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Support for Curia Vista 15.409: legal professional privilege for in-house counsel

Dear President Markwalder,

We are writing on behalf of the Association for Corporate Counsel (ACC) and in particular, its European chapter ACC Europe, to support your initiative for the introduction of a legal professional privilege (LPP) for in-house counsel. We believe that your motion is an important step forward to advance strong corporate compliance functions and achieve a level playing field for Swiss in-house counsel and the corporations for which they work. ACC Europe and its members therefore fully support your initiative.

ACC Europe is a chapter of the Association of Corporate Counsel¹, the premier association for in-house counsel. ACC Europe has more than 2200 members throughout Europe, including 345 in Switzerland. We serve in-house attorneys through networking, knowledge sharing, continuing legal education and advocacy on behalf of the in-house profession.

ACC through ACC Europe intervened in the 2010 *Akzo Nobel Chemicals Ltd. & Akros Chemicals Ltd. v. Commission* case before the European Court of Justice and has supported other efforts to elevate the role and status of in-house counsel in Europe. We are grateful that you have taken up the subject matter, notably since your own professional background as in-house counsel provides you with particularly strong insights into the consequences of the current regime.

We would like to support your arguments with our following outlines. We believe extending the LPP to in-house counsel will bring two primary benefits to Swiss businesses. *First*, allowing privilege for communications with in-house counsel promotes strong corporate compliance functions. *Second*, extension of the LPP will put Swiss firms on a more level playing field against companies in jurisdictions where the privilege is respected

¹ The ACC is a global bar association that promotes the professional and business interests of in-house counsel who work for corporations, associations and other private-sector organizations through information, education, networking opportunities and advocacy initiatives.. We have more than 40,000 members representing over 10,000 organizations in more than 85 countries.

for in-house counsel. We welcome further discussion of these principles and hope you will share these thoughts with your parliamentary colleagues.

The LPP strengthens the unique preventative and compliance role that in-house counsel occupy within businesses. In-house counsel provide companies with expert guidance on a wide variety of legal matters and they are drivers for corporate compliance and integrity. The LPP strengthens this function of in-house counsel by allowing for full and frank discussion of legal issues between in-house counsel and company employees, without the concern that communications will later be used against the company in litigation or enforcement. A lack of LPP can have a chilling effect on corporate compliance efforts, because company management will avoid disclosing sensitive information to in-house lawyers.

When in-house counsel are limited by not having LPP, this affects effective implementation of legal rules within the company. In common law jurisdictions where in-house counsel communications are protected, legal violations are often discovered in the first place almost accidentally - by the deep, constant, and trusting relationship between key business people and in-house counsel. In large corporations with a deep commitment to compliance, it is still possible that one or a few employees will violate the law notwithstanding that corporate commitment. When appropriate corporate personnel discover such cases, critical and difficult decisions will have to be made with the advice of counsel. Once discovered, the violation is typically the subject of a searching internal investigation. At that point, it is often the role of counsel to show the great benefits of leniency through voluntary disclosure, despite the natural instincts of their clients to conceal rather than confess wrongdoing. Without accessible, candid, and above all confidential legal advice, companies are far less likely to discover the violation in the first place or to take advantage of leniency thereafter.

It is no answer to say that these roles can be filled by outside counsel. Outside counsel primarily deal with solving a legal problem after it occurs, whereas inside counsel's primary role is preventative. Outside counsel typically do not know the company and its people as well. They do not have the long history and frequent contact that allows the necessary trusting relationship to develop. And it is frequently more difficult and more expensive, at least on an incremental basis, to consult them, giving company employees a disincentive to initiate the contact that will lead to the necessary advice being given.

The other reason we support expanding the LPP to Swiss in-house counsel is that the present legal situation leads to unequal standards especially in legal disputes of Swiss firms that are dealt with by US courts. We are aware of several cases involving Swiss firms or subsidiaries where documents containing Swiss legal advice from in-house counsel had to be disclosed during litigation because US courts are following the Swiss practice of denying the LPP to its in-house counsel. US companies involved in the same dispute, have in-house counsel who are protected by the US-equivalent to the LPP – the “attorney-client”-privilege.

Moreover, Swiss corporate lawyers are currently uncertain in many situations whether they can consider themselves protected by the privilege or not, depending on where they

operate, and for how long. The reality is that modern multinational enterprises have far-flung operations. They utilize a variety of technologies for disseminating information over large geographic areas. These technologies include the use of computer systems, intranets, e-mails, and other electronic files. Such technologies have become essential to the general business management of the enterprise and also ensure that the corporation complies with all the laws of the many jurisdictions in which it operates. Using such systems, corporations control access in ways consistent with maintenance of the traditional privilege, but disseminate information to those who need it in order to carry out the legal advice the corporation receives. To have an efficient system for seeking legal advice and disseminating information in some countries, and at the same time have to wall off Switzerland from that system, not only raises costs, but also raises the risks that employees either inside or outside Switzerland will violate a law simply because it is clumsy for the two parts of the business to communicate. In addition, moving human resources - including lawyers - around is also critical to management of the enterprise generally and to compliance in particular. Clearly, the lack of LPP for Swiss firms causes burdens for Swiss business even when they are not involved in US litigation.

On a broader scale, the failure of Switzerland to recognize the privilege makes it more difficult for corporations to keep themselves in compliance with competition laws worldwide, presents logistical and organizational difficulties in collecting information necessary to render legal advice and in transmitting that advice, and raises costs for Swiss, European, American, and other multinational firms alike.

ACC Europe is hopeful your motion will remedy these issues in Switzerland and be an important first step in effecting further changes across Europe. Please feel free to contact ACC Europe board member Wolf Frenkel at [wolf.frenkel@bearingpoint.com] if you wish to discuss these matters at greater length, or if we can provide you with any further supportive material. Thank you very much for your consideration and assistance.

Sincerely,



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