of legal clinics and clinical education in Portugal. The main constraints for university-based legal incubators are:

- The wide interpretation of legal advice made by the Portuguese Bar
- The lack of any legal provision with relation to legal clinics
- The law requires that the creation and functioning of a legal advice bureau has to be approved by an ordinance of a Government member responsible for Justice.
- The provision of free legal counselling must be defined by a protocol between the Ministry of Justice and the Bar.
- The Portuguese law on the access to the Law only protects individuals, thus excluding for-profit organizations and legal persons from acquiring a right to free legal aid.
- The Bar has restricted the location of legal advice offices. For instance, law offices should best avoid ground floors or malls.
- The Bar has restricted the provision of electronic legal advice, limiting virtual clinic advice opportunities.

VI. Spain

The Spanish legal environment is particularly difficult to assess and requires some additional background information and exposition.

In Spain, **the legal profession seems to be in dire straits, with many lawyers claiming it is hard to make a living.**¹ Access to the profession was very easy until 2014. Therefore Spain has an extremely high number of lawyers (285 per 100.000 inhabitants). Most of the lawyers work solo or share facilities with few other lawyers.²

Given these circumstances, **Spanish lawyers are understandably wary of anything that could divert a possible source of revenues.** One could also easily imagine there to be a heavy reluctance of universities to start a legal clinic. Only the few big law firms may consider a free legal clinic for start-ups as a long-term investment to gain promising clients and recruit young lawyers.

The Legal Environment

According to Article 6 of the *Estatuto de la Abogacía* and Article 542 of the *Ley Orgánica del Poder Judicial*, the name and function of a lawyer is exclusively reserved to law graduates that represent a client in court or grant legal advice.

Little literature is available with regard to the exclusive nature of legal advice. As a consequence, it is also difficult to assess the legality of the free provision of legal services by students. This uncertainty remains even if it were to be expressly communicated that the advice was not given by actual lawyers. Moreover, Law Societies and Law Schools have a long history of collaborating based upon mutual respect and *bona fide* behaviour in the fields of competition. The preservation of this relationship is to the interest of all parties involved.

The provision of free legal advice for start-ups under the patronage of a Law School and provided by students, if not illegal, would very probably be seen by lawyers and their societies as an aggressive policy that could endanger the status quo of current collaborations. And even more so if these services are advertised in any way.

This problem could be solved or at least soothed if:

- Law Schools are not the entrance door for potential clients, that is, start-ups looking for advice; that requires the Law Schools to adopt a less central role and to put in place a softer coordination.
- Every student is formally enrolled as an apprentice or intern of a lawyer or law firm.

A semi- solution could be to embed the legal clinic as an internship, which is part of the *Master de Abogacía* and is managed by the Lawyers Societies. Alternatively, a third party, as for instance a public or private incubator, to be the manager of a legal clinic.

Conclusion

The rules governing the provision of legal advice, and as a consequence thereof legal clinics, differ from Member State to Member State. Although we have established in a previous brief that there is no set model for legal incubators, this nonetheless presents significant disadvantages. First, this makes it more **difficult for legal clinics to share best practices**. Second, in some Member States **it may even be impossible to start a legal clinic in the first place**.

Two major barriers liable to constrain the establishment of a legal clinics have been identified:

- **The first barrier relates to the monopolization of legal aid: in some Member States, legal advice can only be provided by a qualified lawyer. Depending on how legal advice has been defined by the national legislator, this exclusivity can be far-reaching.** Consequently, students are not allowed to grant legal counselling, except when under the guidance of a lawyer. Country examples are: Germany, Portugal and Israel
- **The second barrier is related to the bar associations present in the Member States.** Some incubators feel that they are being inhibited by constraints implemented by the local bar. The Country examples are: Portugal, Spain and Israel.

Although not as prevalent, the economic climate of the country involved may also play a crucial role. An example of the latter can be found in Spain, where due to the high number of unemployed lawyers, the creation of a legal clinic also has severe ethical consequences.

iLINC RECOMMENDS

RECOMMENDATION I:

- **By providing start-ups a cost-friendly alternative to legal advice and students a practical learning experience, legal clinics fulfil both a market and educational need. The establishment of university-based legal clinics should therefore be further promoted.**

RECOMMENDATION II:

- **The provision of legal advice should not be monopolized by qualified lawyers or individuals already in possession of a law degree.**

RECOMMENDATION III:

- **Member States should increase legal certainty by clearly defining different types of legal service provision. This to enable third-party service providers, such as legal clinics, to distinguish between legal services that are to be exclusively provided by qualified professionals and those that are not.**

RECOMMENDATION IV:

- **Member States should clearly specify those legal services that can only be provided by qualified lawyers or by individuals already in possession of a law degree.**

RECOMMENDATION V:

- **In an open society, where legal advice can be provided by third parties, the range of control of the local bar and bar associations should remain limited. The bar should not be able to exert pressure or indirectly affect legal service provision by third parties. Rather, their influence should be restricted to the activities performed by lawyers.**

References

1. Barómetro Interno de Opinión de la Abogacía Española 2013, 2013, Metroscopia.

www.abogacia.es/wp-content/uploads/2012/05/INFORME-GENERAL-Barometro-Interno-de-Opinion-Enero-2013.pdf

2. La abogacía vista por los abogados. Tercer Barómetro Interno de Opinión del CGAE, 2008, Metroscopia.

<http://www.abogacia.es/wp-content/uploads/2012/05/III-BAROMETRO-INTERNO.pdf>

ILINC is the European Network of Law Incubators. Its main objective is to facilitate the provision of free legal support to start-ups while, at the same time, offering postgraduate law students the opportunity to engage in professional practice in the fast-moving and highly exciting world of technology start-ups.

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