

*AM&S EUROPE
LIMITED V.
COMMISSION OF
THE EUROPEAN
COMMUNITIES:
CONFIDENTIALITY
OF LAWYER-CLIENT
COMMUNICATIONS
IN COMMISSION
COMPETITION
INVESTIGATIONS*

I. INTRODUCTION

In 1982, the Court of Justice of the European Communities ("EC")¹ established Community level confidentiality rights for lawyer-

¹There are three organizations collectively termed the EC. They are the European Economic Community ("EEC"), the European Coal and Steel Community ("ECSC") and the European Atomic Energy Community ("Euratom"). COMMON MKT. REP. (CCH) ¶ 101. Within the EEC there are four institutions which

client communications in EC competition investigations. These rights previously existed only in the individual Member States.² The Court's decision in *AM&S Europe Limited v. Commission of the European Communities*³ has benefited companies with operations in the European Economic Community ("EEC") by creating a right, where no right previously existed, to confidentiality for documents containing legal advice. The significance of the *AM&S* decision, however, does not lie in the confidentiality rights it established. Instead, its significance lies in the four conditions it imposes for a finding of confidentiality and on the impact these conditions will have on the practice of law and the operation of companies within the EEC. Application of these conditions will result in the absolute exclusion of all in-house lawyers and all lawyers from non-EEC countries from the protection of the confidentiality principle. Failure to be intimately acquainted with the details of the *AM&S* decision and failure to ensure that all legal documents meet each of the conditions imposed by the court may result in legal advice from in-house and even independent lawyers being used against the company in a com-

carry out the Community functions. They are the Council, the Commission, the Parliament, and the Court of Justice. In very general terms, the Council is a quasi-executive, quasi-legislative body, the Commission is an administrative body, the Parliament is the legislative body, and the Court of Justice is the judicial body. COMMON MKT. REP. (CCH) ¶¶ 100 and 121. The Member States of each of the Communities have agreed that these four institutions will perform the functions of each of the three Communities. COMMON MKT. REP. (CCH) ¶ 101. Unless otherwise indicated, all references to Community refer to the European Economic Community.

²1982 E. Comm. Ct. J. Rep. 1575, at 1610-11, [1979-1981 Transfer Binder] [Court Decisions] COMMON MKT. REP. (CCH) ¶ 8757, at 9059. Although the question of confidentiality of lawyer-client communications had not previously been submitted to the Court of Justice, each of the Member States recognizes some form of confidentiality for lawyer-client communications. *Id.* at 1610 and 1632, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9059 and 9070. See *infra* notes 17 & 18 and accompanying text. Furthermore, the Commission of the European Communities acknowledged it recognizes some confidentiality rights in a competition investigation. Answer to Written Question No. 63, 21 O.J. EUR. COMM. (No. C 188) 30 (1978), COMMON MKT. REP. (CCH) ¶ 2532.45. But see Commission Decision No. 69/240/CEE, 12 J.O. COMM. EUR. (No. L 192) 5 (1969), [1965-1969 Transfer Binder] [New Developments] COMMON MKT. REP. (CCH) ¶ 9313, where an adverse legal opinion discovered by the Commission was an aggravating factor in determining the fines to be imposed under Article 85(1) of the EEC Treaty.

Other predecision discussion of confidentiality rights in Community law includes Stewart and Vaughan, *Does Legal Professional Privilege Exist In The EEC?*, 72 L. SOC'Y GAZETTE 1207 (1975); H.L. SELECT COMMITTEE ON THE EUROPEAN COMMUNITIES, COMPETITION PRACTICE, 8TH REPORT, No. 91, (1981-1982).

³1982 E. Comm. Ct. J. Rep. 1575, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8757.

petition investigation undertaken by the EC Commission. For this reason, this note is directed to all excluded lawyers and all companies with operations in EEC Member States.

II. THE PROGRESS OF *AM&S* FROM COMMISSION INVESTIGATION THROUGH COURT OF JUSTICE DECISION

Pursuant to Council Regulation 17, in February, 1978, the Commission of the European Communities ordered an investigation into suspected price fixing and market sharing agreements between several firms in the European zinc industry, including Australian Mining & Smelting Europe Limited ("*AM&S*").⁴ Commission personnel conducted the investigation at *AM&S*' Bristol, England offices in February, 1979.⁵ Upon completion they took several documents with them and left a written request for additional, specified documents.⁶ *AM&S* provided many of the documents requested but refused to disclose the remainder claiming legal privilege.⁷ In response, the Commission issued a Commission Decision⁸ requiring *AM&S* to submit to a new investigation and to produce all re-

⁴*Id.* at 1579, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9039. The investigation was ordered pursuant to Article 14(1), Regulation 17. (1959-1962) O.J. EUR. COMM. ENG. SPEC. ED. 87 (1962), COMMON MKT. REP. (CCH) ¶ 2531. Article 14(1) provides that "[i]n carrying out the duties assigned to it by Article 89 and by provisions adopted by Article 87 of the Treaty, the Commission may undertake all necessary investigations into undertakings and associations of undertakings." *Id.* Articles 85 and 86 of the Treaty specifically prohibit price fixing and market sharing agreements between companies within the Community. COMMON MKT. REP. (CCH) ¶¶ 2005-2101. Article 87 of the EEC Treaty requires the Council to adopt regulations to enforce the principles of Articles 85 and 86 of the EEC Treaty. COMMON MKT. REP. (CCH) ¶ 2201. Regulation 17 is one such regulation.

