ORIGINAL

TO THE MEMBERS OF
THE COURT OF JUSTICE OF
THE EUROPEAN COMMUNITIES

STATEMENT IN INTERVENTION

PURSUANT TO ARTICLE 40 OF THE STATUTE OF THE COURT OF JUSTICE AND
ARTICLE 93 OF THE RULES OF PROCEDURE OF THE COURT OF JUSTICE

lodged by

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intervener,

in support of the conclusions of Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd. in

Case C-550/07 P

in which **Akzo Nobel Chemicals Ltd.** and **Akcros Chemicals Ltd.** pursuant to Article 56 of the Statute of the Court of Justice request that the decision of the **Court of First Instance of the European Communities** of 17 September 2007 in Case T-253/03, be set aside.

STATEMENT IN INTERVENTION PURSUANT TO ARTICLE 40 OF THE STATUTE OF THE COURT OF JUSTICE AND ARTICLE 93 OF THE RULES OF PROCEDURE OF THE COURT OF JUSTICE IN
CASE C-550/07 P,
AKZO NOBEL CHEMICALS v. COMMISSION OF THE EUROPEAN COMMUNITIES

I. SUMMARY AND INTRODUCTION

1. This Statement in Intervention is submitted by The European Company Lawyers' Association ("ECLA"). It supports the form of Order sought in Akzo Nobel Chemicals Ltd. ("Akzo") and Akcros Chemicals Ltd.'s ("Akcros") appeal of December 8, 2007 (the "Appeal"), and respectfully requests the Court to set aside the judgment of the Court of First Instance in Case T-253/00, *Akzo Nobel Chemicals v. Commission*, (the "*Akzo* judgment") insofar as it rejected the claim of privilege for communications between the general manager of Akcros and a member of Akzo's Legal Department.

2. The Community concept of legal privilege is based on national law concepts. The Community lacks the competence to define who is a lawyer, much less to deny legal privilege to communications with a lawyer entitled to legal privilege under the law of the Member State where he or she is established.

3. For this Court to uphold the *Akzo* judgment would, in effect, deprive certain lawyers of their national law rights, and their clients of the protections enshrined in these national laws. This would be contrary to the right to get legal advice, and to the fundamental rights of defence.

4. Discouraging undertakings from seeking the advice of properly qualified and regulated in-house lawyers cannot be in accordance with the policy to encourage self-regulation by undertakings and compliance with competition law.

5. Denying privilege to in-house counsel irrespective of their professional status imposes a formalistic test (*i.e.*, employment) that is irrelevant to the true independence of the lawyer in question in providing legal advice. The crucial question is whether the lawyer in question is a full member of a national Bar or a regulated legal profession under the national law of a Member State that allows or imposes an obligation on the lawyer to provide legal advice in full independence. If he or she is a member of such a profession and granted privilege under national law, then privilege should apply in Community investigations also.

6. ECLA therefore supports the Appeal based on the following grounds, namely, that the Court of First Instance:

i. violated the principles of national competence and procedural autonomy;

ii. violated the fundamental right to obtain legal advice from the lawyer of one's choosing pursuant to Article 6 of the European Convention on Human Rights, the right of defence, and the fundamental right of the lawyer to practice his profession; and

iii. erred in its reasoning and drew the wrong conclusions from the facts.

7. This Statement in Intervention addresses each of the grounds on which the Court of First Instance rejected the claim of privilege for correspondence with Akzo's in-house lawyer (*Akzo* judgment, ¶¶ 165-180) and is organised as follows: Section I provides a brief overview of ECLA's pleas in law; Section II explains why the Community lacks competence to suppress legal privilege for communications with in-house lawyers by national law; Section III explains that not granting privilege to communications with in-house counsel breaches fundamental rights of defence, as well as the fundamental right of a lawyer to practice his profession; Section IV argues that any decision in this case must be made on the basis of principle and outlines the relevant principles; and Section V provides some concluding remarks.

II. COMMUNITY LAW CANNOT SUPPRESS NATIONAL LAW PROTECTIONS FOR IN-HOUSE LAWYERS

8. The Court of First Instance in the *Akzo* judgment concluded that communications between the lawyer in question (a member of Akzo's Legal Department and an Advocaat of the Netherlands Bar) and the general manager of Akcros were not privileged because the Court of Justice in *A M & S* said that,[1] for privilege, the lawyer should not have a relationship of employment with the client (*Akzo* judgment, ¶¶ 166-169). ECLA respectfully requests this Court to reconsider the judgment in *A M & S*, in this regard.

9. ECLA considers that the essential question before the Court of Justice in this case is as follows: if national law provides that a properly qualified in-house lawyer is a full

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

member of the national Bar or of an equivalent regulated profession, and has the same status as an outside lawyer for the purpose of legal professional privilege, can Community law override that position?

10. ECLA submits that, in accordance with the general principles of national competence and national procedural autonomy, Community law cannot do so. This is so because of the reasons set out below and also because there is a fundamental right to choose one's lawyer, guaranteed by Article 6 of the European Convention on Human Rights.

11. ECLA considers that the Court should recognise that Member States are entitled to decide whether in-house lawyers are regarded as full members of the national or regional Bars or equivalent professional institutions, *i.e.*, whether they belong to a regulated legal profession. The Court should also recognise that national laws may determine whether communications with in-house lawyers, when they are full members of the Bar or of a regulated legal profession, are or are not privileged. Member States have unrestricted competence to define and regulate the legal profession.

12. Since Community law allows national law to define who is regarded as a full member of the Bar, national law should also define the consequences, and in particular the rights, privileges, and obligations that result from that status. The *Wouters* case (discussed below)[2] shows that the Dutch Bar is particularly strictly regulated, and there is therefore no justification for denying a privilege given by Dutch law to communications with a full member of the Dutch Bar. For this Court to find otherwise would be contrary to the right to consult a lawyer of one's choosing, set out Article 6 of the European Convention on Human Rights, as illustrated by the recent ruling of the Irish High Court in Law Society of Ireland v. Competition Authority.[3]

a. <u>The status of in-house lawyers under Dutch law</u>

13. The *Akzo* judgment (¶ 176) dismisses the fact that the lawyer in question is a full member of the Netherlands Bar. ECLA considers that this dismissal was inappropriate and a crucial error of law, because national law invariably determines

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2 Case C-309/99, *Wouters and others v. Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577.

3 [2005] IEHC 455.

who is and who is not a lawyer. Community law says nothing on that subject. In fact, other Community institutions have been careful to respect the clear delineation of national law competence in this regard.

14. For example, Directive 98/5/EC concerning the freedom of establishment of lawyers,[4] recognises that the definition of who is and who is not a lawyer is a matter for the Member States alone.[5] Recital 7 states that the Directive is "*without prejudice in particular to national legislation governing access to and practice of the profession of lawyer under the professional title used in the host Member State.*"[6] The Directive specifically preserves the position of employed lawyers under national law and no distinction is made as between employed and self-employed lawyers, except to the extent that such a distinction is already exists under national law. Article 1(3) of the Directive states that the title of lawyer applies to "*both lawyers practicing in a self-employed capacity and to lawyers practicing in a salaried capacity in the home Member State and, subject to [recognition of employed lawyers], in the host Member State.*" Article 8 of the Directive provides that the ability of employed lawyers to practice under their home title in another Member State is determined by the recognition given to such lawyers by the host Member State. Importantly, this provision does not attempt to impose a Community rule for the status of employed lawyers in the area of freedom of establishment – the Directive implicitly recognizes that the status of such lawyers is a matter for national law.[7]

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4 Directive 98/5/EC of February 16, 1998, to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, OJ L 77, March 14, 1998, p.36 (hereinafter "Directive 98/5/EC").

5 Article 1(2)(a) of the Directive defines "lawyer" as "*any person who is a national of a Member State and who is authorised to pursue his professional activities under one of the following professional titles*," and refers to the titles accorded to members in the Bar in each Member State *e.g.*, advocaat in the Netherlands, (with the exception of Estonia for which the Directive refers to "*vandeadvokaat*" or sworn advocates but other persons may also be "*advokaadid*" *i.e.*, members of the Estonia Bar).

6 Recitals 10 and 11 of the Directive also seek to preserve national law rules on the exercise of certain legal activities, such as the reservation of certain activities for professions other than the legal profession, the requirement for a lawyer practicing under his home-country professional title to work in a conjunction with a local lawyer when representing or defending a client in legal proceedings, and the reservation of access to the highest courts to specialist lawyers.

7 Similarly, Directive 89/94/EEC of December 21, 1988, on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration, OJ L 19, January 24, 1989, p.16 (hereinafter "Directive 89/94/EEC"), ensures that a lawyer is integrated into the profession in the host Member State. Directive 89/94/EEC does not attempt to modify the rules regulating the profession in the State or to remove such a lawyer from the ambit of those rules. *See also* recital 2 of Directive 98/5/EC (cited above) on this point.

15. Since Community law is compelled to recognise as a lawyer everyone who is so recognised by the national law of a Member State, it is irrational and anomalous for the *Akzo* judgment to deny the consequences of that status to a Dutch in-house lawyer who is unquestionably a full member of the Dutch Bar. Community law would not allow the Commission to question his status as a member of the Bar, since that would be an unjustified interference with national law and with national procedural autonomy. The *A M & S* judgment requires what is in effect a *renvoi* to the national law that defines who is full member of the Bar,[8] so it is an unjustifiable interference with national law to claim that the consequences of that definition can be modified by Community law. The *Akzo* judgment says that there is a Community concept of privilege (¶ 176), but there cannot be a Community concept of privilege that deviates from national law when there is clearly no Community concept of who should be entitled to it.

16. The *Akzo* judgment also suggests that the Community Courts have sought to develop a Community concept of privilege (*Akzo* judgment, ¶ 176), and implies that this would be inconsistent with a rule by which the privilege depended on whether it was recognised by the national law of the lawyer in question. That is incorrect. The Community concept of privilege depends on whether national law considers the individual in question to be a full member of the national Bar or of a regulated legal profession. Those national laws have not been harmonised, and, as noted above, there is no Community concept of a lawyer for this purpose.

17. The Community law concept of privilege is not based on a Community regulation, but on concepts of fundamental rights and the principles that the Court found to be common to the laws of the Member States.[9] Those laws all recognise the rights, duties, and privileges of clients and of lawyers, and the Court is therefore not concerned, in this case, with a self-contained, autonomous concept of Community law.

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8 *A M & S*, cited above, ¶ 25: [...] *the protection thus afforded by Community law ... to written communications between lawyer and client must apply without distinction to any lawyer entitled to practise his profession in one of the Member States* [...].

9 *A M & S*, ¶ 18.

18. In this context, the judgment of this Court in Case C-309/99, *Wouters and others*,[10] is important. In that judgment the Court stated that:

> "... *in the absence of specific Community rules in the field, each Member State is in principle free to regulate the exercise of the legal profession in its territory (Case 107/83, Klopp, [1984] ECR 2971 para. 17, and Reisebüro, paragraph 37," Case C-3/95, [1996] ECR I-6529. "For that reason, the rules applicable to that profession may differ greatly from one Member State to another" (para. 99 of the Wouters judgment).*
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> *The approach of the Netherlands, where the Advocatenwet "entrusts the Bar of the Netherlands with responsibility for adopting regulations designed to ensure the proper practice of the profession, is that the essential rules adopted for that purpose are, in particular, the duty to act for clients in complete independence and in their sole interest, the duty, ... to avoid all risk of conflict of interest and the duty to observe strict professional secrecy*" (para. 100) (emphasis supplied).

19. ECLA considers it significant that a legal profession as strictly regulated as the legal profession in the Netherlands, which went so far as to prohibit multidisciplinary partnerships, regards in-house lawyers as full members of the Bar, and as completely independent. Annex 1 explains the legal position of an in-house lawyer under Dutch law. The statement of Mr. Cohen, attached at Annex 2, outlines the considered evaluation of the role of in-house/employed lawyers in the Netherlands culminating in the recommendation that they be allowed to be full members of the Bar and that the same privilege rules should apply to all members of the Bar.

b. Community law cannot deprive a lawyer of privilege granted under national law

20. There is no justification in Community law for saying that a privilege undoubtedly granted by the national law of the lawyer in question can be taken away by Community law, because the legal basis for the doctrine of privilege in Community law is found in national law, and not in Community legislation. Since national law determines who is a lawyer, and determines what consequences result from that, it would be irrational and anomalous for Community law to take away one of the most important consequences of being a lawyer. Community law presumes that an external lawyer fulfils whatever requirements of Community law there are which justify privilege (ethics and discipline), so Community law should logically presume that the

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10 Cited above.

requirements are fulfilled for an employed lawyer if national law says that they are fulfilled. National law is better placed than Community law to determine whether the criteria of ethics and discipline are met. Since national law determines who is a lawyer, national law should determine the consequences when a lawyer is a full member of the national Bar or of a regulated legal profession.

21. It would also be irrational if privilege depended on whether a "dawn raid" conducted pursuant to Community competition law was being carried out by Commission officials or by a national competition authority. If the Commission conducted the dawn raid, the *Akzo* judgment would dictate that documents prepared for or by in-house counsel (unless reporting on external counsel's advice) would not be subject to privilege. However, if a national competition authority conducted the dawn raid on behalf of the Commission or if a national competition authority was conducting a dawn raid of its own initiative pursuant to Community competition law, it could not inspect documents prepared for or by in-house counsel for purposes of giving legal advice where the Member State in question recognized privilege for communications with in-house lawyers. It is worth noting that Regulation 1/2003 explicitly states that even where officials of national competition authorities conduct investigations on behalf of the Commission, they must exercise their powers "*in accordance with their national law.*"[11] Accordingly, when the Commission conducts a dawn raid (as opposed to a Member State competition authority), the *Akzo* judgment diminishes the rights of defence afforded to companies by Member States which recognise in-house privilege.

III. FAILURE TO RECOGNIZE PRIVILEGE FOR IN-HOUSE COUNSEL BREACHES FUNDAMENTAL RIGHTS

22. The *Akzo* judgment is inconsistent with the fundamental right for private parties to be able to consult the lawyer of their choice without creating evidence that might be used against them. The EU Charter of Fundamental Rights provides in Art. 47 that: "*Everyone is entitled to a fair and public hearing within a reasonable time by an*

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11 Article 22(2) of Regulation 1/2003 of December 16, 2002, on the implementation of the rules on competition laid down in Articles 81 and 82, OJ L 1, January 4, 2003, p.1, hereinafter "Regulation 1/2003."

independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented."

Any restriction on the fundamental rights involved must be justified by clear and strong reasons. Restrictions must be tested *in concreto*, rather than *in abstracto* as the Court of First Instance has done by adopting the *AM&S* standard. The denial of legal privilege to in-house lawyers is disproportionate and unnecessary, and violates the prohibition of discrimination, the right to a fair trial, the right to privacy and the right to property.[12]

23. In the *Akzo* judgment, the Court of First Instance has simply dismissed the argument of the applicants that by not granting the protection of legal privilege to in-house lawyers, the Commission has also violated a number of fundamental rights. For its dismissal, the Court of First Instance merely referred to its considerations with regard to other complaints against the decision of the Commission.[13]

24. ECLA is of the opinion that the judgment of the Court of First Instance in this respect cannot be upheld, for the following reasons.

25. The protection of legal privilege is based on a number of fundamental rights, both of the client and the lawyer in question, and restrictions to the legal privilege also affect these fundamental rights. These fundamental rights in question are to be found in national (constitutional) laws of Member States, as well as in the European Convention on Human Rights ("ECHR") and the International Covenant on Civil and Political Rights ("ICCPR"). These fundamental rights are also safeguarded in European Community law as general principles of community law, for which the ECHR and its interpretation by the European Court of Human Rights in Strasbourg ("ECrtHR") are guiding.[14] The EU Charter of Fundamental Rights of the European Union (the "Charter") – that will have formally binding force after the Reform Treaty has entered into force - also recognizes the ECHR protection as the minimum level of

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12 *See* the judgments of the European Court of Human Rights, in *Niemietz v. Germany*, ECrtHR 16 December 1992, para. 40; *Campbell v. United Kingdom*, ECrtHR 28 February 1993 para. 46; *Schöneberger and Dumaz v. Switzerland*, ECrtHR 20 June 1988, para. 29; *Campbell and Fell v. United Kingdom*, ECrtHR 28 June 1984; *Wieser and Bicos Beteiligungen v. Austria* 16 October 2007; *Kopp v. Switzerland*, ECrtHR, 25 March 1998 para. 50; *Lambert v. France*, ECrtHR 24 August 1998 para. 21.

13 *Akzo* judgment, cited above, ¶ 181-183.

14 *See* Article 6 of the Treaty on European Union ("EU Treaty").

protection. If the protection of fundamental rights within European Community law ("EC law") would be below the ECHR standard, the Member States involved would risk to be condemned by the ECrtHR.[15] There would also be a risk that national courts would be forced to let national fundamental rights prevail to the detriment of the effective implementation of EC law. In recent case law, this Court has therefore rightly adopted the view that in principle the ECHR standard of fundamental rights protection should be followed.[16] For these reasons, the ECHR standard will be focussed on hereinafter.

