Legal Professional Privilege in Competition Proceedings Before the European Commission: Beyond the Cursory Glance

Eric Gippini-Fournier*
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Abstract

Although set against the background of investigations by the European Commission in proceedings for the application of the main competition rules of the EU, the discussion remains at the level of broad principles. The driving notion of this article is that the basis and ratio for judicial recognition of a privileged communications doctrine in EU law must be defined explicitly, and that this definition may have important consequences as to the scope and practical administrability of the doctrine. Part I explores the principal rationales usually claimed for the privilege: the utilitarian view and the rights-based approach. This discussion serves as useful background to understand the position of EU law regarding operation of the privilege in competition proceedings conducted by the Commission. Part II describes the state of the law since AM&S, commenting on the personal and material scope of the current privilege rule, the possible reasons underlying its strict conditions, and the procedural arrangements for resolving privilege disputes. It then considers whether changes in the legal context since AM&S have eroded the foundations of this judgment.
LEGAL PROFESSIONAL PRIVILEGE 
IN COMPETITION PROCEEDINGS BEFORE 
THE EUROPEAN COMMISSION: 
BEYOND THE CURSORY GLANCE

Eric Gippini-Fournier*

Como el abogado non debe descobrir la poridat del pleyto de su 
parte a la otra 

Visada cosa es, e derecha, que los abogados, aquí dizen los omes 
las poridades de sus pleytos, que las guarden, e que no las descubran 
ala otra parte . . . e cualquiera que contra esto ficiere, desque le fuere 
provado: mandamos, que dende adelante sea dado por ome de mala 
fama, e que nunca pueda ser abogado, nin consejero, en ningun 
pleyto . . . los omes . . . muestran a los abogados sus pleytos, e 
descubrenles sus poridades: por que puedan mejor tomar consejo, e 
ayuda dellos.†

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sion’s Legal Service; Visiting Lecturer, Université de Tours. This Article was originally 
presented at the 2004 Fordham Corporate Law Institute’s Annual Conference on Inter-
national Antitrust Law and Policy. Several cases concerning the subject matter of this 
article are pending. Although I will not comment on them directly, some disclosures 
seem appropriate. I have been an official with the European Commission (“Commis-
sion”) since 1995, and I served as “référendaire” (law clerk) with the President of the 
European Court of Justice (“Court of Justice”) from 2002 to 2003. In neither position 
have I been involved with any of the cases mentioned above. Many thanks to F. Castillo 
de la Torre, A. Font Galarza, J. Lete Achirica, K. Mojzesowicz, M. Szpunar, Ph. Van den 
Wyngaert, and W. Wils, who were kind enough to comment — within an unreasonably 
short time — on a first draft of this paper or otherwise provide helpful assistance. Of 
course, mistakes and omissions remain mine. The views expressed here are purely per-
sonal, and should not be construed as representing the views of any of the persons or 
institutions mentioned.

† Partida III.-Tit. VI.-De los abogados (1265). I thank my colleague J. L. Buendía 
for providing a facsimile of an early print edition of Las Siete Partidas (1555), a seven-
part code compiled around 1265 from Visigothic, Roman, and Church law under the 
supervision of Alfonso X, the Wise (1252-1284), of Castile. The expansion of Spain in 
the sixteenth century gave the Partidas the widest territorial application ever for any 
codified body of law. In many jurisdictions now under the sovereignty of the United 
States, modern law began with the Partidas. As recent as 1924, for example, the Louisi-
amana Supreme Court devoted the major part of an opinion to the law of the Partidas. In 
Texas and California, Spanish law remained in force for some time, and the Partidas 
are frequently cited in the early court reports of these states. An online search of U.S. 
case law reveals more than fifty cases mentioning the Partidas in states such as Arkansas, 
Arizona, California, Colorado, Florida, Louisiana, Massachusetts, Missouri, North Caro-
lina, Nevada, and New Mexico. For a new five-volume English translation of the Par-
provided here is mine.
[On how the lawyer must not reveal the intimacy of his party’s case to the other

A wise and just thing it is, that lawyers, to whom men tell the intimacies of their disputes, shall guard them and shall not disclose them to the other party . . . and if any of them acts against this, and this is proven, it is ordered that he shall be henceforth regarded as disreputable, and that he be banned from ever being a lawyer again, or an advisor, in any litigation . . . men . . . show lawyers their disputes and uncover their every secret, so that they can take better advice and assistance from them.]

Since the 1982 judgment of the Court of Justice of the European Communities ("Court of Justice") in Australian Mining & Smelting Europe Ltd. v. Commission ("AM&S"),¹ the law of the European Union ("EU")² has imposed restrictions on the ability of the European Commission ("the Commission") to obtain and present documents constituting communications between a lawyer and his or her client as evidence in its competition investigations. The Order of the President of the Court of First Instance of the European Communities ("CFI") in Akzo Nobel Chemicals and Another v. E.C. Commission ("Akzo")³ has brought this area of law into the spotlight again, reviving academic debate about whether the rules established in AM&S are outdated and should be changed. This order was subsequently quashed on appeal to the Court of Justice.⁴ A decision on the merits is expected, prob-

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ably some time in 2006.

Not surprisingly, the defense bar embraced the first Akzo order for widening the categories of material that should be protected from scrutiny by the Commission.\(^5\) In-house lawyers, whose communications are not protected under AM&S, have also joined the fray with renewed demands that the law be changed.\(^6\) Commentary on AM&S by practitioners and academics from common law jurisdictions invariably tends towards enthusiastic assimilation of the law applicable in those jurisdictions to the "legal professional" or "attorney-client" privilege.\(^7\) Many of those commentators appear to praise Akzo for effectively abandoning AM&S by recognizing a broad right to oppose compelled disclosure to the Commission of any communication containing or reflecting the views of a lawyer, or prepared in connection with obtaining the views of a lawyer, or even, more generally, of any information submitted to a lawyer.

This Article takes a slightly different approach. Although set against the background of investigations by the European Commission in proceedings for the application of the main competition rules of the EU,\(^8\) the discussion remains at the level of broad principles. The driving notion of this article is that the basis and ratio for judicial recognition of a privileged communications doctrine in EU law must be defined explicitly, and that this definition may have important consequences as to the scope and practical administrability of the doctrine. Part I explores the principal rationales usually claimed for the privilege: the utilitarian view and the rights-based approach. This discussion serves as useful background to understand the position of EU law regarding operation of the privilege in competition proceedings conducted by the Commission. Part II describes the state of

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8. See EC Treaty, supra note 2, arts. 81-82, O.J. C 325/33, at 64-65.
the law since AM&S, commenting on the personal and material scope of the current privilege rule, the possible reasons underlying its strict conditions, and the procedural arrangements for resolving privilege disputes. It then considers whether changes in the legal context since AM&S have eroded the foundations of this judgment.

A utilitarian view of the privilege presents some conceptual difficulties and, although may well inspire a commendable policy, does not necessarily command judicial recognition of a wide lawyer-client privilege in competition investigations. AM&S strikes a balance between the interests of the company under investigation and the interests of fact-finding in law enforcement. I argue that this balance is coherent with the minimal demands of a non-utilitarian approach to the privilege, based on the rights of defense of the client. In many respects, the AM&S judgment is consistent with — and may even exceed — the requirements of the rights of defense as defined in the European context. While a different approach to the privilege is perfectly conceivable, I therefore find no basis in EU law compelling expansion of the privilege beyond the needs of the rights of defense. It is also my belief that the premises upon which the AM&S solution was based remain essentially unchanged. Substantial changes to the law would therefore require more sophisticated consideration than is often offered.

**PRELIMINARY REMARKS**

Any discussion about the need for, and the proper scope of, a doctrine of legal privilege requires clarification of what is to be understood by “legal privilege,” of the setting where privilege claims are to develop their effects, and of the legal effects of the rule.

In the most general terms, “legal privilege” will be used here to mean “a rule of law according to which certain lawyer-client communications cannot be subject to compelled disclosure in legal proceedings,” and “[i]f disclosed against the will of the client . . . [will be] inadmissible as evidence in the proceedings.” “Legal proceedings” here refers not only to judicial proceedings but also to administrative enforcement proceedings where an administrative agency has investigative powers allowing it to com-
pel production of evidence from parties subject to the investigation.

Competition proceedings before the European Commission constitute one such example of the administrative enforcement of "public law" prohibitive rules. As the administrative authority in charge of prosecuting infringements, the Commission possesses limited power to compel production of business records and documents. This is the main category of evidence for which legal privilege claims may arise in procedures before the Commission, if not the only one. Claims concerning other types of evidence and proceedings may arise in other legal systems, but are absent here. There is no civil litigation before either the Commission or the EU courts. Generally speaking, EU law does not govern the rules of production and discoverability of evidence before Member State courts where such civil litigation arises. In those jurisdictions where civil procedure provides for extensive discovery between the parties, the contours of any priv-

9. "Public law" (as opposed to "private law") is that part of the legal system which deals with the legal and political relationships between government and the citizen, and not with the private legal dealings between citizens. See Black's Law Dictionary 500, 513 (Pocket ed. 1996). I use it here in a more limited sense to refer to areas of substantive law concerned with protecting collective and diffuse interests (as opposed to private rights) through prescriptive and prohibitive rules which are enforced, at least in part, by public authorities vested with special powers to compel compliance with, and sanction breaches of, the law. Administrative enforcement of competition laws or environmental regulations is an example. Whether the scope of the investigative powers of the European Commission — and therefore the scope of the legal privilege itself — might be different in the context of merger control (where a violation of the law is not at stake) is outside the scope of this article. In Hilti AG v. Commission of the European Communities, Case T-30/89, [1990] E.C.R. II-163, [1990] 4 C.M.L.R. 602, the Court of First Instance upheld AM&S, specifying that legal privilege covers written communications exchanged between lawyer and client "after the initiation of the administrative procedure which may lead to a decision on the application of Articles 85 and 86 of the Treaty [now Articles 81 and 82 of the EC Treaty] or to a decision imposing a pecuniary sanction on the undertaking." Id. ¶ 13. The Court did not mention merger control proceedings, although the original Merger Regulation, providing for roughly the same investigative powers available in proceedings concerning Articles 81 and 82 of the EC Treaty, had been adopted only some months before. See Council Regulation No. 4064/89, O.J. L 395/1 (1989), corrected version in O.J. L 257/13 (1990), arts. 11-13 [hereinafter Merger Regulation]; see also Commission of the European Communities, Della Vedova Report on the Proposal for a Council Regulation on the Control of Concentrations between Undertakings: "The EC Merger Regulation", COM(5) 257 Final, at 30 (July 2004) (stating that "it does not seem appropriate to put the Commission's powers of investigation as regards mergers on the same level as the strengthened powers recently envisaged in the regulation on cartels, since the areas are completely different"). In merger investigations, the European Parliament favored extension of legal privilege to in-house counsel. See id.
ilege for client-lawyer communications remain defined by national law alone. In other words, AM&S does not directly control the discoverability or admissibility of evidence in national court proceedings, even in actions where the infringement of EU competition law is the subject of the dispute. This does not mean that the scope of the privilege in the case law of the Court of Justice is without any influence on the standard applicable in national proceedings. The main point here is that EU law does not directly require national investigations and proceedings to protect legal privilege to the same standard as that defined by the Court of Justice for Commission investigations. National rules recognizing a broader scope for legal privilege are compatible with the existence of a narrower standard in investigations conducted by the Commission. Narrower privilege rules may also subsist. However, the source and rationale for legal privilege may be decisive in this regard: human rights and fundamental principles of EU law need to be respected also in national actions, in particular where Articles 81 and 82 are applied.

The definition of "legal privilege" proposed above is purposefully austere in normative value. It does not say, for example, what is meant by "lawyer-client communications" or a "lawyer," nor does it specify the conditions, if any, which must be satisfied for lawyer-client communications to be covered by the privilege. It does, however, roughly delineate the province of operation and validity of the rule of legal privilege in EC law, and distinguishes legal privilege proper from related rules governing the confidentiality of communications between lawyer and client.

This distinction is critical for our purposes because these other related confidentiality rules are not directly governed by EC law. When the Court of Justice defines the scope of a rule of legal privilege in competition proceedings before the Commission, it is only confronted with the issues of compellability and admissibility of evidence. It does not define the scope of any confidentiality obligations lawyers may have outside the framework of

10. This may be the case in an action for damages or for breach of contract. Contra J. Philip, EEC Competition Law and Privilege Against Self-Incrimination in English Law, in Legal Issues of European Integration 49, 51, 74-75 (Martijn van Empel et al. eds., 1981).

11. For a discussion of these questions, as well as of the "soft harmonization" effect of the AM&S judgment, see infra notes 184-93 and accompanying text.
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these legal proceedings, nor is it concerned with the legal consequences of a breach of these duties.

This is an important issue to understand, because it is easy, though unhelpful, to incorporate other legal concepts related to the preservation of confidentiality in lawyer-client communications into a discussion of legal privilege. This is why the expression "legal privilege," though foreign to most European jurisdictions, is preferable to "confidentiality" or "professional secrecy" for the purposes of our discussion. Referring to "professional secrecy" or "confidentiality" as the equivalent of legal privilege in civil law jurisdictions only leads to confusion. Professional secrecy as such is a duty, a generic obligation imposed on a professional to keep matters discussed with the client in strict confidence and not to disclose them to third parties. A number of legal constructs revolve around the professional secrecy duties of lawyers, each implicating different legal consequences, including: disciplinary sanctions on the basis of ethical rules applying to the profession, criminal sanctions, and private actions for breach of contract or non-contractual liability. Several other professions are also subject to duties of professional secrecy emanating from a variety of sources, including, inter alia, laws, contracts, private association statutes, ethical rules, and oaths. But there is no inherent relationship between such duties of "professional secrecy" or "confidentiality" and a privilege against the compelled production of evidence, even where such duties emanate from legislation. Many professions have a duty of secrecy, few have privilege.

Since 1822, for example, successive versions of the Spanish Criminal Code have rendered the "revelation of secrets" a felony. The 1822 version of the Code applied to "clerics, lawyers, doctors, surgeons, pharmacists, barbers, midwives and any others," though subsequent amendments variously redefined the personal scope of the crime. In its current version, this provi-

12. In common law jurisdictions, disciplinary sanctions and private actions for "breach of confidence" are based on "agency rules of confidentiality." See Jonathan Auburn, Legal Professional Privilege—Law and Theory 1 (2000) (noting that "the privilege is not a branch or variant of any over-arching confidentiality doctrine, and is sometimes driven by goals which are slightly different from these other rules"); see also Charles W. Wolfram, The U.S. Law of Client Confidentiality: Framework for an International Perspective, 15 Fordham Int'l L. J. 529, 544-46 (1992) (delineating the "agency law of confidentiality" as applied to lawyers in the United States).
sion criminalizes the revelation of secrets by "anybody who has learnt them by reason of his profession or of a relationship of employment," and foresees aggravated sanctions where secrets are revealed in breach of a professional duty of confidentiality. The existence of a duty of "professional secrecy" for domestic help employees, for instance, has been recognized by the Spanish Constitutional Court. It is abundantly clear, however, that this "duty" does not automatically provide protection against giving evidence when so required in legal proceedings. The Spanish Constitution provides that privileges against court testimony on grounds of professional secrecy will be regulated by law. Criminal procedural law in Spain stipulates only two general professional "privileges" against compelled testimony: for "the lawyer representing the accused in a criminal case in relation to facts communicated by his client in his capacity as defense counsel" and for "priests and ministers of a church in relation to facts learnt in this capacity."

The different scope, nature, and legal effects of confidentiality obligations and evidentiary privileges can be illustrated by examples taken from virtually every jurisdiction. In English law, the breach of confidence doctrine prevents the disclosure of certain communications made in confidence. Although it may have an impact on the admissibility of evidence in court, however, the doctrine "cannot stand in the way of legal compulsion, whether such compulsion comes in the form of a search warrant, an order for discovery, or an order that a particular question be answered by a reluctant witness." Lawyer confidentiality obligations are closely related to privileges against compelled disclosure, perhaps complementary, but conceptually different nonetheless and therefore mutually independent.

13. See Código Penal (C.P. 1822, 199). A primitive and delightfully drafted version of this provision existed already in Las Siete Partidas. See LAS SIETE PARTIDAS, supra note †, Partida I, Tit. IV, Ley 85.


15. See SPAIN CONST. art. 24(2) (1978), translated in 8 CONSTITUTIONS (1987) (stating that the matter shall be regulated "by law," i.e., by statutory instrument).

16. See Ley de Enjuiciamiento Criminal, (L.E.Crim. 1988, arts. 416(2), 417(1)). There is also a limited privilege for public officials in matters related to their scope of employment. In civil matters there is a wider "privilege" against testimony by professionals subject to a duty of confidentiality. These privileges relate only to court testimony. See Código Civil, (C.C. 2002, art. 1247(5)).

17. AUBURN, supra note 12, at 48.

18. The same may be said of other evidentiary privileges: a privilege against mari-
The material scope of a rule of legal privilege is not coextensive with either communications deemed "confidential" or with all those covered by "professional secrecy." Duties of confidentiality applicable to lawyers broadly cover all client communications, not only those protected by legal privilege, and apply regardless of the nature or source of the information or the fact that others may share the knowledge. In the context of competition investigations, information such as business secrets may be "confidential" with respect to the outside world, and yet be obtained, copied, and used in evidence by the Commission on a regular basis. Article 12 of Council Regulation (EC) No. 1/2003 ("Regulation 1/2003") on the implementation of the rules on competition provides that the Commission and the national competition authorities "shall have the power to provide one another with and use in evidence any matter of fact or law, including confidential information." Confidentiality claims therefore only arise in relation to transmission of documents to specific third parties (such as co-defendants or complainants), and more generally in the context of publication in the Official Journal or the online posting of decisions or other acts of the Commission routinely expunged of business secrets and other confidential matters.

The question of whether documents covered by confidentiality obligations may be disclosed and used in the proceedings is conceptually autonomous within EU courts as well, and cannot be answered by mere reference to a "duty of confidentiality" on the party called to disclose.

The legal consequences of recognizing "privileged" status to a communication (and to written communication in particular) are also specific. By definition, legal privilege involves a claim of confidentiality, not against third parties, but against the adjudical testimony, or even a legal rule preventing spouses or close relatives from testifying, may exist without a legally enforceable duty of discretion, as any tabloid shows.


20. Article 28 of Regulation 1/2003 provides for a duty of "professional secrecy" in relation to information "acquired or exchanged pursuant to this Regulation." Id. art. 28. This entails, *inter alia,* the protection of business secrets against public disclosure. See Regulation 1/2003, supra note 19, art. 28, O.J. L 1/20, at 20 (2003).

