

Attorney-Client Privilege in the EEC: The Perspective of Multinational Corporate Counsel

I. Introduction

The decision in December 1984 by the Commission of the European Communities in the *John Deere* case¹ (the Decision) is a good example of a common problem confronting multinational corporate counsel active in Europe. A quick reading might lead to the conclusion that the case simply deals with a violation of Article 85(1) of the Rome Treaty,² since Deere and Company was found guilty of having imposed on its dealers and distributors, bans on the exports of John Deere agricultural machinery products to other member States within the EEC. It is well-known that the free flow of goods within the EEC may not be constrained,³ and it is also known that the Commission imposed substantial fines for violations of this, the most sacred of EEC commandments.⁴

Why then is the *John Deere* case of particular interest? Corporate counsel

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1. *John Deere*, Comm'n Dec. of 14 Dec. 1984, 85/79, COMMON MKT. REP. (CCH) ¶ 10,652.

2. Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 11.

3. *Miller International Schallplatten GmbH v. EEC Commission*; 19/77 [1978]; COMMON MKT. REP. (CCH) ¶ 8439. *BMW Belgium et al. v. EEC Commission*; 32/78 and 36-82/78 [1979]; COMMON MKT. REP. (CCH) ¶ 8548. *Kawasaki*; Commission Decision of December 12, 1978; COMMON MKT. REP. (CCH) ¶ 10,097. *Pioneer Electronic Europe NV*; Commission Decision of December 14, 1979; COMMON MKT. REP. (CCH) ¶ 10,185. *Johnson & Johnson Inc.*; Commission Decision of November 25, 1980; COMMON MKT. REP. (CCH) ¶ 10,227.

4. 2 B. HAWK, *United States, Common Market and International Antitrust* (2d ed. 1985) 118-121. U. TOEPKE, *EEC COMPETITION LAW* (1982) 445-473. For recent Commission decisions

reading the Decision cannot help but be struck by references to written opinions from Deere's own in-house counsel, such as: "Deere and Company knew that such conduct and, in particular, the contractual export ban, was contrary to EEC and national competition law. It was advised on this by its in-house counsel."⁵ Such comments about in-house counsel, in a case involving serious misconduct and high fines, provokes reflection about in-house counselling activities in Europe and how the same might later be construed by the Commission against the corporate client and employee.

II. EEC Commission and the Decision Process

In order to appreciate fully the seriousness of the problem, one must understand that the Commission is the executive body of the EEC and one of its purposes is the enforcement of the EEC competition laws embodied in Articles 85 and 86 of the Rome Treaty.⁶ In typical continental European

on market partitioning, see EEC COMMISSION, FOURTEENTH REPORT ON COMPETITION POLICY, 62-66 (1985).

5. John Deere, *supra* note 1, at point 21.

6. Article 85: The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decision by associations of Member States and which have as their object of effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices on any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;
- any decision or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 86: Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.

Such abuse may, in particular, consist in:

fashion, the administrative enforcement procedure is inquisitorial and not adversarial.⁷ The Commission is, in the first place, an investigating body with broad powers. It can go so far as to conduct unannounced on-the-spot investigations (euphemistically known as "dawn raids") on unsuspecting companies for the purpose of obtaining damaging documents. After the investigation stage it is again the Commission which files a complaint, or "Statement of Objections," against the alleged offender. Thereafter the accused is invited to a brief hearing (brief by U.S. standards), which is again before the Commission. After the hearing, the Commission is free to render a decision, which can include the imposition of very high fines, cease and desist orders, and injunctions.⁸ It is sometimes said that the Commission is the investigator, prosecutor, judge and jury, all in one.

III. In-house Legal Advice and Privilege in the EEC

A. THE *DEERE* CASE

1. *Background*

Mindful of the Commission's broad function and powers, a closer look at the *John Deere* Decision is most revealing. On September 3, 1982 the National Farmers Union in the United Kingdom complained to the Commission that Deere's independent dealer in Belgium had refused to supply a tractor to one of its members. Six weeks later, on October 14, Commission inspectors visited the Belgian dealer and a month thereafter, on November 18 and 19, they conducted an investigation at the Deere and Company European Offices in Mannheim, Federal Republic of Germany, from which they took copies of about 150 documents relating to "over the border sales." One should note the speed with which the Commission can act; in less than three months from the time the National Farmers Union complained, it visited two locations and obtained copies of approximately 150 documents on which to base its case.

