International Chamber of Commerce
The world business organization

Issues paper

Competition law and legal privilege

Prepared by the Commission on Competition

This issues paper sets forth the views of the International Chamber of Commerce (ICC) with respect to the necessity and importance of protecting the confidentiality and the privilege against evidentiary use of communications between a corporation and its legal advisers.

Implementation of a strict competition policy starts with its integration into business strategies of businesses. To this end, sound legal advice as well as competition audits are indispensable. Any communication taking place in this context should benefit from legal privilege. Unfortunately, some legislations apply such legal privilege in a very restrictive manner. This is counterproductive, notably for international business.

ICC fully endorses strict enforcement of competition law. However, fair proceedings and the rights of defence have to be fully respected. Legal privilege should not be limited to communications with external lawyers only. Corporations should not be discouraged from looking to the legal advisers most knowledgeable about their businesses for assistance in complying with the laws of the jurisdictions in which they do business. This might undermine the implementation of a sound competition policy into business strategies.

Compliance with the law requires confidential legal professional advice

ICC begins with the premise that compliance with the law of each jurisdiction in which a corporation does business is a cornerstone of good corporate citizenship. ICC recognizes that doing business in multiple jurisdictions, under multiple rules of law and frequently conflicting regulations, presents a corporation with special challenges in achieving compliance. To meet these challenges, most corporations have to rely on the advice of lawyers. These lawyers are likely to include both outside counsel (lawyers not employed by the corporation) and company lawyers (in-house legal counsel), who are employees of the corporation.
Each corporation makes its own judgments about the mix of legal advice its management receives, looking to outside counsel for some of that advice and to its own legal department for other advice. Most corporations tend to look to their company lawyers, who normally have a detailed understanding of the corporation's business, to make the determination about whether a particular legal problem can be handled by the company lawyers in the corporation's legal department or would best be referred to an outside lawyer.

Coordinating business practices around the globe, so that they both respond to the demands of the marketplace and comply with the often-conflicting requirements of different legal systems, requires the advice -- often on a daily basis -- of legal advisers intimately familiar with the intricacies of a company's business. Company lawyers best fulfil this role. Although corporations routinely enlist the aid of outside counsel in each of the legal systems in which they operate, decision makers rely on company lawyers both for immediate, timely advice and to synthesize and present the advice of outside lawyers in the context of making business decisions on a global basis. Company lawyers are uniquely able to advise on how to conform actual business practices to the changing requirements of laws and regulations. Businesses believe, with good reason, that no law enforcement agent is as effective at achieving compliance with the law as a corporation's in-house company lawyer.

While access to legal advice is indispensable, it is equally important that the advice be confidential and that it be protected from use as evidence against the company. International business men and women are accustomed to putting the facts fully and forthrightly before their lawyers, in the well-founded belief that only a fully informed lawyer can give fully informed legal advice. They will only do so, however, if they are confident that both their communication to the lawyer of the facts and circumstances as to which advice is needed, and the lawyer's advice regarding how to deal with those facts and circumstances, will be kept in confidence and will not be used against the corporation in court or in administrative proceedings.

The protection of such advice relies in part on the professional conduct of the lawyer. Both inside and outside lawyers are expected to provide objective and independent legal advice. Both inside and outside lawyers, therefore, and their clients, should also be shielded from any obligation to disclose such confidences, as long as the lawyer is acting as a lawyer and not merely as a business adviser. The protection of legal advice requires that public authorities, including courts and commissions, respect the confidentiality of communications between corporate clients both with their internal and external lawyers, and that they accept a rule of privilege that prevents such communications from being used against the corporate client. The US rule of privilege also protects the confidentiality of such communications from intrusion or use in court by government agencies, whether the context is civil or criminal.[1]

Clients have a fundamental right to obtain confidential legal professional advice

Legal privilege has been recognized as a fundamental human right by the European Court of Human Rights and by national courts in the EU.[2] The United Kingdom's House of Lords has acknowledged that legal professional privilege is an essential condition of an individual's ability to exercise the right to obtain legal advice, noting that "such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may