26. The legal privilege is firstly protected by Article 6(3) under b and c ECHR, in which the right to have adequate time and facilities for the preparation of one's defence and the right to defend himself in person or through legal assistance of his own choosing. The ECrtHR has stated: "*It is clearly in the general interest that any person who wishes to consult a lawyer should be free to do so under conditions which favour full and uninhibited discussion. It is for that reason that the lawyer-client relationship is, in principle, privileged.*"[17] The ECrtHR emphasizes the fundamental rights nature of the legal privilege and explicitly states that this privilege serves the general interest of the good administration of justice. As the ECrtHR stated in the *Niemietz* case: "(...) *an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by Article 6 of the Convention.*"[18] The ECrtHR has even ruled that without legal privilege, the assistance of a lawyer would lose much of its usefulness.[19] It also follows from case law with regard to Article 6 ECHR that the legal privilege should not be interpreted restrictively: it concerns all the information that a lawyer receives during the exercise of material activities of his or her profession, such as the defence and/or

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15 The accountability of Member States under the ECHR for acts within the scope of EU law has been confirmed in ECHR 30 June 2005, *Bosphorus Airlines v. Ireland. See also* the *Senator Lines* case before the ECrtHR (Case No. 56672/00), where an action was brought against all Member States; the case was in the end not decided by the ECrtHR.

16 *See* ECJ 12 June 2003, *Brenner motorway*, Case no. c-112/00, ¶ 69-82 and ECJ 14 October 2004, *Omega v. Oberbürgermeisterin der Bundesstadt Bonn*, ¶ 33.

17 ECrtHR 28 February 1992, *Campbell v. United Kingdom*, A-233, ¶ 46.

18 ECrtHR 16 December 1992, *Niemietz v. Germany*, ¶ 40. *See also* ECrtHR 20 June 1988, *Schöneberger and Dumaz v. Switzerland*, A-137, ¶ 29; ECrtHR 28 June 1984, *Campbell and Fell v. the United Kingdom*, A-80; ECrtHR 16 October 2007, *Wieser and Bicos Beteiligungen GmbH v. Austria*.

19 ECrtHR 28 November 1991, *S. v. Switzerland*, ¶ 48; ECrtHR 13 March 2007, *Castravet v. Moldova*, ¶ 50.

representation of a client in proceedings and the giving of legal advice, even outside the scope of any legal (court) proceedings.[20] So also in this respect the *Akzo* judgment of the CFI can be criticised, as it has chosen a very narrow interpretation of legal privilege.

27. Secondly, Article 8 ECHR on the respect for private life is relevant for the protection of legal privilege as well. In the *Niemietz* case, the ECrtHR expanded the protection of the right to respect of private life to the offices of a lawyer.[21] The ECrtHR has furthermore ruled that professional correspondence of lawyers is also protected under Article 8 ECHR.[22] It should, by the way, be noted that the ECrtHR has confirmed that the protection under Article 8 ECHR also covers business premises, irrespective of whether professionals with legal privilege are involved or not; this approach has been confirmed by this Court.[23]

28. Thirdly, the right to property as protected by Article 1 of the First Protocol to the ECHR is also affected by the denial of legal privilege to in-house lawyers. As a consequence of the denial of legal privilege to lawyers who are in a relationship of employment with their client, such clients are for certain cases forced not to consult their own in-house lawyers but to involve external lawyers as their services are protected by legal privilege. The in-house lawyers, for their part, may consequently lose part of their activities, resulting in loss of goodwill, reduced income or even loss of employment. It has been confirmed in ECrtHR case law that goodwill as well as the loss of future income to which an enforceable claim exists, may constitute 'property' within the meaning of Article 1 of the First Protocol.[24] The right to property of companies that make use of the services of in-house lawyers is affected as well. They will be forced to make use of the service of external, often more

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20 Compare in this respect Constitutional Court of Belgium 23 January 2008, ¶ B.9.6 (Raad van Balies van de Europese Unie *et al.*); Dutch Supreme Court 12 February 2002, NJ 2002, 439 and Dutch Supreme Court 29 June 2004, NJ 2005, 273.

21 *Niemietz*, cited above, ¶ 33.

22 *See also* ECrtHR 25 March 1998, *Kopp v. Switzerland*, ¶ 50 et al. and ECrtHR 24 August 1998, *Lambert v. France*, ¶ 21.

23 ECrtHR, 16 July 2002, *Colas Est v. France*, ¶ 42 et al. and ECJ 22 October 2002, *Roquette Frères SA v. Director General of Competition and Commission*.

24 *See* ECrtHR 26 June 1986, *Van Marle v. the Netherlands*, ¶ 41 and ECrtHR 19 October 2000, *Ambruosi v. Italy*, ¶ 20 respectively.

expensive, lawyers.[25] These interferences with the property rights are particularly compelling in the light of the modernisation of European competition law which leans heavily on the objective of voluntary compliance by companies, as discussed above, and for which the assistance of lawyers is crucial.

29. Fourthly, the prohibition of discrimination (unjustified unequal treatment) is of particular interest, because in-house lawyers who are in a relationship of employment with their client are, according to the Court of First Instance, not entitled to legal privilege, whereas other lawyers are. The principle of equal treatment is safeguarded by Article 14 ECHR, as an accessory fundamental right to Articles 6 and 8 ECHR and Article 1 First Protocol, and by the independent fundamental right to non-discrimination included in the Twelfth Protocol to the ECHR. This right is viewed as one of the core rights of the ECHR. The prohibition of discrimination provides protection both when similar cases are treated differently (formal distinction)[26] and when different cases are treated the same way (material distinction).[27] The discrimination grounds mentioned are meant non-exhaustive: discrimination on any ground is forbidden under the ECHR.[28]

The question whether the infringement of fundamental rights could be justified

30. Now that it has been established that the denial of legal privilege for in-house lawyers affects various fundamental rights, it must be assessed whether such interference can be justified. ECLA is of the opinion that such justification cannot be found so that is must be concluded that the Court of First Instance judgment upholding the Commission decision violates the fundamental rights mentioned before.

31. The key question is whether the distinction the Court of First Instance has made between in-house lawyers and external lawyers can be justified. The Court of First Instance circumvents this question in a way by stating that in-house and external lawyers are not comparable, because there is a relationship of employment in case of

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25 A broad definition of 'property' within the meaning of Article 1 of the First Protocol, which is based on the general rule of said Article, was given in ECrtHR 5 January 2008, *Beyeler v. Italy,* ¶ 106.

26 ECrtHR 13 June 1979, *Marckx v. Belgium,* ¶ 32; ECrtHR 18 February 1991, *Fredin v. Sweden,* ¶ 60.

27 ECrtHR 6 April 2000, *Thlimmenos v. Greece,* ¶ 44.

28 ECrtHR 8 June 1976, *Engel et al. v. the Netherlands,* ¶ 72.

the former.[29] By doing so, the Court of First Instance adopts a concept 'defined' in the *A M & S* judgment[30] and simply rules *in abstracto* that this relationship leads to 'functional, structural and hierarchical integration' within the company. Arguments that in practice other circumstances are relevant for this assessment, such as membership of a Bar or Law Society or being subject to professional discipline and ethics, are dismissed as being outside the scope of the *A M & S* definition. The Court of First Instance simply refuses to assess – on the basis of the arguments presented by the parties and apart from the relationship of employment - whether the relevant in-house lawyer is in fact sufficiently independent. However, this line of reasoning is too formal and cannot be accepted in the light of the case law of the ECrtHR. This can be explained as follows.

32. To assess whether cases are to be considered equal, under the ECHR only relevant factors should be taken into account. Another approach would lead to unacceptable results with respect to fighting discrimination, because no two persons are entirely the same. Furthermore, it is not acceptable to rule *in abstracto* and on the basis of general considerations concerning an identified group.[31] Considering that for the Court of First Instance independence is the relevant criterion to decide whether or not legal privilege should be granted in the current matter, factors should be taken into account that are indeed relevant for the desired independence of the lawyer involved. The mere existence of a relationship of employment is not such a relevant factor, as described above and certainly not sufficient on its own. In the Netherlands, employment contracts of in-house lawyers are supplemented with a professional statute that safeguards their independence in relation to the employer. Apart from that, external safeguards exist, such as regulations and disciplinary rules from the Dutch Bar Association. Considering all these circumstances, external lawyers and in-house lawyers who are in the situation that Mr. S in the current matter is in, are materially equally independent. Given this fact, external lawyers and in-house lawyers who are members of a Bar Association and are subject to disciplinary rules, should be considered as similar cases.

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29 *Akzo* judgment, ¶ 174.

30 *Akzo* judgment, ¶ 166-169.

31 ECrtHR 16 December 2003, *Palau-Martinez v. France*, ¶ 42.

33. Therefore, it must be assessed whether the unequal treatment (by not granting legal privilege to the latter) is justified. This means that the difference in treatment should serve a legitimate purpose and be necessary for that purpose. The purpose should furthermore effectively be served by the measure and the disadvantage should not be disproportionate. In the case at hand, the purpose could be that the effective supervision of competition law would be served with a categorical exclusion of all in-house counsel, considering that the degree of independence varies too much between Member States.

34. However, it must be noted that in relation to this purpose, the unequal treatment does not meet the requirements of necessity, subsidiarity or proportionality. This already follows from the fact that it would be very easy to compile a register that provides information on the status and independence of in-house counsel in general and in-house lawyers in the several Member States. So the unequal treatment is not really necessary to serve the purpose of effective control on competition conditions. Next to that, in-house lawyers and their clients are also affected disproportionately, because they will lose an important part of their activities and be forced to consult (more expensive) external lawyers, as described above. The distinction made is even more objectionable, considering the fact that legal privilege has been recognized as a fundamental right (through fundamental rights established in the ECHR, such as the right to a fair trial, the right to privacy). With respect to the right to equal treatment, the distinction is also very weighty because in-house lawyers in the Netherlands, such as Mr. S. do enjoy legal privilege in matters and proceedings that are subject to Dutch law, including national competition law matters. This makes the unequal treatment even more disproportionate.

35. With respect to the right to equal treatment, the question whether certain cases should be considered equal frequently leads to discussions. For that reason, there are good reasons to replace the test of comparability applied above - which has been common in case law in the past - with a 'disadvantage test'. In any case that one person is impaired by a treatment in comparison with another person, it should – in short – be assessed whether this disadvantage *i.e.,* unequal treatment is justified (whether it

serves a legitimate purpose and is proportionate).[32] It has already been concluded above, that the latter is not the case with respect to the denial of legal privilege to Mr. S. in the *Akzo* judgment.

36. The Court of First Instance has also violated other fundamental rights, both from in-house lawyers and their clients, by denying legal privilege to in-house lawyers. As set out above, legal privilege is also protected by Article 6 and 8 ECHR and Article 1 First Protocol. Restrictions on those rights must be necessary and proportionate as well. As has been demonstrated above in relation to the prohibition of discrimination, the latter is not the case. In that respect it is also important to stress that the ECrtHR emphasizes that the legal privilege is crucial for the exercise of a lawyer's role.

37. Moreover, the ECrtHR has consistently emphasized: "*In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 para. 1 (art. 6-1) would not correspond to the aim and the purpose of that provision.*"[33] Restrictions to the fair administration of justice "*must be very compellingly established*".[34] Article 6(3) ECHR defines minimum rights for the right to a fair administration and the rights provided for in that paragraph should thus not be interpreted restrictively either.

38. Contrary to the latter principle, the Court of First Instance has expressly adopted a restrictive interpretation of the legal privilege in the *Akzo* judgment: "*It must be borne in mind that protection under LPP is an exception to the Commission's powers of investigation, which are essential to enable it to discover, bring to an end and penalise infringements of the competition rules. Such infringements are often carefully concealed and usually very harmful to the proper functioning of the common market. For this reason, the possibility of treating a preparatory document as covered by LPP must be construed restrictively.*"[35] The Court of First Instance has

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32 J.H. Gerards, *Judicial Review in Equal Treatment Cases*, Leiden/Boston: Martinus Nijhoff Publishers 2005.

33 *See* ECrtHR 17 January 1970, *Delcourt v. Belgium*, ¶ 25. This has been confirmed frequently in case law, see *i.a.* ECrtHR 27 June 1968, *Wemhoff v. Germany*, "As to the Law", ¶ 8; ECrtHR 26 October 1984, *De Cubber v. Belgium*, ¶ 30; ECrtHR 17 January 2008, *Ryakib Biriyukov v. Russia*, ¶ 37.

34 ECrtHR 15 January 2008, *Micallef v. Malta*, ¶ 46.

35 *Akzo* judgment, cited above, ¶ 124.

thus adopted a restrictive interpretation in favour of investigation powers of the Commission.

39. According to the ECrtHR, however, grounds as the effectiveness of investigations carry less weight than the right to a fair administration of justice and cannot justify a restrictive interpretation: "(...) *While the rise in organised crime requires that appropriate measures be taken, the right to a fair trial, from which the requirement of the proper administration of justice is to be inferred, nevertheless applies to all types of criminal offence, from the most straightforward to the most complex. The right to the fair administration of justice holds so prominent a place in a democratic society that it cannot be sacrificed for the sake of expedience* (...)".[36]

40. It is also important to stress that in vertical situations, fundamental rights should play the role of classic 'defence rights' against governmental interferences, in this case the Commission's investigation powers, meant to facilitate enforcement of competition law. Such an approach should not be confused with the 'fair balance' that needs to be struck in case someone else's enjoyment of fundamental rights or, arguably, of a general principle of EC law, such as the free movement of goods, is at stake. This means that the test to be applied by the courts should be whether or not the interest of effective implementation of competition law can justify an interference in the fundamental right to legal privilege. In the *Akzo* judgment the Court of First Instance has wrongly not adhered to this principle and treated the fundamental right to legal privilege on equal footing with the interest of effective implementation of competition law. This is not according to the ECHR standards.

The Irish Law Society judgment

41. A recent judgment of the Irish High Court is instructive in this regard. In *Law Society of Ireland v. Competition Authority*,[37] the Irish High Court considered whether a notice published by the Irish Competition Authority could lawfully prevent one lawyer representing more than one client in a competition investigation. The High Court found that this was contrary to both the Constitution of Ireland and Article 6 of the European Convention on Human Rights.

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36 ECrtHR 5 February 2008, *Ramanauskas v. Lithuani*a, ¶ 53.

42. The court concluded that there is a right to freedom of choice of one's own lawyer, as an aspect of the right to fair procedures guaranteed by Article 40.3 of the Constitution of Ireland. The court said:

> *" ... in civil proceedings such as the type conducted by the respondents there must be a strong presumption in favour of freedom of choice of representation.*
>
> *... The interference by a tribunal with a choice of lawyer will in many instances cause actual unfairness because of the disruption of confidence, which is an essential aspect of every successful lawyer/client relationship.*
>
> *I am satisfied that a person facing a tribunal in respect of which it is appropriate to have legal representation does, as an incident or aspect of the right to fair procedures, have a constitutional right pursuant to Article 40.3 of the Constitution to freely select the lawyers that will represent him or her, from the relevant pool of lawyers willing to accept instructions.*
>
> *... The appropriate balance between the constitutional right of a person facing a tribunal to freely choose their legal representatives, and the right and duty of the tribunal to control its proceedings so as to discharge its function in accordance with the constitution and the law, is achieved by the aforesaid strong presumption in favour of a freedom of choice of legal representation, but with the retention in the tribunal of a discretion to deny that freedom of choice where it is apparent, that to permit a particular legal representative to act, would have the likely result of frustrating or impeding the tribunal discharging its lawful function."*

43. On the subject of Article 6 of the European Convention the High Court said:

> *"If freedom of choice of lawyer cannot be denied in a criminal trial where legal assistance is being provided by the State, without good and sufficient reason, it would seem to me to be unarguable that the Convention would require as an incident of a fair trial, that the freedom of choice of lawyer by a client who is paying for the services of a lawyer would be respected and not interfered with save for the gravest and most compelling of reasons which must necessarily in my view establish that the choice of lawyer made, would for whatever reason, grossly impede the conduct of the proceedings in question.*
>
> *... I would be of opinion, that as a general proposition Article 6(1) requires that persons before tribunals which have a jurisdiction to determine rights and impose liabilities either in the primary hearing before them or to cause decisive events to occur which materially affect the determination in secondary proceedings, consequent upon the primary proceedings, have the right to choose their legal representatives, subject only to the tribunal having a discretion to interfere with that choice, as discussed above."*

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37 [2005] IEHC 455.

44. The Attorney General of Ireland was represented in the Irish court. ECLA understands that:

> *"... The Attorney General submitted that the policy in the Notice was not compatible with Article 6 ECHR and that there would have to be a compelling justification for any interference with the choice of lawyer where the client is paying. It was submitted that the flaw in the Notice was that the correct approach should have been a case-by-case analysis rather than a general rule. Thus the Notice could be made the subject matter of a declaration pursuant to section 5(1) of the ECHR Act. The Attorney General argued that the reasons put forward by the Authority to justify the Notice were not sufficiently compelling to justify a general prohibition. It was also submitted by the Attorney General that the Authority by their Notice "fundamentally misunderstood" the "importance of what at a minimum is the prima facie entitlement of a person under investigation to a lawyer of their own choice as part of the requirements of a fair hearing within the meaning of Article 6.1 and wrongly reverses a general rule with the exception."*[38]

45. The decision of the Irish High Court demonstrates that in a democracy subject to the rule of law, private parties have a fundamental right to be able to consult the lawyer of their choice without thereby creating evidence that might be used against them. This principle means that a lawyer can never be required to disclose what his client told him, and both a request for legal advice and the advice itself, if written, are protected from disclosure to public authorities. This is an overriding principle, because all of the rights and freedoms recognised and protected by the European Convention for the Protection of Human Rights may need, on occasion, to be claimed by a lawyer on behalf of his/her client.[39]

46. For this purpose, there must be no doubt who is, and who is not, a lawyer, and the profession of lawyer must have certain characteristics apart from a certain knowledge of law. Specifically, lawyers must be members of a profession that is subject to certain rules of professional ethics that allows or requires them to advise independently and to a regime of professional discipline applied in the public interest.

