The protection of the confidentiality and legal privilege against use of communications between a corporation and its in-house legal advisers is an important issue for the implementation of successful business strategies. Corporations should not be discouraged from seeking advice from their in-house counsels about their business and compliance with the applicable laws and regulations.

The United States Supreme Court asserted long ago that the purpose of the rule of attorney-client privilege is to “encourage clients to make full disclosures to their attorneys”.

It therefore protects the confidentiality of communications between corporate clients both with their external and internal lawyers.

This paper sets forth the latest developments with respect to the rule of legal privilege for in-house counsels in Europe and seeks to identify avenues of improvement.

1. The concept of legal privilege for in-house counsels and relevant European case law

a. Legal privilege has been recognized as a fundamental human right by the European Court of Human Rights and some National Courts in the European Union (Foxley vs. UK (2000) 31 EHRR 637).

The English Court of Appeals recently relied on decisions of the European Court of Human Rights to reaffirm that “access to legal advice on a private and confidential basis is also a fundamental right” regardless of whether the context was civil or criminal (Bowman vs. Fels – 2005 – EWCA civ 226).

b. In 1982, in the “AM&S Europe vs. Commission of the EU” case, the European Court of Justice (ECJ) had recognized that the confidentiality of communications between clients and lawyers should be protected, but had limited the protection to communication between a client and “an independent lawyer entitled to practice his profession in a member state”, i.e. members of bar associations of a member state.

c. In an Order dated 4 April 1990 in a “Hilti vs. Commission of the EU” case, the Court of First Instance of the European Communities (C.F.I.) ruled that the protection of communications between an external lawyer and his client must be considered as also expanding to internal notes limited to restating the text or content of these communications, in order to disseminate them in the corporation and submit them to management.

d. In a ruling dated 17 September 2007 “Akzo Nobel & Akcros vs. Commission of the E.U.” having to do with competition investigations, the C.F.I. specifically excluded communications with in-house counsels, i.e. counsels employed by their clients, from the protection of confidentiality.
The court thus reiterated the AM&S criterion: only legal advice provided in “full independence”, i.e. “that provided by a lawyer who, structurally, hierarchically and functionally, is a third-party in relation to the undertaking receiving that advice” will be protected by legal privilege.

The ruling of the C.F.I. has been appealed by Azko Nobel and the decision is pending.

Is it to say that in-house counsels in Europe wherever located are at a disadvantage vis-à-vis their foreign colleagues and have a strong incentive in communicating confidential information through external counsels?

2. The conflicting position of in-house counsels in Europe and possible remedies

a. Although at the European Union level, corporate clients seem to be deprived of the ability to obtain confidential and privileged advice from their in-house counsels, the situation is more complex at the member state level under national law.

   Indeed, nine member states recognize in-house counsel legal privilege:

   England – Germany – Ireland – The Netherlands –
   Portugal – Scotland – Spain – Denmark – Belgium.

   But in-house counsel privilege is not recognized in other member states:

   France – Italy – Luxembourg – Sweden –
   Finland – Austria and in the 12 new member states.

   This fact causes some concern to corporations and makes it more difficult for them to comply with the law.

b. In a position paper issued in June 2006, the International Chamber of Commerce (I.C.C.) clearly expressed itself in favor of expanding the legal privilege to communications between in-house counsels employed by corporations and their employer(s). The I.C.C. recommended to submit in-house counsels, non-member of a Bar, to the same ethical rules than those applicable to members of the Bar in their relationship with their clients.

   In as far as in-house counsels are not admitted to the Bar, corporations should make clear by way of written confirmation that they oblige them to follow these rules. All interested parties would welcome such a move as the experience of corporations has generally been that the in-house lawyers serve a crucial role in keeping the company in compliance with the law.

   It should be noted that the I.C.C. has now joined the appeal against the Akzo Nobel ruling of the C.F.I., as an intervening party.

c. The concept of “professional secret” might be an alternative or complementary answer to this problematic situation. A concrete example will be useful.

   Under relevant French rules (Law 31 December 1971 on the “Reform of certain legal and judicial professions”): “any individual authorized [by the present law] to give legal advice to or to draft agreements for a third-party on a regular and remunerated basis, must respect professional secrecy in accordance with provisions of article L226-13 and L226-14 of the Penal Code”.

“In-house counsels exercising their function within a corporation or group of corporations, as an execution of their labor contract, may give legal advice and draft agreements in the exercise for their function and to the exclusive benefit of the corporation acting as employer or a corporation pertaining to the same group.”

d. Hence, in-house counsels acting under cover of these provisions are under a strict and “erga omnes” obligation of professional secrecy.

Any disclosure made in violation of this rule of professional secrecy, may be prosecuted and severely sanctioned.

But should one entail from the above that the secrecy obligation prevents or protects the corporation or group of companies recipient of the information from disclosure of such information to third-parties?

As far as such disclosure would affect the fundamental right to defense of the recipient and force him to communicate information covered by professional secrecy, we believe that it is a legitimate objection to disclosure, duly opposable to third-parties.

This avenue has yet to be tested in court, but we consider that in-house counsels and their employers in France (and potentially other jurisdictions) may rely on these provisions to assert legal privilege.

Conclusion

In-house counsels in Europe should be shielded from any obligation to disclose communications with their employer, as long as they are acting as legal advisers.

They are expected to provide objective and independent legal advice, and will do so if and when submitted to professional rules of conduct imposed by law or the Bar Associations.


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Altadis, now part of the IMPERIAL TOBACCO group of companies, is a world leader in cigars, a strong player in the cigarette and RYO industry and a major logistics operator for tobacco products in Europe, with an economic turnover in 2007 of over 4 billion Euros.