

Brussels, August 19, 2003

**ECLA POSITION PAPER**  
**IN-HOUSE COUNSEL LEGAL PRIVILEGE**  
**NEEDED WITH MODERNIZATION OF EC COMPETITION LAW**

There is renewed attention for the question whether EC law should recognize legal professional privilege for communications with qualified in-house counsel. The Committee on Economic and Monetary Affairs of the European Parliament called for recognition in its *Della Vedova Report* of July 8, 2003, in the context of EC merger review. The Court of First Instance is reviewing this issue in the pending *AKZO* case.<sup>1</sup> The European Court of Human Rights will on October 22, 2003 hear the *Senator Lines* case, concerning the question whether the European Human Rights Convention applies to EC antitrust procedure. It is hoped that the Court will make some statements that would be a first step towards the recognition of the right to choose one's own counsel.

As of May 2004, this issue will be more relevant than ever, with the entry into force of Regulation 1/2003, relying more on Member State authorities and courts, increasing the powers of the EC Commission, and eliminating the possibility of notification of agreements for exemption under Article 81(3) EC. The modernization of EC competition law means that companies will have a much greater responsibility to conduct their own *ex ante* review of the legality of proposed agreements and conduct. The refusal to recognize in-house counsel privilege hampers companies' ability to organize this review efficiently.

The European Company Lawyers Association (ECLA)<sup>2</sup> has been calling for the recognition of in-house counsel privilege for many years.<sup>3</sup> ECLA was created in 1983 in

---

<sup>1</sup> Case T-125/03 *Akzo Nobel v. Commission*, OJ 2003 C 146/42 and Case T-253/03 *Akzo Nobel v. Commission*.

<sup>2</sup> ECLA is a confederation of national associations of company lawyers in Europe. ECLA represents its member organizations, which in turn represent the vast majority of company lawyers in their respective countries (approximately 30,000 lawyers) on a European and international level. ECLA is an international non-profit association governed by Belgian law. The Articles of Association were approved by Royal Decree on June 25, 1990. More information on ECLA may be obtained from its website at [www.ecla.org](http://www.ecla.org).

<sup>3</sup> ECLA papers on this topic (available on [www.ecla.org](http://www.ecla.org)): *The Commission's white paper on the modernisation of the rules implementing articles 81 and 82 EC and legal privilege for in-house lawyers*, September 1999; *The case for in-house legal privilege in EC law*; *Legal privilege for in-house lawyers*, Position paper, December 2000; *Legal privilege before national competition authorities*; *Legal Privilege Versus Secret Professionnel*; *In-House Lawyer – Issues Of Ethics And Independence*; *A Quality Professional Service – Initiatives for the Company Lawyer*, *The intellectual independence of the company lawyer*, by Pierre Charreton; and *Human Rights Implications Of Privilege Denial*, speech by Jettie Van Caenegem (Vice-President ECLA) to the IBA, Paris, February 21, 2002. On issues of

response to the European Court of Justice's *AM&S* judgment,<sup>4</sup> which deprived in-house counsel legal advice from legal privilege in EC antitrust proceedings. Advocating the adoption of in-house counsel legal privilege at the EC level remains ECLA's main activity.

This paper is organized as follows. Section I summarizes important points made in the paper. Section II discusses legal developments that support the recognition of in-house counsel legal privilege in EC antitrust proceedings. Section III explains that in-house counsel privilege would not jeopardize the effectiveness of the European Commission's antitrust investigations. Section IV sets out appropriate and well-recognized limitations on privilege which would apply to counter misuse and abuse were privilege extended to in-house counsel communications. Finally, Section V concludes that in-house counsel privilege would likely enhance compliance with EC competition rules.

## I. SUMMARY

1. ***Fundamental right to consult a lawyer of one's choice.*** 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 subject to appropriate rules of ethics and discipline. There is no reason to treat properly qualified in-house counsel differently from outside counsel in this respect. Recognizing privilege will improve compliance by companies because it lowers the barrier to consultation.
2. ***Effectiveness of investigations.*** 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 solely on evidence obtained from in-house counsel files to establish illegal conduct. Comparisons with other jurisdictions show that recognition of in-house counsel privilege does not jeopardize or even affect effective enforcement.
3. ***Leniency and cartel enforcement.*** 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

---

privilege for in-house counsel, see in general, Maurits Dolmans, *Attorney-Client Privilege for In-House Counsel*, Columbia Journal of Eur. Law, No. 1, 1998, pp. 125-138; Maurits Dolmans, *Sauce for the Goose is Sauce for the Gander*, Eur. Counsel, No. 1, February 1999, pp.7-8; Jonathan Faull, *In-house Lawyers and Legal Professional Privilege: a Problem Revisited*, Columbia Journal of Eur. Law, No. 1, 1998, pp. 139-146; J. Carr, *In-house Privilege – Are Your Internal Communications Protected ?*, Eur. Counsel, September 1996, p. 27.

