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Confidentiality, Corporate Counsel, and Competition Law: Representing Multi-National Corporations in the European Union Third Annual Symposium on Legal Malpractice & Professional Responsibility: Symposium Presentations.

Sue Bentch

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CONFIDENTIALITY, CORPORATE COUNSEL, AND COMPETITION LAW: REPRESENTING MULTI-NATIONAL CORPORATIONS IN THE EUROPEAN UNION*

SUE BENTCH**

My talk today is about the intersection of two of the most cherished and protected values of our profession: independence and confidentiality; and about the tension between those two core values inherent in the role of corporate counsel, especially as it plays out in practice in the European Union. For the sake of clarity, I will try to minimize my use of acronyms—I know they can be confusing—and I will also try to avoid historical names of European institutions such as European Economic Community (EEC) in favor of the contemporary names like European Union (EU), even though the historical name may technically be the more accurate in context.

As you may have noted in the brief biographical sketch in the program, I am a clinical professor of law here in San Antonio, Texas; however, I have been fortunate in recent years to spend quite a bit of time teaching Legal Ethics in Latvia. "Where's that?" you might ask.

Latvia is a small country on the eastern side of the Baltic Sea, opposite Sweden, between Russia and the sea. It was an independent country between the World Wars, but before World War I it was part of the Russian Empire, and from 1940 to 1991 it was forcibly incorporated into the Soviet Union. Before going to Latvia, I

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** Clinical Professor of Law, St. Mary's University School of Law. B.A., Newcomb College/Tulane University; M.A., Emory University; J.D., St. Mary's University. Fulbright Senior Scholar at Riga Graduate School of Law 1999-2000 and 2000-2001; Fulbright Senior Specialist at Riga Graduate School of Law 2003, 2004.

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learned what little I could from afar about its history and about legal ethics and law practice there and in Europe.

The capital of Latvia is Riga. In Riga, the governments of Latvia and Sweden and the Soros Foundation founded the Riga Graduate School of Law as a one-year postgraduate master's program to train graduate lawyers in the rule of law and in western legal practice, all with an eye toward Latvia's eventual membership in the European Union. When I first went to Latvia in 1999 to teach Legal Ethics at the Riga Graduate School of Law in its initial year, that seemed little more than a pretty dream. Now that dream is nearing reality. Latvia, its Baltic neighbors, and several other former Warsaw Pact countries will join both the EU and NATO this spring.

Naturally, the law of the European Union features prominently in the curriculum of the Riga Graduate School of Law, so I learned quite a bit about the EU right along with my students. And naturally, because I am a clinical professor, I have an eye for practical problems in the practice of law. That's what led me to explore the disconnect that I saw in the expectation of professional independence and confidentiality that can have serious consequences for lawyers who represent companies that do business in Europe.

Here in the U.S., we're lucky that despite dozens of different licensing jurisdictions—fifty states, the District of Columbia, the federal districts, and so on—lawyers all have pretty much the same initial training and licensing requirements. Consequently, even though I'm not licensed to practice in Oklahoma, a lawyer who went to law school in Oklahoma learned pretty much the same things that I learned at St. Mary's and followed a similar process for licensure in Oklahoma that I followed in Texas. Similarly, a Texas lawyer for SBC, Dell, or any other large corporation, who practices in the office of its general counsel, has successfully completed the same process of training and licensure. Not so in Europe.

Most people know that in Britain, on which our common law system is primarily based, there is a distinction between barristers and solicitors in both practice and training. In civil law countries like France and Germany, the legal profession is even more fragmented. Education and training may be different, licensing may differ, and in some cases there may be no licensing at all for certain types of lawyers. It's hard for us to conceive of a world where

some lawyers are not entitled to be members of the bar, but that's the situation in various European countries. There are many educational and cultural reasons for these differences: one is that law is an undergraduate and theoretical pursuit in most European countries; another is that law faculties at major universities tend to be immense by our standards. For example, there are over 20,000 law students at the University of Rome. Needless to say, most of these law graduates do not become lawyers in the sense that we think of lawyers—professionals who are trained, licensed, and subject to discipline by the collaboration of the legal academy, the bench, and the bar.