21. See, e.g., Gencor Ltd v. Commission, Case T-102/96, [1997] E.C.R. II-879 (holding that the duty of confidentiality originating in an agreement between the applicant and a person not party to the proceedings is not controlling as regards communication of the information in question to interveners).
cator itself (in this case, the Commission in its role as law enforcement agency). Though the scope of the legal privilege rule differs among jurisdictions, its effect can be far-reaching. First, privilege usually prevents compelled testimony about the communication, and may also determine the inadmissibility of evidence of privileged communications in legal proceedings. As practiced in common law jurisdictions, legal privilege goes beyond the bar against compelled testimony and the inadmissibility of evidence in legal proceedings, in that it prevents the prosecution, investigative body, or adjudicator from accessing the communication itself. Thus, a valid claim of legal privilege for documentary or recorded evidence in most common law jurisdictions bars the investigative body, prosecutor, or adjudicator, not only from disclosing the relevant document to third parties, but from copying it and using it as evidence. If a document is genuinely privileged, the prosecution or investigating authority may not even access its contents. The underlying assumption is that merely viewing the contents of a document which turns out to be privileged may influence their perception of the case as well as the subsequent course of the investigation, because acute amnesia cannot be guaranteed. A rule of legal privilege need not elicit all the legal consequences listed here, though the most robust ones do.

I. FOUNDATIONS AND RATIONALIZATIONS OF THE PRIVILEGE

This is not the place to review in detail the origins and rationales proposed throughout the history of the privilege at common law or under its civil-law-jurisdiction counterparts. The standard account of the origins of the common law doctrine in


23. For information on the privilege within common law jurisdictions, see JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 542 (rev. ed. 1961); see also AUBURN, supra note 12, at 1-9; Geoffrey C. Hazard, An Historical Perspective on the Attorney-Client Privilege, 66 CAL. L. REV. 1061 (1978).
Wigmore’s influential treatise holds that the privilege emerged initially as an “honour-based” prerogative to refuse testimonial compulsion, and was enjoyed by the lawyer because of his prominent status as a gentleman. Under this “honour” or “dignity” approach emphasized by subsequent writers, the privilege stemmed from a concern with the “oath and honour of the attorney” which opposed compelled disclosure of a client’s secrets in violation of the gentleman’s code of honor. Although Wigmore’s account is almost universally accepted, its accuracy has since been challenged. Auburn, for instance, doubts that the early foundation of the privilege can be traced to traditional respect for the honor and status of a lawyer. Early cases before the Elizabethan Chancery Court in the late sixteenth century show that high social status did not prevent compelled testimony, even for the nobility, and that lawyers were not exempt from being called and examined as witnesses. The privilege operated only to relieve the lawyer from the duty to answer certain questions concerning his involvement with the case at hand. According to Auburn, “[i]t will never be possible to come to a conclusive answer to the origin of and early rationale for the privilege because the decisive pieces of information, the reasoning underlying the first reported cases and precise knowledge of Pre-Elizabethan Chancery procedure, are simply not available.”

Whatever its historical foundations, modern discussions about legal privilege have been concerned with explaining its rationale and justification. The views taken on the validity of these rationales and justifications in turn determine the position taken by writers as to the soundness of the rule itself as well as its proper personal and material scope.

24. See Wigmore, supra note 23, at 543 (emphasis in the original). Whether or not this account of the historical origins of the privilege is accurate, the notion that social status should determine evidentiary privileges was no longer tenable by the late eighteenth century. Lawyers were able to retain the privilege, one of the justifications proclaimed being in sharp contrast with the alleged “status” origin of the privilege that “the lawyer was no better than a servant, and there was an old and powerful feeling that a servant must keep its master’s secrets.” Comment, Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine, 71 Yale L.J. 1226, 1228 (1962) [hereinafter Functional Overlap].


26. See id. at 5-6.

27. Auburn, supra note 12, at 7. In criticizing Wigmore’s historical account, Auburn indicates that in Chancery Court proceedings the privilege actually operated in the opposite manner to the “honour exception” for people of high status. See id. at 6.
A. Disclosure and Privilege under the Utilitarian Rationale

Literature about "legal privilege" in common law jurisdictions usually takes for granted its utilitarian basis. Wigmore's treatment of legal privilege, and of evidentiary privileges in general, has been enormously influential in this regard. This "instrumental" view, as some prefer to call it, holds that the privilege is necessary for the maintenance of good client-lawyer relations: lawyers cannot fulfil their mission without the fullest possible knowledge of the facts of their client's situation. The expectation of confidentiality encourages candid communications and the disclosure of all relevant information. Thus the privilege exists not to protect the immediate result (i.e., the secrecy of the communication) but to promote a broader societal goal.

Risky heresy, one may wonder what that societal goal may be. It seems troublesome indeed to accept that the mere goal of promoting "the confidence reposed in legal advisers" would suffice to justify a wide privilege — or any privilege at all — intended to prevent adversaries, courts, and law enforcement agencies from accessing relevant evidence. Building confidence between people in every walk of life is a worthy goal that could justify granting confidentiality against compelled disclosure to a vast array of professionals and business relations, from journalists, psychologists and marriage counsellors to clients, suppliers, employees, accountants, bankers, tax consultants, and business advisors. An expectation of confidentiality for communications with these professionals would foster trust and facilitate the flow of information at least as much as it does for lawyers. Some of these professionals require candid communications as much as lawyers do to discharge their duties correctly. One could even argue that the social benefits derived from enhanced trust in these relationships would not be significantly less than the social benefits derived from enhanced trust in lawyers. After all, many people go through life without ever needing a lawyer, and most have only occasional contact with one. By contrast, everyone has


29. See Developments: Privileged Communications, supra note 24, at 1250.
friends or co-workers, deals with banks and tax advisors, is an employer or an employee, and interacts daily in these relationships. Yet many personal, professional, or business communications are either not protected against disclosure whatsoever, or are merely covered by ethical, contractual, or legal rules imposing a duty of confidentiality which does not provide a shield against compelled disclosure in legal proceedings.

Some overriding societal value must therefore be at stake to make it necessary to promote trust in the lawyer-client relationship over and above trust in most other social contacts. That is, unless we are satisfied with viewing confidentiality rules and legal privilege, through the prism of private or special-interest theories, as the result of rent-seeking behavior by a strong interest group. From this perspective, evidentiary privilege is created and enforced by lawyers and for lawyers, and is therefore systemically biased to the detriment of the general welfare. If we are not ready to countenance these views, then we must identify some intrinsic value to distinguish legal communications as especially deserving of the privilege against compelled disclosure. Such value may be related to the rights and interests of the client, as will be discussed later, but from a purely utilitarian perspective, it cannot be a private interest predominantly or exclusively valuable to the client or to the lawyer. It must necessarily be one that enhances the welfare of society as a whole in a manner and to an extent that, in the clear majority of cases, compensates for the detrimental effects of non-disclosure on the law-enforcement process. In other words, the utilitarian rationale requires the privilege rule to yield strong collective benefits capable of outweighing the pernicious effects of non-disclosure, and to be instrumental in obtaining those benefits.

30. For comments along the line of this "power" or "bias" theory and similar notions, see Developments: Privileged Communications, supra note 24, at 1232-34, nn.41-47 (referring to the lawyers' control of the appropriate decision-making process through their presence in the judicial and legislative branches, and suggesting that evidentiary privileges protect relationships favored by "society as the community of lawyers sees it"); see also Developments: Privileged Communications, supra note 28, at 1493-98; Fred C. Zacharias, Rethinking Confidentiality, 74 Iowa L. Rev. 351, 359-60, 372-74 (1989) (referring to the vested interests of the legal profession, from financial concerns to the psychological comfort of avoiding hard ethical decisions, in devising wide confidentiality rules). For a general discussion of the economics of professional regulation, as well as a survey of literature in the field, see K. Kiljanski, Self-Regulation of the Legal Profession (2004) (unpublished manuscript, on file with author).
The obvious answer seems to be that the privilege rests on the assumption that the confidentiality of legal communications yields a unique contribution to increased compliance with the law. If people are able to consult lawyers without having to worry about the risks of subsequent disclosure of the information revealed and of the legal advice received, lawyers will be sought more frequently, the advice received will be more accurate, and the law will be respected more often. Note that the utilitarian view necessarily assumes that legal advice from a well-informed lawyer will generally be correct, lead the client to respect the law, and discourage him from contemplated misconduct.

Leaving aside these assumptions for the time being, there is one striking outcome to this line of reasoning. The utilitarian rationale as described compels us to introduce a distinction between legal communications related to past conduct and those referring to a future or contemplated course of action. The logical inference from competent legal advice towards compliance with the law necessarily implies that the legal advice sought and given relates to future conduct, or at least to ongoing conduct that can still be modified. The reverse holds true when the advice deals with the legality of completed conduct; what is done is done and can no longer be changed. Thus, generally speaking, significant utilitarian benefits in terms of increased compliance with the law are not to be expected from the protection of communications involving past conduct.

31. This seems to be the ultimate instrumental goal of the privilege as construed by the U.S. Supreme Court. See Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (stating that encouraging candor between lawyer and client gives the client an incentive to consult with counsel more readily as to how she should proceed so as to remain within the bounds of the law); see also Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343, 348 (1985) ("the attorney-client privilege serves the function of promoting full and frank communications between attorneys and their clients. It thereby encourages observance of the law and aids in the administration of justice").

32. See Louis Kaplow & Steven Shavell, Legal Advice About Acts Already Committed, 10 Int’l Rev. L. & Econ. 149 (1990) [hereinafter Kaplow & Shavell, Acts Already Committed] (proposing an economic model for analyzing the effects of advice about sanctionable past conduct, and finding that advice may be socially irrelevant, desirable, or undesirable, and that the diluting effect of legal advice may be offset by higher sanctions). The authors show that "legal advice provided after parties act should not be thought, a priori, to channel behavior in accordance with legal rules." Id. at 158. See Steven Shavell, Legal Advice About Contemplated Acts: The Decision to Obtain Advice, Its Social Desirability, and Protection of Confidentiality, in 2 The New Palgrave Dictionary of Economics and the Law, 516-20 (Peter Newman ed., 1998) [hereinafter Shavell, Contemplated Acts]. According to Shavell, a "notable difference between [ex ante and ex post legal advice] is
This reasoning can be taken even further: under a radically utilitarian approach, there is a case to be made for withdrawing any privilege whatsoever for legal communications involving completed or even ongoing conduct, and for protecting only communications containing legal advice about future conduct. This would strongly encourage clients to obtain competent legal advice in advance of any contemplated course of action before it is completed or even initiated. If we accept the assumptions behind the utilitarian logic, this would result in increased compliance with the law.

To be sure, there is no question about denying the societal value of the ability to consult a lawyer in confidence about the legality of past conduct. Under a utilitarian approach, however, this value cannot be primarily related to expectations about future compliance with the law, since orientation of future conduct is not the main impetus for seeking advice about the legality of past behavior. Legal advice about past actions may of course pose marginal benefits for future conduct, but only if the client contemplates repeating the conduct in question. The case for confidentiality under the utilitarian rationale is therefore more relevant to advice on future conduct.

The doctrine of legal privilege in common law jurisdictions implicitly addresses this weakness by focusing on the distinction between future and completed conduct in the "future wrongdoing" exception to legal privilege. Under this doctrine, variously called "crime-fraud," "crime-tort" or "iniquity," lawyer-client communications are not privileged if the client consults the lawyer to obtain assistance in the engagement of future misconduct. The choice of language here is, of course, charged with meaning. Though the labels "crime" or "fraud" suggest ex-
tremely serious violations of the law, courts interpret the exception rather broadly to cover all sorts of nefarious acts, including antitrust violations and even omissions that might not constitute civil fraud if a lawyer were not involved. 35

Obviously, the crime-fraud exception is partly meant to deal with the lawyer's own unethical behavior, though this is not its sole rationale. The "future wrongdoing" and "crime-fraud" exceptions do not necessarily require the lawyer's involvement in, or support for, the client's breach of the law. In most cases, it suffices that the client's intention was not to learn how to comply with the law, but how to trump it with the least chance of detection or punishment. It is not necessary for the attorney to be involved with or even privy to the client's reprehensible intention; he or she may be completely innocent and have no knowledge of the client's purposes. 36 By denying privileged status to these communications, courts are implicitly acknowledging the moral hazard problem inherent in protecting confidentiality. Enabling clients to discuss planned misconduct with impunity might actually promote misconduct by the lawyer as well as the client. 37 The preventive logic inherent in the "future wrongdoing rationales); see also Note, The Future Crime or Tort Exception to Communications Privileges, 77 Harv. L. Rev. 730 (1964) [hereinafter The Future Crime or Tort Exception].

35. See, e.g., A v. B, 726 A.2d 924 (N.J. 1999). For other examples in the United States, see In re Sealed Case, 754 F.2d 395, 399 (D.C. Cir. 1985) (dealing with "crime, fraud or other misconduct"); see also United States v. AT&T, 86 F.R.D. 603, 624-25 (D.D.C. 1979) (dealing with "crime, fraud or tort," including anti-trust violations); Cookey v. Hilton Int'l Co., 863 F. Supp. 150, 151 (S.D.N.Y. 1994) (referring to "intentional torts moored in fraud"); Volcanic Gardens Management Co. v. Paxson, 847 S.W.2d 343, 347 (Tex. Ct. App. 1993) (stating that "fraud" is "much broader" than common law and criminal fraud, and may include "false suggestions" and "suppression of truth"); Central Constr. Co. v. Home Indemnity Co., 794 P.2d 595, 598 (Alaska 1990) ("acts constituting fraud are as broad and as varied as the human mind can invent. Deception and deceit in any form universally connote fraud. Public policy demands that the fraud exception to the attorney-client privilege . . . be given the broadest interpretation"); International Tel. & Tel. Corp. v. United Tel. Co., 60 F.R.D. 177, 180 (M.D. Fla. 1973) (stating that the differences between prospective crime and prospective action of questionable legality "are differences of degree, not of principle") (quoting Garner v. Wolfinbarger, 430 F.2d 1093, 1103 (5th Cir. 1970)).


37. See Zacharias, supra note 30, at 369. Contra S. Shavell, Legal Advice About Contemplated Acts: The Decision to Obtain Advice, Its Social Desirability, And Protection of Confidentiality, 17 J. Legal Stud. 123, 129 (1987) ("Legal advice can only lead to two types of changes in behavior: to a party's committing an act that is not sanctionable and that he would not otherwise have committed . . . or to a party's not committing a sanctionable act that he would otherwise have committed . . . . Both these types of changes in behavior are socially desirable").
ing" exception addresses this problem.

This prophylactic logic might be taken a step further. If the privilege is instrumental in fostering law-abiding behavior, there is a theoretical case to be made not only for limiting the privilege to legal communications about contemplated conduct, but also for requiring that the client effectively follow the advice given. This follows directly from the assumptions behind the utilitarian rationale (i.e., that fully informed legal advice is almost always correct and capable of orienting the client's conduct towards compliance with the law). Leaving aside for one moment the practical difficulties of such an approach, it is arguable that limiting the privilege to communications involving advice on future conduct to cases where the client has effectively followed the lawyer's advice would greatly enhance law-abiding behavior. Clients seeking legal advice on future conduct would not be deterred from providing the lawyer with all information necessary, as long as they intended to act in accordance with the lawyer's advice. Under the utilitarian rationale, the case for protecting confidentiality is much weaker when the client chooses not to follow the legal advice received, since refusing privilege under such circumstances would bring about socially desirable consequences. Ex ante, the prospect of disclosure would encourage clients to follow legal advice while discouraging them from harboring fraudulent intentions. Ex post, disclosure would either expose voluntary misconduct which the client was advised against and could have avoided, or expose incompetent legal advice. Both these results would appear to be socially desirable in that both would contribute to increased compliance with the law (the latter, by introducing strong incentives for ethical, competent, and reliable legal advice).

Of course, many lawyers will recoil at such a proposal. But this instinctive rejection does not necessarily follow from the utilitarian justification of the privilege, but from the understanding that it would result in refusing privileged status for legal communications involving past wrongdoing, or exposing wrongdoing committed by the client against sound legal advice. This is precisely the type of information which, if disclosed, would be most harmful to the client's interests. Such a concern is perfectly understandable but not necessarily related to enhancing compliance with the law.

It might be pointed out that future compliance with the law
is not the only welfare-enhancing goal served by the privilege, and that shielding lawyer-client communications from compelled disclosure furthers other societal values. Some authors and courts make references to maintaining the integrity of the adversarial system or the judicial process, in which case advice on the legality of past conduct is highly relevant, even more so than advice about contemplated action. The same is true of correct legal advice on future actions not followed by the client which, if disclosed, would weaken the client’s position in litigation. But such values remain foreign to proper utilitarian balancing in shaping a rule of confidentiality, for they are nothing else than different labels, cast in the language of collective interests, for the individual rights and interests of the client. The labels “integrity of the adversarial system” and “protection of the judicial process” convey the notion that client-lawyer communications involving the legality of past conduct deserve to be kept confidential in order to ensure that the client receives adequate representation and defense in legal proceedings. Such rights constitute what we call “due process” or “the right to a fair trial,” and appear to provide the most robust rationale for extending privilege to legal advice about past conduct.

One troublesome feature of the traditional utilitarian approach to legal privilege is the lack of empirical data behind some of its basic assumptions. To accept the modern systemic arguments in favor of confidentiality, one must reach at least one of two conclusions: first, that clients would use lawyers significantly less if more exceptions to the privilege existed; second, that clients who make use of lawyers would reveal substantially less information. This “chilling effect theory” (otherwise known by its detractors as “the chicken little view” or “the sky is falling” approach) is typically asserted with little or no empirical corroboration. Nonetheless, the social utility of a rule of confidentiality for lawyer-client communications, and in particular one preventing compelled disclosure in legal proceedings, depends on the validity of such speculations on the practical impact of the rule on information-sharing between client and lawyer. Appealing and plausible as they may be, it is striking that they are routinely taken for granted, sometimes in apocalyptic

38. See Zacharias, supra note 30, at 363-64.
39. See Auburn, supra note 12, at 67.
The least that can be said is that something more than mere intuitive appeal might be expected to justify a rule excluding relevant evidence from law enforcement. If legal privilege must be grounded in utilitarian balancing, it seems only right to demand at least some empirical corroboration as well as a more precise knowledge of the marginal utility to be gained from the expansion of confidentiality to new categories of material, and of the marginal loss from introducing limitations or exceptions. But empirical studies are rare, small-scale, and often lacking in statistical significance. There does not appear to have been any survey or report addressing these issues in Europe. Reviewing the results of the existing U.S. studies, Auburn has concluded that the privilege is not in fact as important as usually assumed.

