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Protection of Legal Privilege in EEC Competition Law: The Imperfections of a Case

Theofanis Christoforou*

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Theofanis Christoforou

Abstract

The AM & S Europe judgment by the Court of Justice of the European Union was the first ruling on the principle of confidentiality. Part I will deal with certain facets of the principle of confidentiality, not considered by the Court, in the light of a comparative analysis of the laws of the Member States. Finally, part II will analyse the impact of the Court's ruling on both Community and national laws and briefly discuss the implications of the judgment for lawyers from third countries.

PROTECTION OF LEGAL PRIVILEGE IN EEC COMPETITION LAW: THE IMPERFECTIONS OF A CASE

*Theofanis Christoforou**

INTRODUCTION

In implementing articles 85 and 86 of the Treaty establishing the European Economic Community¹ (EEC Treaty) the Commission of the European Communities (Commission) may undertake all necessary investigations into undertakings and associations of undertakings operating in the European Economic Community (Community or EEC). Pursuant to article 14(1) of Regulation 17/62² (Regulation 17), the officials authorised by the Commission are empowered to examine the books and other business records of the undertakings and associations of undertakings, to take copies of or extracts from the books and business records, to ask for oral explanations on the spot, and to enter any premises, land and means of transport of undertakings.

In February 1979 the Commission department responsible for competition policy decided to conduct an investigation at the premises of AM & S Europe Limited (AM & S Europe) in order to ascertain the competitive conditions concerning the production and distribution of zinc metals.³ The Commission officials made a written request for the submission of certain

* Member of the Legal Service of the Commission of the European Communities. All opinions expressed in this paper are strictly personal. I am indebted to A. Pappalardo for useful suggestions and comments. I would also like to express my gratitude to the following colleagues and friends for their comments on early drafts of this paper: C. Bail, B. Engwegen, F. Espion-Tobias, J. Faull, J. Temple Lang, B. van der Esch and J-F. Verstryngé (all of the EEC Commission); L. Goffin (of the Brussels Bar); and V. Korah (of University College, London). However, I alone am responsible for the opinions expressed in the final text.

1. Treaty establishing the European Economic Community, Mar. 25, 1957, 1973 GR. BRIT. T.S. No. 1 (Cmd. 5179-II) (official English translation), 298 U.N.T.S. 11 (1958) (unofficial translation) [hereinafter cited as "EEC Treaty"].

2. First Regulation Implementing Articles 85 and 86 of the Treaty, 5 J.O. COMM. EUR. 204, 1 COMMON MKT. REP. (CCH) ¶ 2401 (Feb. 6, 1962) [hereinafter cited as "Regulation 17"].

3. AM & S is a company incorporated in the United Kingdom with premises at Bristol and Avonmouth and is a subsidiary of Australian Mining and Smelting Limited; both companies, however, belong to the well-known "Rio Tinto Zinc" group.

documents. AM & S Europe refused to comply, claiming that the documents were covered by legal privilege, i.e., the principle of legal professional privilege, as understood in common law jurisdictions, or confidentiality.

By decision of 6 July 1979, taken under article 14(3) of Regulation 17, the Commission required AM & S Europe to submit to further investigation at its premises and to produce, *inter alia*, "all documents for which legal privilege is claimed."⁴ AM & S Europe refused to show to the Commission's inspectors the entirety of the documents for which privilege was claimed. A subsequent meeting held in Brussels between the company and the Commission failed to resolve the dispute. As a result an action for annulment under article 173 of the EEC Treaty was brought by AM & S Europe against the Commission's decision. In its first judgment to be pronounced on the question of confidentiality, the Court of Justice ruled *inter alia* that: firstly, protection of confidentiality of certain written communications between lawyer and client constitutes a general principle of law common to the laws of the Member States and, as such, forms part of Community law; and secondly, protection of confidentiality will be assured in Community competition law only when the following three conditions are met: (a) the written communications between lawyer and client are made for the purposes and in the interests of the client's right of defence; (b) the written communications emanate from independent lawyers, i.e., lawyers not bound to the client by a relationship of employment; and (c) the written communications emanate from a lawyer who is entitled to practise his profession in one of the Member States and has acted within the scope of Council Directive 77/249/EEC⁵ (Council Directive) on the freedom to provide legal services.⁶

4. Investigation of Zinc Producers for Violations of Competition Rules, 22 O.J. EUR. COMM. (No. L 199) 31, 33 (1979), [1978-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 10,153, at 10,473 (art. 1(b) of the Commission Decision).

5. Council Directive 77/249/EEC, 20 O.J. EUR. COMM. (No. L 78) 17 (1977) [hereinafter cited as "Council Directive"].

6. AM & S Europe Ltd. v. Commission, 1982 E. Comm. Ct. J. Rep. 1575, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757. It should be noted that in the case in question the United Kingdom and the Consultative Committee of the Bars and Law Societies of the European Community intervened in support of the applicant's arguments. France intervened in support of the Commission. After Advocate-General Warner had given his opinion of the case, the Court of Justice took the unu-

The *AM & S Europe* judgment was the first ruling on the principle of confidentiality. It might be asking too much to expect the Court of Justice to have resolved all of the problems to which the application of a principle of law as complicated as the protection of confidentiality between lawyer and client gives rise. This is especially true in view of the widely diverging approaches adopted in the laws of the different Member States. Consequently, this study will seek to analyse those parts of the Court's judgment which, in the author's opinion, merit such analysis. Part I will deal with certain facets of the principle of confidentiality, not considered by the Court, in the light of a comparative analysis of the laws of the Member States.⁷ Finally, part II will analyse the impact of the Court's ruling on both Community and national laws and briefly discuss the implications of the judgment for lawyers from third countries.⁸

I. PROTECTION OF THE PRINCIPLE OF CONFIDENTIALITY IN EEC COMPETITION LAW

A. History, Legal Basis and the Scope of the Principle of Confidentiality

In common law jurisdictions protection of legal privilege is derived initially from consideration of "oath and honour" of the lawyer rather than from apprehension of his client. The foundation of the principle began to be conceived differently at the end of the eighteenth century, however, and the law now regards the privilege as that of the client rather than the lawyer.⁹

It was said a long time ago that the protection of confidentiality

is out of regard to the interests of justice, which cannot be

sual step of reopening the procedure and ordering the applicant to send to the Court, in a sealed envelope, all documents for which legal privilege was claimed so that they could be examined by the Court and a report could be drawn up. A second opinion on the case was given by Advocate-General Sir Gordon Slynn. The Court of Justice finally pronounced its ruling on 18 May 1982.

7. See *infra* notes 9-141 and accompanying text.

8. See *infra* notes 142-81 and accompanying text.

9. 8 J. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2290 (MacNaughton rev. 1961); see also Peiris, *Legal Professional Privilege in Commonwealth Law*, 31 INT'L & COMP. L.Q. 609 (1982).

upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. . . . [D]eprived of all professional assistance, a man would not venture to consult any skillful person, or would only dare to tell his counsellor half his case.¹⁰

The purpose of legal privilege today is, therefore, to foster full and frank communication between clients and their lawyers and, ultimately, to encourage lawful conduct and promote the proper administration of justice.

In common law jurisdictions, discovery of documents by the litigants in civil law procedure is widely admissible. In the laws of most European Member States, however, such discovery is, as a rule, not only very limited but is also administered by the Courts and not by individuals. Another difference between common law and civil jurisdiction lies in the fact that, as a basic principle of criminal law and procedure in civil law jurisdictions, communications exchanged between an accused person and his defence lawyer are confidential and immune from disclosure. For this reason, protection of confidentiality of communications between lawyer and client in Europe is more closely related to the rights of defence of the accused than it is in common law countries. A breach of the rule of confidentiality is considered in almost all Member States to be a criminal offence. In addition, protection of confidentiality is seen in several Member States more as an obligation of the lawyer than as a right of the client.¹¹ Finally, most of the Member States with civil law systems regard the rule of professional secrecy as a principle of public order and also as a necessary requirement for the proper administration of justice.

10. *Greenough v. Gaskell*, 1 My. & K. 98, reprinted in 39 Eng. Rep. 618, 621 (1833) (per Lord Chancellor Brougham).

11. For a useful analysis of the laws of the Member States, see D.A.O. Edward, *The Professional Secret, Confidentiality and Legal Professional Privilege in the Nine Member States of the European Community*, a report prepared for the Commission Consultative des Barreaux de la Communauté Européenne (1976) [hereinafter cited as the "Edward Report"] (unpublished report available at the Legal Service of the Commission of the European Communities). See also *AM & S Europe*, 1982 E. Comm. Ct. J. Rep. at 1651-53, 1656-58, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757, at 9077, 9081 (the opinion of Advocate-General Sir Gordon Slynn containing a survey of the laws of the Member States).

Generally speaking, the protection of legal privilege is the result of a compromise between two competing interests: 1) the public interest, which requires that the administration of justice be conducted on the basis of all available evidence, and 2) the right of the individual to have unfettered recourse to proper legal advice and assistance with a view to safeguarding his rights.

It should be stressed from the outset, however, that the purpose of the privilege is not to conceal facts. It protects only the confidentiality of communications and not the facts underlying communications between lawyer and client. Hence, it does not stand in the way of any inquiry into disputed issues but merely seals off one source of evidence concerning those issues. In addition, it is well-established law that no adverse inference should be made merely from the fact that privilege is claimed.

At the time the *AM & S Europe* case was pending before the Court of Justice, no express provision of Community law afforded protection to legal privilege. The legislative history of Regulation 17, as both Advocates-General remarked, provides no clear indications as to the Community draftsmen's intentions. The only assurance of protection is given in a Commission answer to a parliamentary question.¹² In that answer, the Commission decided not to use as evidence of infringement of Community competition rules certain papers considered to be strictly legal in nature.¹³ The papers at issue were written with a view to seeking or giving opinions on points of law to be observed or relating to the preparation or planning of the defence of a firm.¹⁴

The Court of Justice of the European Communities (Court of Justice or Court) acknowledged the existence of a gap in Community competition law with regard to the protection of confidentiality in the *AM & S Europe* case. It sought to fill this gap by offering recourse to the general principles common to the laws of the Member States. The Court defined the principle of confidentiality as serving "the requirements, the impor-

12. 21 O.J. EUR. COMM. (No. C 188) 30 (1978) (Written Question No. 63/78 by J.P. Cousté).

13. *Id.*

14. *Id.*

tance of which is recognized in all of the Member States, that any person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it.”¹⁵

Despite its general terms, this definition of the principle of confidentiality seems to be closer to the rationale of legal privilege as understood in English law (fostering frank and full consultation between client and lawyer) and only partly reflects the position of civil law countries. The Court further explained in Ground 20 of the *AM & S Europe* judgment that

“Whilst in some of the Member States [common law countries] the protection against disclosure afforded to written communications between lawyer and client is based principally on a recognition of the very nature of the legal profession, inasmuch as it contributes towards the maintenance of the rule of law, in other Member States [civil law jurisdictions] the same protection is justified by the more specific requirement (which, moreover, is also recognized in the first-mentioned States) that the rights of the defence must be respected.”¹⁶

However, as the Court also rightly pointed out, the rights of defence are equally recognized as a ground for protecting legal privilege in common law countries.¹⁷

Since the Court found that the scope of privilege and the criteria for affording protection varied in the legal systems of the Member States, it *incorporated* into Community law only those criteria relative to the principle that were found to be common to all Member States. Firstly, the Court found that written communications between attorney and client should be made for the purposes and in the interests of the client’s rights of defence; and secondly, that they should emanate from independent lawyers, i.e., lawyers who are not bound to the client by a relationship of employment. A third condition¹⁸

15. *AM & S Europe*, 1982 E. Comm. Ct. J. Rep. at 1610, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757, at 9059 (Ground 18 of the Judgment).

16. *Id.* at 1610-11, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757, at 9059 (Ground 20 of the Judgment).

17. *See AM & S Europe*, 1982 E. Comm. Ct. J. Rep. 1575, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757.

18. While the Court of Justice considered only the first two conditions necessary for *incorporation* of the general principle of confidentiality into Community law, the third condition is imposed by the structure of the EEC Treaty in the *application* of the

which recognizes the provisions of the EEC Treaty on freedom of establishment and freedom to provide services must also be met before the protection of confidentiality will be applied. The principle of confidentiality will be *applied* only when the lawyer with whom the communications were exchanged is entitled to practise his profession in one of the Member States and has acted, in the particular case in question, within the limits determined by the Council Directive¹⁹ on the freedom to provide legal services.²⁰

B. *Extent of Protection under the Principle of Confidentiality*

1. The *Confidential Nature* of the Communications as a Criterion for Protection

A prerequisite for the protection of legal privilege has always been the confidential or secret nature of the communications exchanged between lawyer and client. No protection is afforded to communications not made in confidence or to communications which were originally confidential but have subsequently lost that status. The Court of Justice very discreetly acknowledged the necessity of this condition when it stated that certain business records may be recognized as being of a confidential nature.²¹ In general, the party claiming privilege also bears the burden of establishing all the necessary elements, including the confidential nature of the communications.

Looked at objectively, the meaning of confidentiality is a negative one, relative in terms of time and dependent on the *animus* of the person concerned. Anything not generally known or not known to an indefinite number of people but only to one or certain given persons is confidential. Safeguarding the confidentiality of the communications is considered necessary to foster consultations between lawyer and client for the purpose of obtaining or furthering legal advice and

principle of confidentiality in practice. *Id.* at 1610, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757, at 9059; *see also id.* at 1612, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757, at 9060 (Ground 25 of the Judgment).

19. Council Directive, *supra* note 5.

20. 1982 E. Comm. Ct. J. Rep. 1575, 1612, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757, at 9060 (Ground 26 of the Judgment).

21. *Id.* at 1610, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757, at 9059 (Ground 18 of the Judgment).

assistance. Once the confidential nature has been destroyed or lost, however, the rationale for affording the privilege in the first place no longer applies.

In the situation where the same lawyer acts for two or more parties having a common interest (i.e., undertakings which have concluded an agreement within the meaning of article 85(1) of the EEC Treaty) and each party communicates with the same attorney, these communications would seem to preserve their confidential character at the instance of a third person, such as the EEC Commission.²² From the Court's judgment on the facts of the case it seems that the exchange of legal memoranda between undertakings belonging to the same group, or the mere filing of documents in the company's general files, will not rob the documents of their confidential character.²³

2. The *Purpose* For Which the Communications Were Exchanged as a Criterion for Protection

With regard to the first of the three conditions mentioned earlier,²⁴ namely that the communications were made for the purposes of and in the interests of the client's rights of defence, it is of paramount importance—before attempting to delimit the extent of protection—that the concept "rights of defence" be defined.

In the legal systems of most Member States, as in Community law,²⁵ observance of the rights of defence constitutes a general principle of law. Certain manifestations of those rights, such as the right to be heard, have progressively enjoyed explicit or implicit constitutional status. Observance of the rights of defence is required in the process of *adversary proceedings* in which sanctions, such as fines or penalties, may be

22. *See mutatis mutandis*, Heintz van Landewyck Sarl v. Commission, 1980 E. Comm. Ct. J. Rep. 3125, at 3239, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8687, at 8184 (Ground 46 of the Judgment) [hereinafter cited as "FEDETAB"].

23. *See AM & S Europe*, 1982 E. Comm. Ct. J. Rep. at 1614-15, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757, at 9058-59.

24. *See supra* notes 16-17 and accompanying text.

