FEATURE ARTICLE

The Annual Conference of the International Bar Association in Prague featured a debate on whether the European Union should recognise a legal privilege protecting the confidentiality of communications between the business managers of a company and the lawyers employed by the company in its legal department **James H Boykin** reports on the debate.

Legal Privilege – the Debate

The Annual Conference of the International Bar Association in Prague featured a debate on whether the European Union should recognise a legal privilege protecting the confidentiality of communications between the business managers of a company and the lawyers employed by the company in its legal department ('company lawyers'). The debate occurred during the fourth panel of an all-day programme devoted to privilege and professional secrecy organised by the IBA's Dispute Resolution Section on 26 September 2005. The speakers were Jacques Buhart of Herbert Smith's Brussels and Paris offices, Jan Eijsbouts, general counsel of Akzo Nobel, and Emil Paulis, Director of DG Competition at the European Commission. John Townsend of Hughes Hubbard & Reed LLP moderated the panel.

Jacques Buhart began the debate by presenting a paper he had prepared on this topic.[1] He started by noting that any discussion at the European level of the question of confidentiality of advice given by company lawyers was often subject to a considerable degree of confusion resulting from the different ideas of confidentiality that exist between civil law and common law jurisdictions. To dispel such confusion at the outset of the debate, Buhart began by describing the civil law concepts of professional secrecy and the duty of confidentiality as those concepts are applied in France and in most civil jurisdictions.

After noting that current rules in France prevent company lawyers from being members of the bar, Buhart discussed recent legislation in Belgium, a civil law country, that extended confidential treatment to the advice of company lawyers who are members of the *Institut des juristes d'entreprise*. He noted that this protection provided by Belgian law was similar to the 'legal privilege' protection accorded to communications between company lawyers and their clients in common law jurisdictions. Buhart suggested that similar changes at Member State level throughout the EU have eroded a principle

James H Boykin is an associate at Hughes Hubbard & Reed LLP in Washington, DC. This summary is based on his notes taken at the IBA meeting. He can be contacted at boykin@hugheshubbard.com

foundation for the rule expressed by the European Court of Justice in the *AM&S* case.[2]

Buhart went on to discuss the hardships imposed on companies doing business in Europe by the limitations on legal privilege recognised in the EU under the *AM&S* rule.

He highlighted the apparent irony of according privilege to the internal communications of Commission and Council employees while simultaneously refusing to treat the communications of company lawyers as privileged. He further explained how the refusal to recognise as privileged the communications between business people and company lawyers has had an adverse impact on corporations operating in Europe. This effect will be even greater now that the Commission's enforcement powers have been reinforced by Regulation 1/2003.[3]

Eijsbouts began his presentation, entitled 'In-house legal privilege as a compliance tool in corporate governance,' by describing the factual background of the case involving his company currently pending before the European Court of First Instance, in which the *AM&S* rule is called into question.[4] The decision to start the case was based on the practical experience of the company in a new and very comprehensive and thorough competition law compliance programme, which began in 1999. He stressed the importance of confidential legal advice as an indispensable corporate governance tool essential for ensuring compliance. Noting that a company's reputation is one of its most essential assets and that any damage to a company's reputation is costly and difficult to repair, he elaborated on the many roles that company lawyers play in protecting a company's reputation and ensuring compliance, by providing sound and confidential legal advice on which management can base effective corporate governance decisions. Emphasising today's complex and globalised business environment, Eijsbouts said that it is very difficult (if not impossible) for outside counsel to fulfil this role and render the assistance required.

Eijsbouts highlighted the necessity of having effective compliance programmes for various areas of legislation in multiple jurisdictions – informed by sound legal advice in the context of what he called the 'Legal Imperative of Compliance', exemplified by corporate governance statutes and regulations such as the rule-based Sarbanes-Oxley Act in the United States and the principle-based codes in EU countries. All of these acts and regulations require comprehensive codes of conduct, covering both hard laws and ethical standards, as well as monitoring and assessment systems.

Eijsbouts stressed both the necessity and the utility of according legal privilege to the advice of company lawyers, in order for those lawyers to be best positioned and equipped to fulfill their important roles of helping the corporations they work for to comply with the law. Because effective compliance in today's business environment realistically requires that companies have uninhibited access to legal advice from their company lawyers, it is in the best interests of the company, its stakeholders, and especially the regulators that the advice companies receive from their in-house lawyers be treated as privileged.