For the rational client, the relevance of evidentiary rules concerning confidentiality and the disclosure of communications may be a function of her knowledge about the risks of disclosure and the private value of foregoing the protection of confidentiality to share information with others. There are indications, however, that a significant proportion of clients are either unaware of the privilege or mistakenly believe that it has no limits. Studies show that clients are willing to candidly disclose information to a variety of lawyer and non-lawyer professionals under the generic expectation that such communications will remain confidential; whether such confidentiality would be maintained in legal proceedings, however, is never addressed. This

40. See Murphy, supra note 7, at 454 ("[t]here is a real likelihood of companies not seeking legal advice for fear of possible disclosure of their internal communications to the Commission. This result could lead to inadvertently engaging in anti-competitive behavior . . . . Or undertakings may simply choose not to trade in Europe if their legal affairs could be potentially exposed"). Writing about marital privilege, one author suggests that "if the communications privilege were now to be abolished, publicity about the change might reach large segments of the population . . . . One might then expect a decrease in communications between spouses." Auburn, supra note 12, at 69 (quoting Comment, Marital Privilege and the Right to Testify, 34 U. OF CHI. L. REV. 196, 200 n.25 (1966)).

41. For an inventory of these studies and an assessment of their results, see Auburn, supra note 12, at 69-78, 93-96; see also Zacharias, supra note 30, at 376-407.

42. See Auburn, supra note 12, at 77.

may well be an indication that the value of candid disclosure may be so powerful as to outweigh any perceived risks of disclosure. If complete frankness is a necessary condition of competent legal representation, many clients find their need for legal assistance so compelling that it leaves them no choice but to talk candidly.\(^4\)

One thing that emerges clearly from the few existing studies is a disparity between client expectations and the reality of the privilege. Lawyers do not always inform their clients about the extent of the privilege and its possible exceptions, which often fosters mistaken expectations. This is what Auburn refers to, rather bluntly, as “wrongful inducement”, and what has driven him to the conclusion that “the law of privilege is built on active deceit.”\(^45\) It is not necessary to subscribe to such a harsh judgment in order to share the more general concern over the lack of empirical evidence for the utilitarian rationale. In fact, the same could be argued about other assumptions supporting the utilitarian construction of the privilege: the general desirability of legal advice based on the notion that it leads to increased compliance with the law, and the belief that the absence of confidentiality would lead to more decisions being taken without legal advice, and thus an increase in illegal conduct. Ultimately, even the desirability of legal advice itself turns on empirical proof.\(^46\)

Assuming the empirical uncertainty surrounding the utilitarian rationale can be overcome; designing a rule of legal privilege on this basis still raises questions as to its appropriate scope. Under purely utilitarian logic, the privilege would admit any construction within a sliding scale of zero to infinity. Whether dealing with its personal scope or its material reach, the contours of the privilege can be shaped in any manner consistent with the assumptions of the rationale. One could conclude, for instance, that extending the privilege to statements made before third parties,\(^47\) to the content of any conversation made in the

\(^{44}\) See Auburn, supra note 12, at 75.

\(^{45}\) Id. at 75. See id. at 94-96 (referring to “wide-scale professional deceit”).

\(^{46}\) See Bundy & Elhauge, supra note 43, at 319.

\(^{47}\) The requirement that the statements be made “in confidence” has been strongly challenged as inadequate. See, e.g., Paul R. Rice, Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished, 47 Duke L.J. 853 (1998). The criticism may be valid, at least to the extent that, from a purely utilitarian approach, knowl-
presence of a lawyer, or to legal discussions with consultants, law professors, auditors or third-year law students, would all promote compliance with the law. The utilitarian argument would then justify extending the privilege to those communications as well. By the same token, it would be equally admissible to design a narrower privilege for corporate clients if it turns out that corporations' need for legal advice is so strong and pervasive that limiting the privilege would not significantly impair the flow of information.

The same utilitarian balancing could also be used to determine the material scope of the privilege rule, including how far to protect such secondary evidence of lawyer-client communications as internal notes within a corporation discussing whether to follow legal advice. Take, for example, the following notes of a cartel meeting participant: "I called our lawyer about the following agreement that was made during the meeting.... I read it aloud to her and she said that it was illegal." The prospect of disclosure in this case would certainly discourage the client from contacting her lawyer. It is not obvious that treating such notes as privileged enhances compliance with the law; but if it does, surely a utilitarian approach would recommend protection.

Inherent in the utilitarian view of the privilege is a balancing exercise weighing the instrumental benefits of a given rule against its costs in terms of lost evidence of wrongdoing. This is perhaps more appropriately characterized as balancing "policies" rather than "principles," in the sense given these terms by Dworkin.48 It may be that deriving a "right of non-disclosure" and defining its precise material and personal scope on the basis of policy (or interest) balancing remains a task best left to the legislature. This is not a charge against judicial originality, but a

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48. See Ronald Dworkin, Taking Rights Seriously 22 (1978) (calling "policy" the kind of standard "that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community," and "principle" a standard "that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality").
misgiving that common law judges appear to share, at least in the area of evidentiary privilege. The common law offers no privilege to any other professional group apart from lawyers; most other privileges have therefore been introduced by legislative action. In civil-law countries, on the other hand, all privileges against compelled testimony are expressly provided for in legislation, and sometimes even in the constitution. In many cases, the legitimacy of a judicially created rule derives from having originated in principle rather than policy. Policy-based arguments justify political decisions by showing that they advance or protect some collective goal of the community as a whole; arguments of principle, however, justify political decisions by demonstrating that they respect or secure some individual or group right. Difficult cases often require judges to extract a rule of law by balancing competing principles; conversely, extracting a rule from balancing competing policies is more appropriately the realm of the legislature. While judges are often confronted with the need to accommodate competing values in applying existing rules and standards to individual cases, they are rightly wary of stepping into a broader balancing exercise between different public policy interests at the stage of defining the rule itself.

The developments above show that, even as the law stands in the EU today, attempts at justifying legal privilege under a purely utilitarian view remain problematic. Strict confidentiality rules rest on assertions concerning the effects of rules on clients, the validity of which necessarily depends on empirical research. Extending legal privilege in competition proceedings before the European Commission on the basis of its alleged instrumental benefits may well be envisaged, but it seems a task best left to the legislature. In fact, determining the scope of the privilege has become a major issue within recent EU legislation. The possibil-

49. Of course the issue presents itself differently in common law jurisdictions where, given the broad scope of legal privilege, arguments for or against judicial intervention often refer to the introduction of new exceptions to (rather than extensions of) the privilege. Even so, common law judges express uneasiness when called to define the scope of further limitations. See Auburn, supra note 12, at 135-45 (summarizing arguments for and against judicial intervention in defining new exceptions to the privilege).

50. See, e.g., Functional Overlap, supra note 24, at 1227, 1229, n.21.

51. See supra note 15 and accompanying text.

52. See Dworkin, supra note 48, at 82.
ity of extending legal privilege to in-house lawyers, for example, was raised in the European Parliament over the course of its adoption of Regulation 1/2003. The Evans report on the Commission’s proposal, as adopted in the Economic and Monetary Committee of the European Parliament, foresaw an Amendment (No. 10) providing that “[c]ommunications between a client and outside or in-house counsel containing or seeking legal advice shall be privileged provided that the legal counsel is properly qualified and complies with adequate rules of professional ethics and discipline.” In the plenary session, however, the Amendment was rejected by a vote of 404 to 69, with 9 abstentions. This does not necessarily mean that legislative extension of legal privilege ought to be discarded. But caution is warranted, and further initiatives in this direction would benefit greatly from empirical evidence on the likely effects of expanding the privilege beyond its current confines.

B. Privilege as a Fundamental Right

An alternative approach to legal privilege is to construe it as an individual entitlement, a right to confidentiality bestowed upon the client and disconnected from utilitarian balancing. Under this view, the privilege against compelled disclosure of certain legal communications exists, not because of its instrumental value in furthering collective societal goals, but because of its inherent subjective value for the holder of the right. Rights are not instrumentally derived and therefore do not depend for their force upon balancing public policies. Without doubt, the most powerful and far-reaching construction of privilege-as-a-right is based on fundamental rights, which are not susceptible to balancing against general policy interests and are therefore likely to prevail in any given conflict with other rights.


55. See The Attorney-Client Privilege, supra note 28, at 480.

56. See Dworkin, supra note 48, at 92 (stating that rights, by definition, cannot be
those rights whose inherent value requires them to prevail over
generic societal goals, important as they may be. Severing the
hands of managers participating in a cartel, or establishing an
arbitrary process without due respect for the rights of the de-
fense, might well prove frightening enough to encourage com-
pliance with the law. Yet debate over such proposals would not
even be countenanced, because they represent gross violations
of individual rights deemed sufficiently fundamental as to pre-
vail against broad social interests. Only minimal interference
with such rights may be warranted, and only under extremely
limited circumstances.

One variation of privilege-as-a-right is clearly the construc-
tion adopted by the Court of Justice in AM&S, in which protec-
tion of the confidentiality of lawyer-client communications was
construed as a necessary requirement of the client's right to a
fair trial. Another possibility is to view legal privilege as an ema-
nation of the client's fundamental right to privacy.

1. Privacy

People desire a sphere of freedom from public exposure,
and value, as an end in itself, the ability to keep their affairs pro-
tected from scrutiny and interference, especially by public au-
thorities. Although "privacy" is an elusive concept, it is generally
accepted that it goes further than a right to voluntary seclusion
or "to be left alone," but that it is inextricably linked to the un-
fettered development of human personality. This is undoubt-
edly how the European Court of Human Rights has construed it:
"private life . . . includes a person's physical and psychological
integrity . . . and is primarily intended to ensure the develop-
ment, without outside interference, of the personality of each
individual in his relations with other human beings."57

Communications with a lawyer may well be part of what one

outweighed by all social goals, categorizing rights as "absolute" or "less than absolute," and proposing to define the "weight of a right" as its power to withstand competition from other individual rights and collective goals); see also id. at 191 (suggesting that governmental measures limiting liberty are usually justified if they increase general util-
ity in which "the gains to the many will justify the inconvenience to the few," but not when they interfere with certain "fundamental" moral rights against the government).

tive to limit the notion [of private life] to an 'inner circle' in which the individual may
live his own personal life as he chooses and to exclude therefrom entirely the outside
world not encompassed within that circle. Respect for private life must also comprise to
may legitimately wish to keep within the realm of private life, protected not only from disclosure in legal proceedings but from the view of strangers in general. This view, in turn, would help dissociate the privilege-as-a-right from the limitations of the rights of defense. After all, the need for protection against disclosure of embarrassing or unpleasant information, or even information that one wishes to remain private, is not confined to the realm of legal proceedings.

Again, it is important not to confound legal privilege with related legal constructs imposing confidentiality duties in lawyer-client relationships. Protecting the client's expectation of privacy may well play a role in justifying the broad application of these rules well beyond the requirements of the rights of defense. Preserving client privacy may also help explain the extent of lawyer confidentiality obligations as well as the gravity of the legal consequences for their breach. Note that a violation of confidentiality obligations may occur in the absence of any connection with legal proceedings, and yet still give rise to civil or criminal liability. Legal privilege, in contrast, operates not as a sword but as a shield against the compelled production of evidence (or against the admissibility of evidence) in legal proceedings. It is, in this sense, a rule of evidence. Privilege can only be "breached" by the disclosure of evidence in legal proceedings, and only then by the adjudicator who wrongly rejects a valid claim of legal privilege. Privacy rights can therefore not be the rationale for a privilege altogether disconnected from legal proceedings, for the simple reason that legal privilege has no existence or meaning outside legal proceedings.

As a rationale for legal privilege proper (i.e., for a rule
preventing compelled disclosure in law-enforcement proceedings), the right to privacy has major shortcomings. On the one hand, it provides no explanation for favoring communications with lawyers over and above other private communications. Since lawyer-client communications cannot be presumed to be the most intimate type of social intercourse, the privacy rationale is incapable of justifying special protection denied to other relationships. Contrary to such privileges as that preventing the compelled testimony of certain close relatives, legal privilege does not concern itself with facilitating the flow of personal or intimate communications, nor is it concerned with sparing the client from public exposure. Secrecy is not sought as an end in itself; in fact, much of the information communicated to the lawyer eventually comes to light in legal proceedings anyway. An essential part of the lawyer's task in litigation consists in selecting, using, and disclosing that information which he or she believes will support the client's position. Thus, the goal of the privilege is not so much to preserve the private sphere of the client from exposure, as it is to preserve the free selection of information from that provided by the client. Information deemed beneficial will be disclosed, and information deemed damaging will be kept secret. There is no reason to assume, however, that information detrimental to the client's position in legal proceedings presents a more direct connection with the client's private sphere than favorable information.

Anchoring legal privilege in the need to safeguard the client's expectation of privacy is also difficult to reconcile with the operation of some exceptions to the privilege or, more generally, to lawyer confidentiality duties. The disclosure of lawyer-client communications to other persons in the same law firm is generally permitted, as is disclosure to collect a fee or to defend the lawyer or the lawyer's associates against allegations of malpractice or misconduct. Yet such disclosures are at least as in-

What we are concerned with here is the contractual duty of confidence, generally implied though sometimes expressed, between a solicitor and client).

60. See The Attorney-Client Privilege, supra note 28, at 483 (comparing the intimacy of attorneys and their clients to that of "friends and lovers").

61. See Parry-Jones, [1969] 1 Ch. 1 (holding that the Law Society was entitled to inspect a solicitor's books and supporting documents in order to ascertain whether the Solicitors' Accounts and Trust Accounts Rules were being complied with, even if it meant disclosing the client's affairs, thereby overriding any privilege or confidence which might otherwise subsist between solicitor and client).
jurious to the client's privacy rights as disclosures against the client herself in the context of legal proceedings. The privacy rationale also fails to explain the strict requirement, typical in common law jurisdictions, according to which privilege is lost if the communication is not made "in confidence." Under a privacy rationale, the presence of a trusted third party should not take the communication outside the private sphere.

Considering legal privilege solely in terms of the client's generic expectation of having his matters remain private would probably result in weaker protection than viewing it as a corollary of the rights of defense. Compelled production of evidence in legal proceedings rests precisely on the notion that truth-seeking requires us to tolerate a limited invasion of a sphere that individuals would prefer to keep secret. Law enforcement has developed tools and instruments to accommodate privacy interests by means that do not entail the suppression of evidence, such as exceptions to the publicity of proceedings and limited disclosure. At least within the strict confines of the law enforcement process, however, relevant evidence is rarely excluded from scrutiny purely on the basis of privacy concerns, even when the assault on privacy is severe.

In the context of inspections by a competition authority, there is little doubt that an inspection of the private home of a director, manager, or employee of an undertaking is far more invasive than the copying of legal memoranda pertaining to the business activities of the undertaking. Yet the law allows unannounced inspections at private homes. A privilege based on the privacy rationale would be eminently receptive to balancing the

62. See, e.g., European Convention for the Protection of Human Rights and Fundamental Freedoms [hereinafter European Convention], Sept. 3, 1953, art. 6(1), 213 U.N.T.S. 221, 228 (providing that "everyone is entitled to a fair and public hearing . . . [in which] [j]udgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial . . . where the protection of the private life of the parties so require[s], or to the extent necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice").

63. Situations involving particularly severe invasions of privacy may include paternity tests, child abuse investigations, body searches, character testimony, telephone tapping, or searches at private homes.

64. Inspections at non-business premises, including private homes of directors, managers, and employees, are possible with judicial authorization under Article 21 of Regulation No. 1/2003. See Regulation No. 1/2003, supra note 19, art. 21, O.J. L 1/15, at 15 (2003).
need for privacy against the need for evidence. Given that business and professional documents (as opposed to personal matters and correspondence) are the central target of competition investigations, the invasion of privacy ought to be relatively limited in the overwhelming majority of cases. The case for confidentiality, if based on privacy, would therefore often be weak. Were the protection of the client's privacy the paramount concern, it would hardly justify pulling a curtain over evidence relevant to an investigation about serious wrongdoing, even less so if that evidence consists of legal opinions and memoranda.

Recourse to privacy as an alternative basis for the privilege would also open the door to a distinction between individual and corporate clients. Protection of privacy derives in great part from a concern for such human feelings as guilt, shame, embarrassment, and anxiety, all difficult to ascribe to corporations. Although the notion of private life extends to some activities of a professional or business nature, corporations arguably have a weaker claim to privacy than individuals. This is recognized even by staunch defenders of a role for the privacy rationale in shaping legal privilege, and is supported by authority in European law. Construing the doctrine of legal privilege as essen-

65. See Developments: Privileged Communications, supra note 28, at 1482-83, n.73 (stating that "[t]he privacy interest must always be balanced against society's interest in ascertaining the truth", and noting that "[e]ven proponents of the privacy rationale concede that privacy must always be balanced against other interests").


68. See Niemietz, 16 Eur. Ct. H.R., ¶ 31 (holding that the right of interference established by Article 8(2) of the European Convention "might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case"). The Court had never recognized a "right to privacy" for legal persons until Colas Est. See Colas Est, [2002-III] App. No. 37971/97, ¶ 41 (holding that the rights guaranteed by Article 8 of the Convention could "in certain circumstances" be construed as including the right to respect for a company's head office, branch office, or place of business). There is a related general principle of EC law ensuring protection against disproportionate or arbitrary intervention by the public authorities in the
tially founded on the human need for privacy would potentially lead to a "dual-track" privilege in which corporate clients would take the back seat, a conclusion defensible from a utilitarian perspective as well. This is particularly relevant in competition proceedings before the European Commission, which contains no provision for the prosecution of natural persons. But if legal privilege is viewed as a necessary component of the rights of defense, there is no discernible distinction to be made between corporate and individual defendants.

It therefore appears that the type of client "privacy" protected by the privilege is a very specific one, directed solely at the privacy of communications with a lawyer that is essential to ensure that the client is able to exercise his rights of defense in legal proceedings. We value that privacy, not as an end in itself, but because it is necessary for a proper exercise of the rights of defense. It is difficult to see what the privacy rationale would add to the notion of the privilege as a corollary of the rights of defense. For even from a purely utilitarian perspective, the privilege seeks to encourage communications conveying one specific category of information only: information potentially harmful


69. See supra note 47 and accompanying text; see also The Attorney-Client Privilege, supra note 28, at 473-77 (applying a balancing model to the corporate client-attorney privilege and arguing that "corporate claims present the clearest occasions for abandoning a fixed rule of protection").

70. The application of EU competition rules to individuals is not entirely excluded, as is the case with "undertakings," an economic notion which does not necessarily exclude natural persons. There is even anecdotal presence of such "one-person undertakings" in case law and Commission practice. See, e.g., Hydrotherm v. Compact, Case 170/83, [1984] E.C.R. 2999, ¶¶ 10-12 (regarding an individual and the firms under his personal control); Commission Decision No. 76/743/EEC, O.J. L 157/39 (1976) (regarding an individual "exploiting the results of his own research and [acting] as commercial adviser to third parties"); Commission Decision No. 78/516/EEC, O.J. L 157/39 (1978) (dealing with opera singers); Commission Decision No. 76/29/EEC, O.J. L 6/8, at 12 (1976) (regarding an inventor). Note, however, that Commission investigations targeting individuals trading as such (as opposed to trading through a corporate form) are sufficiently rare to make this hypothesis negligible.
to the client's legal position and which the client would therefore be reluctant to convey to the lawyer without an expectation of confidentiality. In a rights-based construction, the privacy rationale is instrumental to, and may be subsumed within, the rights of defense rationale.\(^{71}\)

2. Rights of Defense

The discussion about the privacy rationale above is not necessarily contradicted by the fact that, in legal systems where the confidentiality of lawyer-client communications does not have a specific constitutional or legislative basis, it has been derived from provisions, often of constitutional rank, protecting the privacy of personal communications. Compulsory evidence-taking of any kind is by definition an invasion of "privacy"; it is therefore entirely natural that the law should take this as a starting point. The real question is whether privacy is to be protected as an end in itself or as a means to preserve some other value. When legal communications between lawyer and client are at stake, the answer may well be that the need for privacy is instrumental to the effective exercise of the rights of defense. Communications between lawyer and client do not deserve privacy because they belong to an individual's private life, but because disclosure would compromise the rights of defense.