25. *Hoffman - La Roche & Co. AG v. Commission*, 1979 E. Comm. Ct. J. Rep. 461, 511, [1978-1979 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8527, at 7538.

imposed.²⁶

In the sphere of Community competition law proceedings, a provision has been made permitting undertakings and associations of undertakings to present their views and to defend themselves effectively before the Commission takes a decision affecting their rights or imposing fines and penalties.²⁷ The content of those rights of defence is defined widely by the provisions of Regulation 99/63²⁸ (Regulation 99).

It would be reasonable to conclude, therefore, that all communications exchanged between lawyer and client which are closely related to or were rendered necessary for the exercise of the rights referred to in Regulation 99, may be considered to be made for the purposes and in the interests of the client's rights of defence.

In addition, communications exchanged between lawyer and client in the course of certain other proceedings for the adoption of interim measures by the Commission, on the principle laid down by the Court in the *Camera Care* case,²⁹ will also be covered by the principle of confidentiality in investigations or proceedings to be brought subsequently by the Commission or the opposing party. These communications will be considered to have been exchanged for the purposes and in the interests of the client's rights of defence.

Conversely, communications which are totally unrelated to those right of defence, such as communications alien to the subject-matter of the proceedings in question or exchanged as part of friendly correspondence or aimed at assisting the client to evade rather than to comply with the law, will not be covered by the principle of confidentiality. English law provides for legal privilege in two principal areas.³⁰ Firstly, confidential communications made for the purposes of pending or contem-

26. *See, e.g.*, Judgment of Mar. 13, 1981, Conseil d'Etat, Fr., 1982 J.O. Nos. 141-42, [1982] 1 GAZ. PAL. 278.

27. Regulation 17, *supra* note 2, at art. 17, 1 COMMON MKT. REP. (CCH) ¶ 2582 (art. 19).

28. Regulation No. 99/63/EEC, 6 J.O. COMM. EUR. 2268 (July 25, 1963).

29. *See Camera Care Ltd. v. Commission*, 1980 E. Comm. Ct. J. Rep. 119, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8645.

30. For obvious reasons, English law is assumed to represent the law on legal privilege as it stands in common law jurisdictions. French law is assumed to represent confidentiality in continental legal systems. For a more detailed analysis of the laws of all Member States, see *supra* note 11.

plated litigation, if exchanged between the client or his lawyer and a third party, are covered.³¹ Secondly, confidential communications exchanged between a lawyer and client seeking or providing legal advice are also covered, even though no litigation was contemplated by the client.³²

The position of French law, by contrast, is not entirely clear. There is no doubt that the principle of confidentiality protects communications exchanged between lawyer and client which are strictly for the purposes of pending or contemplated litigation. French courts seem to be divided, however, on the issue of whether communications between lawyer and client which seek or give mere legal advice, with no prospect of being submitted to pending or contemplated litigation, are also immune from scrutiny.³³

In the context of Community competition law, the concept of the rights of defence will cover both kinds of communication with one important qualification. Communications exchanged only in order to seek or give mere legal advice and not for the purpose of pending or contemplated litigation will be covered by confidentiality if exchanged *before* the initiation of the administrative procedure under Regulation 17.³⁴ Further, the communications must have a *relationship* to the subject-matter of that procedure. This category would seem to include, for example, early advice as to the compatibility of an agreement with the competition rules, the need to notify for a negative clearance or individual exemption, and the possibility of fines being imposed by the Commission, among other things.

31. See Peiris, *supra* note 9, at 610-11; R. CROSS, *CROSS ON EVIDENCE* 282 (5th ed. 1979).

32. See Peiris, *supra* note 9, at 610-11; R. CROSS, *supra* note 31.

33. Compare Judgment of Apr. 28, 1982, Cour d'Appel, Versailles, 1982 J.O. Nos. 146-47, [1982] 1 GAZ. PAL. 310 (correspondence between a lawyer and his client is strictly confidential no matter how it falls into the hands of a third party) with Judgment of Nov. 18, 1981, Cour d'Appel, Paris, 1982 J.O. Nos. 64-65, [1982] 1 GAZ. PAL. 127 (correspondence exchanged between a French lawyer and a German lawyer which is not written in anticipation of litigation but merely gives advice on general business matters is not covered by privilege).

34. See Regulation 17, *supra* note 2, 1 COMMON MKT. REP. (CCH) ¶ 2401.

3. The *Time* at Which the Communications Were Exchanged as a Criterion for Protection

The Court distinguished between two broad categories of documents that may fall within the scope of protection. The first category covers written communications between lawyer and client exchanged *after* the initiation of the administrative procedure under Regulation 17.³⁵ The second category covers written communications exchanged *before* the initiation of the procedure, provided that they have a "relationship to the subject-matter of that procedure."³⁶

The dividing line, therefore, is the initiation of the administrative procedure under Regulation 17 "which *may lead* to a decision on the application of articles 85 and 86 of the Treaty or to a decision imposing a pecuniary sanction on the undertaking."³⁷ Although the time at which the procedure under Regulation 17 is initiated is not unanimously agreed upon by legal writers, it seems reasonable to conclude that the Court is referring to the *factual* rather than the *formal* initiation of the procedure.³⁸

35. *Id.*

36. *AM & S Europe*, 1982 E. Comm. Ct. J. Rep. at 1611, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757, at 9059-60 (Ground 23 of the Judgment). The definition of the second category of documents may require some further clarification with regard to such terms as "relationship" and "subject-matter of that procedure." See, e.g., C.S. KERSE, EEC ANTITRUST PROCEDURE 28-29 (Supp. 1982).

37. *AM & S Europe*, 1982 E. Comm. Ct. J. Rep. at 1611, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757, at 9059-60 (Ground 23 of the Judgment) (emphasis added). Presumably, when the Court refers to "a decision on the application of Articles 85 and 86," this must also include decisions under article 85(3) and all the secondary legislation adopted on the basis of those articles.

38. Kuyper & van Rijn, *Procedural Guarantees and Investigatory Methods in European Law, with Special Reference to Competition*, [1982] 2 Y.B. EUR. L. 1, 15 (1983). The Court of Justice has held in an earlier case, *SA Brasserie de Haecht v. Wilkin-Janssen*, 1973 E. Comm. Ct. J. Rep. 77, 88, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8170, at 8271, that for the purposes of article 9(3) of Regulation 17, the procedure is considered to be initiated by "an authoritative act of the Commission, evidencing its intention of taking a decision under the said Articles." *Id.* Virtually identical language was also used by the Court in the recent *IBM* case where the court said that "initiation of the procedure under the above-mentioned provisions is clearly marked by an act manifesting the intention to take a decision." *IBM Corp. v. Commission*, 1981 E. Comm. Ct. J. Rep. 2639, at 2653, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8708, at 8465 (Ground 15 of the Judgment). However, in practice there is often a significant time lapse between the moment the Commission initiates the procedure under Regulation 17 (for example by a request for information under article 11, or by conducting an on-the-spot investigation under article

In *AM & S Europe* the communications in question were almost all connected with legal opinions given towards the end of 1972 and during the first half of 1973, i.e., they were drawn up during the period preceding, and immediately following, the accession of the United Kingdom to the European Communities. Thus, a period of some seven to eight years elapsed between the time they were drafted and the initiation by the Commission of the administrative procedure under Regulation 17.

Despite the fact that so many years had elapsed, these documents were said to be covered by confidentiality. According to the Court, the documents were principally concerned with "how far it might be possible to avoid conflict between the applicant (*AM & S Europe*) and the Community authorities on the applicant's position, in particular with regard to the Community provisions on competition."³⁹ Thus, the documents

14 of the same Regulation), and the point in time that the Commission takes a *formal* decision informing the interested firms and competent authorities in the Member States that it has initiated the procedure. For the most part, this point in time coincides with notification to the firms of the Statement of Objections. This practice was approved by the Court of Justice in its judgment in *Azienda Colori Nazionali-ACNA S.p.A. v. Commission*, 1972 E. Comm. Ct. J. Rep. 933, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8169. On the other hand, a number of authors have argued that the Decision under article 11 and article 14 of the Regulation constitutes initiation of the procedure by the Commission, as required by article 9(3) of the Regulation. See *Saint-Esteben, La mise en oeuvre de l'article 85 après l'arrêt de la Cour de Justice des Communautés européennes du 6 février 1973*, REVUE TRIMESTRIELLE DE DROIT EUROPÉEN [R.T.D.E.] 270, 279 (1973); M. WAELEBROECK, LE DROIT DE LA COMMUNAUTÉ ÉCONOMIQUE EUROPÉENNE 153 (ed. 1972); B. GOLDMAN & A. LYON-CAEN, DROIT COMMERCIAL EUROPÉENNE 845 (4th ed. 1984); see also *IBM*, 1981 E. Comm. Ct. J. Rep. 2639, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8708.

In some ways it seems to me artificial to divide up the 'investigative' stage of the procedure from the so-called 'formal' stage. The whole is one process, beginning with enquiries, when tentative views are formed on information given which crystallize into the statement of objections, and which itself leads to a final decision as to whether or not there has been an infringement. If that is right, the procedure is *initiated* in a real sense at a *much earlier* stage than the decision to serve a statement of objections and flows step by step to the final decision.

Id. at 2663, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8708, at 8471 (per Advocate-General Sir Gordon Slynn) (emphasis added). The Court of Justice seems to have implicitly corroborated this view in the same case, particularly in Ground 21 of the Judgment. *Id.* at 2654, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8708, at 8465-66.

39. *AM & S Europe*, 1982 E. Comm. Ct. J. Rep. at 1614, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757, at 9049 (Ground 34 of the Judgment).

fell "within the context of the rights of the defence and the lawyer's specific duties in that connection."⁴⁰

The ruling of the Court on this particular point is significant for several reasons. Firstly, the Court considers that the investigations under article 14(1) of Regulation 17⁴¹ constitute initiation of the administrative procedure, at least for the purposes of privilege.⁴² Secondly, the Court gave a rather wide interpretation to the term "rights of defence" so as to encompass the provision of legal advice in order to help the client to avoid a future conflict with Community competition rules.⁴³ Thirdly, the period of time that may have elapsed between the provision of the legal advice and the initiation of the procedure does not seem to matter very much or, at any rate, may be fairly long, as it was in the case in question.⁴⁴

40. *Id.*

41. See Regulation 17, *supra* note 2, 1 COMMON MKT. REP. (CCH) ¶ 2531 (art. 14(1)).

42. The answer to the question whether the article 11 and the article 14 decisions constitute initiation of the procedure by the Commission is also significant for another reason. The criteria and scope of protection of confidentiality vary from one country to the next. See *supra* notes 11, 30-33. In addition, the conditions laid down by the Court for incorporation of the general principle into Community law do not always coincide with the requirements of all the national laws. On the other hand, it is accepted that incorporation of a general principle into Community law does not impose a legal obligation on the Member States to harmonize their domestic law where it deviates from the position of Community law resulting from such incorporation, i.e. it does not produce a "reverse effect." See T.C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 218 (1981). If it is accepted, therefore, that decisions under articles 11 and 14 *do constitute* the initiation of the procedure within the meaning of article 9(3) of Regulation 17, *supra* note 2, 1 COMMON MKT. REP. (CCH) ¶ 2482 (art. 9(3)), then the competent authorities in the Member States are divested of their authority as regards implementation of articles 85 and 86. Conversely, if it is accepted that they *do not constitute* the initiation of the procedure, then the same written communication may, theoretically, be protected by privilege under national law but not under Community law and *vice versa*, according to the circumstances of each particular case. This discrepancy will be the result of the concurrent jurisdiction of the Commission and the Member States as regards implementation of articles 85 and 86 of the EEC Treaty.

43. In this way the meaning of the term "rights of defence" is dissociated from the requirement that an adversary procedure should be pending before the Commission, although some fairly remote assumption that such a procedure might arise seems to be required.

44. It is estimated that seven to eight years had elapsed between the giving of the legal advice and the initiation of the procedure. It could be assumed that undertakings will attach more importance to safeguarding the secrecy of documents that advise on: 1) the status of an agreement or practice under the competition rules; 2) the need to notify; 3) the likelihood of the Commission stumbling upon it; or

4. *Authorship* of the Communications as a Criterion for Protection

The main limitations in the application of the principle of confidentiality in practice stem from the Court's interpretation of the authorship of the communication.

a. The Lawyer as Author of the Communication

If a written communication is to be covered by legal privilege, it must, in the opinion of the Court of Justice, "emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment."⁴⁵ The Court's reasons for laying down this condition are set out in Ground 24 of the Judgment. It states that this requirement "is based on a conception of 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."⁴⁶ There are thus two main facets to the lawyer's role which must coincide when he is giving legal advice to his client. The lawyer's primary concern must be to contribute to the proper administration of justice. Secondly, the lawyer must be concerned with giving completely independent advice. In cases where a lawyer seeking to justify his client's interests is faced with a choice between legal advice that is more consonant with his client's wishes and advice that is more in line with his role in ensuring the proper administration of justice, the Court's decision is unequivocal: the proper administration of justice must take precedence.⁴⁷

4) the imposition of fines etc., that are exchanged before the initiation of the procedure. There are perhaps two reasons for this. This period may extend many years into the past, and so the number of documents coming within the scope of the legal privilege is liable to be much larger. Furthermore, previous correspondence drawn up without the prospect of being submitted to the Commission is most likely to contain information and advice drafted with a greater measure of frankness and accuracy. The acquisition of such documents would obviously be extremely revealing and helpful for the Commission but particularly treacherous for the undertakings.

45. See *AM & S Europe*, 1982 E. Comm. Ct. J. Rep. at 1611, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757, at 9059 (Ground 21 of the Judgment).

46. *Id.* at 1611-12, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757, at 9060.

47. It can be indirectly inferred from the fact that the Court considered the lawyer's primary role to be his contribution to the proper administration of justice that the right to protection of confidentiality is lost where the lawyer is party to, or helps

The counterpart to this dual role lies “in the rules of professional ethics and discipline which are laid down and enforced in the general interest by institutions endowed with requisite powers for that purpose.”⁴⁸ In this way the Court recognizes the rules of professional ethics and discipline as one, or rather, the *only* way to put pressure on the lawyer to perform his role as he should.

i. Status of the Independent Lawyer

The *AM & S Europe* court made the application of legal privilege contingent upon the written communication being drafted by an independent lawyer. It remains to be determined, however, which of the two aspects of the lawyer’s role,⁴⁹ as expressed by the Court, will be fulfilled by the requirement in the *AM & S Europe* judgment that the lawyer be independent.

There is no doubt that it is the lawyer’s duty to give independent legal advice that more closely satisfies the independence requirement of *AM & S Europe*. The Court thus appears to hold that the advice given is more likely to be independent where the lawyer is not tied to his client by a relationship of employment.⁵⁰ By contrast, one could have justifiably concluded from the above that, since the *primary* role of the lawyer, as the Court acknowledged, is to contribute to the proper administration of justice rather than seek to safeguard the interests of his client, the legal advice would—in theory at least—always be independent, irrespective of whether or not lawyer and client were bound to each other by a relationship of employment.

The Court’s reluctance to place independent lawyers and in-house lawyers on the same footing is understandable to some degree. The fact that the in-house lawyer has only one

his client commit, an illegal act. The Court makes no specific mention, however, of cases or conditions in which the right to protection is actually lost. Apparently, this was not at issue in the case in question.

