

Brussels, 17 May 2004

TO THE PRESIDENT AND THE MEMBERS
OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

INTERVENTION STATEMENT

by

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Intervener

in

Case T-253/03

**Akzo Nobel Chemicals Ltd
Akcros Chemicals Ltd**

Applicants

v

European Commission

Defendant

seeking the annulment of Commission Decision C (2003) 1533 final of 8 May 2003 by which
the Commission rejected the Applicants' claim that two sets of documents seized by the
Commission during a dawn raid at Akzo's offices in Eccles, United Kingdom, were covered
by legal professional privilege.

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I. Introduction

1. The Applicants seek the annulment of Commission Decision C(2003) 1533 of 8 May 2003 (the "Contested Decision"), by which the Commission rejected claims for legal professional privilege made by Akzo in respect of two groups of documents.
2. ACCE concurs with many of the arguments raised by the Applicants and the other Interveners, particularly in relation to the issue of professional privilege for in-house counsel. There are, however, additional and alternative arguments which ACCE wishes to set forth in this Intervention Statement.
3. In order to illustrate certain of the points raised below, this Intervention Statement refers to judicial decisions and analysis under the laws of the United States of America. This is not to suggest that the Court should treat those as precedent and should necessarily follow the US approach; ACCE is well aware that there are differences between the Community and the US legal system. ACCE would, however, submit that, taking particularly into account the fact that issues of privilege have been litigated extensively in the United States, and that underlying policy considerations overlap significantly from jurisdiction to jurisdiction, the US case law and legal scholarship could assist the Court in this case.
4. By this Intervention Statement, ACCE urges the Court to annul the Contested Decision. ACCE's position on the relevant issues is as follows:
 - (i) Legal professional privilege should attach to appropriate communications from "in-house counsel". In-house counsel for these purposes should include:
 - (a) employed members of a bar within the European Union;
 - (b) those who (1) would be qualified to be a member of a bar within the European Union were they not precluded under local laws from membership by virtue of their employed in-house status, but (2) are nevertheless members of other organisations that are comparable to a bar in terms of their qualification requirements, ethical rules, and internal disciplinary procedures; and
 - (c) employed lawyers who are qualified members of a bar outside the European Union.

- (ii) The scope of legal professional privilege extends to documents prepared for the purpose of giving advice over which privilege is claimed.
 - (iii) Responsibility for determining disputes as to the applicability of privilege should be assigned to an independent adjudicator.
5. One of the questions before the Court in these proceedings is whether documents that emanated from Mr Sweere are covered by professional privilege. ACCE recognises that Mr Sweere is a qualified member of the Netherlands Bar, and that the Court need not rule on the wider question as to whether other in-house lawyers, mentioned at paragraph 4 above, should enjoy legal professional privilege. For the reasons outlined in this Intervention Statement, however, ACCE would respectfully suggest to the Court to clarify existing case law in relation to all of the above issues.
6. In determining what advice from in-house counsel should be privileged, ACCE believes that the test applied by courts in the United States would, if adopted by the Court, serve to clarify the position under Community law, and resolve current inconsistencies. The US test involves asking the following two questions; if the answer to both is "yes", then the communication is privileged:
- 1. Is the client communication to or from an individual who is qualified to give legal advice (i.e. competent, and permitted by law to do so)?
 - 2. If so, does the communication relate to such legal advice and is it confidential?

This privilege exists between a corporation and its in-house counsel¹.

¹ See, e.g., *Ferko v. National Association for Stock Car Auto Racing, Inc.*, 218 F.R.D. 125, 139 & n.13 (E.D. Tex. 2003) (holding that "[a]ttorneys who work as in-house counsel do not waive the attorney-client privilege because of their status as in-house counsel.") (Annex I-1); *Owens-Corning Fiberglass Corp. v. Jacqueline R. Watson*, 413 S.E.2d 630, 638 (Va. 1992) (holding that "[c]onfidential communications between attorney and client made during the course of the relationship and that relate to the subject matter of the attorney's employment are privileged from disclosure. This privilege exists between a corporation and its in-house attorney." (internal citations omitted)) (Annex I-2). See also *Exxon Corp. v. Dept. of Conservation and Natural Resources*, 859 So. 2d 1096, 1103 (Ala. 2002) (holding that corporations are entitled to the benefit of the attorney-client privilege because corporations are included in the definition of "client" under Alabama rules of evidence) (Annex I-3).