This may be illustrated by reference to the case law of the European Court of Human Rights. While the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR")\(^{72}\) does not expressly guarantee the right to

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71. There have been proposals to incorporate privacy, together with any other rationale for the privilege, in a "full utilitarian balancing," where "individual privacy interests and non-individuated societal interests may together outweigh the costs of a particular privilege, even if neither alone could outweigh them." Developments: Privileged Communications, supra note 28, at 1484-86, n.91. When examining a "rights" approach to legal privilege, however, there seems to be little added value in considering "privacy" not as an alternative rationale, but as a supplementary one. The rights of defense incorporate fully the entire weight of privacy considerations relevant to justify legal privilege.

72. The European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on Nov. 4, 1950, guarantees a number of substantive rights, and establishes institutions and remedies for their protection. See European Convention, supra note 62. Under the Convention, a European Court of Human Rights hears appeals by individual citizens against governments of the contracting parties, seeking a declaration that a violation of fundamental rights has occurred as well as appropriate compensation. All 45 Member States of the Council of Europe are parties to the Convention, including the 25 Member States of the European Union. For a table
communicate privately with defense counsel, several judgments have nonetheless recognized a right to the confidentiality of communications between lawyer and client. These judgments are primarily grounded in the right to a fair trial under Article 6. Other judgments base the requirement of confidentiality on the right to respect for private and family life, home, and correspondence under Article 8. These latter cases, however, have involved legal communications with little "privacy intensity" in themselves; it seems that a heightened level of protection under Article 8 was justified only in order to safeguard another fundamental right. The European Court of Human Rights was clearly of this view in Niemietz, in which it expressly rejected any specificity to lawyer-client communications for the purposes of Article 8 taken in isolation, stating that:

[t]he Commission attached particular significance to the confidential relationship that exists between lawyer and client. The Court shares the Government's doubts as to whether this factor can serve as a workable criterion for the purposes of delimiting the scope of the protection afforded by Article 8. Virtually all professional and business activities may involve, to a greater or lesser degree, matters that are confidential, with the result that, if that criterion were adopted, disputes would frequently arise as to where the line should be drawn. . . . Where a lawyer is involved, an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by Article 6 [the right to a fair trial].

A statement to the same effect can be found in Kopp v. Switzerland, another Article 8 case concerning the monitoring of a

lawyer's telephone lines. While finding a violation of the lawyer's right to respect for his private life, the Court emphasized that strong safeguards should be in place when a lawyer is being monitored as a "third party" (as opposed to a suspect). Precautions should therefore be taken not to interfere with legal professional privilege in "matters specifically connected with a lawyer's work under instructions from a party to proceedings."\textsuperscript{76} The Court also stressed the need to protect "this sensitive area of the confidential relations between a lawyer and his clients, which directly concern the rights of the defense."\textsuperscript{77} In \textit{Erdem v. Germany}, the Court again affirmed that the confidentiality between a prisoner and his counsel touched directly upon the former's rights of defense and could therefore only be authorized in exceptional circumstances and with adequate safeguards.\textsuperscript{78} Thus, the case law of the European Court of Human Rights offers strong support for a construction of legal privilege firmly anchored in the rights of defense.

Two fundamental rights are relevant to a configuration of a legal privilege based on the rights-of-defense rationale: the right to effective representation ("right to counsel") and the right against self-incrimination. Both of these rights have a basis in Article 6 of the ECHR.\textsuperscript{79}

Article 6(3)(c) clearly provides a basis for the right to be assisted by a lawyer. Although confidentiality of communications is not expressly guaranteed,\textsuperscript{80} the Court has recognized in

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{77} Id.
\item \textsuperscript{78} See Erdem v. Germany, [2001] App. 38321/97, ¶ 65.
\item \textsuperscript{79} See European Convention, \textit{supra} note 62, art. 6:
\begin{enumerate}
\item In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law
\item Everyone charged with a criminal offense shall be presumed innocent until proved guilty according to law.
\item Everyone charged with a criminal offense has the following minimum rights . . . (b) to have adequate time and facilities for the preparation of his defense; [and] (c) to defend himself in person or through legal assistance of his own choosing, or if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.
\item The European Convention differs in this regard from the American Convention on Human Rights: "Pacto de San José de Costa Rica," which recognizes "the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel." \textit{See American Con-}
\end{enumerate}
\end{itemize}
\end{footnotesize}
S. v. Switzerland that:

an accused’s right to communicate with his advocate out of hearing of a third person is part of the basic requirements of a fair trial in a democratic society and follows from Article 6(3)(c) of the Convention. If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective.

Note that this judgment refers to the right of “an accused.” Although Article 6 of the ECHR concerns the adjudication of civil rights and obligations or criminal charges “by a tribunal,” Article 6(3) refers only to those charged with a “criminal offense,” suggesting that the right to counsel is clearly relegated to the preparation of the client’s defense. A question therefore arises as to exactly what point in time the right to counsel comes into existence. As for criminal proceedings, Article 6(3) appears to guarantee this right, not only during the trial, but from the moment that charges are formally brought. But the right to counsel may arise even before a formal accusation. In Imbroscia v. Switzerland, for instance, the Court relied on precedent applying Article 6 guarantees to pre-trial proceedings. In Murray v. United Kingdom, the Court confirmed that Article 6 even applies to the preliminary investigation into an offense by the police. Under the Court’s construction, however, the right to be assisted by a lawyer only arises automatically from the accusation; while dur-
ing the preliminary investigation, "the manner in which Article 6(3)(c) is to be applied . . . depends on the special features of the proceedings involved and on the circumstances of the case." According to the Court in Murray, where national law attaches consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defense in subsequent criminal proceedings, Article 6 requires that "the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation." 

It is possible to summarize the ECHR case law on legal privilege as follows: there appears to be an automatic right to counsel, with an attendant right to communicate with counsel in private, starting from the moment charges are brought against a person. During preliminary investigations, the existence of a right to counsel is no longer automatic, and will be strongly dependent on the type of proceedings and the circumstances of the case. In general, a right to counsel is recognized where absence of legal representation would risk compromising the accused's other rights of defense. Before an investigation has begun, there is no basis in Article 6(3)(c) on which to assert a fundamental "right to counsel" or a concomitant right to confidentiality of communications. Finally, confidentiality is guaranteed concerning "matters specifically connected with a lawyer's work under instructions from a party to proceedings."

It seems also that the ECHR is not prepared to find an automatic violation of Article 6 whenever confidentiality of communications with defense counsel is not assured. In Labita v. Italy, although interferences with the correspondence of an accused constituted a breach of Article 8, the Court rejected the applicant's Article 6 claim concerning the same interference specifically affecting his correspondence with defense counsel. The judgment offers two grounds for its rejection of this claim: first, that the Article 6 claim was "absorbed" within the Article 8 violation; second, that "the applicant has not stated in what way his defense was adversely affected by the censorship of his corre-

Against this background, it is possible to draw a general inference regarding legal privilege. Assuming that secrecy of communications is a necessary corollary of the right to counsel as construed by the ECHR, it appears that no right to confidentiality of lawyer-client communications arises from Article 6 where a fundamental right to be assisted by a lawyer does not exist. By the same token, confidentiality must be protected in every situation where a right to counsel arises and with respect to all communications passing between lawyer and client from that point onwards.

Finally, a full picture of the rights of defense relevant to legal privilege would not be complete without reference to the right against self-incrimination. In Saunders v. United Kingdom and Funke v. France, the ECHR accepted that the right to silence and the right not to incriminate oneself, though not specifically mentioned in the Convention, are an inherent part of the right to a fair hearing under Article 6.

The justification for an absolute privilege for communications passing between a criminal defendant and counsel after charges have been brought is clear. A large part of defense counsel's task is to elicit information from the client in order to

88. Labita v. Italy, [2000-IV] App. 26772/95, ¶ 188 (unreported). The Court also notes as relevant the fact that the applicant was finally acquitted at the end of the proceedings in question.

89. Some protection (i.e., that of private life) may still arise under Article 8. As stated above, however, the Court has rejected any specificity of lawyer-client communications for the purposes of Article 8, deriving increased protection of privacy in the case of lawyer-client communications from Article 6 instead. See supra notes 74-78 and accompanying text.


determine the best defense strategy. A competent defense requires the lawyer to be particularly aware of any incriminating information. The privilege is of little relevance for "favorable" information: as stated above, part of the lawyer's task is to select facts and information supporting the client's defense and to disclose them as convincingly as possible to the adjudicator. But a fair trial also requires that the lawyer be aware of any information damaging to his client's case. Unconstrained access by the lawyer to incriminating information in the possession of the client is, in reality, what the privilege seeks to protect. Compelling, or even allowing, the lawyer to disclose incriminating information would be an intrusion into the defendant's defense camp, tantamount to denying him the right to a lawyer. Without privilege, the defendant would face an impossible dilemma: "to preserve his right against self-incrimination, the defendant would have to forgo communicating with an attorney," yet "to enjoy even the most minimal use of his right to an attorney; the defendant would have to surrender his testimony to the court." This is why all civilized legal systems allow defendants the opportunity to reveal everything to one person and nobody else, without fear that what they say could be used against them. To deny this right would taint the adversarial system itself.

Hence, the two sides of legal privilege go hand in hand as both a necessary corollary of the defendant's right to counsel and as a condition to his right against self-incrimination. This is the essence of legal privilege construed as a right of the de-

93. See supra note 60 and accompanying text.
95. The Attorney-Client Privilege, supra note 28, at 486. Contra Simmons v. United States, 390 U.S. 377, 394 (1968) (stating that it would be "intolerable that one constitutional right should have to be surrendered in order to assert another").
96. U.S. readers may find this line of argument reminiscent of the opinion in Radiant Burners v. American Gas Association, 207 F. Supp. 771 (N.D. Ill. 1962), rev'd, 320 F.2d 314 (7th Cir. 1963) ("[i]n its historic genesis in the common law [the right to counsel] is so intimately entwined with its great partner, the privilege against self-incrimination, that a person reading its history begins to doubt that two separate privileges ever were originally intended. Rather the one seems to be but an extension and outgrowth of the other"). Chief Justice Campbell's view of the privilege was incompatible with its extension to corporations because, among other reasons, they have no recognized Fifth Amendment privilege against self-incrimination. See Braswell v. United States, 487 U.S. 99 (1988); see also United States v. White 322 U.S. 694, 698-99 (1944). This is not the case in EC law, where companies have a certain degree of protection against self-incrimination. See, e.g., Orkem v. Commission, Case 374/87, [1989] E.C.R.
fense, the consequences of which are twofold. On the one hand,
the confidentiality of lawyer-client communications has a
stronger claim to absoluteness than would be the case under al-
ternative rationales. Under exceptional circumstances, to be
sure, it may still be legitimately superseded by interests deemed
strong enough to take precedence; generally speaking, how-
ever, it admits no interference whatsoever and is not amenable
to balancing in individual cases. On the other hand, no right to
confidentiality arises before the start of an investigation liable to
result in an accusation. Lawyer-client communications outside
the framework of the relationship between a defendant accused
of serious wrongdoing and his counsel remain, of course, cov-
ered by strict confidentiality obligations; as part of an individ-
ual’s private life, they deserve particular protections against arbi-
trary disclosure. Under the logic of the rights-of-defense ratio-
nale, however, they are not privileged against the compulsory
taking of evidence required by the needs of law enforcement.

If this reading is correct, the protection granted under
AM&S not only satisfies, but actually goes beyond the require-
ments set for legal privilege by the ECHR. According to the
Court of Justice in AM&S, the privilege covers “all written com-
munications exchanged after the initiation of the administrative
procedure,” which is equivalent to the “bringing of charges”
under the Convention. As for earlier communications, the
Court affirmed the possibility of extending the privilege to docu-
ments having “a relationship to the subject matter of that proce-

98, [2001] ECR II-729. See also infra note 98 and accompanying text.

97. One such example is the statutory abrogation of the legal professional privi-
lege in the United Kingdom under the Children Act 1989, under which the “para-
mount interests of the child” limit operation of the privilege (and of the litigation privi-
lege) in Children Act proceedings. See In Re L, [1997] AC 1 (H.L. 1997); see also Au-
burn, supra note 12, at 8, 130-31. The Children Act also limits the right to silence. See id. at 87, n.59. The Court of Appeals found a similar abrogation involving tax inspec-
2001). The judgment, however, was reversed on appeal to the House of Lords. See Regina v. Special Commissioner & Another, ex parte Morgan Grenfell & Co Ltd.,
(2001) (amending Directive No. 91/308 on prevention of the use of the financial sys-
tem for the purpose of money laundering, to establish inter alia a duty for certain pro-
fessionals, including lawyers, to report suspicious transactions concerning the affairs of
their clients to the authorities).
In this case, the privilege was held to cover communications which had been passed well before the beginning of the investigation, even before the United Kingdom (where AM&S had its operations) had become a Member State.

If the confidentiality of communications preceding any investigative step is to be reconciled with the construction of the privilege as a right of the defense under the ECHR, it must necessarily be based on the right against self-incrimination, and not the right to counsel. This may have been the rationale underlying the Court's approach in AM&S. Nonetheless, there remains a certain inconsistency between the granting of legal privilege to such communications in AM&S, and established case law entitled the Commission to compel an undertaking to "provide all necessary information concerning such facts as may be known to it" and to disclose documents in its possession "even if the latter may be used to establish, against it or another undertaking, the existence of anti-competitive conduct." The mere fact of being obliged to comply with the Commission's requests for documents already in existence cannot therefore constitute a breach of the principle of respect for the rights of defense or impair the right to fair legal process — both principles restated in recital 23 to Regulation 1/2003. To the extent that it protects written communications passed between client and lawyer well before the start of an investigation, the rule of legal privilege as formulated in AM&S may even afford protection extending significantly beyond that strictly required by respect for the rights of defense as construed by the ECHR, as well as the Court of Justice's own construction of the right against self-incrimination.

II. COMPULSORY DISCLOSURE OF LAWYER-CLIENT COMMUNICATIONS IN COMPETITION INVESTIGATIONS CONDUCTED BY THE EUROPEAN COMMISSION: AM&S REVISITED

A. Legal Privilege Under AM&S: The Law As It Stands

The following deals with the state of the law of legal privilege as it has developed before the Court of Justice. The law is remarkably consistent with the requirements of the rights-of-defense rationale as put forward under section I(B)(2) above.

Virtually the entire law of legal privilege in competition proceedings before the Commission is contained in one single judgment. AM&S originated in a dispute about the confidentiality of a series of documents found at the premises of AM&S during an investigation into a cartel of zinc producers. The company claimed that the documents were privileged written communications between lawyer and client, and refused to produce them for the Commission inspectors. The Commission subsequently issued a decision requiring AM&S to produce the documents.

In reality, the dispute in AM&S was not so much about whether correspondence between lawyer and client could be privileged in competition investigations — the Commission had already accepted this principle in previous public statements and in its submissions to the Court — but rather on the precise scope and practical implications of the privilege itself. According to the Commission, its inspectors should be entitled to examine the contested documents themselves in order to establish "whether they should be used or not," since this was the only way in which the inspectors would "be assured of the[ir] true content and nature." AM&S argued that permitting the inspectors to examine the documents would violate their confidential status, that the inspectors should be satisfied with a description of the documents, and that, in case of discrepancy, the mat-

103. See, e.g., Written Question No. 63/78 by Mr. Cousté to the Commission, O.J. C 188/30 (1978).
ter should be referred to an independent third party. The British government as well as the Consultative Committee of the Bars and Law Societies of the European Community ("CCBE") intervened on AM&S's behalf, supporting a procedure involving recourse to an independent "expert" or "arbitration" in disputed cases. The French government defended the position of the Commission.

The Court could not, however, confine its judgment to establishing procedural rules for the practical resolution of disputes concerning the privileged status of documents. It needed first to address the heart of the matter by deciding whether a rule of legal privilege applies in competition proceedings before the Commission, and, if so, by defining its scope and limitations. AM&S was not an accidental or unimportant judgment. The Court had the benefit of "very full and very distinguished legal submissions" from the parties and three intervenors. After hearing the case and sitting in deliberation twice, the Court reopened the oral procedure and ordered AM&S to produce the contested documents in a sealed envelope. Only the reporting judge and the Advocate-General saw the actual documents firsthand.

The decision reached by the Court starts by reaffirming the Commission's powers, and rejecting any suggestion that third

106. See id. ¶ 3-4. The applicant's absolute view of confidentiality would not even have allowed inspection of the documents themselves by the third party. The Court reports the applicant's position as implying that the third party would only "verify the description of the contents of the documents." Id. ¶ 4.

107. All the parties and intervenors agreed that persistent disputes would ultimately be resolved by the Court itself, the Consultative Committee of the Bars and Law Societies of the European Community ("CCBE") arguing that the Court's determination should proceed "on the basis of an expert's report." See AM&S, [1982] E.C.R. ¶ 8.

108. See I. S. Forrester, Legal Professional Privilege: Limitations on the Commission's Powers of Inspection Following the AM&S Judgment, 20 COMMMN MKT. L. REV. 75, 76 (1983). It is noteworthy that among the cohort of prominent lawyers appearing in the case, two were later to serve as members of the Court of Justice and the Court of First Instance.

109. This was an unusual step, intended by the Court to address the fact that its composition had changed in the meantime. See AM&S, [1982] E.C.R. at 1603.

110. See id. at 1616 (ordering AM&S to send the whole of each of the contested documents to the Court's registry, and explaining that "it may prove necessary for the Court to consider for the purposes of its decision, in particular, the date on which and the place where they were drawn up, the exact occupation or status of the author and of the addressee and sufficient information as to the nature of their contents").

parties should decide on its behalf. In the course of competition investigations, the Commission may require production of the business documents which it considers necessary, including written communications between lawyer and client, insofar as they have a bearing on the market activities of the undertaking. Moreover, it is for the Commission itself, and not the undertaking concerned or a third party (whether an expert or an arbitrator) to determine whether or not a given document must be produced.

The Court then mitigates these categorical statements (referred to as "rules" in the judgment) by recognizing that "certain communications between lawyer and client" are protected from scrutiny. According to the Court, privileged communications must be made for the purposes and in the interests of the client's rights of defense; and must "emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment." The Court bases the second condition regarding the "position and status of an independent lawyer" on a "conception of the lawyer's role as collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interests of that cause, such legal assistance as the client needs." The legal privilege rule "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," and "may not be extended beyond those limits, which are determined by the scope of the common rules on the exercise of the legal profession.”