48. *AM & S Europe*, 1982 E. Comm. Ct. J. Rep. at 1612, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757, at 9060.

49. See *supra* notes 45 and 47 and accompanying text.

50. It is quite difficult to accept that the existence of a relationship of employment between lawyer and client can induce the lawyer to systematically transgress his primary role which, as we have seen, is to contribute to the proper administration of justice.

client, his employer, is thought in some Member States of the Community to put him in a different, more difficult and less independent position than that of the non-corporate lawyer. Not only must he be sensitive to the interests and activities of his employer, but he must also take due account of the opinions and attitudes of his superiors who happen, in many cases, not to be lawyers. On the other hand, permanent involvement with the activities of one firm and direct dependence on this firm for their salary is thought to lead in-house lawyers to identify themselves with the firm's interests to the detriment of their independence, and the discipline and influence that professional and other union organisations might be able to exercise.

The opposite may, however, be argued with equal merit. In-house lawyers may, in fact, feel safer and more confident leaving one corporation and seeking employment with another if they disagree with the management. This phenomena may be more likely if the lawyer is a specialist in a particular area. Furthermore, in-house lawyers can always get the advice of an outside lawyer in cases where they think they may disagree with the board of directors. By contrast, a lawyer or a small, independent firm of lawyers may sometimes be willing to do anything for a major client, particularly when it is struggling for survival.⁵¹

In short, it seems difficult to draw a line between the two and generalize afterwards. It should also be remembered that attitudes, behavior and personalities differ.

As a criterion for determining the lawyer's degree of independence the Court thus preferred the *legal* (absence of a relationship of employment) to the *actual* (professional conscience) relationship between lawyer and client. In seeking to substantiate its preference the Court resorts to the rules of professional ethics and discipline which it considers to constitute the counterpart of confidentiality. However, this plainly highlights the contradictions in its reasoning. The two Advocates-Gen-

51. For all the above reasons, full-time employment in some Member States is incompatible with the professional status of lawyers and, consequently, on entering their employment they are disbarred (e.g., in Belgium, France, Italy and Luxembourg). In other Member States the employed lawyer remains subject to the rules of professional ethics and discipline. See *AM & S Europe*, 1982 E. Comm. Ct. J. Rep. at 1655, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757, at 9085.

eral (and almost everyone who has voiced an opinion on the judgment) were unanimous in their view that legal privilege should also extend to in-house lawyers where they continue to be members of the appropriate lawyers' societies or bars and are subject to the rules of professional ethics and discipline.⁵² Thus, while the Court advances the same grounds (rules of professional ethics and discipline) in support of its argument, it unjustifiably excludes *all* in-house lawyers from the protection of confidentiality of communications.⁵³ The result of this approach is rather obscure. In seeking to avoid differentiation in treatment of in-house lawyers from one state to the next, the Court was content to see the *form* (i.e. uniform application of Community protection of confidentiality) take precedence over the *substance* (i.e. protection of confidentiality of in-house lawyers in the Member States where they continue to be members of the appropriate lawyers' societies or bars and are subject to the rules of professional ethics and discipline). However, were the Court to adopt this latter approach, the differentiation in treatment would be the consequence of the disparate national laws and not a result of the Community principle of confidentiality.

In an attempt to appraise the competing interests involved, it is submitted that from the standpoint of policy considerations the Court's judgment on this point exhibits considerable merits. At the time legal privilege was developed in common law jurisdictions, professional legal advisers were in independent practice and the clients were small merchants or individual citizens. In modern society, however, the emer-

52. See, e.g., *id.* at 1655, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757, at 9085 (Opinion of Advocate-General Sir Gordon Slynn); *id.* at 1640, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757, at 9076 (Opinion of Advocate-General J.P. Warner).

53. Exclusion of in-house lawyers from protection of confidentiality has been the subject of sharp criticism in virtually all the legal literature. See C.S. KERSE, *supra* note 36, at 29; Forrester, *Legal Professional Privilege: Limitations on the Commission's Powers of Inspection Following the AM & S Judgment*, 20 COMM. MKT. L. REV. 75, 82 (1983); Ghandi, *Legal Professional Privilege in European Community Law*, 7 EUR. L. REV. 308, 313 (1982); Goffin, *Le Principe de la Confidentialité*, 18 CAHIERS DE DROIT EUROPÉEN 381, 398-99 (1982); Lasok, *AM & S - The Court Decides*, 3 EUR. COMPETITION L. REV. 99, 102-03 (1982); Pagone, *Legal Professional Privilege in the European Communities: the AM & S Case and Australian Law*, 33 INT'L & COMP. L.Q. 663, 680 (1984); Usher, *Legal Professional Privilege and Confidentiality in EEC Competition Proceedings: The Judgment of the European Court*, 1982 J. BUS. L. 398, 400. *But see* Kuyper & van Rijn, *supra* note 38, at 15.

gence of large corporate entities with in-house legal departments may give rise to a greater risk of abuse. This may occur, for example, if corporations are permitted to hide otherwise discoverable information by using their legal department as a conduit through which all potentially incriminating documents are transmitted. Since corporations cannot be denied the right to legal privilege, it is not surprising that common law courts have developed several different standards to control the application of privilege to corporate communications.⁵⁴

By contrast, in civil law jurisdictions where legal and institutional tradition is different,⁵⁵ the risks of abuse of the privilege in corporate communications does not seem to be higher than when individual clients are involved. Independent lawyers, upon entering full-time in-house employment, are, as a rule, disbarred.⁵⁶ As a result, they cannot defend their employers in court or claim protection on the grounds of professional secrecy. Consequently, documents exchanged between a corporation and its in-house lawyer are subject to the same rules of search and seizure as the documents of individual clients.

Seen against this background, the Commission's limited resources and powers of search would run the risk of becoming virtually ineffective if the right to confidentiality were to be granted unconditionally to business concerns.⁵⁷ Obviously aware of these risks of abuse, the Court understandably looked for appropriate means to counterbalance the negative effects of affording the right to privilege to undertakings. It opted for

54. Such standards include the control group test, the subject matter test, the modified subject matter test and under United States law, the *Ampicillin* test. See *In re Ampicillin Antitrust Litigation*, 81 F.R.D. 377, 384 (D.D.C. 1978); see, e.g., Gergacz, *Attorney-Client Privilege*, 37 *BUS. LAW.* 461 (1982); Note, *The Attorney-Client Privilege and the Corporate Client: Where Do We Go After Upjohn?*, 81 *MICH. L. REV.* 665 (1983).

55. See *supra* note 11 and accompanying text.

56. *Supra* note 51. This is implicit from the laws of certain Member States in Continental Europe, e.g. in Belgium, France, Luxembourg, Greece, Italy, and apparently in Germany and the Netherlands. Only lawyers who actually practice their profession have the right to be registered. Upon entering full time employment, i.e., in-house counsel, lawyers must notify the Bar at which point they are disbarred. See *AM & S Europe*, 1982 E. Comm. Ct. J. Rep. at 1655, [1979-1981 Transfer Binder] *COMMON MKT. REP. (CCH)* ¶ 8757 (Opinion of Advocate General Sir Gordon Slynn).

57. The Commission does not dispose of wide powers of search and seizure and cannot seal documents. It may only ask for the submission of information. See Regulation 17, *supra* note 2, 1 *COMMON MKT. REP. (CCH)* ¶ 2531 (art. 14).

the solution offered by the continental legal systems. In other words, it excluded from protection of confidentiality all lawyers who are in full-time employment (in-house lawyers) even if they continue in some Member States to be subject to the same rules of professional ethics and discipline as their independent counterparts.

ii. Status of the In-House Lawyer

The Court considers an independent lawyer to be one who is "not bound to the client by a relationship of employment."⁵⁸ In contrast, an in-house lawyer *will* be bound to his client by a relationship of employment. At first sight this wording seems to be so general that it would cover cases involving a *permanent contract of employment* to provide legal services and cases where the relationship is *less close*, either as regards the period involved or its legal nature.

The definition undoubtedly includes lawyers who provide legal or other services in their capacity as *employees* of a company (in-house lawyers). Thus, any written communication passing between a company and its in-house counsel will *not* be immune from scrutiny because it did not emanate from an independent lawyer.⁵⁹

In an attempt to circumvent the Court's ruling on this point, undertakings may be prompted to try to convert their legal departments into separate legal offices with the appearance of independence.⁶⁰ Further, in-house lawyers may be tempted to give *oral* rather than written advice. It is known that in many cases the facts and legal aspects of the problems are so complex and the interpretation of the rules of competi-

58. *AM & S Europe*, 1982 E. Comm. Ct. J. Rep. at 1611, [1979-1981 Transfer Binder] COMMON MKT. REP. ¶ 8757, at 9055.

59. In most Member States the profession of lawyer is exercised not only on an individual basis but also by groups of lawyers in the form of a firm. This being so, it must be accepted that a written communication exchanged between a company and a lawyer belonging to such a firm is covered by privilege since the lawyer is an employee of the firm of lawyers and not of the company in question.

60. See Duffy, *Legal Privilege and Community Law*, 132 NEW L.J. 580, 582 (1982); Pagone, *supra* note 53, at 680. Apart from the legal and practical difficulties which such a conversion is likely to encounter in the legal systems of the Member States, it is submitted here that it would most probably not comply with the Court's judgment either, particularly with the requirement that the lawyer should be independent.

tion so difficult that recourse to oral advice cannot effectively satisfy a corporation's interests.

If a corporation feels that oral advice on a particular problem is not sufficient, its only recourse would appear to be to seek legal advice from an outside, independent lawyer. In-house lawyers would then appear to enjoy a somewhat wider degree of protection. Indeed, the in-house lawyer employed by corporation X may provide written legal advice to corporation Y, to which he is not linked by an employment relationship, provided, of course, that the terms of the employment relationship that binds him to corporation X permit him to do so.⁶¹ In this case, written communications passing between the lawyer and corporation Y would be covered by legal privilege even though the lawyer is an employee of corporation X. This view is not at first sight discernible from the Court's judgment. It does not, however, clash with the letter of the judgment. The Court considers as independent lawyers those who are not bound to the *client* by a relationship of employment. It is submitted that this must be true particularly in cases where the in-house lawyer continues to be a member of a lawyers' society or bar and is subject to its rules of professional ethics and discipline.

In *AM & S Europe* the Court did not impart a Community content to the term "relationship of employment," i.e. the answer to the question as to when a lawyer is bound to his client by a relationship of employment will be decided on the basis of the domestic law of the Member State in question. This means that the rules of private international law of the State in which the client has his residence, or where the lawyer provides his services, will be applied in determining the rule of law to be applied.

Closely related to this problem is the question whether an in-house lawyer of a subsidiary belonging to a multinational group with one or more subsidiaries inside or outside the Community should be deemed, for the purposes of privilege, to be bound by a relationship of employment to all members of

61. This occurs particularly in West Germany, and in the case of solicitors, in England. See 1 *THE ROYAL COMMISSION ON LEGAL SERVICES*, CMD. 7648, No. 20, at 234-35, 240-41 (1979). Naturally, companies X and Y should not be direct competitors in the market. Otherwise the conduct of the in-house lawyer may be considered to be contrary to the rules of professional ethics and discipline.

the multinational group. In accordance with the Court's case-law, the criterion in this case is the degree of economic independence enjoyed by the subsidiary in determining its course of action on the market.⁶²

In *AM & S Europe*, Advocate-General Sir Gordon Slynn suggested, by contrast, that documents drawn up by or for one member of the group and subsequently found in the possession of another should be protected by confidentiality. This is justified by the common interest of all members of the group. The Court seems to have endorsed the principle of group interest by holding that a certain document found at the premises of AM & S during the investigation by Commission officials was protected by confidentiality. The document contained advice from an independent English solicitor which was initially given to AM & S's parent company in Australia and not to AM & S. Thus, the answer to this question will hinge on the response to the previous question as to the degree of economic independence of a subsidiary vis-à-vis its parent company.

It is reasonable to expect, therefore, that in-house lawyers of a subsidiary which does not possess a sufficient degree of independence vis-à-vis its parent company may be considered to be bound by a relationship of employment to all members of the group. As a result, the correspondence between them will not benefit from the principle of confidentiality. It can be concluded that in such cases a lawyer is required to pass a double scrutiny: first, with regard to his national law, it must be determined whether he is bound to his client by a relationship of employment; and second, with regard to Community law, it must be seen whether he is an employed lawyer of all members of the multinational group for the purposes of the Community principle of confidentiality.

iii. Status of the Legal Adviser

The status of a legal advisor is uncertain. For example, what happens in the case of a lawyer who, although not a full-time employee of a company, renders purely legal services for a fixed annual or monthly fee? Can lawyers falling within this

62. *Imperial Chem. Indus. v. Commission*, 1972 E. Comm. Ct. J. Rep. 619, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8161, at 8001.

category be considered to be bound to the companies they advise by a relationship of employment no matter how tenuous this relationship may be?

The institution of independent lawyers rendering legal services to corporations for a fixed annual or monthly fee exists in virtually all Member States of the EEC. In French law, for instance, the position of lawyers providing purely legal services and receiving a fixed annual or monthly fee is described, in the prevailing view, as a contract for the provision of services or hired labour.⁶³ Such a lawyer is never considered to be an employee, or in-house lawyer, although objectively at least, he is bound to the firm by a relationship of employment. Moreover, in England a lawyer or firm of lawyers may be bound to one or more companies by a special contractual relationship for the provision of services, which is known as a contract of retainer. The same contractual relationship in France is known as *contrat d'abonnement*.

It is submitted here that the principle affording legal privilege to written communications passing between lawyers and their clients should also be afforded to the above category of lawyers for two main reasons. Firstly, such lawyers remain, for the duration of this contractual relationship, independent of the companies to whom they supply their services. Secondly, they retain membership of their lawyers' societies or bars and are thus still subject to the rules of professional ethics and discipline in all Member States.

It would appear that the Court has underestimated the problems that a broad interpretation of the concept relationship of employment is liable to entail. For this reason alone a narrow interpretation of the notion embracing in-house lawyers exclusively would seem to be in keeping with the spirit of the Court's decision without, on the other hand, disregarding the situation existing in the laws of all Member States.⁶⁴ Admittedly all these uncertainties would have been easily avoided had the Court used instead the term "contract of full-time employment" or "a lawyer in a permanent contractual relationship."⁶⁵

63. See I H. SOLUS & R. PERROT, *DROIT JUDICIAIRE PRIVÉ* 789 (1961).

64. See Gandhi, *supra* note 53, at 314.

65. It should be stressed that the Court itself was well aware of the distinction

b. The Requirement That a Lawyer Should be Registered with a Bar or Have the Right to Practise His Profession in a Member State

In Ground 25 of the Judgment the Court imposed a further condition for the protection of confidentiality. The lawyer must not be bound to his client by a relationship of employment and at the same time he must be entitled to practise his profession in one of the Member States.

It is interesting to note that the French version of the Judgment uses the term "lawyers enrolled in a bar in one of the Member States" rather than "lawyer entitled to practise his profession in one of the Member States," as the English text reads.⁶⁶ The Court seems to have drawn its terminology from article 17 of the Court's statute,⁶⁷ in which the same discrepancy between the French and English texts gives rise to comment. This discrepancy also has practical significance since the English version seems to be broader in meaning than the French.⁶⁸ Indeed, the former appears to cover both barristers

between the three categories of lawyers described in the text. Indeed, during the second oral hearing, the Court invited the litigants to submit their views on the national laws of the Member States relating to the protection of legal privilege in the communications exchanged between a client and: (i) an independent lawyer; (ii) a lawyer in a permanent contractual relationship or one who is an employee of an undertaking; and (iii) a legal adviser. See *AM & S Europe*, 1982 E. Comm. Ct. J. Rep. at 1604, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757, at 9056. One is therefore left wondering why the Court preferred the vague term "relationship of employment" and did not use one of the more precise terms indicated above.

