

# CPI Antitrust Journal

September 2010 (2)

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on the Last Judgment of the ECJ  
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# Legal Privilege or Legal Inconvenience? Some Reflections on the Last Judgment of the ECJ in Relation to the Akzo Case

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## I. INTRODUCTION

This article analyzes the concept of Legal Professional Privilege (“LPP”) in EU through the lenses of the *Akzo* case. It underlines what the recent ECJ Judgment clarified and what, instead, left the door open to further discussion. It concludes that the Court has unduly limited the scope of the LPP by refusing to extend LLP to in-house lawyers. The ECJ Judgment creates real inconvenience for in-house lawyers who, fearing the use the Commission could make of their documented advice, are prevented from freely and fully advising companies.

## II. WHAT IS THE CURRENT SCOPE OF THE LPP UNDER EU LAW?

The European Courts have recognized, at the EU Level, the much-debated doctrine of Legal Professional Privilege (hereinafter “LPP”) in the field of competition law.<sup>2</sup> However, its scope has been narrowly defined. In fact, the principle extends its protection only to the following categories of documents:

- 1) Communications to or from independent lawyers which are made for the purposes and in the interests of the client’s right of defense, whether begun after the initiation of EU competition law proceedings or before, which have a relationship to the subject matter of the procedure;
- 2) Internal notes which are limited to reporting the text or the content of the lawyer-client communications as defined above; and
- 3) Preparatory documents which were drawn exclusively for the purpose of seeking legal advice from an external lawyer in exercise of the rights of the defense.

It should also be emphasized that only communications with an external independent legal counsel member of an EU Bar are covered by the protection of LPP. In addition, only documents seeking or providing legal advice fall within the scope of LPP. Any other communication with a lawyer will not be covered by LPP.

## III. BACKGROUND OF THE CASE

The legal battle between Akzo Nobel Chemicals Ltd (hereinafter “Akzo” or the “Company”) and DG Comp began in 2003, when the European Commission initiated an investigation against Akzo and its subsidiary Akros Chemicals Ltd (hereinafter “Akros”). The Commission seized two e-mails exchanged between two members of Akzo’s staff, i.e. the

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<sup>2</sup> Please note that each of the 27 EU Member States has different legal provisional rules in the context of the legal privilege.

managing director and an in-house lawyer who was the coordinator of the competition law department of the company and was also Advocaat of the Dutch Bar. The Company argued that the above mentioned e-mails were covered by LPP.

The Commission, by their decision of May 8, 2003, firmly rejected the claim brought by Akzo and stated that the documents were not legally privileged. The Company appealed the Commission's decision to the Court of First Instance of the European Union (now the General Court or "GC").

On September 17, 2007, the GC dismissed Akzo's appeal and recalled the ruling of *AM & S Europe Limited v Commission*<sup>3</sup> pointing out that: "the protection accorded to LPP only applies to the extent that the lawyer is independent, that is to say not bound to his client by a relationship of employment."<sup>4</sup> By affirming that ruling, the GC explicitly denied in-house lawyers the privilege of being covered by the LPP.

#### IV. THE RECENT ECJ JUDGMENT DELIVERED ON SEPTEMBER 14, 2010

Akzo and Akros appealed the GC's Judgment of September 17, 2007.<sup>5</sup> On September 14, 2010<sup>6</sup> the ECJ to dismissed the appeal brought by Akzo and Akros against the Judgment of the GC of 17 September 2007.<sup>7</sup> In particular, the ECJ confirmed the GC's refusal to extend the personal scope of protection of LPP to correspondence between AKZO and its in-house lawyer.