⁵1982 E. Comm. Ct. J. Rep. at 1579, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9039.

⁶*Id.*

⁷*Id.* The Court emphasized that *AM&S* was claiming protection by the doctrine of legal privilege as understood in common law jurisdictions. In extending confidentiality rights to documents in Commission investigations the Court did not adopt any one concept of lawyer-client privilege but instead created a hybrid concept which it termed the confidentiality principle. See *infra* notes 16 & 17 and accompanying text.

⁸Commission Decision No. 79/670/EEC, 22 O.J. EUR. COMM. (No. L 199) 31 (1979), [1978-1981 Transfer Binder] [Regulations List and New Developments] COMMON MKT. REP. (CCH) ¶ 10,153. The Commission Decision is an order by the Commission, authorized under Article 14(3), Regulation 17, for the company to submit to an investigation. It is often a follow-up to an order under Article 14(1) if the company refuses to cooperate. See *supra* note 4.

quested documents including "all documents for which legal privilege is claimed."⁹ AM&S again refused, but indicated it would allow the Commission to inspect a portion of each document to establish that the document was, in fact, privileged.¹⁰ The Commission rejected the proposal and reasserted its demand for the documents.¹¹

AM&S brought an action for review of the Commission Decision in the Court of Justice under Article 173 of the EEC Treaty.¹² AM&S requested that the Court either void that portion of the decision which required production of the documents AM&S claimed were privileged, or void the entire decision insofar as it required AM&S to produce each of the documents in its entirety.¹³ AM&S complied with the court order to submit the documents to the Court, and the Advocate-General and Judge-Rapporteur prepared a report summarizing the documents to assist the Court in its decision-making process.¹⁴

In its decision, the Court recognized that Community law derives from both the legal and economic interpenetration of the Member

States.¹⁵ Therefore, the Court reasoned, Community law must be based upon the principles and concepts common to the laws of the individual Member States.¹⁶ Even though each Member State recognizes some rights of confidentiality for lawyer-client communications, there is wide disparity between the Member States regarding the criteria each imposes for granting confidentiality rights.¹⁷ Despite this disparity, the Court concluded that the confidentiality principle could be extended to the Community level in the context of a Commission investigation because: 1) sufficient similarity existed within the Member States' laws to find a generally recognized confidentiality principle; and, 2) application of such a principle protecting the confidentiality of certain business records was not precluded by Council Regulation 17, the regulation creating the competition investigation and controlling its use by the Commission.¹⁸

In extending the confidentiality principle to the Community level the Court imposed four conditions necessary for a finding of confidentiality:

¹⁵1982 E. Comm. Ct. J. Rep. at 1610, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9059. The Court noted that when creating Community law it must consider the laws of the individual Member States. This requirement is contained in Article 3 of the EEC Treaty which provides that "... the activities of the Community shall include . . . the approximation of the laws of Member States. . . ." COMMON MKT. REP. (CCH) ¶ 171; Edward, *Confidentiality in the EEC*, 75 GUARDIAN GAZETTE 941, 942 (1978).

¹⁶Basing Community law on the common elements of the Member States' laws does not mean that total unanimity is required. 1982 E. Comm. Ct. J. Rep. at 1650, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9082. Judge Kutscher, previously of the Court of Justice, stated:

[t]here is complete agreement that when the Court interprets or supplements Community law on a comparative law basis it is not obligated to take the minimum which the national solutions have in common, or their arithmetic mean or the solution produced by a majority of the legal systems as the basis of its decision. The Court has to weigh up and evaluate the particular problem and search for the 'best' and 'most appropriate' solution.

Kutscher, J., *Methods of Interpretation as Seen by a Judge at the Court of Justice*, COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES JUDICIAL AND ACADEMIC CONFERENCE I-1, at I-29 (Sept. 27-28, 1976).

¹⁷1982 E. Comm. Ct. J. Rep. at 1610, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9059. Advocate-General Slynn briefly outlined relevant elements of the Member States' laws in his opinion to the Court. *Id.* at 1651-54 & 1656-58, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9083 & 9085-87. See generally, Edward, *Confidentiality in the EEC*, *supra* note 15; Edward, THE PROFESSIONAL SECRET, CONFIDENTIALITY AND LEGAL PROFESSIONAL PRIVILEGE IN THE NINE MEMBER STATES OF THE EUROPEAN COMMUNITY, (The Edward Report) (published by the Commission Consultative Des Barreaux De La Communauté Européenne).

¹⁸1982 E. Comm. Ct. J. Rep. at 1611, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9059-60. See *supra* notes 4 & 17.

⁹*Id.* at 33, [1978-1981 Transfer Binder] COMMON MKT. REP. (CCH) ¶10,153, at 10,473, Article 1(b).

¹⁰1982 E. Comm. Ct. J. Rep. at 1579-80, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9039-40.

¹¹*Id.* at 1580, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9040.

¹²*Id.* at 1578, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9039. Article 173 authorizes the Court to review the legality of acts of the European Council and Commission. COMMON MKT. REP. (CCH) ¶ 4635.

¹³1982 E. Comm. Ct. J. Rep. 1578, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9039. Article 174 of the EEC Treaty authorizes the Court to annul improper actions taken by the Commission and Council. COMMON MKT. REP. (CCH) ¶ 4641. See *supra* notes 8 & 12.