66. *Id.* at 1612, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757, at 9058. Although formally the two texts have the same force, the English version must be considered more correct as English was the language of the proceedings.

67. Protocol on the Statute of the Court of Justice of the European Communities, Apr. 17, 1957, 1973 GR. BRIT. T.S. No. 1 (Cmd 5179-II) 245, 249 (official English version), 298 U.N.T.S. 147 (unofficial English version).

68. *Id.* The English text states: "Other parties must be represented by a lawyer entitled to practice before a court of a Member State." 1973 GR. BRIT. T.S. No. 1 (Cmd 5179-II) at 249 (official English version). The corresponding French text reads: "Les autres parties doivent être représentées par un avocat inscrit a un barreau de l'un des Etats membres." 294 U.N.T.S. 227, 233 (unofficial French version). It appears from these texts that the criterion of eligibility for appearance before the Court of Justice is not the *nationality* of a Member State but either enrollment in a Bar of a Member State (French version) or entitlement to practise the profession of lawyer in a Member State (English version). As a result, lawyers from non-Community countries who satisfy one of the aforementioned conditions should normally be permitted to appear before the Court. For this reason it is felt that the Court's indirect references to article 17 of its Statute do not clarify the issues.

and solicitors, while the French text would seem to cover only lawyers entitled to represent their clients in Court (right of audience), i.e., barristers. The English version of the term is considered to be more correct. English was the official language of the case and some of the documents held to be covered by legal privilege in *AM & S Europe* were drafted by an independent English solicitor.⁶⁹ As a result of this condition, legal advice given by certain other persons, such as patent agents or tax advisers, would obviously not be protected even though they do enjoy protection in certain Member States.⁷⁰

The case of *conseils juridiques* in France seems to pose a number of problems. Although they are officially allowed to provide legal advice, they may appear only before lower courts in a few minor instances. On the other hand, they may not be registered with a bar or law society. They are organized in a separate legal profession and may only be employed by, or associated with, other *conseils juridiques*.

A preliminary approach to the problem would seem to suggest that the *conseils juridiques* are eligible for protection by the principle of confidentiality (assuming that the other conditions laid down by the Court are met). The Court's reference to the Council Directive⁷¹ on the freedom to provide legal services, however, leaves no room for doubt that they are excluded from protection.⁷² They do not fall within the category of lawyers to which the Council Directive applies.⁷³ It is highly questionable whether the profession of *conseil juridique*, in the manner it is organized and the legal services it provides, could be considered to collaborate effectively "in the administration

69. *AM & S Europe*, 1982 E. Comm. Ct. J. Rep. 1575, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757.

70. In connection with patent agents in the U.K., see Civil Evidence Act, 1968, ch. 64, § 15.

71. Council Directive, *supra* note 5.

72. See *AM & S Europe*, 1982 E. Comm. Ct. J. Rep. at 1612, [1979-1981 Transfer Binder] COMMON MKT. REP. ¶ 8757, at 9060.

73. See Council Directive, *supra* note 5 (art. 1(2)). The Council Directive provides:

2. 'Lawyer' means any person entitled to pursue his professional activities under one of the following designations:

of justice by the courts.”⁷⁴

The most important consequence of the condition that a lawyer must be enrolled in a bar or law society in one of the Member States is that communications written by lawyers from *third* countries, i.e. non-Member State countries, are excluded from protection of confidentiality. In most Member States, nationality of the state in which the lawyer intends to practise his profession is a prerequisite for membership in a bar.⁷⁵ As a result, any written communication between a Member State firm and, for example, an American lawyer will *not* be protected by legal privilege irrespective of the law—be it Community or American—that the advice given seeks to interpret.

A literal interpretation of Ground 25 of the Judgment, however, may lead to another result. An independent lawyer from a third country who is lawfully registered with a bar or entitled to practise his profession on the same footing as an EEC lawyer in a Member State will fall within the protection of the principle of confidentiality.⁷⁶

<u>Belgium:</u>	Avocat-Advocast
<u>Denmark:</u>	Advokat
<u>Germany:</u>	Rechtsanwalt
<u>[Greece:]</u>	Δικηγόρος]
<u>France:</u>	Avocat
<u>Ireland:</u>	Barrister Solicitor
<u>Italy:</u>	Avvocato
<u>Luxembourg:</u>	Avocat-avoue
<u>Netherlands:</u>	Advocaat
<u>United Kingdom:</u>	Advocate Barrister Solicitor

Id.

74. See *AM & S Europe*, 1982 E. Comm. Ct. J. Rep. 1575, 1611-12, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757, at 9060 (Ground 24 of the Judgment); Goffin, *supra* note 53, at 400-01.

75. See S.P. LAGUETTE, *L'AVOCAT DANS LES 9 ÉTATS DE LA COMMUNAUTÉ EUROPÉENNE* (1978).

76. Ground 25 of the Judgment reads: “the protection . . . must apply *without distinction to any lawyer* entitled to practise his profession in one of the Member States” *AM & S Europe*, 1982 E. Comm. Ct. J. Rep. at 1612, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757, at 9060 (Ground 25 of the Judgment) (emphasis added); see also Kreis, *The AM & S Judgment of the European Court of Justice and its Consequences Within and Outside the Community*, 20 SWISS REV. INT'L ANTITRUST L. 3, 20 (1984).

c. Protection of Confidentiality and the Council Directive on Freedom to Provide Legal Services

The Court's requirement that a lawyer should be entitled to practise his profession in a Member State was further elucidated by a requirement set out in a Council Directive.⁷⁷ The Court stated that:

protection [of confidentiality] may not be extended beyond those *limits*, which are determined by the scope of the common rules on the *exercise of the legal profession* [This directive] is based in turn on the mutual recognition by all the Member States of the national legal concepts of each of them on this subject.⁷⁸

The Court's reference to the freedom of establishment and the freedom to provide legal services has not received adequate attention from those who have passed an opinion on the Judgment. This is particularly true with regard to the aforementioned Council Directive.⁷⁹ If construed literally, this passage from the Court's Judgment undoubtedly provides much room for interpretation of its far reaching implications in terms of their precise scope and purpose.⁸⁰

One possible interpretation would suggest that the Court wished not only to explain further the category of lawyers who are entitled to practise their profession in all Member States. It may also be read to suggest that the protection of confidentiality should be confined exclusively to the list of lawyers mentioned in the provisions of that Council Directive.⁸¹ On the other hand, it is equally possible that the Court, having previously considered the rules of professional ethics and discipline as the counterpart to protection, also wanted to substantiate its argument by making a further reference to the parallel provi-

77. Council Directive, *supra* note 5.

78. *AM & S Europe*, 1982 E. Comm. Ct. J. Rep. at 1612, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757, at 9060 (Ground 26 of the Judgment) (emphasis added); *see also* Council Directive, *supra* note 5 (art. 6).

79. *See* Council Directive, *supra* note 5.

80. One could hardly suggest that the Judgment was the result of an oversight after proceedings lasting two and a half years. Apart from the parties concerned, two governments and the Consultative Committee of the Bars and Law Societies of the European Communities intervened. There were two oral hearings and the opinions of two Advocates-General were given.

81. *See* Council Directive, *supra* note 5; *see also* C.S. KERSE, *supra* note 36, at 54; Goffin, *supra* note 53, at 399.

sions of the Council Directive.⁸²

As a result, any remaining doubts concerning the extent of the protection arising from the different standards of the rules on professional ethics and discipline applicable in the Member States would be dismissed. The principle of confidentiality would be considered to be applicable "without distinction to any lawyer entitled to practise his profession in one of the member States regardless of the Member State in which the client lives."⁸³

It is also quite plausible that the Court simply wished to point out that the question of professional secrecy had already been mentioned in the Council Directive. Hence, the Court had one further reason to base the protection of confidentiality in EEC competition law only on the principles that were found to be common in the laws of all the Member States.⁸⁴

i. The Council Directive

It is submitted here that by invoking the provisions of the Council Directive, the Court wanted to impose certain limits on the extent to which confidentiality ought to be applied in practice. It is thus necessary to elaborate on the first of the above possible interpretations and attempt to touch on some of its implications.

The purpose of the Council Directive is merely to facilitate the freedom of lawyers to provide legal services within the Common Market.⁸⁵ Article 1(2) specifies exhaustively the categories of lawyers in all Member States who may invoke the provisions of the Council Directive. However, in dealing with the problem arising here, particular account must be taken of the legal basis of the Council Directive. According to the first paragraph of its preamble, "any limitation of the provision of services based on nationality or residence requirements shall be abolished at the end of the transitional period."⁸⁶ The

82. See Council Directive, *supra* note 5 (art. 4).

83. *AM & S Europe*, 1982 E. Comm. Ct. J. Rep. at 1612, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757, at 9060 (Ground 25 of the Judgment).

84. See Council Directive, *supra* note 5 (art. 4).

85. See de Brauw, *La Libéralisation de la profession d'avocat en Europe après la directive émise par le Conseil des Ministres des Communautés Européennes*, 14 CAHIERS DE DROIT EUROPEEN 33 (1978).

86. Council Directive, *supra* note 5 (preamble).

Council Directive's legal basis is thus article 57 and 66 of the EEC Treaty. In other words, the Directive applies only to lawyers who are nationals of one of the Member States of the Community. Consequently, while the criterion for the third condition imposed by the Court is membership of a bar or the right to practise the profession in a Member State, the Court's reference to the Council Directive would seem to add a further criterion: the lawyer must be a *national* of a Member State of the Community.

A literal interpretation of the Court's reference to freedom of establishment and freedom to provide services and to the Council Directive consequently points to the following conclusion. The confidentiality of a communication between lawyer and client will be protected only where the lawyer, aside from fulfilling the conditions laid down by the Court, also has the nationality of a Member State of the Community and both lawyer and client reside within the Community but not necessarily in the same Member State.

In West Germany, German nationality is not a prerequisite of membership of a bar.⁸⁷ In Belgium, a foreign national may become a member of a Belgian bar if there is a bilateral agreement between Belgium and the national's state, i.e., if reciprocity exists.⁸⁸ Finally, in France, although French nationality is, in principle, a prerequisite of membership of a bar, certain bilateral agreements with former French colonies extend the right to exercise the profession of lawyer, on the basis of reciprocity, to nationals of those countries.⁸⁹

Thus the Court's reference to the Council Directive might have another important implication. It may also exclude certain categories of lawyers from the protection of confidentiality. For example, non-Member State lawyers who are entitled to practise their profession in one of the Member States and are registered with a bar or lawyers' society in that State may

87. See S.P. LAGUETTE, *supra* note 75, at 32. It should be pointed out that, although any discrimination on nationality grounds has been abolished for nationals of the Member States, such discrimination may lawfully exist where nationals of non-Member States are concerned.

88. *Id.* at 31-32.

89. As, for example, with Dahomey, Nigeria, Upper Volta, Mauritania, Ivory Coast, Angola, the Central African Republic and Gabon. See S.P. LAGUETTE, *supra* note 75, at 30; J. LEMAIRE, *LES RÉGLES DE LA PROFESSION D'AVOCAT ET LES USAGES DU BARREAU DE PARIS* 430 (1975).

be excluded.⁹⁰ However, this would be in contradiction, at least, to the laws of the U.K., Ireland, France, and possibly the Netherlands. In these states foreign lawyers enjoy the same degree of protection of confidentiality as national lawyers, without additional requirements.⁹¹

ii. Right of Establishment and the Freedom to Provide Legal Services

It is necessary at this juncture to distinguish between the right of establishment of the lawyer and the freedom to provide legal services. In the latter case a distinction must be made between provision of legal services where lawyer and client reside in the *same* Member State and where the lawyer resides in a State *different* from that in which the client he is advising resides.

Assume that an EEC lawyer is legally registered with a bar, or entitled to practise his profession in one Member State. He is thus bound by the rules of professional ethics and discipline of that State. He may exercise his profession in another Member State on a permanent basis, without also becoming registered with a bar in that State. This may be the case if he has not acquired the necessary qualifications. Such cases may very well arise in those Member States where legal consultation is not the exclusive preserve of lawyers registered with a bar in those States. The Court of Justice recently affirmed in *Ordre des Avocats au Barreau de Paris v. O. Klopp*⁹² that it is very likely that a Member State lawyer may simultaneously practise in two or more Member States. For example, a lawyer may open a secondary establishment in another Member State to advise with respect to his national law, international law, or Community

90. *E.g.*, Germany, Belgium, or France.

91. *See* S.L. PHIPSON, PHIPSON'S MANUAL ON THE LAW OF EVIDENCE, 251 (Buzard, Almot, Mitchel rev. 1970); Judgment of Mar., 1982, Cour d'Appel, Paris, [1982] GAZ. PAL. 5. It would appear from the legal systems of the remaining Member States that a non-Member State lawyer does not enjoy protection of confidentiality because he cannot be registered with a bar. This result would have been the same for EEC lawyers had the Council Directive not been in force. *See* Council Directive, *supra* note 5.

92. *Ordre des Avocats au Barreau de Paris v. O. Klopp*, 3 COMMON MKT. REP. (CCH) ¶ 10,639, at 11,529-30 (preliminary ruling by the Court of Justice, Judgment of 12 July 1984).

law. He may simultaneously maintain an establishment in his country of origin providing more complete legal services.

In *AM & S Europe*, the Court of Justice's reference to the Council Directive can be interpreted as imposing a separate and positive condition for the application of the principle of confidentiality. However, this interpretation inevitably leads to quite unacceptable conclusions. For example, the lawyer and client communications mentioned in the above example may be excluded from the protection of confidentiality. Such lawyers will be thought of as providing their legal services outside the scope of the right of establishment and the limits of the Council Directive.⁹³

As a second hypothetical, assume that the client of a member state lawyer, whether or not a national of a Member State, is residing or established outside the territorial boundaries of the Community. A literal interpretation of the Court's Judgment will also unjustifiably exclude from the protection of confidentiality communications passing between the Member State lawyer and his client. His services will be considered not to fall within the scope of the Council Directive.

A third hypothetical more amply demonstrates how difficult it is to understand the reasoning underlying the Court's reference to the Council Directive. Let us again assume that a lawyer from a third country, for instance, an independent lawyer from the United States, is legally registered with a bar in Belgium. The lawyer provides his services to clients (whether or not a national of a Member State): (a) residing in Belgium, (b) residing in other Member States, and (c) residing in third countries. This lawyer is legally registered with the Belgian bar, but as an American, he is not able to invoke the right of establishment enshrined in the EEC Treaty on the basis of the domestic law of that country.

The application of Grounds 25 and 26 of the Judgment to the above hypotheticals naturally leads to the conclusion that this lawyer's communications would not be covered by the principle of confidentiality. By contrast, assuming that all the other conditions laid down by the Court for the protection of confidentiality are met, one could justifiably have expected that

93. See *supra* note 73. Similar doubts were expressed by Usher, *supra* note 53, at 400.

the lawyer's communication with his client in hypothetical (a) to be covered by confidentiality. The communication in hypothetical (b) might not be covered, as the provisions of the Council Directive could not be invoked. In hypothetical (c), however, the communication should be covered by privilege when the actions of those firms produce effects within the Common Market.

