Association Européenne des Juristes d'Entreprise
EUROPEAN COMPANY LAWYERS ASSOCIATION

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ECLA

COMMISSION'S PROPOSAL ON THE MODERNISATION OF THE RULES IMPLEMENTING ARTICLES 81 AND 82 OF THE TREATY

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LEGAL PRIVILEGE FOR IN-HOUSE LAWYERS

UPDATED POSITION PAPER (December 2000)

ECLA is the European representative organisation of in-house lawyers and was created in 1983. It is a confederation of national in-house lawyers associations, which together represent more than 30,000 lawyers established in 16 European countries .

Web-site: http://www.ecla.org

A. WHAT IS ECLA SEEKING ?

ECLA submits that communications with in-house lawyers should receive the same treatment as those of outside counsel. It **proposes** the following wording to be included in the forthcoming new implementation regulation :

> **Communications between a client and outside or in-house counsel containing or seeking legal advice shall be privileged, provided that the legal counsel is properly qualified and complies with adequate rules of professional ethics and discipline which are laid down and enforced in the general interest by the professional associations to which the legal counsel belongs.**

(A similar amendment was proposed at the time of the revision of Regulations 17 and 19 concerning Vertical Restraints. The amendment was approved by the European Parliament, more than 100 MEPs voting in favour of it).[1]

B. WHY IS THIS NOW OF FUNDEMENTAL IMPORTANCE ?

The proposal on modernisation of the rules implementing articles 81 and 82 of the Treaty adopted by the Commission on 27 September 2000 ("the Commission's proposal"), aims at significantly increasing the powers of **investigation** of the Commission, which needs to be counterbalanced by full and proper rights of defense. **Restrictions** placed by law on the **documents** which may be used by the Commission as proof in competition cases are a **central** part of these rules, and cannot be considered without taking into account legal privilege.

The review of Articles 81 & 82 of the Treaty, and related rules such as Regulation 17, recognising the particular need to maintain legal security, to keep compliance costs as low as possible and an enormous increase in self assessment by companies, is the perfect moment to **reconsider** the question of legal privilege for in-house lawyers, 19 years after the AM&S case.

The Commission's proposal will result in changes to much of the European case law and therefore the position that only a further Court decision can bring about a change in the legal privilege issue is all the more untenable.

Since the AM&S case, that branch of the legal profession which operates "in-house", i.e. as part of the enterprise, has been **increasingly organised and recognised in the Member States**. It is also becoming clearer that in-house lawyers are playing an enhanced role in competition law issues at company level, including SMEs.

Throughout the EU in-house lawyers have the same academic legal qualifications as outside counsel. They are however, **uniquely placed** in companies to give advice on competition issues and thus contribute to compliance on account of their in-depth knowledge and experience of the companies they are working for.

[1] See also ECLA's Position Papers dd May 23, 1997 and September 1999, available on the ECLA website

It is clear that legal privilege can only be granted to communications with in-house lawyers to the extent that they respect certain **professional standards** (including compliance with deontological rules). This objective can be achieved either by incorporating the profession into existing outside counsel structures (e.g. the bar), as is the case in a number of Member States or by creating a separate in-house lawyers professional group, as is the case in others. There is no evidence to suggest that integration into the existing structures is the only or even the best solution.

The reforms proposed by the Commission deprive companies of one source of legal certainty, in the form of rulings, official or otherwise, by the Commission. The Commission has specifically stated its expectation that companies will now have to rely on increased self-assessment. In view of the vital role played by in-house lawyers in this increased self-assessment, it is of fundemental importance that the Commission extend the protection of legal privilege to in-house counsel. The current rule is archaic,discriminatroy, misconceived (in seemingly treating all in-house counsel as co-conspirators) and misguided (in presenting legal privilege as the possibility to keep all 'suspicious documents' from the Commission, while the concept of legal privilege is in the legal practice of the member states restricted to requests for and the giving of legal **advice**).

If this right were to be recognised, companies would then be able to receive proper and objective advice from their in-house lawyers without fear of reprisal, while restoring to companies the legitimate right to choose freely their defence.

This Position Paper focuses on the subject of legal privilege and takes no position on any other aspect of the Commission's proposal, which is left to industry and the organisations representing it.

In any case, ECLA deeply regrets that the comments it and many other organisations (Unice,CBI,CEFIC…) and certain national authorities made with respect to legal privilege further to the publication of the White Paper on the Modernisation, were not integrated by the Commisssion in its proposal.

C. IF THE COMMISSION'S PROPOSAL IS ADOPTED, THIS WOULD FURTHER REINFORCE THE NEED FOR IN-HOUSE LAWYERS TO BE GRANTED LEGAL PRIVILEGE

The three main reasons are as follows :

1. The end of the notification system –Article 81(3) – Ex post control

The Commission is proposing that the new system be based on **self-assessment** of agreements by companies. This will remove the reassurance of an opinion from the Commission on important transactions and lead to companies placing greater demands on in-house lawyers, since there would be an increased need for legal opinion if the legal risks of common transactions are to be properly assessed.

