STATEMENT
of the
UNITED STATES COUNCIL
FOR INTERNATIONAL BUSINESS

Protecting the Confidentiality of Communications Between a Corporation and a Lawyer Employed by the Corporation

May 24, 2005

UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS
1212 Avenue of the Americas, New York, New York 10036. (212) 354-4480

United States Council for International Business

1212 Avenue of the Americas, New York, NY 10036-1689
tel: 212-354-4480 ~ fax: 212-575-0327
e-mail: info@uscib.org ~ Internet: www.uscib.org

Serving American Business as U.S. Affiliate of:

International Chamber of Commerce (ICC)
International Organisation of Employers (IOE)
Business and Industry Advisory Committee (BIAC) to the OECD
ATA Carnet System

Statement of the United States Council for International Business

Protecting the Confidentiality of Communications Between a Corporation and a Lawyer Employed by the Corporation

This statement sets forth the views of the United States Council for International Business (USCIB) with respect to the necessity and importance of protecting the confidentiality and the privilege against evidentiary use of communications between a corporation and the legal advisors employed by the corporation.[1] This policy statement is occasioned by the current un-protected status of such communications under the law of the European Union, as illustrated by the *Akzo Nobel* case currently pending in the European Court of First Instance.[2] In that case, the European Commission takes the position that such communications are not and should not be protected under E.U. law by any rule of confidentiality or privilege against use in court.[3] USCIB urges reconsideration of that position. Multinational corporations should not be

---

[1] The United States Council for International Business (USCIB) advances the global interests of American business both at home and abroad. It is the American affiliate of the International Chamber of Commerce, the Business and Industry Advisory Committee to the OECD, and the International Organisation of Employers. USCIB officially represents U.S. business positions both in the main intergovernmental bodies and vis-à-vis foreign business communities and their governments. USCIB has taken positions on a broad range of policy issues with the objective of promoting an open system of world trade, finance and investment in which business can flourish and contribute to economic growth, human welfare and protection of the environment.

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

[3] The same problem arises under national law in several member states, most notably France and Italy.

discouraged from looking to the legal advisors most knowledgeable about their businesses for assistance in complying with the laws of the jurisdictions in which they do business.

Compliance with the law requires confidential legal advice

USCIB begins with the premise that compliance with the law of each jurisdiction in which a corporation does business is a cornerstone of good corporate citizenship. USCIB recognizes, however, that doing business in multiple jurisdictions, under multiple rules of law and frequently conflicting regulations, presents a corporation with special challenges in achieving compliance. To meet these challenges, most multinational corporations, and certainly most American corporations, rely heavily on the advice of lawyers. These lawyers are likely to include both outside counsel (lawyers not employed by the corporation) and company lawyers (in-house legal counsel), who are employees of the corporation. Each corporation makes its own judgments about the mix of legal advice its management receives, looking to outside counsel for some of that advice and to its own legal department for other advice. Most American corporations tend to look to their company lawyers, who normally have a detailed understanding of the corporation's business, to make the determination about whether a particular legal problem can be handled by the company lawyers in the corporation's legal department or would best be referred to an outside lawyer.

Coordinating business practices around the globe, so that they both respond to the demands of the marketplace and comply with the often-conflicting requirements of different legal systems, requires the advice -- often on a daily basis -- of legal advisors intimately familiar with the intricacies of a company's business. Company lawyers fulfill this role. Although American corporations routinely enlist the aid of outside counsel in each of the legal systems in which they operate, decision makers rely on company lawyers both for immediate, timely advice and to synthesize and present the advice of outside lawyers in the context of making business

decisions on a global basis. Company lawyers are uniquely able to advise how to conform actual business practices to the changing requirements of laws and regulations. American businesses believe, with good reason, that no law enforcement agent is as effective at achieving compliance with the law as a corporation's in-house company lawyer. For this reason, many American companies establish legal departments that are as heavily staffed as major law firms, with many lawyers having focused expertise in specialized areas of the law.

While access to legal advice is indispensable, it is equally important that the advice be confidential and that it be protected from use as evidence against the company. American business men and women are accustomed to putting the facts fully and forthrightly before their lawyers, in the well-founded belief that only a fully informed lawyer can give fully informed legal advice. They will only do so, however, if they are confident that both their communication to the lawyer of the facts and circumstances as to which advice is needed, and the lawyer's advice regarding how to deal with those facts and circumstances, will be kept in confidence and will not be used against the corporation in court or in administrative proceedings.