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[38] Power, The right to choose your lawyer in competition investigations, 2006 European Competition Journal 371-385 at p. 381.

[39] The Charter of Fundamental Rights of the European Union, Article 48, also guarantees the rights of the defence.

It is these characteristics that explain why law graduates, however well informed, are not automatically regarded as professional lawyers.[40]

47. Interference with the right to communicate with and consult the lawyer of one's choice would infringe Article 6 of the European Convention on Human Rights. Article 6, on the right to a fair trial, provides that "*Everyone charged with a criminal offence has the following minimum rights: ... (i) to defend himself in person or through legal assistance of his own choosing ...*"

48. If communications and consultations were not confidential, they would be valueless. The Court should be slow to prevent a client from communicating in confidence with the lawyer of its choice when the lawyer in question is a full member of the relevant national Bar. This would need the strongest possible justification. In *A M & S*, this Court recognised that the protection of confidentiality is an essential aspect of the rights of the defence.[41] This Court stated "*the counterpart of that protection [privilege] 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*".[42]

49. Finally, the *Akzo* judgment interferes not only with the fundamental right of the client to obtain advice from whatever member of the legal profession it chooses, but also with the fundamental right of the lawyer to practice his profession. The right to earn one's living and to practice one's profession has been recognised by the Court of Justice in several cases.[43] In none of those cases was the interference with the right to earn one's living been as serious as the denial of confidentiality to communications with an in-house lawyer. Where Member States afford privilege to in-house counsel, it is typically the corollary of the ethical and deontological obligations that apply to

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40 This is in line with the position in the U.S. where American courts have consistently held that attorney-client privilege does not apply to communications with a law school graduate unless he/she is admitted to practice at the Bar of a state or federal court. The requirement for a lawyer to be a member of a Bar to benefit from legal privilege was recently upheld in *Louis Vuitton Malletier v. Dooney & Bourke*, 04 Civ. 5316 (RMB) (MHD), (S.D.N.Y., November 29, 2006).

41 *A M & S*, cited above, ¶ 23.

42 *A M & S*, cited above, ¶ 24.

43 Case 4/73 *Nold v. Commission* [1974] ECR 491, paras. 13-14; Case 44/79 *Liselotte Hauer v. Land Rhineland-Pfalz* [1979] ECR 3727, paras. 31-33; Case 234/85 *Staatsanwaltschaft Freiburg v. Franz Keller* [1986] ECR 2897, para. 8.

them. While EU law currently denies the privilege, those in-house counsel are still bound by the ethical and deontological obligations set out by their professional associations. Thus, whenever an issue of EC competition law arises, the in-house lawyer has to refer the matter immediately to an outside attorney if he wants the advice rendered to be covered by privilege. Especially for small and medium sized companies, this creates an unfair situation and creates unnecessary costs. The confidentiality of the advice rendered is essential to create the trust and confidence necessary to allow management to communicate freely with and proactively seek legal advice from its internal law department, whose members typically know the industry better than external counsel and can therefore better assess potential risks than external counsel.

IV. THE RECOGNITION OF LEGAL PRIVILEGE MUST BE BASED ON CLEAR PRINCIPLES

a. Legal privilege should be decided on the basis of principle and not on the basis of majority

50. ECLA notes that in the *A M & S* judgment, the Court considered that it could accept the principle of privilege even though, at that time, there was no clear majority support for the principle as the Court stated it. The *Akzo* judgment (¶¶ 170-171), however, accepted that "*specific recognition of the role of in-house lawyers and the protection of communications with such lawyers under LPP is relatively more common today than when the judgment in A M & S was handed down*" but went on to say "*it is not possible, nevertheless, to identify tendencies which are uniform or have clear majority support in that regard in the laws of the Member States.*"[44]

51. ECLA comments that this Court does not need to wait until a clear majority of Member States has adopted a particular solution. The test to determine whether or not a certain lawyer's communications providing legal advice are privileged should be, as stated in *A M & S*, whether rules of professional ethics and discipline require the lawyer in question to act independently in the public interest. The Member States that recognise that employed lawyers can be full members of the Bar or of a regulated

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44 *Akzo* judgment, cited above, ¶ 170.

legal profession also generally give such employed lawyers the counterpart to that membership, *i.e.*, privilege protection.

52. The judgment went on to say that some Member States do not regard in-house lawyers as members of the Bar and in other Member States where they can be members of the Bar, that does not necessarily mean that their communications are privileged (*Akzo* judgment, ¶ 171). In short, there is no uniform answer to the question of privilege of in-house lawyers in all Member States.[45] ECLA therefore concludes that this Court should not try to search for a majority opinion, but to decide the question on the basis of principle. Two safeguards are important in this respect.

53. First, ECLA accepts that communications to in-house lawyers should be privileged only if they are for the purpose of obtaining legal advice, and that communications from in-house counsel should be privileged only if counsel acts as legal adviser or counsellor. It is therefore the responsibility of companies to ensure that documents concerned with other matters, which would not be privileged, are separate from documents seeking or giving legal advice. Communications with in-house lawyers in a management or business capacity, if such communications occurred, would not be privileged.

54. Second, if, as appears from paragraphs 166 through 169, that the *Akzo* judgment is based on the lack of "independence" of the in-house lawyer and what is thought to be the risk that an in-house lawyer would help the company to break the law, that issue does not arise, because the judgment makes clear that privilege only applies where the rights of the defence are being exercised.[46] Any lawyer facilitating his or her client to break the law is not exercising the rights of the defence, and impedes the administration of justice. Privilege would not apply under such circumstances, and appropriate sanctions against the company are available under Community law to fine for any such behaviour. An in-house counsel who is a member of the Bar or regulated profession is under an obligation to advise his client to comply with the law. Knowingly participating in a breach of law would be grounds for exclusion from the profession. If ethical and disciplinary rules are sufficient guarantees for the

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45 *See* Table providing an overview of the position of legal privilege for in-house/employed lawyers attached as Annex 3.

46 *Akzo* judgment, cited above, ¶ 77.

Commission and the Courts to accept privilege in the case of external counsel, then the same logic should apply to in-house counsel when they are in comparable situations in this regard.

55. None of the arguments given in the judgment, discussed below, can be regarded as conclusive, and it follows that this Court should reconsider the question of privilege of in-house lawyers on grounds of principle.

b. Legal privilege encourages companies to seek legal advice and to obtain best advice in most efficient manner

56. The judgment says that the greater responsibility given to companies under Regulation 1/2003,[47] is not "*directly relevant*" to the importance of legal professional privilege, and that even without privilege in-house lawyers are not prevented from taking part in discussions (*Akzo* judgment, ¶¶ 172-173). These comments misinterpret the situation under Regulation 1/2003 in several respects.

57. First, under that Regulation, companies are not required, and they are not even entitled, to ask the Commission for a ruling. They are obliged to decide for themselves, with whatever legal advice is appropriate. Previously companies could notify their agreements or practices to the Commission, without involving an external lawyer. Under Regulation 1/2003 companies no longer have that possibility, but they still need legal advice.

58. Second, it is often more practical for companies to obtain advice from in-house lawyers, and the advice can often be obtained in a more timely manner, as compared with instructing external lawyers – it is sometimes simply not possible to receive timely legal advice from external lawyers. In-house lawyers can provide a number of clear advantages over external lawyers, including the following: (i) they are better informed about the company and the markets in which the company operates, thereby increasing the quality of the advice provided; (ii) they are readily available and have a duty to be available; (iii) they can be consulted earlier in the process; (iv) there is often no need to provide extensive background to the matter, the in-house lawyer can

47 Regulation 1/2003, cited above.

respond promptly;[48] and (v) the extra cost of external counsel leads companies to hire internal advisors rather than rely solely on external lawyers.

59. Third, while in-house counsel in certain cases have clear advantages over external counsel, if in-house counsel are not able to benefit from privilege, companies are discouraged from using in-house counsel. Since the alternative (external lawyers) is often less convenient, less timely, and more expensive, companies are less likely to seek legal advice, which in turn risks less compliance with European law. It also bears emphasis that Community competition rules often raise complex issues of fact and law, and so providing advice orally is not a satisfactory solution. In sum, granting privilege to in-house counsel increases the likelihood of advice being sought, as well as guaranteeing the quality of the advice, and that it is likely to be followed.

c. The protection of legal privilege for in-house lawyers furthers the Commission's objective of voluntary compliance with competition law rules

60. The *Akzo* judgment (*e.g.*, ¶ 176) says that privilege is an exception to the Commission's powers of investigation, and that compliance with competition rules is vital to the functioning of the common market. However, the judgment makes the wrong deduction from these facts. The conclusion that should be drawn is that it is vital for the functioning of the common market that companies should be enabled and encouraged to obtain legal advice on competition law issues whenever they think they need it, and from whatever lawyer they choose (provided, of course, that he or she is recognised as a full member of the Bar or of a regulated legal profession). The Commission simply does not have the resources to enforce Community competition law against every company in Europe. The effective observance of competition law depends primarily on voluntary compliance or self-regulation. The Commission therefore should actively encourage companies to get legal advice. In practice, if

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48 In *Upjohn Co. v. U.S.*, (449 US 383, 1981), Justice Rehnquist recognized the value of the advisory communications between the company and its in-house lawyer and stated: "*The narrow scope given the attorney-client privilege by the court below [whereby privilege would only apply to communications between in-house lawyers and senior management of the corporation, and not middle/junior employees] not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law. In light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law.*"(p.392)

companies have in-house lawyers, they are much more likely to ask for legal advice on a day-to-day basis than from an external lawyer. That is what the in-house lawyers are paid for. Further, companies are more likely to consult and seek advice from in-house lawyers at the earliest possible stage, long before companies would consider hiring external lawyers.

61. A Community policy that discouraged consultation with in-house lawyers would be self-defeating, because it would make satisfactory voluntary compliance less likely, more difficult, and more expensive for the following reasons.

i. Companies with in-house lawyers are, in general, the companies with the most numerous and most complex legal problems, and which wish to act within the law. It would not make sense to discourage such companies from getting legal advice in the way that they find most efficient.

ii. Competition law advice often needs to be sought in writing, so that complex facts can be set out fully and clearly, and competition law advice often needs to be set out in writing. It would be bad policy to discourage in-house lawyers from putting their advice in writing when they think that is necessary.[49]

iii. Even if granting privilege might allow some in-house lawyers acting in bad faith to act unprofessionally, the overall benefit of encouraging all in-house lawyers to write freely and firmly, knowing that they were not creating evidence that could be used against their clients, would outweigh any harm that might occur. After all, granting privilege to external lawyers allows some of them to act unprofessionally, but the overall effect of recognising privilege is to encourage compliance with the law. As Mr. Justice Ambro stated in the recent U.S. Court of Appeals decision in the *Teleglobe* case, *"Communication between [in-house] counsel and client is not, in and of itself, the purpose of the privilege; rather, it only protects the free flow of information <u>because</u> it*

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[49] As Rehnquist J. stated in *Upjohn Co v. U.S.*, cited above, p.389: *"[The] purpose [of attorney-client privilege] is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."*

promotes compliance with law and aids administration of the judicial system."[50]

d. The Community law concept of privilege is based on national law and national regulation of the legal profession

62. Where, as in this case, the lawyer in question is unquestionably a full member of the national Bar of a Member State, he is subject to precisely the same rules of professional ethics and precisely the same regime of professional discipline as all other members of the same Bar. Under Dutch law, the rules of professional ethics and discipline apply in full to in-house lawyers, and no in-house lawyer would be allowed to argue that his or her duties were altered or lessened as a result of his or her in-house status. A Dutch in-house lawyer would have exactly the same legal obligations as an external lawyer to advise independently,[51] and not to participate in illegal activities, withhold information from a court, or obstruct the administration of justice. National procedural and substantive autonomy determines the status of members of the Bar and their rights, duties, and privileges.

63. It was argued by the Commission that, in substance, in-house lawyers are less independent than lawyers in private practice or in separate law firms. That opinion reveals, unfortunately, the Commission's lack of awareness of professional practice, and may also reveal the influence on the Commission of protectionist arguments by some practising lawyers. It also discloses a certain naivety. Nominally independent lawyers may be as dependent, financially and otherwise, as any in-house lawyer could be. Even more important, the client of a nominally independent external lawyer has an absolute right to withdraw his instructions at any time, and the lawyer has no remedy of any kind even if he knows that the reason is that he gave unwelcome advice, or refused to mislead a court or to help the client to break the law. An in-house lawyer, by contrast, cannot have his employment terminated on these grounds, and would have a guaranteed judicial remedy against his employer if it was terminated for any such reason. An in-house lawyer is therefore in a stronger

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50 *In re Teleglobe Communications Corp.* No. 06-2915, 2007 U.S. App. LEXIS 16942 (3d Cir. July 17, 2007), p. 361. The Court applied Delaware law to the dispute, but recognized that other jurisdictions follow the same principles.

51 Every "Cohen Advocaat" has to have signed a declaration in the terms indicated in Annex 2.

position, if a situation of this kind arises, than any external lawyer could be. If, as in this case, he is a full member of the Bar, he can truthfully say that if he committed a breach of professional ethics he would be subject to the full rigours of professional discipline.[52] If his employment were terminated because he had done his duty, he would obtain both an effective remedy and the sympathy of the court as a result of his integrity. The Commission does not seem to understand this, and the judgment does not discuss it, and plainly gave it insufficient weight.

64. In the *Akzo* judgment, the Court of First Instance also went a step further than the Court in *A M & S*, which had said that a lawyer cannot benefit from legal privilege if the lawyer has a relationship of employment with the client. In particular, the Court of First Instance stated that "*full independence*" requires the lawyer to be "*structurally, hierarchically, and functionally*" a third party in relation to the undertaking receiving the advice. There is no authority or obvious justification for these words or requirements. Indeed, ECLA respectfully submits that these words have no clear meaning in this context, and that in any event the "Cohen advocaat" (see Annex 2) in this case meets the "independence" requirement. The key test of independence should be whether the lawyer is free to give frankly and honestly his or her view of what the law permits. As explained above, where the profession is regulated, an in-house lawyer is in a stronger position (or, at the least, in no less strong a position) to give frank and honest advice than external advisers. Where an employed lawyer is subject to a strict code of professional conduct (as is the case, for example, in the Netherlands, Belgium, the United Kingdom, and Ireland), he or she is subject to precisely the same professional ethics obligations as an external lawyer.

65. The crucial question therefore, as ECLA and other interveners have argued, is whether the lawyer in question is a full member of a Bar or of a regulated legal profession under the national law of a Member State, allowing or requiring counsel to give independent legal advice, and subjecting counsel to ethical rules effectively enforced in the public interest. If he or she is a member of such a profession, then privilege should apply. If, under the rules of the profession, the lawyer is not allowed to

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52 *See*, on this point, Advocate General Slynn in *A M & S*, cited above, at 1611 – 12: *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 [privilege] purposes in the same way as lawyers in private practice, so long as he is acting as a lawyer.*

become employed, and ceases to be a member of the profession if he takes employment, then the privilege does not apply. But that is the result of the rules on the profession in question under national law. It is not, and should not be, regarded as the result of a rule of Community law. Since national law governs who is a member of the profession, national law must govern the privilege to which members of the profession are entitled.

66. As discussed above, it would be unreasonable and unjustified for Community law to say that, although the applicable national law regards a given individual as a full member of the Bar or of a regulated profession, Community law knows better, and deprives him or her of some of the most important consequences of that membership. The judgment under appeal would deprive in-house lawyers who are Bar members or members of a regulated profession with strict ethical obligations of the freedom to give the legal advice for which they were employed. Community law provides no basis and no justification for imposing additional requirements on members of professions, or for interfering between a lawyer and the Bar of which he or she is a member, or treating him or her as a non-member. Community law should recognize the right of clients to get advice from every individual if he is a fully qualified member of that profession. The judgment under appeal would deprive in-house lawyers of the freedom to obtain information and to give legal advice, which is one of the most important tasks of a lawyer, and it would deprive undertakings of the right to a lawyer of their choosing, one of the important rights of a client.[53]

67. The judgment therefore interferes with both the fundamental right of the client to obtain advice from whatever member of the legal profession it chooses, and the fundamental right of the lawyer to practice his profession. Provided that the in-house lawyer remains a full member of a Bar or of a regulated legal profession, privilege should apply.

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53 The purpose of legal privilege was identified by Advocate General Slynn in *A M & S*, cited above, p.1654: *[Legal privilege] springs essentially from the basic need of a man in a civilized society to be able to turn to his lawyer for advice and help, and if proceedings begin, for representation; it springs no less from the advantages to a society which evolves complex law reaching into all the business affairs of persons, real and legal, that they should be able to know what they can do under the law, what is forbidden, where they must tread circumspectly, where they run risks.*

V. CONCLUSION AND FORM OF ORDER SOUGHT

68. For the reasons outlined above, ECLA therefore asks the Court to set aside the judgment of the Court of First Instance insofar as it concluded that communications between Akcros Chemicals and the member of the legal department of Akzo Nobel were not subject to legal professional privilege.

69. On the above grounds, the ECLA respectfully requests the Court to:

- set aside the *Akzo* judgment insofar as the Court of First Instance held that the communications between Akcros Chemicals and the member of the legal department of Akzo Nobel were not subject to legal professional privilege; and

- order the Commission to pay ECLA's costs.