Emil Paulis outlined the policy considerations behind the European Commission's position that the advice of company lawyers should not be shielded from regulatory scrutiny by any rule of legal privilege. He began by observing that the big difference between outside lawyers and those employed directly by companies is that company lawyers are not independent of their employers, because the employment relationship creates an inherent conflict of interest. Paulis stressed that the Commission does not believe that company lawyers are inferior to their colleagues in private practice, but rather that a lack of independence is the inevitable consequence of any employment relationship.

Paulis said that the problem of the company lawyer's lack of independence would not be solved by the company lawyer becoming a member of the Bar. Bar membership is immaterial to the issue of privilege for company lawyers, because professional rules setting standards for attorney conduct are inherently inadequate for resolving the conflict of interest created by the employment relationship. He disagreed with Jacques Buhart's view that the rule of privilege set down in *AM&S* had become outmoded as a result of several European Union Member States having changed their internal rules of privilege. With respect to the use of Belgium in particular as an example of a country that had extended privilege to company lawyers as long as the company lawyers' conduct was regulated by an independent professional association, he said that this aim could only

be achieved, if at all, by a set of professional rules supervised and enforced by effective institutions. He added that it was an over-statement to say that the law of privilege at Member State level has evolved since *AM&S*.

Paulis also argued that according privileged status to the advice of company lawyers would disrupt a carefully balanced equilibrium in public law between the powers of regulators, on the one hand, and the rights of the defence, on the other. As an illustration, he referred to the difficulty of distinguishing between legal and business advice. He said that the Commission's inspectors would be overwhelmed if they were forced to devote time to that type of issue, which is typical of the discovery disputes about privilege familiar to lawyers in the United States. Paulis suggested that, if a privilege for company lawyers were to be recognised, the equilibrium could only be reestablished by giving the Commission additional investigatory powers of the kind available to American prosecutors, which it does not now have.

Paulis said that the investigatory powers of government agencies in the United States are radically different from those available to government agencies in Europe. In particular, he said that the Commission does not have the power to compel the testimony of witnesses and, most notably, that the Commission has no power to bring criminal charges against anyone suspected of destroying evidence. He added that the Commission's current powers were limited to 'going and finding the needle in the haystack', and suggested that the public law equilibrium might already be skewed against regulators. In light of the differences in investigative powers between the Commission and agencies in the United States, he argued that the European Union should not import a rule of privilege that emerged from another legal system and which only made sense in the context of a system where investigatory powers were much greater than in Europe.

Paulis then addressed what he referred to as fallacy arguments. The first is that *AM&S* is old case law and that Member State jurisprudence on this issue has evolved. He disagreed with both propositions. The second fallacy argument is that the Commission's own documents are protected by legal privilege. He said that the cases frequently cited for this proposition actually stand for the principle that disclosure of the internal deliberations of government would produce legal uncertainty. He also distinguished between the Commission and commercial corporations by noting that the Commission is not in the business of making a profit.

The third fallacy argument identified by Paulis was that EC Regulation 1/2003 had dramatically changed a company's burden of self-assessment. He said the Commission did not as a matter of practice make inspections for the type of conduct subject to Article 81(3) of the EC Treaty. He said that inspections were generally made to seek evidence of conduct in violation of Articles 81(1) and 81(2), the illegality of which is already so well established that self-assessment should not be difficult.

Paulis closed with two developments that he described to his audience of lawyers as 'positive'. First, he said that the Commission was no longer using legal advice as an aggravating factor, as had been done in the *John Deere* case. Secondly, he stated that the Commission, as an informal matter of practice, treats all communications with external lawyers, regardless of nationality, as privileged, notwithstanding the statement in *AM&S* that legal privilege applies only to independent lawyers who are members of the bar of a Member State.

Ramon Mullerat of Barcelona, in an intervention, argued that all lawyers have the same professional obligations to advise their clients and uphold the law, whether they are employees of their clients or members of law firms. He urged that all communications with lawyers should be given the same protection of privilege, regardless of whether the lawyer is employed by his or her client. ❖

Notes

1 Jacques Buhart, 'Confidentiality of advice given by in-house legal counsel practicing in the European Union' (Paper submitted to the IBA).

2 *AM&S Europe Ltd v Commission of the European Communities*, [1982 ECR. 1575, Case 155/79 (ECJ 1982).

3 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 2003 L1/1).

4 *Akzo Nobel Chemicals Ltd v Commission of the European Communities*, Joined Cases T-1225/03 and T-253/03 R (Court of First Instance, 30 October 2003).