While there is consensus that these qualifications exclude

113. See id. ¶ 17.
114. See id. ¶ 18 (“confidentiality serves the requirements, the importance of which is recognized in all of the Member States, 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”).
115. See id. ¶ 21.
116. Id.
117. Id. ¶ 24.
118. Id. ¶ 25.
third-country attorneys from the benefit of legal privilege, their significance is not necessarily limited to its "geographic" scope. As discussed below, these statements are of great import with respect to the exclusion of legal privilege for in-house counsel.

Regarding the material scope of the privilege, it covers "all written communications exchanged after the initiation of the administrative procedure," though it may be extended to "earlier written communications which have a relationship to the subject matter of that procedure."\textsuperscript{120} The Court further makes clear that the lawyer's client may waive the privilege by disclosing the written communications if he considers it to be in his best interests to do so.\textsuperscript{121}

The judgment in \textit{AM&S} has been criticized as representing a compromise on the "minimum" common ground that could be found among the Member States.\textsuperscript{122} This seems to be an unfair characterization, for \textit{AM&S} clearly represents a significant extension of existing privilege rules in most Member States. Subsequent accessions have witnessed changes in the laws of several new Member States meant precisely to bring them up to the standard of protection guaranteed under \textit{AM&S}.

What is certain is that the Court in \textit{AM&S} clearly favored the notion of privilege as a fundamental right, establishing a set of rules that are strikingly consistent with the rights-of-defense rationale. Communications are automatically privileged once the Commission "brings charges" by initiating the administrative proceedings, though the privilege may also be extended to ear-

\begin{footnotes}
\footnote{120. \textit{See AM&S}, [1982] E.C.R. \textsuperscript{23}. Concluding that "the principle of the protection of written communications between lawyer and client may not be frustrated on the sole ground that the content of those communications and of that legal advice was reported in documents internal to the undertaking," the Court of First Instance in \textit{Hilti} expanded the scope of the legal professional privilege to include internal notes "confined to reporting the text or content" of communications between lawyer and client. \textit{See Hilti}, [1990] E.C.R. \textsuperscript{18}.
}

\footnote{121. \textit{See AM&S}, [1982] E.C.R. \textsuperscript{28}.
}

\footnote{122. \textit{See Lasok}, supra note 111, at 101 (criticizing the Court's approach as "a reversal of its case law over the last twenty-eight years, a rejection of academic opinion, and a repudiation of the views of a succession of eminent members of the Court . . . including at least one President"); \textit{see also} Opinion of Advocate General Slynn, \textit{AM&S}, [1982] E.C.R. at 1648-50 ("[t]here is complete agreement that when the Court interprets or supplements EC law on a comparative law basis it is not obliged to take the minimum which the national solution have in common, or their arithmetic mean or the solution produced by a majority of the legal systems as the basis of its decision").
}
lier written communications which have a relationship to the subject matter of that procedure. By privileging communications passed between lawyer and client well before any investigation of AM&S had begun, AM&S may actually go beyond the requirements of the rights of defense, as construed under the ECHR. 

But given the facts of the AM&S case, it is possible that the Court saw a link between recognition of the privilege in these earlier documents and one component of the rights of defense, namely the right against self-incrimination. The documents recognized as privileged by the Court concerned advice on EU competition law in view of the United Kingdom’s imminent accession, advice that had been requested expressly to ascertain the prospects of litigation. Within this context, it is possible to read the seemingly obscure notion of “relationship with the subject-matter of the procedure” as conditioning legal privilege in earlier communications on the potential for self-incrimination. Communications with a lawyer made in anticipation of litigation would thus constitute an exception to the principle that compelled disclosure of pre-existing documents does not amount to self-incrimination. This is one way to explain why the Court felt that a privilege based on the rights-of-defense rationale should be extended retroactively to a point in time prior to an investigation by the Commission.

This reading, in turn, supports a “procedural” approach to the notion of a “relationship with the subject-matter of the procedure.” There are at least two possible readings here. A “procedural” one would require a direct link with the investigation where access to the documents is sought by the Commission. For a legal communication passed before the start of an investigation or the initiation of proceedings to be privileged, it would therefore need to have been made in anticipation of such proceedings. Legal advice in this context would be a “preparatory” step in the undertaking’s defense. The second reading would construe the expression “subject matter” literally by requiring merely that the documents concerned contain information related to the alleged infringement. The latter reading appears more consonant with the text of the AM&S decision, though there is one problem: if read literally, it would render the condition imposed by the Court meaningless, since the Commission

123. See supra notes 97-98 and accompanying text.
lacks the power to request or copy documents and records, or to ask questions, unrelated to the subject matter of its investigation.\footnote{124. See Regulation 1/2003, \textit{supra} note 19, art. 20(2)(e), O.J. L 1/14, at 14 (2003) (stating that oral questions must relate to "the subject matter and purpose of the inspection"); \textit{see also} id. art. 20(3) (stating that written authorization for the inspection must "specify the subject matter and purpose of the inspection"); \textit{id.} art. 23(1)(d) (stating that, in the context of oral questioning during an inspection, fines are provided for only in case undertakings fail or refuse to provide a complete answer on "facts relating to the subject matter and purpose" of the inspection).} The Court cannot have wanted to state the obvious.

By way of conclusion, it appears that the rule that communications predating the start of the investigation may be privileged if they present "a relationship to the subject matter of the proceedings" remains obscure. ECHR case law does not provide any assistance in interpreting this condition, because the protection granted in \textit{AM&S} for earlier documents extends beyond the standards required by the rights of defense before the ECHR. This is an area which requires clarification, particularly with respect to its relationship with the rights of defense.

B. In-house Counsel

Much has been said about the discrimination against in-house counsel in the \textit{AM&S} ruling. This has been criticized as unfair and counterproductive. It has been said that corporate clients having their own legal departments are in a worse position than those resorting to external lawyers for legal advice. Concern about the "chilling effect" of the lack of privilege on candid communications with in-house lawyers is loudly voiced. Limitation of the privilege to outside lawyers causes offense to those who understand the rule as implying that in-house lawyers are somehow less principled, untrustworthy, or lacking in integrity.\footnote{125. \textit{See}, \textit{e.g.}, Murphy, \textit{supra} note 7, at 454 ("[j]ustifying the narrow application of the privilege doctrine on vague notions of professional conduct creates a sweeping and negative generalisation about the legal ethics of in-house lawyers. In-house counsel are just as skilled, dedicated and scrupulous as those in independent practice"). \textit{See also} Hill, \textit{supra} note 7. For a detailed analysis of the position of in-house counsel under \textit{AM&S}, see Theofanis Christoforou, \textit{Protection of Legal Privilege in EEC Competition Law: The Imperfections of a Case}, \textit{9 Fordham Int'l L. J.} 1, 15-25 (1985-1986).}

To the extent that criticism against the exclusion of in-house counsel focuses on utilitarian arguments, it is relevant. As seen above, the utilitarian logic could apply to in-house and external lawyers alike. If the rule of legal privilege is to be deline-
ated as an instrumental device aiming at fostering candid communications with lawyers in order to enhance compliance with the law, it may well be advisable to extend it to every person trained in the law, without distinction. This depends only on whether the assumptions about the social benefits of confidentiality underlying the utilitarian view are valid, and whether they hold equally true for in-house counsel. These issues would deserve careful consideration.

However, once we move away from a utilitarian construction of legal privilege — as the Court did in AM&S, basing the privilege on the rights of defense and a specific view of the role of the lawyer — there are compelling arguments to differentiate between independent lawyers and in-house counsel. By and large, the role of in-house counsel is advisory in nature, and from a quantitative point of view, their work is much less likely to be part of the preparation of a defense in legal proceedings. By operation of law in many cases, as an empirical reality in others, this role is overwhelmingly played by independent counsel.

The core question around which the debate about in-house counsel privilege revolves is clearly the requirement of “independence.” It is a simplistic view of things to read in this requirement an implicit moral judgment on the intellectual independence of the in-house lawyer. In AM&S the court appears to have been more concerned with the “structural” independence of the lawyer. It is worth noting that the Court did not define the concept of independence positively (i.e. a lawyer who is a member of the Bar is independent). Rather, it defined it negatively (the lawyer who is in a relationship of employment is not independent). Communications with employed lawyers, independently of bar membership, are not within the scope of the privilege. Quite clearly, the Court did not consider that bar membership alone guaranteed the appropriate level of independence to trigger a privilege against compelled production of evidence.

An employed lawyer cannot be said to be structurally different from the undertaking employing him. It is not a “third party” to which communications may pass. One may refer by analogy to case law of the Court of Justice and the Court of First Instance regarding the notion of undertaking as the entity subject to the obligations imposed by the competition rules. According to that case law, when employees and managers act
within the scope of their employment, they do so in furtherance of their employer's economic activity. As the Court explained in Becu, in an employment relationship employees perform the work in question "for and under the direction of" undertakings; for the duration of that relationship, they are incorporated into the undertakings concerned and thus form an economic unit with each of them. While this case law is not necessarily controlling for our purposes, it illustrates a more general trend, visible in other cases such as Euro-Lex European Law Expertise. There, the Court of First Instance rejected as inadmissible an application signed on behalf of a German company by a lawyer who was also one of its directors. The lawyer signing the application was entitled, under German law, to represent the company before the German courts. Yet the Court of First Instance was unimpressed. It stated firmly the principle that valid representation in proceedings before it require not only that the lawyer is authorised to practise before a court of a Member State, but also that the lawyer must be "a third party" who is "independent of the applicant." In the same vein, the Court of Justice has clearly established in Lopes that a lawyer cannot appear before the Court representing himself, even where he would be entitled to do so before Member State courts. This is an important line of case law for the present purposes, because the AM&S Court relied explicitly on the very provision of the Statute of the Court which was interpreted in Euro-Lex and Lopes. The Court's view of the independent lawyer appears thus to imply a threshold requirement of "otherness" in relation to the client, which is ar-


128. The Court's procedural rules only state, in relevant part, that "parties must be represented by a lawyer" and that "[o]nly a lawyer authorised to practise before a court of a Member State . . . may represent or assist a party before the Court." See Protocol on the Statute of the Court of Justice, art. 19, annexed to the TEU, the EC Treaty, and the Euratom Treaty, O.J. C-325/167 (2002), at 171.


guably lacking in the case of employed lawyers. Indeed, in a number of Member States, employed lawyers may not appear in court on behalf of their employer.132

A second ground in the AM&S judgment for excluding employed lawyers from the scope of the legal privilege rule appears to lie in the part of the judgment often read as defining simply the “geographical” requirement of qualification in one of the Member States. This requirement seems rather to highlight the fact that the profession of independent lawyer is regulated in all Member States. That is, the law sets conditions as regards access to the profession and as regards its continued exercise, and imposes, directly or indirectly, rights and duties on the members of the profession. Persons not fulfilling those conditions cannot exercise the functions attached to the profession, and persons who cease to fulfil them are disciplined and may be excluded from further exercising the profession. More importantly, there is a common understanding of the profession of independent lawyer, reflected in the existence of common rules. Mutual trust in the level of regulation has allowed unhindered freedom of establishment and provision of services across borders. This common understanding, these common rules, and this mutual recognition simply do not exist in the case of in-house counsel. In most, if not all, Member States, companies are free to staff their legal departments as they see fit, and there is no rule forcing a company to dismiss or not to employ in-house counsel having engaged in unethical behavior. Even in the countries where there is some sort of regulation, it does usually not go further than creating a protected “title” for company legal advisors; disciplinary powers are limited, and may depend on voluntary affiliation to the governing body of the profession. This is the case now in Belgium, for example, where the unethical professional may be barred from using the title of “company lawyer” (“juriste d’entreprise”), but nothing prevents his continued employment as in-house counsel.133

132. In Germany, according to the Bundesrechtsanwaltsordnung [BRAO] [Federal Statute on Attorneys], an undertaking may not be represented in court by a Syndikus-Anwalt, i.e., a salaried lawyer, whose function is advising the undertaking on legal questions. See BRAO § 46, Abs. 1 (Germany). For a review of civil law jurisdictions in this regard, see Opinion of Advocate General Slynn, AM&S, [1982] E.C.R. at 1655, and Christoforou, supra note 125, at 18 & n.56.

133. See J.-P. Buyle & I. Durant, La confidentialité des avis des juristes d’entreprise, in L.e
The third notion that appears relevant to the Court’s exclusion of in-house counsel relates to incentives and disincentives. Independence is not, in this context, a matter of moral worth. Employed lawyers are not likely to be more dishonest or less ethically minded than independent attorneys, or any other person for that matter. But a decision about the appropriate personal scope of legal privilege cannot stop at the functional overlap between in-house and external counsel. Because access to part of the truth is sacrificed at the altar of legal privilege, a careful analysis of systemic incentives and disincentives is required. And the incentives and disincentives faced by an external lawyer and an employed one are undoubtedly different. Independent lawyers face the prospect of disciplinary action, with the attendant loss of reputation and its consequences on business. Sanctions may include suspension or disbarment, implying the dramatic loss of the lawyer’s livelihood. The independent lawyer faces the prospect of liability for malpractice, and in some countries there is a legal obligation to obtain insurance to cover that risk. These very prospects keep at bay temptations to engage in “sharp” practices—or at least they should. Independent lawyers may refuse representation, indeed any involvement with a client, if they feel that it would be contrary to their conscience or ethics. Indeed, they are often required to: in Belgium, the attorney’s oath includes the duty to refuse to give advice or representation in any case which cannot be deemed just in conscience; similarly, in Germany, the Rechtsanwalt (independent non-company lawyer) must refuse instructions contrary to the law or ethics and is obliged to decline or cease the representation if faced with such instructions. One may legitimately suspect that these considerations underlie the emphasis in the judgment in AM&S on the “counterpart” to the protection offered by legal privilege,

SECRET PROFESSIONNEL 187, 206 (2002) (underlining that the title is not necessary for the exercise of the profession).

134. In France, this insurance is usually covered by a collective insurance policy contracted by the different barreaux (bar associations) for its members. In the case of salaried lawyers, this is either unknown or extremely rare in the legal orders of many Member States. Concerning Spain, see F. Álvarez López, LA RESPONSABILIDAD CIVIL DE ABOGADOS, PROCURADORES Y GRADUADOS SOCIALES 141-47 (2000); see also A. Bayano Sarrate, LA RESPONSABILIDAD PROFESIONAL DEL ABOGADO COMO ASESOR DE EMPRESAS, in ÉTICA DE LAS PROFESIONES JURÍDICAS 111 (J. L. Fernández Fernández & A. Hortal Alonso eds., 2001).

135. See Code Judiciare [Judiciary Code] art. 428 (Belg.). For text of the oath, see id. art. 429.
in the shape of "the rules of professional ethics and discipline laid down and enforced in the general interest by institutions endowed with the requisite powers for that purpose."\textsuperscript{136} Although the Court was clearly of the view that bar membership alone was not enough, it took into account the role played by the deterrent effect of the deontological rules as a reinforcement of the lawyer's independence from the client.

By contrast, employed lawyers depend on their employer for their livelihood, and do not usually have complete control over their staff, who are also dependent on and accountable to the employer. Employed lawyers are not free to choose their client or the case, and more generally lack real freedom to refuse work which they consider objectionable; in many companies, they are subject to a hierarchical structure and the complex ethos of corporate personal relationships. Job security, pay raises, promotion, dismissal, and financial interests in the business results of the company\textsuperscript{137} are real issues faced everyday in company legal departments. Vigorous opposition to an objectionable course of conduct favored by top executives or company directors may be difficult. And after unsuccessful opposition, the lawyer may face a hard choice between resignation or submission. Some authors invoke abundant examples of litigation involving the allegedly

\begin{itemize}
  \item \textsuperscript{137} In the United States, long-term incentives (bonuses and stock options) as a percentage of grand total compensation for chief legal officers employed in corporations were 44.8\% in 2000 (in value U.S.$459,873). See Amy I. Stickel, The Grim Outlook: In-House Counsel Compensation Remains Flat as Economy Slumps, CORP. LEGAL TIMES, Mar. 2003 (using data from several sources). Concerning staff attorneys, nearly a quarter (23.9\%) of their salaries in 2000 consisted of such long-term incentives (U.S.$33,850). See id. These figures saw a dramatic reduction in 2002. See id. By 2004, according to the Altman Weil Law Department Compensation Benchmarking Survey of U.S. corporate law departments, the value of stock options in compensation packages of chief legal officers had reached U.S.$618,800 (deputy chief legal officers U.S.$367,200 and division general counsel U.S.$248,300). See Press Release, In-House Lawyers See Healthy Increases in Compensation, New Survey Reports, Altman Weil, Inc. (Oct. 20, 2004), available at http://www.altmanweil.com/news/release.cfm?PRID=46 (last visited Aug. 1, 2005). In Canada, three-quarters of lawyers employed as general counsel receive an annual bonus; over 50\% receive stock options; 61\% of other in-house lawyers who are not general counsel received a bonus averaging Can.$21,000; 22\% received stock options averaging Can.$20,000. See Kirsten McMahon, Corporate Dividends: The Canadian Lawyer 2004 In-House Counsel Compensation Survey, CANADIAN LAWYER, May 2004, available at http://www.canadianlawymag.com/pdfs/In_House_Comp_Survey.pdf (last visited Aug. 1, 2005). In Europe, this information is not easily available, but bonuses are generally said to represent about 10\% of in-house remuneration, and stock options are usually granted only at senior level.
\end{itemize}
wrongful dismissal of employed lawyers who refused to assist their employer in doubtful endeavors or refused to violate their code of ethics. The large number of such cases is said to confirm the high ethical standards of in-house counsel and their ability to resist pressure to violate their ethical responsibilities. It is, of course, also possible to take these as illustrations of the very serious consequences that an employed lawyer may have to face when confronted with dubious or illegitimate demands by his employer, and of the insufficient protection offered by bar membership and ethical duties. In their vast majority, independent lawyers do not have to contemplate the same dire consequences and are therefore in a better position to resist similar pressures. Anecdotal — and only anecdotal, but chilling — evidence shows how far legal privilege can be diverted from its purpose in corporate settings. In the practical setting of a Commission inspection, arguments could start at the basic question of whether in-house privilege bars access to the lawyer's office within the company.

An argument sometimes raised against the exclusion of communications with in-house legal advisors from the benefits of legal privilege is that it treats differently the Commission and the undertaking. According to the case law (most notably the order in the case of Carlsen), the opinions of the Legal Services of the European institutions are internal documents, gen-

138. See Hill, supra note 7, at 188-89 nn.193-95 (compiling reported cases and literature concerning suits for wrongful discharge of in-house lawyers, noting that courts in the United States have seldom permitted such suits, and stating that "[t]he number of these cases... supports the premise that in-house counsel do try to force their companies to obey the law").


erally not to be disclosed. Several writers141 refer to this, and denounce what they see either as inconsistency, or ominous inequality. This is the "if you can see mine, I can see yours" argument, and does not lack superficial appeal. Upon closer scrutiny, however, it may well turn out to be not only simplistic but plainly wrong.

