Hastings International and Comparative Law Review

Volume 13
Number 3 *Spring 1990*

Article 8

1-1-1990

Disparity in the Application of Legal Principles as a Form of Trade Restraint: Attorney-Client Privilege in the European Community

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By DAN R. MASTROMARCO*

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I. INTRODUCTION

Americans look toward 1992, the proposed deadline for final entry into force of the Single European Act,[1] with a combination of enthusiasm and trepidation. The Single European Act signals a return to the original, ambitious goal of the Treaty of Rome more than three decades earlier—the formation of a single and fully integrated European market—a Europe without frontiers. The signing of the Act in February 1986 and the European Community's (EC) systematic execution of the comprehensive agenda towards economic integration represents the unfolding of historic events in modern world politics that few could have envisaged.

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1. *Opened for signature* Feb. 17, 1986, 30 O.J. EUR. COMM. (No. L 169) 1 (1987).

If implemented in a market-oriented way, the Act will greatly advance international economic cooperation as part of the global movement toward freer competitive markets, and will enhance both European and world economic prospects.

The apprehension of United States businesses about this event partly stems from a perceived lack of preparedness in the United States for stiffer competition. The expected increase in European market power, efficiency, and political leverage resulting from European integration has been the subject of some justifiable concern. More important, however, is the perception that the unified European market will be less accessible to American business because of the implementation of inequitable trade policies designed to give unfair advantage to European competitors.[2] For this reason, European Community Directives and Decisions have been followed closely by the United States academic community, by Congress, and by trade and professional associations, including those which represent the legal profession.

For the growing portion of the American Bar who practice international trade law,[3] this fear has been substantiated by two European Court of Justice[4] (Court of Justice) decisions, *AM&S Europe Limited v. Com-*

2. This perception is exemplified by statements made by U.S. Senator Max Baucus, Chairman of the Subcommittee on International Trade, Senate Finance Committee when he proposed talks with Pacific Rim nations as a "counterthreat" to a protectionist European Community. *See Bilateral Trade Agreements: Hearing on S. 137 Before the Subcomm. on International Trade of the Finance Comm. of the U.S. Senate*, 101st Cong., 1st Sess. 61 (Mar. 13, 1989); *see Baucus Proposes "Fortress Pacific" to Balance Europe*, [1 No. 4 EUROPE-1992, THE REPORT ON THE SINGLE EUROPEAN MARKET 73 (Mar. 15, 1989).

3. As one indication, the American Bar Association reports a marked increase in the number of attorneys who belong to the International Section. Established in 1937 with only a few hundred lawyers, the section now numbers 11,804 lawyers as of January 1, 1990. Membership Records, A.B.A., 750 N. Lake Shore Dr., Chicago, IL 60611.

4. The EEC Treaty, signed by the six original Member States, entrusted the authority of the EC to four main institutions: the Assembly, the Council, the Commission, and the Court of Justice. Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 4, 1988 Gr. Brit. T.S. No. 47 (Cmd. 455) 82, 83 [hereinafter EEC Treaty] (original version at 298 U.N.T.S. 11). The Commission, consisting of 17 individuals appointed by Member States, *id.* arts. 157, 158, at 132, to 4 year terms, *id.* art. 158, is in effect the executive or administrative branch of the EC. The Commission's mandate is the implementation and guardianship of the Treaty. *Id.* art. 155, at 131. It must act in the interest of the community as a whole, independent of individual member countries' interests, political parties or the Council. *Id.* art. 157, at 132. The Commission not only has the right to place the proposals before the Council for action, but also executes the Council's decisions and can take the other institutions or other individual countries before the Court of Justice if they are in breach of their responsibilities. *Id.* art. 155, at 131.

The European Court of Justice, composed of 13 judges and 6 advocates-general, *id.* arts. 165, 166, at 134, appointed for 6 year terms, *id.* art. 167, is responsible for adjudication of disputes arising out of the Treaties. *Id.* art. 164. Its findings are enforceable in all the member

mission of the European Communities [5] and *John Deere v. Commission of the European Communities.*[6]

The *AM&S* and *Deere* decisions have had the effect of drawing an important distinction between the ability of counsel within and without the European Community to secure the privacy interests of their clients. Under the *AM&S* decision, the Commission's sweeping powers to investigate are unencumbered by the almost universally recognized right of attorney-client privilege in cases in which independent counsel of a nonmember country is involved. The attorney-client privilege pertains in the representation of clients on EC matters only if the attorney representing the client happens to be an independent counsel within the European Community.[7]

This gross disparity in the application of a legal principle gives EC lawyers an important advantage over United States and other non-Member State lawyers. The decision negatively affects the American legal service industry by hindering the ability of United States lawyers to advise clients on EC matters. It also indirectly affects virtually all American companies, large and small, by placing them at an unfair disadvantage with their European competitors who are more apt to rely on outside EC counsel. Moreover, the incongruity manifested in *AM&S* [8] is in conflict with the laws of the Member States.[9] It may also violate existing treaties between the United States and the individual Member States by which the European Community is obligated to abide.

