CLEARY GOTTLIEB STEEN & HAMILTON LLP

BRUSSELS

IN THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

INTERVENTION STATEMENT

IN CASE T-253/03

AKZO NOBEL CHEMICALS LTD.
and **AKCROS CHEMICALS LTD.**

against

COMMISSION OF THE EUROPEAN COMMUNITIES

ON BEHALF OF:

THE EUROPEAN COMPANY LAWYERS ASSOCIATION

IN SUPPORT OF AKZO NOBEL CHEMICALS LTD.
AND AKCROS CHEMICALS LTD. (the "Applicant")

Represented by:

Maurits Dolmans, Advocaat (Rotterdam Bar)
John Temple Lang, Solicitor (Law Society of Ireland)
Kristina Nordlander, Advokat (Swedish Bar)

With an address for service at:

Rue de la Loi, 57
B-1040 Brussels, Belgium,
where service can be effected by telefax on +32.2.231.16.61

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY

1. This Intervention Statement is submitted pursuant to the Order of the President of the Fifth Chamber of the Court of First Instance of 4 November 2003 and the Registrar's letter of 19 November 2003.

2. The European Company Lawyers Association (ECLA) supports the Applicant's request for the annulment of Commission Decision C(2003) 1533 final of 8 May 2003 (the "Commission Decision"). This Intervention Statement comments on the Commission's Defence dated 14 November 2003.

3. The Commission Decision denied privilege for two sets of documents seized by the Commission during an on-site investigation. The first set of documents (the "Set A Documents") are memoranda drafted for the purpose of a telephone conversation with a lawyer concerning a potential procedure. The second set of documents (the "Set B Documents") includes communications with Akzo's in-house counsel.

4. Whether the Set A and Set B Documents are privileged appears to be an open issue under the Court's judgment in *AM&S*.[1] The Court noted in para. 21 of that judgment that Member State laws protect communications emanating from independent lawyers who are not bound to the client by a relationship of employment, but it did not specifically hold that such an employed lawyer could never be considered "independent" for purposes of EC law, even if he or she is a member of the national Bar, national Bar association, or professional in-house counsel association and subject to effective rules of ethics and discipline laid down in the public interest.[2] The possibility of independence in those specific circumstances was not at issue in the *AM&S* case, and remains an open question.

---

1 Case 155/79 *AM&S v. Commission* [1982] ECR 1575.

2 Advocate General Warner notes in his *AM&S* Opinion that: *"The Court is not, I think, called upon, if it holds in favour of the existence of such a principle, to define in this case its precise scope, for instance to say to what extent it may apply where the communications are between an undertaking and a lawyer employed on its own staff (an 'in-house' lawyer)"*, p. 1630.

5. This Intervention Statement explains the basis for ECLA's view that the open question should be answered positively. In essence, recognizing privilege for the Set A and Set B Documents is consistent with the rationale of the *AM&S* judgment, described as follows in para. 24:

> "*the requirement as to the position and status as an independent lawyer, which must be fulfilled by the legal adviser from whom the written communications which may be protected emanate, 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 . . . such legal assistance as the client needs. The counterpart of that protection lies in the rules of professional ethics and discipline which are laid down and enforced in the general interest by institutions endowed with the requisite powers for that purpose.*"

6. The intervention is organized as follows. Section II discusses the importance of legal privilege as a fundamental right recognized by EU Member States. Section III surveys national laws and recent EC law developments and concludes that there is sufficient support in the case-law of the Court of Justice and the laws of the Member States for the recognition of in-house counsel privilege as a generally accepted principle of Community law. Section IV shows that the Commission is wrong to say that professional independence and employed status are incompatible. Section V counters the Commission's allegation that recognizing in-house counsel privilege would render its investigations ineffective. Section VI discusses the appropriate procedure and scope of privilege. Finally, Section VII concludes by proposing a legal test for privilege in EC law.

II. IMPORTANCE OF LEGAL PRIVILEGE

7. In a society governed by the rule of law, a company must have a right to obtain legal advice from the lawyer of its choice without thereby creating evidence against itself, provided that such counsel is properly qualified and subject to effective rules of ethics and discipline. If a company cannot communicate with

its in-house counsel in confidence, it is effectively denied the right to consult the lawyer of its choice. Denying privilege for in-house counsel advice, if that is the counsel of the company's choice, undermines company's ability to know the law and comply with it.

8. Moreover, as the Court expressly recognised in *AM&S*, the protection of the confidentiality of written communications between lawyer and client is an essential corollary to the protection of the rights of the defence.[3] This confidentiality contributes to the effective administration of justice.

9. There are therefore two policy reasons to recognize the right to consult in confidence with a lawyer of one's choice as a fundamental right – (a) the need to ensure an effective administration of justice in legal and administrative proceedings, and (b) the need to put persons in a position to know and comply with the law.

10. This approach is reflected in the European Convention of Human Rights (ECHR). Interference with the right to consult a lawyer of one's choosing violates Article 6 ECHR, while unauthorized access to correspondence between lawyer and client violates Article 8 ECHR.[4] These fundamental rights constitute principles of Community law.[5] Any interference with such

---

3 *AM&*S judgment, para. 23.

4 See *General Mediterranean Holdings SA v. Patel* [1999] 3 All ER 673. Article 6(3)(c) ECHR specifically states that a person charged with a criminal offence has the right to legal assistance of his own choosing. The EC competition rules are "criminal" law for purposes of the ECHR. The criminal nature of competition rules is confirmed by the Court of Human Rights' statement in *M&Co.*, that "it can be assumed that the antitrust proceedings in question would fall under Article 6 had they been conducted by German and not by European judicial authorities" *(M&Co. v. Germany*, Decision of February 9, 1990, Application No. 13258/87). In *Daniels*, Kirby J. recently observed that the Australian High Court *"has consistently emphasized the importance of the privilege as a basic doctrine of the law and a 'practical guarantee of fundamental rights', not simply a rule of evidence law applicable to judicial or quasi-judicial proceedings. It has been increasingly accepted that legal professional privilege is an important civil right to be safeguarded by the law." The Daniels Corporation International v. Australia Competition and Consumer Commission* [2002] HCA 49, para. 85.

5 *See* Opinion 2/94 on the *Accession by the Communities to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759, para. 33: "It is well settled that fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. In that regard,

correspondence, including searches of business premises, must be in accordance with the law and be necessary in a democratic society, *i.e.*, proportional.[6]

11. ECLA submits that unauthorized access to in-house counsel communications is not necessary and is disproportional. As explained in further detail later in this Intervention Statement, accessing in-house counsel communications to discover violations of competition law (which in turn supposedly serves the objective of furthering compliance with the law) is inconsistent with at least one – and in ECLA's view all – of the three aspects of proportionality:

a. ***Effectiveness***. The Commission has not adduced any evidence suggesting that withholding privilege is an effective or appropriate way to further compliance with Community law. In fact, withholding privilege from in-house counsel is counterproductive. It hinders companies' attempts to meet the increased burden of self-assessment imposed on undertakings pursuant to Regulation 1/2003 and is inconsistent with the Commission's program of modernization of EC competition law;

b. ***Indispensability***. Discovering breaches by accessing in-house counsel communications is not indispensable to further compliance with Community law. Less restrictive and more effective ways are available – namely, leniency programs, requests for information, dawn raids, employee interviews, and reasonable rules placing companies in a position to understand and comply with the law. Recognizing legal privilege for in-house counsel is such a reasonable rule striking a proportional balance, because it does not cover all lawyers, but is subject to the cumulative conditions that counsel (i) be properly

---

the Court has stated that the [ECHR] has special significance." *See also* European Council Decision of June 4, 1999 on the drawing up of a Charter of Fundamental Rights of the European Union :"Protection of fundamental rights is a founding principle of the Union and an indispensable prerequisite of her legitimacy"; available at http://europa.eu.int/council/off/conclu/june99/annexe_en.htm. *See also, e.g.*, Case C-12/86 *Demirel* [1987] ECR 3719, Joined Cases C-46/87 and 227/88 *Hoechst* [1989] ECR 2919, and Case C-136/79 *National Panasonic* [1980] ECR 2033.