Nevertheless, in many European countries, especially countries with a civil law tradition, there are law graduates who are not formally members of any bar, and therefore not subject to this three-part collaboration of academy, bench, and bar, who can and do act as legal consultants and as in-house counsel. In some of these countries, they may even be prohibited from becoming members of the bar because they are viewed as insufficiently independent to exercise professional judgment.

In the U.S., and for that matter in countries like Britain and Ireland, we expect corporate counsel to be bound by the same professional ethics as courtroom practitioners—in fact we count on it. We expect corporate counsel to exercise the same degree of independent professional judgment as outside practitioners—managers and directors should insist on it. We expect that corporate counsel's advice to management will be confidential and privileged from forced disclosure. We can usually count on the courts to enforce that expectation, although we all understand the necessary exceptions when life, crime, or fraud may be threatened.

Imagine then, if you will, that you're an in-house lawyer for John Deere, the American tractor company based in Moline, Illinois. John Deere sells tractors all over the world, and the European market is quite lucrative. Company policy originally forbade export of its tractors from dealers in one European country to purchasers in a different county. When Deere first imposed these export bans in 1967, they were not illegal. However, over the next twenty years, European laws against impeding the free flow of goods from one country to another developed rapidly. Corporate counsel were therefore competently doing their jobs when they tracked and reviewed the development of this area of the law and

its effect on company policy. Thus, as European competition law changed, corporate counsel advised management accordingly. Specifically, Deere's in-house lawyers wrote opinions to their European and U.S. managers to advise them that constraints on parallel exports and contractual export bans were contrary to European and national laws. The legal department gave Deere's management sound advice and acted professionally, fulfilling the lawyers' duties to their corporate client and under the rules of professional responsibility. Right? How many people think those written opinions were confidential and protected by the attorney-client privilege?

That's what the John Deere lawyers thought, too. You can imagine their consternation when their legal opinions became the crux of the case *against* their corporate client.

Here's what happened: in September 1982, the National Farmer's Union in Britain complained to the European Commission that a Deere dealer in Belgium refused to supply a tractor to one of its members in the U.K. Within six weeks, the Commission had investigated the dealer in Belgium and less than a month later raided the Deere & Co. European headquarters in Germany and seized documents relating to cross-border sales, including the opinions of corporate counsel.

Investigation and sanction move at lightning speed under EU competition law, specifically the infamous Regulation 17.[1] The European Commission is roughly analogous to the executive body of the EU, but its administrative process is inquisitorial rather than adversarial. It has broad powers to investigate and adjudicate suspected violations of EU competition law that make it comparable to investigator, prosecutor, judge, and jury, all rolled into one. Its investigative powers include the kind of "dawn raid" that it conducted on the Deere offices in Germany. After the raid, the Commission needed only five months to analyze the evidence it had gathered and, even after legal maneuvering back and forth by both sides, barely two years to announce its decision to fine Deere & Co. two million European Currency Units (ECU, now Euros). Its decision was based in large part on the internal opinions of corporate counsel. The Commission thus attributed an intentional viola-

1. Commission Regulation 17/62, 1962 J.O. (13) 204.

tion to Deere, stating that Deere's senior management in the U.S. knew that such conduct was illegal under both European and national competition law because it had been so advised by its in-house counsel.

This story shocks me every time I hear it, read it, or tell it. The Deere legal department tried valiantly to advise their client on a complex and rapidly developing area of European competition law. How painful it must have been to have their opinions used against the interest of their client. More generally, can it be good for either the European Commission's enforcement of competition law or the legal profession to permit the Commission to use good advice by in-house counsel as a weapon against the corporate counsel's client?

Therein lies the tension between the core values of independence and confidentiality that is at the heart of this issue. Before I explain further, first let me give you a brief explanation of how this state of affairs came to pass.