The purpose of this Article is to describe briefly the origin of the Community confidentiality standard, emphasizing the disparate treatment accorded EC and non-EC attorneys; to discuss the nature of the American attorney-client privilege and the rationale for that privilege; and to explore the inherent problems presented in the EC position. The

countries. *See id.* art. 189, at 138. The task of the Court is to ensure the observance of the law in the interpretation and application of the Treaties setting up the Community, and to implement regulations issued by the Council or the Commission. *Id.* art. 177, at 137.

5. 1982 E. Comm. Ct. J. Rep. 1575, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8757, at 9037.

6. 28 O.J. EUR. COMM. (No. L 35) 58 (1985).

7. COM(84) 548 final (Oct. 9, 1984) was a recommendation for a council decision authorizing the Commission to open negotiations with a view to the conclusion of agrements between the EEC and certain third countries concerning the protection of legal papers. However, no action has been taken on that recommendation.

8. *AM&S*, 1982 E. Comm. Ct. J. Rep. at 1575, [1979-1981 Transfer Binder] Common Mkt. Rep. at 9037.

9. Crinion, *AM&S Europe Limited v. Commission of the European Communities: Confidentiality of Lawyer-Client Communications in Commission Competition Investigations*, 1984 WIS. INT'L L. REV. 131.

paper concludes by criticizing the decisions in *AM&S* and *Deere* for going against the underlying spirit of the EC through the disparate application of legal principles.

II. THE DEVELOPMENT OF THE EC ATTORNEY-CLIENT CONFIDENTIALITY STANDARD

A. The AM&S Case

The rule excluding non-EC member attorneys from using the attorney-client privilege finds its genesis in the *AM&S* decision, which is the foundation of the Community standard for attorney-client confidentiality.[10] The *AM&S* case concerned an investigation ordered pursuant to Council regulation 17, article 14(1) into suspected price fixing between several firms in the European zinc industry, including Australian Mining and Smelting Europe Limited (AM&S).[11] In conducting the investigation, the Commission utilized the broad authority delegated to it under regulation 17, article 14(1). According to that article, "[i]n . . . carrying out the duties assigned to it by article 89 and by provisions adopted by article 87 of the Treaty, the Commission may undertake all necessary investigation[s]."[12]

In the course of the investigation conducted at the Bristol, England offices of AM&S, investigators sought certain records which AM&S claimed were protected under the attorney-client privilege.[13] Determined to inspect the documents, the Commission issued a Commission Decision,[14] as authorized under article 14(3) of regulation 17, which required AM&S to produce all requested documents, including those "for which legal privilege is claimed."[15] AM&S refused to submit the docu-

10. *AM&S*, 1982 E. Comm. Ct. J. Rep. at 1610-13, [1979-1981 Transfer Binder] Common Mkt. Rep. at 9059-60.

11. Article 87 of the EEC Treaty requires the Council to adopt regulations enforcing the principles of articles 85 and 86 of the Treaty, which specifically prohibit price-fixing agreements between companies within the Community. EEC Treaty, *supra* note 4, art. 87, at 108. The Council of Ministers, composed of the Heads of State from the twelve Member States, is the centralized legislative body of the EEC. *Id.* art. 146, at 129. The Council's task is to establish the law of the Community by making regulations, guidelines and decisions within the limits fixed by the Treaty, while ensuring the economic cooperation of the Member States. *Id.* arts. 145, 189, at 129, 138.

12. [1959-1962] O.J. EUR. COMM. 87, 91 (1962).

13. AM&S Europe v. EEC Commission, 1982 E. Comm. Ct. J. Rep. 1575, 1579, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8757, at 9037, 9039.

14. *Commission Decision No. 79/670/EEC*, 22 O.J. EUR. COMM. (No. L 199) 31 (1979).

15. *Id.* at 33.