The protection of such advice relies in part on the professional conduct of the lawyer. Under American rules, both inside and outside lawyers are expected to provide independent legal advice and are constrained by rules of professional ethics from disclosing client confidences. Both inside and outside lawyers, however, and their clients, are also shielded from any obligation to disclose such confidences, as long as the lawyer is acting as a lawyer and not merely as a business advisor. Those rules recognize that the protection of legal advice requires that public authorities, including courts and commissions, respect the confidentiality of communications between clients and company lawyers and accept a rule of privilege that prevents such communications from being used against the corporate client. In the United States, the rules of privilege prevent private parties from intruding on the confidentiality of lawyer-client

communications in the context of the discovery process in American civil litigation. The same rules also protect the confidentiality of such communications from intrusion or use in court by government agencies, whether the context is civil or criminal.[4]

Clients have a fundamental right to obtain confidential legal advice

In addition to serving the state's interest in seeing its laws enforced and its citizens' interest in complying with those laws, legal professional privilege has been recognized as a fundamental human right by the European Court of Human Rights and by national courts in the E.U.[5] The United Kingdom's House of Lords has acknowledged that legal professional privilege is an essential condition of an individual's ability to exercise the right to obtain legal advice, noting that "such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice."[6] The English Court of Appeals recently relied on decisions of the European Court of Human Rights to reaffirm that access to justice is a fundamental principle of European Community law, and that "access to legal advice on a private and confidential basis is also a fundamental right not lightly to be interfered with" regardless of whether the context was civil or criminal.[7] Indeed, the right to obtain legal advice, the right to a defense, and the right to private communications are fundamental rights set out in the proposed Treaty Establishing a Constitution for Europe.[8]

Respect for the fundamental right to obtain confidential legal advice also makes good policy sense. No scheme of enforcement can yield the same degree of legal compliance as

---

4 The United States Supreme Court noted, in a leading case upholding the confidentiality of such communications against intrusion by the U.S. Government, that the purpose of the attorney-client privilege is "to encourage clients to make full disclosures to their attorneys." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

5 Foxley v. U.K. (2000) 31 EHHR 637 (grounding the protection of the confidentiality of a client's communications with its lawyer in the Right to Privacy guaranteed by Article 8 of the European Convention on Human Rights). See also Campbell v. U.K. (1992) 15 EHHR 137.

6 R (Morgan Grenfell & Co. Ltd.) v. Special Commissioner for Income Tax [2002] UKHL 21, ¶ 7.

7 Bowman v. Fels [2005] EWCA Civ 226, ¶ 74, citing Foxley v. U.K. (2000) 31 EHHR 637 and Golder v. U.K. [1975] 1 EHRR 524, paras 35-36.

8 Treaty Establishing a Constitution for Europe, Art. II-67; Art. II-107-108.

respecting every individual's right to seek confidential advice about how to conform his or her behavior to the requirements of law. Unless such advice can be sought in confidence, the risk that the advice will be used as evidence of a violation will deter people from seeking it. The House of Lords recently recognized that such a deterrent effect was inimical to a society based on the rule of law, noting that "it is necessary in our society, a society in which the restraining and controlling framework is built upon a belief in the rule of law, that communications between clients and lawyers, whereby the clients are hoping for the assistance of the lawyers' legal skills in the management of their affairs, should be secure against the possibility of any scrutiny from others, whether the police, the executive, business competitors, inquisitive busy-bodies or anyone else."[9]

The right to confidentiality should include company lawyers

Recent trends in the laws of several European Community member states, including Belgium, the Netherlands, and Germany, have recognized the contributions of company lawyers toward the administration of justice by protecting the confidentiality of communications between management and company lawyers and providing some form of privilege against the use of such communications against the company. Those trends were recognized by the President of the Court of First Instance in the *Akzo Nobel* case.[10] Several organizations representing different branches of the legal profession intervened in that case to urge the Court to extend the recognition of the confidential and privileged status of communications between a company and a company lawyer to European law.

USCIB believes that the problem represented by the *Akzo Nobel* case must be recognized as a problem for business corporations, not as a lawyer's problem. The effect of the ultimate

---

9 Three Rivers DC v. Bank of England (No. 6) [2004] UKHL 48, ¶ 34.

10 See note 2, Akzo Nobel ¶¶ 124, 126.

decision in that case will be felt primarily by corporations that use the services of company lawyers. In other words, the problems caused by the rule of European law that was originally stated by the European Court of Justice in the *AM&S* case, and that is now before the Court of First Instance in the *Akzo Nobel* case, are problems for clients rather than for lawyers.[11] Specifically, and of most concern to USCIB, American corporations doing business in Europe are seriously and adversely affected by the current European rule.