<sup>4</sup> Case 155/79 *AM&S v. Commission* [1982] ECR 1575.

full immunity or a reduction from fines by cooperating with the Commission's investigation and providing relevant information. Ironically, refusal to recognize in-house counsel privilege hampers the internal process necessary for firms to come to the conclusion that they should cooperate with the Commission.

4. **Modernization.** As of May 2004, the Commission will have expanded investigatory powers at its disposal, and can access information from national competition authorities through the network of competition authorities. These will render the reservation of the right to access in-house counsel advice even less necessary. At the same time, the need for in-house counsel privilege increases. It becomes particularly important in view of the imminent modernization reform and the demand for self-assessment of compliance with the EC competition rules. Recognizing in-house counsel's involvement in compliance will lower the enforcement burden on the Commission, national authorities, and courts.
5. **Limitations.** Protection of in-house counsel communications would not be absolute. The following limitations would apply against abuse and misuse, so as to preserve the effectiveness of the Commission's investigative powers:
  - Privilege would only be granted to communications with in-house counsel who are bound by 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;
  - 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;
  - Privilege would be lost in case the counsel is involved in the illegal conduct or the company destroys evidence.

ECLA welcomes the proposal in the Della Vedova Report to provide for in-house counsel privilege in the EC Merger Regulation, and suggests that the concept be recognized also in enforcement guidelines under EC Regulation 1/2003.

## II. LEGAL DEVELOPMENTS SUPPORT IN-HOUSE COUNSEL PRIVILEGE

In 1982, Advocate-General Warner stated in his opinion in *AM&S* 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.*”<sup>5</sup> Advocate-General Slynn indicated that ““*Lawyer*” is accepted by the Commission to cover

---

<sup>5</sup> Opinion of Mr. Warner in Case 155/79 *AM&S* [1982] ECR at 1638-39.

*both a lawyer in private practice and a salaried lawyer, employed by a company, so long as he is effectively subject to a comparable régime of professional ethics and discipline as is the lawyer in private practice in the Member State in which he practices.”*<sup>6</sup> Somewhat surprisingly and without offering any clear explanation or justification, the European Court of Justice in *AM&S* decided otherwise, and excluded privilege for communications with lawyers who are employed by their clients.

***Modernization and self-assessment requires privilege.*** Since *AM&S*, much has changed. Most recently, the Commission and Council have embarked on the modernization of EC competition law. The last step will be made in May 2004, when Regulation 1/2003 will enter into force.<sup>7</sup> This will entail the following changes:

- National courts and competition authorities will obtain the right to apply Article 81(3), and will cooperate closely to collect evidence and exchange information. This is expected to result in a significant increase in the volume of antitrust infringement proceedings, investigations, and litigation before EU and national fora.
- Fines are increasing, as are claims for damages for breach of antitrust law. This increases the risks associated with antitrust violations.
- The greater risk and legal uncertainty is exacerbated by the fact that the Commission and most (if not all) national competition authorities will no longer consider notifications of planned agreements for *ex ante* exemption after May 2004.
- This is accompanied by a proliferation of EC competition case law, regulations and notices, as well as the imposition of market share ceilings in new block exemption regulations, and a greater emphasis on economic analysis.

These elements, taken together, reduce legal certainty and increase risk. Yet companies are being left to fend for themselves, which they can only do with the help of in-house and outside counsel. There are significant barriers to using the latter. The Commission cannot expect in-house counsel to meet the challenge of intensified scrutiny and greater exposure without placing them in a position to give legal advice in an efficient and effective way. In-house counsel will only be able to provide thorough and objective advice if communications are privileged and cannot later be used to incriminate the company and lead to fines. Effective in-house counsel advice would benefit the Commission. It would contribute to legal certainty, and improve compliance with competition rules. It would foster the use of antitrust compliance programs, which in turn would reduce the burden of enforcement on competition authorities and courts.