A. The Decision

According to the Decision:

ments for which it claimed privilege, but offered to allow the Commission to preliminarily inspect a portion of the documents in order to determine if the privilege applied.[16] The Commission rejected AM&S's offer, maintaining that it was permitted to inspect all documents first to determine if the privilege applied.[17] When the Commission reasserted its demand, AM&S brought an action for review in the Court of Justice under article 173 of the EC Treaty,[18] which permits the Court of Justice to review the legality of both Commission and Council actions.[19]

> AM&S Europe Ltd is hereby required to submit to an investigation . . . to allow the Commission officials responsible for the investigation to enter its premises during normal office hours and to produce for examination . . .; (a) all files, correspondence, telexes, internal memos and any other business records from 1971 to date . . .; (b) all documents for which legal privilege is claimed, as listed in the appendix to AM&S Europe Ltd's letter of 26 March 1979 to the Commission . . . .

Id. at 32-33.

In reaching this Decision, the Commission did recognize an earlier position advanced in reply to Written Question No. 63/78 in the European Parliament, asked by Mr. Couste: "[T]he Commission 'follows the rules in the competition rules of certain Member States and is willing not to use as evidence of infringements of Community competition rules any strictly legal papers written with a view to seeking or giving opinions on points of law . . . .' " *Id.* at 32 (quoting 21 O.J. EUR. COMM. (No. C 188) 31 (1978)). Nonetheless, the Commission dismissed AM&S's claim that they may withhold documents on the basis of irrelevancy or confidentiality stating that: "[N]either the undertaking concerned nor its legal advisors can be the ultimate or only arbiter either as to questions of fact or of law, as to whether any given document . . . was written in circumstances which would justify its not being used." *Id.* at 32 (1979).

B. Article 14(2) of Regulation 17 of February 6, 1962, in its original French text provides:

> Les agents mandatés par la Commission pour ces vérifications, exercent leurs pouvoirs sur production d'un mandat écrit qui indique l'objet et le but de la vérification, ainsi que la sanction prévue a l'article 15, paragraphe 1, alinéa c), du présent réglement au cas où les livres ou autres documents professionels requis seraient présentés de façon incomplète. La Commission avise, en temps utile avant la vérification, l'autorité competente de l'État membre sur le territoire duquel la vérification doit être effectuée de la mission de vérification de l'identité des agents mandatés.

5 J.O. COMM. EUR. (No. L 13) 209 (1962).

16. *AM&S*, 1982 E. Comm. Ct. J. Rep. at 1575, [1979-1981 Transfer Binder] Common Mkt. Rep. at 9037.

17. *Id.* at 1580, [1979-1981 Transfer Binder] Common Mkt. Rep. at 9040.

18. *Id.* at 1578, [1979-1981 Transfer Binder] Common Mkt. Rep. at 9039.

19. EEC Treaty, *supra* note 4, art. 173, at 136. The Treaty provides:

> The Court of Justice shall review the legality of acts of the Council and the Commission other than recommendations or opinions. It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of power.
>
> Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although

In reaching its decision, the Court considered the laws of the individual Member States, recognizing that Community law is derived from an "approximation" of their collective legal principles.[20] The Court found that all nine Member States recognized the attorney-client privilege to some degree, but that the scope of the privilege and the mechanisms used to enforce it differed widely.[21] The Court concluded, nonetheless, that sufficient similarity existed within the laws of the Member States to find a commonly recognized confidentiality principle. Furthermore, the Court held that application of the privilege to certain attorney-client communications was not precluded by regulation 17, which empowered the Commission to investigate AM&S.[22]

In its decision, the Court limited the confidentiality standard to communications which essentially satisfy three requirements: (1) that the communication be embodied in a written document between lawyer and client; (2) that the written document be in the interests of the client's right of defense; and (3) that the document originate with an independent lawyer entitled to practice his profession in one of the Member States.[23]

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in the form of a regulation or a decision addressed to another person, is of direct and individual concern to him.

Id.

20. Article 3 of the EEC Treaty provides that "the activities of the Community shall include . . . the approximation of the laws of the Member States." *Id.* art. 3(h), at 83.

21. For a brief outline of relevant elements of Member States' laws, see Advocate-General Slynn's opinion to the court in *AM&S.* AM&S Europe v. EEC Commission, 1982 E. Comm. Ct. J. Rep. 1575, 1610-11, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8757, at 9037, 9059; *see also* D.A.O. EDWARD, THE PROFESSIONAL SECRET: CONFIDENTIALITY AND LEGAL PROFESSIONAL PRIVILEGE IN THE NINE MEMBER STATES OF THE EUROPEAN COMMUNITY (Commission Consultative Des Barreaux De La Communauté Européenne publ.).

