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29 May 2003

European Commission
Competition Directorate General
Services Directorate
DG/Liberal Professions
B/1049 Brussels
Belgium

Dear Sirs

Please find attached the comments of the Global Corporate Counsel Association (GCCA) on the European Commission's Working Document "Regulation in Liberal Professions and its effects".

We would be happy to discuss our comments in further detail.

Sincerely

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Comments of the Global Corporate Counsel Association-Europe on the European Commission's Working Document "Regulation in Liberal Professions and Its Effects"

May 2003

I. Introduction

The Global Corporate Counsel Association-Europe (GCCA-Europe), which celebrates its tenth anniversary this year, serves in-house attorneys in Europe through networking, knowledge sharing, continuing legal education and advocacy on behalf of the in-house profession. GCCA-Europe is the European chapter of the American Corporate Counsel Association, the in-house bar association[SM] serving the professional needs of lawyers who practice in the legal departments of corporations and other private sector organizations worldwide. ACCA promotes the common interests of its members, contributes to their continuing education, seeks to improve understanding of the role of in-house attorneys, and encourages advancements in standards of corporate legal practice. Since its founding in 1982, ACCA has grown to more than 14,000 members in 40 countries who represent 6,500 corporations, with 43 chapters and 12 committees serving the membership. Its members represent 49 of the Fortune 50 companies and 97 of the Fortune 100 companies. Internationally, its members represent 42 of the Global 50 and 77 of the Global 100 companies.

We are pleased to have this opportunity to comment on the European Commission's Working Document on Regulation in Liberal Professions and Its Effects. ACCA members are directly affected in multiple ways by the regulation of lawyers. First, we are providers of legal services to our companies. Second, we are consumers of legal services offered by outside counsel. Third, we play a gatekeeper role in our companies' consumption of legal services. Because of these different yet complementary roles, we have a strong interest in ensuring that the regulation of lawyers ensures high standards of ethics and professionalism, while at the same time promoting competition and a full Internal Market in legal services.

The questionnaire included in the Working Document is divided into two sections: one addressed to users of professional services, the other addressed to providers of professional services. As both users and providers of legal services, we have views on the issues addressed in both sections of the questionnaire, and our comments are structured accordingly. In putting together this submission, we paid substantial attention to the questions posed by the Commission. However, we concluded that our submission would be most valuable if we were to address those issues where we have the most to contribute, based on our experience. For this reason, rather than answer the questions sequentially, our submission is written in a discursive manner.

II. GCCA-Europe's Views as a User of Professional Services

As users of legal services, GCCA-Europe's members have an overriding interest in obtaining sound legal advice provided by knowledgeable and competent lawyers adhering to high ethical standards. Thus, we believe that professional regulatory associations, entrance requirements for the legal profession, and disciplinary procedures all have an important role to play in making the legal profession a "profession". At the same time, as part of creating a full Internal Market in legal services, it is important that none of the above elements, important as they are, be used to create artificial restrictions on the provision of legal services. For this reason, we believe that barriers to entry to the legal profession must be individually justified as essential to ensuring that lawyers possess the requisite knowledge to provide legal advice. Similarly, we support freedom to provide legal services across borders, subject to the caveat that the lawyer knows the law on which he or she is opining. And, of course, we want to ensure that we do not overpay for legal services. Therefore, we believe that fees for legal services should be transparent and set by the market, and that lawyers should be free to take on as many clients as they wish, consistent with their obligation to render timely and competent advice. We discuss each of these points in turn below.

1. The legal profession is characterized by strong ethical rules. Adherence to ethical standards designed to ensure that a lawyer represents the interests of his or her client and does not engage in illegal or fraudulent activity constitutes one of the hallmarks of the legal profession. The ethical principles underlying the practice of law are well established, having developed organically over a period of centuries. These principles include:

- **Confidentiality.** Lawyers are under a strict ethical and legal obligation to protect the secrets of their clients. It is for this reason, as discussed in the next section, that lawyers' communications with their clients are privileged from discovery or production.