---

<sup>6</sup> Opinion of Sir Gordon Slynn in Case 155/79 *AM&S* [1982] ECR at 1646-1647.

<sup>7</sup> See in particular Council Regulation (EC) No 1/2003, on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L 1/1, 4.1.2003.

Recognition of in-house counsel privilege in the amended EC Merger Regulation is particularly appropriate, because (a) merger control is not a matter of discovery of illegal conduct, but the regulation of prima facie permissible transactions, (b) complainants are an important source of information and views in these proceedings, which render access to in-house counsel materials unnecessary and disproportionate, and (c) given the need to conduct a careful review of the feasibility of proposed (often complex) transactions, free and unencumbered communication with in-house counsel is essential. It is also in the Commission's interest, because it may weed out transactions that are not feasible, without having to waste Commission resources.

***In-house counsel can be independent.*** Based on *AM&S*, the Commission counters these points by arguing that in-house counsel's employment relationship is incompatible with professional independence, and that therefore in-house counsel should be treated differently from outside counsel. Commissioner Monti has stated that:

*Because in-house lawyers are not independent and have to follow the instructions given by the management of the company, they could be used as an instrument to commit infringements and conceal documentation on such infringements if they were to benefit from legal professional privilege.<sup>8</sup>*

There is no evidence whatsoever of the implied accusation that in-house counsel act as stooges for management plotting to break the law. In the 40 years of EC decision practice, the Commission can cite no case where this happened. Nor is it fair to argue that the risk of violations is greater for in-house than for outside counsel: the only published cases of a lawyer organizing or cooperating with a cartel concerned outside counsel.<sup>9</sup>

In fact, all published EC case law involving in-house counsel advice indicates that in-house counsel advised *against* infringement.<sup>10</sup> In many cases, in-house counsel is indeed better positioned to ensure compliance with law than outside counsel. Under the labour laws of many countries, it is much more difficult to get rid of a salaried employee than to terminate an attorney-client relationship. Also, in-house counsel typically occupies a position of particular trust within an undertaking, with the specific task of ensuring compliance with the law in the activities of the undertaking. In such a case, in-house counsel are unlikely to engage in practices that conflict with professional ethics. Very recently, in-house counsel of the Norwegian shipping company Stolt-Nielsen Transportation resigned rather than having to

---

<sup>8</sup> Letter to the President of ECLA dated April 11, 2000.

<sup>9</sup> 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. 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.

<sup>10</sup> *John Deere* OJ 1985 L 35/58, para. 21, and *Sabena* OJ 1988 L 317/47, para. 36.

condone cartel activity.<sup>11</sup> The case illustrates that in-house counsel are no more likely than outside counsel to engage in unethical conduct, and no less likely to exercise independent judgment in accordance with ethical rules.

Recognizing that employment status is not an absolute barrier to independence, both Advocates General in the *AM&S* case specifically rejected (unfortunately in vain),

*“any suggestion that lawyers who are employed full time by [...] the legal departments of private undertakings, are not to be regarded as having such professional independence as to prevent them from being within the rule.”*<sup>12</sup>

Furthermore, Member State labour laws protect employees, including in-house counsel, against being required to commit unlawful acts or omissions, or breaches of professional ethical rules.<sup>13</sup> To the contrary, in-house counsel may face criminal liability, fines, and disbarment if they were to follow such instructions.<sup>14</sup>

---

<sup>11</sup> *Shipper Gets Conditional Immunity*, Wall Street Journal, February 26, 2003.

<sup>12</sup> Case 155/79 *AM&S* [1982] ECR at 1655.

<sup>13</sup> Employment contracts in violation of law are unenforceable, and the same applies to instructions from employers to employees in breach of competition law. 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). An employee is under an obligation to carry out lawful orders from the employer, that is orders which are within the scope of the contract of employment. There is, however, an implied obligation on the employer not to give the employee orders which are illegal; and an employee cannot lawfully be ordered to work beyond his contract and insistence on such an order could found a claim of constructive dismissal. 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 the Netherlands, employers of legal counsel members of the Bar are required to sign a statement confirming that “the employer shall respect the free and independent professional status of the employee [and] ... shall refrain from anything that could influence the professional activities of the employee and the professional discretion in establishing a policy in a particular case” (Article 2). The employer must not interfere with the lawyer’s compliance with ethical rules (articles 3 and 4). 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.