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

298 U.N.T.S. 11, 47-48.

7. TOEPKE, *supra* note 3, at 686.

8. Van Bael, *A Practitioner's Guide to Due Process in EEC Antitrust and Antidumping Proceedings*, 18 INT'L LAW. 841, (1984). Hawk, *supra* note 3, at 16-29.

Over the course of the next nine months, the Commission evidently analyzed the documents so gathered, and on August 12, 1983 it filed a Statement of Objections. In October 1983 both Deere and the dealers submitted written responses to the Statement of Objections without asking for a hearing.⁹ Five months later, in March 1984, the Commission made available the quotations from the 150 documents on which it might base its Decision. Deere commented on those quotations, apparently without being able to reverse the Commission's interpretation. On December 17, 1984, the Commission adopted a Decision, holding that article 85(1) was violated and that Deere and Company be fined 2,000,000 European Currency Unit (ECU).

2. *The Case and Decision*

Given such a procedure, it is particularly disturbing to learn that in-house legal opinions were used to the considerable detriment of the company. Even with the benefit of hindsight, it does not appear that the legal department rendered bad advice or acted in an unprofessional manner. Instead, it acted quite normally and reasonably in the performance of its duties, although today one might say that the advice should have been spoken and not written.

There were two relevant issues on which the legal department gave written advice in the *Deere* case. First, it appears that the in-house lawyers wrote opinions to European, and U.S. managers to the effect that efforts to constrain parallel exports and, in particular, a contractual export ban, were contrary to EEC and national competition laws. Since 1967 when Deere first imposed such export bans, European law against impeding the free flow of goods within the EEC developed substantially¹⁰ and, therefore, it is only natural for the legal department to follow such developments and to advise management accordingly. This effort, however, backfired. The Commission reviewed the in-house legal opinions and concluded as follows: "Deere acted intentionally. There was knowledge of the pressure for parallel trading, knowledge of its policy to prevent this trading, and of the doubtful legality of many of the steps taken in order to prevent it throughout the Deere group within the Community. . . ."¹¹ In fixing the fine, the Commission takes into account whether the violation was intentional. The in-house legal opinion made it easier to find intentional misconduct, thus justifying a higher fine.

The second issue on which the legal department opined is more complex.

9. Van Bael, *supra* note 6, at 849 for defense counsel's opinion as to hearings in general.

10. Toepke, *supra* note 3, at 471-472.

11. John Deere, *supra* note 1, at point 39.

In 1972 Deere management, apparently aware of the legal risk surrounding contractual export prohibitions, must have thought that a qualifying clause attached to the export ban might give protection from liability. The clause put into the German sales conditions reads as follows: "The purchaser undertakes, *as far as no contrary legal regulation prevents*, not to resell articles . . . abroad with or without modification either directly or indirectly."¹² [emphasis added]

Presumably, Deere argued in its defense that the contractual export ban was only effective if permitted by law, and since EEC law proscribed export prohibitions within the EEC, the export prohibition clause did not apply to goods flowing across national borders within the EEC. The Commission did not spend much time analyzing the restraint of exports, but instead took the easy way out. It simply dismissed Deere's defense by saying that this particular provision constitutes an export ban in spite of the savings clause, since a dealer signing the agreement is generally small and thus not likely to consult a lawyer. Then, the Commission gave Deere's defense the knockout punch with the following words: "Deere's own in-house counsel expressed doubts as to the legitimacy of such a device."¹³

One cannot help but be sympathetic to the plight of the Deere and Company legal department. It seems that the in-house lawyers made a valiant effort to advise their client on complex and rapidly developing points of EEC law, which advice management can find difficult and expensive to accept. To have this opinion used afterwards as an admission against the interest of their client/employer, must have been painful indeed. How can it be that good advice by in-house counsel can later serve as ammunition for the Commission?

B. THE RELATED AM&S JUDGMENT

On May 18, 1982, a mere three and one-half months before the National Farmers Union complained to the Commission about Deere and Company, the European Court of Justice handed down a landmark decision with respect to attorney-client privilege as it relates to the investigative powers of the Commission. It is this case which affirmed the Commission's power to obtain and use as evidence certain types of legal documents and, as we have seen, the Commission wasted no time in employing that power against Deere and Company.

12. *Id.* at point 16.

13. *Id.* at point 27.