- **Diligence and Competence.** Clients retain and rely on lawyers for their expertise. For this reason, a lawyer must ensure that he or she provides competent and timely representation, so that the interests of the client are protected.

- **Duty of Loyalty.** Subject to the prohibitions on assisting with illegal activity or misleading a tribunal, a lawyer owes a duty of loyalty to his or her client, who is relying on the lawyer to represent its interests. Above all, lawyers must avoid activities and representations that conflict with the interests of their clients.

- **Integrity.** A lawyer must always act with integrity, especially with regard to handling of client funds. Also, a lawyer must not engage in inappropriate conduct that could bring the profession into disrepute.

- **Compliance with the Law.** Lawyers are subject to an absolute prohibition on misleading a tribunal or assisting a client with illegal or fraudulent activities.

These ethical principles should be reflected in more detailed codes of ethics that are developed and implemented by the legal profession itself, in conjunction with others who have interest in legal services, such as consumers of legal services, regulatory bodies before whom lawyers practice, and courts.

2. There should be firm and fair disciplinary procedures for lawyers – both in-house and outside – who fall short of professional standards. In order to ensure the integrity of the legal profession and the confidence of consumers of legal services, it is important that the profession effectively police itself, in conjunction, where appropriate, with government agencies and other regulatory bodies. Otherwise, the public could be at risk from unscrupulous lawyers. It is, of course, vital that these proceedings be fair, as they could not only strip a lawyer of his or her livelihood, but also besmirch his or her reputation.

3. Lawyers should have demonstrated knowledge and competence before being admitted to practice. For consumers of legal services – be they large multinationals, small and medium-sized enterprises, or individuals – to have confidence in the profession, there need to be entry criteria that ensure that lawyers know their country's laws and are competent to provide legal advice. At the same time, these criteria should not be so restrictive as to prevent otherwise qualified persons from gaining admission to practice. Today, there still remains a significant disparity in what an aspiring lawyer must do to gain admission to the legal profession. In Belgium, for example, an *avocat* must complete three years as a *stagiaire* before becoming a full member of the profession. In Spain, by contrast, an *abogado* is fully qualified to practice upon completion of a university course of study in law. Thus, as most people seek admission to the bar of their home country, nationals of some countries face greater barriers to entry than others, with the result that the legal market in those countries is less competitive.

To ensure that nationals of all EU countries have an equal shot at practicing law, entry requirements should be harmonized. Of course, as noted above, these requirements need to remain stringent enough to test knowledge and competence. For this reason, more than a mere degree should be required. One model would be to reflect the procedures of the mutual recognition of qualifications directive (89/48/EC), and require either a period of practical experience or the passing of an examination.

4. Lawyers should be free to provide services and establish themselves throughout the EU, but should also have demonstrated knowledge of the law on which they are advising. A full Internal Market in legal services benefits both users and providers of such services. It gives users the widest selection of lawyers from which to choose, allowing them to select those with the right expertise and skills to address a particular issue. It also strengthens competition, with all of the attendant benefits in terms of price and quality of service. For providers, it ensures that they have freedom to live anywhere in the EU and practice their profession. Moreover, it allows them to provide services to clients irrespective of where in the EU the client is established.

At the same time, as noted above, it is critically important that lawyers have demonstrated knowledge of the law about which they are advising. A user of legal services – whether the matter is of a transactional, regulatory, or litigation nature – is purchasing the lawyer's expertise about and advice on the law. If the lawyer is unfamiliar with the law on which he or she is advising, the client is not obtaining the service sought. This is generally not an issue where the lawyer is practicing in his or her home jurisdiction, where he or she has been admitted to practice. However, where a lawyer practices in a different Member State, there may be questions about his or her knowledge of that country's law.

