– THE CASE FOR IN-HOUSE LEGAL PRIVILEGE IN EC LAW

The debate on in-house legal privilege in community law has waged ever since the European Court of Justice ruled in the AM&S case in 1982 that the doctrine should only apply to communications between a company and its outside legal advisors. The decision has been heavily criticised ever since by in-house counsel whose dilemma has been described by Carl Belding, counsel at IBM, in the following terms:

> *"As matters stand, a lawyer who does a thorough job of analysing the facts and risks, so that he can better advise his business client, runs a significant risk that his work will be used against his client. The current policy frustrates the lawyers' fundamental professional obligation of counseling clients to comply with the law."*[1]

The debate has reached a climax with the publication of the European Commission's White Paper on the modernisation of Articles 81 and 82 of the Treaty of Rome which, somewhat surprisingly, makes no reference at all to legal privilege. Other parties, including the European Parliament and the employers' federations are starting to take an interest in the issue.

It is therefore an appropriate time to examine whether the AM&S case law is valid for the future or whether the rule should be relaxed to enable legal privilege extend to communications by in-house counsel.

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1 Josephine Carr: "Should In-House Lawyers lave Lawyer/client Privilege?", International Business Lawyer, December 1996

1° Human Rights

DG IV's reason for opposing privilege for in-house counsel is its continued desire to use the corporate legal department as a potential source of compromising evidence of anti-trust violations. This raises certain human rights implications.

A recent English case[1] found that interference with the right to consult a lawyer of one's choosing violates article 6 of the European Convention on Human Rights (ECHR) guaranteeing the right to a fair hearing, including legal assistance. The same case decided that interference with correspondence between lawyer and client infringes the principle of respect for privacy enshrined in article 8 of ECHR.

The EC Competition Directorate (now referred to as "DG C") acknowledges that ECHR is taken into account by the Court of Justice in its judicial review of Commission decisions. While also acknowledging that ECHR protects the right to consult a lawyer of one's choice, DG C construes this provision, however, as only applying to communications with a lawyer in private practice. There would appear to be no legal basis for such a statement. Right of access to in-house counsel is guaranteed by the national laws and institutions of the Member States. Even in countries where in-house counsel are not members of a bar, such as Belgium or France, national legislation specifically recognises the existence of the profession. DG C's objection to the extension of the application of articles 6 and 8 of ECHR is based exclusively on a distinction between the status of in-house counsel compared with that of outside counsel. It is surely a contradiction in terms, however, to condition the exercise of human rights in a democratic society by discriminating between two branches of the same profession. In any event, DG C's position in this regard infringes Article 14 of ECHR which allows the protection of all ECHR rights without discrimination.

1 *General Mediterranean Holdings SA versus Patel and another, Queen's Bench Division, All England Law Reports 11th August 1999 at page 673 et seq.*).

2 Rights of defence

The White Paper increases the need for companies to self-assess the legality of their agreements by abolishing the negative clearance system. Henceforth, assessments under Article 81 (3) to ensure agreements are compatible with competition law will invariably be made by in-house counsel. This will certainly enhance the role of in-house counsel in competition compliance. It follows that there will be a greater than ever need for legal privilege in doing so since in-house counsel must, more than ever before, be able to give advice without fear of it later being used against the company.

DG C's response to this concern is expressed as follows[1]:

> *"Cases of severe violations of Article 81 where the Commission makes an investigation with a view to imposing fines are not normally involving an assessment under Article 81(3). The (White) Paper does not change anything in respect of the issue of legal professional privilege for in-house lawyers. Companies can thus without any risk consult their in-house lawyers on cases involving Article 81(3)."*

It is precisely because the White Paper does not change anything in respect of legal privilege that the self-assessment procedure of Article 81 (3) puts companies at an even greater risk than ever before.

Similarly, the strengthening of DG C's powers of investigation by allowing them to call employees as witnesses, as proposed in the White Paper, would, if applied to in-house counsel, dramatically jeopardise the most elementary notions of the rights of defence and violates due process.[2]

1 Letter of Commissioner Monti dated 11th April 2000 to Colm Mannin, President of ECLA, the European confederation of company lawyers' associations.