In the light of what was said earlier, if one examines once again the condition that a lawyer must be a member of a bar together with the Court's reference to the Council Directive it is reasonable to conclude that the Court's aim seems to have been twofold. First, the court tried to show that the principle of legal privilege applies to all categories of independent lawyers mentioned in the Council Directive, even where lawyer and client do not reside in the same Member State. This was accomplished by specifying the *geographic* area in which freedom to provide legal services and the protection thereof exists. Second, the Court stressed its *lack of jurisdiction* in judging the validity of the guarantee provided by the rules of professional ethics and discipline of non-member countries compared with the corresponding rules of the Member States, as well as its reluctance to try to exercise such jurisdiction.⁹⁴ The Court's twofold aim could have been achieved just as effectively, however, by means of a sole requirement mandating that a lawyer either be a member of a bar or be entitled to practice his profession in a Member State. The reference to the Council Directive would therefore appear to be inexplicable and unwarranted.

For all of these reasons, and particularly because the lack of protection in the case of a non-Member State lawyer entitled to practice his profession or register with a bar in a Member State, a different reading of Ground 26 of the Judgment is proposed here. The reference to the Council Directive should function not as a separate and positive condition for the recognition of the protection of confidentiality, but only as a *negative requirement* remaining always subordinate to the main condition

94. It is questioned, however, whether the Court, by refusing to recognize that the rules of professional ethics and discipline of third countries provide the same degree of guarantee, has implicitly acknowledged what it had tried to avoid, namely its fear that the rules of professional ethics and discipline of third countries may be inferior to those of the Member States of the Community.

that the lawyer be registered with a bar or entitled to practice his profession in one of the Member States.

Under this reading, the scope and purpose of Ground 26 of the Judgment would be confined exclusively to determining the category of lawyers who are entitled to practise their profession in the Member States. This category will include only the designations of lawyers mentioned in article 1(2) of the Council Directive. If so, legal professions such as the *conseil juridique* in France⁹⁵ or *avoué* (except the *avocat avoué* in Luxembourg) and any other designations not included in the Council Directive, will not fall within the category of lawyers entitled to benefit from the principle of confidentiality.

For the sake of clarity it must be emphasized that lawyers from non-Member States who are legally registered with a bar in one of the Member States should be subsumed under the Community principle of confidentiality. On the contrary, there is a group of lawyers who do not benefit from the protection of confidentiality. This group consists of independent lawyers from non-Member States who are established in one Member State on the basis of bilateral treaties between their countries and the Member State concerned. These lawyers may provide consulting services on their respective national laws, international law or even Community law, but may not be registered with a bar or entitled to practice their profession to the full extent (i.e. do not enjoy the right of audience) in the Member State in which they are established.⁹⁶ The principles of comity and equity in international relations would appear to require that independent lawyers from non-Member States be treated in the same manner as lawyers who are nationals of the Member States when they fulfill the other conditions imposed by the Court.

The Commission was apparently influenced by those considerations. It subsequently announced that on grounds of equity in international relations and in consideration of the interests of independent lawyers in the Member States, the Commission would submit appropriate proposals to the Council to

95. See *supra* notes 73-74 and accompanying text.

96. It is questioned whether the communications of such lawyers are covered by confidentiality when they are employed by EEC law firms and their advice cannot be individualized.

negotiate agreements based on reciprocity with certain non-Member States with a view toward extending legal privilege to their independent lawyers.⁹⁷

In view of the relatively small number of officials working for the Commission's competition department,⁹⁸ and the present stage of development of Community competition law, it would be fair to say that the Commission is still to a large extent obliged to rely on voluntary compliance by businesses with the rules of the EEC Treaty for the effective implementation of Community competition law.⁹⁹ This presupposes, however, that companies are free to avail themselves of appropriate legal advice of their own choosing, even if such counsel is afforded by a lawyer from a non-Member State.¹⁰⁰

Companies that have a large turnover and whose business activities extend beyond the territorial limits of the Community are potential transgressors of the competition rules embodied in the EEC Treaty. An example of this is the hypothetical case of a merger or joint venture in the Common Market, or an agreement to grant a license for an industrial property right, involving a Community company and a company with its registered office in the United States. In this hypothetical, legal advice given by a lawyer from one of the Member States will also be protected by privilege in the United States, whereas advice

97. See *Confidentiality of legal documents: application of the competition rules*, 16 BULL. EUR. COMMUNITIES, Aug. 1983, at 43 [hereinafter cited as "Confidentiality of Legal Documents"]; see also *Recommendation for a Council Decision authorizing the Commission to open negotiations with a view to the conclusion of agreements between the European Economic Community and certain third countries concerning the protection of legal papers in connection with the application of the rules on competition*, DOCUMENTS OF THE COMMISSION OF THE EUROPEAN COMMUNITIES, COM(84) 548 final (9 Oct. 1984) [hereinafter cited as "COM(84) 548 final"] (internal document submitted to the Council of Ministers of the European Economic Community by the Commission and not published, but available to the public).

98. The Commission's competition department is also known as DGIV.

99. Community law, unlike American competition law, does not provide for class actions or treble damages. Moreover, infringements of Community competition law are not criminal offenses. Although damage actions seem to exist in theory, they have hitherto not been widely applied. See C.S. KERSE, *supra* note 36, at 266-77 (references therein to judgments of national courts); see also *Garden Cottage Foods, Ltd. v. Milk Marketing Board*, [1983] 3 W.L.R. 143 (recent judgment of the House of Lords); Picañol, *Remedies in National Law for Breach of Articles 85 and 86 of the EEC Treaty: A Review*, [1983] 2 LEGAL ISSUES EUR. INTEGRATION 1.

100. See, e.g., Temple Lang, *Compliance with the Common Market's Antitrust Law*, 14 INT'L LAW. 485, 502-03 (1980).

emanating from an American lawyer will not, even where it concerns interpretation of American law. The result is that non-Community businesses are obliged to go beyond the objective limits of prudent business activity to the extent that they are required to avail themselves of lawyers from one of the Member States if they wish their communications to benefit from legal privilege. In contrast, the confidentiality of communications between a lawyer and his client is protected by the national laws of some Member States even if the lawyer is a foreign national. What should the solution be, however, where communications exchanged between lawyer and client were drafted by both a lawyer (whether an independent or in-house lawyer) from a non-Member State and an independent Member State lawyer, resulting in constituent parts that cannot be separated? Should the involvement of the Member State lawyer, who fulfills the other conditions laid down by the Court of Justice, be sufficient to provide the necessary sanction for the principle of confidentiality to apply?

Finally, the Court was unable to avoid a further contradiction in its reasoning. Some of the documents considered protected by legal privilege had been drafted some seven or eight years before the Commission initiated the procedure.¹⁰¹ According to the Court's Judgment, those documents should not have been considered protected by legal privilege since the United Kingdom was not yet a Member State when the documents were drafted.¹⁰² Therefore, the lawyers who drafted the documents were nationals of a non-Member State.¹⁰³ For some unknown reason, however, the Court considered them

101. I.e., exactly one year *before* the United Kingdom became a member of the European Community.

102. *AM & S Europe*, 1982 E. Comm. Ct. J. Rep. 1575, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757.

103. It would perhaps be going too far to infer from the Court's judgment on this point that the crucial moment at which all the conditions it laid down for the application of protection of confidentiality are fulfilled is the moment when the Commission begins its investigation at the company's premises, and not the time at which the documents were drafted. Indeed, there is no doubt that a communication to the lawyer, or by the lawyer, to his client, will be deprived of the protection of confidentiality if it was made before their relationship was entered into or after it ended. This is necessary because the lawyer, when providing his legal service, must act in his capacity as a lawyer. On the other hand, once all the conditions are met and privilege is attached to the communications they will remain privileged unless the right is waived or lost.

protected by the principle of confidentiality.¹⁰⁴

d. The Client as Author of the Communications

Written communications that “*emanate from* independent lawyers” are protected by legal privilege.¹⁰⁵ The Court’s repeated use of the term *emanate from* creates the impression that only written communications sent by the *lawyer* are immune from scrutiny. But are documents sent by the *client* to his lawyer requesting legal advice also protected? In some sections of its judgment the Court uses the term “protection of written communications *exchanged between* a lawyer and his client”.¹⁰⁶ But any *exchange* necessarily presupposes two interested parties: the client who normally first sends a letter to his lawyer stating the facts and requesting legal assistance, and the lawyer who then sends a letter in reply. Furthermore, according to the Court, the purpose of confidentiality is to enable “any person . . . without constraint, to consult a lawyer. . . .”¹⁰⁷ The client’s recourse to his lawyer would be inhibited and the lawyer’s reply would be incomplete if the degree of protection were not equal. It would indeed be a contradiction if documents containing legal advice were protected but documents on which the provision of that advice was based were not. In fact, two of the documents relating to the case, Nos. 1 and 5, which the Court held to be protected by privilege, were letters from AM & S to independent English solicitors requesting legal advice. There is no doubt, therefore, that all documents exchanged between lawyer and client, irrespective of whether they were drafted by the former or the latter, are protected provided they satisfy the other conditions laid down by the Court.

104. Reasons of expediency clearly influenced the Court’s thinking. Legal advice given in order to solve problems created by a country’s accession to the Community seems to warrant a slight deviation from the conditions laid down by the Court for protection of confidentiality. One can therefore justifiably expect similar treatment in the future for cases connected with the accession of Greece, Spain or Portugal. An equally probable explanation, of course, is that this discrepancy escaped the Court’s attention.

105. See *supra* note 45 and accompanying text.

106. See *AM & S Europe*, 1982 E. Comm. Ct. J. Rep. at 1611-12, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757, at 9059-60 (Grounds 23 and 27 of the Judgment).

107. See *id.* at 1610, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757, at 9050 (Ground 18 of the Judgment).

There is a common principle in both common law and civil law countries that confidentiality also protects communications exchanged to or by the lawyer's clerks, assistants or agents under the lawyer's authority for the purpose of rendering legal services. Adoption of this principle of confidentiality by the Community would not seem to create any legal problems, provided that the lawyer bears the burden of proof that his assistants or agents acted under his authority and for the purpose of rendering his services. With regard to the client acting also through servants or agents the position would apparently be the same as for the lawyer.¹⁰⁸

When the Court laid down the three conditions mentioned above with respect to the protection of confidentiality it was considering protection chiefly from the *lawyer's* standpoint. For this reason, with the exception of the condition that the client's rights of defense be respected, the other conditions do not appear to refer directly to the client. If we look at the matter of confidentiality from the client's viewpoint, this would raise the question whether the conditions for protection are the same, fewer, or perhaps different from those applying to the lawyer.

To begin with, the term client within this context covers both natural and legal persons, and in the latter case the communications exchanged with the lawyer must emanate from the persons authorized to represent them by law or by their constitution.¹⁰⁹

The condition requiring that the client's rights of defence be observed does not appear to create any particular problem. When a client requests legal advice from his lawyer, he will have to act for the purposes and in the interests of his rights of defense. Furthermore, the second condition will oblige firms

108. In the case of corporate clients acting through servants or agents, see *infra* note 109 and accompanying text.

109. See *mutatis mutandis* Regulation 17, *supra* note 2, 1 COMMON MKT. REP. (CCH) ¶ 2501 (art. 11(4)). This seems to be the normal practice of corporate clients where lower or middle-ranking personnel do not usually have the power to request legal advice from outside counsel. The persons authorized to represent a corporation by the law or its constitution may, however, delegate their right of representation or the right to conclude certain agreements to other servants or agents of the corporation. The risks of abuse by according legal privilege to corporate clients were largely averted in Community law by the Court's decision to deprive in-house lawyers of the right to confidentiality. See *supra* notes 45-62 and accompanying text.

to request legal advice from, or put their defence in the hands of, independent lawyers when they consider that the provision of oral advice by the in-house lawyers is inadequate to meet the needs of the case in question. Finally, as for the application of the third condition, before companies seek legal advice from a lawyer they will have to satisfy themselves that the lawyer is both a member of a bar of, or has the right to practice his profession in, a Member State. Companies located outside Community territory will also be bound by this condition where their activities are liable to produce effects within the Community or where they have branches and subsidiaries established in Community territory.

5. The *Place* of Residence of the Client or Lawyer as a Criterion for Protection

In Ground 25 of the Judgment the Court states that "the protection thus afforded by Community law . . . to written communications between lawyer and client must apply without distinction to any lawyer entitled to practise his profession in one of the Member States, regardless of the *Member State* in which the client lives."¹¹⁰ At first sight, this paragraph seems to imply that the client must be resident in a Member State before his communication is considered protected by legal privilege. But the competition rules embodied in the EEC Treaty also extend to companies whose seat or registered office is outside the territorial limits of the Community.¹¹¹ It would thus be a contradiction if on the one hand, activities of foreign companies, giving rise to consequences within the Community, fall within the provisions of articles 85 and 86 of the EEC Treaty but, on the other hand, they did not benefit from the protection of confidentiality simply because their seat or registered office is located outside the Community. For this reason it would be more accurate to say that the general principle protecting the confidentiality of written communications between

110. *AM & S Europe*, 1982 E. Comm. Ct. J. Rep. at 1612, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757, at 9060.

111. Where a firm has its registered office outside the Community and exercises no activities in the Community through branches or subsidiaries, the Commission's power to conduct an investigation pursuant to article 14 of Regulation 17 is virtually non-existent. It may do so only with the consent of the firm and the Member State in which the firm's registered office is located.

lawyer and client applies *regardless* of the place where the client resides or where the company has its seat or registered office, even where it is located outside the Community.

Furthermore, the same must apply with regard to the place where the lawyer resides. An independent lawyer registered with a bar or lawyers' society in a Member State will not need to locate his professional residence or, in the case of a firm of lawyers, its seat or registered office, within the Community for the communication to be deemed to be protected by legal privilege, provided that this lawyer is subject to the rules of professional ethics and discipline of one of the Member States. Only three Member States, Belgium, West Germany and Luxembourg, require the lawyer to be established in the State of which he is national before he is entitled to register with a bar in that State.

Document No. 7 in *AM & S Europe*, which the Court held to be protected by legal privilege, contained legal advice given by an independent English solicitor to a firm other than AM & S. This other firm was part of the same group of companies and had its registered office in Australia. Document No. 7 was found in the possession of AM & S while the Commission's investigation was taking place. The Court therefore seems to corroborate in practice the view that confidentiality of written communications between lawyer and client is protected no matter where the client or lawyer have their registered office, even where it is outside the Community's territorial limits.

6. *Possession* of the Documents as a Criterion for Protection

In almost all cases, the problem of privilege will be closely linked to documents found in the *client's* possession, i.e. in the company's offices where Commission inspectors have conducted an investigation on the strength of article 14 of Regulation 17.¹¹² A logical consequence of a privilege that covers communications between lawyer and client and vice versa is that such a communication should be protected by the Commission officials conducting the investigation *regardless* of the person in whose hands it is found. As soon as all of the Court's conditions for incorporation of this general principle into Community law have been met, the mechanism of legal

112. See Regulation 17, *supra* note 2, 1 COMMON MKT. REP. (CCH) ¶ 2401.

privilege takes effect automatically. This will occur irrespective of whether the communication is in the hands of the client or in the possession of the lawyer.