Fortunately, the EU has a set of three directives – the services directive (77/249/EEC), the mutual recognition of qualifications directive (89/48/EC) and the establishment directive (98/5/EC) – governing the cross-border provision of services by and establishment of lawyers that balance these competing considerations. Through the following means, these directives permit EU- qualified lawyers to provide services and/or establish themselves in any Member State while ensuring that users of legal services have guidance regarding the lawyer's knowledge and competence in the law of a particular jurisdiction.

- Lawyers providing services or establishing themselves in a different Member State from the one in which they are admitted to practice are subject to the same ethical restrictions and rules as lawyers of that Member State.

- A lawyer providing services from another Member State or who has recently established himself or herself in a new Member State must practice under his or her home country title.

- Simple, efficient mechanisms exist for lawyers from one Member State to have their qualifications recognized in a second Member State;

- Lawyers who have gained experience in the law of a Member State in which they have practiced for a significant period of time can seek full admission to the legal profession of that Member State.

We believe that this principle of free movement should also apply, in a slightly different form, to non-EU-qualified lawyers. As EU-based enterprises expand across the globe, they increasingly need advice at their headquarters on several different legal regimes. It is not always convenient to seek this advice from counsel located in those countries, especially given time zone differences and the urgency of some legal questions in today's world. Unfortunately, some EU countries – such as France and Germany – make it difficult or impossible for non-EU lawyers to advise in the EU on their home country's law, even though they are, by definition, not in competition with local lawyers.

In our view, the outlines of a regime that benefits EU enterprises while not adversely impacting local lawyers is clear The non-EU lawyer's ability to work in the EU should be subject, as at present, to the lawyer's obtaining a work permit or similar authorization demonstrating that there is a need for his or her services; however, once this condition is met, the non-EU lawyer should merely be required to register with the relevant bar. As with EU-qualified lawyers practicing outside their home jurisdiction, the ethical and other rules of the EU country in which the non-EU lawyer practices should apply. And, of course, the non-EU lawyer should be limited to advising on the law of his or her home country, international law, or EU law. A particularly successful model of such a regime is Belgium's Liste B, which has been in operation for almost two decades.

5. Lawyers' fees and rates should be transparent and set by the market. As consumers of legal services, we naturally have a strong interest in the fees outside counsel charge for their

services. As with any other product, the price charged for legal services has a significant impact on competition in the market. If fees are subject to an artificial floor, users of legal services may pay more than is necessary to obtain advice. Similarly, if fees are subject to an artificial ceiling, it may prevent lawyers with significant expertise in a particular field from realizing the full value of their services. For this reason, we believe that the level of fees for legal services should be completely decontrolled. The decision of the European Court of Justice in Case C-35/96[1], cited in the Working Document, is certainly a start, in that it establishes that professional associations may not impose compulsory fee scales and that governments may not enact legislation enabling or requiring them to do so.

However, Case C-35/96 does not address fee schedules established by law. For example, Germany has a law, the *Budesgebürhrenordnung*, that regulates the fees charged by *Rechtsanwälte.* As a practical matter, the schedule does not reflect commercial reality, particularly given the types of matters handled by large national law firms. But to deviate from this schedule, a written agreement with the client is required. In other EU countries, professional associations of lawyers, while leaving fees up to their members, issue guidance regarding what fees might be considered excessive, or fees below which lawyers generally should not go.

Fee schedules, whether established by law or merely advisory, restrain competition by prescribing or signaling what lawyers should charge for their services. By impairing clients' ability to obtain more favorable rates – or, conversely, by impairing lawyers' ability to realize the full value of their services – they distort the market for legal services and should be prohibited. For this reason, they should be eliminated. To the extent there are concerns about lawyers charging unwitting clients excessive fees, rules on unfair pricing should provide sufficient protection.