<sup>14</sup> In the UK solicitors are governed by the Law Society's Professional Codes of Ethics and Conduct. In-house lawyers are subject to the same principles of conduct as solicitors in private practice. The requirements of professional conduct are in addition to the requirements under the general laws of contract, tort, crime and so on. The following practice rules from the Code are particularly relevant to the issues of lawyers' independence:

“A Solicitor shall not do anything in the course of practicing as a solicitor, or permit another person to do anything on his or her behalf, which compromises or impairs or is likely to compromise or impair any of the following:

- the solicitor's independence or integrity
- a person's freedom to instruct a solicitor of his or her choice
- the solicitor's duty to act in the best interests of the client

*The majority of Member States recognizes privilege.* More importantly, Commissioner Monti's statement disregards the fact that in-house counsel in many EU Member States and elsewhere are subject to effectively enforced ethical rules and disciplinary proceedings, which guarantee their independence *vis-à-vis* the company they work for.<sup>15</sup> In fact, since the 1982 *AM&S* case, there has been an increasing trend among Member States to recognize in-house counsel privilege and to acknowledge that employment status is not incompatible with professional independence.<sup>16</sup>

The fact that in-house counsel are independent and follow rules of professional ethics has been recognized in the legal systems of EU Member States. Already in 1972, the UK High Court had recognized that in-house lawyers

*“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.”*<sup>17</sup>

This also seems to be the rule imposed by certain other Member States (*e.g.*, Ireland, Netherlands, Greece), which do not distinguish between outside and in-house counsel members of Bar Associations and, for this reason, recognize legal privilege for communications of both in-house and outside counsel.

Countries with a common law legal tradition such as the United States, the United Kingdom, Ireland, Australia, and Canada have for many years accepted that in-house counsel are entitled to legal privilege if they are members of the bar and comply with ethical rules. A

- 
- the good repute of the solicitor's profession
  - the solicitor's proper standard of work
  - the solicitor's duty to the Court.”

“It is fundamental to the relationship which exists between solicitor and client that a solicitor should be able to give impartial and frank advice to the client, free from any external or adverse pressures or interests which would destroy or weaken the solicitor's independence or the client's freedom of choice.”

<sup>15</sup> In the *AM&S* case, the ECJ stated the following regarding external legal counsel: “...it should be stated that 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, and in the overriding interests of that cause, 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. Such a conception reflects the legal traditions common to the Member States and is also to be found in legal order of the Community...” (para. 24). The same applies in many jurisdictions to in-house counsel members of the Bar or members of professional associations.

<sup>16</sup> The courts in a number of Member States have upheld this principle. See, *e.g.*, in France : Cour de Cassation, March 29, 1963; in the Netherlands : Hof van Discipline, December 18, 1974, *Advokatenblad* 1975, 366 *et seq.*; and in Belgium : Cour de Cassation, March 27, 1968, *Arr. Cass.* 1968, 977 and *Pas.* 1968, 1, 916; Liège, June 25, 1958, *J.L.* 1958-1959, 116; C.T. Liège, December 12, 1974, *Jur. Liège* 1976, 66, confirming T.T. Verviers, November 22, 1972, *J.T.T.* 1973, 157; T.T. Nivelles, June 28, 1991, *J.T.T.* 1992, 264; T.T. Bruxelles, December 8, 2000, *A.J.T.* 2000-2001, 646.

<sup>17</sup> *Alfred Crompton Amusement Machines Ltd. v. Customs and Excise Commissioners (No. 2)* [1972] 2 Q.B. 102.

number of other countries in Europe now accept that as well. For example: the Netherlands Bar now enlists in-house counsel who have taken the bar exam, and Dutch competition law specifically recognizes in-house counsel privilege; German law recognizes in-house counsel privilege for *Syndikusanwaelte*; Belgian law recognizes privilege for opinions by in-house counsel who are members of and subject to the disciplinary rules of the *Institut des Juristes d'Entreprise*; Danish law recognizes privilege for in-house counsel admitted to the Danish Bar Association (“*Advokater*”). Even in Spain, Portugal, and Greece, qualified in-house counsel enjoy privilege. Other Member State authorities have recently indicated that they may in practice recognize in-house counsel privilege.<sup>18</sup>