First, the argument ignores that an undertaking suspected of breaching the law and the public authorities entrusted with enforcing the law are not identical, but are in very different positions. The authority has powers of investigation without there being parallel or equivalent powers in the hands of the undertaking as against the administration or the judiciary. It would thus be mistaken to view the issue of access to Commission internal documents as one of "equality of arms" within the administrative competition proceedings, simply because in these proceedings the Commission acts as the law enforcement authority and initial adjudicator, and the undertaking is targeted by an investigation about alleged breaches of the law, founded on inductive evidence.142 Authorities and courts are vested with fact-finding powers, including powers of compulsion, which are obviously not available to the undertakings under investigation. This imbalance between the authority and the target of an investigation is inherent to the prosecution of serious wrongdoing. It is not confined to legal communications: business secrets and similarly sensitive data are obtained during investigations, without a corresponding right for the undertakings to pay unannounced visits to the prosecution and inspect their premises. In plain terms: the argument "if you see mine, I can see yours" forgets that, in competition proceedings, documentary evidence is sought not as a matter of caprice or routine checks, but in the framework of an investigation into potentially serious breaches of the law.

Second, the argument forgets that the *Carlsen* case was only concerned with the issue of access to the opinion of the Legal Services of the institutions in the specific frame of the general right of citizens of the Union to access documents of the Com-

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141. See, e.g., Auburn, *supra* note 12, at 28; Murphy, *supra* note 7, at 452.

142. See *supra* note 8 and accompanying text (noting that the treatment of hypothetical legal privilege claims in merger control proceedings, where a violation of the law is, generally speaking, not at stake, is outside the scope of this article).
community institutions, first regulated in a “code of conduct” and a series of decisions in the 1990s, and today by Regulation 1049/2001. These provisions are exclusively concerned with “transparency” or “openness” in the work of the European institutions. For that purpose they provide for a generic right of public access to documents. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, i.e. documents drawn up or received by an institution and in its possession. There are exceptions to this principle of general access, including \textit{inter alia} opinions for internal use as part of deliberations and preliminary consultations within the institution. Third-party documents are even less widely disclosed: in particular, access to a document is not granted if disclosure would undermine the protection of privacy or the commercial interests of a natural or legal person. Before disclosing third-party documents, the institution must consult the third party with a view to assessing whether an exception is applicable, unless it is clear that the document must or must not be disclosed. It is quite obvious that these exceptions cover not only internal Commission documents, but equally — and probably to a greater extent — all evidence gathered by the Commission in the course of competition investigations. Clearly, a request of access by any citizen of the Union to an opinion of the Commission’s Legal Service would be denied in the very same manner as a request for access to the legal advice given by a lawyer —


145. See Council and European Parliament Regulation No. 1049/2001, art. 2, O.J. L 145/43 at 1, 3 (2001). The institutions may also grant access to documents to any natural or legal person not residing or not having its registered office in a Member State. See id. art. 2.

146. See id. art. 4.

147. See id. art. 4(4).
whether in-house or external — to an undertaking under investigation in a competition case.

The only acceptable parallel that could be drawn between the position of an undertaking subject to an investigation into possible infringements of the competition rules and the position of the Commission is where the latter appears as defendant in an appeal against one of its decisions, and there is suspicion that the Commission has misused its powers. Then, the position of the Commission is arguably similar to that of the undertaking suspected of serious wrongdoing. And there, not only is the *Carlsen* case law not controlling, but a number of judgments make clear that, even though in the course of the administrative procedure the Commission does not have to disclose internal documents, the Court is prepared to order disclosure of internal Commission documents in the context of judicial proceedings about the legality of the Commission’s acts, if the aim is to prove through an inspection of internal documents that the Commission has abused its discretionary powers. It should not be surprising that such disclosure would only be ordered at the request of a party, where the circumstances give rise to serious doubts as to the real reasons underlying the decision and, in particular, to “suspicions that those reasons were extraneous to the objectives of Community law and hence amounted to a misuse of powers” or other serious irregularities. How-

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150. Under Article 24 of the Statute of the Court of Justice, the Court may require the parties to produce all documents and to supply all information which it considers desirable. Under Article 64(3)(d) and (4) of the Rules of Procedure of the Court of First Instance, measures of organization of procedure may consist of asking for documents or any papers relating to the case to be produced and their adoption may be proposed by the parties at any stage of the procedure.


C. Procedural Handling of Legal Privilege: The Proof Dilemma\footnote{153}{See The Future Crime or Tort Exception to Communications Privileges, supra note 34, at 736.}

Privileges against compelled production of evidence present an apparently insoluble dilemma to the adjudicator. The dilemma is that often the only way to establish whether the privilege applies is to look into the content of the documents themselves. Thus, the adjudicator will either have to examine the allegedly privileged communication directly — at the risk of trumping the very rule whose applicability is at dispute — or tolerate a potentially huge margin of uncertainty in resolving disputed claims of privilege. As the AM&S case itself clearly shows, privilege claims cannot be adjudicated on the exclusive basis of declarations of the party claiming privilege. At some point, somebody has to examine the documents. This dilemma does not emerge, to the same extent at least, when the privilege is claimed against compelled testimony.\footnote{154}{As long as the witness has not spoken, the allegedly privileged material does not exist. Once the statement has been produced, the issue becomes one of admissibility of the information disclosed. Since the information has already been disclosed, the issue of admissibility can be adjudicated on the basis of an examination of the information itself.} For this reason, only the situation where the privilege is raised to bar production of existing documentary evidence needs to be considered here.

I submit that, unlike other potentially confidential communications, lawyer-client communications present a much less serious version of the proof dilemma. This conclusion derives also from the previous discussion concerning the rationale of legal privilege: some exceptions to compelled testimony and other ev-
identiary privileges are probably motivated by the protection of the privacy interests of the communicating parties. Let us take marital privilege (or, in many civil-law countries, the parallel doctrine of incompetence of close relatives to testify) as the paradigmatic example, and suppose that in a given jurisdiction it protects intimate correspondence between husband and wife. The proof dilemma is exceptionally acute here, because the expectation of confidentiality is anchored chiefly in privacy concerns. And privacy will suffer irremediably even if disclosure is made only for the purposes of adjudicating the claim of privilege. The case is strong here for disposing of privilege claims in a manner that does not involve disclosure of the contested material. This forces the law to create very strong presumptions of privilege, emanating simply from the existence of the privileged relationship.

The situation is different concerning legal privilege. If we view legal privilege as chiefly concerned with the rights of defense, and accept that the privacy rationale is not its central concern, the client's interest is confined to the possible use in legal proceedings of communications with his lawyer liable to result in a decision unfavorable to his interests. The only reason why the privilege is not confined to an evidentiary rule of inadmissibility is that the viewing of the evidence by the authority or jurisdiction competent to decide the substance of the proceedings may taint its vision of the case, and — in the case of an investigating authority or magistrate — may consciously or unconsciously give a different direction to the investigation. If disclosure for the purposes of adjudicating the privilege claim can be done in such a manner that guarantees the absence of harm to this paramount interest, there will be no harm to the right of defense, and thus the client's (legitimate) interest in non-disclosure will be preserved.

This reasoning, which stems inevitably from the view of legal privilege as a corollary of the rights of defense, finds support in the order of September 27, 2004, of the President of the Court of Justice, ruling on the appeal in the Akzo Nobel interim measures case. The President of the Court of Justice overturned the order of the President of the Court of First Instance partially
granting interim measures, on the grounds that the condition relative to urgency was not satisfied, and therefore interim measures were not warranted.

The President of the Court of First Instance had considered that it had not yet been established that, in the context of an inspection, the Commission’s officials must refrain from “casting even a cursory glance over the documents” which an undertaking claims to be protected by professional privilege. Although the Commission inspectors did actually “cast a cursory glance” over some of the documents (and copied in full another set of documents), the President of the CFI granted interim measures to prevent the Commission from looking further into the documents until the Court had issued its final ruling.

The President of the Court of Justice disagreed, and ruled that one of the conditions for granting interim measures (“urgency”, i.e. the likelihood of serious and irreparable harm) was not satisfied. He stated in this regard:

The Court has . . . held, with respect to a decision by the Commission to order an investigation, that if that decision were annulled by the Community judicature, the Commission would in that event be prevented from using, for the purposes of proceeding in respect of an infringement of the Community competition rules, any documents or evidence which it might have obtained in the course of that investigation, as otherwise the decision on the infringement might, in so far as it was based on such evidence, be annulled by the Community judicature . . . .

The same principles apply where a decision of the Commission not to allow professional privilege for one or more documents is at issue and that decision is annulled by the Community judicature.

The Commission accepts, moreover, that if the decision of 8 May 2003 were subsequently held to be unlawful, it would be required to remove from its file the documents affected by that unlawfulness and would therefore be unable to use them as evidence.

In those circumstances, the possibility of the unlawful use of the . . . documents in proceedings for infringement of

the Community competition rules brought by the Commission is purely theoretical, and in any event improbable.

In view of the Commission's undertaking not to allow third parties to have access to the . . . documents until judgment is given on the main application in Case T-253/03 and of the impossibility of the Commission using those documents as evidence in proceedings for infringement of the Community competition rules if the decision of 8 May 2003 were held to be unlawful, only the disclosure of the documents in question could serve to establish that the condition of urgency is satisfied in the present case.156

Recalling that the Commission's officials had already examined, "albeit cursorily," the documents in question during the inspection, the President of the Court ruled that "[t]he harm which might possibly result from a more detailed reading of those documents is not sufficient to establish the existence of serious and irreparable harm, since the Commission is prevented from using the information thus obtained."157

By focusing its analysis of possible harm arising from disclosure of the allegedly privileged documents exclusively on the possible impact on the proceedings before the Commission, the Order follows a reasoning that is entirely in harmony with a view of legal privilege as a corollary of the rights of defense.

To be sure, and despite what a cursory reading might suggest, I submit that the President of the Court of Justice did not transform legal privilege exclusively into a rule about the admissibility of evidence. He appeared to accept that disclosure of privileged information could be harmful in itself, even if the Commission does not disclose it further to third parties and does not use it in evidence in the proceedings. The Order states that "mere reading by the Commission of the information in the . . . documents, without that information being used in proceedings for the infringement of the Community competition rules, may possibly be capable of affecting professional privilege."158 However this statement does not indicate acceptance of other rationales for the privilege apart from the preservation of the rights of defense of the client in the competition proceedings before

157. Id. ¶ 42-43.
158. Id. ¶ 41.
the Commission. It stands simply for the proposition that legal privilege may be more than a rule about the admissibility of evidence. However, it is true that the Order just summarized appears to take away some of the sanctity of legal privilege. Again, I suggest, this is entirely consistent with a view of legal privilege as an emanation of the rights of defense.

The developments above, and the Order of the President of the Court of Justice in *Akzo*, strongly suggest that proper adjudication of legal privilege claims in competition proceedings does not require a battery of presumptions, but should proceed on the basis of limited disclosure of the allegedly privileged material to a person, organ, or magistrate not involved in investigating, prosecuting, or deciding the legal proceedings where the relevant documents could be used as evidence, and subject to the strictest duty of confidentiality. This person or organ should be able to directly examine the documents for which confidentiality is claimed. From a utilitarian perspective, limited disclosure of this type dramatically increases the probability that claims of privilege will be correctly adjudicated, and thus will foster the flow of the type of information that the privilege is intended to protect. While in the adjudication of private conflicts there seems to be no reason why this role could not be played by any independent third party agreed by the parties, matters of public law require disclosure to be made to, and applicability of the privilege decided by, a public authority.

This direction is clearly illustrated by the approach of the Court in *AM&S*, where the contested documents were sent to the registry in a sealed envelope, and were seen only by the reporting judge and the Advocate-General. There is no discernible way in which this procedure could have harmed the rights of defense, (or indeed any other legitimate interests) of the undertaking. This is even so in a case which presented a critical setting for the "proof dilemma," because the privilege claim was being decided by the full Court, with all the judges deliberating. Therefore the integrity of the rights of defense required disclosure to be as limited as possible, because there was a clear possibility that the case on the substance would subsequently be brought before the Court for determination by all or some of the same judges. Under normal circumstances, the privilege claim could be decided by a chamber of the Court, and any subsequent conflict about the substance of the case could be allo-
cated to a different chamber. In any event, a judge involved with the adjudication of the privilege claim could always recuse him- or herself from subsequent participation in the case.

The proper way to dispose of privilege claims before the Court seems therefore relatively unproblematic. What about the earlier stages? Unless the prospect of litigating away every disputed privilege claim appears satisfactory, some improvement would be desirable in the Commission’s procedures to address the proof dilemma in disputed privilege cases. Recourse to third parties does not seem advisable in procedures involving the application of public law. Moreover, any procedure involving arbitration or the intervention of external experts would encounter the obstacle that this was quite clearly excluded by the Court of Justice in AM&S, where it stated that it is for the Commission itself, “and not the undertaking concerned or a third party, whether an expert or an arbitrator, to decide whether or not a document must be produced to it.”

This “rule” formulated by the Court may be interpreted as having some meaning beyond permitting the Commission to adopt a “blind” decision requesting production which could then be challenged by the Court. At the level of the Commission itself, a procedure might be devised whereby the proof dilemma could be resolved by disclosure of the contested documents to an organ not involved in the investigation and adjudication of the substance of the competition case. Although the inspectors are not the decision-makers, and very often are competition officials not involved with the case, enlisted solely for the purposes of the inspection, they are not well-placed to adjudicate borderline privilege claims. Inspectors usually operate under the direction of officials in charge of the investigation, and their duties during the inspection place them clearly in an adversarial position in relation to the undertaking. On the other hand, it seems extreme to believe that mere assertion of privilege should in all cases suffice to prevent the inspectors from viewing a document. It cannot be ruled out that, faced with an improper claim of privilege, the inspectors would be justified in reviewing a document and copying it. However, in cases of genuine dispute, inspectors

159. See Lasok, supra note 111, at 108.
should, as they do, refrain from reading the contents of the document, and arrange for a secure procedure for integral copies to be made of allegedly privileged material, and such copies to be secured and protected against any tampering. A “sealed envelope” taken away from the premises and deposited in a safe place appears to be a satisfactory procedure which protects the interests of all involved. That the “safe place” should be under the Commission’s control and not that of the company or a third party seems inevitable and largely incontrovertible.

The next step is where there seems to be scope for improvement. The European Court of Human Rights has accepted that review of communications with a lawyer could be accepted under adequate safeguards. In *Erdem v. Germany*, it held that because the review of correspondence was effected by an independent magistrate not linked with the investigation and under an obligation of secrecy regarding the information acquired through such review, sufficient safeguards had been taken.¹⁶¹ An independent organ entrusted with ensuring respect of the rights of defense throughout the proceedings exists within the Commission: the Hearing Officers.¹⁶² Subject to review by the Court, a safe procedure with adequate guarantees could be devised whereby the contents of the documents in dispute would be briefly made accessible to one of the Hearing Officers, perhaps in the presence of the undertaking and the official managing the case, so that he or she would be able to make a determination on behalf of the Commission with the aid of precise *in pectore* knowledge of the nature and contents of the document. The documents would then be put back in a sealed envelope. The Hearing Officer in question would either take the decision him- or herself (this would require providing for delegation of


¹⁶². Hearing Officers are “independent persons experienced in competition matters” with the “integrity necessary to contribute to the objectivity, transparency and efficiency” of competition proceedings. Their terms of reference are framed so that they are exclusively concerned with the rights of defense of the undertakings throughout the whole procedure. Their functions include, *inter alia*, presiding over and conducting hearings, and deciding on claims of confidentiality regarding information to transmit to third parties, and publication of decisions. In order to ensure their independence, the Hearing Officers are attached (for administrative purposes only) directly to the member of the Commission with special responsibility for competition. See Commission Decision No. 2001/462/EC, ECSC, O.J. L 162/21 (2001) (determining the terms of reference of hearing officers in certain competition proceedings).
powers by the Commission to the Hearing Officers, as is the case today for a number of other decisions) or simply report to the Commission and propose either a decision requiring production of the document, or a decision that the documents should not be used and should be returned to the undertaking. The decision to request production of the document under either Articles 18, 20 or 21 of Regulation 1/2003 would of course be subject to appeal before the Court of First Instance, and interim measures would be available in the same manner as today. But the advantage would be that Commission's decisions on privilege claims would be taken soundly, rather than blindly. If necessary, the Hearing Officer who read the allegedly privileged documents could be restricted from being otherwise involved with the case.

This proposal would probably require some adjustments to the Mandate of the Hearing Officers, perhaps even reconsideration of their hierarchical position: placing them under the direct authority of the President of the Commission would remove them further from the investigative and decision-making process. However, the main guarantees of independence from the prosecution, concern with respect of the rights of defense, and no participation in the investigation and adjudication of the substance of the case, are already in place.\(^\text{163}\)

By way of conclusion, I submit that the proof dilemma does not present genuine difficulties in the approach to legal privilege in competition proceedings before the Commission. \textit{AM&S} has shown a procedural path that is both workable and respectful of all interests at stake. Its only inconvenience is that effective adjudication of privilege claims requires either negotiation and mutual concessions — with the concomitant potential for incorrect adjudication — or systematic litigation, a costly and time-consuming solution, fraught with risks of abuse.\(^\text{164}\) Review of disputed documents by one of the Hearing Officers, subject to

\(^{163}\) A not very different procedure had been suggested in \textit{AM&S} itself by Advocate General Warner. \textit{See AM&S}, [1982] E.C.R. at 1640 (exploring, but not retaining, the possibility that the contested documents could be "sent in a sealed envelope for perusal by, say, someone in the Commission's Legal Service, who would be required to impart its contents only to the Members of the Commission responsible for taking the actual decision on the claim . . . who would be required . . . to take no further personal part in the case").

\(^{164}\) \textit{Contra Christofourou, supra} note 125, at 48 (approving the \textit{AM&S} procedure as "reasonable," and stating as the only difficulty that it "could make the Court of Justice
appropriate guarantees and necessary adaptations of and changes to the Hearing Officers’ mandate, would improve the process without significant detriment to the rights of defense of the client which the privilege seeks to protect.

D. Legal Developments

1. Powers of the Commission in Competition Investigations

A brief reminder of the Commission’s investigative toolbox appears useful, in order to ascertain whether Regulation 1/2003 creates new situations where claims of “legal privilege” against compelled production of evidence on the basis of the AM&S case law will arise. Chapter V of Regulation 1/2003 (Articles 17-22) sets out the investigative tools available in competition proceedings conducted by the Commission. Stated briefly, these include:

- the power of the Commission to require undertakings to provide information;
- the power to conduct inspections at the premises of any undertaking or association of undertakings (and, in case of suspected serious infringements, at other premises including private dwellings of the undertaking’s directors, managers and staff);
- the power to take and record statements from any natural or legal person who agrees to be interviewed.

