

The AM&S Case

Australian Mining & Smelting Europe Ltd. v. E.C. Commission

EUROPEAN COMMUNITY COMMISSION
2 COMMON MARKET LAW REPORTS 264 (1982)

Author's Note: A commission of the European Community (EC) initiated a proceeding questioning whether AM&S business activities violated regional competition laws. The EC sought documents prepared by the company's lawyers. AM&S did not want to comply, on the basis of a claimed attorney-client privilege from disclosure in legal proceedings. There was no provision in the various EC treaties and regulations regarding the viability of such a privilege from discovery in Community legal proceedings.

In 1979, AM&S (based in the United Kingdom) instituted proceedings to have Commission Decision 79/760/EEC of 6 July 1979 declared void. That provision required AM&S to produce a number of documents which the company claimed were insulated from discovery in these proceedings—on the basis of a supposed attorney-client privilege, which was not set forth in any Community law.

The following excerpt is the Second Opinion of the Advocate General (Sir Gordon Slynn). Under Community procedure, this EC official filed his opinion, analyzing the availability of the claimed privilege from discovery in proceedings pending before the EC's administrative and judicial tribunals. The Advocate General thus presented the analysis of whether there was a general principle (attorney-client privilege) in the laws of the various EC member States, and, whether it should apply in Community proceedings. The textbook author has supplied italics in certain passages.

Commission's Opinion: In February 1979, officials of the Commission required the applicants to make available documents which they wished to see in connection with an investigation ... of competitive conditions concerning the production and distribution of zinc metal and its alloys and zinc concentrates in order to verify that there is no infringement of Articles 85 and 86 of the EEC Treaty [the European Community's basic competition provisions]. The applicants produced copies of most of the documents. Some, however, were not produced ... on the basis that they were covered by legal confidentiality, which [allegedly] entitled the applicants to withhold them. The parties were invited to state at the re-opened oral hearing their views on the law as to, and legal opinions relating to, the existence and extent of the protection granted in investigative proceedings instituted by public authorities ... to correspondence passing between ... [the lawyer and his client AM&S].

The Commission's investigative powers ... [authorize it to] 'undertake all necessary investigations ...' and, to that end, its authorised officials are empowered to examine books and business records, to take copies of them, and to ask for oral explanations. *There is no reference to any exemption or protection which may be claimed on the basis of legal confidence.* Is that silence conclusive that no such protection is capable of applying in any form and in any situation? In my view it is not. The essential enquiry is, first, whether there is a principle of

Community law existing independently of the regulation, and, secondly, whether the regulation does on a proper construction restrict the application of that principle. ...

That *general principles* which have not been expressly stated in the Treaty or in subordinate legislation may exist as part of Community law, the observance of which the Court is required to ensure, needs no emphasis. ... The Commission argue[s] that there has to be a consensus among the laws of all the member-States, and that the Court cannot establish a principle which goes beyond that accepted by any one of the member-States.

It cited no specific authority for that proposition, nor indicated what is the necessary level or degree of consensus required to establish the existence of a general principle.

That national law may be looked at on a comparative basis as an aid to consideration of what is Community law is shown in many cases. ... Such a course is followed not to import national laws as such into Community law, but to use it *as a means of discovering an unwritten principle of Community law*....

The Court has been provided with extracts from legislation, case decisions and the opinions of academic authors ... to ... deal first with the general position as to the protection of legal confidence and then consider the position in relation to competition law.

In Belgium, it seems that confidential communications between lawyer and client are protected and cannot be seized or used as evidence. ...

In Denmark, the rules of the professional secret prevents lawyers from giving evidence of confidential information confided to them in their professional capacity, and a lawyer can refuse to produce documents covered by professional secrecy. Communications between an accused person and his lawyer are protected....

In Germany [and France], ... breach of the professional confidentiality by a lawyer is a criminal offence. Thus such documents in the hands of the lawyer cannot be seized.

...

In Greece, it seems that confidential communications in the hands of lawyers are protected in investigative proceedings instituted by judicial or administrative authorities. Documents in the hands of the client are covered by the general principle of privacy defined in ... the Constitution....

In Ireland and the United Kingdom, although there may be differences in detail, broadly the law of the two member-States is the same. ... It should be repeated, however that it covers both (a) communications between a person and his lawyer for the purpose of obtaining or giving legal advice whether or not in connection with pending or contemplated legal proceedings and (b) communications between a person and his lawyer and other persons for the dominant purpose of preparing for pending or contemplated legal proceedings.

In Italy, as in most of the member-States, the law forbids lawyers from giving evidence of the information confided in them by their clients and entitles them to withhold documents covered by the doctrine of professional secrecy. ... It seems that ... professional secrecy is a reflection of the right to a fair trial guaranteed by Article 24 of the [Italian] Constitution.

In Luxembourg, rules of professional secrecy and *les droits de la défense* [rights of the defense], it would seem, protect legal confidences in the hands of the lawyer, and of the client after proceedings have begun, but little case law has been produced showing the application of these rules in practice.

Dutch law forbids the revelation of confidences by persons exercising a profession, such

as lawyers. Coupled with this there is a right to refuse to give evidence on matters covered by professional secrecy. These matters include not only the information revealed by the client but also, in the case of lawyers, the legal advice they have given. ...

This summary is substantially, if not entirely, accepted by the Commission, the applicants and the body representing the Bars of all the member-States as being a fair and acceptable statement of the laws of member-States.

It seems to me significant that they were able to reach agreement as to the existence of the principles which are set out in the document which they prepared to read to the Court.

From this it is plain, as indeed seems inevitable, that the position in all the member-States is not identical. It is to my mind equally plain that there exists in all the member-States a recognition that the public interest and the proper administration of justice demand as a *general rule* that a client should be able to speak freely, frankly and fully to his lawyer. ... It springs essentially from the basic need of a man in a civilised society to be able to turn to his lawyer for advice and help, and if proceedings begin, for representation; it springs no less from the advantages to a society which involves complex law reaching into all the business affairs of persons, real and legal, that they should be able to know what they can do under the law, what is forbidden, where they must tread circumspectly, where they run risks.

...

The application [by AM&S] is based on the submission that in all the member-States written communications between lawyer and client are protected by virtue of a principle common to all those States, although the scope of that protection and the means of securing it vary from one country to another. According to the applicant, it follows from that principle ... that the protection is properly claimed on the ground that the documents in question are in fact covered by legal privilege.

*The interpretation of Article 14 of Regulation 17 [conferring investigatory powers on the EC]
(b) Applicability of the protection of confidentiality in Community Law*

...

However, the above rules do not exclude the possibility of recognising, subject to certain conditions, that certain business records are of a confidential nature. Community law, which derives from not only the economic but also the legal interpenetration of the member-States, must take into account the principles and concepts common to the laws of those States concerning the observance of confidentiality, in particular, as regards certain communications between lawyer and client. That confidentiality serves the requirement, the importance of which is recognised 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.

...

(d) The confidential nature of the documents at issue

...

In view of that relationship and in the light of the foregoing considerations, the written communications at issue must accordingly be considered, in so far as they emanate from an independent lawyer entitled to practice his profession in a member-State, as confidential and on that ground beyond the Commission's power of investigation under Article 14 of Regulation 17.