¹⁴1982 E. Comm. Ct. J. Rep. at 1643, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9078. 1982 E. Comm. Ct. J. Rep. at 1617. The documents can be divided into the following five categories: 1) communications from AM&S executives requesting advice from independent English lawyers and communications containing legal advice sent from those lawyers to AM&S; 2) communications from AM&S lawyers requesting advice from independent lawyers of non-Member States; 3) documents from independent lawyers of a non-Member State containing legal advice to AM&S executives; 4) documents from AM&S lawyers containing legal advice to AM&S executives; and, 5) documents from one AM&S executive to another requesting legal advice or summarizing legal advice received. See *id.* at 1625 & 1643-44, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9065 & 9078. See A.B.A. Sec. of Int'l L. and Prac., Rep. to the House of Delegates No. 301 (December 8, 1982), amended and approved 1983 Midyear Meeting (February 7-9, 1983).

The Court viewed only the report, so there was no predecision disclosure of the disputed documents.

- 1) the documents must be written communications between lawyer and client;
- 2) the documents must be made for the purposes and in the interests of the client's rights of defense;
- 3) the documents must emanate from independent lawyers; and,
- 4) the confidentiality principle must apply uniformly to any lawyer entitled to practice his profession in one of the Member States.¹⁹ Each of these conditions was a requirement common to the individual Member States.²⁰

Applying these conditions to the documents in dispute, the Court held that the Commission's decision was void insofar as it required AM&S to disclose to the Commission those documents which met each of the four conditions.²¹ The Court refused to grant confidentiality to the remaining disputed documents.²²

This note examines the four conditions for a finding of confidentiality. It specifically discusses the various interpretations of, the rationales for, and the legal and business communities' reactions to the conditions. This note also suggests the nature of possible future judicial and legislative action regarding each condition.

This note concludes that the Court did not go far enough in defining the term "written communications" in the first condition. The Court's language leaves unresolved the question whether recordings or written summaries of oral communications are protected during competition investigations. More importantly, this note concludes that the Court went too far in excluding all non-EEC lawyers from the protection of the confidentiality rule. Such exclusion is in conflict with the laws of the individual Member States and may well violate existing treaties between the United States and the individual Member States by which the EEC is obligated to abide. Finally, this note concludes that despite the exclusion of in-house lawyers from the protection of the confidentiality rule, the Court's decision is in accord with existing law in the individual Member States. Further change can be achieved only through legislative action.

¹⁹1982 E. Comm. Ct. J. Rep. at 1611-12, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9059-60.

²⁰*Id.* at 1611, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9059.

²¹*Id.* at 1614-15, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9061.

²²*Id.* at 1615, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9061.

III. THE EFFECT OF THE COURT'S DECISION ON THE EEC BUSINESS COMMUNITY AND ON INDEPENDENT EEC LAWYERS

A. "... Confidentiality Of Written Communications ..."

The Court recognized that confidentiality of written communications between lawyer and client is a general principle of the laws of the individual Member States,²³ and held that such communications are to be protected if the other three conditions — for the client's defense, from an independent lawyer and from an EEC lawyer — are satisfied.²⁴ The Court, however, strictly limited its discussion to written communications, *i.e.*, recordings or written summaries of oral communications were not discussed.²⁵ The Court's limitation of its decision to determining the confidentiality of only written communications is evidenced by the Court's statement that the dispute was essentially concerned with the "confidentiality of written communications."²⁶

The Court's limitation leaves a very important question unanswered. Does the written communication requirement extend to recordings or written summaries of oral communications between lawyer and client?²⁷ The minority view is that the Court's repeated references to written communications indicates the Court's clear intention not to protect anything but written communications.²⁸ The majority view differs for two reasons.²⁹ First, the Court limited its decision to the question presented, the confidentiality of written communications.³⁰ Second, neither the parties, intervenors, Advocates-General, nor the Court suggested that there be any limitation of the confidentiality principle to written communications. Therefore, confidentiality should also extend to written summaries or

²³*Id.* at 1610, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9059. *See supra* notes 16 & 17 and accompanying text.

²⁴*Id.* at 1611-12, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9059-60).

²⁵This was not an express holding of the Court but commentators have interpreted it as such because of the Court's many references to written communications. Mehigan, *Legal Professional Privilege in EEC Law*, 79 L. Soc'y GAZETTE 689, 690 (1982).

²⁶1982 E. Comm. Ct. J. Rep. at 1609, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9058.

²⁷Fox, *Professional Privilege in EEC Law*, 127 SOLIC. J. 233, 236 (1983).

²⁸*Id.* at 235-36; Millett, *Legal Confidentiality and the European Commission*, 126 SOLIC. J. 532, 533 (1982).

²⁹Mehigan, *supra* note 25; Duffy, *Legal Privilege and Community Law*, 132 NEW L.J. 580, 582 (1982).