22. *AM&S*, 1982 E. Comm. Ct. J. Rep. at 1611-12, [1979-1981 Transfer Binder] Common Mkt. Rep. at 9059-60.

23. *Id.* at 1611-12, [1979-1981 Transfer Binder] Common Mkt. Rep. at 9059-60. Specifically, the Court held as follows:

> Community law, which derives from not only the economic but also the legal interpenetration of the Member States, must take into account the principles and concepts common to the laws of those States concerning the observance of confidentiality, in particular, as regards certain communications between lawyer and client. . . .
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> . . . .
>
> . . . [T]here are to be found in the national laws of the Member States common criteria inasmuch as those laws protect, in similar circumstances, the confidentiality of written communication between lawyer and client provided that, on the one hand, they emanate from independent lawyers, that is to say, lawyers that are not bound to the client by a relationship of employment.
>
> . . . .
>
> As far as the first of those two conditions is concerned . . . such protection must, if it is to be effective, be recognized as covering all written communications exchanged [upon] the initiation of the administration procedure under Regulation No.

Applying these conditions to the documents in dispute, the Court held that the Commission was not empowered by regulation 17 to examine documents which met all of the three criteria, and reversed the decision insofar as it sought documents that satisfied these three criteria. The Commission was permitted to review documents which did not satisfy these criteria.[24]

B. The John Deere Case

The Commission wasted little time in capitalizing on the decision reached in *AM&S*. Less then three months later, the United Kingdom's National Farmers Union complained to the Commission that an independent dealer for John Deere, Inc., located in Belgium, was operating under restrictive market orders from the parent company.[25] The ensuing investigation of Deere's European offices in Mannheim, Federal Republic of Germany, encompassed approximately 150 documents, many of which contained in-house legal documents.[26] Barely one year after filing the original complaint, the Commission completed its review of the documents and filed a Statement of Objection.[27] Both Deere and their dealers submitted written responses to the Statement of Objection, but were unsuccessful in their effort to defeat the Objections or the Quotation of the Documents, which was later made available.[28]

On December 14, 1984, the Commission adopted a decision holding Deere in violation of article 85(1) and fining Deere two million European

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17 which may lead to a decision on the application of Articles 85 and 86 . . . or to a decision imposing a pecuniary sanction on the undertaking. It may also be possible to extend it to earlier written communications . . . .

As regards the second condition, . . . the requirement as to the position and status as an independent lawyer . . . is based on . . . the lawyer's role as collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interests of that cause, such legal assistance as the client needs. . . .

. . .[T]he protection thus afforded by community law . . . to written communications between lawyer and client must apply without distinction to any lawyer entitled to practice his profession in one of the Member States, regardless of the Member State in which the client lives.

Such protection may not be extended beyond those limits . . . based . . . on the mutual recognition by all the Member States of the national legal concepts of each of them on this subject.

Id. at 1610-12, [1979-1981 Transfer Binder] Common Mkt. Rep. at 9059-60.

24. *Id.* at 1612, [1979-1981 Transfer Binder] Common Mkt. Rep. at 9060.

25. John Deere v. EEC Commisssion, 28 O.J. EUR. COMM. (No. L 35) 58, 59 (1985).

26. *Id.*

27. *Id.* at 60.

28. *Id.*

Currency Units (ECUs).[29] From their decision it is evident the Court relied in part upon the content of legal opinions from in-house counsel to corporation management in order to support its finding that article 85(1) was intentionally violated.[30] In those opinions, in-house counsel was advising management of the potential problems surrounding the use of a contractual clause that might be construed as a contractual export prohibition.[31] Although the opinions were issued by counsel in an effort to effect compliance with EC law, Deere's knowledge of the potential infraction, provided through the in-house counsel's advice, was used against Deere.[32]

The *Deere* opinion has generated much consternation from the United States legal community and from EC countries which grant full professional status to in-house lawyers.[33] This displeasure was expressed in a 1983 resolution of the American Bar Association's Section of International Law and Practice (ABA).[34] The ABA's resolution requested that the Commission extend the confidentiality privilege to all in-house lawyers, regardless of whether they are nationals of the United States or of EC Member States. Additionally, the resolution requested that a review of the decision to discriminate against non-EC independent counsel be undertaken.

There is little doubt that the actions taken against Deere would also have been taken with the same speed and forcefulness if the company had used independent American lawyers. The *AM&S* decision just as clearly excluded non-Member lawyers from the protections of the privilege as in-house counsel. Thus, for the present, businesses with EC operations, including businesses which normally use in-house counsel, will be forced to utilize the services of independent EC lawyers or assume the risk that their internal documents and other communications may be disclosed.