II. Legal Principles and Policy Considerations

1. Europe

7. The leading case law on legal privilege under Community law is *AM&S*,² where the ECJ held that communications between a client and in-house counsel do not benefit from professional privilege under Community law.
8. In reaching its decision in *AM&S*, the ECJ established a number of important principles, including the following:
 - Community law must take into account the principles and concepts common to the laws of Member States concerning the observance of confidentiality³.
 - All Member States recognise the importance of confidentiality to the client/lawyer relationship and, in particular, that “any 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”⁴.
 - Communications between a lawyer and client are confidential when they are made in the interests of the client’s right of defence and emanate from an independent lawyer⁵.
 - The notion of independence derives from the lawyer’s role as collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interests of that cause, such legal assistance as the client needs⁶.
 - The rules of professional ethics and discipline that apply to lawyers are crucial in assessing independence⁷.

² Case 155/79 *AM&S Europe Limited v Commission*, [1982] ECR 1575 (“*AM&S*”).

³ *AM&S*, paragraph 18.

⁴ *AM&S*, paragraph 18.

⁵ *AM&S*, paragraph 21.

⁶ *AM&S*, paragraph 24.

⁷ *AM&S*, paragraph 24.

a) The main principles of *AM&S* would not be undermined by extending professional privilege to in-house counsel

9. ACCE maintains that, in extending the right of professional privilege to in-house lawyers, the Court would be acting consistently with the underlying principles stated above.
10. The role of the in-house lawyer is to provide independent legal advice and services no different from those demanded from an external lawyer. In larger companies, in-house lawyers operate from specialist legal departments and offer advice to in-house clients based in entirely different locations/countries to themselves. In-house lawyers very often have no relationship to the in-house client other than in the context of the legal advice being sought because they may work for a different corporate entity and be located elsewhere.

b) Professional regulation and the independence of in-house counsel

11. In *AM&S*, the ECJ held that the “counterpart” of professional privilege lies in the rules of professional ethics and discipline which are enforced by the relevant professional institutions. The ECJ in *AM&S* viewed this as an essential element of the independence which the ECJ held was crucial to establishing professional privilege.
12. ACCE would submit that professional ethics and discipline do not have to be a *sine qua non* of professional privilege, for the following reasons:
13. First, this would appear to be confusing the issue of professional privilege with abuse of that privilege. Professional privilege does not arise because there are protections against abuse. Rather, it arises because of the benefits that unfettered communications between client and lawyer offer to society. Professional privilege should be sufficiently broad to secure these benefits, though not so broad as to interfere with the administration of justice to a degree incommensurate with the benefits that it offers society.
14. Second, abuses can be dealt with without regard to whether professional discipline is available or not. The criminal law, to which legal counsel is subject to the same extent as any other person, provides sufficient protection against abuse of professional

privilege by legal counsel. The availability of professional discipline does not necessarily protect against abuse.

15. Third, membership of a bar does not guarantee independence and certainly does not prevent abuses. In *SAS/Maersk*, two airline companies had illegally shared markets and, in order to keep incriminating evidence outside the reach of antitrust authorities, the companies agreed to place such documents in escrow in the offices of outside counsel.⁸ The companies had also been advised by their outside lawyers that information concerning market sharing and price fixing should not be included in a written agreement. Occasionally, the relationship between external counsel and the client company is as close, or closer – both financially and personally – than that existing between the in-house lawyer and his/her in-house client. Particularly for smaller independent law firms working principally for one client, the pressures to cooperate with management in addressing commercial pressures can be just as great for external lawyers as for in-house counsel. In sum, independence is not just, or principally, a function of bar membership, but rather is a function of the role played by the lawyer in a particular matter.
16. Even if the need for professional discipline is accepted as a pre-requisite to professional privilege, there is no valid basis for distinguishing between in-house and external counsel. Many in-house counsel are members of well-recognised professional bodies which have disciplinary powers. Those in-house lawyers who are members of an appropriate professional body are deterred, both by the rules of their professional body and by their duties (in some jurisdictions) as officers of the Court, from misusing privilege.
17. In the United Kingdom and Ireland, for example, in-house lawyers and barristers, in conjunction with their private practice colleagues, are members of professional associations and subject to statutory regulations that include the possibility for disciplinary sanctions. German, Danish, Belgian, Greek, Dutch, Portuguese and Spanish in-house counsel may also be members of a bar or equivalent association.