If, however, communications with in-house lawyers do not enjoy the benefit of legal privilege, this will inhibit clients from asking advice from their in-house lawyers and in-house lawyers from giving such advice, and will inevitably require their clients to resort to outside counsel for the same service for which they pay their own in-house lawyer. This will further **restrict** a company's **freedom to seek legal advice from a lawyer of its choice**, which is a fundamental right of any citizen, whether individual or corporate. It also jeopardises company's undeniable legitimate interest, and duty to the stakeholders, to obtain competent legal advice.
The **increased cost** involved in consultation of outside counsel could **impact negatively on the competitiveness of companies in the EU, and in particular SMEs.**

More generally, this will reinforce, without any objective justification, the "de facto" monopoly of outside counsel (as European Case law [2] does recognise that communications with lawyers in private practice made for the purpose and in the interest of a client's right of defence, do not have to be disclosed to the Commission in EU Competition cases)., while infringing the rights of the in-house lawyers to exercise their profession.

2. Decentralisation

The **application** of Articles 81 & 82 as proposed by the Commission, **at national level** either by national authorities or courts, including national procedural rules will create divergence in the application of EU law. In the case of in-house lawyers, differences in national law will cause serious **anomalies** in the treatment of their legal advice as evidence in competition cases.

For many years, legal privilege, including before the national anti-trust authorities, has been granted to the communications between in-house lawyers and their clients in a number of important Member States (eg UK, Ireland, Spain, Germany), as in the United States , but not in all. The system proposed by the Commission would therefore be **discriminatory** according to where the lawyer practices, the company is based, or the case is brought…. . It might even hinder the **free movement** of workers (the in-house lawyers), in the EU.

Equality before the legal institutions of the EU for all citizens (including companies) of all Member States requires that the same level of legal privilege exists throughout the EU.

In addition, the Commission Proposal Paper specifically favours the **circulation of confidential business information** between national authorities, with the Commission and national courts. Parts of such information would be privileged in certain countries and not in others: it is difficult to see how, without a universal application of legal privilege to all in-house lawyers, this intra-Community communication can function without serious impacts on the **rights of the defence**, as embodied in articles 6 and 8 of the Convention of Human Rights. [3]

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[2] The AM&S case in which judgement was given on 18 May 1982, Australian Mining and Smelting Europe Ltd v Commission, 155/79, Rec 1982, p 1575

[3] See General Mediterranean Holdings SA v Patel and another (1999), QB, All ER, 673 et seq : legal confidentiality is part of Community Law as laid down in the Convention of Human Rights

These factors constitute **barriers to the single market** and unified company systems (which were only achieved after long efforts). Equally, they will cause companies to continue to seek local solutions to global issues, which again detracts from the idea of a single market.

Finally, **legal certainty,** which is said to be a key objective of the Commission [4], would be assisted if legal privilege is granted to communications with in-house lawyers in any new system. Unless this happens, a company would have great difficulty knowing whether or not internal legal advice is privileged.

3. Intensified ex-post control

ECLA understands that if there were to be a self-assessment system with ex post control, the Commission is anxious to have enhanced **powers of enquiry.**

The new system and powers contemplated by the Commission would represent a distinct move towards the US model, where the power of the Competition Authorities to compel the disclosure of evidence (through the common law procedure of "discovery") is the equivalent of the Commission's powers of inspection under Regulation 17. However, in the United States, in-house lawyers enjoy legal privilege as a counter balance to these wide ranging powers of enquiry. ECLA submits that the solution in Europe can, in this respect, only be the same as in the US. This is particularly true in the context of the increasing globalisation of companies, their markets, the way their legal services are organised, the dealing with competition matters by competition authorities around the world and the discussions on Trade & Competition.

Deprived of the opportunity to obtain an ex ante decision by the Commission a company needs even more than in the past to be able to submit envisaged transactions for legal advice with disclosure of all underlying facts. In keeping with the fundamental human right to freely consult a lawyer of its choice, the company should be in the position to seek such advice from its in-house lawyer.

Otherwise, an intolerable burden would be placed upon the ability of the in-house lawyers to perform their **legitimate professional role** and to give **proper advice** to their companies and so fulfil their duty to their client, who is also their employer.

In this respect the proposal in the Commission Proposal Paper for greater rights for the Commission to call **witnesses** should be clarified to expressly exclude in-house lawyers from the duty to give evidence about the transactions in which their company is involved (including the right not to hand over documents containing the legal advice and the documents prepared for the purpose of obtaining such advice). The absence of such an express exclusion could lead to unacceptable self-incrimination by the companies concerned.

[4] White Paper, paragraph 78

Furthermore, the European Court of First Instance has recently recognised the public interest in allowing legal privilege for the Commission's and Council's Legal Services and therefore, their (employed) in-house lawyers [5]. This Judgement finally lays to rest the untenable proposition that the giving of independent legal advice is incompatible with the status of employment.

D. CONCLUSION

In view of the above, it is therefore proposed that the Commission adopts the language set out at the beginning of this paper. ECLA is willing to work with the Commission on guidelines setting out the practical application of this provision.

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[5] Case T – 610/97 R, Hanne Norup Carlsen and Others V Council, judgement of 3 March 1998. See also ECLA press release issued on this case