III. THE UNITED STATES LAW OF ATTORNEY-CLIENT PRIVILEGE

A. Scope of the Privilege

As in the Member States of the EC, all of the states within the

29. *Id.* at 64.
30. *Id.* at 61.
31. *Id.*
32. *Id.*
33. Burkard, *Attorney-Client Privilege in the EEC: The Perspective of Multinational Corporate Counsel*, 20 INT'L LAW. 677-79 (1986).
34. A.B.A., SECTION OF INT'L LAW & PRACTICE, REPORT NO. 301, REPORT TO THE HOUSE OF DELEGATES 8 (Jan. 18, 1983).

United States recognize, to varying degrees, the confidentiality of certain communications between client and lawyer.[35] The rule is of ancient origin, predating the American colonial period[36] and going as far back as Roman law.[37]

Much has been written about the scope of the attorney-client privilege in the United States. As in Europe, legal nuances of the privilege have developed differently in the different states, and there are many facets to its application. In general terms, however, the privilege is perhaps best formulated as follows:

> Where legal advice of any kind is sought from a professional legal advisor in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at this instance permanently protected from disclosure by himself or by the legal advisor, except when the protection is waived.[38]

The privileged communications need not relate to litigation, either existing or contemplated. Instead, it is sufficient for application of the privilege that the statements are made in the course of legitimate professional transactions between attorney and client, and that they relate to matters in which the client has sought the attorney's advice. Indeed, the privilege has been found to extend to cases in which the attorney did not even recognize the relationship of attorney-client, provided the circumstances show that the client thought the relationship actually existed.[39]

B. Rationale for the Privilege

The attorney-client privilege in the United States is based not upon any inclination to accord attorneys special privileges, but upon a desire to further the interests of justice and its administration and to protect the lawful rights and interests of clients. The theory underlying the privilege

35. Alexander v. United States, 138 U.S. 353, 357-60 (1891); *see* S. GARD, JONES ON EVIDENCE 762 (6th ed. 1972).

36. S. GARD, *supra* note 35, at 762.

37. C. MCCORMICK, MCCORMICK ON EVIDENCE § 87, at 204 (3d ed. 1984). The origins of Roman law have been traced by the late eminent American scholar, Professor Charles Phineas Sherman, D.C.L. (Yale). 2 C. SHERMAN, ROMAN LAW IN THE MODERN WORLD 420 (2d. ed. 1924). The cite referenced by Professor Sherman was to the Justinian Code 1, 20 *Quando libellus principi dutus litis contestationem tacit*, and 4, 20 *De Testibus.*

38. *See* 8 J. WIGMORE, EVIDENCE §§ 2291-2296, at 545-69 (McNaughton rev. ed. 1961).

39. *Id.* § 2291, at 545. In People v. Gardner, 106 Cal. App. 3d 882 (1980), a written statement by a prisoner addressed to "Public Defender" was held to fall within the privilege, even though the court had not yet appointed a public defender. *Id.* See also Taylor v. Sheldon, 172 Ohio St. 118 (1961), 173 N.E.2d 892 (1961), and *In re* Petition of Sawyer, 129 F. Supp. 687, 696 (D. Wis. 1955), where communication was held to be inadmissable although attorney refused to accept client and refused a fee.

is that adequate representation is premised on full and frank disclosure,[40] and that if attorneys were compelled to testify against their clients, clients would understandably be loath to discuss the legality of contemplated conduct with their attorneys.[41] Without such protections, the client would be inadequately represented.

In the corporate context, interference in the flow of information between management and counsel may deter legal compliance in cases where management seeks to determine the proper course of conduct. For example, in *Deere* the counsel's opinion was meant to alert Deere's management to an apparent conflict between a contractual clause and EC law. If management thought such communications were not protected by privilege, they would be reluctant to seek advice. Absent sound advice, management might act or fail to act without adequate knowledge of the law. The privilege is intended to ensure clients' confidence in the secrecy of their communications[42] and to promote greater freedom of consultation so that appropriate decisions will be made.[43]

Implicit in the recognition of the privilege is a public policy decision that the potential cost to the administration of justice in a particular case is outweighed by the benefit of according litigants the privilege. However, the privilege is not extended blindly to protect communications whose purpose is to further violations of civil or criminal law, or to interfere with the proper enforcement of these laws. On the contrary, the privilege does not extend to the disclosure of inequities or frauds.[44]

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40. Upjohn v. United States, 449 U.S. 383, 389 (1981).

41. *See id.* (citing Hunt v. Blackburn, 128 U.S. 464, 470 (1888)).