In accordance with article 14 of Regulation 17,¹¹³ the Commission officials may investigate only premises of the firm, i.e. all premises, land and means of transport belonging to it. Commission officials may not, however, enter premises not used in connection with a company's activities. The offices of a firm's in-house lawyer, which is the company's legal department and forms part of its establishment, is subject to the Commission's powers of investigation. On the other hand, the office of an independent lawyer who is merely affording legal advice to the firm is not directly subject to those powers.¹¹⁴ Thus, while the legal privilege of written communications in the hands of the *lawyer* has never been called into question by any of the laws of the Member States, the Court's ruling in *AM & S Europe* also confirmed protection of communications found in the possession of the *client*.

Certain questions still remain unresolved: is the confidentiality of a communication protected when it is not in the hands of the client or his lawyer, but in the possession of a *third party*? Does the manner in which that party got hold of the papers have any significance? Finally, if the third party forwarded those documents to the Commission, can the Commission then be restrained from using those documents when making its decision?

AM & S Document No. 7 contained advice initially given by an independent English solicitor to a firm belonging to the same group¹¹⁵ as AM & S, but not to AM & S directly. This document, which the Court held to be protected by legal privilege, was found to be at the premises of AM & S during the investigation by Commission officials. One view is that the

113. *Id.*

114. Incriminating documents that the firm passed either to the offices of an independent lawyer or any other place outside its premises (e.g., the director's home) in order to avoid a possible investigation by Community officials have to be produced or sent to the Commission at the Commission's request. If such a request is not complied with, the Commission may request the assistance of the national authorities pursuant to article 14(6) of Regulation 17, *supra* note 2, 1 COMMON MKT. REP. (CCH) ¶ 2531, (art. 14(6)). The law to be applied in this case is the domestic law on investigations or seizure of documents of the Member State concerned.

115. *See supra* note 3.

Court took into account, in this case, the interests of the group as a whole.¹¹⁶ Thus, documents originally addressed to one member of the group and later found in the possession of another member of the same group of companies will be immune from scrutiny. Another view, however, is that the Court's protection of AM & S Document No. 7 indicated its intention to extend protection even to papers in the hands of a third party. The other conditions referred to above however must be satisfied and the papers must not have lost their confidential nature as a result of passing into the possession of the third party.

This third party need not have any connection with the lawyer-client relationship. For example, a firm with which the client had previously concluded an agreement or concerted practice¹¹⁷ or a competitor, would be protected by legal privilege. Under English law, documents acquired by means of either a third party, as a result of a violation of the lawyer's duties, or by unlawful means (e.g., theft of the original), may be accepted as evidence. Those documents or the originals will, in the initial stages, be protected by privilege.¹¹⁸ By contrast, in French law, documents of this kind may not be used as legal evidence, as this would be detrimental to the client's rights of defence.¹¹⁹

The Court decided in Ground 23 of the Judgment that protection of confidentiality of written communications between lawyer and client constitutes an essential corollary of the latter's rights of defence. Does that mean, however, that confidentiality should benefit from the same system of protection as rights of defence which, as a general principle of Community

116. The same was suggested by Advocate-General Sir Gordon Slynn in *AM & S Europe*, 1982 E. Comm. Ct. J. Rep. at 1661, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757, at 9089.

117. Article 85(1) of the EEC Treaty states that "all agreements between undertakings, decisions by associations of undertakings and *concerted practices* which may affect trade between Member States" are prohibited if their object or effect is to restrict competition. EEC Treaty, *supra* note 1, at 32, 298 U.N.T.S. at 47-48 (emphasis added).

118. See R. CROSS, *supra* note 31, at 291-95; Peiris, *supra* note 9, at 630-33; The Position of English law on this particular point is subject to severe criticism. See Heydon, *Legal Professional Privilege and Third Parties*, 37 MOD. L. REV. 601 (1974); Peiris, *supra* note 9, at 633; LAW REFORM COMMITTEE SIXTEENTH REPORT, CMD. 3472, at 13-14 (1967) (privilege in civil proceedings).

119. See Judgment of Apr. 28, 1982, Cour d'Appel, Versailles, 1982 J.O. Nos. 146-47, [1982] 1 GAZ. PAL. 310.

law and a fundamental human right, bind the Commission? Acceptance of this view would mean that the Commission would be obliged to take account *ex officio* of the confidentiality of written communications, and that it cannot use the contents of these communications as a basis for deciding that there had been an infringement of competition rules of the EEC Treaty. It is submitted, however, that Commission decisions implementing articles 85 and 86 will *not* automatically be declared invalid simply because the contents of the documents so acquired by the Commission were used as a basis for its decisions. Interested parties may have to seek protection before the Court of Justice by bringing an action for annulment under article 173 of the EEC Treaty¹²⁰ regarding the relevant Commission decisions. The Court adopted a similar approach to another right of defence of the undertakings (the right of access to the file) in the *Hoffman-La Roche* case.¹²¹ Definitive answers cannot be given to all of these questions. The Court undoubtedly has direct interest in the question of whether the three conditions it laid down for protection of legal privilege are fulfilled simultaneously. A person claiming legal privilege for a document must have some legitimate interest in its protection.

7. The *Type* of Communication as a Criterion for Protection

Throughout its judgment, the Court repeats the phrase "confidentiality of *written* communications between lawyer and client." It is unclear whether this phrase embraces all types of written communication that may in practice constitute contact between lawyer and client. Aside from the traditional forms of communication, i.e., a letter, either party may resort to other more modern means such as telegrams, telex, magnetic tapes or computerized electronic messages. Does legal privilege then extend to all these forms of communication? The Court gave a very broad meaning to the term *business records* referred

120. EEC Treaty, *supra* note 1, (art. 173).

121. See *Hoffman-La Roche*, 1979 E. Comm. Ct. J. Rep. at 513, [1978-1979 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8527, at 7539 (Ground 15 of the Judgment). The Court's decision on this point, however, has been strongly criticised. See Walker, *Hoffman-La Roche—The Judgment of the European Court Appraised*, 1979 EUR. INTELL. PROP. REV. 357; C.S. KERSE, *supra* note 36, at 98.

to in article 14(1) of Regulation 17.¹²² This term includes all written communications exchanged between lawyer and client to the extent that they have a bearing on "the market activities of the undertaking."¹²³ If we follow the Court's interpretation, then there is no doubt that protection of confidentiality does extend to all the aforementioned types of written communication.

The question whether legal privilege also covers *oral* communications exchanged between lawyer and client presents a number of problems. Although the Commission is empowered under article 14 of Regulation 17 to examine only the company's books and other business records, from a legal standpoint oral communications should enjoy the same protection afforded written communications. This subject would assume importance if the Commission exercised broader investigatory powers, such as the power to examine and take sworn or unsworn testimonies from witnesses. This power is not exercised at present under Community law but is permitted, for the relevant authorities, in the national competition laws of certain Member States. However, under article 14(1)(c) of Regulation 17 Commission officials are empowered to request *oral* explanations on the spot when investigating a firm. One view is that "on the spot" means during the investigation and not at a later stage. Moreover, there is virtually total agreement in the legal literature that the oral explanations should result directly from the books and other business records which happen to be under investigation.¹²⁴ Thus, the issue arises whether employees can refuse to answer questions put by Commission officials when doing so would disclose information covered by legal privilege. The view advocated by this author is that they are quite justified, in such an instance, in refusing to do so. The fact that in one case the legal advice appears in writing or print in a business document while in the other it exists only in the memory of an employee of the firm should not lead to different treatment in terms of protection of

122. Regulation 17, *supra* note 2, 1 COMMON MKT. REP. (CCH) ¶ 2531 (art. 14(1)).

123. See *AM & S Europe*, 1982 E. Comm. Ct. J. Rep. at 1609-10, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757, at 9059.

124. See C.S. KERSE, *supra* note 36, at 82-83. But see Kreis, *EEC Commission Investigation Procedures in Competition Cases*, 17 INT'L LAW. 19, 40-41 (1983).

confidentiality. The only difficulty in protecting the confidentiality of oral communications would seem to stem from the verbal nature of communications, which, unlike written ones, are more prone to the risks of abuse and more difficult for the Commission to verify effectively in practice.

Quite often, the complex nature of agreements or concerted practices of firms, such as transactions involving mergers or joint ventures, require lawyers to be present at the negotiating table to offer immediate oral advice. In such cases the lawyers' advice is recorded in the minutes of the meeting, which are usually kept by employees of the firms. Assuming that all the other conditions laid down by the Court are met, the question arises whether the oral advice which was not written and dispatched immediately by the lawyer but was recorded in the minutes of the meeting by an employee of the firm is covered by legal privilege.

Advocate-General Sir Gordon Slynn stated in *AM & S Europe* that legal privilege should cover the contents of advice given either orally or in writing irrespective of how it is recorded, be it in a letter, summary, notes or minutes.¹²⁵ The Court, however, takes a somewhat different view. AM & S Document No. 12 in the case in question was an internal memorandum sent by an AM & S executive to another executive in the same firm. It contained a summary of the legal advice previously given to AM & S by an independent English solicitor. The Court decided that the memorandum was not protected, even though it was a summary of legal advice given initially by an independent solicitor. Is it not inconsistent to afford protection to a document which the lawyer sent to the firm while not protecting the content of the same document when it is reproduced by employees of the same firm?¹²⁶ The Court's decision in this matter seems to be unjustified and could easily lead to an undermining of legal privilege itself. Although the Court's decision on this point was not directly concerned with oral advice, one is forced to conclude that the oral advice recorded in the minutes, in the example above, will not be protected either. Nevertheless, it is submitted that, in principle,

125. *AM & S Europe*, 1982 E. Comm. Ct. J. Rep. at 1655, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757, at 9085.

126. See Goffin, *supra* note 53, at 402.

oral communications between lawyer and client should enjoy the same degree of protection as written communications for the additional reason that they are protected on the same footing as written communications in the domestic law of the Member States.

C. Waiver and Loss of the Protection of Confidentiality

One aspect of privilege which is superficially discussed by the Court is the *waiver* of the right to protection. Oddly enough, the circumstances in which privilege is *lost* are not even touched upon, apparently because they were not at issue in *AM & S Europe*. The Court opined that the principle of confidentiality may be waived by the client where he considers it in his interest to do so.¹²⁷ This ruling brings the Community principle of confidentiality more into line with English law. Under English law the principle of confidentiality is considered to be a privilege of the client and only he may waive it. In contrast, in most Member States in continental Europe the privilege belongs to the lawyer and he alone is entitled to waive it.

In theory, the ultimate purpose of privilege is to encourage clients to consult their lawyers without constraint, free from the fear that the confidence so entrusted will later be disclosed. The underlying rationale is that a lawyer can defend his client's interests properly only if he avails himself of all relevant information. However, if the client divulges confidential information to a third party, it is presumed that he would also have divulged it to his lawyer even without the protection of privilege. Once the privileged information has been disclosed, therefore, the basic justification for protection no longer applies, and the privilege is considered to have been waived. Conversely, if the person to whom the privilege belongs wishes to preserve it, he must take some affirmative action to preserve confidentiality.

A waiver of privilege may be either express or implied, deliberate or unintentional, partial or total.¹²⁸ The ruling of the Court of Justice seems to refer only to express or deliberate

127. *AM & S Europe*, 1982 E. Comm. Ct. J. Rep. at 1613, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757, at 9060 (Ground 28 of the Judgment).

128. See generally 8 J. WIGMORE, *supra* note 9, § 2327.

disclosure of the whole of the written communications to which the privilege is attached. In practice, however, it is unintentional, inadvertent or erroneous disclosures which raise the most difficult questions. Implied waiver by deliberate disclosure of the communications or other supporting materials poses no major identification problems. Partial waiver, which is not allowed under English law should not be allowed at the Community level. To allow a client to reveal only certain parts of a confidential communication, presumably those parts most favourable to his cause, and to assert privilege as to the remainder, would tend to transform the privilege from a shield to a sword to be used offensively in order to paint a one-sided picture of the facts.¹²⁹

It remains to be seen, however, whether inadvertent or unintentional disclosure of confidential communications by a company's employee will constitute waiver of privilege. In such a case, French law would not consider it a waiver, while under common law, knowledge or lack of knowledge of the existence of privilege appears to be irrelevant. A question arises, however, in the case where documents, otherwise protected by privilege, are sent to the Commission by the employees of a firm.¹³⁰ It appears that this should not be considered a constituted waiver since the privilege is a right of the company and not of the individual employee.

In regard to the circumstances in which the right to protection of confidentiality is deemed to be lost, it is a well-established principle of English law that legal advice or assistance obtained for the purpose of aiding in the commission of a crime or perpetration of a fraud is not privileged. Since the privilege is that of the client, his guilt deprives him of the right to protection whether or not his lawyer is privy. Under English law, a prima facie case that the communications in question were made in preparation of, in furtherance of, or as part of, a

129. See Peiris, *supra* note 9, at 637; Comment, *Stuffing the Rabbit Back into the Hat: Limited Waiver of the Attorney-Client Privilege in an Administrative Agency Investigation*, 130 U. PA. L. REV. 1198, 1208 (1982).

130. See *Hoffman-La Roche*, 1979 E. Comm. Ct. J. Rep. 461, [1978-1979 Transfer Binder] COMMON MKT. REP. ¶ 8527, at 7503; Bennett, Current Survey, *Hoffman-La Roche: Abuse of Dominance on the Vitamins Market Confirmed*, 4 EUR. L. REV. 210, 221 (1979); see also *S.G. Adams v. Commission*, 1985 E. Comm. Ct. J. Rep. — (case number 145/83; not yet reported).

criminal act or fraud is all that must be established.¹³¹ Under French law, on the other hand, the general rule is that privilege is lost if the lawyer assists his client or personally takes part in his illegal activities.¹³²

Both jurisdictions, however, distinguish legal advice obtained in preparation for the commission of a crime or illegal activity from legal advice obtained after the event for the legitimate purpose of defence. Protection of confidentiality of the communications between lawyer and client is assured only in the second category. The precise boundaries of this distinction, however, are less clearly defined than its principle. Serious problems still exist regarding legal services originally solicited for a lawful purpose and subsequently used for an unlawful end.

Community competition law does not typically concern itself with criminal law. For this reason, the wider concept of illegal activities used by French law would seem to be more appropriate.¹³³ On the other hand, it could not be said that the lawyer, in assisting his client to commit a breach or to evade the competition rules embodied in the EEC Treaty, is acting within the framework of his client's rights of defence and contributing to the proper administration of justice in the Community. For these reasons, adoption of the common features of the national laws described above would seem to constitute a reasonable approach with respect to the circumstances in which the right to privilege is deemed to be lost.