6 *Roemen et Schmit v. Luxembourg*, No. 51772/99, February 25, 2003, and *Niemitz v. Germany* [1992] 16 EHRR 97.

qualified as a lawyer; (ii) communicate or provide advice in his or her capacity as a lawyer; (iii) be subject to adequate rules of professional ethics and discipline which are laid down and enforced in the general interest by the bar or professional associations to which the legal counsel belongs; and (iv) act in compliance with such rules of professional ethics and discipline;

c. ***Overriding importance***. Discovering evidence of infringements through access to in-house counsel communications is, given the availability of other means of detection, less important than the overriding objectives served by recognizing in-house counsel privilege: a proper administration of justice, and facilitating knowledge of and compliance with the law.

12. In-house counsel play an invaluable role in providing companies with legal advice in antitrust matters which require intimate knowledge of the operations of the company. Such advice cannot always easily be replaced by advice given by outside counsel who are less familiar with the organization and operations of the company and the markets in which it is active. The quality of in-house counsel advice, its effectiveness, and the likelihood that it will be sought can only be sufficiently guaranteed if the communications made with a view to obtaining or giving legal advice are protected by legal privilege.

13. As of May 2004 with the entry into force of Regulation 1/2003, this issue will be more relevant than ever in the EU. The modernization of EC competition law means that companies will have a much greater responsibility to conduct their own review of the legality of proposed agreements and conduct, including agreements and conduct which may lead to serious infringements of EC competition law (contrary to what the Commission claims in para. 95 of the Defence). The refusal to recognize in-house counsel privilege hampers companies' ability to organize this review efficiently.

III. IN-HOUSE COUNSEL LEGAL PRIVILEGE IN EC AND NATIONAL LAW

14. According to the information available to ECLA, the communications with Akzo's in-house counsel at issue in this case meet the criteria for legal privilege under Dutch law:

- The lawyer in question is properly qualified as a lawyer and is a full member of the Dutch Bar.

- He is therefore subject to the disciplinary and ethical rules of the Dutch Bar, which are laid down and enforced in the general interest, and enjoys legal privilege under Dutch law. These rules are the same for outside and in-house counsel.

- The electronic mail correspondence contained legal advice to his client given by the in-house lawyer in his capacity as legal advisor.

15. Article 51 of the Dutch Competition Act specifically recognizes in-house counsel privilege for legal advice from members of the bar in these circumstances. Under Dutch law, employed status does not detract from independence.

16. The issue in this case is therefore whether Akzo's in-house counsel's employment relationship, as such, has an effect in EC law which it does not have under Dutch law. The Commission is arguing that EC law takes away the right to privilege given by Dutch law. ECLA submits that this is wrong, for two reasons.

a. First, a lawyer's status, rights, and obligations are governed by national law. If national law provides that a properly qualified in-house lawyer is a member of the national Bar, is entitled and required to give independent advice, and therefore has the same rights and duties as an

outside lawyer for privilege purposes, the Commission has no right to ignore this.[7]

b. Second, since *AM&S* was decided, there have been a number of developments in national and EC law confirming that privilege should be recognized for all communications with counsel meeting the conditions mentioned above, regardless of whether the counsel in question is employed or not.

17. In the recent *Carlsen* and *Interporc* cases, the Court recognized the importance of privilege in relation to opinions given by the Commission's and Council's Legal Services – even though they are civil servants in an employment relationship:

> *"The purpose of this definition of the scope of the exception is to ensure both the protection of work done within the Commission and confidentiality and the safeguarding of professional privilege for lawyers."*[8]

18. There is no reason to treat company employees differently from Commission employees. Like the Community institutions, companies will only be able to ensure the legality of their actions if they can obtain quick and effective legal advice in confidence.

19. As explained in some detail in the attached Annex on Member State laws, most Member States laws now recognize the independence of in-house counsel (subject to conditions and provisions of national law) and the legal privilege for in-house counsel communications:

---

7 National courts and competition authorities apply EC law according to their own procedure under the so-called 'principle of national procedural autonomy' recognized by the European Court of Justice. See, *e.g.*, *Mireco* Case C-826/79 [1980] ECR 2559 and *Rewe* Case C-158/80 [1981] ECR 1805.

8 Case T-92/98 *Interporc v. Commission*, 1999 ECR II-3521, para. 41. See also Case T-610/97 *Carlsen and others v. Council*, 1998 ECR 485.

- ***Belgium***: Members of the Institute of Company Lawyers enjoy privilege under Article 5 of the Law of March 1, 2000, on the same basis as members of the Bar;

- ***Denmark***: In-house counsel can be admitted to the Bar, and the Danish Administration of Justice Act acknowledges privilege for all Bar members;[9]

- ***Finland***: In-house counsel are not Bar members, but are entitled to privilege on the same basis as outside counsel if they represent their employer in civil, administrative or arbitration proceedings;

- ***Germany***: German in-house lawyers can be admitted to the Bar as *Syndikusanwaelte*, and as such can claim legal privilege for their communications to the same extent as lawyers in private practice;

- ***Greece***: In-house counsel are required to be members of the Bar, and have privilege to the same extent as outside counsel;

- ***Ireland***: In-house counsel can be members of the Law Society or the Bar, and as such claim privilege to the same extent as outside counsel;

- ***Netherlands***: Since 1997, in-house counsel can be admitted to the Bar as *advocaat in dienstbetrekking*, and have the same duties of confidence and rights of privilege as outside counsel;

- ***Portugal***: Portuguese in-house counsel can be members of the Bar, and as such are entitled to privilege on the same basis as outside counsel under the Statute of the Order of Advocates;

---

[9] It should be mentioned that while Danish and Finnish law recognize privilege for in-house lawyers subject to certain conditions, the Danish and Finnish competition authorities appear to deny privilege for in-house counsel communications in antitrust cases based on a restrictive reading of *AM&S*. ECLA submits that this should be ignored, since denying privilege on this basis would lead to circular reasoning.

- ***Spain***: The General Regulation of the Legal Profession allows in-house counsel to join the Bar, and it and Organic Law 6/1985 on the Judiciary recognize legal privilege for all Bar members;

- ***United Kingdom***: Lord Denning held in *Alfred Crompton Amusement Machines Ltd*. that in-house counsel have legal professional privilege if they are members of the Bar or the Law Society. Article 30 of the 1998 Competition Act confirms this.

20. Para. 59 of the Commission's Defence exaggerates and distorts the difference between common law and civil law procedures. The attached survey of national laws shows that the reasons and effects of legal privilege rules in common law and civil law countries are very similar – they impose a duty of confidentiality, and entitle a properly qualified lawyer subject to ethics and discipline to refuse to testify and refuse to disclose written communications. Communications with legal counsel in his/her professional capacity (as opposed to a management role) are privileged whether or not a legal proceeding has been initiated.