Brussels, 27 February 2008

John Temple Lang **Maurits Dolmans** **Kristina Nordlander**

SCHEDULE OF ANNEXES

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Annex 3	Overview table on the recognition of legal profession privilege in the Member States	52	20	26

ANNEX 1

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European Company Lawyers Association ECLA
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Subject: legal opinion in re Akzo Nobel Chemicals/Commission, 17 September 2007 (T-125/03R en T-253/03 HR)

Nunspeet, 25 February 2008

Dear Mr. De Jonge,

I hereby submit my legal opinion in the case **Akzo Nobel Chemicals / Commission** of 17 September 2007 (T-125/03R and T-253/03 HR).

In the following legal opinion I answer the questions a) whether the criterion of 'employment relationship' is a useful criterion for appraising an invocation of confidentiality and b), whether the existence of an employment relationship between an employer and his attorney form an obstacle to the independent exercising of the profession of attorney under Dutch law.

LEGAL OPINION

1. Ruling: Akzo Nobel Chemicals/Commission

In the Akzo Nobel Chemicals / Commission ruling the Court recognizes that confidential correspondence between attorney and client in Commission proceedings is to be protected:

> *However, the Court held that Regulation No 17 does not exclude the possible recognition, subject to certain conditions, of certain business*

records as confidential in character. It thus stated that Community law, which derives from not only the economic but also the legal interconnection between the Member States, must take into account the principles and concepts common to the laws of those States concerning the observance of confidentiality, in particular as regards certain communications between lawyer and client. That confidentiality serves the requirement, the importance of which is recognised in all of the Member States, that every person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it. Similarly, the Court considered that the protection of the confidentiality of written communications between lawyer and client is an essential corollary to the full exercise of the rights of the defence (AM & S, paragraphs 18 and 23).

In the Court of First Instance the applicants defended the proposition that the aforesaid protection should also be extended to correspondence conducted with an attorney in the company's employment. The Court of First Instance, referring to earlier jurisprudence of the EC Court of Justice, regarded that proposition as incorrect:

As regards, first of all, the applicants' principal argument, it must be pointed out that in its judgment in AM & S, the Court of Justice expressly held that the protection accorded to LPP under Community law, in the application of Regulation No 17, only applies to the extent that the lawyer is independent, that is to say, not bound to his client by a relationship of employment (paragraphs 21, 22 and 27 of the judgment). The requirement as to the position and status as an independent lawyer, which must be met by the legal adviser from whom the written communications which may be protected emanate, is based on a concept 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 the administration of justice, such legal assistance as the client needs (AM & S, paragraph 24). It follows that the Court expressly excluded communications with in-house lawyers, that is, legal advisers bound to their clients by a relationship of employment, from protection under LPP. It must also be pointed out that the Court reached a conscious decision on that exception, given that the issue had been debated at length during the proceeding and that Advocate General Sir Gordon Slynn had expressly proposed in his Opinion for that judgment that where a lawyer bound by an employment contract remains a member of the profession and subject to its discipline and ethics, he should be treated in the same way as independent lawyers (Opinion of Advocate General Sir Gordon Slynn in AM & S, p. 1655).

The Court therefore concludes that, contrary to what the applicants and certain interveners submit, the Court in its judgment in AM & S defined the

concept of independent lawyer in negative terms in that it stipulated that such a lawyer should not be bound to his client by a relationship of employment (see paragraph 166 above), rather than positively, on the basis of membership of a Bar or Law Society or being subject to professional discipline and ethics. The Court thus laid down the test of legal advice provided 'in full independence' (AM & S, paragraph 24), which it identifies as that provided by a lawyer who, structurally, hierarchically and functionally, is a third party in relation to the undertaking receiving that advice.

Accordingly, this Court rejects the applicants' principal argument and holds that the correspondence exchanged between a lawyer bound to Akzo Nobel by a relationship of employment and a manager of a company belonging to that group is not covered by LPP, as defined in AM & S.

The five arguments cited by the applicants for interpreting the AM & S ruling differently were also rejected by the Court of First Instance.

2. Questions for which a legal opinion has been requested

The following questions with regard to the above considerations have been presented to the undersigned:

1) *Is "employment relationship" is a useful criterion for appraising an invocation of confidentiality?*

and

2) *Does the existence of an employment relationship between employer and attorney form an obstacle to the independent exercising of the profession of attorney under Dutch law?*

3. Answers

3.1. The phenomenon of "attorney in employment"

To answer the questions a distinction must be drawn between a 'company lawyer' and an 'attorney in employment . " Between the two persons there are important differences.
On November 27, 1996, the Dutch Order of Lawyers ("NovA") adopted the "Regulation on legal practice in an employment relationship". Since then, it is possible for attorneys to enter the employment of an enterprise or institution

which is not a law firm. Such lawyers are sometimes called Cohen lawyers.[1] According to estimates, there are currently a few hundred Cohen lawyers working in the Netherlands.
The "attorney in employment " must meet the same requirements as an "external attorney". That implies that he must be registered with the Bar, must be professionally qualified (as recognised by the Dutch Order of Lawyers), must gain annually 16 educational credits (by following training schemes recognised by the Dutch Order of Lawyers), must have taken out professional liability insurance and must have a '*stichting derdengelden*' (trust arrangement for third-party monies). Furthermore, the attorney is subject to the applicable rules of professional ethics and may be subjected to disciplinary proceedings. For the 'attorney in employment ", unlike an external attorney, there is an additional condition, embedded in the above-mentioned Regulation: there must be a professional charter (*statuut*) in place. The professional charter is a standard agreement that the attorney concludes with his employer. Its provisions seek to guarantee the independence of the attorney in his relationship with his employer.[2]

3.2 Characteristics of employment relationship

The employment relationship or employment contract is defined in article 7:610 of the Dutch Civil Code.

Under this article a employment relationship is present if "one party, the employee, undertakes to perform labour in the service of the other party, the employer, for a certain time." From this description it is evident that four elements must be satisfied:
- the obligation to perform labour;
- during a certain time;
- the obligation to pay remuneration; and
- in the service of the other party.

The first three elements do not constitute an essential difference with other types of labour relationship, but this does apply in the case of the last element, "in the service of the other party." This element is called the authority element (*gezagselement*).

3.3 Defining the "authority" element

[1] So called after chairman Cohen of the "Interdepartementale Werkgroep Domeinmonopolie Advocatuur" which on June 27, 1995 presented its report on the exercising of legal practice in an employment relationship.
[2] For an international overview, see: CCBE, Regulated legal professionals and professional privilege within the European Union, the European Economic Area and Switzerland, and certain other European jurisdictions, 2004.

The criterion 'in service' or 'authority' has changed colour since 1907. Initially, the emphasis was placed on the employer issuing substantive instructions. This approach, however, is no longer appropriate to a growing group of employees. The higher the educational qualifications, the required expertise and the necessary skills, the less self-evident it will be that the employer will or can issue substantive instructions. This is *inter alia* the case with attorneys, accountants, senior managers, medical practitioners and other highly qualified employees. These people are hired precisely because of their specialization and have as a rule great freedom in shaping the performance they are to deliver. In Dutch case law, therefore, recourse is had to a different interpretation of the authority criterion: it is not about the authority to issue instructions pertaining to the content of the work, but the authority to issue instructions pertaining to working discipline or corporate procedure. The employee can be given instructions regarding organizational matters. This then raises the question whether the working relationship has been given a 'normal' organizational embedding. In this last-mentioned case, the aspects considered are the regularity of working, the manner and the nature of the remuneration, whether pay is continued during sick leave, holiday arrangements, working hours and the place where the work is to be done, and so forth.[3] In case law both approaches are used alternately and/or in combination. One example is the Imam ruling [4] in which the Supreme Court accepted that an 'authority relationship' could be deemed to exist between a mosque's governing body and an imam because the working hours and possible vacation days were laid down by the employer. According to the Supreme Court the fact that the person who had committed himself under an agreement to fulfil a religious office and was not subject to his counterparty's instructions did not rule out that "with regard to other aspects of the contractual relationship there is an authority relationship." Under the same reasoning it is also accepted in case law that ministers in other religious institutions can likewise have an authority relationship and thereby an employment contract. [5]

The above reasoning also applies to directors (whether or not provided for by a company's articles of association) who, despite the very great freedoms they have in the pursuit of their employment duties and the often high remunerations, are nonetheless in an authority relationship with their respective employers. In the literature it is sometimes pointed out that such persons do not need the protection of labour law but nonetheless they do have – as a rule – an employment contract by law.[6]

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[3] C.J. Loonstra & M. Westerbeek, Honderd jaar definitie van de arbeidsovereenkomst; moet het anders?, SMA 2007/11/12, p. 416; C.J.H. Jansen & C.J. Loonstra, Erosie in de gezagsverhouding: de koers van de Hoge Raad, NJB 1998, p. 817 *et seq.*

[4] Supreme Court 17 June 1994, NJ 1994, 757 m.nt. PAS; JAR 1994/152.

[5] See *inter alia* Ktr. Lelystad 2 February 2005, JIN 2005/180m.nt. Zondag en Hof Leeuwarden 19 oktober 2005, JIN 2006/6 m.nt. Loonstra.

[6] G.C. Boot, Arbeidsrechtelijke bescherming, The Hague: Sdu 2005.

In the light of the foregoing, it can be argued that under Dutch law an employment relationship may exist purely on the basis of merely formal aspects. The required degree of 'authority' is therefore paper thin. The same is true of the "attorney in employment". The presence of an authority relationship - necessary for an employment contract – need only apply to a few organizational aspects, such as leave records and the accounting of hours worked. With regard to the content of the work, no authority need be exercised (see below).

3.4 Authority relationship and charter

In many cases the substantive independence of employees in specific occupations is governed by specific laws and regulations and by a charter.

As an illustration, let us take the legal status of company physicians. Company physicians (in charge of medical supervision) may also have an employment relationship with the employer. Large companies even have company physicians on the payroll. The existence of an authority relationship between the company physician and the employer does not preclude the necessary independence of the company physician, according to Dutch legislation. The Dutch government has commented on this as follows:

> *'The independence of a company physician's judgments and advice stems in the first place from his / her professionalism. Protection of the employee's health comes first. In the second place the above-mentioned independence is guaranteed by the Working Conditions Act (Arbowet) and the professional charter of Arbo (Working Conditions, i.e. Health & Safety) services and company physicians; the charter offers the company physician explicit protection by the Arbo service in the event of improper pressure on the part of the employer. Consequently, no lack of independence whatsoever ensues from the occupational physician's paid employment relationship with the Arbo service. In the third place, provisions are made for employers or employees who do not agree with a company physician's opinion or advice. They can, within the Arbo service, consult a second physician, request an the UWV (agency implementing employed persons' insurance schemes) to issue an expert opinion, or make use of the civil-law disputes procedure."*[7]

In addition to the applicable laws and regulations and the rules of professional ethics, the professional charter of company physicians guarantees that an employed company physician can independently exercise his duties as a medical practitioner.[8]

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[7] Letter from Secretary of State of the Ministry of Social Affairs & Employment to Dutch Parliament (Second House) dated 23 August 2005, AVB/VDB/04 51850.

[8] Cf. Art. 9 of charter: 'The company physician is independent in his or her professional judgement, medical intervention, referral policy and substantive advice, and is personally

Other professionals, such as the editor-in-chief and the church minister, enjoy the freedom necessary for their profession (and thus independence), which is guaranteed in a charter. In the literature on this the following is noted:

> *'The Imam, the Reverend and the editor cannot exercise their fundamental rights of religious freedom and freedom of expression respectively without being given the opportunity to do so – in return for pay – by a foundation, congregation or publisher, which evidently also take advantage of the freedom provided to them by the fundamental rights. The foundation's constitution, church rules and editorial charter are inequality compensating instruments which are needed because of the duties in question, which the incumbent must be able to carry out in freedom. They are needed because without such arrangements the authority relationship would stand in the way of that freedom.*[9]

The attorney in employment is likewise bound to a professional charter (as previously cited) that is stipulated as obligatory by the Dutch Order of Lawyers in the relationship between an employer and an attorney in employment . The provisions of the charter guarantee the professional independence of the attorney in employment. The contractually agreed authority of the employer (also enshrined in article 7:610 of the Dutch Civil Code) is thereby placed under certain constraints.
I quote in this context two provisions of the charter (see also Attachment 1):

> *2. The employer shall honour the employee's free and independent pursuit of his profession. As employer he shall refrain from anything that may influence the employee's professional conduct and the professional determination of the line of policy to be followed in a particular case, notwithstanding the provisions of Article 7. The employer shall ensure that, with respect to the foregoing, the employee shall suffer no disadvantage with regard to his position as an employee.*
> *(...)*
> *4. The employer shall enable the employee to comply with the professional rules and rules of conduct applicable to attorneys. He shall vouch that the employee is totally free not to take on the defending of the interests of two or more parties if the interests of those parties are contradictory or a development in that direction is plausible.*
> *The employer shall enable the employee to fulfil his obligations as an*

---

responsible for his or her professional functioning and quality of treatment. The company physician acts in accordance with relevant statutory frameworks (incl. Arbowet, social security legislation, WGBO, BIG en WMK), general KNMG [medical association] guidelines and codes, and arrangements collectively adopted by BOA, NVAB and KNMG.'

[9] G.A.I. Schuijt, Hoofdredacteur, imam en dominee, in: L.Betten *et al.* (ed.), Ongelijkheidscompensatie als roode draad in het recht, Liber Amicorum for Prof. M.G. Rood, Deventer Kluwer 1997

attorney with respect to the confidentiality of data and the free and unfettered exercising of the right of privilege with regard to the cases handled by him and the nature and extent of appertaining interests. The employer shall abstain from anything that would lead to persons other than the employee, client, persons designated by the client or persons employed in the attorney's practice being able to acquaint themselves with that data. The employer shall, if necessary, align the organisation and set-up of the business with the above and shall enable the employee to exercise his attorney's practice in a proper manner by providing adequate resources.

It is, however, recognised and agreed that the attorney in employment may be given certain instructions by the employer in the interests of the proper course of business within the organization. Such instructions shall not, however, contravene the above-stated independence:

5. The employee is bound vis-à-vis the employer to follow the instructions given to him by or on behalf of the employer in the interests of good order and the proper course of business within the organization, including quality of service provision, as long as they do not contravene the provisions of this agreement.[10]

In the event of a difference of opinion between the employer and the attorney in employment, the latter is protected from dismissal or a disciplinary measure. Nor should obstacles be imposed upon working as an attorney after the contract of employment has come to an end:

8. Notwithstanding the provisions in the previous article, any difference of opinion about the employee's professional policy in the handling of matters entrusted to him shall not constitute grounds for unilateral termination of employment by the employer, or for measures to that end.
9. The employer shall not impose any obstacle on the employee regarding working as an attorney after termination of this employment relationship.

[10] The explanatory memorandum to the Regulation reads: In Article 2, the free and independent pursuit of the profession is dealt with in further detail. That freedom entails that, notwithstanding the provisions of Article 7, no repercussions may arise within the company if the attorney's professional actions differ from the employer's views. Obviously, the provision of Article 2 does not affect the normal authority of instruction that the employer has, who can at the same time be regarded as a client (of the company lawyer/attorney). In this connection, cf. also Article 5: the employer can require of the employee that certain quality criteria are fulfilled. e.g. regularly reporting back to the customer on progress in a particular case. The company lawyer/attorney will, however, have the freedom to reject certain orders if they are incompatible with his professional responsibility.

In disputes about whether the employee has rightly invoked the freedom he enjoys as an attorney, recourse may be had to the Supervisory Board (*Raad van Toezicht*) in the court district where the employee is registered as an attorney:

> *10. Parties can submit any disputes that might arise with regard to the application of this Agreement to the Supervisory Board in the court district where the employee is registered as an attorney, pursuant to Article 5(3) of the Regulation on legal practice in an employment relationship, for mediation and advice. The other party shall fully co-operate with such an initiative.*

The charter for the attorney in employment thereby fulfils a similar purpose as the charter for company physicians, the church rules for church ministers, the editorial charter for an editor-in-chief, and the official formulation of company directors' duties and powers.
The authority relationship between employer and professional does not, therefore, preclude the independent pursuit of the profession.

3.6 The 'employment relationship' as distinctive criterion

The question arises as to what extent the employment contract – under Dutch law – constitutes a distinctive criterion, as brought forward in the Akzo Nobel Chemicals / Commission ruling. In addition to what has been discussed above, attention can be drawn to two variants of labour relationship in which the attorney does not have an employment relationship with the client but is in a similar relationship in terms of supervision:

- the attorney as a bogus self-employed person
- the attorney on a secondment basis

Attorney as a 'bogus self-employed person'

In a number of cases, the "employment contract" criterion fails to provide a remedy because it is less clear-cut than the Court of First Instance seems to assume.

There is a grey area within which discussion can arise about whether work is being done on the basis of an employment contract or on the basis of a contract for professional services ("self-employed").[11] It is not always clear, by a long way,

[11] In other countries the same issues are involved. For an international overview, see ILO, The employment relationship relation contract, report V (1), Geneva 2006, p. 30 *et seq.*; Günter Schaub, Arbeidsrecht Handbuch, Munchen 2002, p. 78 *et seq.*; The ILO has made recommendations regarding the unmasking of bogus constructions: ILO, R198 Employment relationship Relationship Recommendation, 2006; C.J. Loonstra en W.A. Zondag, Het begrip

to everyone involved what kind of contract they are dealing with. This ambiguity is not resolved by stipulating the type of contract, e.g. contract for professional services, in the agreement. It is possible that the parties to the agreement have indicated that the labour relationship is to be classified as a contract for professional services but that the reality is not in accordance with the classification of the agreement as set down by the parties on paper. In the light of case law, it has to be investigated in such cases what "the parties envisaged when concluding the agreement, also taking into account the way in which they actually implemented the agreement and thereby imparted substance to it."[12] Not just a single characteristic is the decisive factor, but the various legal consequences that the parties attached to their relationship have to be viewed in their interrelated context.[13] In 2007 the Supreme Court ruled, on the basis of this criterion, that the lower court had rightly concluded that an employment contract existed between an "employer" and a director.[14] In this case, the employer took the position that its director was working for it under a management contract, via a management company. However, according to court of appeal – and the Supreme Court, which left its judgement intact – this arrangement did not entail a management contract (self-employed), even though it had been termed as such by the parties, but entailed a bogus self-employed person engaged on the basis of an employment contract.