D. *The Procedure to be Followed in Affording Protection to Confidentiality in EEC Competition Law*

Having recognized the general principle of confidentiality and incorporated it into Community law, the Court of Justice naturally turned its attention to the procedure to be followed in applying the principle of confidentiality in practise. The Court stated that "it is in principle for the Commission itself, and not the undertaking concerned or a third party, whether

131. See *Butler v. Board of Trade*, [1970] 3 All E.R. 593, 598.

132. See Judgment of Feb. 3, 1983, Cour d'Appel, Aix-en-Provence, [1983] 2 GAZ. PAL. 11.

133. The Commission's submissions were similar in *AM & S Europe*, 1982 E. Comm. Ct. J. Rep. at 1588, [1979-1981 Transfer Binder] COMMON Mkt. REP. (CCH) ¶ 8757, at 9045.

an expert or an arbitrator, to decide whether or not a document must be produced to it.”¹³⁴ When a firm is, however, being investigated by the Commission’s authorized officials and, therefore, wishes accordingly to claim legal privilege for certain documents which it has exchanged with its lawyer, it must produce “*relevant material* of such a nature as to demonstrate that the communications fulfill the conditions for being granted legal protection. . . .”¹³⁵ This seems to suggest two things: first, that a simple assertion on the part of a company that all the prerequisites for the protection of confidentiality had been met would not be sufficient in the event of disagreement between the company and the Commission officials; and second, that the firm would not be obliged to disclose the whole contents of the documents at issue. “Relevant material,” however, could lead to confusing interpretation of the lawyer client privilege. For instance, how could it be shown that the communication between lawyer and client was made for the purposes of the client’s rights of defence without at the same time disclosing the whole contents of the communication? Whereas it is relatively easy to establish the independence of a lawyer, the question of establishing exactly when the communication was exchanged for the purpose of the client’s rights of defence is likely to be more problematic.

Despite the practical difficulties, if the Commission’s officials deem the documents produced to be satisfactory, this would seem to be the end of the affair and the entire contents of the document would not have to become known to the officials. If the parties disagree, however, the only recourse open to the Commission is to order the firm, pursuant to article 14(3) of Regulation 17, “either to supply such additional evidence as the Commission considers necessary or to produce the communications in question whose confidentiality, in the Commission’s view, is not protected in law.”¹³⁶

The firms concerned may, if they so wish, contest the Commission decision on the basis of article 173 of the EEC

134. *See id.* at 1610, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757, at 9059 (Ground 17 of the Judgment).

135. *Id.* at 1613, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757, at 9060 (Ground 29 of the Judgment) (emphasis added).

136. *See id.* at 1613, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757, at 9061 (Ground 31 of the Judgment).

Treaty. Although this kind of recourse does not have a suspensory effect¹³⁷ (i.e., the firm will still be obliged to produce the documents or additional evidence demanded by the Commission), it may request the Court to take interim measures of protection where certain other conditions are met.¹³⁸

Since *AM & S Europe*, the Court has become the only body competent to give a definitive judgment on the protection of confidentiality in cases where the application of the protection is disputed between the Commission officials and the undertaking whose premises are being investigated. This is due to the fact that the Commission is acting "in a field as vital to the functioning of the Common Market as that of compliance with the rules on competition, the solution of disputes . . . may be sought only at *Community level*."¹³⁹ This is reasonable to the extent that the Court has, as the supreme judicial institution, the final say in interpreting Community law. This does not, on the other hand, seem to pose problems for the speedy administration of justice.¹⁴⁰ It could, however, make the Court of Justice into a court of first instance, a notion that was definitely not intended by the Treaties establishing the European Community.¹⁴¹

137. See EEC Treaty, *supra* note 1, (art. 85).

138. See Gray, *Interim Measures of Protection in the European Court*, 4 EUR. L. REV. 80 (1979).

139. *AM & S Europe*, 1982 E. Comm. Ct. J. Rep. at 1613, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757, at 9060 (Ground 30 of the Judgment) (emphasis added).

140. Although the procedure before the Court lasted about two and a half years, it is hoped that the procedure in *AM & S Europe* will be much shorter in the future because, in the event of an application to the Court, the case can be decided by a chamber. Moreover, as happened in *AM & S Europe*, documents may be examined only by the Advocate-General and the Judge-Rapporteur. There is not a lengthy lapse of time where an application for interim measures is submitted, since the application is usually decided only by the President of the Court.

141. See *National Carbonising Co. v. Commission*, 1975 E. Comm. Ct. J. Rep. 1193, 12 Common Mkt. L.R. 457; see also *AM & S Europe*, 1982 E. Comm. Ct. J. Rep. at 1586-87, 1598, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757, at 9044, 9052; Kuyper & van Rijn, *supra* note 38, at 15.

II. PRACTICAL CONSEQUENCES AND FUTURE DEVELOPMENTS FOLLOWING THE RECOGNITION OF THE PRINCIPLE OF CONFIDENTIALITY

The importance of *AM & S Europe* resides in the fact that the Court incorporated a general principle, common to the laws of the Member States, into Community law, notwithstanding the fact that the extent and the criteria for applying it were found to vary widely from country to country. When the Court laid down the conditions for incorporation and application of the general principle in Community law, however, it based its conclusions solely on those elements of the principle common to the laws of the different Member States. The consequence of this was not only the abandonment of the practice followed of incorporating the most "progressive solution"¹⁴² into Community law, but also the imposition of conditions which are not entirely justifiable. Indeed, one may wonder whether it would not have been more appropriate for the Court merely to have acknowledged the existence of the principle of confidentiality in Community law and to have left to the Community legislature the task of defining its scope and limits.¹⁴³

The most important consequence of the judgment lies in the limitation of the powers of investigation conferred on the Commission by article 14 of Regulation 17. However, it should be stressed that the effects of the Court's ruling are in practice less important than they appear to be. The Court of Justice did not rule that all the communications exchanged between lawyer and client are protected by the principle of confidentiality but only those which meet the fairly restrictive conditions it imposed.

Although the Court made no specific mention of it, protection of confidentiality will have to be applied, *mutatis mutandis*, in the framework of the Commission's powers to collect

142. See H. KUTSCHER, *METHODES D'INTERPRETATION VUES D'UN JUGE DE LA COUR* 29 (1976).

143. This was done by the Court of Justice with regard to the general principle of limitation periods in Community competition law in *Boehringer Mannheim GmbH v. Commission*, 1970 E. Comm. Ct. J. Rep. 769, 795, [1967-1970 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8085, at 8221, 8242; and in *ICI*, 1972 E. Comm. Ct. J. Rep. at 653, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8161, at 8001, 8026.

information on the strength of article 11 of the same Regulation. Confidentiality will presumably also apply in the case of investigations carried out by the competent authorities of the Member States on the strength of article 13 of Regulation 17. It should be noted, however, that in the course of these investigations the national authorities will be applying their domestic rules on procedure (including the rules on legal privilege) while enforcing EEC substantive law on competition.¹⁴⁴ Inquiries into sectors of the economy on the basis of article 12 of Regulation 17 would appear to present a greater number of problems. It is generally admitted that this type of inquiry does not constitute initiation of the procedure in the sense indicated earlier in this paper.¹⁴⁵ It is therefore debatable whether the communications exchanged between an undertaking and an independent lawyer, in order to enable the former to reply innocuously to questions put by the Commission on the strength of article 12, will be deemed to have been made for the company's rights of defence, and thus to be protected by the principle of confidentiality. It is submitted here that the company will be entitled to claim protection for those communications which, if requested in the course of investigations under article 14 of the Regulation, would have been held to be protected by confidentiality. The Court considered the principle applicable even to communications exchanged before the initiation of the administrative procedure if they have "a relationship to the subject-matter of that procedure."¹⁴⁶

It remains to be seen whether the *AM & S Europe* judgment will trigger demands for the protection of confidentiality in other fields, such as: the competition rules of the European Coal and Steel Treaty,¹⁴⁷ the Euratom Treaty;¹⁴⁸ the an-

144. See J. THEISING, H. SCHRÖTER & J.F. HOCHBAUM, *LES ENTENTES ET LES POSITIONS DOMINANTES DANS LE DROIT DE LA C.E.E.* 515-17 (Jupiter ed. 1977).

145. See *supra* note 38 and accompanying text.

146. See *AM & S Europe*, 1982 E. Comm. Ct. J. Rep. at 1611, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757, at 9060 (Ground 23 of the Judgment).

147. Compare Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 1973 GR. BRIT. T.S. No. 2 (Cmd. 5189) (official English translation), 261 U.N.T.S. 140 (1958) (unofficial English translation) (arts. 65(3) and 66(4)) *with id.* (arts. 47 and 86); see also Decision No. 14-64, [1963-64 Special Edition] O.J. EUR. COMM. 162 (8 July 1964); Commission Decision No. 379/84/ECSC of 15 February 1984, 27 O.J. EUR. COMM. (No. L 46) 23 (1984).

148. See Treaty Establishing the European Atomic Energy Commission, Mar. 25, 1957, 1973 GR. BRIT. T.S. No. 1 (Cmd. 5179-II), 298 U.N.T.S. 169 (arts. 81 and 82).

tidumping investigations under Regulation 2176/84¹⁴⁹ and Decision 2177/84;¹⁵⁰ or, the cases under article 213 of the EEC Treaty and under other general principles of law such as self-incrimination.¹⁵¹ It is submitted that the wording of the Court's judgment in *AM & S Europe* does not exclude such a possibility.¹⁵²

The impact of *AM & S Europe* on undertakings and associations of undertakings operating within the Community is very significant. They will either have to confine themselves to oral advice from their in-house lawyers or seek counsel from independent lawyers if they wish their communications to benefit from legal privilege. They may also have to take appropriate measures when Commission officials are conducting an investigation on their premises to ensure that communications exchanged with their lawyers and undertaken in order to fulfill the conditions laid down by the Court do not inadvertently (or due to their own ignorance) come into the hands of Commission officials. This could be achieved through appropriate organization of the firm's archives (perhaps by filing strictly legal papers separately from commercial papers) or through the presence of a lawyer operating in a supervisory capacity during the investigation. Provision of adequate information to employees of the firm empowered to represent it or bind it vis-à-vis third parties, particularly as regards the procedure to be followed in protecting confidentiality, will make an effective contribution to safeguarding legal privilege.

For national lawyers' associations in general, and the Consultative Committee of the Bars and Law Societies of the EEC in particular, the need to take measures to inform their members is all too obvious. It would be expedient for the Consultative Committee, in its capacity as the association representing lawyers at Community level, to take timely measures to harmonise the rules of professional ethics and discipline in all Member States. This would perhaps constitute the first step to-

149. 27 O.J. EUR. COMM. (No. L 201) 1 (1984).

150. *Id.*

151. See *Community Report: Due Process in the Administrative Procedure*, 3 FEDERATION INTERNATIONALE POUR LE DROIT EUROPÉEN 11-1, at 11-5 (1978) (contribution of C.D. Ehlerman and D. Oldekop).

152. See *AM & S Europe*, 1982 E. Comm. Ct. J. Rep. at 1610, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757, at 9059 (Ground 18 of the Judgment).

wards the extension of legal privilege in the future to in-house lawyers.

Such an ideal objective would be extremely difficult, if not impossible, to achieve in the near future since this would also necessitate the harmonisation of the laws on the exercise of the legal profession. It may be argued that, if in-house lawyers' associations in all Member States succeed in bringing their members within rules of professional ethics and discipline similar to those of independent lawyers, the Community might be willing to extend protection of confidentiality to in-house lawyers, even if they are not in fact registered with a bar.

At the legislative level, the Community is confronted at present with the question of whether protection of confidentiality should also be extended to lawyers from non-Member States and, if so, in what way. It is suggested here that in order to achieve this aim the Commission may have to consider one or more of the following approaches: (a) it can adopt internal Community legislation; (b) it could resort to modes of international cooperation by concluding international agreements and treaties of a bilateral or multilateral nature with interested non-Member States; and (c) it could explore the use of a conflict-of-laws approach.

The first two approaches entail a number of possible courses of action. Under the first approach the Commission may concede protection of confidentiality to non-Member State lawyers by: 1) issuing a non-binding administrative declaration to that effect on the part of the Commission alone or, preferably, all the Community institutions in terms analogous to those of the common declaration for the protection of human rights in the Community;¹⁵³ 2) making appropriate amendments to the relevant provisions of Regulation 17; and 3) proposing a new Regulation to deal exclusively with all the questions arising from the protection of confidentiality in the Community.¹⁵⁴ Under the second approach the Commission may choose from among the following options: 1) to accede

153. 20 O.J. Eur. Comm. (No. C 130) 1 (1977). In this case, proceedings before the Court of Justice will also be covered. See Faull, *Legal Professional Privilege (A.M. & S): The Commission Proposes International Negotiations*, 10 EUR. L. REV. 119 (1985).

154. The same occurred with Commission Regulation 2988/74, 17 O.J. EUR. COMM. (No. L 319) 1 (1974), concerning limitation periods in competition proceedings.

to, or propose, non-binding instruments of international cooperation, such as the OECD Recommendation on cooperation between Member countries on restrictive business practices affecting international trade,¹⁵⁵ or the USA-Canada Understanding;¹⁵⁶ 2) to conclude international agreements of a bilateral nature, such as the USA-West Germany agreement relating to mutual cooperation regarding restrictive business practices;¹⁵⁷ or to propose the conclusion of similar agreements of a multi-lateral nature;¹⁵⁸ and 3) to become a party to the existing international conventions dealing with this matter, such as the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters of 1970.¹⁵⁹ Finally, under the third approach, the Commission would not be required to take any concrete legislative measures, but instead would have to adopt the solutions to be decided by the conflict-of-laws approach in each individual case.

The Commission recently decided to recommend to the Council the opening of negotiations with non-Member States for the conclusion of international agreements in accordance with the procedure provided for in article 228 of the EEC Treaty.¹⁶⁰ This choice will be better understood if the question of extending legal privilege to non-Member States lawyers is placed within the factual and legal framework within which the

155. See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, COMPETITION LAW ENFORCEMENT: INTERNATIONAL CO-OPERATION IN THE COLLECTION OF INFORMATION, Annex I (1984) (adopted by the Council at its 501st meeting on Sept. 25, 1979) [hereinafter cited as "COMPETITION LAW ENFORCEMENT"].

156. COMPETITION LAW ENFORCEMENT, *supra* note 155, Annex IV, at 113.

157. See *id.* at 115.

158. As to the question whether these may be considered to be "mixed" agreements, see *infra* note 180 and accompanying text.

159. The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, opened for signature March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 [hereinafter cited as the "Hague Convention on Evidence"]. The Convention has been ratified by Denmark, France, Norway, Portugal, Sweden, the United Kingdom, the United States and West Germany. For an original analysis, see Amram, *Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, 12 I.L.M. 327 (1973). For more recent accounts dealing with the Convention, see in particular Borel & Boyd, *Opportunities for and Obstacles to Obtaining Evidence in France for Use in Litigating in the United States*, 13 INT'L LAW. 35 (1979); Collins, *Opportunities for and Obstacles to Obtaining Evidence in England for Use in Litigating in the United States*, 13 INT'L LAW. 27 (1979); Shemanski, *Obtaining Evidence in the Federal Republic of Germany: The Impact of the Hague Evidence Convention on German-American Judicial Cooperation*, 17 INT'L LAW. 465 (1983).

160. See COM(84) 548 final, *supra* note 97.

Commission's power to collect information is most likely to arise. For this purpose two broad categories of factual situations may be distinguished.