³⁰*See supra* notes 14 and 25.

recordings of oral communications.³¹

An analysis of the opinions of the Advocates-General³² and of the Court's opinion support the assertion that written summaries and recordings of oral communications between lawyer and client are also protected. Advocate-General Warner suggested to the Court that the Commission's investigative powers under Regulation 17 were subject to a company's right to claim confidentiality for all communications between itself and its lawyers made for the purpose of seeking or giving legal advice.³³ Advocate-General Slynn directly addressed whether only written communications were protected. He suggested that confidentiality should apply to the contents of a communication "(given orally or in writing), in whatever form it is recorded — whether in a letter or in a summary or in a note or in minutes."³⁴ The opposing arguments of the Commission and the French Government do not challenge the proposition that recordings and written summaries of oral communications should be included within the confidentiality principle. Those arguments were limited to asserting that neither Regulation 17 nor any other element of Community law includes an express provision granting confidentiality to lawyer-client communications in a Commission investigation. Hence, confidentiality should not be granted in this instance.³⁵ Neither the Commission nor the French Government distinguished between written communications and recordings or written summaries of oral communications. The Court adopted the policy concerns expressed by the Advocates-General, stating

³¹See *supra* note 29.

³²Article 166 of the EEC Treaty provides that the Advocate-General is to assist the Court in its decision making process COMMON MKT. REP. (CCH) ¶ 4607. In practice, the Advocate-General submits to the Court an opinion on what he believes the law to be on the particular issue. These opinions are not legal authority but they do provide background on the various legal issues posed and give insight into the Court's reasoning of its decision.

³³1982 E. Comm. Ct. J. Rep. at 1637, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9073.

³⁴*Id.* at 1655, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9085. See *supra* note 17.

³⁵1982 E. Comm. Ct. J. Rep. at 1583-85 & 1597, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9042-43 & 9051. The Commission and the French Government, in making this argument, referred to a parliamentary committee report (the Deringer Report) claiming it was legislative history of the EC Parliament's intent to reject any idea of protection for documents in a Commission investigation under Regulation 17. See generally, 1961-1962 PARL. EUR. DOC. (No. 57) (1961). The Advocates-General questioned the validity of this report as legislative history since the report was directed to another Article of Regulation 17 and then criticized only that portion of the Regulation which excused representatives of companies being investigated from answering incriminating questions. 1982 E. Comm. Ct. J. Rep. at 1620-21 & 1658-60, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9062-63 & 9087-88.

that "confidentiality serves the requirements . . . that any person must be able, without constraint, to consult a lawyer . . ."³⁶ Confidentiality of recordings and written summaries of oral communications is at least as important as confidentiality of written communications in protecting the right of an individual to consult a lawyer. Therefore, a holding of confidentiality for recordings or written summaries of oral communications would be consistent with the Court's opinion.

Undoubtedly, future litigation will result from the Court's lack of clarity in defining the written communications condition. The use of oral communications for requesting or giving legal advice is an established fact in the practice of law, particularly in the operation of in-house legal departments. The restrictive language of the opinion is, however, understandable since the only documents at issue were written communications.³⁷ The Court could have minimized the likelihood of litigation either by making more definite policy statements or by using more explicit wording. Nevertheless, the Court is likely to hold in the future that recordings or written summaries of oral communications are confidential. A holding of confidentiality is probable for two reasons: first, consistency with the minimal policy statements the Court did make; and second, no party offered any arguments which distinguished between written communications and recordings or written summaries of oral communications.

B. ". . . For The Purposes And In The Interests Of The Client's Rights Of Defense . . ."

As the second condition for confidentiality, the Court required that a communication must have been prepared for the purposes and in the interests of the client's rights of defense.³⁸ This condition is common to the laws of each of the Member States and for that reason was imposed at the Community level.³⁹ The Court may have been persuaded by Advocate-General Slynn's argument that the confidentiality rule covers "communications between lawyer and client made for the purpose of obtaining or giving legal advice . . . whether legal proceedings have begun

³⁶1982 E. Comm. Ct. J. Rep. at 1610, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9059.

³⁷See *supra* note 14.

³⁸1982 E. Comm. Ct. J. Rep. at 1611, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9059-60.

³⁹*Id.* See *supra* notes 16 & 17 and accompanying text.

or not.”⁴⁰

As a policy basis for an effective confidentiality principle, the Court held that Regulation 17 ensures that the company being investigated has the opportunity to exercise its rights of defense to the fullest.⁴¹ Hence, the Court held that Regulation 17 requires the extension of confidentiality to written documents exchanged between lawyer and client after initiation of the Commission's investigation.⁴² Confidentiality is also extended to prior written communications relating to the subject matter at issue in the Commission investigation.⁴³

The Court broadly construed the requirement that the communication be prepared for the client's defense. First, the Court held that the condition could be satisfied as long as the contents of the communication merely related to the client's defense in the current investigation.⁴⁴ This requirement was liberal enough to permit the Court to find that a communication exchanged five years before an investigation was ordered was made for the purpose of the client's defense.⁴⁵ Second, the Court found the condition was satisfied even when the documents were not strictly defensive but were made to avert possible future conflict.⁴⁶

⁴⁰1982 E. Comm. Ct. J. Rep. at 1655, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9085. Advocate-General Slynn suggested a slightly broader limitation for applying confidentiality than that adopted by the Court. After noting the Court's broad construction of the conditions, however, the difference becomes merely a matter of semantics. See *infra* notes 44-46 and accompanying text.

⁴¹1982 E. Comm. Ct. J. Rep. at 1611, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9059. The eleventh recital in the Preamble to Regulation 17 provides that undertakings concerned must be accorded the right to be heard by the Commission. COMMON MKT. REP. (CCH) ¶ 2401. Article 19, Regulation 17 similarly provides that the Commission must give the undertakings concerned the opportunity to be heard on the matters to which the Commission has taken objection. COMMON MKT. REP. (CCH) ¶ 2581.