1. *Background*

Much has been said and written about the Court of Justice opinion in *AM&S Europe Limited v. Commission*,¹⁴ but it might nevertheless be worthwhile to analyze the implications of the case from the perspective of international corporate counsel. During the course of an investigation by the Commission of the U.K. company AM&S Europe Limited, the company refused to produce certain documents for inspection. Pursuant to the power granted the Commission by regulation 17, article 14(3), the Commission took a formal Decision which ordered, in part, the production for examination of “. . . all documents for which legal privilege is claimed. . . .”¹⁵ It is important to recall what was said earlier about the power of the Commission, namely that in the final analysis it is investigator, prosecutor, judge and jury. With respect to the documents for which AM&S claimed privilege, the Commission essentially ordered that it must first look at the documents and then, as “judge,” rule on the question of privilege to determine whether it, the Commission, can use the same documents as evidence in its capacity as investigator and prosecutor. Or, to put it another way, the Commission must see the entire document first, in order to rule as a matter of law, whether it may see it.¹⁶

The basic problem of the AM&S case is due to the fact that the Council of Ministers, i.e., the legislative body of the Community, gave broad investigative powers to the Commission in regulation 17, but remained silent on the question of legal privilege. AM&S, therefore, had very little choice but to claim that the national laws of the member States, in one form or another, recognize the concept of legal privilege and that this protection should also be available in proceedings before the Commission.

The Commission, on the other hand, maintained that it had been given broad powers to investigate, and that only the Commission had the right to determine what documents would be protected. The Court's task was a difficult one, since it clearly wanted to give some type of protection to attorney-client communications and yet there was no firm foundation in Community law on which to base such a holding. At one point in the Opinion, the Court reveals its frustration by saying that the problem arises “from the omission to date by the Commission to exercise its power of initiative and to propose a regulation providing, in a manner that conforms to the law of the Community, for a procedure for use in these cases.”¹⁷ The

14. *AM&S Europe Ltd. v. Commission*, 155/79, [1982] E. COMM. CT. J. REP. 1575, COMMON MKT. REP. (CCH) ¶ 8757.

15. *Id.*

16. Toepke, *supra* note 3, at 700.

17. *AM&S Europe Ltd.*, *supra* note 14.

Commission, however, always seemed quite content with its unrestricted power under regulation 17, and demonstrated no inclination to propose new legislation to the Council to limit its own investigative authority.

2. *The Court's Decision*

In spite of this difficulty, the Court did make some progress on the issue of legal privilege. The Court held as follows:

- (a) The Commission's investigative power is subject to a restriction imposed by the need to protect confidentiality. This confidentiality is premised on the condition that such communications are made for the purposes and in the interests of the clients' right of defense and that they emanate from independent lawyers, i.e., lawyers who are not bound to the client by a relationship of employment.
- (b) This protection applies without distinction to any independent lawyer entitled to practice his profession in one of the member States regardless of the member State in which the client lives. However, the protection may not be extended beyond those limits.
- (c) The party refusing to produce a particular document bears the burden of proving to the Commission that the document is protected by privilege. The respondent is not obliged to reveal the entire contents of the document in order to meet this burden of proof. If the inspector is not satisfied with the proof so given, it is for the Commission to order by Decision the production of the document in question. Such a Decision to produce is then subject to review by the Court of Justice under article 173 of the Rome Treaty.

In sum, EEC lawyers in private practice have legal privilege, while in-house counsel and non-EEC lawyers are left out in the cold. Furthermore, a respondent does not have to reveal the entire document to the Commission to meet the burden of proof on the question of privilege, and the Court of Justice is available to resolve any resulting disputes.

C. COMMISSION'S POSITION ON IN-HOUSE LAWYERS

Parenthetically, it is curious to observe how the Commission views the role of the in-house legal advisor. In its *Twelfth Report on Competition Policy*, the Commission seems quite content with the *AM&S* ruling, depriving in-house counsel communications of legal privilege. Only independent lawyers deserve this privilege since:

. . . the requirement as to position and status as an independent lawyer is based on a conception of the lawyer's role as collaborating in the administration of justice. The counterpart of that protection lies in the rules of professional ethics and

discipline which are laid down and enforced in the general interest by institutions endowed with the requisite powers for that purpose.¹⁸

However, the Commission's view of in-house counsel changes drastically when it comes to the issue of a company's right to be assisted by legal advisors during an on-the-spot investigation, that is, during a "dawn raid." In the same *Twelfth Report on Competition Policy*, under the heading "Procedures during inspections," the Commission says the following:

. . . during the inspection the undertaking may call in its legal advisers for consultation. However, their presence is not a legal precondition for the validity of the inspection, which must not be unduly delayed as a result. In all events, it is not necessary to wait for a legal adviser where the undertaking concerned has in-house lawyers.¹⁹

The in-house counsel, therefore, is both a real lawyer and not a real lawyer, depending on what happens to be convenient for the Commission. The Commission's position on in-house counsel seems, in effect, to be, "Heads I win, tails you lose."

