THE POSITION OF THE FRENCH ASSOCIATION OF COMPANY LAWYERS (AFJE) ON "LEGAL CONFIDENTIALITY"

The forthcoming entry into force of the European Regulation on the modernisation of competition law[1] is an opportunity for AFJE, the French Association of Company Lawyers, to state its position on the question of confidentiality and exemption from seizure of opinions issued by Company Lawyers, better known under the name of "Legal Privilege", and referred to hereafter as "Legal Confidentiality".

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No one would currently dare to dispute the fact that the legal component of corporate acts, decisions and strategies has become essential. The often considerable stakes involved in large industrial, commercial or financial operations which the company is party to, whatever its size, mean that legal risk is an element no company director can afford to ignore. Thus the fact that companies appoint the skills of internal legal advisers has now become an undisputed necessity. As a legal technician with knowledge of the company, the company lawyer advises the decision-makers in the business world of the appropriate solutions in order to ensure compliance with the rule of law and business ethics.

As the legal aspect has increasingly become part of the business decision-making process, it has also become noticeable for its complexity. The technicality of regulations, the internationalisation of contractual relationships and the diversity of national legal systems are increasing this complexity on a daily basis. There are very few significant business transactions these days in which the legal aspects appear to be simple to regulate: whether the particulars of the problem in question are highly technical, or whether the letter of the law is not sufficient to deal with them, most situations do not have a black and white solution and on the contrary require the nuance, interpretation, analysis and capacity for judgement of lawyers. The result is that in a large number of cases, in order to be properly understood, weighed and taken into account by the person to whom it is addressed, legal analysis must be drafted in writing. In the same way as the information that forms the basis for the conclusions of financial analysis can only be understood from graphs and tables of figures, legal analysis of a complex situation must be able to be visualised, highlighted, annotated and re-read by its recipient. Irrespective of the complexity of the matter, this requirement is further strengthened by the considerable development in electronic means of communication, which these days are very widely used by company managers to communicate with their teams, including their legal departments.

[1] Regulation 1/2003 will enter into force on 1 May 2004. It should be remembered that its main purpose is to remove the individual exemption procedure and therefore to require enterprises to carry out their own analysis of their agreements in terms of competition law, without now being able to obtain prior confirmation of validity from the supervisory authorities.

Thus the corporate legal environment is currently characterised by the dual necessity that any company manager must have the ability, on the one hand, to appoint and consult internal lawyers and, on the other hand, to receive written opinions from these lawyers enabling him to understand the legal risks, grasp the possible solutions and make his decision with full knowledge of the facts.

However, it would be paradoxical and contrary to the objective of legal security to admit the validity of this dual necessity and at the same time accept that, for the company that submits to it, this could result in an increase in its legal risk. This would be the case if the legal opinion issued by the company lawyer could, in the context of legal proceedings, be used against the company that had requested it. It is therefore essential that this opinion benefits from a protection that will guarantee its confidentiality in the event of a later dispute relating to the facts in question.

The aim of the principle of Legal Confidentiality is to enable this to happen.

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The principle of Legal Confidentiality consists in guaranteeing to the company that the correspondence issued by its internal lawyers, or addressed to these lawyers, cannot be seized or produced against the said company. Through its objective of allowing company managers to be fully informed of the legal aspects of planned decisions, it represents an essential pre-requisite to the company's observance of the rule of law. Its ultimate purpose therefore comes under the scope of public policy.

However, contrary to the legislation in a fair number of countries[2], French law does not recognise Legal Confidentiality. This means that the opinions issued by company lawyers may, in the same way as any other internal company document, be seized as part of a search or legal proceedings, and be used as evidence against the company. This results in the paradox that the French company director who has made the effort of appointing appropriate legal advisers is in reality dissuaded from formally requesting their advice before making his decision.

Such a consequence is evidently harmful, as it negates the very role of the company lawyer, which is, in addition to a rapid clarification of the risks related to the planned decision, to enable the implementation of legally satisfactory alternative solutions.

Of course, in order to deal with this complication, the company director can choose to use a lawyer outside the company, whose correspondence will benefit from the protection

[2] Countries that recognise Legal Confidentiality for company lawyers include the United States, Germany, Belgium, Denmark, Spain, Greece, Ireland, the Netherlands, the United Kingdom etc. It should be noted that for companies with internal legal departments in several countries, the co-existence of systems that recognise and systems that do not recognise Legal Confidentiality constitutes, in addition to an element of unjustified discrimination, a source of complexity with regard to the management of cross-border written communication.

associated with his membership of the Bar. However, such a solution, which paradoxically implies keeping the internal lawyer out of questions likely to pose a problem of Legal Confidentiality, cannot be satisfactory in practice. Firstly, the company director frequently cannot determine by himself whether the matter under discussion is one that needs to concern itself with Legal Confidentiality and therefore needs to be brought to the attention of an outside lawyer. Secondly, as the lawyer is outside the company, whatever his level of competence, he can only analyse the situations previously submitted to him; only internal company lawyers have full knowledge of all the aspects that enable them to give the company director adequate warning prior to the decision-making process. Finally, given their situation at the heart of the company, internal lawyers have no other clients, so to speak, meaning that they are fully available and immediately responsive. These are essential elements as the ability of the company to measure legal risk as precisely and as quickly as possible is a key factor in its competitiveness.

The principle of Legal Confidentiality is a right that belongs to the company, not to the company lawyer. By protecting the correspondence with the company lawyer, the aim is to protect the interests of the company, not the position of the company lawyer himself. Although it is true that, in order to attain its ultimate goal of encouraging the company to comply with the law, Legal Confidentiality presupposes intellectual independence on the part of company lawyers, this is in no way incompatible with the employment contract binding them to their employer. By virtue of their duty of loyalty, company lawyers identify with the company, espouse its objectives and are naturally affected by its results; however, they retain their spirit of independence with regard to the recommended means of attaining these objectives.

A fair number of provisions already exist, either in legislative form[3], or in the form of a professional code[4], which are intended to guarantee both the professionalism and integrity of company lawyers. The AFJE, in consultation primarily with the Chancellery department, is currently working on formulating specific proposals in order to detail and reinforce the content and scope of these provisions.

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Far from wishing to arrange immunity for companies indulging in reprehensible acts, the aim of Legal Confidentiality is to provide the means for a better understanding and implementation of the rule of law and ethics in companies. For this reason, the recognition of the importance of this principle by the business sector, followed by its recognition in legislation, are the AFJE's priority objectives.

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[3] Cf. specifically the Law of 31 December 1971, Law of 31 December 1990 and Decree of 28 November 1991.
[4] Cf. the AFJE Code of Ethics, which all members of the association are required to adhere to.