The one area in which regulation of fees is warranted is transparency. Like other products or services, users should be able to comparison shop on price. It is unquestionably true that a user does not obtain exactly the same expertise or service from one lawyer to another. But any evaluation of which lawyer offers the best value in addressing a particular legal question requires consideration of the fee to be charged. Thus, lawyers should be required to inform clients in advance of what their fees or rates for handling a particular matter will be.

6. Countries should not impose restrictions on the number and types of customers a lawyer may have. Consistent with their obligation to provide high-quality legal advice and representation, lawyers should be free to take on however many clients, across a wide range of entities, as they see fit. What is of critical importance is not an artificial limitation on the number or types of clients a lawyer may have, but whether he or she (1) has the relevant expertise to handle the matter and (2) can provide the advice or representation in a timely manner, given other commitments. This is not something that needs to be regulated *ex ante* – the ethical obligation of diligence and competence, properly policed, should suffice to protect users of legal services from lawyers who do not meet these criteria. The effect of *ex ante* regulation, by contrast, would be to deny some set of potential clients the counsel of their choice, even if that lawyer would be able to provide them quality representation.

III. GCCA-Europe's Views as a Provider of Legal Services

As legal practitioners, GCCA-Europe's members have a strong interest in how the legal profession is regulated. In these comments, however, we wish to focus on two issues of particular importance to in-house counsel. First, we believe that in house counsel, as legal professionals, should be able to join a national bar or other professional association, and be subject to the same or similar ethical rules and disciplinary procedures as lawyers in private practice. Second, we believe that for in-house counsel to perform their compliance and advisory role properly, their communications with their internal clients must be privileged.

1. In-house counsel who are fully qualified and who would otherwise be admitted to practice in an outside capacity ought to be able to become full members of a bar or other professional association. In the UK, Spain, Portugal, Denmark, Germany, and Ireland, in-house counsel are able to join the same bar as lawyers in private practice. In other countries, in-house counsel are not able to join the bar, but have available in-house counsel associations that have their own ethical rules, along with disciplinary procedures that ensure compliance with them. In some

[1] *Commission v. Italy*, [1996] ECR I-3851.

countries, such as Belgium, these in-house counsel associations are formally recognized; in others, such as Italy and the Netherlands, they are not.

Because the legal profession is grounded in adherence to ethical principles discussed above, it is vital that all lawyers – whether in-house, in private practice, or with government – be members of a professional association that ensures compliance with those principles. Ideally, all counsel – both in-house and in private practice – would be members of the same bar and subject to the same ethical rules and disciplinary procedures. Where national circumstances preclude this approach, in-house counsel should, at a minimum, be able to affiliate with a formally recognized in-house counsel association that requires compliance with the core ethical principles of the legal profession and implements effective disciplinary procedures to enforce them.

2. In-house counsel should be granted legal privilege. As noted in the previous section, one of the key ethical obligations on lawyers is to protect the confidentiality of their clients' information. This obligation, generally imposed by law, exists for a sound reason: clients need the ability to seek legal advice unencumbered by the fear that disclosures they make to their lawyer will be discovered by adversaries or authorities. To preserve this confidentiality, in most countries communications between lawyers and clients are privileged from discovery and production.

Unfortunately, privilege is not extended equally across the legal profession. Most notably, privilege does not extend to communications from in-house counsel sought by the European Commission's Directorate-General for Competition (DG Competition). In addition, in some EU Member States, in-house counsel lack privilege, as they are unable to join a national bar. For the following reasons, this disparity in the application of privilege is not justified and should be eliminated.

- **In-house counsel are no less independent than outside counsel.** The basis for the distinction between in-house and outside counsel with respect to privilege was articulated by the European Court of Justice in *AM&S*[2], which held that in-house counsel are not entitled to privilege because they are not independent. Under this reasoning, because in-house counsel are employees of an enterprise, they owe a duty of loyalty to their employer that trumps their professional obligations. Those who take this view also argue that employers could potentially influence in-house counsel's advice and decisions, because of the employer's power to discipline them or terminate their employment. Put another way, in-house counsel were seen by the Court as too beholden to their employer that they could not provide advice consistent with "the lawyer's role as collaborating in the administration of justice by the courts".