21. The Commission's Defence claims that the Member State rules listed above should be ignored, since Member State rules must be of a constitutional nature to be of relevance to the substance of EC law.

22. ECLA notes that Articles 6 and 8 of the ECHR are of "constitutional nature". The rules granting in-house counsel privilege in the various Member States are based on the same considerations as those pertaining to outside counsel privilege, namely the confidentiality of correspondence between a properly qualified lawyer and his/her client and the protection of the rights of the defence. There is no basis for the Commission's statements (*e.g.*, paras. 50, 72-74 of the Defence) that in-house counsel privilege rules are based on mere 'professional obligations' as opposed to fundamental rights and rights of the defence.[10]

---

[10] The preparatory works for the Belgian law creating the *Institut des juristes d'entreprises* specifically state that "[t]he confidentiality applicable to in-house lawyers will ensure their complete independence

23. Based on the *Interporc* case-law of the Court mentioned above and the principles of national law listed above, the European Parliament recently proposed amendments for the EC Merger Regulation providing that:

> "*communications between undertakings and associations of undertakings and outside or in-house counsel containing or seeking legal advice should be privileged, provided that the legal counsel is properly qualified and is subject to adequate rules of professional ethics and discipline laid down and enforced in the general interest by the professional association to which the legal counsel belongs*".[11]

24. ECLA submits that these amendments reflect a recognition of existing principles of Community law and urges the Court to confirm this in *Akzo v. Commission*.

25. A similar amendment had been proposed in connection with Regulation 1/2003 – Amendment No. 10 of the Evans Report on the Commission's Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. The Commission argues that that amendment was never adopted, and should therefore be ignored, but its description in paras. 96-97 fails to mention that it was dropped in the Plenary in response to an explicit promise by the Commissioner for Competition not to use in-house counsel files as evidence to increase fines. This promise, in any case inadequate, was never formalized (to the disappointment of Parliamentarians and in-house counsel). The Parliament's restatement and adoption of the amendment in the context of the modified Merger Regulation indicates Parliament's conviction that the principle is part of general principles of Community law and should therefore have been explicitly recognized.

---

and will guarantee that their advices and opinions will not be made public. If there would be no such confidentiality, in-house lawyers could not fulfill their legal duties of public interest [guaranteeing the compliance with the law]" (Preparatory Works of the Senate nr. 1.45/4, D, Article 5).

[11] The Della Vedova Report (EP A5-0257/2003) adopted by the ECON Committee on July 8, 2003, was adopted by the European Parliament on October 8, 2003. See Amendments 5 and 25 available at: http://www3.europarl.eu.int/omk/omnsapir.so/pv2?PRG=CALDOC&FILE=20031009&LANGUE=EN&TPV=PROV&LASTCHAP=16&SDOCTA=10&TXTLST=1&Type_Doc=FIRST&POS=1.

IV. INDEPENDENCE AND EMPLOYMENT ARE COMPATIBLE

26. The Commission argues that employees are by definition dependent on their employers, and that in-house counsel should therefore be denied privilege under *AM&S*. In para. 90 of its Defence, the Commission claims that the application of ethics rules to in-house counsel is not sufficient to eliminate what the Commission alleges is an inherent conflict between the loyalty to the employer and the obligation to respect the law.

27. The Commission's position contradicts the approach adopted by the Commission and by both Advocates General in the *AM&*S case who specifically addressed the status of an in-house lawyer member of the Bar. All three concluded that such a lawyer should be considered "independent" in the same way as an outside lawyer and should thus benefit from the same protection for his/her communications:

> *"Where the lawyer who is employed remains a member of the profession and subject to its discipline and ethics, in my opinion, he is to be treated for present purposes in the same way as lawyers in private practice, so long as he is acting as a lawyer. […] I would reject any suggestion that lawyers (professionally qualified and subject to professional discipline) who are employed full time by the Community institutions, by government departments, or in the legal departments of private undertakings, are not to be regarded as having such professional independence as to prevent them from being within the [legal privilege] rule. Accordingly I consider that counsel for the Commission is right to accept that, provided he is subject to rules of professional discipline and ethics, the salaried lawyer should for present purposes be treated in the same way as the lawyer in private practice."*[12]

28. The same conclusion was reached by Drs. Ehlermann and Oldekop, then members of the Commission Legal Service, in a paper published for the 1978

---

[12] Opinion of Advocate General Sir Gordon Slynn in *AM&S* at 1655.

FIDE conference and referred to in Advocate General Warner's *AM&S* Opinion:

> *"there seems to be no reason to treat salaried lawyers employed by their client differently from independent lawyers in professional practice, provided that they are effectively subject to similar rules of professional ethics and discipline."*[13]

29. The facts in the case at hand demonstrate that the Commission is wrong to argue in the Defence that employment is incompatible with independence. When he became a member of the Bar, Akzo's in-house counsel and Akzo itself signed a set of rules called the "professional statute" ("*professioneel statuut*"), which guaranteed the independence of the in-house lawyer. The agreement provides that:

> "*the employer will respect the free and independent professional practice of the employee. As employer, he will refrain from anything that could exert influence on the professional actions of the employee and the professional determination of the policy to be followed in a case, without prejudice to that which is stipulated in article 7. The employer will ensure that the employee will not encounter any disadvantage with regard to his position as employee due to the above.*" (Section 2). [14]

30. The signature of this "*professioneel statuut*" is one way to express a general principle that ethical rules such as those of the Dutch Bar or the CCBE, which require lawyers to give independent advice, prevail over any duty of loyalty that is inconsistent with these ethical rules. Such principles may also be laid down in employment agreements, board decisions, work regulations or other company statements or conduct recognizing in-house-counsel's duty to provide independent legal advice.

---

13 Opinion of Advocate General Warner in *AM&S* at 1623.

14 See *Professioneel Statuut voor de Advocaat in Dienstbetrekking* (Professional Statute for Attorney Acting in Employment Relationship), attached to the *Verordening op de Praktijkuitoefening in Dienstbetrekking* (Regulation on Exercise of Practice as an Employee), Stcrt. 1997, 75, as amended.

31. As explained above, the independence of in-house counsel and their obligation to follow rules of professional ethics has been recognized in the legal systems of a number of EU Member States. Already in 1972, the UK High Court had recognized that in-house lawyers admitted to the Bar or members of the Law Society:

> "*are regarded by the law as in every respect in the same position as those who practice on their own account. They must uphold the same standards of honour and of etiquette."*[15]

32. Member States' employment laws and corporate laws confirm that employment status generally is not incompatible with professional independence. The Commission argument that employees cannot be regarded as "independent" implies that in-house counsel have to follow an employer's order even if that results in a violation of competition law. There is no basis for this suggestion. An in-house counsel's duty of loyalty is owed not to management, but to the company that employs them, and part of that duty is to protect the company from the liability that flows from breaches of the law. There is, therefore, no breach of duty of loyalty if a lawyer advises management that a particular planned course of conduct is illegal and if the lawyer refuses to help implementing it.

33. Indeed, the Court could not and would not in *Interporc* have recognized legal professional privilege for the Legal Service if it had thought that Commission employees owed a duty of loyalty to the Community institutions that could prevail over the general obligation to comply with the law. This is no different for company employees.