2 Peter Plompen: Efficient Enforcement of EU Competition Law, Conference on reform of EU competition law, Freiburg, November 9 – 10, 2000

3° Legitimate interest

Management has undeniably a legitimate interest in obtaining competent legal advice and indeed, it has an obligation to its shareholders to do so. German BDI President Henkel notes in this regard:

> *"In-house counsel cannot easily be substituted by outside counsel. It needs an in-house counsel's intimate knowledge of business, products, procedures and the acting people to give valuable legal advice in the complex environment of today's corporations. You would need to integrate outside counsel in a similar way in order to get similar service. It also needs in-house counsel's full professional independence (for management) to receive valuable legal advice. And, of course, as an executive, I must be able to rely on my in-house counsel's professional secrecy. I cannot live with a situation where I must be wary when consulting my very in-house counsel because his legal opinions may be used against me or he may have to give evidence against me. I need to communicate completely openly with him. Otherwise, I lose my closest and most valuable source of legal advice"* [1]

The Confederation of British Industry (CBI) shares the concerns of their German colleagues.[2] Similar views are echoed by the Federal Republic of Germany in its commentary on the White Paper:

> *"Unlike external lawyers, lawyers who are employed as permanent legal advisors to an enterprise cannot refer to their right to refuse to give evidence and the related seizure prohibition. This would mean that to be on the safe side, many companies would feel obliged to call upon the services of external lawyers more often. As a consequence, costs would rise and outweigh bureaucratic reliefs. First reactions by industry show that the relief effects are expected to be small compared with the assumed drawbacks of the directly application exception."*[3]

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1 Letter to Competition Commissioner Mario Monti dated 3Oth June 2000.

2 CBI preliminary discussion paper on EC draft regulation of modernisation, 8th November 2000

Significant practical constraints in providing advice to corporate clients arise as a direct result of the AM&S case law.

Firstly, in-house counsel cannot give written advice on competition law. This is frustrating and inevitably reduces effectiveness because, as one general counsel of a major European company observed:

> *"Putting something in writing is much more likely to concentrate the minds of the business people"*[1]

A further consequence is that important advice has to be given by outside counsel in order to ensure the protection of legal privilege. This adds to delay and expense, particularly for SMEs. It also compromises the value of the advice obtained since a law firm's knowledge and understanding of the client's business is incomparably less than that of in-house counsel.

Finally, corporate governance cannot be effectively assured for as long as companies are required to operate in this manner. Jettie Van Caenegem, General Counsel at UCB SA in Belgium and Vice-President of ECLA notes that this situation does not contribute to building respect for competition law and compliance on the part of companies and their management.

> *"If a lawyer cannot give clear advice on what is allowed or undertake an analysis to establish whether or not, for example, it is in a dominant position, the company is hampered in its ability to govern itself."*[2]

These views are widely shared by General Counsel throughout Europe who point out that DG C cannot reasonably expect them to undertake compliance audits and other preemptive actions if the results are likely to be used against their employers.

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1 Josephine Carr: "Should In-House Lawyers lave Lawyer/client Privilege?", International Business Lawyer, December 1996

2 Ibid

4° Treaty obligation

DG C argues that the grant of legal privilege would unjustifiably hinder it in the accomplishment of its task under the Treaty of ensuring compliance with the competition rules in the common market.[1]

ECLA, the European confederation of company lawyers' associations, which represents thirty thousand in-house counsel in sixteen countries, objects that DG C's refusal to grant privilege actually violates the Treaty obligation to ensure effective anti-trust compliance. ECLA reasons that the AM&S case law has proved to be counter-productive. Instead of encouraging compliance with competition law, it has had the reverse effect as companies have avoided consulting in-house counsel and the latter are hampered in fulfilling their pro-active role of ensuring compliance with the competition regulations.

In support of ECLA's position, the European Chapter of the American Corporate Counsel Association highlights the practical consequences of the ban on in-house privilege:

> *"This situation in no way contributes to the enforcement or even understanding of European competition law, complex though it is, without these difficulties. Also, it causes the law to be broken unknowingly because it cannot be sufficiently explained and legal alternatives evaluated. So, in the end the workload of the Commission officers is increased."*[2]

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1 Letter of Commissioner Monti dated to ECLA President ibid

2 American Corporate Counsel Association (European Chapter) comments on the White Paper on Modernisation of European Competition Law and Legal Privilege for In-House Counsel, 30th June 1999.