  This reasoning does not accurately reflect the situation of in-house counsel either as it existed at the time *AM&S* was decided or as it exists today. First, most in-house counsel are members of national bars or associations of in-house counsel that impose ethical duties to which in-house counsel must adhere irrespective of any instructions to the contrary that they receive from their employer. Second, in-house counsel owe a duty of loyalty to the company for which they work, not to its management. Thus, where management acts in an illegal manner, to the detriment of the company, in-house counsel must not only refuse to participate, but must take action to protect the company. Third, outside counsel are as vulnerable – perhaps even more vulnerable – to pressure from a company's management. In-house counsel are generally protected by employment laws, which in most EU Member States make it difficult to terminate their employment. Outside counsel, without such protection, can be fired by the company at will. For a lawyer, or group of lawyers, who rely on one or a few large companies for their business, this may be an extremely effective threat. Indeed, in his opinion in *AM&S*, Advocate-General Slynn implicitly recognized this fact when he wrote "A lawyer in private practice who is a member or associate of a large firm may act for long periods for only one client. If his communications are protected, so . . . should be those of the lawyer who is a member of the legal department of a company".

- **Privilege is necessary to provide complete and clear legal advice that helps companies comply with the law.** In-house counsel have an important role to play in

[2] Case 155/79, *AM&S v. Commission*, [1982] ECR 1575.

compliance. They are more familiar with the company, and with its people. They are more likely to have relationships of trust with management, allowing company employees be comfortable in seeking – and taking – advice from them. But a lawyer who has to worry that his or her communications with a client will be discoverable is faced with a harsh and intractable dilemma: provide the advice in writing and risk discovery, or provide the advice orally and risk the client not being able to refer to it or misunderstanding it.

In today's world, for most legal advice to be useful and effective, it must be in writing. Legal advice often is both nuanced and detailed – particularly in the competition area – making it difficult to provide a full and complete picture orally. This is particularly true where, as is frequently the case, the advice is best illustrated by considering alternative scenarios. In addition, written advice allows counsel to memorialize the proper course of action and the consequences of failing to follow it, so that others can refer to it going forward. And, for advice relating to a complex manner, written distribution may be the only effective means of ensuring that all personnel who have a role to play in ensuring compliance receive the advice.

- **Privilege is necessary to encourage company officials to speak candidly to in-house counsel about their proposed plans.** Without privilege, management may be more reluctant to disclose their business plans to in-house counsel, and as a result may decide not to seek legal advice that otherwise they would. Indeed, this concern, in the governmental sphere, underpins the reasoning of the Court of First Instance in the *Carlsen* case discussed below. At a minimum, this increased reluctance of management to consult in-house counsel greatly complicates the latter's compliance role, as they must attempt to discover information about potential risky activities on their own. And because some violations that would have been caught by in-house counsel will, as a result, occur, the burden on regulatory authorities to detect and correct violations is increased, along with the cost to society of those violations.

- **In-house counsel act in a legal compliance role.** DG Competition has suggested that when in-house counsel give legal advice, they are seeking to advance the interests of management and are not acting dispassionately as part of the legal system. This claim is belied by the facts. In cases where DG Competition has relied upon in-house advice in investigations, it has used memos from in-house counsel advising that the conduct in question <u>was</u> probably illegal to demonstrate that the company's actions were knowing and intentional, and therefore justified added penalties.[3] For example, in *John Deere*[4], the Commission used the fact that Deere's own in-house counsel had expressed concern about an export ban to demonstrate that the company knew the conduct in question violated EC competition law. Similarly in *London European/Sabena*[5], the Commission determined that Sabena's infringement was deliberate based on a warning from the legal department that the conduct could result in the imposition of penalties by the Commission. These examples show that in-house counsel act in a compliance role, live up to the ethical standards, are not cowed by management, and offer sound legal advice independent of management's interest in continuing the conduct in question. Indeed, the Commission has never found a case in which in-house counsel amended its advice based upon internal pressure from management.