34. Nor are in-house counsel "dependent" on their employers to such an extent that they can be dismissed if they fail to follow an order that would result in a breach of the law. Employment contracts in violation of law are unenforceable, and the same applies to instructions from employers to

---

[15] *Alfred Crompton Amusement Machines Ltd. v. Customs and Excise Commissioners (No. 2*) [1972] 2 Q.B. 102.

employees in breach of competition law.[16] Member State labour laws protect employees, including in-house counsel, against dismissal for failure to follow an order to commit unlawful acts or omissions, or breaches of professional ethical rules. Akzo's in-house counsel's "*professioneel statuut*" under Dutch law confirms this:

> "*a difference of insight regarding the professional policy of the employee in the handling of the cases entrusted to him may not constitute grounds for a unilateral termination of the employment by the employer, or for measures that could lead thereto.*" (Section 8).

35. The compatibility of employment with obligations of independence and ethical duties in the public interest is not limited to lawyers. In most, and probably all, Member States, liberal professions (*i.e.*, medical doctors, psychologists, pharmacists, accountants, etc.) are organized into professional associations at national or local level, subject to ethical rules guaranteeing the independence of the employed professional. Just like company lawyers bound by ethical rules may and must advise management to follow the law even if another route might be commercially more attractive, company-employed physicians are entitled (and indeed obligated) to declare employees unfit to work even if this increases costs for the employer, and the employer's management must not interfere with this diagnosis.[17]

---

[16] For example, UK Employment Law provides for an implied term in every contract of employment that an employee shall not be required by his employer to perform an unlawful act. This principle is well established in case law (see, for example, *Gregory v. Ford* [1951] 1 All ER 121; *Morrish* v. *Henlys (Folkestone) Ltd* [1973] IRLR 61). Similar rules apply elsewhere. In Belgium, for instance, "*L'employé ne peut être obligé d'accomplir des actes illicites, soit qu'ils soient défendus par la loi ou la morale, soit qu'ils mettent en danger sa propre sécurité ou celle d'autres personnes*" (T.T. Nivelles, June 28, 1991, *J.T.T.* 1992, 264; C.T. Liège, December 12, 1974, *Jur. Liège* 1976, 66, confirming T.T. Verviers, November 22, 1972, *J.T.T.* 1973, 157; Liège, June 25, 1958, *J.L.* 1958-1959, 116). In German labor law, employees generally need not follow employers' instructions that violate state or federal law. Refusal to follow such instructions does not constitute a breach of the employment contract and cannot provide the basis for sanctions by the employer. Similar principles apply under the laws of other Member States.

[17] These principles of professional independence are confirmed in many Member States in case-law and the codes of ethics of professional associations, as is the case for lawyers' bars, law societies and professional associations. The following is a list of examples confirming professional independence of medical doctors, whether self-employed or employed by others.

36. There is no evidence to support the Commission's implied suggestion that in-house counsel's employed status actually interferes with professional independence. In the 40 years of EC decisional practice, the Commission has cited no case where in-house counsel has compromised its ethical duties.[18] In fact, all published EC case law mentioning in-house counsel advice indicates that in-house counsel advised *against* infringement.[19] This positively confirms that employed counsel can and do "*provide, in full independence . . . such legal assistance as the client needs.*"

37. Accordingly, the potential abuses and "(unpredictable) dangers" referred to by the Commission in paras. 92-93 of its Defence have no basis in reality, and

---

UK: See *Cassidy* v. *Ministry of Health*, [1951] 2 KB 343, supporting the proposition that U.K. physicians, as employees, have independence in their clinical judgment.

Italy: See Article 69 of the *Codice Deontologico dei Medici*, *i.e.*, Code of ethics for physicians, adopted by the national association confirming professional independence.

Belgium: See Articles 36, 122 and 174 of the *Code de Deontologie Médicale* (*i.e.*, Code of ethics) issued by the *Ordre des Médecins*. Article 174 of the Code states that contracts between physicians and non-physicians (which can, for instance, be an undertaking employing the doctor) containing elements that could limit the diagnostic and therapeutic freedom of the doctor are prohibited.

Germany: See for instance, Sections 2(4), 23(1), 30 and following of the Model Professional Regulation for German Physicians ("MPRD") issued by the Federal Physicians' Association (*Bundesärztekammer*), and Section 1(2) of the Federal Physicians' Regulations (*Bundesärzteordnung*). According to the Federal Constitutional Court, physicians are not subject to their employer's instructions with regard to medical decisions. Violations are tried by professional tribunals (*Berufsgerichte*).

Netherlands: See Article 1(4) of the Rules of Conduct (*Gedragsregels voor Artsen 2002*) of the Royal Dutch Medical Association (*KNMG – Koninklijke Nederlandsche Maatschappij tot bevordering der Geneeskunst*). The Rules of Conduct are applied in informal justice within the KNMG, by the disciplinary tribunals (*tuchtrechter*) and the regular civil courts.

Similar rules apply to other liberal professions. An example is the Belgian Royal Decree of 18 April 1985 concerning the creation of the National Association of Architects, which provides that architects can exercise their profession either as self-employed persons or as employees, and employee status is compatible with their obligation of independence (See Article 7 of the Royal Decree of 18 April 1985).

[18] The only published cases of a lawyer organizing or cooperating with a cartel concerned outside counsel. In *SAS/Maersk*, the two airline companies had illegally shared markets and, in order to keep incriminating evidence outside the reach of antitrust authorities, the companies agreed to place such documents in escrow in the offices of outside counsel (Commission decision 2001/716/EC *SAS/Maersk Air* (COMP.D.2 37.444) OJ 2001 L265/15, para. 89 and footnote 16). The companies had also been advised by their outside lawyers that information concerning market sharing and price fixing should not be included in a written agreement. In such cases privilege can be denied. Cf. also Commission Decision 75/497/EEC of 15 July 1975, *IFTRA rules for producers of virgin aluminium*, [1975] OJ L 228/3, 29.08.1975.

[19] *John Deere* OJ 1985 L 35/58, para. 21, and *Sabena* OJ 1988 L 317/47, para. 36.

certainly no more than with respect to outside counsel. Privilege would and should be lost in case of abuse, and companies abusing the procedure can be fined.

38. In sum, in many cases, in-house counsel may be better positioned to ensure compliance with the law than outside counsel. In-house counsel often occupy a position of trust, are more knowledgeable about the client's organization and activities than outside counsel, and in fact give independent advice. Under the labour laws of many countries it is much more difficult to get rid of a salaried employee giving "unwanted" advice than to terminate an attorney-client relationship.

39. For these reasons, ECLA submits that employment is perfectly compatible with independence, provided that in-house counsel is properly qualified as a lawyer and is subject to and complies with adequate rules of professional ethics and discipline which are laid down and enforced in the general interest by the professional associations to which the legal counsel belongs.

V. RECOGNIZING IN-HOUSE COUNSEL LEGAL PRIVILEGE WOULD NOT JEOPARDIZE THE EUROPEAN COMMISSION'S INVESTIGATIONS

40. As indicated above, ECLA submits that denial of in-house counsel privilege is disproportional. More specifically, recognizing in-house counsel privilege in EC antitrust proceedings would not prejudice the effectiveness of the Commission's investigations. No published case decided by the Commission to date has relied primarily on evidence obtained from in-house counsel files to establish illegal conduct.