⁸ Commission Decision 2001/716/EC, *SAS/Maersk Air* (COMP.D.2 37.444) OJ 2001 L265/15, paragraph 89.

18. The professional obligations that apply to lawyers typically require independence and integrity. Rule 1 of the English Solicitors' Practice Rules, for example, prevents a solicitor from doing anything which compromises or impairs, or is likely to compromise or impair, among other things: "*the solicitor's independence or integrity..... the solicitor's duty to act in the best interest of his client..... and the good repute of the solicitor or the solicitor's profession.*"
19. Even in those Member States where in-house lawyers need not be members of national bar associations, there would undoubtedly be a legal requirement, based on the conditions of employment, for an in-house counsel to offer objective and independent legal advice when required. Failure to abide by such requirements may well constitute a breach of contract entitling the employer to terminate the employment agreement. It is also the case that, however one defines the precise duties of an employee, those duties would be owed to the company and not to any individual within it. Again, failure to comply with such an obligation could lead to dismissal in serious cases.
20. The suggestion, made by some commentators reading *AM&S*, that in-house counsel are more likely than external counsel to be cajoled by senior management into presenting advice in a particular way has little foundation. According to ECLA, in the 40 years of Community decisional practice, the Commission can cite no case where this has happened⁹. Nor is any such case mentioned in the Commission's Defence. Indeed, the only published cases of a lawyer organising or cooperating with a cartel concerned outside counsel (see paragraph 15 above).
21. The evidence from Commission cases in fact proves the opposite demonstrating the independence of outside counsel. In *John Deere*,¹⁰ the Commission used the fact that Deere's own in-house counsel had expressed concern about an export ban to demonstrate that the company knew the conduct in question violated Community competition law. Similarly in *London European/Sabena*,¹¹ the Commission determined that Sabena's infringement occurred despite a warning from the legal

⁹ "*In-House Counsel Legal Privilege Needed with Modernisation of EC Competition Law*", August 2003, ECLA website, www.ecla.org.

¹⁰ Commission Decision 85/79, O.J. 1985 L35/58.

¹¹ Commission Decision 88/589, O.J. 1988 L317/47.

department that the conduct could result in the imposition of penalties by the Commission. In both of these cases, in-house counsel provided objective legal advice, despite their status as employees. External counsel could have done no more.

22. Any merit that such an argument had in 1982 at the time of *AM&S*, is being rapidly eroded by recent employee protection legislation coming into force across Europe. In the United Kingdom, the Public Interest Disclosure Act 1998 protects employees who inform on the illegal activity of their employers. Similar legislation has been implemented in the Netherlands and campaigns are also underway in Denmark, Germany, and Lithuania¹².
23. Even where legislation has not been put in place, organisations such as Public Concern at Work in the United Kingdom, are helping to encourage employees to stand up to employers who act unethically or illegally. Legal and cultural shifts since 1982 therefore make it far less likely that in-house counsel would be susceptible to being pressured to provide improper legal advice.
24. By granting in-house counsel and in-house clients the right to privilege, the Court would effectively be restoring the right of the in-house client to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it.
25. The statement in paragraph 18 of *AM&S* that Community law derives from the economic and legal interpretation of the Member States, and must take into account the principles and concepts common to the law of those Member States, suggests that the question of legal privilege must be periodically re-examined in the light of changing circumstances.
26. Since 1982, Europe has undergone manifold changes in terms of law, politics, and economics. In summary, the developments that ACCE consider to be among the most significant to the issues before the Court are as follows:
27. First, since 1982, there has been an increasing trend among Member States to recognise in-house counsel privilege and to acknowledge that employment status is not

