LEGAL PRIVILEGE FOR IN-HOUSE LAWYERS

POSITION PAPER

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1. PURPOSE OF THIS PAPER

In proceedings brought by the Commission under Regulation 17 to enforce the competition rules of the EC Treaty, the legal advice of lawyers practising in Europe who are bound to their Client by a relationship of employment will, in law, have to be disclosed to the Commission in the course of its investigation. The European Company Lawyers' Association (ECLA) believes that this position is wrong in principle and should be changed.

In this Paper, ECLA will:

- State the legal issue, and the background to the concept of "legal privilege," which differs in various parts of the European Union.

- State the reasons of public policy why privilege should be extended to the legal advice of In-House Lawyers.

The positions laid out in this Paper are supported by additional material which is available from ECLA . The Paper refers to these additional materials where relevant.

2. THE BACKGROUND TO THE LEGAL ISSUE, THE CONCEPT OF "PRIVILEGE" AND ITS SCOPE IN PRACTICE

A. The Background to the Legal Issue

The issue of "Legal Privilege" for In-House lawyers in competition cases arises from the procedure to be followed by the Commission in enforcing Articles 85 and 86 of the EC Treaty pursuant to Regulation 17, and in particular, Paragraph 14(3), and similarly Article 53 and 54 of the EEA Treaty.

In ECLA's view the principle and the arguments developed in this paper should also extend to the other procedures for the enforcement of competition law, such as the merger control regulation procedure.

Since legal privilege is not specifically mentioned in Regulation 17, it was on the occasion of one of the first cases concerning this issue, and involving a company under investigation by the Commission, that the Court of Justice had the opportunity to rule on this question. The case referred to is A.M.& S. Europe Limited (Australian Mining and Smelting Europe Ltd.v.Commission,155/79, Rec. 1982, p.1575), in which judgment was given on 18 May 1982.

The Court:

§ stated that the rules included in Regulation 17 did not exclude the possibility of recognising, subject to certain conditions, that certain business records are confidential;

§ indicated that, as regards the protection of written communications between external lawyers and clients, it is apparent from the legal systems of the Member States that such a protection is generally recognised, although its scope and the criteria for its application vary;

declared that "*there are to be found in the national laws of the Member States common criteria, inasmuch as those laws protect, in similar circumstances, the confidentiality of written communications between lawyer and client provided that, on the one hand such communications are made for the purposes and in the interest of the client's rights of defence and, on the other hand, they emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment*";

As a consequence, the Court did not recognise legal privilege for the advice of In-House lawyers. In a more recent case however the Court did allow that privilege could extend to an internal memorandum of an In-House lawyer, which simply reported the opinion of an external lawyer (Hilti v. Commission, T30/89, 1991);

Since 1982, the Commission has, on several occasions, used In-House lawyers' notes against the client the lawyer was advising (SABENA Decision, 1988, L317/47).

B. Privilege is the word commonly used to describe two separate, if related, concepts:

One, which is used in common law countries (the Republic of Ireland, the United States, Australia, Canada and the United Kingdom) describes the **right** of a **client** who has received legal advice to refuse to produce any document containing that advice in legal proceedings where he would otherwise be under a duty to do so. Such proceedings include civil or criminal proceedings and in many cases include proceedings brought by the Competition Law Enforcement Authorities.

The other use is to describe the **obligation** of a lawyer in many civil law jurisdictions (in some countries on pain of criminal sanctions) to respect a professional obligation of secrecy and to refuse to give evidence which would breach that obligation. This is unconnected with any obligation placed on the client to disclose documents (which, in civil proceedings, exists in only very exceptional cases).

A separate Paper discussing in more depth the difference between the common law concept of "Legal Privilege" and the civil law concept of "Secret Professionel" is available from ECLA.

C. What is the scope of "privilege" in practice?

Under the common law approach, it is the nature and content of the document itself which will determine whether it is privileged. Under the civil law approach, it is the fact that the document was issued by a lawyer acting in that capacity which will determine the issue. Thus under both approaches, the term "privilege" should cover ONLY one class of documents, i.e. documents which were created for the dominant purpose of giving or obtaining legal advice.

Privilege does not cover documents falling outside this class. The ordinary business records of an undertaking would therefore never fall under the privilege, neither would any other document not created predominantly for the reasons set out above. The cloak of "privilege" should not be used to conceal evidence from the Commission's Inspectors. There should be no difficulty in devising a procedure to enable the Court of First Instance to examine disputed documents and to ensure that the rules are respected. ECLA would wish to be involved in working out this procedure.