41. In *John Deere*[20] and *Sabena*[21], for instance, the Commission referred to in-house counsel's advice as supplementary evidence of the company's knowledge of the illegality of its behaviour so as to increase the fine, but this evidence was not needed or used to establish the infringement of the competition rules. In *Volkswagen*, the Commission copied documents from

---

20 Commission decision 85/79/EEC *John Deere* (IV.30.809) OJ 1985 L35/58, para. 21.

21 Commission decision 88/589/EEC *Sabena* (IV.32.318) OJ 1988 L317/47, para. 36.

the in-house legal department and denied legal privilege. However, there is no evidence in the Commission's decision or the subsequent Court of First Instance judgment that in-house counsel documents were relied upon as evidence.[22]

42. Since the *AM&S* case in 1982, there have been significant developments in the scope and effectiveness of the investigative powers for antitrust infringements. In cartel enforcement in particular, the effectiveness of the Commission's investigations is greatly enhanced by the leniency program and the possibility for companies to receive full immunity or a reduction from fines by cooperating with the Commission's investigation and providing relevant information. An effective leniency policy has done more for discovery of illegal cartels in two years than access to in-house counsel files has done in the twenty years since *AM&S*.

43. ECLA submits that refusal to recognize in-house counsel privilege is actually counterproductive. It interferes with the internal process necessary for firms to come to the conclusion that they should cooperate with the Commission. It discourages in-house counsel from conducting a proper internal investigation, preparing appropriate corporate statements, giving written advice on applications for leniency and other matters, and properly retaining such written advice for future reference and reminders. Recognition of in-house counsel privilege could lower the threshold for in-house counsel involvement in internal investigations, and thus make the Commission's leniency policy and enforcement efforts more effective.

44. As of May 2004 under Regulation 1/2003, the Commission will have greatly expanded investigatory powers at its disposal, and can access information from national competition authorities through the network of competition authorities. Under Regulation 1/2003, the Commission is empowered to seal premises, inspect private homes, compel statements during dawn raids, take statements other than in dawn raids from any person who consents to being

---

[22] Commission decision 98/273/EEC *Volkswagen* (IV.35.733) OJ 1998 L124/60, para. 198, and Case T-62/98 [2000] ECR 2707.

interviewed, and has the ability to impose higher fines. Improved powers of detection and discovery will render the reservation of the right to access in-house counsel advice even more unnecessary than it is now.

45. At the same time, modernization increases the need for in-house counsel privilege. With the elimination of *ex ante* notifications for exemption under Article 81(3) and Regulation 17/62, companies must self-assess proposed or existing agreements and practices under EC competition rules. Denying in-house counsel privilege is counter-productive, since it hampers the effectiveness of efforts to obtain adequate legal advice, and jeopardizes internal compliance programs. As a counterpart for withdrawing the right to notify agreements for exemption, the Commission should have recognized legal privilege to place companies in a position to assess application of Article 81(1) and 81(3) themselves.

46. Protection of in-house counsel communications must be proportional and therefore would not be absolute. National laws and Bar rules recognize a number of limitations that would preserve the effectiveness of the Commission's investigative powers. For example,

    a. Privilege would only be granted to communications with in-house counsel who are members of the national Bar, law society or professional association with effectively enforced professional ethical rules, which are laid down and enforced in the general interest by the professional association to which the legal counsel belongs;

    b. Privilege would cover only communications containing or seeking legal advice from in-house counsel acting in the capacity of legal counsel and not in a management or business capacity; and

    c. Privilege would be lost in case the counsel is involved in the illegal conduct.

47. There is no evidence that competition authorities in those Member States where in-house counsel privilege is recognized are less effective than those where it is not. Instead, effectiveness depends on many different factors, such

as the number and quality of the staff of the competition authority, the policy pursued by the authority, and the authority's ability to impose fines directly rather than having to convince a jury and a court to do so. Although in-house counsel privilege is recognized in the United States, for instance, it would be wrong to suggest that the US antitrust authorities are less effective than the European Commission in investigating antitrust infringements. In-house counsel privilege is also recognized in, for example, Canada, Australia, New Zealand and Norway, and there is no evidence that these antitrust authorities are less effective than the Commission. In *Daniels*, the Australian High Court recently noted in the context of antitrust investigations that:

> *"[…] it is difficult to see that the availability of legal professional privilege to resist compliance with a notice under s 155(1) of the Act would result in any significant impairment of the investigation of contraventions of the Act, much less in the frustration of such investigations."*[23]

VI. PROCEDURE AND SCOPE OF PRIVILEGE

48. A second issue at stake in this case concerns the procedure to be followed for the recognition of privileged documents, and whether privilege also covers internal documents prepared for the purpose of communication with counsel. These issues are discussed below.

A. Procedure for recognition of privilege

49. The Commission claims the right to see privileged documents to decide whether privilege applies, and that it is sufficient for the Commission to promise not to use the document in evidence.

---

[23] *The Daniels Corporation International v. Australia Competition and Consumer Commission* [2002] HCA 49, para. 24.

50. ECLA submits that this approach is wrong. Privilege protects the confidence between a lawyer and his/her client.[24] Advocate-General Warner stated in his *AM&S* Opinion that:

> "*... in a civilised society, a man is entitled to feel that what passes between him and his lawyer is secure from disclosure. That principle is accordingly breached as soon as there is disclosure of the contents of such a communication, and not merely by its being used in evidence*."[25]

51. Wrongful disclosure cannot be remedied by a decision not to use the privileged material in evidence. A Commission decision or Court judgment ordering the Commission to ignore the documents does not induce amnesia, and the knowledge of their content would – consciously or unconsciously, but unavoidably – colour the Commission officials' perception of other documents and facts.

52. The Court in *AM&S* has developed a procedure clearly based on legal privilege <u>prohibiting</u> disclosure. In para. 29 of its judgment the Court explains that an undertaking which is the subject of an investigation must provide the Commission's authorized agents with material demonstrating that any claim of legal privilege is well founded. The undertaking is, however, <u>not</u> bound to reveal the contents of the communications in question. ECLA submits that the proportional approach is for such documents to be sealed for review by the Hearing Officer and the Court, and abuse of this process could result in fines.

53. The Court goes on to state (para. 31) that if the Commission orders the production of communications for which the undertaking claims legal privilege, the parties' interests are safeguarded by the rules applicable to appeals of Commission decisions, *i.e.*, the possibility to apply for interim

---

[24] See, *e.g.*, *General Mediterranean Holdings SA v. Patel* [1999] 3 All ER 673, where it was held that legal professional privilege "was not merely an ordinary rule of evidence, but was rather a fundamental condition on which the administration of justice rested and was an attribute or manifestation of the right to legal confidentiality which arose as a matter of substantive law."

[25] Opinion of Mr. Warner in Case 155/79 *AM&S* [1982] ECR at 1638-39.

measures pending the outcome of the appeal. In other words, it is for the Court to decide the privilege issue and the Commission can be prevented from reviewing the documents in question.

54. Both Advocates General in *AM&S* clearly supported the view that the nature of legal privilege implies an absolute bar against disclosure to the Commission.[26]

55. The Commission investigation team should thus not have been allowed to take even a "cursory look" at the documents for which privilege is claimed. Instead, the contested documents should have been placed in a sealed envelope awaiting the Court's or other independent third party's (*e.g.*, the Hearing Officer) determination of the privilege claim.

B. <u>Scope of privilege</u>

56. As regards the appropriate scope of legal privilege, ECLA urges the Court to confirm that documents prepared for the purpose of seeking legal advice within the context of an internal compliance program should be privileged.

57. The Court found in para. 23 of its *AM&S* judgment that based on common criteria in Member State laws, Regulation 17 should be interpreted to protect the rights of the defence, and that the protection of the confidentiality of written communications between lawyer and client is an essential corollary.