¹²

“Global Solution?” The Whistleblower, Public Concern at Work, Issue 3, July 2003 (Annex I-4).

incompatible with professional independence. The current state of the law in the old Member States has been set out comprehensively in the Annex on Member State Laws in ECLA's Intervention Statement, to which we refer. We note that there is some disagreement among the various briefs regarding whether in-house counsel in Belgium enjoy professional privilege. We attach a legal opinion from the Belgian law firm of Liedekerke, Wolters, Waelbroeck, Kirkpatric that concludes that in-house lawyers in Belgium who have the status of juriste d'entreprise benefit from professional privilege (Annex I-5).

28. Second, since 1982, external legal costs have generally increased, putting more pressure on companies to seek legal advice solely from within. Greater reliance is therefore placed on in-house counsel to provide objective and independent legal advice.
29. Third, since 1982, in-house legal departments have become more professional. In-house departments globally among large companies have increased and in-house salaries have risen to reflect the demand for better-trained staff. A recent survey by Garfield Robbins, the international recruitment consultancy, on in-house salaries reported that in-house departments have endeavoured to address the disparity between top private practice and in-house salaries and "in most instances, have increased salaries on offer in order to compete with the law firms".¹³ This has led to the improved quality of in-house lawyers generally. Again, the Garfield Robbins survey states, "companies and financial institutions continue to attract some of the best lawyers in the UK as well as being seen as extremely attractive places to work by foreign lawyers."¹⁴
30. Fourth, educational initiatives, particularly those being undertaken by ECLA in the new Accession States, and including periodicals such as *The In-House Lawyer*, which were not around in 1982, have contributed and will continue to contribute greatly to the professionalism of in-house counsel.

¹³ Garfield Robbins International, London. In-house Salary Survey 2001-2003, page 7 (Annex I-6).

¹⁴ *Ibid.*

31. The passage of time has also provided an opportunity to assess the effect of *AM&S* on the practice of law (see section II below).

c) Qualification within and outside the Community

32. The judgment in *AM&S* leads to discrimination as against all Community in-house counsel and is in flat contradictions to the principles of the freedom of establishment and the freedom to provide services which, ironically, the Court in *AM&S* ruled, "must apply without distinction to any lawyer entitled to practice his profession in one of the Member States, regardless of the Member State in which the client lives."¹⁵

33. Although in-house counsel are entitled under the laws of their home countries to offer legal advice to clients, by virtue of the ruling in *AM&S*, they are not afforded the same degree of protection in relation to confidentiality as their private practice counterparts. The net result of this is that in-house counsel are reluctant to offer advice that could be disclosed in legal proceedings and so are prevented, either actually or potentially, from performing their role as legal advisors (see below). A corollary of this is that the ruling also unjustifiably discriminates between clients of in-house counsel and clients of private practice counsel who are forced by virtue of law to expect a different quality of legal protection for the same type of advice.

34. The discrimination arising from the *AM&S* judgment is most blatant in those Member States - which are in the majority -, where in-house counsel receive the same qualifications and are subject to the same laws and codes of professional conduct as their private practice counterparts. Often, in-house counsel have spent many years in private practice before taking up an in-house role; this is true both in those countries where in-house counsel are entitled to be bar members, and those where they are not. Two groups of lawyers, with exactly the same qualifications and obligations, are therefore unable to practice on equal terms in a Community law context. There is no adequate justification for such discrimination.

35. Besides discriminating against in-house lawyers within the Community, the *AM&S* ruling also unjustifiably discriminates between EU and non-EU qualified lawyers. It is

¹⁵ *Ibid*, paragraph 25.

illustrative that no such distinction exists in the United States. In *Renfield Corp. v. Remy Martin & Co. S.A.*,¹⁶ the court held that the requirement for determining whether attorney-client privilege existed was not whether the attorney at issue was a member of a state bar. The court noted that French in-house counsel are not permitted to be members of the bar and therefore are not subject to the attorney-client privilege in France. But in finding that the United States had the most significant relationship with the communications at issue in the case, the court determined that the French law prohibiting the application of attorney-client privilege to the communications of French in-house counsel was not relevant. Instead, the court held that "the requirement is a functional one of whether the individual is competent to render legal advice and is permitted by law to do so." The court held that, because both French and American in-house counsel "have legal training and are employed to give legal advice to corporate officials on matters of legal significance to the corporation," the documents at issue in that case were privileged.¹⁷

36. ACCE submit that the US approach, if adopted by the Community, would provide a fairer and more consistent basis for determining those persons entitled to be viewed as legal counsel for the purposes of determining the scope of professional privilege.