5° Efficient, proactive anti-trust compliance

In-house counsel are uniquely placed to advise on competition issues and thus contribute to compliance by reason of their in-depth knowledge and experience of the companies they work for. They alone are able to provide legal expertise on an exclusive basis to their respective managements. They do so on-the-spot, full-time and at minimal expense.

Unrestricted access to in-house counsel therefore provides informed and cost-effective legal assistance in ensuring anti-trust compliance. Ultimately, this must result in less violation and thus less work for DG Competition. While not denying these benefits, the latter holds that the grant of legal privilege should not undermine effective policing of violations.

6° Modern solution

ECLA argues that the continuing denial of legal privilege is contrary to the rule of law, inconsistent with the ECJ's own recent decisions (see section 10 below) and wholly self-defeating in terms of ensuring compliance with Community competition law. Certainly much has changed since AM&S was decided in 1982:

- There has been a huge growth in the use by European businesses of employed lawyers, upwards of 90% of legal advice to corporate clients being provided by in-house counsel these days – a modern solution is therefore required.

- The practical constraints imposed on advising companies on competition regulations have become more apparent, notably in the *John Deere* case and that of *Sabena*, in both of which the European Commission used written opinions of the in-house counsel concerned to prove violations of competition regulations.

- The in-house bar has recognised the need to reform its operating rules and, with the establishment of ECLA, has adopted the CCBE code of conduct for its national associations.

- The pressures of corporate governance have made management more conscious of the need to ensure compliance with the law and access to effective legal service to enable it do so.

- The competition rules and regulations have become more complex, making it ever more important that companies receive reliable guidance and assistance from well-informed legal advisors.

As these trends indicate, the situation has changed so dramatically in the past 18 years that even the Auditor General to the European Court of Justice declared in 1993 that the AM&S discrimination should be removed.[1]

In ECLA's view, the enlightened thing to do now would be to reverse what it regards as dangerous and out-dated case law by introducing into the forthcoming regulations implementing Articles 81 and 82 the following provision:

> *"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."*

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1 Ibid Josephine Carr: "Should In-House Lawyers lave Lawyer/client Privilege?", International Business Lawyer, December 1996

The European Parliament adopted that resolution in April 1999 and the proposal has support among national competition authorities of the Member States with whom ECLA and its member associations have discussed the issue in the light of the White Paper.

7° Ethical

Competition Director General Alexander Schaub is prepared to recognise privilege for those lawyers who are subject to ethical rules.[1] The members of ECLA subscribe to the code of conduct of the Confederation of the Council of the Bars and Law Societies of the European Community (CCBE), the very first article of which requires a lawyer to act within the scope of applicable laws.

In addition, there are well-defined rules for the application of legal privilege to prevent abuse. Indeed, the doctrine itself is limited in scope. It does not extend to all documents in the possession of in-house counsel. It only covers materials sent to and communications with him for the purpose of receiving legal advice as well as, of course, the advice itself.

Finally, a claim of privilege can always be challenged in court and the material involved can be held separate in the meantime.

While accepting that the situation regarding codes of ethics for in-house counsel has improved since the AM&S decision in 1982, DG C believes there is a greater guarantee of compliance by a law firm with competition regulations because it would suffer in its reputation if it failed to do so.

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1 "Inside DG IV", European Counsel, October 1997 page 18

In-house counsel consider this reasoning defies reality. They point out that a company's reputation can suffer through violation of competition regulations and

can incur heavy penalties for having done so. Hence, management expects in-house counsel to provide candid advice adding that their integration into the company is such that they are uniquely well-placed to know how advice can be presented in the most relevant manner such that it is most likely to be assimilated and applied.

8° Comity

Comity procedures are an important element of international anti-trust enforcement. Bilateral cooperation requires due consideration of such issues of which legal privilege is a key factor notably in relation to the exchange of information between competition authorities in different jurisdictions.

