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REPORT

PRIVILEGE

Legal Professional Privilege Under European Union Law — Navigating the Unresolved Questions Following the *Akzo* Judgment

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Introduction

On 14 September 2010, the Court of Justice of the European Union gave its ruling in the *Akzo*[1] case confirming that the protection of legal professional privilege (LPP) does not extend under EU law to advice given by in-house lawyers.

The judgment held no surprises given that it followed the line taken by the General Court (previously known as the Court of First Instance)[2] and the opinion of the Advocate General. Accordingly it is now settled law that:

- Advice from and communications with in-house lawyers can be demanded or seized by the European Commission.[3] This includes a written request from a company to its in-house lawyer for legal advice and written advice given by the in-house lawyer.
- Internal preparatory documents may be protected by LPP even if they have not been exchanged with an external lawyer, but only if they were prepared *exclusively* for the purpose of seeking legal advice from an external lawyer in the exercise of the rights of defence.
- Internal summaries (prepared by an in-house lawyer or other company employee) which merely summarise the content of an external lawyer's advice will be protected by LPP if the communication from the external lawyer would also have

[1] Case C-550/07P *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission* ("*Akzo 2010 judgment*").

[2] The CFI was renamed the General Court by Article 2(2)(n) of the Treaty of Lisbon which entered into force on December 1, 2009.

[3] The position in the EU contrasts markedly with that in the United States where the protection of attorney-client privilege and attorney-work product is well recognized to extend to in-house counsel.

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been protected. Any internal opinion or commentary will not be covered by LPP.

The *Akzo* judgment, however, addresses only the question of LPP for in-house communications but leaves unresolved a number of questions relating to the operation of LPP rules under EU law.

These include questions of acute importance to U.S. companies concerning whether those rules might capture communications emanating from U.S. lawyers. For example:

- What is the status of in-house communications involving U.S. lawyers, including those giving advice on matters of U.S. law, for example, advice from a U.S.-based in-house lawyer to his client accessible in the EU from a U.S.-based server?
- What is the status of communications involving external U.S. lawyers, including those giving advice on matters of U.S. law, for example, advice from a U.S.-based external lawyer to his client copied to an in-house lawyer in the EU?
- Is it the case that compliance with EU demands for disclosure can lead to the potential waiver of U.S. attorney-client or work product privilege over the relevant documents?
- What is the scope of the subject matter of the external advice that is protected by LPP and, in particular, is it only competition law advice that is afforded such protection?

This article reviews the evolving EU case law on LPP to date and concludes that the circumscribed approach to LPP in the EU means that the fundamental justification for the existence of privilege, *i.e.* that a person should be able to speak ''*freely, frankly and fully*'' to their lawyer, is jeopardised. The approach also gives rise to serious legal and practical difficulties for U.S. companies in obtaining confidential legal advice and communicating that advice within their business (where they also have operations within the EU).

The evolving EU case law on LPP

The unfettered ability to communicate with a lawyer on a confidential basis is a fundamental right which exists in many legal systems around the world.

The rationale underlying this right is that, if a client is discouraged from telling his lawyer the whole truth for fear that his communications may be disclosed, the lawyer will be restricted in advising and representing his client, and the client will be prevented from obtaining the most effective representation in the exercise of his rights of defence.[4] The importance of this right was recognised by Advocate-General Sir Gordon Slynn in his opinion in the leading case of *AM&S* where he stated:

> . . . it is plain, as indeed seems inevitable, that the position in all the Member States is not identical. It is to my mind equally plain that there exists in all the Member States a recognition that the public interest and the proper administration of justice demand as a general rule that a client should be able to speak freely, frankly and fully to his lawyer.[5]

Despite the fact that this right is recognised by many EU legal systems, its precise boundaries are not always clear and vary from jurisdiction to jurisdiction across EU Member States. Regulation 1/2003[6], the main procedural regulation governing EU competition investigations, contains no provision dealing with the status of lawyer-client communications. The EU rules on the scope of LPP have instead been established by the case law of the Court of Justice and the General Court, in particular in three leading cases: *AM&S*,[7] *Hilti*,[8] and *Akzo*.[9]

AM&S

The issue of LPP first came before the Court of Justice in *AM&S*. In its landmark 1982 judgment the Court ruled that written communications between a lawyer and his client should be protected from disclosure (as an essential corollary to the rights of defence), subject to two cumulative conditions being met, namely that the communications should:

(i) be made for the purposes and in the interests of the client's rights of defence; and

(ii) emanate from independent lawyers, that is to say lawyers who are not bound to the client by a relationship of employment.[10]

With respect to condition (i), the Court made clear that, to be effective, the protection should cover all written communications exchanged after the initiation by the Commission of administrative proceedings[11] but also that it could be extended to ''earlier written communications which have a relationship to the subject-matter of that procedure''.[12]

With respect to condition (ii), the Court, by insisting that there should be no relationship of employment involved, limited the application of LPP to external lawyers.[13] According to the Court, the second condition was based 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 counterpart of that protection lies in the rules of professional ethics and discipline which are laid down and enforced in the general interest by institutions endowed with the requisite powers for that purpose.[14]

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[4] An additional rationale is the higher duty of the lawyer to uphold the law and encourage others to do so.