IV. Reactions to the AM&S Judgment

Although voices strongly protesting the *AM&S* judgment were heard throughout Europe, as well as in the United States, the degree of dissatisfaction varied from country to country, depending on the manner in which the respective national laws and traditions deal with the concept of legal privilege for in-house counsel. For example, in the U.K. and Ireland, in-house barristers and solicitors are full-fledged members of the legal profession, subject to the same rules of professional ethics and discipline as their colleagues in private practice, including the rights and obligations pertaining to legal privilege. In France, Italy, Belgium and the Netherlands, employed lawyers are not members of the Bar and, therefore, their communications are not protected. In Germany, house counsel may be members of the Bar, but they may not represent or defend their employers in court.²⁰ It, therefore, came as no surprise when the loudest outcry against the *AM&S* ruling was heard in the U.K. The *Financial Times* in June 1982 expressed its displeasure as follows:

May 18 deserves to be marked with red letters in the diaries of EEC competition lawyers in private practice. A judgment handed down by the European Court on that day will go a long way to create for them a useful monopoly and to eliminate

18. EEC Commission, *Twelfth Report on Competition Policy* (1982) at point 52.

19. *Id.* at point 32

20. Kreis, *The AM&S Judgment of the European Court of Justice and its Consequences within and outside The Community*, 20 SWISS REV. INT'L ANTITRUST L. 3, 16 (1984).

competition of in-house lawyers and of American and any other non-EEC lawyers active in this lucrative branch of law.²¹

In reaction to the *AM&S* judgment, the House of Delegates of the American Bar Association adopted two resolutions in February 1983 requesting the EEC Commission: (1) as a matter of comity, to grant the U.S. lawyers the same legal privilege in the EEC as EEC lawyers are afforded before the U.S. Courts and antitrust enforcement agencies; and (2) to study and extend attorney-client privilege to house counsel whether of an EEC Member State or otherwise.²²

V. Implications for In-House Lawyers and the Availability of Legal Privilege

The criticisms levied at the *AM&S* judgment seem, for the most part, to be based on concepts such as professional qualifications of the lawyer in member States, professional ethics and discipline, international comity, reciprocity, rights under bilateral treaties, prestige of the legal profession, the client's right of defense, the manner in which the lawyer is paid, etc. But no one has yet focused on the chilling effect this case has, and will continue to have, on the communications and deliberations within multinational corporations on matters of European competition law. Perhaps this omission is due to the fact that the experts on legal privilege do not have a sufficient understanding of the modern multinational corporation, how it communicates, deliberates and ultimately makes decisions.

A. ATTORNEY-CLIENT PRIVILEGE IN HISTORY

This is not the place to engage in a deep philosophical debate on attorney-client privilege, but one can nevertheless safely say that for several hundred years in Western civilization, the privilege has been defended as providing an important social benefit to society.²³ We have moved away from the concept that the privilege exists to enhance the status of the lawyer and, instead, we now focus on the importance to society of open and uninhibited communications with legal advisors.²⁴ One of the basic underpinnings of most legal systems, including the EEC, is the ancient axiom that everyone is presumed to know the law, and it, therefore, follows that everyone can ascertain the law by consulting a lawyer. It is also ancient wisdom that one

21. *Financial Times* (London) June 3, 1982, as quoted in Kreis, *supra* note 18, at 4.

22. See Kreis, *supra* note 18, at 10.

23. 8 WIGMORE ON EVIDENCE § 2290 at 542 (McNaughton rev. 1961).

24. *Id.* § 2291 at 545.

must be able to make inquiries on legal matters without incurring any danger. The communication must be privileged or else the inquiry will not be made in the first place, which means that the law will remain a sealed book. In that case, the presumption that everyone knows the law becomes an absurdity and the very foundation of the legal system is called into question.

If our Western legal systems have a tradition of encouraging and protecting confidential communications with legal counsellors, it must be for the very good reason that society benefits if its citizens have access to legal advice without fear or concern. With legal privilege, society protects the confidentiality of the communication itself, since without such confidentiality, our tradition tells us, the public at large will be most reluctant to learn what it is that society demands through its laws.