2. Public Interest

37. The key benefit of professional privilege is that it enables a client to consult with his lawyer, without fear that advice may be used against him. One concept underpinning the European legal system is that every person is presumed to know the law. It follows, therefore, that everyone should be free to ascertain the law by consulting a lawyer without fear of having that consultation used against them in subsequent proceedings. If such a person knew that the contents of the consultation would be used against him, then he would be discouraged from seeking advice. An inevitable result would be that people would not readily seek legal advice and hence be ignorant of the law. The underpinning of the presumption that every person knows the law would therefore be weakened.

¹⁶ 98 F.R.D. 442 (D. Del. 1982) (Annex I-7).

¹⁷ *Ibid.*

38. In the United States, there are two chief policy justifications for professional privilege as it applies to both outside and in-house counsel. The first is a traditional justification based on the benefits to be gained by promoting the exchange of information between attorney and client, and the second is a justification based on the idea that the client has rights of privacy and autonomy to determine who should have access to his information.¹⁸ As one legal commentator puts it, “non-lawyers cannot function efficiently or effectively in the adversary system without assistance of counsel and . . . individuals need to seek advice on the law and its complexities to function within the system. If individuals do seek legal assistance and conform with the laws, the benefits of this legally correct behavior will flow to society.”¹⁹
39. The traditional justification was adopted by the US Supreme Court in what has become the leading US case on professional privilege: *Upjohn v. United States*.²⁰ In holding as privileged certain questionnaires that corporate employees filled out so that the corporation could secure legal advice from its in-house counsel, the Supreme Court stated that the purpose of the 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.”²¹ The Supreme Court explained that “[t]he privilege recognises that sound legal advice or advocacy serves public ends and that such advice or advocacy depends on the lawyers being fully informed by the client.”²²
40. The need for protecting the privilege as a means of encouraging full and frank discussions between attorney and client is particularly acute in cases involving in-house counsel because, unlike most individuals, corporations “constantly go to lawyers to

¹⁸ Alison M. Hill, 27 *Case W. Res. J. Int'l L.* 145, 171-72 (Winter 1995) (Annex I-8).

¹⁹ Hill, *supra* footnote 19, at 172-73 (citing Steven Shavell, *Legal Advice About Contemplated Acts: The Decision to Obtain Advice, Its Social Desirability, and Protection of Confidentiality*, 17 *J. Legal Stud.* 123, 127 (1988)).

²⁰ *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (Annex I-9).

²¹ *Upjohn*, 449 U.S. at 389. This justification also rests on “the utilitarian argument that, to promote freedom of consultation with legal advisers, the law must prohibit ‘disclosure except on the client’s consent.’” Hill, *supra* footnote 19, at 172 (citing 8 John Henry Wigmore, *Evidence in Trials at Common Law* § 229 (McNaughton rev. 1961)).

²² *Id.* at 389 (citing *Trammel v. United States*, 445 U.S. 40, 51 (1980); *Fisher v. United States*, 425 U.S. 391, 403 (1976)) (Annex I-10).

find out how to obey the law.”²³ Thus, the privilege serves to encourage corporations to openly communicate with their in-house counsel, which in turn allows in-house counsel to provide the corporation with the information that it needs to ascertain and comply with its legal duties, thereby promoting the administration of justice.²⁴

III. Practical Considerations

1. Threat to legal compliance

41. Privilege facilitates the provision of clear legal advice, which helps companies comply with the law. In-house counsel are more likely to have relationships of trust with management, allowing company employees to be comfortable in seeking – and taking – advice from them.
42. The absence of legal privilege may make managers reluctant to seek legal advice before embarking on a course of action. Moreover, in-house counsel who worry that communications with a client will be discoverable are engaging in defensive practices. One of the most common is to provide advice orally. However, for most legal advice to be useful and effective, it must be in writing. Legal advice is often nuanced and detailed – particularly in the competition area – making it difficult to provide a full and complete picture orally. In addition, written advice allows counsel to memorialise the proper course of action and the consequences of failing to follow it, so that others can refer to it in future. In a complex matter, written distribution by e-mail or memorandum may be the only effective means of ensuring that all interested personnel receive the advice.

