



In-House Counsel and the Attorney-Client Privilege

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Contrary to common law which provides that in-house lawyers (juristes d'entreprise) enjoy the same status as private practitioners (avocats), French law still considers these two professions as totally separate.

According to the French Bars Harmonized Regulations (Règlement Intérieur Harmonisé des Barreaux de France), which provide for professional rules of conduct, lawyers are subject to an obligation of absolute professional secrecy. Indeed, a lawyer must not reveal to a third party either her/his client's secret information, or the legal opinions she/he expresses to the client. A breach of such a duty by lawyers constitutes a professional misconduct that gives raise to disciplinary punishments and a criminal offense under the French Criminal Code. The lawyer can solely be released from this obligation in the exclusive case of defending herself/himself against a charge alleged by her/his client.

These texts also provide that communication between a lawyer and her/his client, whether to advise or to defend, are covered by legal privilege. Therefore, a lawyer is entitled in the event of an investigation by public authorities or Court to assert confidentiality over communications, written or verbal between herself/ himself and her/his client.

Besides, a lawyer can decline to testify on such confidential information.

Since the Decree of 27 June 2006, lawyers are required to declare to the Public Prosecutor any transaction they have knowledge of which involves sums which they know to be the proceeds of an offence (drug trafficking, fraud against the financial interests of the European Communities, corruption or organised crime, financing of terrorism) and when they execute for and on behalf of

their clients any financial or real-property transaction or when they participate by assisting their clients with the preparation or execution of transactions relating to: 1) the buying and selling of real property or business concerns; 2) the management of funds, securities or other assets belonging to the client; 3) the opening of bank current accounts, savings accounts or securities accounts; 4) organisation of the contributions required to create companies; 5) the formation, administration or management of companies; 6) the formation, administration or management of foreign-law trusts or any similar structure. Nevertheless, the president of the Bar of Paris has claimed that professional secrecy is the main principle while the obligation to declare certain sums or transactions remains the exception.

Under French law, in-house counsel is obliged to respect professional secrecy regarding the information qualified as «business secrets» they receive within the framework of their position with the company. Professional secrecy also applies to legal opinions they render to their «client», i.e. the company. A breach of this obligation is deemed as a criminal offense.

Nevertheless, as only lawyers are covered by a strict code of professional conduct, legal privilege is not extended to communications between in-house counsel and employees, officers or directors of a company that aim at obtaining legal opinions on subject related to their work.

At Community law level, both the Court of Justice and the European Commission reject for the same reasons the concept that the confidentiality privilege should apply to in-house counsel.

Consequently, in a legal procedure, the prosecuting authority has the right and the ability to use documents communicated between the in-house counsel and her/his «client». Therefore, an in-house counsel can neither resist an investigation by public authorities (either EU or national public authorities), nor refuse a domiciliary visit in the business premises, nor oppose a seizure related to evidence. For instance, French or EU trade Administrations for an inquiry into unfair trading practice may use internal memos against the company.

In addition, unlike lawyers, in-house counsel can be called to testify or to provide evidence against the company they work for. However, they have no access to criminal files, which is not the case for lawyers who have full and free access to criminal files.

The major problem is that privilege may be lost when the communication is made with the in-house counsel in a country that does not recognize legal privilege with in-house counsel. A remedy may consist for in-house counsel in avoiding giving written advice especially on competition law. Furthermore, legal advice of major importance should be provided by outside counsel in order to ensure the protection of legal privilege. Outside counsel may always undertake to himself write what the in-house counsel would normally write in order to have full confidentiality applicable to a legal opinion.