These are largely the same powers already enjoyed by the Commission under Regulation No. 17. The only substantial differences concern the express statutory recognition of the power to take voluntary statements, the new power to inspect non-business premises, the possibility to affix seals on premises, books or records during an inspection, and the new wording of

into a court of first instance,” something “definitely not intended by the Treaties”). Note that a Court of First Instance exists today, which was not the case in 1982.

165. For the sake of brevity, the “sector inquiries” or investigations into “types of agreements” provided for in Article 17 of Regulation 1/2003 are not listed here. These allow the Commission, where market conditions suggest that competition is restricted, to undertake investigations in a given industry or about similar agreements across industries. This Article does not provide for any additional evidence-gathering tools, but allows the Commission in such circumstances to use its standard investigative powers (with the notable exception of inspections at non-business premises).

166. Council Regulation No. 17/62, 13 O.J. 204 (1962) (First Regulation implementing Articles 85 and 86 of the Treaty, as subsequently amended) [hereinafter Regulation 17].
Article 20(2)(e), which suggests an expansion of the old power to request "oral explanations on the spot" during an inspection. These will be briefly commented on in turn, with a view to determine whether the changes are likely to have any bearing on the question of legal privilege.

Under Article 19(1) of Regulation 1/2003, the Commission can take only voluntary statements. While this is, technically, a new provision, it may well not amount to a new power in substance. Nothing before Regulation 1/2003 prevented any individual or undertaking from producing written or oral statements before the Commission, and nothing prevented these statements from being used in the proceedings. There is no compelled production of evidence, and there is not even a legally enforceable duty to produce a complete, truthful, and accurate statement.

There seems to be little in this "new" investigative power that could be characterized as expanding the categories of evidence available to the Commission in a manner that could give rise to a claim of legal privilege. One could imagine the case of a lawyer voluntarily appearing before the Commission to disclose legal advice given to the undertaking under investigation. The absence of any element of compulsion would however place this hypothetical in a slightly different situation not addressed in AM&S. The issues raised by a purely voluntary statement concern at most the admissibility of the statement as evidence in the proceedings (or its probative value against the undertaking), and the consequences of the breach of confidentiality obligations by the lawyer. The first issue differs from the subject of the discussion here, and would be addressed at the stage of an appeal against the Commission's final decision on the merits of the case, perhaps under the same substantive rules defining the scope of the privilege, but not necessarily. The second issue concerns only the relationship between the lawyer and the client; it is not governed by Community law, but by national laws, and would be

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167. It is noteworthy that Regulation 1/2003 does not provide for any sanctions if voluntary statements made under Article 19 prove later to have been incomplete, misleading, or even false. See Regulation 1/2003, art. 23(1).

168. An important point is that many of the practical difficulties involved in designing a rule against compelled disclosure are absent in application of the "admissibility" prong of the rule as against voluntary statements in breach of such a rule. The precise nature and contents of the communication are available at the time the Commission or the Court would need to address the issue of admissibility, and any harm to the client does not originate in use of compulsory powers.
decided in proceedings before national courts. It is not an issue specific to the lawyer; a voluntary statement by a doctor, an employee, or an accountant could likewise give rise to civil or criminal liability for breach of contract, or for breach of professional obligations imposed by law in some Member States.

Article 20(2) (e) of Regulation 1/2003 also deserves some attention. It allows the Commission inspectors "to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers." This contrasts with the laconic provision in Regulation 17 empowering the Commission inspectors "to ask for oral explanations on the spot,"169 which the case law had interpreted as limiting the inspectors' power to seeking explanations about the books and records under examination.170 While the new provision appears to expand the scope of permissible questioning, it remains to be seen how it will be interpreted by the Community courts. While this is unforeseeable at the time of writing, some observations may nevertheless be made.

To determine whether Article 20(2) (e) can be considered "compulsory" requires that a distinction be made between the undertaking and the individuals subject to questioning. The latter would not seem to be under direct compulsion to speak. In case of failure or refusal to provide a complete answer, Article 23(1) (d) of Regulation 1/2003 contemplates fines on the undertaking, but penalties on the individuals subject to questioning are not provided for. National sanctions might be envisaged, although Article 12(3) of Regulation 1/2003 contains considerable limits on the possibility that the information exchanged between authorities could be used by a national authority to impose sanctions on natural persons, and excludes custodial sanctions. It could perhaps be argued that the refusal to answer in itself constitutes "information" exchanged between the Commission and a national authority. The question remains to what extent national sanctions (under domestic provisions concerning obstruction of investigations, for example) could be imposed on individuals refusing to answer questions, bearing in mind

169. Regulation No. 17, art. 14(1)(c).
that, if the individuals risk being prosecuted themselves, they may well have a right against self-incrimination and to remain silent. The question may turn out to be theoretical: the prospect of sanctions for obstruction appear much more applicable to the "old" powers to inspect books and documents (where an employee would attempt to block the door, for example, or refuse to indicate the location of certain files), than in the context of questioning (where one would expect employees simply not to remember facts and information, rather than refuse categorically to speak).

Article 20(2)(e) allows the inspectors to question "any representative or member of staff." It is not clear what a "representative" is in this context, but the difference seems to matter. Regulation 773/2004 ("the implementing Regulation")\(^{171}\) provides that

In cases where a member of staff of an undertaking or of an association of undertakings who is not or was not authorised by the undertaking or by the association of undertakings to provide explanations on behalf of the undertaking or association of undertakings has been asked for explanations, the Commission shall set a time-limit within which the undertaking or the association of undertakings may communicate to the Commission any rectification, amendment or supplement to the explanations given by such member of staff. The rectification, amendment or supplement shall be added to the explanations as recorded . . .

It appears thus that only explanations given by "members of staff" may be rectified, amended, or supplemented.\(^{172}\) On its face, this provision excludes rectification or amendment for explanations provided by a "representative." Comparing this provision with Article 23(1)(d) of Regulation 1/2003 (which provides that fines may be imposed on undertakings where they fail to rectify within the time limit fixed by the Commission an incorrect, incomplete, or misleading answer given by a member of their staff to questions in the course of inspections), it appears


\(^{172}\) One of the recitals to the regulation clarifies that "[t]he explanations given by a member of staff should remain in the Commission file as recorded during the inspection". Regulation No. 773, Recital 4, supra note 171, O.J. L 123/18 (2004).
that explanations by a staff member are always subject to rectification or amendment. Consequently, any person authorized to speak on behalf of the undertaking must be deemed a "representative".

Where does this leave us regarding legal privilege claims arising in the context of questioning? It may be argued that the answers to the inspector's questions do not constitute lawyer-client communications, but an alternative source of evidence for facts and information. As long as the questioning concerns facts, no privilege claim should arise, since it is generally accepted that the privilege covers lawyer-client communications, but not the underlying facts contained in such communications. Therefore, questions about the contents of a contract which cannot be found, or about commercial actions and strategies of the undertaking, should not give rise to a claim of legal privilege, even if a lawyer was consulted about the contracts or about the legal implications of such commercial strategies. The issue may be more complex than that, however: if the inspectors request "explanations" concerning specifically legal communications, and in particular questions about the legal advice received (e.g., "what did the lawyer say?") , a legal privilege claim may well arise if the legal advice at issue is related to the subject-matter of the proceedings.\textsuperscript{173} However, generally speaking, the arguably wider scope of inspectors' questions may present legal privilege issues in a new setting, but since the answers do not themselves constitute legal communications, it seems that this will seldom arise.

The power to affix seals on premises or documents stands out as the first and only — if modest — coercive power ever vested directly in the Commission's inspectors. As it has no discernible effect on the types of evidence accessible to the Commission, it does not seem fated to influence the discussion on legal privilege. At most, one might think that seals could be used as a tool in some improved procedure to secure the integrity of documents whose privileged status is contested. However, there is probably little mileage to this idea, since the affixing of

\textsuperscript{173} See Christoforou, supra note 125, at 42 (expressing the view that employees would be justified in refusing to answer questions when doing so would disclose information covered by the privilege). About the meaning of "relationship with the subject matter of the proceedings in the AM\&S judgment, see supra notes 120-121 and accompanying text.
seals is expressly limited to the duration of the inspections. In any event, an analogous procedure is currently followed by the Commission where the privileged status of a document is in dispute ("sealed envelope" procedure).

Inspections in places other than at the undertaking's own premises ("non-business premises") are the real novelty in the Commission's toolbox. However, this does not seem either to raise any new questions regarding legal privilege against compelled production of evidence, because the categories of evidence accessible to the inspectors remain the same as in an ordinary inspection (business records or professional documents). Article 21(4) limits the inspectors' powers further: no provision is made for oral explanations and the affixing of seals during inspections in non-business premises; such inspections require judicial authorization, and are only allowed in cases of suspected serious infringements. Spectacular as this power may appear, it entails an additional intrusion only with regard to the privacy of the individuals affected by an inspection at their home. However, it is the fact of the inspection in non-business premises that constitutes the additional intrusion; for this reason, judicial authorization is necessary, and it is imaginable that stricter standards of judicial review would apply against arbitrary or disproportionate inspections at private homes. But once the inspection is deemed valid, the categories of material accessible to the inspectors are strictly the same as in regular inspections at business premises. The regulation places no additional burden on the privacy rights of the individuals involved from the point of view of the types of evidence targeted by the inspection. Non-business records, such as personal correspondence, are not targeted. There is also no discernible additional risk that a

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174. See Regulation 1/2003, art. 20(2)(d) (seals may be affixed "for the period and to the extent necessary for the inspection"). Recital 25 of the Regulation places an indicative limit of seventy-two hours. See id. Recital 25.

175. This power may not be as radically novel as often thought. See Commission Decision No. 379/84/ECSC, O.J. L 46/23 (1984) (defining the powers of officials and agents of the Commission instructed to carry out the checks provided for in the ECSC Treaty and decisions taken in application thereof); see also id. art. 1(1)(a) (providing for the inspection of books and records "wherever such books or business records are kept"); id. art. 1(1)(d) (allowing expressly the inspection of third party premises, providing for the power "to enter any premises, land or means of transport of undertakings, and of any third party with whom books or business records have been deposited." Id.
threat to the rights of defense of the undertaking may be involved in inspections at non-business premises. The new power to inspect "other premises," including private dwellings, does not therefore appear to provide a basis for an extension of legal privilege to new categories of evidence.

Thus, a crucial feature of Commission investigations, which remains unchanged in Regulation 1/2003, is that an element of compulsion to produce evidence exists only in relation to documentary evidence consisting of business records and professional documents of the undertaking. Even then, the Commission's powers are limited. It may simply "request" such documentary evidence, and in case of refusal, issue a decision that the documents be produced under threat of financial penalties. The Commission may also inspect premises, request to see documents and records related to the subject matter of its investigation, and take copies. It is quite clear that the powers of the Commission in the context of such inspections are not true powers of "search and seizure". Contrary to received wisdom, the Commission's investigative tools are, therefore, relatively limited. Certainly Commission cartel investigators view with envy their counterparts in other places of the world who are able to tap phones or place people or companies under surveillance.

The situation is not very different in investigations of breaches of EC competition law conducted by national competition authorities. Without entering into details, it is fair to say that, in most cases, their powers are limited in a manner similar to those of the Commission, if not more so. Only criminal prose-
cutors or investigating magistrates — in the very few Member States where violation of EC competition law constitutes a criminal offence — may have more substantial investigative powers. An examination of the treatment of legal privilege claims in the context of national investigations falls outside the scope of this article. The possible impact of the case law of the Court of Justice on these procedures will be briefly addressed in the next section.

By way of conclusion, it may be said that Regulation 1/2003 has not radically changed the setting where claims of professional privilege against compelled production of evidence could arise in competition investigations conducted by the Commission, nor substantially increased the likelihood of intruding into the lawyer-client relationship. By and large, legal privilege claims will remain concerned with decisions of the Commission requesting production of documentary evidence (business books or records and professional documents), and with the copying of the same material during inspections. Claims of "legal privilege" against the admissibility of evidence might also arise in relation to the contents of voluntary statements recorded by the Commission, although the absence of compulsion makes this highly theoretical. Article 20(2)(e) of the Regulation might give rise to privilege issues if the Commission takes an expansive view of the scope of permissible questioning.

2. Evolution of the Body of Common Principles and Concepts

Setting aside the question whether Regulation 1/2003 has brought with it an increase in the powers of the Commission which expand the likelihood of invasion into lawyer-client relationships, another issue deserves examination in examining whether the AM&S case law merits reconsideration. Have the laws of the Member States evolved in a manner which would now justify an extension of the categories of material beyond the reach of the Commission? Indeed, this seems to have been, at least in part, the premise of the Akzo interim measures order, where the President of the Court of First Instance held that the evidence on record "appears prima facie to be capable of showing that the role assigned to independent lawyers of collaborating in the administration of justice by the courts, which proved decisive for the recognition of the protection of written communications to which they are parties [in AM&S], is now capable of being
shared, to a certain degree, by certain categories of lawyers employed within undertakings on a permanent basis where they are subject to strict rules of professional conduct."178

In the AM&S case the Court had the benefit of a very comprehensive report on the state of the law on lawyer-client confidentiality in the — then nine179 — Member States (the "Edward report"), and could rely on its own internal resources to complete its investigation. There is no such detailed report on the present twenty-five Member States.180 The recent accession of ten new Member States complicates a task that is out of the reach of an individual — if only for linguistic reasons — particularly one who does not claim to be a comparatist. With all caution, though, it is possible to offer some fragmented illustration of the way issues of legal privilege present themselves in Europe twenty-three years after AM&S.

In the early 1980s, the Court found that the laws of the then nine Member States diverged widely. Broadly speaking, the privilege was wider in common law jurisdictions, and extended without difficulty to communications passing between client and lawyer well before the initiation of any legal proceedings. Case law in those jurisdictions rested comfortably on a utilitarian rationale. By contrast, in most civil law jurisdictions, legal privilege as such was unknown, although the rights of the defense of the accused in criminal proceedings resulted in certain limitations for the prosecution, or for an investigating authority. In practice, this often meant a bar against lawyer testimony and the protection of documents in the possession of the lawyer. Documents in

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178. Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd. v. Commission, Joined Cases T-125/03 R & T-253/03 R, [2004] E.C.R. __, [2004] 4 C.M.L.R. 15., ¶ 125. See id. ¶ 124, 126-130. As already stated, this order was annulled by the President of the Court of Justice. See supra notes 155-156 and accompanying text. However, the President of the Court of Justice only addressed the issue of urgency, and did not elaborate on the substantive scope of legal privilege.

179. When the AM&S appeal was introduced, the European Economic Community counted nine Member States. Since then, sixteen additional countries have joined the Community (now the European Union): Greece (1981), Spain and Portugal (1986), Austria, Finland and Sweden (1995), and Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic, and Slovenia. There are four additional candidate countries (Bulgaria, Croatia, Romania, and Turkey), and one application is pending (Former Yugoslav Republic of Macedonia).

180. A report appears to have been produced in the Akzo cases pending before the Court of First Instance (the "Fish report"). Information about comparative law in this regard may be found in private or academic sources.
the possession of the client were usually not privileged, and this is still the case in many Member States (e.g., Austria, Italy, Lithuania, Spain, Sweden). Communications with and from in-house counsel were usually not privileged, and in some jurisdictions the timing of the communication was an essential consideration: communications made before the initiation of legal proceedings were generally not considered to be made within the framework of the rights of defense of an accused. Thus, to the extent at least that it shielded materials in the possession of the client, and that it encompassed lawyer-client communications having passed long before the initiation of an investigation, the legal privilege rule of AM&S represented, from the point of view of many civil law jurisdictions, an importation of a much broader concept inspired by the traditionally wider conception of the privilege in common law countries.

As regards common law jurisdictions, the law has not changed substantially. It is interesting to note, however, that academic commentary has either challenged the absolute nature of the privilege and explored the desirability of introducing further exceptions,181 or perceived (while deploring it) a trend in the courts towards restricting the scope of the privilege, a trend including "anti-corporation bias" and "anti-in-house counsel bias".182 Some courts have partaken in this introspective exercise. Delivering the judgment of the Court of Appeal on March 1, 2004, in Three Rivers, Lord Phillips of Worth Matravers stated:

We have found this area of law not merely difficult but unsat-

181. The driving notion of Auburn's book, for example, is that additional exceptions to the privilege would be feasible and are warranted. See generally AUVERN, supra note 12. See Zacharias, supra note 30.

182. G. M. Giesel, The Legal Advice Requirement of the Attorney-Client Privilege: A Special Problem for In-House Counsel and Outside Attorneys Representing Corporations, 48 MERCER L. REV. 1169 (1997) (criticizing strong “anti-corporation bias” and “anti-in-house counsel bias” in judicial application of the attorney-client privilege in the United States, and collecting a large amount of cases where privilege has been denied or limited for corporate clients and in-house counsel). It has been argued that little benefit accrues from applying the privilege to in-house counsel, yet much is lost, so the privilege should not apply. See James A. Gardner, A Personal Privilege for Communications of Corporate Clients — Paradox or Public Policy?, 40 U. DET. L.J. 299, 354-62 (1963); see also United States of America v. Philip Morris, [2003] E.W.H.C. 3028 (Comm.) (High Court), ¶ 38 (“in the nature of things those who are employed . . . are more likely than independent practitioners to become involved in aspects of the business that are essentially managerial or administrative in nature. To that extent it is less easy to maintain that all communications passing between them and the company’s management attract privilege”).
isfactory. The justification for litigation privilege is readily understood. Where, however, litigation is not anticipated it is not easy to see why communications with a solicitor should be privileged. Legal advice privilege attaches to matters such as the conveyance of real property or the drawing up of a will. It is not clear why it should. There would seem little reason to fear that, if privilege were not available in such circumstances, communications between solicitor and client would be inhibited. Nearly fifty years have passed since the Law Reform Committee looked at this area. It is perhaps time for it to receive a further review.\textsuperscript{183}

As to the material scope of the privilege in England and Wales, in the recent judgment of the High Court in \textit{USP Strategies}, Judge Mann helpfully distinguished the rules applying to three categories of information in relation to the obtaining of legal advice: "[r]efferences to the mere obtaining of legal advice are not privileged;" "[r]efferences to the obtaining of legal advice on a given subject matter are not privileged;" "references, which evidence the content of that advice, are prima facie privileged."\textsuperscript{184} Arguably, if such an approach to the material scope of the privilege were adopted by the Community courts, part of the "proof dilemma" would be resolved during inspections: inspectors could, without breaching confidentiality, review the first page of a document, and satisfy themselves as to the identity of

\textsuperscript{183} Three Rivers District Council v. The Governor & Company of the Bank of England, [2004] E.W.C.A. Civ. 218 (Court of Appeal), ¶ 39. The Court also hinted that the scope of privilege might be wider for individuals than for corporations. \textit{Id.} ¶ 32. Appeal against this judgment was allowed by the House of Lords after this Article was completed. \textit{See} Opinion of the Lords of Appeal of 11 November 2004, Three Rivers District Council & Others v. The Governor & Company of the Bank of England, [2004] U.K.H.L. 48; \textit{see also} Three Rivers District Council & Others v. Governor and Company of the Bank of England (No. 5), 3 W.L.R. 667 (Court of Appeal, 2003) (holding that the need for a client to make a "clean breast" of his case to his legal adviser is paramount when litigation exists or is contemplated, but that it is not so clear that, in the absence of contemplated litigation, there is any temptation for the client not to be candid; that it is in the public interest that the courts should come to correct judgments on the basis of all relevant material, and that it is important that legal advice privilege be confined to its proper limits). Commentary on the legal privilege aspects of the \textit{Three Rivers} cases were published by Clifford Chance LLP. \textit{See} Clifford Chance Dispute Resolution News in Brief, \textit{River Deep, Mountain High}, Mar. 2004 (on file with author) (stating that "[t]he trend of narrowing privilege . . . continues"); \textit{see also} Clifford Chance Dispute Resolution News in Brief, \textit{Muddy Waters}, May 2005 (on file with author); Clifford Chance Dispute Resolution News in Brief, \textit{Muddier Waters}, Nov. 2003 (on file with author).