[5] *Opinion of Advocate General Sir Gordon Slynn delivered on 26 January 1982* [1982] ECR II-1575, page 1654.

[6] Council Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (now Articles 101 and 102).

[7] Case 155/79 *Australian Mining and Smelting Europe Limited v Commission* (''*AM&S*'') [1982] ECR II-1575.

[8] Case T-30/89 *Hilti v Commission* (''*Hilti*'') [1990] ECR II-163.

[9] Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals Ltd and Akcros Chemicals v Commission Ltd* (''*Akzo 2007 judgment*'') [2007] ECR II-3523 and *Akzo 2010 judgment*.

[10] *AM&S*, paragraph 21.

[11] Where those proceedings may lead to a decision on the application of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) or to a decision imposing a pecuniary sanction on the undertaking.

[12] *AM&S*, paragraph 23.

[13] It is this aspect which has now been confirmed by the Court of Justice in the September 2010 *Akzo* judgment.

[14] *AM&S*, paragraph 24.

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It was in this context that the Court then went on (in the paragraphs immediately following) to make the statement that has given rise to significant controversy, namely that the protection of LPP must apply without distinction to any lawyer entitled to practise his profession in one of the Member States, regardless of the Member State in which the client lives, and that such protection may not be extended beyond those limits. As further discussed below, it is this statement by the Court which has been taken by some, including the European Commission, to mean that advice from non-EU lawyers falls outside the protection of LPP.

The Court in *AM&S* also established a procedure by which LPP could be protected during the course of an unannounced inspection (dawn raid) by the European Commission. It stated that, if a company wanted to claim LPP over a document, it was obliged to provide the inspectors with ''relevant material of such a nature as to demonstrate that the communications fulfil the conditions for being granted legal protection . . . although it is not bound to reveal the contents of the communications in question''.[15] As further discussed below, the General Court in *Akzo* provided further clarification as to the appropriate procedure to be followed for the protection of disputed documents.

Hilti

In *Hilti* the General Court clarified the possibility of obtaining LPP for summaries of external advice prepared internally by a company. The Court held that, when external advice is reproduced in an internal note distributed within a company, it is protected provided that such notes are confined to reporting the text or the content of lawyer-client communications.[16]

Akzo

The Judgment of the General Court

In 2007, the General Court confirmed the judgment in *AM&S* by stating that only communications with an independent lawyer (*i.e.* one that is not bound to his client by a relationship of employment) are covered by LPP.[17] It rejected arguments that there had been a sufficient change in the legal landscape across EU Member States since *AM&S* to merit an extension of LPP to in-house counsel.[18]

The Court did, however, add an additional category of documents which could be protected by LPP. This category comprises preparatory documents drawn up exclusively for the purposes of seeking legal advice from an external independent lawyer in exercise of the rights of defence, even if the particular documents are not sent to the external lawyer or are not created for the purpose of being sent physically to a lawyer.[19] The Court noted that such ''preparatory documents'' could include documents prepared for the purpose of gathering information to assist the lawyer in gaining an understanding of the facts and context in which the lawyer's assistance is being sought.[20]

The Court also provided further clarification regarding the procedure to be adopted for claiming LPP during a dawn raid. It confirmed that, if the privileged nature of a document is not clear from external indications (for example, by showing the letterhead of the document), the company's officials may refuse to allow the Commission officials even a cursory look at the document, provided that the company considers that such a cursory look is impossible without revealing the document's content and that it gives the Commission officials appropriate reasons for its view.[21] However, if the company refuses the Commission a cursory look at the document, it is possible for the Commission to place a copy of the document in a sealed envelope, pending a formal decision requiring its disclosure which can then be the subject of an appeal to the General Court.[22] Given the Commission's powers to sanction the withholding of documents by the use of fines, a company should not take this step lightly, although it is also noted that the Commission has not to date taken the controversial step of seeking disclosure of sealed documents by way of formal decision.