With particular regard to the issue of an attorney in employment, the following practical situation is conceivable. Over a prolonged period an attorney without staff is mainly or even exclusively working for one large client X (for example, in the context of a major takeover). On paper, the attorney and the client do not conclude an employment contract but a contract for professional services ("self-employed"). Under the Akzo Nobel Chemicals / Commission ruling, the correspondence between the attorney and client X is privileged. However, it is quite feasible that if the relationship between the attorney and client X were to be investigated by Dutch criteria, it would have to be concluded that – contrary to what the parties had agreed on paper – this arrangement is an employment relationship.[15] Before this conclusion is drawn, further investigation would have to be conducted and various indicators would have to be reviewed and weighed up. The following factors, for instance, are relevant:

a) actual – economic – dependence on client X;
b) instructions issued by X;
c) sharing of economic risk (if no orders are placed);
d) entitlement to typical employee rights such as paid leave, sick pay, etc.;

'werknemer' in nationaal, rechtsvergelijkend en communautair perspectief, ArA 2001/1, p. 4 *et seq.*

[12] Supreme Court 14 November 1997, NJ 1998, 149; JAR 1997/263 (Groen/Schoevers).

[13] M.C.M. Aerts, De zelfstandige in het sociaal recht, Deventer: Kluwer 2007.

[14] Supreme Court 13 July 2007, JAR 2007/231; NJ 2007, 449 m.nt. E. Verhulp (Thuiszorg/PGGM).

[15] The converse is also possible: attorney X and client agree an employment contract. However, further investigation reveals that this does not in fact constitute an employment contract: Supreme Court 10 October 2003, JAR 2003/263; NJ 2007, 446.

e) freedom to work for other principals/clients;
f) fiscal treatment of the labour relationship;
g) manner of payment, etc.

It is quite likely that a European Commission official, in the course of an audit or investigation at company X, would respect the confidentiality of correspondence with the attorney because in his perception this is correspondence with an outside attorney, but further investigation would have to lead to the conclusion that the attorney in question is in employment (who would then have failed to sign the agreement ensuing from the regulations covering attorneys in employment).

Attorney on secondment basis

The "employment contract" criterion is not clear-cut in the second place because under Dutch law it is possible to work under a long-term secondment. The Supreme Court has ruled that the principle of legal certainty opposes any tacit replacement of an existing relationship between a hired-in worker and the hirer by an employment contract effective between those persons (with it not being clear for either party at what point in time this was accomplished). Whether the hired-in worker entered the hirer's employment after some time is, in the opinion of the Supreme Court, dependent on what they stated to one another and what they deduced or might reasonably have deduced from one another's statements and actions.[16] The mere fact that, in the case that is the subject of the ruling, the hired-in worker had been working for the hirer for more than three years was in itself insufficient grounds for concluding that this constituted an employment contract between the hirer and the hired-in worker.
With particular reference to an attorney in employment, the following can be established. An external attorney who does not have an employment relationship with client X may indeed be seconded to client X for a prolonged period. During this secondment, there is no employment relationship between the attorney and client X. There would have to be actions indicating that the attorney and client X intended to enter into an employment contract with each other. As long as that is not the case, merely the lapse of time (several years, for example) is insufficient for concluding that there is an employment contract between the attorney and client X.

3.7 Nature of professional privilege

To answer the question whether, in respect of the invoked right to confidentiality, a distinction can be drawn between an external attorney and an attorney in

[16] Supreme Court 5 April 2002, JAR 2002/100 (ABN AMRO/Malhi).

employment, it has to be investigated what the nature is of the confidentiality-related professional privilege. Relevant for the Akzo Nobel Chemicals / Commission case are the considerations of the President of the Court of First Instance on October 30, 2003 (cases T-125/03HR and T-253/03HR):

> *The purpose of professional privilege is not only to protect a person's private interest in not having his rights of defence irremediably affected but also to protect the requirement that every person must be able, without constraint, to consult a lawyer (see, to that effect, AM & S v Commission, cited at paragraph 66 above, paragraph 18). That requirement, which is formulated in the public interest of the proper administration of justice and respect for lawfulness, necessarily presupposes that a client has been free to consult his lawyer without fear that any confidences which he may impart may subsequently be disclosed to a third party. Consequently, the reduction of professional privilege to a mere guarantee that the information entrusted by a litigant will not be used against him dilutes the essence of that right, since it is the disclosure, albeit provisional, of such information that might be capable of causing irremediable harm to the confidence which that litigant placed, in confiding in his lawyer, in the fact that it would never be disclosed.*

Fears of unacceptable erosion of the right of privilege conferred (by the Netherlands as a member state) on an attorney in employment are justified, in my opinion. A client must be free to consult his attorney, even when he is functioning in an employment relationship, without any fear that the information imparted in confidence may subsequently be disclosed to a third party. If this guarantee of confidentiality is absent, the professional privilege, conferred by the member state upon an attorney in employment, is made illusory.

Conclusion

1. The question whether the "employment relationship" is a useful criterion for appraising an invocation of confidentiality is to be answered in the negative.

2. The question whether the existence of an employment relationship between an employer and his attorney forms an obstacle to the independent exercising of the profession of that attorney under Dutch law is to be answered in the negative.

Prof. Dr. Wijnand A. Zondag, Professor of Labour Law, University of Groningen
Nunspeet / Groningen, February 25, 2008

ANNEX 2

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Gemeente Amsterdam

Dr. Job Cohen
Mayor

Return Address: P.O. Box 202, 1000 AE AMSTERDAM

To whom it may concern

Date February 26, 2008
Re. Domain monopoly.

Dear Sir/Madam,

1. At the request of then Minister of Justice W. Sorgdrager, I was President of the "Interdepartementale Werkgroep Domeinmonopolie Advocatuur" (Interministerial Work Group Domain Monopoly on the Dutch Bar), which issued a report on June 27, 1995 in which we recommended to open the Dutch Bar for in-house counsel. I was therefore intimately involved and aware of the policy considerations that led to the regulation and recognition of in-house counsel in The Netherlands.

2. We arranged that inhouse counsel would be treated on an equal basis to outside counsel: admitted to the bar, subject to the same rules of ethics and discipline and subject to the same rules and regulations applicable to outside counsel including continuing legal education, professional liability insurance and bookkeeping, and with the same rights.

3. The objective was to facilitate access to legal advice in an efficient and effective manner.

4. This also serves important long-term policy goals: Improving access to legal advice contributes to compliance with law, and thus improves efficiency and reduces the enforcement burden.

5. These objectives can be met only if there are adequate guarantees equivalent to those applicable to outside counsel:
(a) there must be an obligation to give advice that is objective and independent,
(b) counsel must refrain from assisting in arrangements that are reasonably clearly contrary to law,
(c) counsel must not withhold information that the company is required to disclose, and
(d) counsel must appropriately cooperate with the administration of justice and not mislead a court or a competition authority.

6. To ensure that there is no doubt that these rules of independence trump any obligations under employment law, the counsel's independence and ethical obligations must be recognized and respected by the employer and enshrined in the employment agreement. See "Verordening op de Praktijkuitoefening in Dienstbetrekking" of May 1, 1997, and "Professioneel Statuut voor de Advocaat in Dienstbetrekking" (Professional Statute for the employed lawyer who is member of the bar) , especially Art 2: "De werkgever zal de vrije en onafhankelijke

beroepsuitoefening van de werknemer eerbiedigen" ("The employer shall respect the free and independent exercise of the employee's profession.

7. In these circumstances independence and objectivity is sufficiently guaranteed to grant to and impose on the "Cohen advocaat" the same rights and obligations as outside counsel. That includes the privilege of correspondence to or from the Cohen advocaat requesting or providing legal advice. What matters is not whether the counsel is employee or not (since the employer's recognition of the counsel's independence overrules any obligation of loyalty under employment law), but the role and function of counsel in the process of the efficient compliance with law and fair administration of justice. If the lawyer acts as a counsel subject to effective rules of ethics and discipline, that role and function deserves recognition.

8 As an individual who stood at the cradle of the legislation regarding employed in-house counsel, it is disappointing to experience that the Court of First Instance does not recognize and respect the right of a member state to make its own legislation where there is no community law and where there is no need to create community law since 27 member states have approached the phenomenon of LPP in various manners.

I really hope the European Court of Justice will reverse the decision of the Court of First Instance in the AKZO Nobel case and also will reverse its own decision in the AM&S case of 18 May, 1982 case 155 .79 Jur 1982, 1575 and by doing so granting legal privilege to in-house counsel who are members of a national bar or who are regulated in a similar fashion like the rules of the IBJ (Instituut van Bedrijfsjuristen) in Belgium.

Yours sincerely,

Job Cohen
Mayor of Amsterdam
Past Presidendent of the Interdepartementale Werkgroep Domeinmonopolie Advocatuur and ex professor of law, University of Maastricht .

Wet- en regelgeving

By-law on Inhouse Advocates

Legislation & Rules BY-LAW ON IN-HOUSE ADVOCATES

Professional Charter for the In-house Advocate

The signatories:

1..... with its office in .....

hereinafter referred to as the Employer

2..... residing at .....

hereinafter referred to as the Employee

whereas:
a. the Employee has been in the Employer's service as ..... since ....., which service is on a full-time/part-time (i.e. .....) basis;

b. the parties deem it desirable that the Employee will perform his activities in this employment from now on in the capacity of advocate and the Employee wants to be admitted to the bar/has been admitted to the bar in the ..... district, while he will be employed/remains employed by the Employer;

c. the Employer has a general responsibility of its own with regard to the operations within its company;

d. the profession of advocate must be exercised in freedom and independence under the professional rules and code of conduct applicable to the advocates; hence, the Employee has his personal responsibility with regard to his professional conduct as an advocate;

e. in addition to the employment contract/relationship arising from the appointment as a civil servant, another contract setting forth the individual responsibilities of the advocate in relation to the Employer's responsibilities described above is required for as long as the professional practice continues under the employment contract;

f. article 3(3) of the By-law on In-house Advocates stipulates that the professional practice in employment by the in-house advocate for any of the employers set forth in article 3(1)(b), (e), (f) and (g) and in article 3(2) is only permitted if the Employer has undertaken in writing, in accordance with the charter annexed to that By-law, to respect the independent professional practice and promote the free compliance with the professional rules and code of conduct of the advocate, including the stipulations of that By-law.

have agreed the following:

1. In all the activities carried out in the Employer's service, the Employee shall always have the capacity of advocate and shall always clearly notify any third party of the same.

The Employer shall avoid creating the impression vis-à-vis any third party that the Employee acts in any other capacity, with regard to his activities in service.

2. The Employer shall respect the free and independent professional practice of the Employee. As the Employer, it shall refrain from anything that could exert influence on the professional actions of the Employee and the professional determination of the strategy to be followed in a case, without prejudice to the provisions of article 7. The Employer shall ensure that the Employee does not encounter any disadvantage with regard to his position as Employee due to the above.

3. The Employer shall enable the Employee to meet his membership obligations towards the Netherlands Bar Association and his local Bar Association, including traineeship and training obligations.

4. The Employer shall enable the Employee to comply with the professional rules and the code of conduct which apply to the advocate. It shall vouch for the Employee not being under any obligation to commit to look after the interests of two or more parties if the interests of such parties conflict or a development leading to that is likely.

The Employer shall enable the Employee to meet his obligations as an advocate with regard to observing the confidentiality of information and the free and unhindered exercise of the right to decline to give evidence with regard to cases handled by him as well as the nature and size of interests involved therewith. The Employer shall refrain from anything which serves anybody other than the Employee, the client, client-appointed individuals or individuals employed in the advocate's practice who are able to take note of that information. If necessary, the Employer shall adjust the organization of the company to that effect and give the Employee the opportunity to exercise his legal practice properly by providing him with sufficient resources.

5. The Employee shall be bound towards the Employer to follow instructions given by or on behalf of the Employer in the interest of promoting the order and proper operations within the organization, including the quality of services rendered, unless these are contrary to the provisions of this contract.

6. In the employee's absence (due to holiday, illness or other leave), the Employer shall give the Employee the chance to appoint a deputy , at the Employer's expense.

7. The Employer may stipulate that the Employee will be answerable, in respect of the exercise of his practice, to one or more other practising advocates in the Employer's service.

8. Without prejudice to the provisions of the preceding article, a difference of opinion regarding the professional conduct of the Employee in the handling of cases entrusted to him may not constitute a ground for a unilateral termination of the employment by the Employer, or for measures that could lead thereto.

9. The Employer shall not impose any limitations on the Employee's activities as an advocate to be performed after the termination of this employment.

10. In accordance with article 5(3) of the By-law on In-house Advocates, the parties may bring any dispute arising from this contract before the Council of Supervision in the district in which the Employee is admitted to the bar, for mediation and

recommendations. The other party shall provide its full co-operation with regard to such initiative.

11. This contract shall end upon termination of the employment referred to in (a) above or if the Employee loses his position of advocate admitted to the bar in the Netherlands. Without prejudice to the Employer's obligation, which in that case continues, this provision shall apply to the confidentiality of information as described in article 4(2).

Agreed and signed in duplicate at ..... / .....

....

the Employer The Employee

ANNEX 3

OVERVIEW OF THE RECOGNITION OF LEGAL PROFESSIONAL PRIVILEGE FOR IN-HOUSE LAWYERS IN THE EU MEMBER STATES

This document sets out the position at law on the recognition of legal professional privilege ("LPP") for in-house/employed lawyers in each of the Member States and Norway. Where possible, details on the relevant professional and ethical enforcement bodies have been included, together with the rules with respect to documents produced by in-house/employed lawyers and their role in legal proceedings before national courts.

MEMBER STATES THAT ALLOW IN-HOUSE/EMPLOYED LAWYERS ACCESS TO THE BAR OR TO A REGULATED PROFESSION AND RECOGNISE LPP FOR IN-HOUSE LAWYERS

Belgium, Denmark,* Germany,* Greece, Ireland, The Netherlands, Norway, Portugal, United Kingdom

* Partial in-house legal professional privilege is recognized in Denmark and Germany. (In Germany, privilege is recognized for work performed as a lawyer on the basis of a lawyer-client relationship, even with respect to in-house/employed lawyers.) In Finland, where a partial in-house legal professional privilege is also recognized, in-house/employed lawyers are not permitted to become members of the Bar.

MEMBER STATES THAT DO NOT ALLOW IN-HOUSE/EMPLOYED LAWYERS ACCESS TO THE BAR OR TO A REGULATED PROFESSION AND DO NOT RECOGNISE LPP FOR IN-HOUSE LAWYERS

Austria, Bulgaria, Cyprus, Czech Republic, Estonia, France, Hungary, Italy,** Latvia, Lithuania, Luxembourg, Poland, Romania, Slovak Republic, Slovenia, Spain,** Sweden

** In Italy, lawyers employed by a Public Administration are entitled to become members of the Bar, notwithstanding their employee status. In Spain in-house/employed lawyers may become members of the Bar.

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1. AUSTRIA

Position. In-house/employed lawyers cannot be members of the Bar in Austria and are not independently regulated. Legal privilege is not recognized for in-house/employed lawyers in Austria.

Legal Privilege: Courts/Tribunals. In-house/employed lawyers may, to a limited extent, represent their employer before all national courts and tribunals in civil proceedings in procedures at first instance (*see* Section 27 of the Austrian Code of Civil Procedure; in particular, if the value of the claim does not exceed € 4,000, and in certain specified matters before the district courts). In-house/employed lawyers cannot represent their employer in appeal proceedings (*see* Sections 463 and 506 of the Austrian Code of Civil Procedure; *see also* Section 520).

2. BELGIUM

Position. Legal advice rendered by in-house/employed lawyers that are members of the Institute of Company Lawyers (*Instituut van Bedrijfsjuristen / Institut des Juristes d'Entreprise*), is protected by legal privilege. To become a member of the Institute of Company Lawyers, in-house/employed lawyers need to fulfil several conditions foreseen by law, the respect of which is controlled by the Institute of Company Lawyers. Only members of the Institute of Company Lawyers may hold the title of "Company Lawyer" and thereby benefit from legal privilege. In-house lawyers cannot be admitted to the Bar.

Professional Association. Institute of Company Lawyers: http://www.ije.be. The Institute of Company Lawyers has issued a code of professional responsibility for in-house counsel. A copy of the code is available at http://www.ibj.be/Default.aspx?PageID=84&Culture=nl. The Institute of Company Lawyers is regulated by law. The Institute has issued its own disciplinary rules, which specify "*the in-house lawyer exercises his profession in complete intellectual independence*" (Article 4).

Relevant Legislation/Case Law. The Institute of Company Lawyers Act of March 1, 2000 (*see* Official Journal, July 4, 2000) regulates the profession of in-house/employed lawyers. Article 5 provides that: "*legal advice rendered by company lawyers, to the benefit of their employer and in the framework of their activities as legal counsel, are confidential.*" A copy of the Act is available at http://www.ije.be.