Shortly before the British National Farmers Union complained to the Commission about Deere & Co., the European Court of Justice (ECJ) handed down a landmark decision regarding the attorney-client privilege as it relates to the investigative powers of the European Commission. That is the *AM&S* case.[2]

AM&S Europe Ltd., a U.K. company under investigation by the European Commission, refused to produce certain documents for inspection by the Commission on the ground that the documents contained advice from the company's lawyers and therefore were protected from discovery. These documents were legal memoranda from in-house counsel to company employees. The Commission in turn ordered the production of all documents for which the company claimed legal professional privilege. Due to its unrestricted power to investigate and enforce competition law, the Commission said *it* would be the judge of whether it could then use those documents in its investigation and prosecution. AM&S sought refuge in the European Court of Justice, seeking an injunction against the Commission under the U.K. domestic law which recognized the privilege.

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2. Case 155/79, AM&S Europe Ltd. v. Commission, 1982 E.C.R. 1575.

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In its opinion in *AM&S*, the European Court of Justice recognized the need to protect the confidentiality of attorney-client communications, and for the first time specifically limited the European Commission's power to investigate subject to legal professional privilege. That was the good news. Here's the bad news: the ECJ limited the privilege to only those communications made for the purposes of the clients' defense, and (here's the worst) only communications with outside lawyers. In other words, lawyers who are *not* employees of their client. Here's another restriction: these outside lawyers must be lawyers in one of the EU's member states. Therefore, communications with independent lawyers from countries outside the EU will not be protected either. Finally, it is the company who bears the burden to prove to the Commission that a particular document is protected, although the company need not disclose the contents to meet this burden. If the Commission's inspector is dissatisfied, the burden shifts to the Commission to issue what's called a "decision," ordering production of the document. The company can then seek review by the European Court of Justice.

To summarize, a company's communications with EU lawyers in private practice regarding an investigation by the European Commission are protected from disclosure, but communications with in-house lawyers or with non-EU lawyers are not. That's been the law in the EU since 1982, and the Commission used it almost immediately in the *Deere* investigation.[3]

The level of protest generated by the *AM&S* decision varied from country to country, depending on the status of in-house lawyers in each country. In Britain and Ireland, like in the U.S., in-house lawyers are fully qualified and licensed members of the bar, subject to the same rules of ethics and discipline as lawyers in private practice, including confidentiality and attorney-client privilege. By contrast, in many civil law countries such as France and Italy, in-house lawyers are not members of the bar and, therefore, their communications are not protected. Indeed, one might think that American companies like Deere and British companies like AM&S would bear the brunt of this decision by the European Court of Justice, rather than Italian or French multi-national cor-

3. Commission Decision of 14 December 1984 85/79, 1985 O.J. (L 35) 58.

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porations. Nevertheless, the *Sabena*[4] and *Hilti Aktiengesellschaft*[5] cases are further examples of companies whose fates were sealed by memoranda generated by their own legal departments in civil law countries. Sabena's corporate counsel, like Deere's, warned management that freezing London European Airways out of Sabena's sophisticated computer reservation system could give rise to penalties under EU competition law. (London European Airways is the U.K. subsidiary of Ireland's discount Ryanair.) Until just recently, the *Hilti* case provided the only hope for possibly broadening the privilege: after the European Commission seized documents from Hilti's legal department, the ECJ's Court of First Instance upheld Hilti's argument that legal professional privilege should extend to in-house memoranda that distributed within the company advice generated by outside counsel that was clearly privileged.

In this country, the ABA reacted to the *AM&S* decision almost immediately. In 1983, the ABA House of Delegates formally petitioned the European Commission to grant U.S. lawyers the same privilege that European lawyers would have before courts and antitrust authorities in this country as a matter of comity, and to study and ultimately extend the privilege to corporate counsel regardless of whether they were in an EU member country or another country. The European Commission has never acted on either of those requests. At the time, the Commission was the only body who could propose or enact EU legislation. Although that is no longer strictly the case, the Commission certainly was not then, and still is not, likely to propose new legislation to limit its own investigative authority.

