The CFI's approach appears to be motivated by a desire to avoid subjecting rules with a sporting objective to a full assessment under Article 81, almost certainly because of doubts as to the appropriateness of close scrutiny of sporting rules by EC law. That is not a wholly unreasonable concern. However, it is not the case that competition law is incapable of taking sporting considerations into account: if a rule has a good sporting justification and is proportionate, there is no reason why it could not be justified either on the basis of a *Wouters*-type analysis under Article 81(1) or under the Article 81(3) exemption criteria. If, on the other hand, a rule in the sporting sector generates appreciably restrictive effects on competition and is not in fact necessary and proportionate, for example because the same benefits could be achieved by a less restrictive rule, it is not obvious why the rule should not be prohibited by Article 81. This area therefore remains difficult and the correct legal approach uncertain. It is to be hoped that the ECJ will in due course have an opportunity to consider the CFI's judgment in *Meca-Medina* and provide clarity.

JULIAN GREGORY

LEGAL ADVICE PRIVILEGE AND PRESENTATIONAL ADVICE

IN *Three Rivers District Council* v. *Governor and Company of the Bank of England (No. 6)* [2004] UKHL 48, [2004] 3 W.L.R. 1274 *("Three Rivers (No. 6)")* the House of Lords held that legal advice privilege is not restricted to advice about legal rights and liabilities but extends to "presentational advice".

The claim for privilege arose in litigation following an inquiry into the collapse of the Bank of Credit and Commerce International SA ("BCCI"). The inquiry considered the manner in which the Bank of England ("the Bank") discharged its statutory role to supervise financial institutions in particular. The Bank engaged Freshfields, and appointed officials within the Bank (the Bingham Inquiry Unit ("BIU")) to co-ordinate communications with and submissions to the inquiry. Section 1(4) of the Banking Act 1987 relieves the Bank of any liability unless it discharged its obligations "in bad faith". As a result, the claim by BCCI's liquidators and creditors against the Bank alleged misfeasance in public office. As Lord Scott noted, given the need to demonstrate bad faith, it was not surprising that the claimants sought disclosure from the Bank in the widest possible terms.

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The Bank claimed that communications between BIU and Freshfields relating to a statement to be submitted to the inquiry qualified for legal professional privilege. The authorities distinguish between legal advice privilege and litigation privilege. In light of *Re L (a minor)* [1997] A.C. 16 (which held that litigation privilege attaches only to "adversarial" and not to "inquisitorial" or "investigative" proceedings) the Bank relied on legal advice privilege, which protects communications between lawyer and client for the purpose of seeking and furnishing legal advice.

Tomlinson J. held that it was implicit in an earlier Court of Appeal decision that privilege did not extend to advice as to how the Bank's evidence might be best presented to the inquiry: [2003] EWHC 2565 (Comm). The Court of Appeal dismissed the Bank's appeal on the basis that legal professional privilege is an extension of litigation privilege and is therefore restricted to advice about legal rights and obligations, and does not extend to "presentational advice": [2004] EWCA Civ 218, [2004] Q.B. 916.

The House of Lords unanimously rejected this approach. Finding that there was no *a priori* reason why legal professional privilege should be regarded as stemming either from litigation privilege or more generally from the giving of legal advice, the House of Lords considered the authorities and held that they were clear: legal professional privilege is not dependent on there being a link to litigation.

The Court of Appeal's narrow approach appears to have been prompted by more general doubts about the value of legal advice privilege. The House of Lords did not share these doubts. All judgments endorsed the desirability, in a complex world, of orderly arrangement of affairs. This requires candour in dealings with lawyers, which, in turn, depends on assurance that matters discussed will not be disclosed except with the client's consent. However, the House of Lords acknowledged that the inevitable conflict with the interest in placing all relevant material before the court demands that the privilege be kept within limits.

With this in mind, the House of Lords endorsed the Court of Appeal's approach in *Balabel* v. *Air India* [1988] Ch. 317, especially the observation of Taylor L.J. at 330 that "legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context".

The consensus which emerges from *Three Rivers (No. 6)* is that advice is "legal" where it involves use of legal skills. Legal skills relate to matters "within the ordinary scope of a solicitor's duty". More specifically, advising on presentation of the client and the

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client's story in the most favourable light, determining which material is relevant and assembling it in an orderly fashion are "unquestionably legal skills". Lord Rodger noted that the Bank was not seeking Freshfields' assistance "as bankers, accountants, rhetoricians or anything else: it was seeking their comments and assistance as lawyers professing expertise in the field".

This advice must be given in a legal context—it must relate to rights, liabilities, obligations or remedies under private or public law. However, this does not demand that the client's rights or obligations are at stake. The importance of the interest in protecting personal reputation was noted, as was the fact that clients may legitimately consult their lawyers about someone else's legal position. It was suggested that privilege will apply to advice given to participants in all courts, tribunals and inquiries including inquests and planning inquiries, to promoters and opponents of private bills and to advice by Parliamentary counsel to the Government relating to the preparation of public bills. Baroness Hale suggested that whether the context is legal "may depend upon whether it is one in which it is reasonable for the client to consult the special professional knowledge and skills of a lawyer".

While accepting the possibility of marginal cases, the House of Lords thought that the case before it was "not in the least marginal". The advice sought involved the application of legal skills in the context of an inquiry into whether the Bank's discharge of its obligations under the Banking Acts had been reasonable in the circumstances.

This clarification of legal advice privilege is welcome. However, this privilege only protects communications between lawyer and client. In *Three Rivers District Council* v. *Governor and Company of the Bank of England (No. 5)* [2003] EWCA Civ 474, [2003] Q.B. 1556 the Court of Appeal held that Freshfields' "client" was BIU only, not other employees of the Bank. That decision was not the subject of the appeal in *Three Rivers (No. 6)* and the House of Lords refused to approve or disapprove it. However, Lord Carswell drew attention to the fact that the Court of Appeal adopted this approach "even though it recognised that a corporation can only act through its employees". The weight of opinion is against this restrictive approach to who is the "client" and it seems likely that this issue will also come to the House of Lords.

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