  In various communications and speeches over the years, DG Competition has also suggested that in-house counsel do not act primarily as legal advisors, but instead take an active part in running the affairs of the company. According to DG Competition, this means that many communications from in-house counsel may not constitute legal advice. However, this argument is beside the point, as privilege does not apply to communications that are not legal in nature.

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[3] Interestingly, in a speech before the European Parliament, Commissioner Monti has foresworn this use of in-house counsel documents in the future.

[4] Commission Decision 85/79/EEC, 1985 O.J. (L 35) 58.

[5] Commission Decision 88/589/EEC, 1988 O.J. (L 317) 47.

Legal privilege should cover self-evaluations measurements and other compliance preventative efforts to determine and or increase a company's performance in meeting legal and regulatory obligations.

- **Denial of privilege for in-house counsel raises costs.** Because in-house counsel lack privilege, companies seeking legal advice will be more likely to use outside counsel, so as to ensure that any advice put in writing cannot later be used against them. As a result, companies may seek to involve outside counsel in matters that could be handled completely in-house. This raises costs, as not only must companies pay for outside counsel to provide advice that normally would be provided by in-house counsel, they must also pay outside counsel to get up to speed on the facts, as generally outside counsel are less familiar with a company and its operations. These costs escalate for global companies, where actions taken by employees around the globe could have legal consequences in the EU.

- **In-house counsel are subject to ethical rules.** Clearly, being subject to ethical rules is a condition precedent for the application of privilege, as such rules play a vital role in ensuring a lawyer's independence. In many EU Member States, in-house counsel can either join the bar or join an in-house counsel association that has official or semi-official status. This makes them subject to exactly the same or to a similar set of ethical rules as outside counsel, as the case may be. In particular, just like outside counsel, in-house counsel may not participate in illegal activities, withhold information from tribunals, or pervert the course of justice. And, to the very limited extent that some in-house counsel are not subject to strong ethical rules currently, acceptance of our proposal above that in-house counsel be eligible for membership in either the appropriate bar or an in-house counsel association would address this concern.

- **An increasing number of countries recognize privilege for in-house counsel**. The legal situation regarding privilege for in-house counsel has changed since *AM&S* was decided. Today, among EU countries, Belgium, Denmark, Ireland, Portugal, Spain, and the United Kingdom treat communications from in-house counsel as privileged. Indeed, even Jonathan Faull, at the time a Director in DG Competition, noted in a 1997 speech that there have been changes in the number of Member States that recognize privilege, although he sought to minimize them. This change has come about because of an increasing recognition of the compliance benefits that result from granting privilege to in-house counsel.

- **To the extent that individual Member States differ regarding whether communications with in-house counsel are privileged, multinational companies face disparate treatment in the EU based on nationality and/or where they are established.** To avoid distortion in the market for legal services, it is vital that a single policy governing privilege be adopted throughout the EU so that disclosure of documents in the context of an investigation is not affected by the jurisdiction within the EU where the company is located. Indeed, for this reason the Court in *AM&S* adopted a single policy of not treating communications from in-house counsel as privileged, even where the Commission investigates alleged violations of competition law in countries that recognize privilege for in-house counsel. The difference, of course, is that we believe the uniform rule should be to recognize privilege for such counsel.

- ***AM&S* does not bind the Commission.** The Commission has indicated that it feels bound to its current position by the decision of the Court in *AM&S*. It takes this view notwithstanding the fact that the Commission, in its arguments before the Court, argued that to the extent in-house counsel are subject to rules of professional discipline and ethics, they should be treated, for purposes of privilege, the same as lawyers in private practice. Nothing would prevent the Commission, in its own investigations, from adopting a position that documents were privileged: just because the Commission can compel production of documents does not mean it must exercise that power. Indeed, the Commission exercises similar discretion in its leniency program and fining guidelines.