⁴²1982 E. Comm. Ct. J. Rep. at 1611, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9059-60.

⁴³*Id.* at 1611, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9060.

⁴⁴*Id.*

⁴⁵Requiring earlier exchanged communications merely to relate to the client's defense is not as strict a condition as requiring that the communications actually be prepared for the client's defense. In this case, almost all of the documents in question were exchanged in late 1972 or early 1973. *Id.* at 1614, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9061. This is a period beginning shortly before and ending shortly after accession of the United Kingdom to the EEC, and five years before the Commission's investigation order in February, 1978.

⁴⁶*Id.* Most of the documents in question were not defensive in nature, *i.e.*, prepared after formal action was brought against AM&S. Rather, they were

Little comment on the client's defense condition is available.⁴⁷ This passive acceptance is probably due to the fact that the Court's broad interpretation excludes few documents for which confidentiality is sought. Documents rarely contain legal advice from an independent lawyer which is relevant to a Commission investigation and yet not relevant to the company's defense. Therefore, most documents are granted confidentiality.⁴⁸

The Court's broad interpretation of the client's defense condition suggests that few, if any, obstacles are presented by application of the confidentiality principle to communications which otherwise qualify. Consequently, the condition is of minimal importance to businesses concerned with maintaining confidentiality.

Such a broad interpretation of the condition is consistent with other portions of the opinion. Each of the other conditions either encourages a broad application of confidentiality rights or narrows the scope of those rights only to the extent necessary to avoid disparity in Member States' laws. The exception is the condition which excludes all non-EEC lawyers from the confidentiality rule. This condition, however, has no basis in Member States' laws and probably will be eliminated in the future, thus maintaining the internal consistency of the Court's decision.⁴⁹

C. “. . . The Position And Status As An Independent Lawyer . . .”

The Court's third condition was that confidentiality will be granted only where the communications “emanate from independent lawyers.”⁵⁰ The Court defined “independent lawyers” as lawyers who are not bound to their client by an employment relationship.⁵¹ Hence, lawyers in private practice are distinguished from lawyers who are employed full time by their client, typified by in-house lawyers.⁵²

prepared before any action could even have been considered. See *supra* note 45.

⁴⁷Millett, *supra* note 28; Fox, *supra* note 27, at 235; Joshua, *The Element of Surprise: EEC Competition Investigations Under Article 14(3) of Regulation 17*, 8 EUR. L. REV. 3, 16 (1983).

⁴⁸Forrester, *Legal Professional Privilege: Limitations on the Commission's Powers of Inspection Following the AM&S Judgment*, 20 COMMON MKT. L. REV. 75, 84-85 (1983).

⁴⁹See *infra* notes 77-89 and accompanying text.

⁵⁰1982 E. Comm. Ct. J. Rep. at 1611, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9059.

⁵¹*Id.*

⁵²The Court adopted the language of the Advocates-General in distinguishing between employed and independent lawyers. Advocate-General Slynn discussed the distinction and included within “employed lawyers” those lawyers em-

The Court's independent lawyer requirement was derived from the individual Member States' common practice of extending full professional status only to independent lawyers.⁵³ Each Member State has organized its legal profession in a unique manner, creating multiple categories of legal advisers and assigning different professional rules and responsibilities to each category in accordance with the type of work done by the legal advisers comprising that category.⁵⁴ Council Directive 77/249 establishes those categories whose members are recognized by Community law as having full status as lawyers.⁵⁵

The Advocates-General suggested that confidentiality should be provided to all lawyers of full professional status. Advocate-General Slynn first claimed that the Commission considered "lawyer" to apply both to a lawyer in private practice and to a salaried lawyer employed by a company as long as both are subject to similar rules of professional ethics.⁵⁶ He then suggested that all lawyers employed by the Community, by government departments, or by the legal departments of private companies should be considered sufficiently independent to be within the scope of the confidentiality rule provided such lawyers are professionally qualified and subject to rules of professional ethics.⁵⁷ Advocate-General Warner took the same position.⁵⁸

The Court did not fully accept the suggestions of the Advocates-General. It agreed that confidentiality should be provided only to lawyers of full professional status. In applying the professional status standard, however, the Court was aware that in certain of the Member States, being an employed lawyer is incompatible with having full professional status.⁵⁹ The Member States require full professional status as a condi-

played by the Community, the Member States' governments, and in the legal departments of private companies. *Id.* at 1655, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9085.

⁵³*Id.* at 1611-12, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9059-60. The Court also considered the necessity for the lawyer to be able to provide legal assistance in full independence, referring to the Protocols On the Statute of the Court of Justice of the EEC. COMMON MKT. REP. (CCH) ¶ 4731. See *infra* notes 54-60 and accompanying text.

⁵⁴S. CONE, REGULATION OF FOREIGN LAWYERS, at 31-57 (2d. ed. 1980). See generally *supra* note 17.

⁵⁵Article 1, para. 2, Council Directive 77/249/EEC, 20 O.J. EUR. COMM. (No. L 78) 17 (1977), COMMON MKT. REP. (CCH) ¶ 1494.

⁵⁶1982 E. Comm. Ct. J. Rep. at 1646-47, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9080.

⁵⁷*Id.* at 1655, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9085.

⁵⁸*Id.* at 1622-23, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9064.