42. Harrison v. State, 345 A.2d 830, 839 (Md. 1975). In elaborating on this theme, the court in Pratt v. State, 387 A.2d 779, 781 (Md. Ct. Spec. App. 1978), held: "[T]he theory behind the creation of the privilege is that a lawyer can act effectively only when he is fully advised of the facts and a client's knowledge that a lawyer cannot reveal his secrets promotes full disclosure."

The opinion of Sir Gordon Slynn in *AM&S* suggests the Court of Justice's recognition of similar policy grounds:

> Whether it is described as the right of the client or the duty of the lawyer, this principle has nothing to do with the protection or privilege of the lawyer. It springs essentially from the basic need of a man in a civilized society to be able to turn to his lawyer for advice and help, and if proceedings begin, for representation; it springs no less from [the understanding that] persons . . . should be able to know what they can do under the law, what is forbidden, [and] where they must tread circumspectly . . . .

AM&S Europe v. EEC Commission, 1982 E. Comm. Ct. J. Rep. 1575, 1654, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8757, at 9037, 9084.

43. Spitzer v. Stillings, 142 N.E. 365, 366, 368 (Ohio 1924). For a discussion of the application of the attorney-client privilege in the corporate context, see Belcoure, *Keeping the Company's Secrets—The Attorney-Client Privilege After Upjohn*, [32 No. 7] FED. B. NEWS & J. 278 (Sept. 1985).

44. *See* Clark v. United States, 289 U.S. 1, 15 (1933).

IV. THE DISTINCTION BETWEEN EUROPEAN COMMUNITY AND NON-EUROPEAN COMMUNITY LAWYERS

The communications sought to be protected in *AM&S* would likely have fallen under the protection of attorney-client confidentiality under laws of both the United States and the Member States. Likewise, the communications of in-house counsel in *Deere* would likely have been protected from disclosure under the United States law and laws of the Member States that recognize the full professional status of counsel regardless of the employment relationship. Nevertheless, the Court of Justice made clear in *AM&S* that the privilege of confidentiality is limited to EC counsel, and in particular to independent counsel. It is implicit from the decision in *Deere* that the Court did not hesitate to enforce the newly defined standard in cases where the allegedly protected communications do not satisfy the three criteria advanced in *AM&S*.[45]

The Court's decision in *AM&S* to establish uniform confidentiality standards and exclude in-house counsel from its protection is not inherently inconsistent with EC goals. EC Treaty article 48 unequivocally provides for the freedom of individual citizens to render services anywhere in the EC.[46] EC lawyers are entitled to practice their profession unfettered in any one of the Member States, regardless of the state from which they hail,[47] and the uniform application of legal principle, as the

45. John Deere v. EEC Commission, 28 O.J. EUR. COMM. (No. L 35) 58, 61 (1985). This fact is evidenced by references in the opinion to documents prepared by Deere's in-house counsel. *Id.*

46. EEC Treaty, *supra* note 4, art. 48, at 98. Article 48 provides:

> 1. Freedom of movement for workers shall be secured within the Community by the end of the transitional period at the latest.
> 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality . . . as regards employment, remuneration and other conditions of work and employment.
> 3. It shall entail the right, subject to limitations justified on grounds of public policy . . .
>
> (a) to accept offers of employment . . .;
> (b) to move freely within the territory of the Member States . . .;
> (c) to stay in a Member State for the purpose of employment . . .;

Id. Article 52 provides:

> [R]estrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished by progressive stages in the course of the transitional period. Such progressive abolition shall also apply to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Id. at 99.

47. AM&S Europe v. EEC Commission, 1982 E. Comm. Ct. J. Rep. 1575, 1612, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8757, at 9037, 9060

application of uniform standards to the movement of goods, facilitates this principle. Also, despite some arguments to the contrary,[48] extension of the protection of the privilege to in-house counsel might well have violated the requirement that EC law be derived, whenever possible, from a commonality of Member States' legal principles.[49] Although in-house lawyers in the United States have long been considered to possess full professional status, not all EC Member States recognize the full professional status of in-house counsel.[50] The issue of the proper treatment

48. *Id.* at 1648-51, [1979-1981 Transfer Binder] Common Mkt. Rep. at 9081-83 (Opinion of Sir Gordon Slynn).

49. It may also violate articles 85 and 86, which provide that the EC rules must be applied uniformly among the Member States. EEC Treaty, *supra* note 4, arts. 85-86, at 107-08.