In 2007, the GC had reiterated the finding of the ECJ in *AM & S Europe Limited v Commission*, holding that the Court had made a clear distinction between two categories of lawyers: (i) employed salary lawyers, i.e. in-house lawyers, and (ii) independent lawyers who are affiliated to a EU Bar, i.e. those "who are not bound to the client by a relationship of employment."<sup>8</sup>

The ECJ followed the exact same reasoning and affirmed the distinction between independent external legal counsels and in-house lawyers. The Court observed that "an in-house lawyer, despite his enrolment with a Bar or Law Society and the professional ethical obligations....does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his client."<sup>9</sup>

In its pleadings, Akzo raised several arguments to defend the opposite position. Akzo argued that the fact that the lawyer must be independent "cannot be interpreted as to exclude in-house lawyers."<sup>10</sup> Akzo pointed out that in-house lawyers could also be members of a Bar and are therefore bound by the same or equivalent ethics rules as external counsels. Furthermore, the contract between Mr. S. (in-house lawyer of Akzo) and the Company contained a disposition declaring that his duty of independence through his enrolment with the Dutch Bar prevailed over loyalty to the Company.<sup>11</sup> Therefore, Akzo argued that the GC breached the principle of equal

<sup>3</sup> Judgment of 18 May 1982 in Case 155/79, *AM & S Europe Limited v Commission*, [1982] ECR 1575.

<sup>4</sup> *Id.* ¶¶21,27.

<sup>5</sup> Judgment of 17 September 2007 in Joined cases T-125/03 and T-253/03 *Akzo Nobel Chemicals Ltd and Akros Chemical Ltd*, [2007] ECR II-3523.

<sup>6</sup> Judgment of 14 September 2010 in Case C-550/07 P, *Akzo Nobel Chemicals and Akros Chemicals v Commission and others*, [2010] ECR not yet reported.

<sup>7</sup> *Supra* note 5, ¶21.

<sup>8</sup> *Supra* note 3, ¶21.

<sup>9</sup> *Supra* note 5, ¶45.

<sup>10</sup> *Id.* ¶34.

<sup>11</sup> *Id.* ¶35.

treatment by limiting the benefit of LPP to one category of lawyers while denying LPP to another similarly situated category of lawyers.

However, the Court rejected these arguments on the basis that:

- 1) An in-house lawyer is not independent from the company and thus cannot guarantee the same right of defense to his company client. Because he is not external, he is deemed unable to be impartial. In that connection, the Court emphasized the lawyer's role as "collaborating in the administration of justice...in full independence"<sup>12</sup> as one foundation of LPP;
- 2) From an economic perspective, given the close ties with his company, an in-house lawyer will not be able to enjoy the same level of professional independence equivalent to that of external lawyers. The Court held that "he occupies the position of an employee which, by its very nature, does not allow him to ignore the commercial strategies pursued by his employer, and thereby affects his ability to exercise professional independence."<sup>13</sup>

It thus follows that, according to the ECJ, the two categories of lawyers are in different positions and "there was no breach of the principle of equal treatment."<sup>14</sup>

As an alternative argument, Akzo argued that the Court should look at the evolution of its earlier case laws, both at the EU and Member State levels. Yet the Court noted that a large number of current Member States continue not to grant privilege to in-house lawyers. Since there is still an absence of convergence at the Member States' level, the Court felt it unnecessary to extend the scope of LPP to in-house lawyers at the EU level.

The Court emphasized the fact that, since the Judgment of *AM & S Europe Limited v Commission*, European Law has not been amended to an extent which would allow in-house lawyers to benefit from legal professional privilege. The Court rejected Akzo's contention that the "modernisation" of EU law—forcing companies to self-assess their conduct—has indeed increased the need for in-house legal advice, "the importance of which should not be underestimated in preventing infringements of competition law, since in-house lawyers are able to rely on intimate knowledge of the undertakings and their activities."<sup>15</sup>

Akzo also tried to invoke the constitutional principle of the right of defense, which gives "the right of freedom of choice as to the lawyer who will provide legal advice."<sup>16</sup> The establishment of compliance programs, aimed at ensuring the correct application of European Union competition law, requires that "exchanges with an undertaking or group with in-house lawyer may take place in a confidential environment."<sup>17</sup> Akzo argued that refusing LPP to in-house lawyers actually restricted the rights of defense of undertakings. The ECJ considered instead that individuals seeking legal advice would take into account the restrictions and conditions normally in force in the legal profession, including the limitations and conditions related to the legal professional privilege. The Court pointed out that the issue was not new and that, in *AM&S Europe Limited v Commission*, the Court had held that its ruling was sufficient to

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<sup>12</sup> *Id.* ¶42.

