HUMAN RIGHTS IMPLICATIONS OF PRIVILEGE DENIAL

Speech by Jettie Van Caenegem, Vice-President ECLA to the IBA, Paris 21st February 2002

"The parts of the documents that infringe article 85.1 (will have) to be put in escrow in the offices of the lawyers from both sides.\"

This is an excerpt from minutes of a managers meeting between SAS and Maersk.

Based on this one would have a certain sympathy for DG Competition\'s concern about granting legal privilege to in-house counsel.
Were it not. Were it not for the fact that the lawyers in the case at point were the outside attorneys to the companies concerned.

This illustrates why the approach of DG Competition to the question of legal privilege is at the very least unbalanced.

Let us briefly recall the facts.

In 1982 the issue was raised before the European Court of Justice of in-house counsel claiming legal privilege in the face of an EU investigation.

The privilege was claimed by a UK solicitor who by his own procedural rules could claim privilege; which had been recognised to extend to in-house counsel some years before.

Nevertheless the Court decided, under impulse of the French, civil law judges to discriminate between in-house counsel and outside attorneys; the latter being the only ones able to claim the privilege, and this to the extent they are members of a European bar or similar professional body. Note that membership of a US bar does not grant privilege in European procedures.

Two arguments were put forward :

· in-house counsel are employees and therefor at the beck and call of the company they work for and a useful tool for the companies bent on breaking the law;

· in-house counsel does not have a consistent professional status in the various member states, with appropriate deontological and disciplinary rules.

It is correct that at the time of this AM&S decision there were big differences between the ways the in-house counsels were treated in the member states, going from incorporation in the legal profession, as in the UK, to expulsion from the bar if one went in-house as in Italy (except for public corporations), France and Belgium.

It also cannot be contested that even today the status of the in-house lawyer varies greatly from member state to member state going from the already mentioned membership of law society or bar of the common law countries but also in Spain, to the rather hybrid situation in Germany where a relatively small number of in-house counsels are members of the bar but do not have the right to represent their own company before the courts over

the situation in Belgium where by the law of March 1, 2000 a separate Institute of Company Lawyers has been created with its own disciplinary rules and express recognition of the confidentiality of the advise to the employer, the situation in France where in-house lawyers are not admitted to the bar but the profession of in-house counsel, as an exception to the monopoly of legal advise of the barristers, is recognised and \"passerelles\" between the two professions are created by law, to the situation in Italy where except for public corporations the in-house lawyers have no legal status at all.

This diversity cannot however be an excuse to refuse legal privilege at least to those in-house lawyers who are members of a regulated legal profession in their member state.

ECLA, as well as the American Chamber of Commerce, UNICE, ACCA and other such organisations, has for many years been in continuous contact with DG Competition on this issue, without making much headway.

Contacts with members of the European Parliament, concerned that the necessary powers of the Commission be balanced by other legitimate interests, resulted in a greater sensitivity to ECLA\'s proposals and in 1999 led to the adoption by the European Parliament by a significant majority of an amendment to a Commission proposed amendment of Regulation 17 providing that communications with in-house counsel be privileged, provided they were subject to disciplinary rules.

As the proposal in question was not adopted the amendment also fell by the wayside.

However, when the commission proposal on the reform of the anti trust procedural rules was brought before the European parliament in September 2001, the case of legal privilege was taken up by a Danish member of Parliament, Mr. Rosving, and the same language as previously adopted by the Parliament was included in the draft parliamentary report on this commission proposal (the Evans Report).

The reasons for Mr. Rosving\'s concern are of particular interest as they lay in the field of privacy rights of individuals and companies, which is another element in the difficult equation between various and sometimes conflicting interests that the Commission has to manage.

However, finally the amendment was not included in the report adopted by the Parliament.

Some important steps forward were however taken.

Before going into these I need to digress for a moment into the area of Human Rights.