**Human Rights.** An interference with the right to consult a lawyer of one’s choice violates Article 6 of the European Convention of Human Rights (ECHR), which provides for the right to a fair trial.<sup>19</sup> Article 6(3)(c) 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 arguably “criminal” law for purposes of the ECHR.<sup>20</sup> Correspondence between a lawyer and his client is further protected by the principle of respect for privacy in Article 8 of the ECHR. Any interference with such correspondence, including searches of business premises, must be in accordance with the law and necessary in a democratic society, *i.e.*, proportional.<sup>21</sup> There would seem to be no legitimate reason to recognize these basic rights for outside counsel advice, but not for communications with properly qualified in-house counsel.

### **III. IN-HOUSE COUNSEL PRIVILEGE WOULD NOT JEOPARDIZE THE EFFECTIVENESS OF COMMISSION INVESTIGATIONS**

More recently, the Commission has invoked a need to use in-house counsel documentation as a “lead” to infringements. But a review of cases shows that the Commission does not need access to in-house counsel communications to establish illegal anti-competitive conduct. With modernization and leniency policies, the Commission’s powers to discover evidence will further increase. There is no indication at all that granting in-house counsel privilege would prejudice the effectiveness of the Commission’s investigations.

---

<sup>18</sup> For example, the Finnish Competition Authority informally recognizes that in some cases it may be justified to claim legal privilege also in respect of in-house counsel opinions although its internal guidelines do not protect in-house counsel privilege. However, no case to date has dealt with the question.

<sup>19</sup> In *General Mediterranean Holdings SA v. Patel*, it was held that the interference with the right to consult a lawyer of one’s choosing may violate Article 6 of the ECHR, while interference with correspondence between lawyer and client could violate Article 8 (*General Mediterranean Holdings SA v. Patel* [1999] 3 All ER 673).

<sup>20</sup> 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).

<sup>21</sup> *Roemen et Schmit v. Luxembourg*, No. 51772/99, February 25, 2003, and *Niemietz v. Germany* [1992] 16 EHRR 97.

***No published examples where in-house advice was sole evidence.*** No antitrust case decided by the Commission has relied solely on communications with in-house counsel as evidence of illegal conduct. In *John Deere*<sup>22</sup> and *Sabena*<sup>23</sup>, 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 (which Commissioner Monti has undertaken to do no longer), but this evidence was not necessary to establish the infringement of the competition rules. In *Volkswagen*, the Commission copied documents from 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 actually relied upon as evidence.<sup>24</sup>

***Refusal of privilege is counterproductive.*** In cartel enforcement, 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. As a result, cartel enforcement has increased very significantly. 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*.

Importantly, refusal to recognize in-house counsel privilege 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, and giving written advice on applications for leniency. 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 more effective.

***Access to in-house advice is even less justified after modernization.*** As of May 2004, the Commission will have expanded investigatory powers at its disposal.

- Under Regulation 1/2003, the Commission and national competition authorities are able to share information within the newly created network.
- 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 interviewed, and has the ability to impose higher fines.

This is not all. Recent US case law suggests that plaintiffs can seek discovery in the United States to obtain information and documents that would not be available under national civil proceedings, significantly increasing the efficiency of both civil litigation and EC

---

<sup>22</sup> Commission decision 85/79/EEC *John Deere* (IV.30.809) OJ 1985 L35/58, para. 21.

<sup>23</sup> Commission decision 88/589/EEC *Sabena* (IV.32.318) OJ 1988 L317/47, para. 36.

<sup>24</sup> Commission decision 98/273/EEC *Volkswagen* (IV.35.733) OJ 1998 L124/60, para. 198, and Case T-62/98 [2000] ECR 2707.

complaint proceedings.<sup>25</sup> These developments render the reservation of the right to access to in-house counsel advice even less necessary.

***Enforcement is no less efficient in EU Member States that recognize in-house privilege.*** In-house counsel privilege is recognized to various degrees in several EU Member States, such as the United Kingdom, Ireland, Belgium, the Netherlands, Germany, Denmark, Spain, Portugal, and Greece. In other Member States, such as France, Italy, Austria and Sweden, in-house counsel documents are generally not privileged. There is no evidence, however, 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.