<sup>13</sup> *Id.* ¶47.

<sup>14</sup> *Id.* ¶59.

<sup>15</sup> *Id.* ¶79.

<sup>16</sup> *Id.* ¶93.

<sup>17</sup> *Id.* ¶80.

“ensure that the rights of the defence may be exercised to the full.”<sup>18</sup>

Finally, the two companies underlined a possible breach of the principle of legal certainty. Akzo and Akros argued that the holding of the General Court to deny that exchanges within an undertaking with in-house lawyers were covered by the LPP infringed the principle of legal certainty. In order to guarantee this principle, they proposed that LPP should first be defined under national law and then at the European Union level. This would give greater protection to the principle of legal certainty, instead of undermining it. The Court rejected the argument, ruling that the fact that legal professional privilege is limited to exchanges with external lawyers does not actually affect the principle of legal certainty.

## V. IS THE ECJ HEADING IN THE RIGHT DIRECTION? SOME REFLECTIONS

The need for legal advice will, of necessity, be expanded in the future as a result of the modernization of European law. In that regard, in-house lawyers have a decisive role regarding their companies' legal compliance. For this reason, their role should be expanded and not restricted.

Yet it is clear that the ECJ Judgment does not change the interpretation of the independent lawyer's role that was developed nearly 30 years ago in the famous and by now “old” *AM & S Europe Limited v Commission* case. However, we can hope that a less narrow opinion with respect to in-house lawyers will prevail in the future.

According to the Court, in-house lawyers are not protected by LPP because they are not independent: Does this mean that they are not able to work as effectively and impartially as external lawyers would do? No. The crucial point is the following: Both external independent lawyers and in-house lawyers can be registered to the Bar of their Member State. Thus, both categories of lawyers need to respect the same set of legal and deontological rules that are underlined by the principles of impartiality, confidentiality, and independence. For this reason, the two categories should be treated equally when exercising their roles in respect of the law and their clients' right of defense. Whether they are employed full time by their client or not should not make any difference. Both can ensure their client's right of defense; their communications with their clients should consequently be covered by legal professional privilege.

The ECJ in its Judgment<sup>19</sup> focused on the concept of “economic dependence.” However, it is questionable whether this constitutes a valid criterion to define the personal scope of LPP. Does the ruling mean that, if it were to be proved that an external lawyer had only one or two clients, there is a risk he could lose the benefit of LPP on the grounds that he is economically dependent of his clients? This would create unacceptable legal uncertainty and would threaten the companies' rights of defense.

Due to the emerging *réalité du monde des affaires*, large international law firms frequently work with companies on a daily basis. This has several consequences. First, the lawyers need to familiarize themselves with the client's industry as best as possible—as much as in-house lawyers would. Second, since these large multinational companies can constitute an important source of income for the law firm, these lawyers may be tempted to please their clients' wishes rather than to provide fully independent legal advice. Such long-term relationships may mean that external lawyers will also develop close ties with the company and consequently become less impartial and

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<sup>18</sup> *Supra* note 3, ¶ 23.

<sup>19</sup> *Supra* note 5, ¶ 57.

independent than a “real” independent lawyer as viewed by the Court. In this sense, these lawyers become more akin to in-house lawyers and eliminating any sufficient difference between the two that could justify a difference of treatment regarding LPP.

## **VI. CONCLUSION**

It is regrettable that the ECJ missed the opportunity to recognize the importance of in-house lawyers in modern EU competition law. It is unlikely that the Court’s position will change in the foreseeable future. One hope, however, is that the Court will be more lenient in interpreting the circumstances under which documents may benefit from LPP on the grounds that they were prepared for the purpose of obtaining legal advice from external lawyers.