It is useful to keep in mind that as a universally established rule, the laws of every sovereign authority have force and produce legal effects within the boundaries of its state and bind all subject to it, but not beyond.¹⁶¹ Accordingly, the Court's ruling in *AM & S Europe* cannot be considered to have modified the right of protection of confidentiality of non-Member States lawyers and clients established outside the territorial limits of the Community. It must also be recalled here that requests for the supply of information and documents sent by the Commission on the strength of article 11 of Regulation 17 to a company established outside the EEC can be lawfully refused by the company apart from the fact that the non-Member State in whose territory the company is established may consider such a request to represent an unlawful exercise of extraterritorial jurisdiction by the Commission and to constitute an infringement of its national sovereignty.¹⁶² On the other hand, the Commission may not dispute the assertion of legal privilege by claiming that some of the conditions for the application of the Community principle of confidentiality were not fulfilled if the company decides to abide by the Commission's request by supplying certain documents and refusing others on the ground that they are protected by legal privilege under its domestic law. As a matter of law, the Commission is obliged in such cases to observe moderation and self-restraint and take into account the substantive laws and procedural rules in the foreign forum when exercising its investigatory powers to obtain information in the possession of persons abroad. Accordingly, the resolution of such conflicts cannot depend on the adoption of unilateral legislative measures by the Community because

161. See Maier, *Extraterritorial Jurisdiction at a Crossroads: an Intersection Between Public and Private International Law*, 76 *AM. J. INT'L L.* 280, 282 (1982); Mann, *The doctrine of international jurisdiction revisited after twenty years*, 186 *RECEUIL DES COURS*, 19, 20 (1984).

162. There is no controversy that the taking of formal action on foreign territory which is manifestly a part of the performance of official functions, or which includes an element of constraint, is generally unacceptable in the absence of an international agreement between the countries involved. See Meessen, *Antitrust Jurisdiction under Customary International Law*, 78 *AM. J. INT'L L.* 783, 790 (1984); *COMPETITION LAW ENFORCEMENT*, *supra* note 155, at 40-41.

they will infringe the rules of international law and the generally accepted principles of sovereignty, comity and fairness that govern cooperation between states in this field. The solution should be reached instead by exploring the appropriate modes of international cooperation. Non-binding instruments of international cooperation such as the OECD Recommendation or the USA-Canada Understanding,¹⁶³ which can be agreed upon more easily and are considered to be a useful first step towards the conclusion of further binding international agreements of a bilateral or multilateral nature, could regulate the question of both substantive and investigatory jurisdiction in antitrust matters.

The Hague Convention on Evidence¹⁶⁴ is also important, particularly in cases where the national courts or competition authorities of the Member States are those who apply articles 85 and 86 of the Treaty,¹⁶⁵ and in cases under article 13 of Regulation 17. In such cases information and documents in the possession of persons abroad may be requested only by the national court adjudicating the case by means of letters of request.¹⁶⁶ Article 11 of the Hague Convention on Evidence¹⁶⁷ allows for the protection of legal privilege under the laws of both the requesting and requested State, and even of third states. It would appear that the Community can, in principle, become a member of the Hague Convention on Evidence,¹⁶⁸ although the question whether it would be opportune to do so, and under what conditions, needs to be studied further and falls outside the ambit of this article.¹⁶⁹

163. See COMPETITION LAW ENFORCEMENT, *supra* note 155.

164. *Supra* note 159.

165. Taking into account the fact that articles 85 and 86 of the Treaty are considered to be directly applicable, national courts and authorities remain competent to apply and enforce Community competition. *BRT v. SABAM*, 1974 E. Comm. Ct. J. Rep. 51, [1974 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8269, at 9185-38—9186.

166. See Borel & Boyd, *supra* note 159, at 38-41; Collins, *supra* note 159, at 29-30; Shemanski, *supra* note 159, at 469; Sutherland, *The Use of the Letter of Request (or Letter Rogatory) for the Purpose of Obtaining Evidence for Proceedings in England and Abroad*, 31 INT'L & COMP. L.Q. 784 (1982).

167. *Supra* note 154.

168. *Id.*

169. The chief fact militating against the Community's accession to the Convention is that the Commission is not a court and, as a rule, the Convention is considered not to apply to pre-trial discovery or to administrative proceedings. Certain of these obstacles are, however, being disputed. *But see* Borel & Boyd, *supra* note 154, at 37-

Secondly, the approach would be different in the case of third-country lawyers and clients who are established within the European Community or in the case of multinational companies with subsidiaries in the EEC. These lawyers are effectively subject to the provisions of the Community principle of confidentiality and, as was explained earlier,¹⁷⁰ legal documents found at the premises of these companies that emanate from such lawyers are not protected by legal privilege.

In the intermediate cases where the business documents which the Commission is seeking to obtain from a company inside the EEC country are located at the parent company's or a subsidiary's offices outside Community territory, the Commission may, by using the "enterprise unity" doctrine, send requests for the supply of information through the company which is established in the EEC. This may be done whether it be the subsidiary or the parent company of a multinational group and whichever of the two is the actual subject of the inquiry, provided that the market behaviour of those companies produces direct and substantial effects within the Community.¹⁷¹ As a matter of either law or policy, these requests generally rely on voluntary cooperation by the parties. Moreover, if the Commission tries to exercise personal jurisdiction over the party in control of the documents or other evidence that is located abroad, it may be faced with the defence that production of those documents would violate the law (including the law on legal privilege) of the country that is the situs of the evidence. If the Commission now wishes to extend protection of confidentiality to legal documents connected with this type of situation, it would have to concede protection to third-coun-

45; Collins, *supra* note 154, at 29-33; Shemanski, *supra* note 154, at 475; Sutherland, *supra* note 166, at 790. The Community position would be modified, however, by the expected establishment of an administrative tribunal of first instance to hear actions against Commission decisions in the competition field. See Commission des Communautés Européennes, *Programme de travail de la Commission*, [1985 Supp.] BULLETIN DES COMMUNAUTÉS EUROPÉENNES, 22 (presented to the European Parliament on Mar. 12, 1985). It is interesting to note that in the United Kingdom the Convention has been extended to the European Court of Justice, enabling evidence for proceedings before the Court of Justice to be taken at its request by U.K. courts. See *The Evidence (European Court) Order 1976*, S.I. 1976 No. 428, reprinted in 7 HALSBURY'S STATUTORY INSTRUMENTS 299-300 (5th ed. 1985).

170. See *supra* note 75 and accompanying text.

171. See *ICI*, 1972 E. Comm. Ct. J. Rep. 619, [1971-1973 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8161.

try lawyers who are established or provide their legal services in, or from within, the European Community. Such an extension could be achieved by the use of Community legislative instruments alone. The adoption of an administrative declaration by the Commission or, preferably, by all Community institutions, may be the simplest solution, but it would not create binding rights. An amendment to Regulation 17, on the other hand, although quite possible and actually urged by the European Parliament,¹⁷² may risk a wider range of unwelcome amendments to Regulation 17 and thus does not seem to be desirable from the Commission's point of view.

The adoption of a new Regulation to deal exclusively with the questions arising from the protection of legal privilege in the Community may resolve a wider range of problems. These include such problems as the question of according confidentiality to in-house lawyers; the waiver and loss of the right to privilege; the extension of the principle in the framework of other provisions of Regulation 17 (such as article 11 and, possibly, articles 12 and 13) and, in respect of other fields of Community law (such as in antidumping investigations, or in cases involving article 213 of the EEC Treaty).¹⁷³

All these possible approaches would involve unilaterally conceding protection of confidentiality to third-country lawyers without sufficient guarantee that EEC lawyers who are established or provide their legal services in third countries will enjoy the same degree of protection. The fact that similar protection of legal privilege already exists in the legal system of certain third countries and also extends to foreign lawyers¹⁷⁴ would seem to take away a substantial part of the problem of reciprocity. However, the question posed above would remain with regard to EEC lawyers who are established or provide their services in third countries whose legal system does not contain any rules or precedent protecting legal privilege or where it does protect legal privilege such protection is not afforded to lawyers from foreign countries. The Commission may make the application of the EEC principle of confidential-

172. See 27 O.J. EUR. COMM. (No. C 127) 131 (1984) (European Parliament's Resolution).

173. See *supra* notes 144-51 and accompanying text.

174. For a very interesting case in United States law, see *Renfield Corp. v. E. Remy Martin & Co.*, 98 F.R.D. 442 (D. Del. 1982).

ity to third-country lawyers subject to the condition that similar protection is accorded to EEC lawyers established or providing their services in third countries by inserting an appropriate provision in the Community legal instruments to be adopted. In such cases, substantial and investigatory jurisdiction in anti-trust matters will be decided by means of the conflict-of-laws approach, and confidentiality will be accorded by the Community to third-country lawyers only on condition that EEC lawyers in the third country concerned enjoy the same or equivalent right to protection.¹⁷⁵ However, it would appear that the right of EEC lawyers will be best guaranteed only if binding international agreements of a bilateral or multilateral nature explicitly regulating the question of reciprocity are concluded.

It is important to examine the grounds advanced by the Commission in its decision to propose to the Council that protection of confidentiality be extended to independent lawyers from third countries by the conclusion of international agreements. Although the laws of some third countries already contain rules or abide by precedent on the protection of confidentiality similar or equivalent to those in Community law and which also apply to communications with lawyers entitled to practise in a Member State of the Community, the Commission seems to be particularly concerned, following the Court's ruling in *AM & S Europe*, with whether at least some of those third countries may amend their rules or procedures so as to withdraw the protection now afforded to Community lawyers.¹⁷⁶ What the Commission therefore appears to be seeking to achieve by the conclusion of international agreements is to safeguard the existing rights of Community lawyers in the provision of their legal services in third countries, or to facilitate the exercise of the legal profession in third countries and only indirectly to protect the principle of confidentiality in the application of the competition rules of the EEC Treaty.

The second argument advanced by the Commission for extending protection of confidentiality to independent lawyers

175. The question of reciprocity will be decided in each particular case by providing sufficient proof that the law of the third country whose lawyer is seeking the protection of confidentiality assures the same degree of protection in the same or similar circumstances to lawyers from Member States of the Community.

176. See COM (84) 548 final, *supra* note 97 ¶ 3.

from third countries is based on the grounds of equity in international relations.¹⁷⁷ Obviously, the Commission is acutely aware of the international implications of the Court's Judgment on this point. Indeed, as was explained earlier, the legal order of the Community may not question the validity of the safeguards with respect to confidentiality applied by the legal systems of third countries, neither can it "export" minimum standards which must be observed for the protection of confidentiality to apply. At present, however, in those third countries which recognize the principle of confidentiality, EEC lawyers enjoy protection of confidentiality in virtually all fields of law, whether civil, criminal, or administrative. The limited approach proposed by the Commission is therefore quite likely to instigate amendments in the laws of third countries, which will limit the protection of confidentiality only to their competition rules. On the other hand, it is not certain whether all third countries will respond to the Commission's call for the conclusion of bilateral agreements or whether clear-cut competition rules exist in the legal systems of all the third countries. Furthermore, it cannot be argued that advising on competition law problems amounts to the totality of the legal services provided by EEC lawyers in third countries, nor that separation of advice on competition law from other advice on complex business transactions will always be easy for the protection of confidentiality to apply. Moreover, the notion of an independent lawyer, i.e. a lawyer who is not bound to his client by a relationship of employment, will be defined each time by the national law of the state concerned, while the content of the rules of professional ethics and discipline vary widely from one Member State to the next. The question may arise, therefore, as to which Member States law should serve as a basis for comparison in order to determine whether the law of a given third country is similar or equivalent to Community standards. The Commission's proposal to conclude bilateral agreements that are limited only to EEC competition rules, is quite likely to disturb the existing norms of protection of confidentiality. It is also likely to restrict the protection currently available to EEC lawyers who provide services in non-Member States with re-

177. See Confidentiality of Legal Documents, *supra* note 97.

spect to the confidentiality of communications rather than to the safeguarding of their rights.

On the basis of the foregoing considerations it may be concluded that the proposed bilateral agreements with third countries should not limit the protection of confidentiality to the competition rules of the EEC Treaty. They should extend it, on the basis of reciprocity, to all fields of law where there is an equivalent system in the laws of third countries and Community law.¹⁷⁸ This is necessary because if protection is now limited to competition rules only, the Community may have to modify those agreements every time a new question of protection or of concluding new agreements arises. In addition, the wording of the agreements to be proposed should be sufficiently general to cover all the problems and discrepancies described earlier, otherwise their conclusion should be postponed until a harmonization of the national laws of the Member States in the respective fields is accomplished.

Another factor militating against the immediate conclusion of such bilateral agreements is that the Court's Judgment is considered to be inconclusive and incomplete in certain aspects. Another opportunity should be given to the Court of Justice to reconsider some aspects of the principle of confidentiality, unless either the Commission or the Council are prepared to obtain beforehand the opinion of the Court as to whether the agreements so envisaged are compatible with the provisions of Community law.¹⁷⁹ It may be inferred from these considerations that the kind of agreements actually proposed by the Commission would be appropriate only for those third countries where protection of confidentiality of communications exchanged between lawyer and client is either not recognized at all or is limited only to competition rules. By contrast, in the case of third countries where protection of legal privilege is widely applied to all fields of law and to foreign lawyers, it may be reasonably expected that the most the Commission's proposal could achieve would be the minimum degree of protection of confidentiality.

178. In such a case, article 87 of the Treaty, as the Commission has proposed, cannot serve as the sole legal basis. Hence, article 235 or the second indent of article 59 will also have to be invoked. See EEC Treaty, *supra* note 1, 298 U.N.T.S. 11.

179. See EEC Treaty, *supra* note 1.

Finally, the Commission has also proposed that the protection of confidentiality will be assured not only in respect of proceedings conducted by the Commission but also in respect of proceedings conducted by national courts or administrative authorities of the Member States.¹⁸⁰ Given the fact that the ultimate conclusion of these international agreements would substantially influence the right of EEC lawyers to exercise their profession in third countries, it is questionable whether the Community has exclusive competence to negotiate and conclude such agreements or, since they appear in reality to be mixed agreements, the Community and the Member States should be considered competent.

CONCLUSION

After two and a half years of proceedings the Court partially annulled Commission Decision 79/670 to the extent that it demanded disclosure of the whole text of documents that were held by the Court to be covered by the general principle of confidentiality to Commission officials. *AM & S Europe* was the first case in which the principle of protection of confidentiality came before the Court both from the point of view of substance and as to the procedure for applying it.¹⁸¹ Given the minimal number of cases where the question of legal privilege arose before the *AM & S* case and the negligible number of instances in which the principle of confidentiality was invoked after the *AM & S* Judgment, it may be concluded that, unlike in legal theory, the consequences of the principle of confidentiality in practice are not as important as one might originally have thought.

The establishment of legal privilege as a principle of Com-

180. See COM (84) 548 final, *supra* note 97.

181. The Commission seems to have applied the principle of protection of confidentiality to documents exchanged between a lawyer and client in the *Quinine* case, 12 J.O. COMM. EUR. (No. L 192) 5, 19 (1969); see also J. THIESING, H. SCHROTER & J.F. HOCHBAUM, *supra* note 144. For unknown reasons, the question of confidentiality was not raised when the case came before the Court of Justice. See *Boehringer Mannheim*, 1970 E. Comm. Ct. J. Rep. 769, [1967-1970 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8085. A possible explanation is that the written communications exchanged between the firm Nogentaise and its legal advisors had been previously published by the U.S. Department of Justice where the same international quinine cartel was also banned. For this reason, the written communications had already lost their confidentiality when the Commission took its decision.

munity law is a compromise between conflicting values and interests. The proper administration of justice requires, on the one hand, that infringements of the competition rules be detected and prohibited in the interests of all. On the other hand, the right of the individual to exercise his rights freely implies recourse to appropriate legal advice if they are to be safeguarded. Finally, the Court of Justice had a further difficulty to surmount: it had to reconcile the divergent national legislations with the Community interest, the latter being expressed and fostered in the unremitting and long-term process of European integration.