> "*[S]uch protection must, if it is to be effective, be recognized as covering all written communications exchanged after the initiation of the administrative procedure under Regulation No 17 […]. It must also be possible to extend it to earlier written communications <u>which</u>*

---

[26] Opinion of Advocate General Warner at 1638-1639: "*The fundamental flaw in the procedure advocated by the Commission, or perhaps rather in the thinking that underlies it, seems to me to be that it misapprehends the real basis of the principle protecting the confidentiality of communications between a lawyer and his client, which, in a nutshell, is that, in a civilized society, a man is entitled to feel that what passes between him and his lawyer is secure from disclosure. That principle is accordingly breached as soon as there is disclosure of the contents of such a communication, and not merely by its being used in evidence.*" Opinion of Advocate General Sir Gordon Slynn at 1662: "*… the Commission's undertaking is only not to <u>use</u> the document. It seems to me that if the protection has come into existence the Commission should not <u>see</u> the document.*"

have a relationship to the subject-matter of that procedure." (emphasis added).

58. Both Advocates General in the *AM&S* case agreed that to be effective, legal privilege must apply to communications predating the initiation of the formal procedure under Regulation 17, and to communications seeking legal advice regarding such potential procedure.[27]

VII. CONCLUSIONS

59. ECLA proposes the following legal test, which would respect the rights granted under national laws while ensuring consistency in the application of EC law:

> "*communications (including preparatory materials and drafts) between a client and outside or in-house counsel containing or seeking legal advice (as opposed to communications relating to business or management advice or other matters where the counsel does not act in his or her capacity as lawyer) should be subject to legal professional privilege, provided that the legal counsel is properly qualified (i.e., has completed an education leading to a degree required for members of the bar or for solicitors in that Member State) and is subject to and complies with adequate rules of professional ethics and discipline which are laid down and enforced in the general interest by the professional associations to which the legal counsel belongs.*"

60. The proposed test is consistent with the rationale applied by the Court in *AM&S* in recognizing legal privilege as a principle of EC law.

---

[27] Opinion of Advocate General Warner of 20 January 1981 at 1637: *"My conclusion therefore . . . is that the powers of the Commission under Article 14 of Regulation No 17 are exercisable subject to the right of the undertaking under investigation to claim confidentiality for communications passing between itself and its lawyers for the purpose of seeking or giving legal advice."* Opinion of Advocate General Sir Gordon Slynn of 26 January 1982 at 1655: *"In my opinion the rule covers communications between lawyer and client made for the purpose of obtaining or giving legal advice in whoever's hands they are and whether legal proceedings have begun or not. It covers also the contents of that advice (given orally or in writing) in whatever form it is recorded"*.

61. On the basis of the information available to it, ECLA concludes that the Set A and Set B Documents should be subject to professional legal privilege. As requested by the Applicant, the Commission's Decision denying such privilege should therefore be annulled.

62. Finally, ECLA notes that it is contrary to the Rules of Procedure to reserve the right, as the Commission does in para. 63, to make new arguments at a later stage in the proceedings.

Brussels, February 27, 2004

Maurits Dolmans John Temple Lang Kristina Nordlander

ANNEX ON MEMBER STATE LAWS

Belgium. Article 5 of the Law of March 1, 2000 on the creation of the Institute of Company Lawyers (*Institut des juristes d'entreprise*) provides that the advice given by an in-house lawyer who is a member of the Institute for the benefit of his/her employer and as part of his/her function as legal adviser is confidential. Pursuant to this rule companies can claim privilege for in-house counsel legal advise in proceedings before the Belgian competition authority. The Institute has issued its own disciplinary rules, which specify that "the in-house lawyer exercises his profession in complete intellectual independence" (Article 3). In-house lawyers cannot be admitted to the Bar.

Germany. In principle, German in-house lawyers can claim legal privilege for their communications to the same extent as lawyers in private practice.[28] This applies in all kinds of proceedings, including proceedings before the competition authority, and in particular in dawn raids.[29] The most important condition for such privilege is that the documents must be in the lawyer's sole custody.[30] In-house lawyers have the choice whether or not to be admitted to practice as attorney. If they are admitted to practice as attorney, they are usually referred to as "*Syndikusanwälte"*, which have the same rights and obligations (including the right to claim legal privilege) as all other "*Rechtsanwälte*", with the exception that they cannot represent their employer in court.[31] An in-house lawyer not admitted to practice as attorney cannot claim legal privilege. All lawyers admitted to practice as attorney are automatically members of

---

28 § 97 para. 1 n° 1 and n° 2 StPO and Roxin, Claus, Das Beschlagnahmeprivileg des Syndikusanwalts im Lichte der neuesten Rechtsentwicklung, NJW 1995, 17.

29 Under German antitrust law, there are two types of procedures in which the *Bundeskartellamt* can request and seize documents: the administrative procedure laid down in §§ 54 et seq. of the Cartel Act (*Gesetz gegen Wettbewerbsbeschränkungen*, GWB) and the fining procedure laid down in §§ 81 et seq. GWB. The administrative procedure does not contain any rules about privilege, while the fining procedure refers to the Regulatory Offences Act (O*rdnungswidrigkeitengesetz,* OwiG) and the Criminal Procedure Act (*Strafprozessordnung*, StPO) including its provisions on legal privilege. Upon initiation of a procedure it is not always clear whether or not it will lead to the imposition of a fine. However, it is widely recognized that, by way of analogy, the privilege provisions of the StPO also apply in the administrative procedure.

30 In the case of in-house counsel, legal advice may be placed in a filing cabinet to which the in-house counsel has the key. See Roxin, Claus, Das Beschlagnahmeprivileg des Syndikusanwalts im Lichte der neuesten Rechtsentwicklung, NJW 1995, 17, 22.

31 § 46 of the Federal Regulation concerning Attorneys (*Bundesrechtsanwaltsordnung*, BRAO).

the Bar.[32] There is no separate professional body for in-house counsel. *Syndikusanwälte* are subject to the same disciplinary rules as all other *Rechtsanwälte*.[33] In 1992 the German Constitutional Court confirmed that in-house lawyers can be admitted to the Bar provided that their employment does not prevent them from fulfilling their duties as independent lawyers.[34] Consequently, before admitting in-house lawyers, local bar associations often require the employer's written consent to the in-house lawyer's activity as independent lawyer. In particular, they may request confirmation that the lawyer will have enough time and freedom to exercise his profession independently from the employer.[35] Lawyers are generally prohibited from misleading courts and other public authorities such as the competition authority in the exercise of their profession.[36]

The Netherlands. Since 1997, in-house lawyers who are admitted to the Bar (*advocaat in dienstbestrekking*) can claim privilege in competition and other proceedings.[37] In-house lawyers admitted to the Bar are subject to the same disciplinary rules as outside lawyers.[38] In-house lawyers can only be admitted to the Bar – and claim privilege – if their employer agrees to a set of rules (*Professioneel statuut*) which guarantee the independence of the in-house lawyer.[39]

The United Kingdom. In the United Kingdom, in-house lawyers can claim legal professional privilege for their confidential documents under the same conditions as

---

32 § 60 BRAO.

33 §§ 74, 74a, 113-115c BRAO.