The European Chemical Industry Council echoes the concerns of many other industries in the following terms:

> "*Legal privilege for in-house counsel should be recognised, similarly, in all jurisdictions, including in the EU. This issue is of crucial importance for in-house counsel based in the EU and constitutes a significant contributor to the European chemical industry attitude vis-à-vis broader and more systematic exchange of confidential information across the Atlantic.*"[1]

US in-house lawyers are concerned about growing cooperation between DG C and US anti-trust agencies. They fear there is a danger that material privileged in the US but not covered by in-house privilege in Europe might be made available to the US agencies by DG C.

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1 CMA-CEFIC position paper on bilateral issues concerning anti-trust policy, September 1996

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9° Case-law evolution

The AM&S case law is widely considered out of date. It was started in 1979 at a time when members of the judiciary were relatively unfamiliar with the nature of in-house legal practice, still in its development phase in many European countries at the time.

Interestingly, the European Commission supported in-house legal privilege in the AM&S case. Advocate General Slynn stated that

> *"The position of the lawyer who is employed as such by an undertaking has been much canvassed….I consider that counsel for the Commission is right to accept that, subject to rules of professional discipline and ethics, the salaried lawyer should for present purposes be treated in the same way as the lawyer in private practice."*[1]

The authority of the AM&S case law has been diminished by recent decisions of the European Court of Justice, one of which, ironically recognises legal privilege for the European Commission's own in-house lawyers. (*Carlsen versus Council of the European Union, Case T-610/97 dated 3rd March 1998*).

The Commission has attempted to distinguish the Carlsen reasoning as applicable to its Legal Service compared with in-house counsel in industry:

> *"This judgement indicates that internal documents of an institution relating to the adoption of a legislative act cannot be disclosed because they would render public the debate inside the institution and fragilise the legal act once adopted. There is a fundamental difference, on this regard, between the internal documents of a company and of a public institution that acts in the general interest"*[2]*.*

1 E.C.R. 1655 (1982) 2 CC.M.L.R. 309-310

2 European Counsel, February 1999

3 Carlsen versus Council of the European Union, Case T-610/97 dated 3rd March 1998 paragraph 52

There is some support for this reasoning in the *dicta* of the Carlsen case, where the court did effectively attempt to distinguish AM&S on the ground that privilege

was justified for the Legal Service of the Commission on the basis of "protection of the public interest in the stability of Community law and the proper functioning of the institutions"[3]

Protection of the public interest was not, however, the only criterion for ruling that legal privilege applied to communications with the Legal Service of the Commission. The court based its ruling on two other factors, the necessity of avoiding a situation where the Commission or the Council "*might lose all interest in requesting the Legal Services for written opinions"* (sic)[1] and secondly, the importance of *"ensuring that the Council (is) able to obtain independent legal advice."*[2] Needless to say, the members of the in-house bar are quick to point out that both of these factors apply equally to them. As Maurits Dolmens of Cleary Gottlieb's Brussels office remarked at the time of the Carlsen decision:

> *"Whats sauce for the goose is sauce for the gander. Surely the Commission should not withhold from others what it claims (and got) for itself?"*[3]

As members of the Commission's Legal Service are employees and not even members of a bar or professional association, Dolmens notes that the court skirted that issue by suggesting that AM&S was based on a different balance of interests.

> "*This is questionable. Both cases concern access to files and both involve a need to protect legal advice in order to protect the public interest. Carlsen therefore supports the position of in-house counsel that whether a lawyer is his client's employee or self-employed should be considered irrelevant for the question of whether he or she deserves privilege."*[4]

1 Ibid paragraph 46

2 Ibid paragrapg 47

3 European Counsel, February 1999

4 Ibid

The *Carlsen* decision was given further authority in the more recent *Interporc* case where the court again affirmed that legal professional privilege applied to correspondence between the Directorates General of the Commission and the Legal Service.[1]

The *Carlsen* and *Interporc* decisions confirm that AM&S is not caste in stone. At a very minimum, ECLA points out, they finally lay to rest the untenable proposition that the giving of independent legal advice is incompatible with salaried status. More importantly, both decisions recognise the legitimacy of in-house legal privilege in Community law. In *Carlsen,* the court realised that its AM&S case law could seriously obstruct the functioning of Community institutions if applied to the Commission's Legal Service. It crossed the Rubicon however, by thus reversing its earlier jurisprudence and by then reaffirming it in *Interporc.*

It is universally recognised that the AM&S decision has proved to be totally counter-productive. There is a general recognition, including within DG C itself, that the strict interpretation of AM&S is not the way forward. Instead of encouraging compliance with competition law, as already observed, it actually produces the opposite effect. The end result, as remarked earlier in this article, is that DG Competition contributes to creating more rather than fewer competition problems, an absurd situation.