[1] The United States Supreme Court noted, in a leading case upholding the confidentiality of such communications against intrusion by the U.S. Government, that the purpose of the attorney-client privilege is "to encourage clients to make full disclosures to their attorneys." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

[2] Foxley v. U.K. (2000) 31 EHHR 637 (grounding the protection of the confidentiality of a client's communications with its lawyer in the Right to Privacy guaranteed by Article 8 of the European Convention on Human Rights). See also Campbell v. U.K. (1992) 15 EHHR 137.

afterwards be disclosed and used to his prejudice."[3] The English Court of Appeals recently relied on decisions of the European Court of Human Rights to reaffirm that access to justice is a fundamental principle of European Community law, and that "access to legal advice on a private and confidential basis is also a fundamental right not lightly to be interfered with" regardless of whether the context was civil or criminal.[4] Indeed, the right to obtain legal advice, the right to a defence, and the right to private communications are fundamental rights set out in the proposed Treaty Establishing a Constitution for Europe.[5]

Respect for the fundamental right to obtain confidential legal advice also makes good policy sense. No scheme of enforcement can yield the same degree of legal compliance as respecting every individual's right to seek confidential advice about how to conform his or her behaviour to the requirements of law. Unless such advice can be sought in confidence, the risk that the advice will be used as evidence of a violation will deter people from seeking it. The House of Lords recently recognized that such a deterrent effect was inimical to a society based on the rule of law, noting that "it is necessary in our society, a society in which the restraining and controlling framework is built upon a belief in the rule of law, that communications between clients and lawyers, whereby the clients are hoping for the assistance of the lawyers' legal skills in the management of their affairs, should be secure against the possibility of any scrutiny from others, whether the police, the executive, business competitors, inquisitive busy-bodies or anyone else."[6]

The right to confidentiality should include company lawyers

Recent trends in the laws of several European Community member states have recognized the contributions of company lawyers toward the administration of justice by protecting the confidentiality of communications between management and company lawyers and providing some form of privilege against the use of such communications against the company. Those trends were recognized by the President of the Court of First Instance in the Akzo Nobel case.[7] Several organizations representing different branches of the legal profession intervened in that case to urge the Court to extend the recognition of the confidential and privileged status of communications between a company and a company lawyer to European law.

ICC believes that such a problem must be recognized as a problem for business corporations, not as a lawyer's problem. This adverse effect is well illustrated by the factual situation in the Akzo Nobel case. In the course of a dawn raid on Akzo Nobel's office in England, as part of an investigation of possibly anti-competitive practices, Commission officials seized a number of files, including documents asserted by Akzo Nobel to be protected by rules of professional confidence and privilege. These documents included an exchange of e-mails between Akzo Nobel business executives in England and Akzo Nobel's competition lawyer in the Netherlands, who was both a

---

3 R (Morgan Grenfell & Co. Ltd.) v. Special Commissioner for Income Tax [2002] UKHL 21, ¶ 7.

4 Bowman v. Fels [2005] EWCA Civ 226, ¶ 74, citing Foxley v. U.K. (2000) 31 EHHR 637 and Golder v. U.K. [1975] 1 EHRR 524, paras 35-36.

5 Treaty Establishing a Constitution for Europe, Art. II-67; Art. II-107-108. This principle has not been objected in the critics against adoption of the Constitution.