Legal Privilege: Courts/Tribunals. In-house/employed lawyers are not entitled to represent their employer in front of national courts or tribunals. Pursuant to Article 440 of the Code of Civil Procedure, only attorneys registered with the Bar can represent clients before a Belgian court or tribunal. In-house/employed lawyers are not entitled to become members of the Bar in Belgium.

Belgian Company Lawyers are subject to professional secrecy rules (*see* Article 458 of the Criminal Code). The Belgian Competition Authority recognizes privilege for Company Lawyers' legal advice in proceedings brought against their employers.

Legal Privilege: Documents. Legal advice prepared by Company Lawyers is privileged. Privilege extends to preparatory documents and correspondence with business people aimed at collecting information with the view to providing legal advice (*see* practical guidelines available at: http://www.ibj.be/Upload/main/Documenten/Gids%20'geheimhouding'.pdf).

3. BULGARIA

Position. In-house/employed lawyers cannot be admitted to the Bar in Bulgaria and are not independently regulated. Only attorneys-at-law *i.e.*, members of the Bar, can

benefit from legal privilege. Legal privilege is not recognized for in-house lawyers in Bulgaria.

There is, however, a draft Jurisconsults law being considered that provides for legal privilege for in-house/employed lawyers. This law has yet to be adopted by the Bulgarian parliament, however, and is unlikely to be adopted in the short term.

Under the Ethical Code of the National Union of Jurisconsults, in-house/employed lawyers are obliged to maintain the secrecy of any information received during the fulfilment of their official duties and perform them in a correct and competent manner.

Legal Privilege: Courts/Tribunals. In-house/employed lawyers may represent the legal entities they work for pursuant to a power of attorney. In-house counsel may appear before all national courts and tribunals in any civil proceedings, administrative litigation, and arbitrations on behalf of their employer but will not be covered by legal privilege (*see* Article 20, paragraph 1, sub-paragraph (c) of the Civil Procedure Code. However, from March 1, 2008 a new Civil Procedure Code enters into force and the re-numbered Article 32(3) will regulate the rights of in-house/employed lawyers to represent their employers).

Legal Privilege: Documents. There is no explicit rule for confidentiality of communications, documents, or correspondence exchanged between in-house counsel and their employer. Bulgarian law does not recognize legal privilege for documents produced by in-house/employed lawyers.

The Commission on the Protection of Competition's Procedural Rules on Search, Seizure and Interview expressly protect and recognize legal privilege only with respect to correspondence between an external lawyer and its client (*i.e.*, the company), and correspondence between an external lawyer and an in-house/employed lawyer, but do not recognize privilege for written advice from an in-house lawyer to his employer.

4. CYPRUS

Position. In-house/employed lawyers cannot be members of the Bar in Cyprus and are not independently regulated. Legal privilege is not recognized for in-house/employed lawyers in Cyprus.

The title of practicing advocate ("*Dikigoros pou aski to epaggelma*" in Greek) is only accorded to legal professionals who are members of the Bar (*see* Articles 2, 6, 6A, and 11 of the Advocates Law, CAP 2 as amended). The concept of a regulated salaried legal professional does not exist in Cyprus.

In-house/employed lawyers are subject to the elements of professional secrecy set out in their contracts of employment, but this does not entitle an in-house/employed lawyer to refuse disclosure in court proceedings.

5. CZECH REPUBLIC

Position. In-house/employed lawyers cannot be members of the Bar in the Czech Republic and are not independently regulated. Legal privilege is only granted to practicing attorneys ("*advocates*", *i.e.*, members of the Czech Chamber of Advocates). Legal privilege is not recognized for in-house/employed lawyers in the Czech Republic. However, in-house/employed lawyers are subject to legal requirements to protect business secrets and to duties of confidentiality arising from their employment relationship. In some cases, in-house/employed lawyers might also be subject to a special duty to maintain confidentiality with regard to the nature of their professional activity (*e.g.*, in-house/employed lawyers at state organizations or employed by regulated businesses).

Even advocates employed as in-house/employed lawyers for a short period of time (*e.g.*, on secondment) must, for the duration of his/her in-house engagement, interrupt his/her membership of the Czech Chamber of Advocates. During this time, his/her advocacy rights are minimized and no legal privilege applies to his/her legal advice to the employer during this period.

Professional Association. There is no equivalent competent authority (to the Czech Chamber of Advocates) that regulates the activities of in-house/employed lawyers who provide legal services to their employer.

Legal Privilege: Courts/Tribunals. In-house/employed lawyers may represent their employer before all national courts or tribunals with the exception of proceedings before the constitutional court, criminal proceedings, and in certain special civil and administrative judicial proceedings.

The duty to preserve professional secrecy is imposed on advocates only (*see* Articles 16, 17 and 21 of the Act No. 85/1996 Coll., on Advocacy as amended by Act No. 210/1999 Coll., 120/2001, Coll., 6/2002 and Coll., 228/2002). Legal professionals who are employed, regardless of their legal qualifications, are not covered by the laws of professional privilege in the Czech Republic. However, these professionals may be subject to the duty to maintain confidentiality arising from the legal requirements to protect business secrets, or arising from their employment relationship or the special nature of their activity.

6. DENMARK

Position. In-house/employed lawyers that are members of the Danish Law and Bar Society ("*advokater*") generally enjoy legal privilege. It is unlikely, however, that in-house/employed lawyers could successfully claim legal privilege regarding investigations by the Danish Competition Authority because the Danish Competition Authority only recognizes privilege for outside counsel.

Danish procedural law does not have a discovery system like that of the U.S. or the English legal system, and therefore the issue of legal privilege has not arisen in a comparable manner with respect to ordinary civil procedure. A party to a civil procedure can be ordered to provide documents of relevance to the case, but the sanction for non-compliance is that the judge may interpret the unjustified failure to

abide by an order as an admission of a given fact. Raising a claim of professional secrecy, however, is likely to be considered justification for non-compliance. In that sense, there is a "legal privilege", but it is of much less practical importance than under discovery systems.

Danish law does not provide for administrative fines. Fines are imposed under criminal law procedure, where the professional secrecy can be lifted by court order, except for defence lawyers.

Professional Association.

- The professional association for in-house lawyers is called Danske Virksomhedsjurister (DFVJ): http://dvj.kunde.vaerk.net/

  Several years ago DVJ adopted rules of professional ethics, disciplinary rules, and sanctions.

- Danish Law and Bar Society: http://www.advokatsamfundet.dk/

  All lawyers are subject to a special duty of professional secrecy, which covers both their appearance as witnesses and the production of documents.

Relevant Legislation/Case Law. Danish Administration of Justice Act (applies equally to in-house counsel and to outside counsel).

- Para. 126(1) – all *advokater* are under a duty always to act in accordance with "good ethical behaviour."

  The Danish Law and Bar Society's "Rules on good ethical behaviour for "*advokater*"" apply equally to in-house/employed lawyers and to external counsel who are *advokater*.

- Section 2.3 – general duty of confidentiality. In-house lawyers who are *advokater* are bound by the same confidentiality obligations as external counsel.

- Section 2.1.1 – *advokater* must always preserve their independence and professional integrity.

Legal Privilege: Courts/Tribunals. In-house/employed lawyers who are *advokater* may represent their employer before all national courts and tribunals.

Persons, including *advokater*, who are subject to rules on professional secrecy and therefore exempt from appearing as witnesses, are also exempt from orders to produce documents for a trial under the rules on civil procedure, unless especially ordered to do so (*i.e.*, 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, *see* Section 170 of the Danish Administration of Justice Act). Thus, an in-house/employed *advokat* will be covered by these provisions and be able to claim legal privilege. The same rules apply, in principle, to a criminal investigation but legal privilege attaches only to the defence lawyer and includes communications between the *advokat* and his/her client clearly related to the offence but preceding the appointment of the defence *advokat*.

Although, to the best of our knowledge, the issue has never arisen, the Danish Competition Authority's right to demand information (pursuant to paragraph 17 of the Danish Competition Act) does not exclude in-house/employed *advokater*; therefore, it is likely that the Danish Competition Authority would not recognize privilege for in-house/employed *advokater*. Whether or not such a position would be justified is yet to be decided by the Danish courts. In any event, general rules on confidentiality and professional duties (including the duty to protect business secrets) apply.

Legal Privilege: Documents. The without prejudice correspondence of in-house/employed counsel that are *advokater*, is – in principle – privileged. However, the protection afforded to communications between in-house/employed lawyers and other lawyers, both internal and external, can be lifted by court order. There are, as yet, no decisions as to whether the court has wider powers to lift the protection with respect to in-house/employed lawyers. Further, the Danish Competition Authority does not recognize that documents originating from in-house/employed lawyers are privileged with respect to the Authority's right to inspect and take copies of documents during an investigation pursuant to paragraph 18 of the Danish Competition Act. Again, no Danish court has, as of yet, decided the issue.

7. ESTONIA

Position. In-house/employed lawyers cannot be members of the Bar in Estonia and are not independently regulated. Legal privilege is only granted to "*advocates*", *i.e.*, members of the Bar. Legal privilege is not recognized for in-house/employed lawyers in Estonia.

Members of the Bar are prohibited from entering into an employment relationship with a company, although they may enter into service or authorization contracts.

Legal Privilege: Courts/Tribunals. In-house/employed lawyers may represent their employer before all national courts or tribunals (except the State Court of Estonia), in any civil proceedings and arbitrations, but will not be covered by legal privilege.

As regards privilege arising in competition cases, it would appear that in accordance with the case law of the European Courts, the confidentiality privilege afforded to external counsel does not extend to communications from in-house lawyers (except for situations where such communication is with an external counsel). However, there is no specific legislative provision or court practice, nor has the Estonian Competition Authority taken any position on the issue so far. Therefore, it is not clear whether the Estonian practice would follow EC practice in this regard.

8. FINLAND

Position. In-house/employed lawyers cannot be members of the Bar in Finland. However, legal privilege is generally recognized for in-house/employed lawyers who represent their employer in civil cases before the national courts, in administrative or arbitration proceedings.

Relevant Legislation/Case Law.

- Chapter 15, Section 17 of the Code of Judicial Procedure sets out the scope of legal privilege of a counsel in cases before the 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.*"

- Chapter 17, Section 23 of the Code of Judicial Procedure qualifies the scope of legal privilege set out in Chapter 15, Section 17 above: "*The following shall not testify:...(1)(4) an attorney or counsel, in respect of matters which 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.*"

- Case KKO 2003:119: The Supreme Court of Finland stated 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, Chapter 17, Section 23 of the Code of Judicial Procedure applies 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, particularly in criminal cases.

- Supreme Court Case KOO 2003:137 sets out how the legal privilege in Chapter 17, 23 is to be interpreted.

- Section 13 of the Administrative Procedure Act applies in administrative proceedings before certain authorities: "*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.*" The Chapter 15, Section 17 confidentiality obligation, outlined above, is applicable before administrative courts (*see* Section 20 of the Administrative Judicial Procedure Act). Chapter 17, Section 23, also applies (*see* Section 39 of the Administrative Judicial Procedure Act, and Section 40 of the Administrative Procedure Act), as do the rules on written evidence, set out below (*see* Section 42 of the Administrative Judicial Procedure Act).

Legal Privilege: Courts/Tribunals. Legal privilege is recognized for in-house/employed lawyers who represent their employer in civil cases before the national courts, in administrative or arbitration proceedings. Legal privilege for in-house/employed lawyers is not recognized in criminal proceedings, or if the in-house counsel is a legal representative of the company (*e.g.*, managing director or member of

the board of directors). There is no explicit rule concerning legal privilege in competition law proceedings.

Legal Privilege: Documents. Legal privilege for in-house/employed lawyers does not apply to general legal counselling.

In general, legal counsel shall not present a document to the court (*i.e.*, district courts, courts of appeal, or the Supreme Court) if it can be assumed that the document contains something on which he/she cannot be heard as a witness *e.g.*, an in-house counsel who is a member of the board of directors cannot act as a witness, and Chapter 17, Section 23 on witnesses will not apply to him/her (*see* Chapter 17, Section 12, Subsection 2 of the Code of Judicial Procedure).

Informally, the Finnish Competition Authority recognizes some cases may justify the claim of legal privilege in respect of in-house/employed lawyers' opinions, although there is no case law on point.

9. FRANCE

Position. In-house/employed lawyers cannot be members of the Bar in France and are not independently regulated. The title of "*avocat*" (advocate) is reserved for members of the Bar, who cannot be employed. Under French law, there is no exact equivalent of the concept of legal privilege. The closest concept is the principle of "professional secrecy" ("*secret professionnel*"), which applies to members of the Bar. In-house/employed lawyers are bound by different rules regarding confidentiality and secrecy and cannot benefit from legal privilege.

Legal Privilege: Courts/Tribunals. In France, "legal privilege" applies to communications and advice between an advocate and his/her client, and to communications between advocates. The duty to protect professional secrets is provided for in France under the provisions of Article 55(3) of the Law 71-1130 of December 31, 1971, and Articles 226-13 and 226-14 of the Criminal Code for in-house lawyers, and also under Article 66-5 of the Law 71-1130 of December 31, 1971 for advocates. These provisions expressly require that lawyers shall not disclose information that contravenes the obligation of professional secrecy.

- ***Members of the Bar (avocats).*** According to the principle of "professional secrecy," an *avocat* is not allowed to disclose any information provided by his/her client for the purpose of advice or defence, except in very exceptional circumstances (*e.g.*, for the *avocat*'s own defence in a trial). All consultations, correspondence, meeting notes and, generally, all documents in the file are covered by "professional secrecy" (*see* Article 66-5 of the Law n°71-1130 of December 31, 1971; Article 4 of the Decree n°2005-790 of July 12, 2005; Article 2 of the Unified Rules). "Professional secrecy" is general, absolute, and has no time limitation. In particular, the client cannot relieve the *avocat* from his/her duty not to disclose information. However, the client can himself disclose the information provided to the *avocat*. Breach of "professional secrecy" by an *avocat* is punishable by criminal sanctions (imprisonment of up to one year and

fines of up to €15,000, pursuant to Article 226-13 of the French Criminal Code) as well as disciplinary sanctions (including possible suspension or disbarment).

- ***In-house/employed lawyers.*** In-house lawyers may represent their employer before commercial courts (*Tribunal de commerce*) and employment courts (*Tribunal des Prud'hommes*) where the assistance of an *avocat* is not compulsory. They will not however benefit from the protection granted by the principle of "professional secrecy."

Legal Privilege: Documents.

- ***Members of the Bar (avocats).*** The principle of "professional secrecy" prohibits the seizure of any correspondence between clients and *avocats* or between *avocats*, and more generally of any documents in the file except in very limited circumstances (*e.g.*, when the *avocat* participated in an infringement).
- ***In-house/employed lawyers.*** Under French Law, in-house/employed lawyers can draft consultations and other documents for the company by which they are employed. In this respect, in-house/employed lawyers are under an obligation not to disclose professional secrets (*see* Articles 55 and 55 of the Law n°71-1130 of December 31, 1971). However, advice provided by in-house lawyers is not confidential. It can, therefore, be seized by the authorities and produced as evidence in court proceedings.

10. GERMANY

Position. German legislation recognises in-house/employed lawyers admitted to the Bar in the same way as external lawyers and makes no difference between external and in-house-lawyers. Legal privilege for in-house/employed lawyers is recognized in specific court decisions for those cases where the in-house/employed lawyer, admitted to the Bar, performs work as an attorney for the employer as a client (and not as an administrator).

Professional Association.

- *Bundesrechtsanwaltskammer* (Federal Bar): http://www.brak.de/

  Note that lawyers must also be members of their relevant regional Bar. The *Bundesrechtsanwaltskammer* provides rules of professional ethics and discipline. There is no separate regulatory or disciplinary body for in-house counsel.

- *Deutscher Anwaltverein, Arbeitsgemeinschaft der Syndikusanwälte im DAV* (German Bar Association, Section for Company Lawyers): http://www.anwaltverein.de.

  The Section for Company Lawyers represents the interests of German Company lawyers under the roof of the German Bar Association, which is the body representing lawyers' interests in Germany.

Relevant Legislation/Case Law.

- §§ 53 para. 1 n° 3, 97 para. 1 n° 1 and n° 2 *StPO: Landgericht* Berlin of November 30, 2005, NStZ 2006, 470: in-house/employed lawyers admitted to the Bar can claim legal privilege for documents created when rendering legal services to a client in their function as an attorney. Under certain circumstances, the in-house/employed lawyer may act as an attorney even within the company. The relevant test is not whether the lawyer acts independently regarding the relevant assignment. Rather, the court assesses whether there is a client relationship between the in-house/employed lawyer and one or several persons within the company seeking legal advice, as part of which the client may expect that the communication remains confidential. Where the in-house/employed lawyer does not explicitly act for a client but for the employing company itself as a sort of administrator (in the normal course of business) there is no legal privilege.

- §§ 53 para. 1 n° 3, 97 para. 1 n° 1 and n° 2 S*tPO: Landgericht* Bonn of September 29, 2005, NStZ 2007, 605: in-house/employed lawyers admitted to the Bar can claim legal privilege only for documents created when rendering legal services to a client in their function as an attorney alongside to their employment as in-house/employed lawyer. These documents must be in the sole custody of the in-house/employed lawyer. In general, in-house/employed lawyers can only claim legal privilege when he performs typical work as an attorney (*anwaltliche Aufgaben*). When the in-house/employed lawyer performs other services for the employer, he does not act as an attorney, as he does not act as an independent body of the judicial system. In general a *Rechtsanwalt* acts as an attorney when he is advising a third party. However, the Landgericht Bonn seems to accept exceptionally that the in-house/employed lawyer may act as an attorney for a member of the company, provided that he has the explicit possibility to work for members of the company as an independent attorney, as in the Landgericht Frankfurt case (*see* below).