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1 Interporc Im und Export Gmbh versus Commission of the European Communities, Case T-92/98 dated 7th December 1999

10° Uniformity

Legal privilege for in-house lawyers is recognised in several Member States. This creates disparities in the Union which will be even more problematic in the light of exchange of confidential information envisaged under the new enforcement system. DG C considers that it should be for the Member States to regulate the extent to which information received from the Commission or a competition authority from another Member State could be used in national proceedings.

This reasoning is flawed in ECLA's view. The Application of Articles 81 and 82 as proposed by DG C at national level either by national authorities or the courts, including national procedural rules, will create divergence in the application of EC law. At present, legal privilege for in-house advice exists in a number of Member States, and many national competition authorities are bound by national law to respect the confidentiality of advice from in-house lawyers when investigating alleged breaches. As the Commission and the national authorities extend the number of cases under EU law handled by the national authorities, a community-wide rule on legal privilege is essential to avoid differences in treatment of in-house advice between the member states and the Commission.

11° Equal Treatment

Equality before the legal institutions of the European Union for all citizens, including corporate entities, of all Member States requires that the same level of legal privilege should exist throughout the EU. There should be no difference between in-house counsel and those in private practice. Both have a contractual relationship with the client; the in-house lawyer has an employment contract while the outside counsel has a service contract. Both are providing the same service of advice on competition law. Both have a professional obligation to provide reliable legal assistance to the same client. Both are under the same client pressures.

More importantly in the context of privilege, both are independent of the client albeit for different reasons. The employed lawyer has a security of tenure which reinforces his ability to give independent advice since he cannot be dismissed without severance money. The lawyer in private practice has other clients.

12° Fairness and Proportionality

It is fair and reasonable that companies be allowed to freely choose their source of legal assistance. Being responsible to their shareholders and equally responsible for the welfare of their employees, managers may reasonably be expected to seek the best available advice. To restrict the scope of their choice is clearly unfair.

Similarly, it is fair and reasonable that in-house counsel be treated on an equal footing with their counterparts in private practice in advising on competition matters since both are providing an identical service.

Indeed, communications with in-house counsel may justify even more protection than those with lawyers in private practice.

> "*Legal departments may receive and generate information about the intimate details of a company's strategies and activities which is of great interest to an authority investigating a suspected violation of competition regulations*"[1]

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1 Jonathan Faull, deputy Director General of Competition at the European Commission: In-house lawyers and legal professional privilege: a problem revisited (1997) :

DG C distinguishes between in-house counsel and lawyers in private practice on the grounds that the salaried status of the former deprive them, in DG C's view, of independence and thus require them to follow the instructions of their management.

Article 2.1.1 of the CCBE code of conduct states as follows:

> "*The many duties to which a lawyer is subject require his absolute independence, free from all other influence, especially such as may arise from his personal interests or external pressure."*

Independence of thought and judgement are expected of in-house counsel just as they are of their external colleagues. Such independence is in no way incompatible with the existence of an employment contract. This principle has been upheld by the appellate courts in a number of EC jurisdictions.[1]. In one such case, the court decided that the employment contract of a lawyer did not endanger his freedom and independence even when acting for his employer.[2]

DG C argues, however, that an in-house counsel could be used as an instrument to commit infringements and conceal documents. Commissioner Monti thus fears that granting privilege could lead to what he describes as "a real sanctuary within companies" and hinder the efficiency of investigations.