⁵⁹Advocate-General Slynn stated that the Member States denying full professional status to employed lawyers are Belgium, France, Italy and Luxembourg.

tion for granting confidentiality.⁶⁰ Consequently, because the Court must consider the common principles of Member States' national laws, the Court could, therefore, only grant confidentiality to lawyers with full professional status.

The Court did not extend protection to all lawyers of full professional status when it created the Community level confidentiality rights. It rejected any final distinction based on full professional status because Community law (specifically Articles 85 and 86 of the EEC Treaty) must be applied uniformly among the Member States.⁶¹ By allowing confidentiality solely on the basis of a lawyer's professional status, the uniform application requirement would be frustrated. In one country communications from an in-house lawyer would not be granted confidentiality while in another country the same communication from the same in-house lawyer would be granted confidentiality.⁶² To satisfy the uniform application requirement, the Court held that only independent lawyers, all of whom have full professional status,⁶³ could obtain confidentiality rights.⁶⁴ Thus, all nonindependent lawyers in all Member States were excluded from the scope of the confidentiality rule, regardless of professional status.

The Court's ruling on this matter has not been well received. In-house lawyers in the United Kingdom have been especially critical of the Court's ruling.⁶⁵ They emphasize that, as applied in the United Kingdom, the Court's establishment of professional status as the determinant for granting confidentiality rights contradicts the Court's application of the independent lawyer requirement as to the United Kingdom.⁶⁶ This is because many in-house lawyers in the United Kingdom have full professional status and are governed by the same rules of professional ethics as are

1982 E. Comm. Ct. J. Rep. at 1655, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9085. See *id.* at 1633, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9070-71.

⁶⁰Fox, *supra* note 27.

⁶¹Preamble to Regulation 17, (1959-1962) O.J. EUR. COMM. ENG. SPEC. ED. 87 (1962), COMMON MKT. REP. (CCH) ¶ 2401. See *supra* note 16.

⁶²The nonuniformity becomes obvious if one were to assume the existence of a private company with operations in the United Kingdom and France and with headquarters in the United Kingdom. If confidentiality were applied solely on the basis of full professional status, communications from the United Kingdom branch to headquarters might be confidential but communications from the French branch would be automatically excluded from protection.

⁶³Fox, *supra* note 27.

⁶⁴1982 E. Comm. Ct. J. Rep. at 1611, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9059.

⁶⁵Editorial, *Legal Privilege in EEC Proceedings*, 1982 J. Bus. L. 263-64; Mehigan, *supra* note 25, at 690.

⁶⁶Editorial, *supra* note 65; Mehigan, *supra* note 25, at 690.

lawyers in private practice.⁶⁷ Furthermore, in many instances an independent lawyer may have only one client. Consequently, any distinction conditioned upon being an independent lawyer must be questionable.⁶⁸ These commentators conclude first, that the Court's holding, as applied to the United Kingdom, arbitrarily distinguishes between categories of lawyers, and second, that the proper basis upon which to grant confidentiality is whether the lawyer has full professional status.⁶⁹

The American Bar Association's Section of International Law and Practice has recognized the potential impact of the independent lawyer condition on American in-house lawyers. In 1983 it adopted a resolution requesting that the Commission extend the confidentiality rule to all in-house lawyers, including those in the United States.⁷⁰ To date, the requested extension of the confidentiality rule has not occurred.⁷¹

Despite discontent with the independent lawyer requirement, the Court's method of resolving the disparities between the classifications of lawyers in the Member States was a practical solution. First, Articles 85 and 86 of the EEC Treaty must be applied uniformly among the Member States.⁷² Conditioning confidentiality on full professional status instead of independence would violate the uniformity requirement since the full professional status standards vary between the Member States.⁷³ Second, extending the confidentiality rule to include all in-house lawyers would violate the requirement that Community law be based upon the common principles of the Member States' laws, since not all in-house lawyers are granted full professional status by all Member States.⁷⁴

Elimination of the independent lawyer condition in the near future is unlikely. First, such an action by the Court would probably violate

⁶⁷Editorial, *supra* note 65; Mehigan, *supra* note 25, at 690. See also Alfred Crompton Amusement Machines Limited v. Commissioner of Customs and Excise, [1972] 2 All E.R. 353, C.A.

⁶⁸In Editorial, *supra* note 65, the commentator argued that the Court's decision did not automatically exclude all in-house lawyers. Rather, the determination whether an employed lawyer is sufficiently independent to be within the confidentiality privilege depends on the terms of the contract and the surrounding circumstances. See Fox, *supra* note 27, at 236.

⁶⁹Sherliker, *EEC Law*, 3 THE COMPANY LAW. 222, 223 (1982).

⁷⁰A.B.A. Sec. of Int'l L. and Prac., Rep. to the House of Delegates, No. 301, *supra* note 14.

⁷¹Interview with Cynthia R. Price, Section Administrator, A.B.A. Sec. of Int'l L. and Prac., (Oct. 31, 1983); *Confidentiality of Legal Documents: Application of the Competition Rules*, 16 BULL. OF THE EUR. COMM., June 1983, at 43.

⁷²See *supra* note 61 and accompanying text.

⁷³Fox, *supra* note 27. See *supra* note 62 and accompanying text.