- §§ 53 para. 1 n°3, 97 para. 1 n° 3 *StPO: Landgericht* Frankfurt am Main of December 17, 1992, WM 1995, 47: an in-house/employed lawyer can claim legal privilege for his communications as defence counsel of an employee of the company, provided that the in-house/employed lawyer has a power of attorney for the defence, and that the documents are in his sole custody. However, in this particular case, the in-house/employed lawyer agreed in a contract separate from his position as in-house/employed lawyer to defend the employee in a criminal proceeding. In addition, the employee worked for a different business division of the company and it seems that the in-house/employed lawyer was not part of a general in-house unit, but of another business division. Finally, the in-house/employed lawyer had obtained the explicit permission of the company to work as an attorney.

- *Bundesverfassungsgericht* of November 4, 1992, BVerfGE 87, 287, NJW 1993, 317: in-house/employed lawyers can be admitted to the Bar provided that their employment does not prevent them from fulfilling their duties as independent lawyers.

Legal Privilege: Courts/Tribunals. In-house/employed lawyers cannot represent their employer in court as an attorney in cases where the assistance of a *Rechtsanwalt* is not compulsory (*see* § 46 of the Federal Regulation concerning Attorneys, the *Bundesrechtsanwaltsordnung*).

Legal Privilege: Documents. In-house/employed lawyers can claim privilege for all their communications in the circumstances described above to the same extent as lawyers in private practice, so long as such communications are in the sole custody of the attorney (*e.g.*, in the case of in-house lawyers, legal advice may be placed in a filing cabinet to which the in-house lawyer has the key). This applies to all kinds of proceedings, including proceedings before the competition authority, and in particular, in dawn raids.

11. GREECE

Position. Greek law makes no distinction between in-house/employed lawyers and lawyers in private practice, all of whom must be members of the Bar. Legal privilege is recognized for all lawyers who are members of a Bar in Greece.

Professional Association.

- *Dikigorikoi Syllogoi* (Bar Associations): Greek Bars are statutory bodies regulated by law. There are several Bar Associations in Greece *i.e.*, in each region where a Court of First Instance sits. All lawyers practicing in the region must belong to their respective Bar. The largest Bar Association is the Athens Bar (www.DSA.gr).

  The *Dikigorikos Syllogos* set out rules of professional ethics and discipline and a "Code of Ethics" that applies to all lawyers.

Relevant Legislation.

- Article 32 of the Code of Ethics provides that a lawyer cannot be examined as a witness in court with respect to matters that came to his/her knowledge in the framework of the exercise of his/her profession either before or outside of the courts.
- Article 49 of the Code of Lawyers (Legislative Decree 3026/1954) states that all matters that a client has entrusted to his lawyer are regarded as privileged. With respect to information that comes to a lawyer's knowledge in the context of practicing his/her profession, it is for the individual lawyer to decide whether he/she should testify as a witness with respect the matter in question. This applies both to in-house/employed lawyers and external lawyers.
- The Code of Criminal Procedure provides that a search of a lawyer's office, as well as confiscation of documents in his/her possession, are prohibited if the lawyer acts for the accused person. This applies both to in-house/employed lawyers and external lawyers.
- Article 63 of the Code of Lawyers (Legislative Decree 3026/1954) states that the carrying out of any activity or service contrary to the independence of a lawyer is

incompatible with the exercise of the legal profession. By way of exception, a lawyer is allowed to offer strictly legal services against a fixed annual or monthly remuneration as legal counsel or lawyer (*i.e.*, in-house/employed lawyer). Such an arrangement does not make the lawyer an "employee" of his client.

- Article 401 of Code of Civil Procedure, Article 212 of Code of Criminal Procedure and Article 183 of the Code of Administrative Procedure provide that lawyers may refuse/are prohibited from testifying in court with respect to matters entrusted by their clients or of which they became aware during the exercise of their profession.

Legal Privilege: Courts/Tribunals. In-house/employed lawyers may represent their principals and will be covered by legal privilege.

Legal Privilege: Documents. All communications that fall within the scope of the professional attorney-client relationship are regarded as privileged.

12. HUNGARY

Position. Legal privilege is not recognized for in-house/employed lawyers in Hungary. The duty to preserve professional secrecy is imposed on regulated professionals ("*ügyvéd*"). In-house/employed lawyers cannot be members of the Bar in Hungary and are registered on a separate registry. The Act on Attorneys does not apply to in-house/employed lawyers. Instead, there is a special regulation for in-house counsel (the Legal Counsel Act).

In-house/employed lawyers can either be employed or provide legal services under a civil law contract. In-house/employed lawyers are entitled to represent the company to which they provide services, legal counselling, legal advice, prepare documents and other instruments, and with respect to which the in-house/employed lawyer is responsible for the coordination of legal tasks. In-house/employed lawyers may represent the company before all courts and administrative bodies (including the Competition Authority). The Legal Counsel Act does not provide for the obligation to preserve professional secrecy. The Act on Attorneys, however, requires attorneys to keep all information obtained during the course of their professional practice as professional secrets.

Relevant Legislation/Case Law.

- Act 3 of 1983 on Legal Counsel (professional secrets)
- Section 8 of the Act XI of 1998 on Attorneys (professional secrets)
- Section 169 and 170 of the Act 3 of 1952 on the Civil Procedures Code (refusal of testimony)
- Section 81 and 82 of the Act XIX of 1998 on Criminal Procedure Code (refusal of testimony)
- Section 53 of the Act CXL of 2004 on Administrative Procedure (refusal of testimony)

Legal Privilege: Courts/Tribunals. At present, the only restriction placed on in-house/employed lawyers is that they can refuse to be a witness against their own company.

Persons who are required to protect business secrets cannot be questioned by the court regarding information considered as business secrets. According to the procedural acts set out above, any person obliged by profession to treat information received as professional secrets may refuse to provide testimony before all Hungarian courts and administrative bodies. It is not clear from these acts who is obliged by profession to treat information as professional secrets. The Act on Attorneys expressly provides that attorneys are bound by this obligation, however the Legal Counsel Act does not contain any similar provision, and the court practice is uncertain in this regard.

13. IRELAND

Position. In-house/employed solicitors (members of the Law Society of Ireland) are treated the same as external lawyers for the purposes of legal privilege. Barristers (members of the Irish Bar) practicing in Ireland and who are not employed are entitled to privilege.

Professional Association.

- Law Society of Ireland: http://www.lawsociety.ie/

  In-house/employed solicitors are subject to the same codes of ethics and discipline as solicitors in private practice. Section 4 of A Guide to Professional Conduct of Solicitors in Ireland describes the rules of privilege that apply to solicitors and the 2002 edition is available at http://www.lawsociety.ie/newsite/documents/Committees/conduct2.pdf

- The Bar Council of Ireland: http://www.lawlibrary.ie/viewdoc.asp?DocID=4

  Barristers practicing in Ireland and who are not employed are entitled to privilege. Section 3.3 of the Code of Conduct of the Bar Council describes the general obligation of confidentiality applying to barristers and the 2006 edition is available at http://lawlibrary.ie/viewdoc.asp?DocID=581

Relevant Legislation/Case Law.

- *Smurfit Paribas Bank Limited v ABB Export Finance Limited* [1990] 1 IR 469: Privilege extends to "advice" but not to legal "assistance."
- *Law Society of Ireland v the Competition Authority* [2005] IEHC455. O'Neill J, 21 December 2005: a rule restricting a client's right to chose a solicitor was held to be unconstitutional.

Legal Privilege: Courts/Tribunals. Privilege 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). These

rules also apply before the Irish Competition Authority (including investigations by the Competition Authority).

Legal Privilege: Documents. 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.

14. ITALY

Position. Pursuant to the Royal Decree n. 1578 dated November 27, 1933 (the "*Professional Law*"), in-house/employed lawyers are not entitled to be members of the Bar in Italy, on the ground that their status as "*employees*" is incompatible with Bar membership.

As a statutory exception to the above, qualified lawyers employed by a Public Administration are nevertheless entitled to become members of the Bar, even though they have employee status.

Except for this exception with regard to qualified lawyers employed in the public sector, the status of in-house/employed lawyers is not statutorily regulated in Italy.

Drafts of revised Acts of Professional Law are under discussion in the Parliament, but legal privilege issues are not addressed.

Legal privilege is not specifically provided for under the Italian Legal System and it is not granted either to Bar members or to in-house/employed lawyers.

Italian law, however, protects the confidentiality of communications (*secrecy*) between Bar members and their clients, provided that and to the extent that those communications occur in the exercise of the rights of defence. No secrecy is applied to in-house/employed lawyers.

Relevant Legislation/Case Law.

- The Italian Criminal Code, the Code of Criminal Procedure, the Code of Civil Procedure, and the Professional Law set out rules with regard to "*secrecy constraints and obligations*" applicable to members of the Bar (*attorneys*), including those qualified in EU countries, and to lawyers employed by the Public Administration in Italy.
- Article 622 of the Italian Criminal Code ("*Codice Penale*") provides that the disclosure of confidential subject matter (*secret*) known to a lawyer pursuant to his/her professional activity is subject to prosecution.
- Article 200 of the Italian Code of Criminal Procedure ("*Codice Procedura Penale*") provides that, in general, members of the Bar (*attorneys*) cannot be summoned before a court as witnesses with regard to facts known pursuant to their defence activities.
- The secrecy provisions apply only to lawyers who are members of the Italian Bar and, pursuant to Article 1 of Law No. 31 of February 9, 1982, lawyers who are members of the Bar of another EU Member State.

- As stated above, "*legal privilege*" status (*i.e.*, confidential to the attorney and not subject to seizure) is limited under the Italian legal system only to instances involving the exercise of the right of defence.
- A broader "*legally privileged*" status in relation to consultancy services (*i.e.*, with regard to out-of-litigation professional advice) is not recognized.
- Italian Regional Administrative Courts ("*TAR*") and higher competent administrative courts ("*Consiglio Stato*") stated (mainly *obiter dictum*) on the secrecy of professional advice that professional advice is not seizable by cognizant Authorities (because these constitute client-attorney correspondence). If and to the extent that such advice is rendered after public proceedings have started (*e.g.*, a lawsuit, arbitration or administrative proceedings by public bodies or agencies), such advice is not legally privileged if without reference to the matters concerned by the litigation (*see* Consiglio Stato 2.4.2001, n. 1893; Consiglio Stato 8.2.2001, n. 513; Consiglio Stato 26.9.2000, n. 5105; Consiglio Stato 27.8.1998, n. 1137; TAR Trentino Alto Adige, Trento 27.1.2003, n. 39; TAR Campania, Napoli, 23.1.2003, n. 386).
- Legal professional privilege does not attach to correspondence emanating from in-house/employed lawyers (mainly *obiter dictum*, *see* TAR of July 5, 2001, no. 6139/01, and judgment of Consiglio di Stato of April 23, 2002, no. 2199/02, in Third Party Car Insurance Cartel case).

Legal Privilege: Documents. In-house written advice and communications emanating from in-house/employed lawyers are not privileged.

Written advice and communications emanating from external lawyers who are members of the Bar are not privileged unless the advice and the communications are rendered by lawyers in the course of litigation related activities (*i.e.*, in relation to exercise of the client's rights of defence).

15. LATVIA

Position. In-house/employed lawyers cannot be members of the Bar in Latvia and are not independently regulated. Legal privilege is not recognized for in-house/employed lawyers in Latvia.

Relevant Legislation/Case Law.

- The Bar Act contains the rules on legal privilege and governs activities of practising attorneys ("*sworn advocates*"). Art. 67 of the Latvian Bar Act provides: "*A sworn advocate may not divulge the secrets of his or her authorising person not only while conducting the case, but also after being relieved from the conducting of the case or after the completion of the case. The advocate shall ensure that these requirements are also observed in the work of his or her staff.*"

Even though it has not been tested in practice so far, the Competition Council is expected to follow the above rule.

16. LITHUANIA

Position. In-house/employed lawyers cannot be members of the Bar in Lithuania and are not independently regulated. Legal privilege is not recognized for in-house/employed lawyers in Lithuania. However, in-house/employed lawyers who are representatives in court proceedings cannot be examined as witnesses concerning the circumstances that came to their knowledge in their capacity as legal representatives. Only members of the Lithuanian Bar are afforded full legal privilege. An advocate's assistant (*i.e.*, a trainee lawyer) is protected by legal privilege, although he/she may not be a member of the Bar.

Relevant Legislation/Case Law.

- Article 1.116 of the Civil Code, Articles 39 and 46 of the Law on the Bar of the Republic of Lithuania, Article 80 of the Criminal Procedure Code, Article 189 of the Civil Procedure Code, and Article 60 of the Law on Administrative Proceedings provide that legal privilege is granted to legal professionals who are authorised to pursue their professional activities under the professional title "*Advokatas*" *i.e.*, members of the Lithuanian Bar.
- Article 34 of the Law on the Bar of the Republic of Lithuania defines an advocate's assistant as a natural person who is registered on the list of Lithuanian advocates' assistants. According to this Law, an advocate's assistant (or "*Advokato padejejas*") is accorded the same rights and duties as an advocate, including legal privilege, except for membership of the Lithuanian Bar and certain other restrictions. An advocate's assistant can represent clients in courts of first instance from one year after the start of their apprenticeship provided that he/she has written consent from his/her supervising advocate. An in-house/employed lawyer cannot be an advocate's assistant.

Legal Privilege. In house/employed lawyers may be members of voluntary associations that set their own rules of conduct including some elements of professional secrecy, namely the duty of discretion owed to their client. In-house/employed lawyers are also subject to the elements of professional secrecy in their employment contracts, but this would not entitle an in-house/employed lawyer to refuse disclosure in court proceedings. The one exception to this rule is that in-house/employed lawyers who are representatives in court proceedings cannot be examined as witnesses concerning the circumstances that came to their knowledge in their capacity as legal representatives. In-house/employed lawyers can represent their employer in all courts, (with the exception that only in-house/employed lawyers holding a university degree in law can represent their employer in appeal proceedings in civil law cases).

17. LUXEMBOURG

Position. Legal privilege is not recognized for in-house/employed lawyers in Luxembourg.

18. THE NETHERLANDS

Position. In-house/employed lawyers are partly protected by legal privilege if they have the status of "*advocaat*," which is accorded to members of the Dutch Bar (*Nederlandse Orde van Advocaten*), and certain additional requirements are met.

The rules for in-house/employed lawyers that have at the same time the status of "*advocaat*" are laid down in the *Verordening op de Praktijkuitoefening in Dienstbetrekking* (Regulation on the Exercise of a Practice as an Employee), the rules of which bring in house/employed lawyers under the same requirements as 'law firm' lawyers.

- For an in-house/employed lawyer to retain the status of "*advocaat*", the employee and employer must agree to a set of rules, "*Professioneel statuut*," that oblige the employer to guarantee the independence of the in-house lawyer and his/her ability to respect the professional rules and code of conduct applicable to those with the status of "*advocaat*" (*see Professioneel Statuut voor de Advocaat in Dienstbetrekking*, Professional Rules for an Attorney Acting in an Employment Relationship), attached to the official publication of the law in the Stcrt. 1997, 75, as amended). The in-house/employed lawyer is required to send a copy of this agreement to his/her local Council of Supervision (*Raad van Toezicht*) before commencing his/her employment. In principle, an in-house/employed lawyer who wishes to retain the status of "*advocaat*" must act solely for the benefit of his/her employer and his/her task must be principally concerned with the practice of law. If he/she wishes to act outside the framework of his/her employer than he/she is bound to (all) the rules for 'law firm' lawyers.
- As to communication, the in-house/employed lawyer must inform all third parties in his/her dealings with them of his/her status of "*advocaat*." If the conditions laid down in the Regulation are met, the in-house/employed lawyer will be able to claim all rights and be subject to all obligations that are applicable to members of the Dutch Bar, including legal privilege.
- The in-house/employed lawyer must also take out a liability insurance for his/her professional in-house/employed work.
- The in-house/employed lawyer must have a separate bank account for third party-money. The 'NGB' offers a common bank account for that purpose.

Professional Association.

- Nederlandse Orde van Advocaten (Dutch Bar Association): http://www.advocatenorde.nl/home.asp

  In-house/employed lawyers who are members of the Dutch Bar are subject to the same codes of ethics and discipline as lawyers in private practice.
- Nederlands Genootschap van Bedrijfsjuristen (Dutch Association for In-house Lawyers): http://www.ngb.nl/

  Membership is open to all in-house lawyers employed by private companies, not only those that are members of the Dutch Bar.

Relevant Legislation/Case Law.

- Article 3(3) Regulation on the Exercise of a Practice as an Employee: an "*advocaat*" may exercise the legal profession as an employee if the employer agrees, in accordance with the provisions of the Professional Rules for an Attorney Acting in an Employment Relationship (*Professioneel Statuut*), to guarantee the independence of the in-house/employed lawyer and his ability to respect the professional rules and code of conduct applicable to those with the status of "*advocaat*."
- Article 7 Regulation on the Exercise of a Practice as an Employee: an in-house/employed lawyer who is a member of the Bar retains the status of "*advocaat*" and must inform third parties of this status.
- Article 51 Mededingingswet (Dutch Competition Act): in-house/employed lawyers who are admitted to the Bar can claim privilege in competition law proceedings for documents sent between the lawyer and his employer that are located on the premises of the employer.
- Recently the European Court of First Instance ruled in a European Competition Law case (*AKZO*) that the Dutch in-house/employed lawyers do not have "Legal Professional Privilege" in investigations by the European Commission, because their position is different from "law firm lawyers". This ruling does not affect Article 51 Mededingingswet, nor the 'legal privilege' based on other legislation (*e.g.*, Dutch Criminal Procedural Code).