50. *AM&S*, 1982 E. Comm. Ct. J. Rep. at 1655, [1979-1981 Transfer Binder] Common Mkt. Rep. at 9085. A number of United States decisions have addressed the subject of corporate counsel, when the lawyer is a full-time employee of the corporation. Questions have arisen when the lawyer is himself a part of the corporate official structure, and when the knowledge acquired is not in the capacity of counsel, but in the capacity of corporate official. Most of the case law supports the claim of privilege if the attorney is acting in a professional, rather than a business, capacity. The cases are divided, however, between whether the subject matter of the communication or the status of the attorney as part of the control group of the company is dispositive. *See* United States v. United Shoe Machinery Corp., 89 F. Supp. 357 (1950); Wise v. Western Union Tel. Co., 36 Del. 456, 178 A. 640 (1935); Waldman, *Beyond Upjohn: The Attorney-Client Privilege in the Corporate Contest*, 28 WM. & MARY L. REV. 473, 487 (1987); Note, *The Corporate Attorney-Client Privilege: Culpable Employees, Attorney Ethics and the Joint Defense Doctrine*, 58 TEX. L. REV. 809, 812 (1980).

Sir Gordon Slynn in *AM&S*, apparently relying on a report published by the Consultative Committee of the Bars and Law Societies of the European Community (the CCBE) (D.A.O. EDWARD, *supra* note 21) indicated:

> The position of the lawyer who is employed as such by an undertaking has been much canvassed. As I understand it, in some Member States full time employment is incompatible with the full professional status of a lawyer (apparently in Belgium, France, Italy, and Luxembourg): in others the employed lawyer remains subject to professional discipline and ethics. Where the lawyer who is employed remains a member of the profession . . . in my opinion he is to be treated . . . the same way as lawyers in private practice, so long as he is acting as a lawyer.

AM&S, 1982 E. Comm. Ct. J. Rep. at 1655, [1979-1981 Transfer Binder] Common Mkt. Rep. at 9085. Italian law, however, should respect a finding of confidentiality for corporate attorneys, since the law draws no distinction on its face. According to Codice Penale, article 622:

> Chiunque, avendo notizia, per ragione del proprio stato o ufficio, o della propria professione o arte, di un segreto, lo rivela, senza giusta causa, ovvero lo impiega a proprio o altrui profitto, è punito, se dal fatto può derivare nocumento, con la reclusione fino o un anno o con la multa da lire sessantamila a un milioni . . . .

According to Il Nuovo Codice di Procedura Penale, article 200:

> Non possono essere obbligati a deporre su quanto hanno consosciuto per ragione del proprio ministero, ufficio o professione, salvi i casi in cui hanno l'obbligo di riferirne all'autorità giudiziaria:
>
> b) gli avvocati, i procuratori legali, i consultenti tecnici e i notai . . . .

In Radiant Burners v. America Gas Ass'n, 320 F.2d 314 (7th Cir. 1963), Hastings, C.J. stated: "[I]t is our considered judgment that based on history, principle, precedent and public policy the attorney-client privilege in its broad sense is available to corporations, and we so hold." *Id.*

of communications between non-EC lawyers and their clients is a separate question, however. That particular question was not before the Court in *AM&S*, and neither party to the controversy suggested that any distinction whatsoever be made between EC and non-EC lawyers. The Court, nonetheless, intentionally drew the distinction.[51]

There are a number of reasons why the Court's decision affecting non-EC lawyers is problematic both within the context of EC and international law. First, as at least one commentator has already pointed out, the Court's decision may not be based upon criteria common to Member States' law because many Member States currently extend legal privilege to communications from non-EC legal advisors.[52] Second, apart from important notions of international comity, the decision appears to be in violation of article 234 of the EC Treaty by contradicting prior agreements between Member and non-Member States. Article 234 forbids the EC from interfering with rights and duties between Member and non-Member States, such as those set forth in bilateral Treaties of Friendship, Commerce and Navigation with the United States. These Friendship Treaties typically require each signatory nation to reciprocally guarantee nationals and companies the right to engage lawyers of their choice. Such a treaty has long existed between the United States[53] and each of the Member States with the exception of England. As previously mentioned, England, which is notoriously fond of confidentiality,[54] grants the

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at 323; *see also* Alpha Beta Co. v. Superior Court, 157 Cal. App. 3d 818, 203 Cal. Rptr. 752 (1984).

51. As Sir Gordon Slynn pointed out, the Court of Justice in *AM&S* was in possession of the document report which indicated that independent lawyers had prepared many of the documents. *AM&S*, 1982 E. Comm. Ct. J. Rep. at 1643-45, [1979-1981 Transfer Binder] Common Mkt. Rep. at 9078.