⁷⁴See *supra* notes 54-60 and accompanying text.

principles of Community law.⁷⁵ Second, legislative action by the EC Parliament is not immediately foreseeable because the Parliament has yet to establish Community-wide standards for law diplomas, a necessary prerequisite to uniform standards of professional status.⁷⁶ Third, passage of EC legislation requires a lengthy period of time. Consequently, for the present, businesses with EEC operations will be forced to content themselves with either retaining independent lawyers for legal opinions in the area of competition law or assuming the risk of possible disclosure of communications in a Commission competition investigation.

D. ". . . Any Lawyer Entitled To Practice His Profession In One Of The Member States . . ."

The final condition was that the confidentiality principle must apply without distinction to any lawyer entitled to practice his profession in one of the Member States, regardless of the State in which the client lives.⁷⁷ This uniform granting of confidentiality throughout the Community is not surprising since the EEC Treaty provides for freedom of citizens of individual Member States to work, live, and provide services anywhere in the Community.⁷⁸

The Court, however, went further. It stated that "the written communications at issue must accordingly be considered, insofar as they emanate from an independent lawyer entitled to practise his profession in a Member State, as confidential. . . ."⁷⁹ Clearly, the Court limited availability of the confidentiality principle to EEC lawyers.⁸⁰

The Court's position is very surprising. Neither the parties, intervenors, nor the Advocates-General suggested that any distinction should

⁷⁵See *supra* notes 72-74 and accompanying text.

⁷⁶See CONE, *supra* note 54, at 54-55. See *supra* notes 55 & 59. Legislation has been proposed to provide for uniform recognition of diplomas by each of the Member States. This action has not been adopted. The Council took explicit notice of this in Council Directive 77/249, *supra* note 55, where the Council stated that the Directive does not contain provisions on the mutual recognition of law diplomas. *Id.* at fourth recital to the Preamble.

⁷⁷1982 E. Comm. Ct. J. Rep. at 1612, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9060.

⁷⁸Article 48, EEC Treaty, COMMON MKT. REP. (CCH) ¶ 1001, Article 52, EEC Treaty, COMMON MKT. REP. (CCH) ¶ 1301 and Article 54, EEC Treaty, COMMON MKT. REP. (CCH) ¶ 1501.

⁷⁹1982 E. Comm. Ct. J. Rep. at 1614, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9061.

⁸⁰See Millett, *supra* note 28; Joshua, *supra* note 47, at 16-17; and Duffy, *supra* note 29.

be made between a lawyer entitled to practice in the EEC and one who is not so entitled. It is unlikely that the Court made this distinction inadvertently since the Court had Advocate-General Slynn's report on the documents which noted that many of the documents were prepared by independent lawyers outside the EEC.⁸¹ Nor is the Court's decision based upon criteria common to Member States' laws since at least one Member State holds directly to the contrary.⁸² Furthermore, a major impetus for the creation of the EEC was recognition of the benefits of the free movement of goods and services.⁸³ Erecting a barrier against free movement of services by precluding confidentiality for communications from non-EEC lawyers is inconsistent with EEC principles. Probably the most important reason for questioning the EEC lawyer condition, however, is that the Court's holding may be contrary to the EEC Treaty. Article 234 provides that Community law may not interfere with rights and duties established by prior agreement between Member and non-Member States.⁸⁴ Each of the Member States has entered into a bilateral Treaty of Friendship, Commerce and Navigation with the United States.⁸⁵ A typical provision of such treaties requires that each nation guarantee to nationals

⁸¹Forrester, *supra* note 48, at 83-84. See *supra* note 14.

⁸²In *re* Duncan, 1968 P. 306, where legal privilege was granted to communications from a foreign legal adviser.

⁸³Article 3, EEC Treaty, COMMON MKT. REP. (CCH) ¶ 171.

⁸⁴Article 234, EEC Treaty, COMMON MKT. REP. (CCH) ¶ 5321.

⁸⁵Treaty of Friendship, Commerce and Navigation, March 27, 1956, United States-Netherlands, art. VIII, para. 1, 8 U.S.T. 2043, 2055, T.I.A.S. No. 3942; Treaty of Friendship, Establishment and Navigation, Feb. 23, 1962, United States-Luxembourg, art. VIII, para. 1, 14 U.S.T. 251, 257, T.I.A.S. No. 5306; Treaty of Friendship, Establishment and Navigation, Feb. 21, 1961, United States-Belgium, art. 8, para. 1, 14 U.S.T. 1284, 1296, T.I.A.S. No. 5432; Convention of Establishment, Nov. 25, 1959, United States-France, art. VI, para. 1, 11 U.S.T. 2398, 2405, T.I.A.S. No. 4625; Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, United States-Germany, art. VIII, para. 1, 7 U.S.T. 1839, 1848, T.I.A.S. No. 3593; Treaty of Friendship, Commerce and Navigation, Oct. 1, 1951, United States-Denmark, art. VII, para. 4, 12 U.S.T. 908, 915, T.I.A.S. No. 4797; Treaty of Friendship, Commerce and Navigation, Aug. 3, 1951, United States-Greece, art. XII, para. 4, 5 U.S.T. 1829, 1857-59, T.I.A.S. No. 3057; Treaty of Friendship, Commerce and Navigation, Jan. 21, 1950, United States-Ireland, art. VI, para. 1, 1 U.S.T. 785, 791, T.I.A.S. No. 2155; Treaty of Friendship, Commerce and Navigation, Feb. 2, 1948, United States-Italy, art. V, para. 4, 63 Stat. 2255, 2262-2264, T.I.A.S. No. 1965; Convention to Regulate Commerce, July 3, 1815, United States-Great Britain, 8 Stat. 228, T.S. No. 110, *extended indefinitely*, Renewal of Commercial Convention, Aug. 6, 1827, 8 Stat. 361, T.S. No. 117. While the treaties with Belgium, France, and Luxembourg were all entered into after 1958, the effective date of the EEC Treaty, the European Council authorized tacit renewal or continued operation of certain commerce treaties with non-Member States. Council Decision No. 80/1046/EEC, 23 O.J.