***Enforcement is no less efficient in other jurisdictions than the EU.*** Although in-house counsel privilege is recognized in the United States, there is no evidence that the US antitrust authorities are less effective than the European Commission in investigating antitrust infringements. This is true even though the Department of Justice faces bigger hurdles for imposing fines because it has to convince a jury to pursue a court case and the court to impose a fine.<sup>26</sup>

Australia is another example of a country where privilege extends not only to outside but also to in-house counsel. In *Daniels*, the Australian High Court recently held that section 155 of the Australian Trade Practices Act 1974, which concerns the investigative powers of the Australian Competition and Consumer Commission, did not require the production of documents that were subject to outside counsel legal privilege. In his opinion, Kirby J. observed that the 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.”*<sup>27</sup>

---

<sup>25</sup> *Malev v. Pratt & Whitney*, 964 F.2d 97 (2d Cir. 1992); *AMD v. Intel*, 292 F.3d 664 (9th Cir. 2002). In *AMD v. Intel* the court held that an investigation by the European Commission qualifies as a "proceeding before a tribunal" within the meaning of 28 U.S.C. § 1782 (which is the basis for foreign tribunals and litigants to seek discovery in the U.S.) even though there is no clear separation of powers between prosecutor and decision-maker.

<sup>26</sup> On a ten-year average, the DOJ initiated 101 investigations per year. In 53 cases, the DOJ convinced the Grand Jury to file a court case; the DOJ won 50 of these cases. Comparable figures for the EU are not publicly available.

<sup>27</sup> *The Daniels Corporation International v. Australia Competition and Consumer Commission* [2002] HCA 49, para. 85. The High Court overturned the decision of the Federal Court.

The Court also noted 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.”*<sup>28</sup>

In-house counsel legal advice is also covered by privilege under Canadian law.<sup>29</sup>

#### **IV. LIMITATIONS ON PRIVILEGE**

There are a number of generally recognized limitations on legal privilege that would apply if it were extended to cover in-house counsel communications. These limitations ensure that a proper balance is struck between a company’s right to seek legal advice in confidence from its internal lawyer and a competition authority’s interest that privilege is not misused or abused to hide evidence of illegal conduct.

***Privilege only for counsel subject to ethical rules and discipline.*** According to the Court of Justice in *AM&S*, “... *the requirement as to the position and status as an independent lawyer ... 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, and in the overriding interests of that cause, 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.*” If such rules are breached, privilege is lost, and this would be the same for in-house and outside counsel.

Privilege should therefore be extended only to in-house counsel that are bound by professional ethics and subject to disciplinary proceedings in case of non-compliance with their ethical obligations.

***Privilege only for advice given in legal capacity.*** Where privilege extends to in-house counsel, it typically applies only to in-house counsel acting in their capacity as legal adviser.<sup>30</sup> For instance, communications by in-house counsel performing non-legal

---

<sup>28</sup> *Ibid.*, para. 24.

<sup>29</sup> *Canadian Pacific Ltd v. Canada (Director of Investigation and Research)* OJ 1995 1867 (Gen. Div.) (unreported). See also Gavin Murphy, *Solicitor-Client Privilege: Canada and the E.C. Compared*, E.C.L.R., No. 4, 1999, p. 185.

<sup>30</sup> In *Georgia Pacific v. GAF Roofing Manufacturing Corp.* the court rejected the company’s request for privilege over a document used for the negotiation of a contract between company executives, because it did not constitute “*exercising a lawyer’s traditional function*” but rather constituted “*acting in a business capacity*” ( [1996] WL 29392). In *E.I. du Pont de Nemours & Co. v. Forma-Pac Inc*, 1998, the collection agency was authorized to hire a firm to file suit, if necessary, and in-house counsel’s communications to the agency were passed on to the firm that eventually was retained. When the defendant in the suit sought discovery of these communications and the privilege was asserted, the claim was rejected. The basis for the court’s decision was that in-house counsel was performing a business function, not a traditional legal function, in pursuing collection of this corporate debt.

managerial tasks would not enjoy legal privilege. Communications that are not made with a view to obtaining or giving legal advice are not protected. That principle would apply also in EC antitrust investigations.