B. IMPACT ON THE MULTINATIONAL CORPORATION

Multinational corporations make great efforts at high cost to obtain expert legal advice in all the jurisdictions in which they operate. However, the very complexity of multibillion dollar enterprises, with numerous products and services marketed and manufactured by tens or even hundreds of thousands of people throughout the world, requires that the confidential communication with legal counsel be conducted in a particular manner in order that it may reach the right people at the appropriate decision-making level and also be cost effective. Modern multinational corporations have, therefore, engaged fully qualified lawyers to work in-house to provide this legal service, since it is virtually impossible for outside counsel to perform this function adequately.

What public purpose can, therefore, be served by granting legal privilege to communications with outside lawyers and denying it with in-house lawyers? What difference does it make to society whether the legal advisor is on the company payroll and receives his check at the end of the month, or whether his office bills the company by the hour or is on a retainer. The important thing is that the company's decision makers know, in this highly complex age, what it is that society, in various countries, expects of them. Only the in-house lawyer, assisted of course by outside legal experts, can get that advice to the right people within the company in a cost effective manner. Does it, therefore, make sense to penalize a company through loss of legal privilege if it selects this form of legal communication, because the circumstances of modern multinational corporate life so demand?

The *AM&S* and *John Deere* cases have considerably choked off free and uninhibited internal written discussions of a company's obligations and liabilities under EEC competition law, and it seems that this state of affairs is not only detrimental to the company itself, but also to society as a whole. As

is suggested by the ABA resolution referenced earlier, the EEC authorities should study carefully the consequences of their rulings and then ask the question once again, whether from the point of view of general public policy, it would not be more desirable for the legal privilege to be extended also to in-house counsel communications, such as it is in the U.K., Ireland and the United States.

C. PRIVATE DAMAGE ACTIONS IN NATIONAL COURTS

The Commission is obviously interested in achieving broad compliance with competition laws, but it is not pursuing this objective by working towards a more harmonious relationship between government and industry. Rather, it seems to be encouraging private parties to bring damage actions in the national courts for violations of Articles 85 and 86 of the Rome Treaty.²⁵ A member of the Commission's Legal Service, Mr. John Temple Lang, expressed this thought recently:

The Commission has an interest in encouraging actions in national courts to enforce Articles 85 and 86, and indeed Community law generally. The Commission is short of staff, and has many important duties as well as enforcing Articles 85 and 86 in individual cases, some of which are of relatively little economic importance however vital they may be to those involved.²⁶

He goes on to encourage litigation in the national courts and indicates the Commission might be of substantial assistance to plaintiffs. He further suggests that one might first complain to the Commission in order to get evidence for a subsequent private damage action in the national courts:

There may be cases in which the plaintiff's principal or sole reason for complaining to the Commission rather than suing in a national court is the hope that the Commission, by using its inspection powers, will obtain important evidence not available under national discovery procedures. If the Commission obtains such evidence, the question then arises whether the Commission must continue with its own procedure even if national proceedings would otherwise be wholly satisfactory, or whether the Commission may relieve itself of the case by giving the evidence in question to the potential plaintiff so that it can use it in national proceedings.²⁷

Later in the same work, Mr. Lang discloses how he thinks the evidence obtained by the Commission could be put to its best use: "It would obviously be more economical if the Commission were free to make the evidence

25. See *supra* note 6.

26. Lang, *EEC Competition Actions in Member State Courts—Claims for Damages, Declarations and Injunctions for Breach of Community Antitrust Law*, 1983 *FORDHAM CORPORATE LAW INSTITUTE* 219, at 237 (B. Hawk ed.).

27. *Id.* at 270.

available to the plaintiff.”²⁸ If the *John Deere* experience is not sufficient to strike fear into the hearts of multinational counsel, perhaps the prospect of in-house counsel documents being introduced as evidence in the national courts by private litigants, will provide some additional food for thought. Private enforcement of Articles 85 and 86 is not yet a real problem in the EEC, but that could change if a particular point of view among Commission officials prevails.

VI. Conclusion

The Japanese experience in recent years has taught us in the West that society can benefit substantially where a harmonious relationship between government and industry exists. In the case of EEC competition laws, both government and industry should make greater efforts to understand the needs and concerns of the other. If that goal is indeed desirable, the channels of communication must ensure that all ideas receive adequate consideration. In-house counsel is an important link in that communications process, and it would be counterproductive if that link were weakened, or even broken, because the EEC legal community is unable to agree on certain esoteric theories underlying the principle of legal privilege.

28. *Id.* at 272.