This adverse effect is well illustrated by the factual situation before the Court of First Instance in the *Akzo Nobel* case. In the course of a dawn raid on Akzo Nobel's office in England, as part of an investigation of possibly anti-competitive practices, Commission officials seized a number of files, including five documents asserted by Akzo Nobel to be protected by rules of professional confidence and privilege. These five documents included an exchange of e-mails between Akzo Nobel business executives in England and Akzo Nobel's competition lawyer in the Netherlands, who was both a company lawyer and a member of the Netherlands Bar. The Commission refused to recognize any rule of secrecy or confidentiality protecting the five documents, so Akzo Nobel sought preliminary relief from the Court of First Instance to protect the documents.

Akzo Nobel's application required the Court of First Instance to consider the status of the decision of the European Court of Justice in the *AM&S* case, in which the current rule governing the protection of communications with lawyers under European law was established. The Court in *AM&S* had recognized that the confidentiality of communications between clients and lawyers

---

[11] *AM&S Europe Ltd. v. Commission of the European Communities*, 1982 E.C.R. 1575, Case 155/79 (European Court of Justice 1982).

should be protected, but had limited the protection to communications between a client and "an independent lawyer entitled to practice his profession in a Member State."[12]

In ruling on the application for preliminary relief in the *Akzo Nobel* case, the President of the Court of First Instance reviewed the state of the law, beginning with the *AM&S* case, and found that the Akzo Nobel communications in question were "not in principle covered by professional privilege" under the *AM&S* rule, because the company lawyer consulted did not, as an employee, meet the standard for independence articulated in that case.[13] The President of the Court of First Instance nevertheless went on to discuss changes in the laws of the member states since *AM&S* that revealed a movement in the direction of recognizing the legitimate need to protect communications between corporate management and company lawyers. The President therefore ordered the documents sealed pending consideration of the merits, but that aspect of his decision was later reversed by the European Court of Justice on the basis that the standard for preliminary relief had not been met. [14]

The effect of the AM&S Rule

As applied by the European Commission, the *AM&S* rule has been profoundly unfriendly to the protection of communications between corporate clients and their company lawyers. In the *John Deere* case, for example, the Commission conducted a dawn raid on Deere's headquarters in Mannheim in response to complaints about restrictions on cross-border sales, and

---

[12] *AM&S*, note 6, ¶ 35. USCIB is concerned that this limitation to member state lawyers is unduly restrictive and could lead to a problem concerning the protection of communications between corporations and their American lawyers. Although no dispute about the confidentiality of such communications has so far been reported, the enactment of EC Regulation 1/2003 and the resulting deputization of the competition law agencies of member states to prosecute violations of Articles 81 and 82, has raised the specter that any of the 25 member states might deny privilege even to a company's communications with outside counsel solely on the basis that those communications were with an American lawyer.

[13] *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 Oct. 2003) ¶ 119.

[14] *Commission of the European Communities v. Akzo Nobel Chemicals Ltd*., Case C-7/04 P(R) (Order of the President of the European Court of Justice, 27 September 2004).

seized the legal opinions of a company lawyer discussing such sales.[15] Those opinions were used by the Commission as evidence that Deere knew that its conduct violated European competition law, and formed part of the basis for the imposition of heightened sanctions based on an allegedly willful violation of the law.

Since *AM&S*, changes at the member state level have improved the ability of corporate clients to consult company lawyers in confidence and under the protection of rules against the use in court of their communications. In part, those changes reflect a commitment to fundamental rights protected under Community law.[16] They also reflect, however, a sensitivity to the need for confidential advice about how to do business in conformity with the increasingly complex laws that govern business behavior. Both the state's interests in seeing its laws enforced and an enterprise's interests in complying with those laws are promoted by secure and confidential access to legal advice.

At the European Union level, however, as well as under the laws of some other member states,[17] corporate clients continue to be deprived of the ability to obtain confidential and privileged advice from the legal advisors in the best position to advise them about the impact of laws and regulations on their business activities: the company lawyers familiar with the company's business. As long as communications with these lawyers can be seized and used as the basis for sanctions, as in *John Deere*, the quality of the advice will suffer, because corporate clients will be reluctant to put the full facts before their lawyers, and the lawyers will be reluctant

---

15 Commission Decision 85/79/EEC of 14 December 1984 ¶21 (IV30.809 – John Deere), 1985 O.J. (L 35) 58.

16 See notes 5-9 and associated text.

17 The fact that France and Italy, as well as to varying degrees Luxembourg, Austria, Hungary, Finland, Sweden, Poland, Estonia, Latvia, Lithuania, Slovenia, and the Czech and Slovak Republics, continue to adhere to rules similar to the one stated in *AM&S* causes multinational corporations the same concerns under the national laws of those countries as the *AM&S* rule does under European law.

to give frank advice. The net effect will be to make it more difficult for these corporations to comply with the law.