34 Bundesverfassungsgericht of November 4, 1992, BVerfGE 87, 287 = NJW 1993, 317.

35 Cf. Guidelines of the Frankfurt/Main bar association at http://www.rechtsanwaltskammer-ffm.de/raka/index.html.

36 § 43a para. 2 of the Federal Regulation concerning Attorneys (*Bundesrechtsanwaltsordnung*, "BRAO") states that "in the exercise of his profession, the lawyer may not act objectionably (*unsachlich*). Objectionable conduct includes in particular spreading untrue information (*Unwahrheiten*) …".

37 Article 51 Mededingingswet and *See* Mvt, Kamerstukken II 24 707, nr. 3, pp. 82-83.

38 Article 46 Dutch Lawyers Law, *Advocatenwet.*

39 The agreement provides that "a difference of insight regarding the professional policy of the employee in the handling of the cases entrusted to him may not constitute grounds for a unilateral termination of the employment by the employer, or for measures that could lead thereto." (Section 8). In addition, "the employer will respect the free and independent professional practice of the employee. As employer, he will refrain from anything that could exert influence on the professional actions of the employee and the professional determination of the policy to be followed in a case, without prejudice to that which is stipulated in article 7. The employer will ensure that the employee will not encounter any disadvantage with regard to his position as employee due to the above." (Section 2). See *Professioneel Statuut voor de Advocaat in Dienstbetrekking* (Professional Statute for Attorney Acting in Employment Relationship), attached to the *Verordening op de Praktijkuitoefening in Dienstbetrekking* (Regulation on Exercise of Practice as an Employee), Stcrt. 1997, 75, as amended.

their peers in private practice.[40] The in-house practitioner must be a qualified lawyer and member of his professional association, *i.e.*, barristers must be members of the Bar and solicitors must be members of the Law Society. Section 30 of the Competition Act 1998 provides for legal privilege,[41] and the rules concerning privilege for in-house counsel are found in the common law.[42] To be privileged, the lawyer must have produced the document in his professional capacity,[43] as opposed to merely giving informal advice.[44] Where a communication is between a legal adviser and his client (or employer), the communication, where it carried out in relation to the adviser's professional capacity, is always privileged, even if no litigation is contemplated, provided it was intended to be confidential.[45] Indeed, a document prepared for the purpose of such communication is privileged, even where not communicated.[46]

Ireland. In-house lawyers in Ireland, whether solicitors members of the Law Society or barristers members of the Bar, are treated in the same way as external counsel for the purposes of the legal privilege rules. They are subject to the same ethics and discipline as outside lawyers. This includes Irish Competition Authority investigations and litigation before the Irish courts. As in England and Wales, privilege is a common law doctrine that applies to (a) confidential communications connected with the defence or prosecution of apprehended, threatened or actual litigation; and (b) confidential communications connected with the giving or seeking of legal advice (even where litigation is not pending or likely). The privilege only

---

40 See *Alfred Crompton* Amusement *Machines Ltd v Customs and Excise Comrs* (No 2) [1972] 2 QB 102 at 129, [1972] 2 All ER 353 at 376, CA, per Lord Denning MR. Case went to the House of Lords but principle not challenged.

41 Available at http://www.legislation.hmso.gov.uk/acts/acts1998/80041--d.htm#30.

42 Office of Fair Trading (OFT) Guideline 404, Powers of Investigation, Article 6.1 Privileged communications, para. 2: The categories of communication which attract privilege under the Act are wider than the categories of communication that the European Court has recognised as being privileged. The definition in the Act refers to a '*professional legal adviser*', which has been interpreted by the United Kingdom courts as including in-house lawyers as well as lawyers in private practice. When the powers of investigation set out in the Act are used to investigate suspected infringements of the Chapter I and Chapter II prohibitions the interpretation of privileged information under Community law will not apply.

43 *Wilson v Rastall* (1792) 4 Term Rep 753.

44 *Minter v Priest* [1930] AC 558 at 566, 568, HL.

45 *Minet v Morgan* (1873) 8 Ch App 361; Competition Act 1998, s30(2)(a).

46 *Southwark Water Co v Quick* (1878) 3 QBD 315 at 323, CA. There are three exceptions to the general rule: where the communication is made for a fraudulent or illegal purpose; where the client waives the privilege; where the communication is made for the purpose of being disclosed to the other party.

extends to legal "advice" - not to legal "assistance".[47] The test for whether a particular document is privileged is the "dominant purpose" test, *i.e*., did the document come into existence for the "dominant purpose" of either (a) or (b) above.

Greece. The privilege of attorney-client communications is a well-established principle in Greek law. There is no distinction between the protection of communications between in-house counsel and outside counsel. All communications which fall within the scope of the professional relationship of attorney-client are regarded as privileged. The Attorney Code of Conduct, the Code that regulates the practice of Law, the Code of Civil Procedure, the Code of Criminal Procedure and the Criminal Code, contain specific provisions, granting protection from disclosure for the content of such communications. In-house counsel are obliged by law to be members of the Bar, and have the same rights and obligations, including compliance with ethical rules and a duty not to mislead the courts, as outside counsel. The independence of in-house counsel is guaranteed by law.

Portugal. Portuguese in-house lawyers can be members of the bar, the Portuguese Lawyers Association (PLA, *Orden dos Abogados*), in which case they must act independently and respect the same rules of ethics and discipline as outside lawyers.[48] According to the rules of the PLA (*Estatuto da Ordem dos Abogados*), an in-house lawyer's employment contract cannot limit the independence of the lawyer.[49] The correspondence of an in-house lawyer member of the PLA which relates to his/her legal practice cannot be seized.[50]

Spain. In-house lawyers can be members of the Bar in Spain. They are subject to professional ethics and disciplinary rules. The General Regulation of the Legal Profession confirms that the legal profession can be engaged in under a labour relationship governed by an applicable written labour contract.[51] There are no separate rules for in-house counsel and it seems generally accepted that they have the same rights and obligations as all other *abogados*. The privilege covers any spoken or written communications, documents or correspondence exchanged by attorney and client.[52] Legal privilege can be invoked in proceedings before the competition

---

47 *Smurfit Paribas Bank Limited v AAB Export Finance Limited* [1990] 1 IR 469.

48 See the PLA Statute which is approved by law.

49 Article 55.

50 Article 60 of the rules of the PLA.

51 Royal Decree 658/2001 of June 22, 2001, Article 27.4.

52 Article 437.2 of the Organic Law 6/1985 on the Judiciary establishes that all attorneys are obliged to keep confidential all the facts or news of which they have knowledge as a result of "a*ny of the possible*

authorities by both outside and in-house lawyers. Spanish lawyers have a statutory duty to be truthful in dealings with the courts.

Denmark. In Denmark the professional association of in-house lawyers is the *Dansk Forening for Virksomhedjurister* (DFVJ). Over half of its members are also members of the Danish Law and Bar Society. They are subject to professional ethics and disciplinary rules and sanctions. There are provisions on attorney-client privilege in the Danish Administration of Justice Act, which apply to in-house lawyers as well as to outside lawyers, provided that they are members of the Bar ("advokater"). In particular, in-house lawyers who are "advokater" are bound by the same confidentiality obligations as outside lawyers. Confidentiality is protected unless a court orders the attorney (in-house and outside lawyers, but not defence counsel in criminal cases) to give evidence when the evidence is deemed decisive for the outcome of the case, and the nature of the case and its importance to the party in question or society is considered to justify such evidence being given.[53] According to para. 126(1) of the Danish Administration of Justice Act, all "advokater" are under a duty to always act in accordance with "good ethical behaviour". Such ethical rules have been laid down by the Danish Law Society and they apply to all "advokater", regardless of whether they act as external or internal counsel. A general duty of confidentiality follows from section 2.3 of said rules. Moreover, it follows from section 2.1.1 that "advokater" must always preserve their independence and professional integrity. In antitrust proceedings, the Competition Act does not provide for legal privilege and no cases or decisions have dealt with the issue to date. It follows from para. 17 of the Danish Competition Act that: "The Competition Agency can demand any and all information, including accounts, accounting material, protocols, business papers and electronically stored data, which may be deemed necessary for the Agency to exercise its powers, including exercising its discretion as to whether any given matter is encompassed by this Act." There are no explicit exceptions to this rule in the Danish Competition Act itself. However, general rules on confidentiality and professional duties apply.