and companies of both signatories the right to engage lawyers of their choice.⁸⁶ The Court itself noted that "confidentiality serves the requirements . . . that any person must be able, without constraint, to consult a lawyer. . . ."⁸⁷ Hence, the Court's refusal to extend confidentiality rights to non-EEC lawyers is contrary to its own statement that any person must be able to consult a lawyer without constraint. Moreover, such constraint on consultation of a lawyer of one's own choosing may, in turn, be a violation of the several Treaties of Friendship, Commerce and Navigation, contrary to Article 234 of the EEC Treaty.⁸⁸

A change extending the confidentiality principle to include all lawyers ultimately will be achieved. No commentator has suggested a valid reason for maintaining such a distinction. Furthermore, efforts by the American Bar Association to encourage the Commission to reverse its position have had some success. The Commission has agreed to propose the opening of negotiations between the EC Council and other countries to discuss the reciprocal extension of confidentiality rights to lawyers of each country.⁸⁹

EUR. COMM. (No. L 307) 29 (1980).

⁸⁶"Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice." Treaty of Friendship, Commerce and Navigation, March 27, 1956, United States-Netherlands, art. VIII, para. 1, 8 U.S.T. 2043, 2055, T.I.A.S. No. 3942. Language to this effect is in all the treaties listed in *supra* note 85 except for the United Kingdom treaty. This sole omission is not damaging as foreign lawyers are already granted confidentiality rights in England. See *supra* note 82.

⁸⁷1982 E. Comm. Ct. J. Rep. at 1610, [1979-1981 Transfer Binder] COMMON MKT. REP. (CCH) at 9059.

⁸⁸Extending the language of the treaties and of the Court's opinion to grant a right to employ any lawyer may not be entirely accurate. The language of the commerce treaties grants only the right to engage a lawyer in the country in which the individual or company is living or operating, and the Court stated only that a person must be able to consult a lawyer. Neither the commerce treaties nor the Court specifically referred to lawyers of countries other than the country of operation or outside the EEC, respectively. See A.B.A. Sec. of Int'l L. and Prac., Rep. No. 301, *supra* note 14, at 21-24.

⁸⁹Forrester, *supra* note 48. See A.B.A. Sec. of Int'l L. and Prac., Rep. No. 301, *supra* note 14; BULL. OF THE EUR. COMM., *supra* note 71.

CONCLUSION

AM&S represents the establishment of Community level confidentiality rights for lawyer-client communications in Commission competition investigations. In extending the confidentiality rights to the Community level the Court required that:

- 1) the documents must be written communications between lawyer and client;
- 2) the documents must be made for the purposes and in the interests of the client's rights of defense;
- 3) the documents must emanate from independent lawyers; and,
- 4) the confidentiality principle must apply uniformly to any lawyer entitled to practice his profession in one of the Member States.

The Court limited its decision to written communications and did not decide whether recordings or written summaries of oral communications are included within the confidentiality rule. An examination of the Court's policy statements and the Advocates-General's opinions suggest that the issue will be resolved in favor of protection. The Court also excluded communications both from in-house lawyers and from non-EEC lawyers from the confidentiality rule. Despite the EEC legal community's discontent with the exclusion of in-house lawyers, the Court's decision was consistent with EEC and Member States' laws and will stand in the future unless certain fundamental political disagreements are resolved. As to the EEC lawyer condition, the Court appears to have erred, possibly violating the EEC Treaty as well as treaties between the independent Member States and the United States. This condition will almost certainly be changed in the near future, either by the Court in future decisions or through negotiations with other countries leading to the extension of reciprocal rights of confidentiality to independent lawyers.

The significance of the *AM&S* decision is that during competition investigations, lawyers and companies must now weigh the benefits of protection under the confidentiality rule against the costs of meeting these four conditions for obtaining such protection. Company legal departments and independent lawyers may very well have to make a significant change in their operations and practice of EEC law. At least for the time being, business executives desiring confidentiality rights would be wise to ensure that all communications are either in written form or strictly oral. No written summary or recording of such communications should be made, and all documents involving competitive practices within the EEC must come from lawyers who are both independent and who are entitled to practice within the EEC.

Although the costs and complexity of the steps that business must take to ensure the confidentiality of their communications are substantial, these steps appear to only minimally advance the interests of the EEC and its Member States. Furthermore, imposition of these burdens may

actually work to the detriment of the EEC by reducing incentives for business development in the Community. In order to maximize the benefits to the Community, the Member States, business, and all lawyers, changes must be effected by the Community institutions to eliminate the unnecessary burdens within the Court's holding. Specifically, it is urged that confidentiality rights be extended to all communications, oral or written or recorded, that legislation be enacted to extend confidentiality to all employed lawyers as well as salaried lawyers, and that confidentiality rights be extended to lawyers outside the EEC as well as those practicing in the EEC.

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