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1 Cour de cassation France 29/03/1963; cour de cassation Belgium 27/3/68 (pas 1968,1,916); Hof van Discipline Nederland 18/12/1974 (Advokatenblad 1975 p.366 et seq

2 Hof van Discipline Nederland ibid.

Commissioner's Monti's view is not shared by the employers' federations. Hans-Olaf Henkel, President of the German Employers' Federation, Bundesverband der Deutschen Industrie (BDI) asks:

> *"Do you really think of me and my fellow executives as abusing in-house counsel in this way?"*

Not surprisingly, in-house counsel take issue with the Commission's allegations. Gilles Mauduit, President of the Association Française des Juristes d'Entreprise, which represents nearly 2 500 in-house counsel in France, puts the position as follows:

> *"Firstly, it is incorrect to state that in-house counsel are not independent in giving advice. Does any one seriously believe that management pays in-house lawyers to issue bogus legal opinions? This is as much an insult to European management as it is to the legal profession. Moreover, how does DG C explain that legal privilege is recognised for in-house counsel in common law jurisdictions, including the United States and Canada if, according to Monti, they are not independent?*

Moreover, he adds, the labour laws in the European member States protect employees against being required to commit unlawful acts.

ECLA considers DG C's fear of legal departments hiding evidence as grossly over-stated and points to the experience of anti-trust enforcement in the US and other jurisdictions where privilege exists for in-house counsel.

Nevertheless, DG C considers its position as slightly different from that of its counterparts elsewhere in so far as DG C has limited resources and limited means of investigation, remarking, for example, that it cannot engage in 'phone tapping. An administrative body's scarcity of resources, however, hardly provides

a justification for otherwise unfair treatment of corporations and their legal advisors.

The Commission acknowledges that "*while the vast majority of companies are fully prepared to cooperate in competition law proceedings, a minority indulge in violations which legal privilege could prevent the EC from detecting*".[1] This is like stating that law firms should not be allowed hold client funds on the grounds that a minority occasionally misappropriate them

BDI President Henkel considers the Commission's explanation as disproportionate and unfair, adding the following words of caution:

> *"Investigation is but a means of repair where compliance failed in the first place. Don't miss your primary aim by overdoing a secondary one."*

Maurits Dolmens supports the argument of disproportionality:

> *"It is not as if the Commission needs all this evidence. In all the cases where in-house counsel communications were used, other evidence was available."*[2]

Many believe DG C is adopting a negative approach to the role of a legal department in competition matters by holding that in-house lawyers could be used as instruments to commit infringements and to conceal documentation. It is surely excessive to suspect in-house counsel of being captive accomplices in anti-trust abuse and delinquent hoarders of compromising evidence.

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1 Commissioner Monti letter dated 6th September 2000 to Mr George Jacobs, President of UNICE, the European employers' federation

2 European Counsel, February 1999 ibid

The opposite is more likely the case since the vital preventive role which in-house counsel play in anti-trust compliance ought to make them DG C's greatest allies. This assumes, however, that they are given the means of doing their job, for which legal privilege would indeed appear to be an essential prerequisite.

CONCLUSION

The AM&S decision in 1982 came as a surprise to many and a rather unpleasant one for in-house counsel and their corporate employers. Although the Commission had argued in favour of in-house privilege at the AM&S hearing, it understandably reversed its position after the decision was pronounced upon realising the strategic advantage which it provided to competition inspectors in dawn raids.

There have been a number of developments on the issue since then. The John Deere and Sabena cases reinforced DG C's determination to use the AM&S case law in targeting legal departments to seek compromising evidence. In reaction to this, the campaign for recognition of in-house privilege has intensified with support coming in recent years from Member States, the European Parliament and the Court of Justice in the *Carlsen* and *Inter Porc* decisions.

AM&S is certainly one of the most controversial decisions the European Court of Justice has ever handed down. The debate which it has provoked has progressively brought to light a number of objective factors in support of the proposition that in-house legal privilege be recognised in EC law, as it is in the laws of several of the Member States and in those of the EU's trading partners.

It is striking to note that the case for in-house privilege seems to have been building over the years while the case against it has diminished. No new arguments against privilege have been elucidated since the AM&S decision was pronounced while many of those cited in that case have lost much of their significance. It is clear now that there are a number of factors which support the case for regulatory change to reverse the AM&S case law while the Commission's objections to doing so have the appearance of being more an excuse for lack of resources than a justification for law enforcement.

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