As you are all aware it is now consistent case law and doctrine that companies can also be the beneficiary of human rights (see Senator Lines Submission footnote 7).

As you are also aware the Treaty on European Union (art 6) provides that the Union is founded on, among others, the principle of respect for human rights, although the Union is not itself a signatory of the Human Rights Convention.

The far-reaching changes which the Commission is proposing to introduce by its modernisation of the rules implementing Articles 81 and 82 mean that, even more than currently, the anti trust procedures are of a criminal nature for purposes of article 6 of the Convention of Human Rights given the punitive and deterrent character of the high fines imposed.

This means that the higher level of respect for defendants rights required in criminal proceedings has to be applied to anti trust matters, including the right to the free choice of counsel.
An artificial distinction between in-house and outside counsel is not acceptable in this respect.

ECLA has been granted the right to file an amicus brief on this question before the European Court of Human Rights in the case of Senator Lines v. Member States of the European Union (case 56672/00). It was filed by Cleary Gottlieb Steen & Hamilton on our behalf on June 22, 2001 and we are waiting to hear whether there will be oral argument or not.

Before returning to the debate in the European Parliament, another short digression.

In 1988 the Sabena case was decided by the Commission. Documents seized in the legal department were used to demonstrate that the company knew it was committing an infringement of the anti trust laws and therefor the fines imposed on the company were increased.

The debate in the European Parliament I mentioned earlier was preceded by some intensive contacts between DG Competition and Mr. Rovsing on the issue of legal privilege.

DG Competition picked up on one of the concerns expressed by our profession which was the increasing of fines as in the Sabena case.

As a result Mr. Monti made the following statement in the Parliament, which led to the Rovsing amendment being dropped :

He said : \" I can assure you that should the amendment be refused, the Commission would renounce using the elements contained in the documents (communications between in-house counsel and the other employees of the company) as aggravating factors in the determination of financial sanctions\".

ECLA has since then received informal confirmation that the sentencing guidelines will be adapted to reflect this position.

In the same speech Mr. Monti stated that the Commission is perfectly aware of the positive role that in-house counsel plays in advising the company with respect to competition rules.

While such a recognition is only in-house counsel\'s due, it does not go far enough and the proposal made by DG Competition, while allaying one of ECLA\'s concerns does not address the other issues at the basis of our request for legal privilege.

What DG Competition tells us is that they are not really that interested in in-house counsel\'s advise as this will usually not address issues of hard core cartels but what they are interested in is the collection of facts which they will find in the in-house lawyers office and which will make their investigation that much easier.

While if I were an investigating magistrate or public prosecutor I might think the same way, there are three major, and I\'m sure several other, fallacies to this approach.

The first is that the authorities should not ignore that notwithstanding their new found role of revenue raiser, that is being given a particularly high profile as is also the case in US, they have another role, laid down in the Treaty and that is to ensure the application of the principles laid down in articles 81 and 82.

Who else is better placed to contribute to ensuring this application than the in-house lawyer.
Who else is more handicapped in this than the in-house lawyer who cannot give advise in writing;
cannot do a proper due diligence or audit for fear of the results being seized, even though they are the most likely to get truthful answers to their questions.

The second is that several decisions of the Court of First Instance expressly recognise legal privilege for the lawyers of the community institutions even though they are not even members of any professional body. This is a clear discrimination.

The third is that any legal system and judicial process is a compromise between diverse social interests, and as the community system is inherently unbalanced as the investigator is also the judge, they need to pay attention to this aspect more than most.

Thus particular attention needs to be given to the rights of defence and particularly the right to a lawyer of one\'s choice, as a counter balance to the need for effective investigative powers for the commission

It is my understanding that the commission is increasing its pressure on the national authorities of the member states to revise even their own national positions on legal privilege.

I therefor urge all of you to convince the national authorities in your countries of the importance of, on the contrary, extending legal privilege to the European level, be it with all necessary safeguards against possible abuses, and to also make this point whenever you have contacts with DG Competition.