6 Three Rivers DC v. Bank of England (No. 6) [2004] UKHL 48, ¶ 34.

7 See note 2, Akzo Nobel ¶¶ 124, 126.

company lawyer and a member of the Netherlands Bar. The Commission refused to recognize any rule of secrecy or confidentiality protecting the documents. Akzo Nobel's application required to consider the status of the decision of the European Court of Justice in the AM&S case, in which the rule governing the protection of communications with lawyers under European law was established. The Court in AM&S had recognized that the confidentiality of communications between clients and lawyers should be protected, but had limited the protection to communications between a client and "an independent lawyer entitled to practise his profession in a Member State."[8]

A different treatment of in-house lawyers compared to lawyers not employed by a company is often based on the argument that non-company lawyers are deemed to be more independent. This argument is not convincing as far as professional advice is concerned. Any company has a strong interest in receiving complete and objective professional advice by its in-house lawyers. Outside lawyers may well economically depend on important clients and will use all advantages the law may offer when giving advice. Another argument is that as far as in-house lawyers are admitted to the bar, they have to respect the same rules as outside lawyers. In as far as in-house lawyers are not admitted to the bar, companies should make clear by way of written confirmation that they oblige in-house lawyers to follow the same ethical principles which apply to the relationship between independent lawyers and clients.

The effect of the AM&S Rule

As applied by the European Commission, the AM&S rule has been profoundly unfriendly to the protection of communications between corporate clients and their company lawyers. In the John Deere case, for example, the Commission conducted a dawn raid on Deere's headquarters in Mannheim in response to complaints about restrictions on cross-border sales, and seized the legal opinions of a company lawyer discussing such sales.[9] Those opinions were used by the Commission as evidence that Deere knew that its conduct violated European competition law, and formed part of the basis for the imposition of heightened sanctions based on an allegedly wilful violation of the law.

Since AM&S, changes at the member state level have improved the ability of corporate clients to consult company lawyers in confidence and under the protection of rules against the use in court of their communications. In part, those changes reflect a commitment to fundamental rights protected under Community law.[10] They also reflect, however, a sensitivity to the need for confidential advice about how to do business in conformity with the increasingly complex laws that govern business behaviour. Both the state's interests in seeing its laws enforced and an enterprise's interests in complying with those laws are promoted by secure and confidential access to legal advice.

8 See note 2, Akzo Nobel ¶¶ 124, 126.
9 See note 2, Akzo Nobel ¶¶ 124, 126.
10 See note 2, Akzo Nobel ¶¶ 124, 126.

At the European Union level, however, as well as under the laws of some other states,[11] corporate clients continue to be deprived of the ability to obtain confidential and privileged advice from the legal advisers in the best position to advise them about the impact of laws and regulations on their business activities: the company lawyers familiar with the company's business. As long as communications with these lawyers can be seized and used as the basis for sanctions, as in John Deere, the quality of the advice will suffer, because corporate clients will be reluctant to put the full facts before their lawyers, and the lawyers will be reluctant to give frank advice. The net effect will be to make it more difficult for these corporations to comply with the law.

From the perspective of the corporate client, the monopoly on legal privilege that is effectively bestowed on European law firms by the AM&S decision is both inefficient and counterproductive. The AM&S rule often forces company lawyers in Europe to request (and pay for) advice from outside law firms that company lawyers would be in a better position to provide. These outside lawyers typically lack the intimate understanding of the client's business that is essential to giving effective advice, so that their advice is necessarily more costly and often less timely. The governmental interest in ensuring compliance with complex regulatory regimes is impeded when the cost of useful and timely legal advice is unnecessarily increased. Basic economics dictate that, as the costs for a service rise, the less demand there will be for it. Because the additional costs that deter companies from seeking legal advice are directly attributable to inefficiencies in the market for such advice created by the AM&S rule, and because those inefficiencies yield no socially beneficial result, the EU's regulatory objectives are not well served by that rule.

The need for a change in the AM&S Rule

ICC knows of no useful purpose served by the AM&S rule. Concerns that protecting communications with company lawyers will somehow hinder law enforcement, by making all documents inaccessible, are not borne out e.g. by the US experience. US rules distinguish carefully between situations where a lawyer is acting as a lawyer and situations where the lawyer acts in a business capacity. Communications in aid of legal advice are protected, and ordinary business communications are not. That rule has been found workable, and others could be devised. The experience of corporations has generally been that their lawyers serve a crucial role in keeping the company in compliance with the law.