\textsuperscript{184} USP Strategies Plc v. London General Holdings Ltd., [2004] E.W.H.C. 373 (Ch) (High Court), ¶ 30.
its author, as to the fact that legal advice is being sought or given, and as to the subject matter of the legal advice. This would enable them, in the vast majority of cases, to make a final determination as to the Commission's position about the privileged status of the document or otherwise. The judgment in USP Strategies further states the legal position regarding draft agreements and business plans. Judge Mann said that a draft agreement "created with a view to its being submitted to solicitors for advice does not, despite its purpose, attract privilege" and that "[a]ny such copy ought therefore to be disclosed and produced." By contrast, "any version produced by the solicitor in draft for the purpose of carrying out his function of giving legal advice to a client would . . . be privileged." Drafts passed back to the clients, "on the assumption that they were part and parcel of legal advice, are again privileged." In Philip Morris, Judge Moore-Bick stated that "it is necessary to approach a claim of legal advice privilege in a rather more critical manner than has perhaps been the case in the past."

It would be necessary to go beyond a cursory look at some recent judgments in isolation in order to conclude that the common law is witnessing a trend towards limitation of the scope of legal privilege. The least that can be said, however, is that the privilege is not expanding.

In countries outside the common law tradition, the main trend that can be identified is towards alignment with the requirements of AM&S in competition investigations. In Spain, the competition authority (Tribunal de Defensa de la Competencia) has strictly followed AM&S in a recent case. The Netherlands and Sweden have introduced specific regulation of privilege in competition proceedings, based on the Community law standard in AM&S. Thus, in the Netherlands, the material scope of professional secrecy as generally defined for crimi-

186. USP Strategies, [2004] E.W.H.C. 373, ¶ 48 (also stating that these answers "are relatively straightforward").
188. Resolución de 22 julio 22, (Expte. R 508/02 v, Pepsi-Cola/Coca-Cola) (Spain).
189. Both the Explanatory Memorandum to the Dutch Competition Act (1998) and the Commentary to the Government Bill of the Swedish Competition Act (1993) clearly state that LPP is introduced in national legislation in order to align it with the EU model.
nal and civil proceedings is now narrower than that available in competition investigations, which has been broadened to cover documents at the client's premises. In the Swedish Competition Act, a provision has been introduced, according to which compulsory requests may not relate to written documents "the contents of which may be assumed to be such as to preclude the possibility of examining a member of the Swedish Bar Association or any of his associates as a witness about it" and "which are in his possession or in that of the person protected by his duty of professional secrecy". Similarly in Germany, courts have struggled to incorporate the AM&S standard in a system where confidentiality of lawyer-client communications, generally speaking, protects only documents at the lawyer's premises, and, even then, only those communications with an "accused" ("Beschuldigten"), i.e., communications passed after charges have been brought. AM&S's privilege for documents found at the client's premises well before the initiation of proceedings represents a higher degree of protection than generally available in criminal investigations. In competition cases, some German courts have converged towards the AM&S solution. Paradoxically, this alignment on the Community standard for competition proceedings may result in some countries granting defendants in such proceedings a higher degree of protection than is otherwise available under general domestic law in these countries, including in investigations under criminal law. Germany, as just seen, may be such an example. In Spain, there is at least a judgment of the Constitutional Court holding that professional secrecy claims cannot be used to oppose seizure of documents during a search authorized by a court in the context of a criminal investigation. This is in sharp contrast with the broader

190. Konkurrenslag [Competition Act], (1993), as amended, art. 54, ¶ (1)&(2) (Swed.).

191. Strafprozessordnung [Code of Criminal Procedure], § 97, Abs. II, s. 1, (Germany). See id. § 53, Abs. I, s. 3 (listing Rechtsanwälte [independent lawyers] among those covered).


193. See STC 37/1989, Feb. 15, 1989, (Spanish Constitutional Court) (holding that everything that is relevant to a criminal investigation may be seized if the search has been duly authorized by a judge, in conformity with Article 18(2) of the Spanish Constitution, and there is no argument about the legality or the conformity with the Constitu-
privilege recognized in competition investigations.\textsuperscript{194}

Those examples appear to indicate that AM\&S exerts a powerful "soft harmonization" appeal in several Member States. It is appropriate to pause to consider what legal factors may be at play in this process. There is no reason why Member State laws should not converge towards EU law on procedural and evidentiary matters. But there is no general requirement to that effect either. Indeed, the "procedural autonomy" of the Member States has long been considered a basic principle of Community law.\textsuperscript{195} However, this principle is not without limits.

A first string of case law that is of interest here concerns the obligations placed on Member States by the requirements of the protection of fundamental rights in the Community. In defining the scope of fundamental rights in the Community, the Court draws inspiration from "the constitutional traditions common to the Member States" and from international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories, "so that measures which are incompatible with the fundamental rights recognized by the constitutions of those States may not find acceptance in the Community." This idea is now enshrined at the "constitutional" level in Article 6(2) of the Treaty on the European Union, which provides that the Union "shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms . . . and as they result from the constitutional traditions common to the Member States, as general principles of Community law." The Court has stated that the requirements of fundamental rights "are also binding on the Member States when they imple-
ment Community rules,” and therefore “the Member States must, as far as possible, apply those rules in accordance with those requirements.” This strongly suggests that when national competition authorities apply Community competition rules, they should adjust their procedures so that fundamental rights are protected at the same level as they would be in proceedings before the Commission. This necessarily includes the standard of protection of legal privilege, to the extent that it is anchored in the rights-of-defense rationale and constitutes a “corollary” of a fundamental right.

It is thus very likely that the fact that the AM&S standard derives from fundamental principles of Community law, elaborated in a manner consistent with the case law of the European Court of Human Rights, explains the strong trend towards spontaneous harmonization. Because the legal privilege rule established in AM&S is grounded on the rights-of-defense rationale, and because it mirrors closely the requirements established by the case law of the European Court of Human Rights, national courts read the judgments of the European Court of Justice in this area as having a strong precedential value. This has led some of them to extend the AM&S solution to competition proceedings conducted by national authorities, and perhaps this movement may continue beyond that.

As just shown, AM&S represents a minimum standard which must be respected by Member State competition authorities when they apply Community law. The next question, and probably more interesting, is whether this process of convergence may also, eventually, affect national laws where the notion of legal privilege is wider. In other terms: is the influence of AM&S, as a matter of law, confined to the role of a minimum standard? This is not altogether certain. Another string of case law places obligations on the Member States to ensure that procedural rules applicable to the exercise of rights conferred by Community law are not less favorable than those governing similar domestic actions (the principle of equivalence) and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effective-

ness). This case law, a direct offspring of the general principles of direct effect and supremacy, has often required adjustment of national procedural rules so as to ensure the existence of effective rights of action and remedies for the enforcement of rights derived from Community law. It is important to note that this case law does not necessarily stand for the general proposition that "the application of Community law" by the Member States must not encounter procedural obstacles. It is the "exercise of rights derived from Community law" that must be protected. But it is possible to envisage situations, at least in private litigation, where the application of overly protective legal privilege rules in a Member States could, in specific circumstances, represent an insurmountable obstacle for the effective exercise, by a plaintiff, of rights derived from Articles 81 and 82. On the other hand, the Court has precisely stated in *Otto v. Postbank* that its case law concerning the rights of the defense on administrative proceedings before the Commission for the enforcement of Articles 81 and 82 "cannot be transposed to national civil proceedings involving the application of [Articles 81 and 82] which exclusively concern private relations between individuals, since such proceedings cannot lead, directly or indirectly, to the imposition of a penalty by a public authority". In that case, the Court of Justice held expressly that Community law did not require national law to recognize in civil proceedings a right against self-incrimination based on its judgment in *Or kem*. This is another area which requires clarification.

As to the existence of a privilege for in-house lawyers, the

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198. There are, however, judgments supporting that broader proposition. See, e.g., Commission v. Greece, Case 68/88, [1989] E.C.R. 2965, ¶¶ 23-24 ("Article 5 of the Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law ... they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive").

199. *Otto v. Postbank*, Case C-60/92, [1993] E.C.R. I-5683, ¶ 17. *A contrario*, the Court implied that administrative enforcement of Articles 81 and 82 of the EC Treaty by national competition authorities would have to guarantee the same rights of defense recognized in proceedings before the Commission.
panorama in the Member States, and in particular in those hav-
ing acceded to the Community after the AM&S judgment, does
not appear overwhelmingly oriented towards assimilation with
independent lawyers. The overall picture that emerges is as fol-
lows: (i) in certain Member States it is possible to be employed
and a member of the Bar (examples include notably the UK and
Spain); (ii) in certain Member States it is possible for employed
lawyers to be members of the Bar subject to specific limitations
(notably Germany and the Netherlands); (iii) in a considerable
number of Member States, membership of the Bar appears to be
incompatible with being in a relationship of employment (exam-
ples are Italy, France, Lithuania, Latvia, the Czech Republic,
Hungary, Poland, Sweden, Austria). To take just one of these, it
seems clear that there is no legal professional privilege for in-
house lawyers in Sweden, where rules on privilege are derived
from the rules on secrecy contained in the Code of Civil Proce-
dure,200 which applies only to members of the Swedish Bar Asso-
ciation. No in-house lawyers are permitted to be members of the
Swedish Bar Association.

German law, while accepting that employed lawyers may re-
main members of the Bar, makes Bar membership dependent
on their ability to practice as independent lawyers for outside
clients, in addition to their duties for the employer.201 Only the
activity performed for clients other than the employer is consid-
ered as the activity of a Rechtsanwalt. Where the employed Recht-
sanwalt acts for his employer, that activity is not regarded as the
activity of a Rechtsanwalt, on the ground that he/she is acting
inside an employment relationship governed by subordination.
It appears that while an employed lawyer may enjoy legal privi-
lege inasmuch as he/she acts for outside clients, the communi-
cations between the in-house lawyer and the undertaking em-
ploying him or her are not privileged in German law.

In Belgium, the law establishing an “Institut des juristes
d’entreprise” (professional association providing the label of
“juriste d’entreprise” or “company lawyer” on a purely voluntary ba-
sis) refers to a duty of confidentiality resting on these profession-
als.202 In the initial draft, breaches of confidentiality were liable

201. BVerfGE 87, 287(295) (Federal Constitutional Court of Germany).
202. Loi du ler mars 2000 créant un Institut des juristes d’entreprise [Act of March 1,
to incur criminal sanctions referred to in Article 458 of the Criminal Code. During the legislative debates, the reference was dropped, clearly acknowledging that the confidentiality at stake did not have the same scope as that of independent lawyers ("avocats").

In Spain, the situation of in-house lawyers is uncertain, although it is fair to say that no major developments have taken place recently. The duty of professional secrecy is provided for in article 542(2) (former article 437(2)) of the Judicial Power law (Ley Orgánica del Poder Judicial) and (with identical wording) article 32(1) of the General Regulation of the Profession of Lawyer (Estatuto General de la Abogacía). The duty of professional secrecy extends to facts and information known as a result of "any of the types of professional practice." Article 27(4) of the same statute provides for the possibility to offer professional services under an employment contract, but this clearly concerns the lawyer working under contract in a law firm ("despacho individual o colectivo"). Although it appears that lawyers may be able to retain Bar membership while employed as in-house counsel, different local bar statutes clarify that the "abogado" referred to in the Judicial Power Law must be independent, not employed.

The Italian competition authority appears to draw inspiration from the AM&S judgment in its approach to legal privilege. The "Consiglio di Stato" (Council of State) has recently confirmed this approach, as regards the exclusion of in-house counsel.

In Poland, the legal profession is divided along functional lines: advocacy and legal advice (the professional titles being

2000, concerning the creation of an Institute of company lawyers], art. 5, M.B. p. 23.252 (Belg.).

203. See generally Buyle and Durant, supra note 133.


206. See, e.g., Boletin Oficial de Canarias [Statute of the Las Palmas Bar] arts. 8(1),(2)&(5), (2003, 223) (Spain). The Statute of the Las Palmas Bar makes clear that in-house salaried lawyers are excluded from the scope of Article 436 (now 542) of the L.O.P.J.

"adwokat" and "radca prawny" respectively). Both are subject to similar confidentiality duties. Only the "adwokat" may plead in court on behalf of a client in criminal cases. The status of "adwokat" is incompatible with a relationship of employment. Privilege seems to attach primarily to court testimony, and is regulated, for criminal matters, in Article 180 of the Code of Criminal Procedure. Even the lawyer's privilege against compelled testimony in court can be overridden by a court order "if required by the proper administration of justice and the facts cannot be established on the basis of other evidence".\(^{208}\) It seems that in Poland, companies may be represented in court by any employee (not necessarily a lawyer), but privilege applies only to lawyers.

Once again, this review does not pretend to be exhaustive. The task of presenting a complete — and possibly more accurate — picture is best left to specialists, and is in any event beyond the scope of this article. However, a dispassionate review of a number of jurisdictions, including the largest Member States having joined the Community since the judgment in *AM&S*, leaves the impression that the small minority of Member States which had a broad conception of legal privilege in the early 1980s has become even smaller after successive enlargements. The balance appears to have tilted further towards a restrictive approach to evidentiary privileges for legal communications. The evolution in recent years appears to have consisted, at most, in "digesting" the *AM&S* standard of protection and adapting similar solutions under national law. This process is still ongoing.

**CONCLUSION**

Legal privilege is obviously a sensitive subject for lawyers, and one that often elicits emotional responses. Common law jurisdictions have witnessed extreme positions on the privilege, from Jeremy Bentham's challenge to its very existence,\(^{209}\) to advocates of radical expansion who recommend abolition of the

\(^{208}\) See *Kodeks postępowania karnego* [Polish Code of Criminal Procedure], art. 180(2), Dz.U 1969 nr 13 poz. 96, amended by Dz.U. 2003 nr 17 poz. 155. This provision applies to lawyers, legal advisors, notaries, journalists, and doctors. Under article 180(1), other professionals subject to a duty of secrecy can be discharged from their duty by either the court or the public prosecutor. *Id.* art. 180(1).

requirements that communications be made in confidence or even that they relate to legal advice. In stark contrast with countries within the common law tradition, legal privilege in most European jurisdictions remains relatively narrow.

The Court of Justice of the European Communities in AM&S struck an intelligent balance that deserves respect for its coherence with the most powerful rationale available for the privilege. More than twenty years later, it is remarkable how consistent the judgment appears to be with the case law of the European Court of Human Rights, which sometimes appears even to have been anticipated. There are many advantages to the rights-of-defense rationale favored by the Court in AM&S, and critics should pause to consider them. One of them is that privileged legal communications do not necessarily lose their status whatever the degree of dissemination within the undertaking. The Court of Justice did not require that the communication be made strictly "in confidence." This is arguably sustainable in a construction of the privilege based on the rights of defense, but would be much more problematic from a utilitarian perspective, as the common law experience attests. The almost impracticable distinction between "legal" and "business" advice is also much less likely to arise under the AM&S standard for two reasons. First, the privilege is confined to independent lawyers (much less likely than in-house counsel to be involved in non-legal communications with the client). Second, a rights-of-defense rationale operates chiefly to protect legal communications about the compatibility of past behaviour, while business advice is likely to concern decisions to be taken in the future.

The pragmatic, dispassionate approach to legal privilege of the case law of the Court of Justice — and possibly, the restraint of the Commission's inspectors — has contributed to a relatively peaceful situation. Very few privilege claims have reached the stage of litigation. Moreover, the rationale of the privilege as construed by the Court of Justice seems to facilitate adjudication

210. See Rice, supra note 47.
211. See Giesel, supra note 182.
212. See, e.g., The Attorney-Client Privilege, supra note 28, at 471 & n.30 (discussing the "tenuousness of the business-legal distinction" and stating that "[w]hether a particular communication involves "legal" rather than merely "business" advice is . . . a largely discretionary judgment, one in all likelihood informed by a judge's ad hoc notion of what is reasonable in a given case").
of privilege claims. In particular, the rights-of-defense rationale suggests that there may be room for the Commission to devise an internal procedure whereby decisions to require production of allegedly privileged documents would not have to be made in the dark and litigated away. The Order of the President of the Court of September 27, 2004, provides indirect support for such an internal Commission procedure. This article suggests one possible modus operandi, based on "in camera" review of allegedly privileged documents by the Hearing Officers. There may be other possibilities.

It is also striking how AM&S, which introduced a concept of legal privilege going well beyond what existed in many Member States, has influenced developments in national law, and in particular in competition proceedings. The gravitational force of AM&S and its influence on national laws may be explained to a large extent by the rights-of-defense rationale and by the relative consistency of the judgment with the case law of the European Court of Human Rights. A paradox may, however, be emerging: to the extent that protection of legal privilege at Community level is perceived to exceed the requirements of fundamental rights, in some countries corporations may now be able to successfully claim privilege in administrative competition proceedings, in situations where similar claims made by individual defendants in criminal cases would be rejected.

Many things have changed since the early 1980s. In particular, the Community has welcomed sixteen new Member States. Scholars have taken a closer look, often through the lenses of economic analysis, at issues surrounding the social desirability of legal advice, lawyer confidentiality duties, and evidentiary privileges. Judges in traditional strongholds of the privilege, where the rules had the maximum scope, have begun to question the benefits of such wide protection. At Community level, the Akzo cases have sparked lively discussion, and the Courts have not spoken their last word. Debate is taking place. In the meantime, AM&S remains the cornerstone of the law of legal privilege in competition proceedings conducted by the Commission. Critics and admirers alike must recognize that the standards established in AM&S have not given rise to serious difficulties in more than twenty years. This is either a tribute to the wisdom of the Court of Justice, or evidence that the legal community has learned to live peacefully with it.