Legal Privilege: Courts/Tribunals. In-house/employed lawyers who are members of the Dutch Bar may represent their employer in all courts in the Netherlands provided they are entitled to do so in their capacity as "*advocaat*." In-house/employed lawyers who are members of the Dutch bar have the same rights of privilege as lawyers in private practice before those national courts and tribunals.

19. NORWAY

Position. In Norway, in-house/employed lawyers are protected by legal privilege if they hold a license to practice law. The license to practice law is granted by the Norwegian Supervisory Council for Legal Practice, and all lawyers that hold this license are authorized to pursue their professional activities under the professional title of *advokat*. An *advokat* is allowed to practice under a contract of employment, when he/she essentially undertakes assignments for his/her employer or for other companies belonging to the same group. However, "*such a legal practice shall not be given the appearance of the exercise of independent legal practice*" and, accordingly, in-house/employed lawyers cannot hold themselves out to be independent legal practitioners. For an in-house/employed lawyer it is vital to distinguish between their position as *advokat* and any other position that he/she may hold within the company. Legal privilege only protects the documents created with respect to the in-house/employed lawyer's position as an *advokat*.

Professional Association. Den Norske Advokatforening *see* http://www.jus.no/

- *Den Norske Advokatforening* (The Norwegian Bar Association). The Norske Advokatforening sets out the rules of professional ethics and discipline. Membership of the Norwegian Bar Association is voluntary and is open to in-house/employed lawyers.
- *Norges Juristforbund* (The Norwegian Association of Lawyers). The Norges Juristforbund is a professional organization representing the interests of its legal professional members, including law students.

Legal Privilege: Courts/Tribunals. In-house/employed lawyers who hold a license to practice as a lawyer are protected by legal privilege before all national courts and tribunals in their position of in-house/employed lawyer, but not with regard to other positions the in-house/employed lawyer holds in the company.

Legal Privilege: Documents. The correspondence of in-house/employed lawyers is protected by legal privilege with regard to legal advice. However, if an in-house/employed lawyer contributes to a collective work, the in-house/employed lawyer's contribution would normally only be regarded as privileged if it is possible to clearly separate their legal advice from the rest of the document. When the Norwegian Competition Authority assists the EFTA Surveillance Authority during investigations in Norway, the scope of legal privilege may be somewhat more limited in line with the ECJ ruling in the *Akzo* case.

20. POLAND

Position. In-house/employed lawyers are not regulated separately from lawyers in private practice. There are two separate legal professions, legal adviser ("*radca prawny*") and advocate ("*adwokat*"), and two separate Bars/Professional Associations. Only legal advisers are allowed to work as in-house/employed lawyers. Legal advisers who are employees are required to be members of the National Chamber of Legal Advisors.

Professional Association. As mentioned above, in Poland, there are two separate bodies representing the legal professions, each with its own governing bodies and regulations.

- Professional Association of Legal Advisers: Krajowa Izba Radców Prawnych: http://www.radca.prawny.lex.pl/kirp.xml
- Professional Association of Advocates: Naczelna Rada Adwokacka: http://www.adwokatura.pl/

Relevant Legislation/Case Law. Legal privilege is regulated in:

- Law on Legal Advisers of July 6, 1982 (Uniform text 2002, Law Journal nr 123 item 1059 with amendments) in Article 3 section 3, 4 and 5:

  "Art. 3. (...)

  3. Legal advisers shall be obliged to keep confidential any information obtained in connection with providing legal assistance.

4. The duty of professional confidentiality may not be limited in time.

5. Legal advisers may not be released from the duty of professional confidentiality in respect of the information that becomes known to him while providing legal assistance or handling a case."

- Ethics Code for Legal Advisers of October 10, 2007, in Chapter III Title 2, articles 12-18.

Legal Privilege: Courts/Tribunals. In-house/employed lawyers are entitled to represent their client before all courts, but they cannot defend their clients either in criminal proceedings or in proceedings relating to crimes against the Treasury.

Legal advisers' professional confidentiality is protected in civil procedures and in administrative procedures. The Civil Procedure Code and the Administrative Procedure Code do not release the legal advisers from the duty of professional confidentiality when they hear information while providing legal assistance or handling a case.

Only the Criminal Proceedings Code contains an exception: legal advisers, as well as advocates, notaries public, medical doctors, and journalists can be questioned as witnesses regarding facts covered by legal privilege, only when it is necessary for the administration of justice and the fact in question cannot be determined by analysis of other evidence (*see* Article 180 § 2 of the Criminal Proceedings Code).

In 2003, four legal advisers complained to the Constitutional Tribunal regarding the incompatibility of the Article 180 § 2 of the Criminal Proceeding Code with the Polish Constitution. In the verdict of November 22, 2004 the Constitutional Tribunal stated that the Article 180 § 2 of the Criminal Proceedings Code is compatible with the Polish Constitution.

A legal adviser complained to the National Council of Legal Advisers as a result of his punishment for refusing to reveal information in civil proceedings. The National Council of Legal Advisers issued a Resolution of December 2006 in which it stated that legal advisers may not be released from the duty of professional confidentiality when they hear information while providing legal assistance or handling a case. The obligation to keep information confidential is absolute.

Legal Privilege: Documents. Legal advisers are required to keep secret everything they have obtained while providing legal advice including all documents, notes, files as well as documents stored in electronic or other form. The Constitutional Tribunal expressed in its final comments in the verdict dated November 22, 2004: *"if a legal adviser is employed on the base of a labour contract, it is difficult to say that he performs a profession of public credibility"* and *"the legal opinion of an in-house/employed lawyer on a legal issue is not covered by professional confidentiality"*.

21. PORTUGAL

Position. In-house/employed lawyers that are members of *Ordem dos Advogados* (the Portuguese Lawyers Association) are protected by legal privilege.

Professional Association.

- *Ordem dos Advogados* (the Portuguese Lawyers Association): http://www.oa.pt/

  The *Ordem dos Advogados* provides rules of professional conduct, ethics, and discipline.

Relevant Legislation/Case Law.

- Law no 15/2005, 26 January, 2005, Estatuto da Ordem dos Advogados (the *Ordem dos Advogados* Act): http://www.oa.pt/Conteudos/Artigos/detalhe_artigo.aspx?idc=30819&idsc=128

  See, in particular, Article 68 of the *Ordem dos Advogados* Act: an in-house lawyer's contract of employment cannot limit their independence as a lawyer.

- Legal Opinion no. E-07/07 of the *Conselho Geral* of *Ordem dos Advogados*, (the General Council of Portuguese Laywers) adopted on June 27, 2007, expressly recognizes legal privilege for in-house/employed lawyers in the context of dawn-raids by Competition Authorities. In addition to the *Ordem dos Advogados Act*, lawyers can invoke this Legal Opinion before Competition Authority inspectors in a dawn raid and before public authorities. The breach of in-house/employed lawyer legal privilege by competition inspectors constitutes a crime under Article 195 of the Portuguese Penal Code, subject to imprisonment of up to one year. The courts are not bound to apply the Legal Opinion, but the Portuguese Lawyers' Act clearly provides that in-house/employed lawyers are protected by legal privilege.

Legal Privilege: Courts/Tribunals. In-house/employed lawyers who are members of the *Ordem dos Advogados* have legal privilege before all national courts and tribunals.

Legal Privilege: Documents. The correspondence of an in-house/employed lawyer member of the Portuguese Lawyers Association that relates to his/her legal practice cannot be seized (*see* Article 71 of the *Ordem dos Advogados* Act).

22. ROMANIA

Position. In-house/employed lawyers cannot be admitted to the Bar in Romania.

The term "in-house counsel" refers to legal counsellors ("*consilieri juridici*"), who have either the status of public servant, or of employee, as the case may be.

In practice there are also lawyers who work (exclusively or not) for one client, which could be either a private sector organization, or a public entity. Such lawyers have a different legal status from legal counsellors.

Relevant Legislation/Case Law.

- The main regulations for lawyers are set out in Law no. 51/1995 for the organization and exercise of the lawyers' profession, as subsequently amended and the Lawyers' Statute published in the Official Gazette on January 13, 2005;

- The main regulations for legal counsellors are set out in Law no. 514/2003 for the organization and exercise of the legal counsellors' profession.
- Romanian law has specific provisions to protect against disclosure of confidential communications between a client and a legal counsellor, whenever the respective legal counsellor is acting in his professional capacity. Art. 16 of the Law no. 514/2003 states that "*the legal counsellor is obliged [...] to respect the secret and the confidentiality of his activity, within the limits of the law.*"

  However, in accordance with court practice before Law 514/2003 was published, the professional secrecy and confidentiality under a labour contract is different to the attorney-client privilege reorganized for lawyers.

Legal Privilege: Courts/Tribunals. A legal counsel may represent the legal entities he/she works for, pursuant to a power of attorney. An in-house/employed counsel may appear before all national courts and tribunals in any civil proceedings, administrative litigation, and arbitrations on behalf of his/her employer.

There is no recent court practice or legal discussion about the application and interpretation of legal privilege for in house/employed lawyers.

Legal Privilege: Documents. There is no explicit rule for confidentiality of communications, documents, or correspondence exchanged between in-house/employed legal counsel and his/her employer.

The Law 514/2003 applicable to the legal counsellors does not explain what "*professional secrecy and confidentiality*" means but the Law 51/1995 applicable to lawyers clearly states that "*for ensuring professional secrecy, the documents retained by the lawyer and his workplace are inviolable and criminal prosecution procedures can be initiated against him only on the basis of a legal mandate and on the order of the prosecutor.*"

There are several professional associations for legal counsellors that define in their professional codes of conduct the confidentiality for legal counsellors in the same terms as confidentiality for lawyers. However, this is a private regulation and there is no guarantee that a court will make the same interpretation. The most persuasive argument available to a prosecutor or a competition council inspector might be that such interpretation, which restricts the discovery actions of public officers, must be clearly stated by the law, as in the case of Law 51/1995 applicable to the lawyers.

23. SLOVAK REPUBLIC

Position. The title of advocate ("*Advokát*") is reserved for regulated legal professionals who must be a member of the Bar to pursue their professional activities. In-house/employed lawyers cannot be members of the Bar in the Slovak Republic and are not independently regulated. Legal privilege is not recognized for in-house/employed lawyers in the Slovak Republic. In-house/employed lawyers are subject to the obligation to protect business secrets (pursuant to the Commercial Code), and by virtue of their employment relationship (pursuant to the Labour Code).

Relevant Legislation/Case Law.

- Act on Advocacy 586/2003 (which came into effect on January 1, 2004): in-house/employed lawyers cannot be members of the Bar. The Bar shall not admit anyone who is in employment or any other similar relation except for pedagogic, publication, literary, scientific activities, and performance of any other activities which are not in accordance with the ethical principles of the advocate profession.
- Section 23, paragraph 1 of the Act on Advocacy No. 586/2003: provides for a duty of professional privilege such that "*The advocate shall not reveal any information relating to the client's representation and shall treat such information as strictly confidential.*"

24. SLOVENIA

Position. In-house/employed lawyers cannot be members of the Bar in Slovenia and are not independently regulated. Legal privilege is not recognized for in-house/employed lawyers in Slovenia.

Relevant Legislation/Case Law. The duty to protect professional privilege is provided for in Slovenia by Article 6 of the Attorneys' Act and by the Statute of the Slovenian Bar. The Statute of the Slovenian Bar provides for disciplinary actions against advocates who fail to comply with the duty to protect professional secrets. Insofar as legal privilege is afforded to advocates only, it follows that communications between in-house/employed lawyers and their employers are not privileged.

The Civil Procedure Act, however, sets out at Article 231 that a witness may refuse to testify in court with respect to the information that he/she obtained during the course of his/her professional practice. An in-house/employed lawyer who has passed the state legal exam may defend a company in a civil procedure pursuant to a power of attorney. Therefore, should an in-house/employed lawyer represent his/her employer in court, he/she could refuse to testify and a "legal privilege" would be recognized. Otherwise, no legal privilege is granted to in-house/employed lawyers. The position is the same for administrative procedures, *see* Article 183 of the General Administrative Procedure Act. A defendant in criminal proceedings can only be represented by an advocate, therefore in-house/employed lawyers are not protected by legal privilege in such proceedings.

Professional Association. There are several lawyers' associations in Slovenia but there is no association exclusively for in-house/employed lawyers.

Relevant Legislation/Administrative Practice. There is no specific legislation regulating the status of in-house/employed lawyers or their duty to protect professional secrets. Further, there is no case law regarding legal privilege for in-house/employed lawyers.

Legal Privilege: Documents. In accordance with the Article 8 of the Attorneys' Act, the search of an attorney's office is only permitted pursuant to a court order referring to specific documents and objects. Documents and objects not specified in the court order

should not be interfered with. As referred to above, this provision applies only to external lawyers and not to in-house/employed lawyers.

25. SPAIN

Position. Spanish law makes no distinction between employed/in-house lawyers and non-employed lawyers. All lawyers are, in principle, independent, whether they are employees or not, *see* Royal Decree 658/2001, article 27.4: Lawyers can practice under a labour contract (*"La abogacía también podrá ejercerse por cuenta ajena bajo regimen de derecho laboral"*). Accordingly, all Spanish lawyers, including in-house/employed lawyers, are subject to rules of professional discipline and ethics. In fact, all in-house/employed lawyers belong to the same professional body in each region, the *Colegio de Abogados*, which is overseen by the national General Council of the Spanish Bar (*"Consejo General de la Abogacía Española"*). In-house/employed lawyers who do not belong to any professional body are not technically considered to be "lawyers." Only professionals affiliated with a Bar Association are considered lawyers in Spain (*see* Article 9, Royal Decree 958/2001). Therefore, whether lawyers who are members of the Bar may properly be considered in-house/employed lawyers is not clear-cut under Spanish law. Where an in-house/employed lawyer belongs to a professional body (*i.e.*, the *Colegio de Abogados*) they have exactly the same rights and privileges as other self-employed lawyers.

Professional Association.

- The General Council of the Spanish Bar (*Consejo General de la Abogacía Española*) and Local Bar Associations:

  http://www.cgae.es/portalCGAE/home.do

  The CGAE provides rules of professional ethics and discipline.

Relevant Legislation/Administrative practice.

- Royal Decree 658/2001 of June 22, 2001, Article 27.4.
- *Pepsi-Cola v Coca-Cola*: the case settled in 2002 before the Spanish Competition Authority (or "*Tribunal de Defensa de la Competencia*", which is an administrative body). The role of an external firm with respect to the issue of legal privilege was at issue, and not the position of in-house/employed lawyers.

Legal Privilege: Courts/Tribunals. All lawyers registered with a local Bar Association in Spain, acting on their own behalf as independent service providers or lawyers employed under a "labour law contract", have the same rights and obligations; there is no exception to this in Spanish law. To date, there has been no relevant case law. The European jurisprudence that requires external lawyers' involvement (*i.e.*, the *AM&S* and *Hilti* cases) has, in practice, been followed by the Spanish Competition Authority.

26. SWEDEN

Position. In-house/employed lawyers cannot be members of the Bar in Sweden and are not independently regulated. Legal privilege is not recognized for in-house/employed lawyers in Sweden.

Legal Privilege: Courts/Tribunals. Any person (including an in-house/employed lawyer) acting as a trial representative may, to some extent, be protected by certain limited legal privilege for trial representatives with regard to communications made in the furtherance of litigation. This is due to the fact that, with few exceptions, anyone can act as a trial representative before Swedish courts, *i.e.* being a lawyer, or a lawyer admitted to the Bar, is not a requirement.

27. UNITED KINGDOM

Position. In-house/employed lawyers, whether solicitors (members of the Law Society of England and Wales) or barristers (members of the Bar Council) are treated the same as external lawyers for the purposes of legal privilege. The in-house/employed lawyer must be a qualified lawyer and a member of his/her relevant professional association.

Professional Association.

- The Law Society: http://www.lawsociety.org.uk/home.law

  In-house/employed lawyers are subject to the same codes of ethics and discipline as solicitors in private practice.

- The Bar Council: http://www.barcouncil.org.uk/

  In-house/employed lawyers are subject to the same codes of ethics and discipline as barristers in private practice.

Relevant Legislation/Case Law.

- *Alfred Crompton Amusement Machines Ltd. v Customs and Excise Commissioner* (No. 2) [1972] 2 QB 102: in-house/employed lawyers can claim legal privilege for their confidential documents under the same conditions as lawyers in private practice.

- Section 30 of the Competition Act 1998 (provides for legal privilege in the context of competition law investigations): http://www.opsi.gov.uk/acts/acts1998/19980041.htm

Legal Privilege. Privilege 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. These rules also apply before the Office of Fair Trading and the Competition Commission.

Legal Privilege: Documents. To be covered by legal privilege, the lawyer must have produced the document in his/her professional capacity, as opposed to merely giving informal advice.

Where a communication is between a legal adviser and his client (or employer), the communication, where carried out in relation to the adviser's professional capacity, is always privileged, even if no litigation is contemplated, provided that such communication was intended to be confidential. A document prepared for the purpose of such communication is also privileged, even when it is not communicated.