Recent changes in both EU and member state law have made the problems created by the AM&S rule particularly acute. With the taking effect of E.C. Regulation 1/200312, companies are now subject to regulation for alleged violations of Articles 81 and 82 of the EC Treaty by the Commission and by the competition law agencies of the 25 member states, and to complaints made by any individual or company. Proceedings alleging such violations may now be

[11] The fact that France and Italy, as well as to varying degrees Luxembourg, Austria, Hungary, Estonia, Latvia, Lithuania, Cyprus, and the Czech Republic, continue to adhere to rules similar to the one stated in AM&S causes multinational corporations the same concerns under the national laws of those countries as the AM&S rule does under European law. Switzerland applies even more rigid rules as only correspondence with an external lawyer dating after the opening of a competition procedure is protected but not advice given before.

[12] Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L1 2003 p. 1).

commenced in any of thousands of local courts in the member states. This new arrangement puts a premium on the ability of a business enterprise to obtain current, frank, and confidential legal advice. Further, under this new enforcement structure, companies may no longer rely on negative clearances or individual exemptions from the Commission. Rather, companies now must rely on their own lawyers to review contractual arrangements which once might have been reviewed by the Commission, but will be reluctant to do so if the advice of those lawyers can be used against them.

Moreover, by permitting the Commission and any national authority to share information obtained in the course of an investigation with national authorities in other member states, the new system of regulation creates the risk of an end run around existing member states' privilege law. Nothing would appear to prevent the national authority of a member state that does not recognize privilege for communications with company lawyers from seizing such communications and making them available to the national authority of another state that would be forbidden by its own national law from obtaining them.

Normally, a corporation would respond to this kind of change in the regulatory environment with adjustments to its program for complying with local laws and regulations, making it a responsibility of its company lawyers to increase the vigilance with which they help the corporation to comply with the rules. The current AM&S rule cripples the ability of corporations to adjust to these changes, because they cannot risk committing frank exchanges with their company lawyers to any form of writing within the reach of a possible dawn raid. A company would be required to keep all such communications and advice oral, which is inefficient, particularly burdensome to a business managed across multiple time zones and locations, and untransparent.

Conclusion

ICC urges all to give urgent consideration to how a change in the rules concerning adequate protection of legal privilege could be achieved. The issue should be taken up with urgency at all levels, including the International Competition Network (ICN). It shall not be overlooked that competition policy in general will profit from the adoption of effective compliance programs by corporations. All measures to stimulate effective compliance should be enhanced. An immediate, cooperative effort is needed to address how Europe can accommodate the acute need of all corporations to be able to look to their company lawyers in confidence for frank legal advice about how to conduct the corporation's business in compliance with the law.

Document n° 225/630
16 June 2006

The International Chamber of Commerce

ICC is the world business organization, a representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world.

The fundamental mission of ICC is to promote trade and investment across frontiers and help business corporations meet the challenges and opportunities of globalization. Its conviction that trade is a powerful force for peace and prosperity dates from the organization's origins early in the last century. The small group of far-sighted business leaders who founded ICC called themselves "the merchants of peace".

Because its member companies and associations are themselves engaged in international business, ICC has unrivalled authority in making rules that govern the conduct of business across borders. Although these rules are voluntary, they are observed in countless thousands of transactions every day and have become part of the fabric of international trade.

ICC also provides essential services, foremost among them the ICC International Court of Arbitration, the world's leading arbitral institution. Another service is the World Chambers Federation, ICC's worldwide network of chambers of commerce, fostering interaction and exchange of chamber best practice.

Within a year of the creation of the United Nations, ICC was granted consultative status at the highest level with the UN and its specialized agencies.

Business leaders and experts drawn from the ICC membership establish the business stance on broad issues of trade and investment policy as well as on vital technical and sectoral subjects. These include financial services, information technologies, telecommunications, marketing ethics, the environment, transportation, competition law and intellectual property, among others.

ICC was founded in 1919. Today it groups thousands of member companies and associations from over 130 countries. National committees work with their members to address the concerns of business in their countries and convey to their governments the business views formulated by ICC.