52. Crinion, *supra* note 8, at 146 n.82.

53. *See, e.g.*, Treaty of Friendship, Commerce and Navigation, Feb. 2, 1948, United States-Italy, art. 5, para. 4, 63 Stat. 2255, 2262-64, T.I.A.S. No. 1965.

54. Blanket confidentiality, as extended to colonies, has hindered the law enforcement operations of various states, including the United States. British secrecy laws, although not as well publicized as those of Switzerland and other jurisdictions, can be just as difficult to penetrate in either a civil or criminal proceeding. There are normally at least three hurdles to obtaining evidence in legal proceedings from parties governed by British law. First is the common law principle of banking secrecy, stemming from Tournier v. National Provincial & Union Bank of England, [1924] 1 K.B. 461. Second is the letter rogatory process. English law, as extended to her colonies, prohibits the furnishing of evidence unless the proceeding for which the evidence is requested is sufficiently advanced. What stage in the proceeding is considered sufficiently advanced depends on whether the proceeding is civil or criminal. The Court must either be contemplating the proceeding or have issued the indictment. Sutherland, *The Use of Letter of Request for the Purpose of Obtaining Evidence for Proceedings in England and Abroad*, 31 INT'L & COMP. L.Q. 784, 823-24 (1982). Third are certain statutory secrecy and blocking laws which provide civil and sometimes criminal penalties for disclosure. *Id.*

privilege to foreign counsel notwithstanding the Treaty. Third, if the decision is in violation of article 234, it follows that such constraints on the ability of an attorney to assure confidentiality of attorney-client communications may directly violate the individual treaties. Finally, the failure to extend attorney-client privilege to communications between non-Member attorneys and their clients represents a barrier on the use of non-Member legal services. This disparity in treatment would not be tolerated among the Member States, and would be construed as a violation of the letter and spirit of the EC.[55]

Therefore, this author proposes that the Community initiate action to ensure that the privileged communications between non-EC lawyers and their clients are accorded the same protection of confidentiality extended to communications between EC lawyers and their clients. In the absence of equitable treatment, the United States should pursue legislative alternatives that would ensure reciprocal treatment. Additionally, further discussion over the issue of extending confidential communications to in-house counsel should take place within the deliberative bodies of the EC.

V. CONCLUSION

The movement toward a more unified Europe through the elimination of trade barriers has been fueled by a fundamental economic precept: that disparate treatment of industries and transactions under separate legal systems lead to market inefficiency, impeding, rather than facilitating, the flow of goods and services. Conversely, the precept can be expressed as follows: that unified standards and nondistortive economic policies between countries lead to greater competition, healthier trade, and a net gain in productivity and standard of living. Because this understanding goes to the very heart of the Single European Act, violations of article 85, which outlaws the prevention, restriction or distortion of competition between the Member States, are considered the deadliest of

55. AM&S Europe v. EEC Commission, 1982 E. Comm. Ct. J. Rep. 1575, 1612, [1979-1981 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8575, at 9037, 9060. Further the Court states:

> Having regard to the principles of the Treaty concerning freedom of establishment and the freedom to provide services the protection thus afforded by Community law . . . to written communications between lawyer and client must apply without distinction to any lawyer entitled to practise (sic) his profession in one of the Member States, regardless of the Member State in which the client lives.

Id., [1979-1981 Transfer Binder] Common Mkt. Rep. at 9060. Apart from the legal propriety of the decision, the rendering of legal advice for a fee is a significant service sector affected by the decision.

sins. Adherence to this economic principle has guided the United States and Canada in efforts to achieve a bilateral free trade agreement, and will hopefully guide other nations as we collectively move toward a more efficient global economy.

The architects of this dramatic movement in Europe undoubtedly recognized the inevitability of instances when laws, regulations, or standards of Member States would be inconsistent with those of non-Member States. The EC anticipates that when these inconsistencies interfere with trade relations, they will be the subject of international negotiation in official and unofficial forums. The additional clout gained through the integration of laws, regulations, and standards will strengthen the EC's bargaining position. The creation of more restrictive standards for foreign competition through the disparate application of EC law, however, is no mere inconsistency, particularly when the disparate application of the law is applied to non-Member States that do not draw similar distinctions. The ruling of *AM&S* ensures that different rules will be applied to a competing non-EC service sector.

Two centuries ago, Europeans considered the radical events taking place in the United States as "the great American experiment." American eyes are now focused on the "great European experiment," in the expectation that it will not fail to implement what it sought to accomplish.