From the perspective of the corporate client, the monopoly on legal privilege that is effectively bestowed on European law firms by the *AM&S* decision is both inefficient and counterproductive. The *AM&S* rule often forces company lawyers in Europe to request (and pay for) advice from outside law firms that company lawyers would be in a better position to provide. These outside lawyers typically lack the intimate understanding of the client's business that is essential to giving effective advice, so that their advice is necessarily more costly and often less timely. The governmental interest in ensuring compliance with complex regulatory regimes is impeded when the cost of useful and timely legal advice is unnecessarily increased. Basic economics dictate that, as the costs for a service rise, the less demand there will be for it. Because the additional costs that deter companies from seeking legal advice are directly attributable to inefficiencies in the market for such advice created by the *AM&S* rule, and because those inefficiencies yield no socially beneficial result, the E.U.'s regulatory objectives are not well served by that rule.

The need for a change in the AM&S Rule

USCIB knows of no useful purpose served by the *AM&S* rule. Concerns that protecting communications with company lawyers will somehow hinder law enforcement, by making all documents inaccessible, are not borne out by the American experience. American rules distinguish carefully between situations where a lawyer is acting as a lawyer and situations where the lawyer acts in a business capacity. Communications in aid of legal advice are protected, and ordinary business communications are not. That rule has been found workable, and others could be devised. The experience of American corporations has generally been that their lawyers serve a crucial role in keeping the company in compliance with the law. American

corporations are understandably disturbed about the need to comply with laws and regulations as complex as those of Europe without that assistance.

Recent changes in both E.U. and member state law have made the problems created by the *AM&S* rule particularly acute. With the taking effect of E.C. Regulation 1/2003[18], companies are now subject to regulation and prosecution for alleged violations of Articles 81 and 82 of the EC Treaty by the Commission and by the competition law agencies of the 25 member states, and to complaints made by any individual or company. Proceedings alleging such violations may now be commenced in any of thousands of local courts in the member states. This new arrangement puts a premium on the ability of a business enterprise to obtain current, frank, and confidential legal advice. Further, under this new enforcement structure, companies may no longer rely on negative clearances or individual exemptions from the Commission. Rather, companies now must rely on their own lawyers to review contractual arrangements which once might have been reviewed by the Commission, but will be reluctant to do so if the advice of those lawyers can be used against them.

Moreover, by permitting the Commission and any national authority to share information obtained in the course of an investigation with national authorities in other member states, the new system of regulation creates the risk of an end run around existing member states' privilege law. Nothing would appear to prevent the national authority of a member state that does not recognize privilege for communications with company lawyers from seizing such communications and making them available to the national authority of another state that would be forbidden by its own national law from obtaining them.

[18] 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 L1 2003 p. 1).

Normally, a multinational corporation would respond to this kind of change in the regulatory environment with adjustments to its program for complying with local laws and regulations, making it a responsibility of its company lawyers to increase the vigilance with which they help the corporation to comply with the rules. The current *AM&S* rule cripples the ability of multinational corporations to adjust to these changes, because they cannot risk committing frank exchanges with their company lawyers to any form of writing within the reach of a possible dawn raid. A company must either require all such communications to be oral, which is inefficient and particularly burdensome to a business managed across multiple time zones and locations, or seek the advice only of outside lawyers, who lack the continuous daily knowledge of a company's activities that is often a prerequisite for giving useful legal advice.

It has taken the business community more than twenty years to become aware of the implications of the *AM&S* decision. Practical exposure to the problem has been largely limited to a few companies, such as John Deere. With the devolution of additional enforcement authority to the national competition authorities of 25 member states, however, multinational corporations can no longer be complacent about the risks posed by the lack of respect for the confidentiality of professional communications represented by the current rule. Stated simply, for a multinational corporation the *AM&S* rule represents a hostile feature of the European business environment.

Conclusion

USCIB urges all those affected by the *AM&S* rule to give urgent consideration to how a change in that rule could be achieved. Those affected include not only corporations, and their lawyers, but also the European and member state authorities that will profit from the adoption of effective compliance programs by those corporations. An immediate, cooperative effort is needed to address how Europe can accommodate the acute need of all multinational

corporations, which is especially felt by American companies, to be able to look to their company lawyers in confidence for frank legal advice about how to conduct the corporation's business in compliance with the law.

17 May 2005