2. Reduced burden on Commission

43. As of May 2004, the Commission has expanded investigatory powers at its disposal and can access information from national competition authorities through the network of competition authorities. These will render the reservation of the Commission’s right to access in-house counsel-provided advice less significant.

²³ *Id.* at 392 (citing Burnham, *The Attorney-Client Privilege in the Corporate Arena*, 24 *Bus. Law.* 901, 913 (1969)).

²⁴ Hill, *supra* footnote 22, at 186.

44. The new competition law regime that is coming into place in the Community will increase the need for in-house counsel-provided advice to be covered by professional privilege. The demand for self-assessment of compliance with the Community competition rules heightens the need for companies to be able to consult with their in-house counsel. Recognizing in-house counsel's involvement in compliance will lower the enforcement burden on the Commission, national authorities, and national courts.

3. Lack of professional privilege increases the burden on regulatory authorities and the cost to society

45. As noted, without privilege, management may be more reluctant to disclose business plans to in-house counsel and, as a result, may decide not to seek legal advice that otherwise they would.
46. At a minimum, this increased reluctance of management to consult in-house counsel complicates the lawyer's compliance responsibility. The in-house lawyer has to make greater efforts, and expend more company resources, to discover information about activities which are potentially hazardous to the business.
47. This increases the risk that violations are missed which, again, increases the burden on regulatory authorities and the cost to society.

4. Choice is limited

48. ACCE concurs with the ECLA Intervention Statement, which argues that, by denying in-house counsel professional privilege, a company is effectively impeded from communicating with the lawyer of its choice. This violates Article 6(3)(c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms which provides that everyone has the right "*to defend himself in person or through legal assistance of his own choosing.*" In addition, ACCE concurs with the ECLA Intervention that these fundamental rights constitute principles of Community law throughout the Community.

5. Anti-competitive

49. Ironically, the Commission's approach has an anti-competitive impact. The judgment created a useful monopoly for competition lawyers in private practice and eliminated

competition of in-house lawyers and of American and any other non Community lawyers active in this important area of the law.

6. Practicability, and cost, of using external counsel

50. In its response to the European Commission's Working Document "Regulation in Liberal Professions and its Effects", ACCE expressed the concern that, because in-house counsel cannot claim privilege, companies seeking advice on sensitive issues are more likely to use outside counsel.²⁵ Even in straightforward cases, this may not be practicable where the need for advice is urgent. In complicated cases, involving multi-jurisdictional issues, the external lawyer may not have access to the information and means of communication necessary to ensure that the right people within the company make informed decisions, within the required timeframe.
51. It is also costly to instruct external counsel, particularly where the external lawyer is not familiar with the company's business, in which case time and expense may be wasted explaining the background.
52. Companies will be concerned to raise awareness of this issue among their in-house legal teams, particularly where the lawyers concerned are qualified in jurisdictions which recognise privilege in respect of communications between in-house lawyers, and their in-house client. This investment in training represents an additional overhead for the business.

7. No impact on enforcement of competition rules

53. ACCE contests paragraph 41 of the Commission's Defence, in which it is stated that "*the principle of legal professional privilege [represents] a restriction on the Commission's investigatory powers.*"
54. First, ACCE would submit that this is irrelevant. The legal privilege between a person subject to a criminal investigation and his lawyer arguably also limits the investigatory powers of the investigating authority because if it could get access to the communication between the accused and the lawyer, it might obtain additional

²⁵ See Annex 2 to ACCE's Application to Intervene.

evidence. Nevertheless, it is a principle common to the legal tradition of the Member States that such communication is privileged.²⁶

55. In addition, ACCE submits that this is wrong. The Commission has never used a legally-privileged document to prove an infringement of competition rules. In addition, the Commission stated before the European Parliament that it will not use such documents in the future to prove aggravating factors when calculating the amount of any fine to be imposed on an undertaking. The advantage to the Commission of using material which would, if prepared by external counsel, be privileged, is therefore questionable.