3. WHAT ARE THE REASON OF PUBLIC POLICY WHY THE POSITION SHOULD BE CHANGED?

A. Freedom in the choice of Counsel

In many Member States there has been a strong growth in the last decades in the number of lawyers employed In-House. Many undertakings value the improvements in accessibility and in the understanding of their business which come with a full-time commitment on the part of their legal advisers to a single client or group. Many undertakings, concerned with the pressures on timing and costs in today's intensely competitive global markets, will also note the substantial savings in time and cost which are associated with full-time salaried employees, when compared with the costs of the same legal resource obtained from external firms. These differences in cost and timing, coupled with the increasing complexity of modern laws and regulations, have prompted many companies, including many Small and Medium Enterprises to invest in In-House legal advice.

In Member States the training and academic qualifications of all lawyers are similar, and in many Member States In-House lawyers have a professional status which is recognised nationally as equivalent to that of lawyers in private practice. Reference is made to the ECLA Paper " The Company Lawyer in Europe" of 15 November 1996, outlining the significant change in the role of In-House Lawyers since the date of the A.M. & S. case.

A further ECLA Paper outlining the issues of professional ethics and independence which arise in the practice of law, and discussing their application to In-House lawyers is also available . It is apparent from this Paper that In-House lawyers are in a position to offer exactly the same standards of professional service and ethics as their colleagues in private practice.

Freedom in the choice of counsel is central to the rights of the defence under any system of law in a free society. The decision whether to consult lawyers who are employed under a contract of service or those who are retained through a contract for services is one which the undertaking should be allowed to make on economic and business grounds alone. The current state of European Law imposes on European Business an unfair juridical disadvantage where an undertaking chooses to seek the advice of an In-House lawyer.

Given further that the same juridical disadvantage does not exist in the United States, and that there are significant cost and efficiency advantages in using In-House lawyers, the present legal position in the Union imposes an unnecessary additional cost burden on European Business.

B. Compliance

A key concern of the vast majority of undertakings in the European Union will be to insure compliance with all legal obligations, including Competition Law. In-House lawyers are uniquely qualified to make a contribution to the task of ensuring compliance with complex laws throughout an undertaking. They do this not only by assuming responsibility for giving advice on specific business transactions, but also by giving training in the practical implications of the legal principles. In-House lawyers are specially qualified to promote compliance, and will be significantly handicapped in their efforts to do so if their advice is liable to be produced to the Competition Law Enforcement Authorities. To restrict them to giving oral advice alone is devoid of logic and a significant prejudice to the spread of compliance. The absurdity of the difference in treatment of the same legal advice tendered by an In-House lawyer and by a lawyer in private practice is evident.

C. Anomalies

The unfair and illogical differentiation between the advice of In-House lawyers and that of external lawyers under European Law produces a number of significant anomalies.

In the US, the legal advice of In-House lawyers is protected from production to the Department of Justice or the Federal Trade Commission in the same way as the advice of external counsel. It will produce serious and unfair anomalies in the administration of

justice if the advice to European Union undertakings from their In-House lawyers is given to the US authorities as part of the increasing co-operation between the Commission and those authorities. If an equivalent privilege from production is not granted within the Union, it is difficult to see how the Commission can guarantee that this will not happen.

Furthermore the Commission has recently increased pressure for improved co-operation between the National Competition Authorities of the Member States and the Commission. In a number of Member States, the advice given to undertakings by their In-House lawyers is privileged and may be withheld from the National Competition Authority. It would be unfair and wrong in principle for the Commission to pass to National Authorities material which the latter would have no legal right to obtain under their national laws or procedures.

4. CONCLUSION

The growth in the use by European Business of employed lawyers and the changes in the professional status of these lawyers since the A.M.&S. case have rendered the decision in that case increasingly anomalous: this is particularly true of the basis for the distinction which the Court drew between In-House lawyers and lawyers in private practice. The present legal position has the effect of restricting the freedom of European Businesses to rely on legal counsel of their choice, so attacking a fundamental right of the defence in all democratic societies, and imposing on European Business, including an increasing number of Small and Medium Enterprises, additional costs and loss of timing which have no substantive public policy justification. It is time for the Institutions of the European Union to begin the process of exploring with ECLA the steps which might be taken to remove this anomaly.

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