The Australian High Court recently confirmed in *Daniels* that, where a document may have more than one purpose, it is necessary to establish the dominant purpose in order to determine whether legal privilege would apply. In the Judgment, Callinan J. explained that:

*“[l]egal professional privilege does not have an unconfined operation. It protects only such documents as have come into existence for the dominant purpose of obtaining, or giving legal advice, or for the use in litigation.”*<sup>31</sup>

The scope of protection afforded by legal privilege is thus limited to documents that have been prepared with a view to obtaining or giving legal advice. The same principles would apply if legal privilege were extended to in-house counsel.

***Privilege only for counsel who comply with ethical rules and the law.*** Privilege must not be abused, and should be denied in case it is invoked by counsel who knowingly cooperated with a breach of the law. In *Strong v. Abner*, for instance, it was held that:

*“the protection which the law affords to communications between attorney and client, has reference to those which are legitimately and properly within the scope of a lawful employment; it does not extend to communications made in contemplation of a crime or perpetration of a fraud.”*<sup>32</sup>

A similar rule was applied in the recent *Rambus v. Infineon* case where attorney-client privilege was pierced based on the crime-fraud exception (*i.e.*, Rambus was suspected of having committed fraud and having destroyed documents, and could thus not invoke privilege).<sup>33</sup>

It is therefore apparent that there are appropriate limitations to privilege and that in the case of unethical conduct or participation in illegal activity, privilege will be denied. Granting privilege to in-house counsel would therefore not result in the hiding of evidence of illegal behaviour under the cloak of privilege. In any event, the mere possibility of abuse in

---

<sup>31</sup> *Daniels*, referred to above, para. 133.

<sup>32</sup> *Strong v. Abner*, 268 Ky, 502, 105 SW 2d 599, 602. See also *Sawyer v. Stanley*, 241 Ala. 39, 1So. 2d 21 (1941) (“Included within the fraud exception is an attorney’s communication which is itself a part of a plan to commit a fraud.”). The same applies in other jurisdictions, such as Australia (see *Daniels*, referred to above, para. 24; “The notion that privilege attaches to communications made between client and lawyer for the purpose of engaging in contraventions of the Act should not be accepted. A communication the purpose of which is to ‘seek help to evade the law by illegal conduct’ is not privileged.”) and Canada, *R. v. Cox and Railton* (1884), 14 QBD 153.

<sup>33</sup> *Rambus, Inc. v. Infineon Techs. AG*, 155 F. Supp. 2d 668, 681 (E.D. Va. 2001); and on appeal 318 F. 3d 1080 (Fed. Cir. Va. 2003). Order Concerning Complaint Counsel’s Motion to Compel Discovery, *In the Matter of Rambus Inc.*, Docket No. 9302 (F.T.C. February 28, 2003). Peter Kaplan, *FTC Opens Antitrust Case Against Rambus*, Reuters, April 30, 2003.

isolated cases should not result in denying legal privilege in respect of all in-house counsel communications. If outside counsel engages in illegal or unethical conduct, the legal privilege will be lost, as was the case in *SAS/Maersk*. Similarly, were privilege extended to in-house counsel, it would be forfeited if the in-house counsel failed to comply with ethical rules or misused the privilege. In any event, as noted, in-house counsel are no more likely, and may in fact be less likely than outside counsel, to engage in unethical conduct, and legal privilege should therefore not be denied merely because unethical conduct is possible.

#### V. **IN-HOUSE COUNSEL PRIVILEGE WOULD ENHANCE COMPLIANCE WITH COMPETITION RULES**

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 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 guaranteed if the communications made with a view to obtaining or giving legal advice are protected by legal privilege. The importance of privilege for internal legal advice has been recognized 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.”<sup>34</sup>*

There is no reason to treat company employees differently from Commission employees. Companies and institutions will only be able to ensure the legality of their actions if they can obtain quick and effective legal advice in confidence. Provided that in-house lawyers are subject to appropriate ethical standards which are enforced, as for example their local bar rules or CCBE's Code of Conduct, privileged legal advice would enhance compliance of companies with competition rules. This is in the public interest, and ECLA therefore again calls on the Commission to recognise the privilege for legal communications with in-house counsel, *“provided that the legal counsel is properly qualified and complies with adequate rules of professional ethics and discipline which are laid down and enforced in the general interest by the professional association to which the legal counsel belongs.”*

Cae/ecla-documents/LP-POSPAPER-2003

---

<sup>34</sup> 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.