56. The Commission also argues, at paragraph 106 of the Defence, that, should in-house counsel be granted legal professional privilege, any disputed document remaining in the hands of in-house counsel might be shredded. ACCE makes the following observations in response:

- It is not clear why the Commission believes a company would shred privileged documents. If they are privileged, they will not be disclosed. Shredding is therefore completely unnecessary and unhelpful to the company.
- Any such action, in the context of a regulatory investigation, could constitute an aggravating factor when assessing the amount of any fine, or other penalty, which could be imposed. In any event this would be a criminal offence and a breach of professional duty in most countries.

IV. Preparatory Documents

57. ACCE contends that preparatory documents, including legal surveys and compliance materials, ought to benefit from legal privilege.

58. ACCE asserts that the question of confidentiality in the legal context involves not just the right of defence, but also more fundamental rights, including the right of any person to consult a lawyer. It is perhaps for this reason that Member States such as the United

²⁶ There are other examples, such as the right of a family member of an accused to remain silent and not give evidence.

Kingdom take a broad approach to professional privilege. Despite the recent English Court of Appeal's decision in *Three Rivers District Council and Others v Governor and Company of the Bank of England*²⁷ that internal memoranda dealing with matters not strictly legal are not entitled to legal privilege, the fundamental principle that legal client/lawyer communications are privileged still stands. The *Three Rivers* decision is, in any event, under appeal to the House of Lords.

59. It must also be kept in mind that, perhaps on account of the existence of fundamental rights in relation to confidentiality, the right of defence has been interpreted broadly in the European context. In *AM&S*, for example, documents were considered privileged even though they had been drawn up some time prior to the initiation of proceedings and before the United Kingdom had become a member of the Community (and hence, before such proceedings were even possible). In *Hilti*²⁸, the Court of First Instance took a similar approach and ruled that professional privilege protects internal notes which are confined to reporting the text or the content of written communications between lawyer and client (presumably as opposed to internal notes unrelated to client/lawyer communications).
60. ACCE submit that preparatory documents, including legal surveys and compliance materials prepared for clients, are no less connected to actual proceedings than the documents considered in *AM&S* and are certainly more connected to the right of defence than the documents dealt with in *Hilti*. Indeed, in creating the preparatory documents that ACCE have in mind, lawyers are always alive to the possibility that the subject matter of what is being addressed may well become a real legal issue for the company. Even with regard to compliance materials, these are often prepared in response to actual problematic legal situations and, even if they are not, such materials may lead to discussions of activities where a company may have not been compliant and so form the basis for a defence.
61. Even if it would be possible to theoretically identify documents that were legal but did not go to the question of defence, in practice making such a distinction would be most

²⁷ (No 5) 3 April [2003] BWCA Civ 474.

²⁸ Case T-30/89 *Hilti v Commission* [1990] ECR II-163, at paragraph 18.

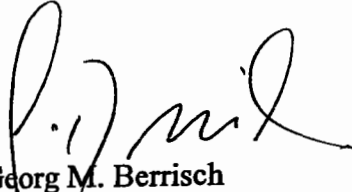
difficult and mistakes in this area would greatly prejudice a defendant's position. Preparatory documents therefore ought to be protected under the heading of legal privilege.

V. Independent Adjudicator

62. ACCE fully concurs with ECLA's position regarding the proper procedure for adjudicating disputes regarding whether particular documents are privileged, and the analysis underlying that position.

VI. Orders Sought

63. For all the above reasons, ACCE respectfully requests the Court
- to annul the Contested Decision; and
 - to order the Commission to bear the costs associated with this Intervention.



Georg M. Berrisch
Rechtsanwalt



David W. Hull
Solicitor (England and Wales)