Even though the *law* in Europe has not changed in twenty years, the *issue* of confidentiality, legal professional privilege, and corporate counsel has not remained stagnant. Two important organizations have made it a cornerstone of their efforts. The first is the CCBE, the Council of the Bars and Law Societies of Europe. (This organization really is known by its acronym, which comes from the earlier French version of its name.) Through the national bars and law societies, the CCBE now represents more than 500,000 Euro-

4. Commission Decision of 4 November 1988 88/589, 1988 O.J. (L 317) 47.

5. Case T-30/89, Hilti AG v. Commission, 1990 E.C.R.II-163, [1990] 4 C.M.L.R. 602 (1990).

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pean lawyers both within and outside the EU. It has independent representative status before the European Commission, the European Court of Justice, and the European Court of Human Rights. The CCBE Code of Conduct, first adopted in 1988, governs cross-border legal practice in the EU. The CCBE Code of Conduct requires absolute professional independence in non-contentious matters as well as in disputes, and a duty of confidentiality to which American lawyers could readily subscribe.

The second organization is the European Company Lawyers Association (ECLA). (Fortunately this acronym corresponds to the English name.) ECLA is a confederation of national associations of company lawyers formed in 1983 in reaction to the *AM&S* decision. ECLA has grown to represent more than 31,000 lawyers in 17 countries. ECLA's members must subscribe to the CCBE's Code of Conduct, whose very first article requires a lawyer to act within the scope of applicable laws. Not surprisingly, ECLA argues that effective in-house counsel's advice would benefit the Commission's enforcement of European competition law by contributing to legal certainty, improving compliance with competition rules, fostering the use of internal anti-trust programs, and in turn, reducing the burden of enforcement on competition authorities and on the courts.

The nature of in-house counsel in Europe has also changed in the past twenty years, in some countries quite dramatically. More and more corporate counsel in Europe are "alumni" of large multinational law firms, rather than merely unlicensed law graduates, and many are alumni of American and British LL.M. programs. This new generation of corporate counsel has expanded the responsibilities of in-house lawyers and has shifted many of these responsibilities from outside law firms to corporate legal departments. Partly in recognition of this fact, and partly as a result of ethical training and regulation provided by associations like the CCBE and ECLA, legal professional privilege has been extended domestically over the past twenty years in some civil law countries to qualified in-house counsel in the Netherlands, Belgium, Germany, Spain, Portugal, and Greece.

These changes, along with intense lobbying by the CCBE, ECLA, the ABA, and the Business Law section of the International Bar Association, have recently generated what may well become a sea change in Europe. The most hopeful note is the *Akzo*

Nobel Chemicals[6] case. In October of 2003, the President of the ECJ's Court of First Instance issued an order suspending a decision of the European Commission which rejected Akzo's claim of privilege, in order to allow the court to more fully consider the claim of privilege for communications with in-house counsel in light of the substantial changes in the role and status of in-house counsel in the past twenty years. The President of the Court of First Instance stated that the evidence shows that

> increasingly in the legal orders of the Member States and possibly, as a consequence, in the Community legal order, there is no presumption that the link of employment between a lawyer and [a company] will always, and as a matter of principle, affect the independence necessary for the effective exercise of the role of collaborating in the administration of justice by the courts if, in addition, the lawyer is bound by strict rules of professional conduct. . . .

Both the CCBE and the European Company Lawyers Association have been permitted by the court to intervene in the *Akzo* case. Parties and intervenors will file their written pleadings this month, but a final decision may be many months away.

Meanwhile, human rights arguments in favor of the privilege have been successfully advanced, first in a strictly domestic British case, the *Patel*[7] case, but most recently in the *Senator Lines*[8] case in the European Court of Human Rights. In the *Patel* case, the English High Court found that interference with the right to consult a lawyer of one's choosing and interference with correspondence between a client and that lawyer violated the European Convention on Human Rights. Interestingly, although every country in Europe is a signatory to the Convention, the EU is not. Consequently, when German shipping company Senator Lines challenged the fine imposed on it by the European Commission as criminal in nature, its recourse could not be to the European Court of Justice. Instead it sued all fifteen member countries individually in the European Court of Human Rights, invoking not only its right to consult and correspond with lawyers of its choosing, its corporate counsel,

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6. Joined Cases T-125/03 R & T-253/03 R, Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd. v. Commission, Interim Order of the President of the Court of First Instance of 30 October 2003, 2004 O.J. (C 35) 15.