- **The Commission's legal staff, who are employees, are entitled to privilege.** The illogic of the Court's decision in *AM&S*, and DG Competition's rigid adherence to it, is show by the fact that communications by the Commission's legal staff are, in fact, privileged. In *Carlsen*[6], the European Court of First Instance granted privilege to the Commission's Legal Services so that the EU institutions would continue to seek legal advice without fear that discussions regarding legality and the scope of measures would be divulged. But this logic applies equally to companies. Moreover, unlike most outside counsel, the staff of the Commission's Legal Services are not members of a professional association with accompanying ethical rules and disciplinary procedures that are essential elements of assuring independence.

  The Court of First Instance reaffirmed privilege for communications from the Commission's Legal Services in *Interporc*[7]. In that case, the Court noted that, unlike in-house counsel, members of the Commission's legal staff could not be fired for their views. In the Court's view, this fact assured their independence from management. But, as noted above, in-house counsel are protected by strong employment laws in most Member States, and the fact that Commission lawyer cannot be fired does not mean that they are immune from pressures by management. Indeed, in *AM&S*, Advocate-General Slynn saw no distinction between Commission lawyers and in-house counsel, lumping them together in rejecting the suggestion that either group did not have sufficient profession independence to have their communications privileged.

- **Refusing privilege to in-house counsel violates the European Convention on Human Rights.** All of the EU Member States are signatories to the Convention, and although the EU itself is not, its powers derive from the Member States and must be exercised in accordance with the Convention. The rights of defense found in Article 6.3 of the Convention explicitly include the right to be represented by counsel of one's choice. In order for this right to be meaningful, clients' communications with their counsel must be confidential; otherwise, it is difficult – for the reasons noted above – for counsel to provide complete and clear ongoing advice. Thus, denial of privilege for in-house counsel in criminal cases runs afoul of Convention, as it has the practical effect of forcing company officials to use outside counsel, thereby denying them the counsel of their choice. And, although EU competition investigations are not considered to be of a criminal nature under the strict terms of the governing regulation, this is not determinative in applying the Convention, which embodies its own concept of what is a "criminal offence". Competition investigations clearly have a punitive and deterrent purpose that brings them within the scope of Article 6.3 of the Convention, and the Commission's refusal to recognize privilege for in-house counsel consequently breaches that Article..

- **Concerns that in-house counsel might collaborate in illegal activities – either voluntarily or under pressure – can be addressed easily.** Certainly, to the extent in-house counsel participate in an illegal or fraudulent activity – a rare occurrence – communications with company officials would not be privileged, just as where outside counsel collaborate in an illegal activity their communications are not privileged. Similarly, a system of independent review could be set up for documents where privilege is disputed, such that a neutral party could review the documents and determine whether they needed to be produced.

In sum, for all lawyers – whether in-house, in private practice, or in government – the touchstone for privilege should be independence secured by membership in an organization that requires compliance with ethical rules common to the legal profession and enforces those rules by effective disciplinary procedures**. It is important that such organizations be open to in-house lawyers in all member states and be recognized as such.** Lawyers meeting these criteria are independent and providing advice that furthers the administration of justice, and should be entitled to privilege so as to be free to provide full and complete advice in writing to their clients to help ensure compliance with the law.

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[6] Case T-610/97 R, *Carlsen v. Council of the European Union*, judgment of March 3, 1998.
[7] Case T-92/98, *Interporc v. Commission*, [1999] ECR II-3521.

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GCCA-Europe wishes to thank the Commission for this opportunity to comment on regulation of the liberal professions, including law. We would be happy to discuss our comments in further detail. For more information, please contact Giuseppe Sanna, Officer, GCCA Board of Directors, via telephone at +44 (0)777585 1677, or via email at giuseppe@sanna7780.freeserve.co.uk