---

ways to carry on their professional activity" and cannot be required to testify with regard to those facts or information. In addition, Article 52 of the Ethical Code approved by the General Council of the Spanish Legal Profession on June 30, 2000, expressly states that "the obligation and right of legal professional confidentiality consists of the confidences and proposals from the client, opposing parties, other attorneys and all facts and documents which have been known or have been received due to *any of the different types of professional activity*". This is interpreted as applying also to in-house lawyers' activity. Article 32 of the General Regulation of the Legal Profession contains an additional provision on professional confidentiality and secrecy.

53 Section 170 of the Danish Administration of Justice Act.

Finland. Even though in-house lawyers cannot be members of the Bar in Finland,[54] they generally benefit from legal privilege. This is a general rule which covers in-house lawyers who represent their employer in civil cases before the courts,[55] in administrative,[56] or arbitration proceedings. Legal privilege does not, however, apply

---

54 Members of the Bar do not have a monopoly to represent clients before Finnish courts. Under the Code of Procedure (*oikeudenkäymiskaari*, in Swedish *rättegångsbalken*), any person who has a law degree, is honest and otherwise suitable and capable of handling the matter may represent a party in court proceedings.

55 Chapter 15, Section 17 of the Code of Judicial Procedure provides the following on the scope of legal privilege of a counsel in cases that are examined in district courts, courts of appeal or the Supreme Court: *"An attorney, a counsel or an assistant thereof shall not without permission disclose a private or family secret entrusted to them by a client, nor similar confidential information received by them in the course of their duties."* This confidentiality obligation is, however, qualified by Chapter 17, Section 23 of the Code of Judicial Procedure according to which: *"The following shall not testify:…(1)(4) an attorney or counsel, in respect of what the client has entrusted to him/her for the pursuit of the case, unless the client consents to such testimony. … Notwithstanding the provisions in paragraph (1)(3) and (1)(4) above, a person referred to therein, except the counsel of the defendant, may be ordered to testify in the case if the public prosecutor has brought a charge for an offence punishable by imprisonment for six years or more, or for an attempt of or participation in such an offence. The provisions in paragraph (1)(1), (1)(3) and (1)(4) apply even if the witness is no longer in the position in which he/she received information on the issue on which evidence is required."* The Supreme Court of Finland has stated in case KKO 2003:119 that "attorney or counsel" means such counsel or assistant that the party has the right to use under law in proceedings in district courts, courts of appeal or the Supreme Court. This statement indicates that if a company authorizes a certain legal counsel as its representative, the above cited provisions apply to the counsel whether or not he is an in-house counsel or an external legal counsel. The counsel must, however, fulfil certain requirements. The in-house counsel might not, for example, always be able to act as the counsel of his employer in court. This is especially so in criminal cases. Moreover, if the counsel is in such a position in the company (*e.g.* managing director or member of the board of directors) that he is considered a legal representative of the company, he cannot be a witness and accordingly Chapter 17, Section 23 of the Code of Judicial Procedure on witnesses does not apply to him. Chapter 17, Section 12, Subsection 2 of the Code of Judicial Procedure provides the following on written evidence: *"A public official or other person referred to in section 23 shall not present a document if it can be assumed that the document contains something on which he/she is not to be heard as a witness; if the document is in the possession of the party in whose benefit the secrecy obligation has been provided, this party need not present it. The provision in section 24 on the right of a witness to refuse to divulge a fact or answer a question or give a statement applies correspondingly to the obligation to present a document if the contents of the document are such as referred to in this provision."* Hence, a counsel shall not present a document if it can be assumed that the document contains something on which he is not to be heard as a witness.

56 In administrative proceedings before certain authorities Section 13 of the Administrative Procedure Act is applicable according to which: *"An attorney or a counsel shall not without permission disclose any confidential information given to him/her by the client for purposes of taking care of the matter."* In administrative courts Chapter 15, Section 17 of the Code of Judicial Procedure on the confidentiality obligation is applicable under Section 20 of the Administrative Judicial Procedure Act. In addition, in administrative proceedings both before authorities and courts Chapter 17, Section 23 of the Code of Judicial Procedure on legal privilege is applicable under Section 39 of the Administrative Judicial Procedure Act and Section 40 of the Administrative Procedure Act. Also Chapter 17, Section 12, Subsection 2 on written evidence is applicable in administrative courts under Section 42 of the Administrative Judicial Procedure Act. Hence, the provisions on legal privilege in administrative

to general counselling,[57] to criminal proceedings, or if the in-house lawyer is a legal representative of the company. In addition, the Finnish Competition Authority may follow the EC *AM&S* precedent granting privilege for communications with external legal counsel, but not for in-house counsel communications. A complete denial of in-house counsel privilege in competition proceedings would arguably not be consistent with Finnish procedural rules.[58] There are no explicit rules or case law concerning legal privilege in antitrust investigations.

---

proceedings are mostly the same as in civil proceedings. Therefore, it can be argued that they should be interpreted in the same way as in civil cases.

57 The legal privilege stipulated in Chapter 17, Section 23 of the Code of Judicial Procedure *applies only to information that the client has entrusted to the counsel for the pursuit of the case.* The Supreme Court stated in case KKO 2003:137 that when Section 17, Chapter 23 is applied, one must consider the way in which the information has been received, the nature of the facts and the connection to the assignment. Moreover, the provision must be applied in accordance with its wording. According to what the Supreme Court stated in case KKO 2003:119, this means that *general counselling is not covered by legal privilege.*

58 Informally the Finnish Competition Authority ("FCA") recognizes that it may in some cases be justified to claim legal privilege also in respect of in-house counsel opinions. However, no case to date has dealt with the question. Where a decision of the FCA is appealed to the Market Court, the above rules of the Code of Procedure apply to the Market Court proceedings. Hence, if in-house counsel represents the company in the Market Court, in-house counsel may not be ordered to testify or to disclose documents in the Market Court if such testimony or documents would reveal information that the client (the company) has disclosed to the in-house counsel concerning the subject matter of the proceedings. That being so, it would be anomalous if the Market Court could take into account as evidence in-house counsel opinions obtained earlier by the FCA during the administrative procedure, even though such documents cannot be ordered to be produced in the Market Court proceedings. Consequently, as the protection of legal privilege should be interpreted to prevent the Market Court from taking in-house counsel opinions into account as evidence, also the FCA should be prevented from obtaining and using such opinions in its investigations. Moreover, since privilege applies even after the counsel no longer represents the client, there is no reason to require that in-house counsel opinions benefit from legal privilege only if the in-house counsel in fact represents the company before the FCA or the Market Court, because the in-house counsel may be regarded as the legal representative of the company, within the meaning of the Code of Procedure, at the time the opinion is given.