7. Gen. Mediterranean Holdings SA v. Patel, 3 All E.R. 673 (Q.B. 1999).

8. Senator Lines Gmbh v. 15 States of the European Union, App. no. 56672/00, Eur. Ct. H.R.

under the European Convention on Human Rights, but also its privilege against self-incrimination. Both the CCBE and ECLA intervened on behalf of Senator Lines in the European Court of Human Rights.

In addition to the possibility of groundbreaking caselaw on the horizon in the *Akzo* case, the regulatory framework is changing as well. The new EU competition regulation that will become effective May 1, 2004 will subsume the old Regulation 17 and the old merger regulation in an effort to streamline and decentralize competition law in the EU, making companies increasingly responsible for their own investigation and review of the legality of proposed agreements and conduct. The new merger regulation came surprisingly close to including a provision that in-house legal counsel be accorded legal professional privilege if "the legal counsel is properly qualified and is subject to adequate rules of professional ethics and discipline which are laid down and enforced . . . by the professional association to which the legal counsel belongs." This language was passed by the Committee on Economic and Monetary Affairs and by the full European Parliament itself (two institutions which can now also propose amendments to legislation), but was ultimately rejected in the final version by the Council of Ministers. Although this amendment was vocally supported by ECLA, the European Company Lawyers Association, the CCBE took the position that neither the term "in-house lawyer" nor "professional association" was clearly defined and, unfortunately, there is no uniform definition which applies across the EU. Nevertheless, the issues of confidentiality and legal professional privilege as they apply to corporate counsel are now on the radar screen of decision makers across Europe.

I don't want to sound like a Pollyanna when I suggest along with ECLA and the CCBE that the European Commission's best guarantee that companies follow the law is recognition of the professionalism of their corporate counsel. One need only think about the Ford Pinto's exploding gas tanks or the tobacco companies or Enron to suspect that company lawyers might at times be in collusion with their corporate clients. With such examples, one can understand why some European countries, and so far the European Court of Justice, believe that company lawyers cannot exercise a sufficient degree of independence to merit the professional stature that would protect their communications with their clients. Indeed,

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European Commissioner Mario Monti has stated that "because in-house lawyers are not independent and have to follow the instructions given by management, if they were to benefit from legal professional privilege they could be used as an instrument to commit infringements and conceal documentation on such infringements." In fact, however, all published European cases involving advice from in-house counsel indicate that corporate counsel advised *against* infringement. In fact, in many cases in-house counsel is in a better position to ensure compliance than outside counsel, and is, or should be, specifically tasked with *ensuring* compliance with the law. Despite headline cases like the tobacco companies and Enron, there are numerous less well-known cases in this country where in-house counsel refused to engage in practices contrary to professional ethics: like Mr. Balla, the in-house counsel who advised Gambro against re-importing and selling dialysis equipment in this country that failed to meet FDA standards; or Andrew Rose, who refused to participate in the cover-up of drug use that his investigation uncovered at defense contractor General Dynamics. Similarly, in a European company recently, general counsel of the Norwegian shipping company Stolt-Nielsen resigned rather than condone collusive activity discovered after an internal investigation. These American and European lawyers were no *more* likely than outside counsel to engage in unethical conduct and no *less* likely to exercise independent judgment in accordance with ethical rules.

Whether the next few months will bring the treatment of corporate counsel in Europe to an equal footing with their counterparts in private practice remains to be seen. But the *Akzo* case and other developments in this rapidly changing area of the law bear watching by anyone who contemplates advising clients who do business in the European Union.

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