The Judgment of the Court of Justice

The Court of Justice upheld the General Court's judgment and, in particular, the two conditions for the application of LPP set out in *AM&S* namely, first, that the exchange with the lawyer must be made for the purposes of the ''client's rights of defence'' and, secondly, that the exchange must emanate from ''independent lawyers'', that is ''lawyers who are not bound to the client by a relationship of employment''.[23] With respect to the second requirement the Court noted that:

(a) The requirement of independence means the absence of any employment relationship between the lawyer and his client.[24] The concept of the independence of lawyers is determined not only positively, that is by reference to professional ethical obligations, but also negatively by the absence of an employment relationship. The Court added that ''an in-house lawyer is less able to deal effectively with any conflicts between his professional obligations and the aims of his client'';[25]

(b) An in-house lawyer ''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''.[26]

[15] *AM&S*, paragraph 29.
[16] *Hilti*, paragraphs 16 to 18.
[17] *Akzo 2007 judgment*, paragraphs 166 to 169.
[18] *Akzo 2007 judgment*, paragraphs 170 to 174.
[19] *Akzo 2007 judgment*, paragraphs 122 and 123.
[20] *Akzo 2007 judgment*, paragraph 122.
[21] *Akzo 2007 judgment*, paragraphs 80 to 85.
[22] *Akzo 2007 judgment*, paragraph 85.
[23] *Akzo 2010 judgment*, paragraph 41 and paragraphs 44 to 50.
[24] *Akzo 2010 judgment*, paragraph 44.
[25] *Akzo 2010 judgment*, paragraph 45.
[26] *Akzo 2010 judgment*, paragraph 47. It is interesting to note just how far the position on independence has moved since the opinion of Advocate General Sir Gordon Slynn in 1982 in *AM&S*. He noted that there was no merit in the statement that in-house lawyers are less independent than external lawyers, and compared the position of in-house lawyers with those employed full time by the Community institutions and those within private practice who for long periods act for the same client: ''A lawyer in private practice who is a member or associate of a large law firm may act for long periods for only one client. If his communications are protected, so it seems to me, should be those of the lawyer who is a member of the le-

An in-house lawyer may be required to carry out other tasks, such as that of ''competition law coordinator'' which ''cannot but reinforce the close ties between the lawyer and the employer''.[27]

(c) Enrolment with a Bar or Law Society and the fact of being subject to professional ethical obligations do not mean that an in-house lawyer can enjoy the same degree of independence from his employer as does a lawyer in an external law firm in relation to his client.[28]

The Court rejected arguments that the *AM&S* judgment should be reinterpreted in the light of recent developments in the legal landscape since 1982, on the grounds that these had not been significant enough to justify a change in the case law. The Court noted that:

(a) A large number of EU Member States still exclude correspondence with in-house lawyers from protection under LPP under their national laws. In addition, in a considerable number of EU Member States in-house lawyers are not allowed to be admitted to a Bar or Law Society and they are accordingly not recognised ''as having the same status as lawyers established in private practice''.[29]

(b) Regulation 1/2003 ''does not aim to require in-house and external lawyers to be treated in the same way as far as concerns legal professional privilege, but aims to reinforce the extent of the Commission's powers of inspection''.[30] The Court was not swayed by arguments that the introduction of self-assessment by Regulation 1/2003 justified a change in the law on LPP.

The Court of Justice rejected arguments that the General Court's interpretation lowered the level of protection of the rights of defence. It took the view that any individual who seeks advice from a lawyer must accept the restrictions and conditions applicable to the exercise of that profession. The Court noted that ''in-house lawyers are not always able to represent their employer before all the national courts, although such rules restrict the possibilities open to potential clients in their choice of the most appropriate legal counsel''.[31]

Unresolved questions

The current case law leaves outstanding a number of important issues, which have a significant impact on U.S. companies who operate within the EU.

Application of LPP to non-EU qualified lawyers

As noted above, at paragraph 25 of its judgment in *AM&S*, the Court stipulated that communications with external lawyers can only be protected by LPP if the external lawyer is ''entitled to practise his profession in one of the Member States''. One reading of this part of the judgment, which is favoured by the European Commission, is that advice from a non EU-qualified lawyer is not protected by LPP under EU law. If sustained, this interpretation could lead to the absurd situation where, for the purposes of a European Commission investigation, advice from an English solicitor on his understanding of U.S. antitrust law would be privileged, but advice from a member of the New York bar on the same subject would not. Similarly, internal advice shared between a U.S.-based in-house counsel and his U.S.-based client, whether on a point of U.S. or EU law (which would be privileged under U.S. law), might be found to be disclosable if it is accessible within the EU.

An alternative interpretation would however place paragraph 25 of the *AM&S* judgment in its context. The paragraph begins with a recognition of the importance of the principles of the Treaty concerning freedom of establishment and the freedom to provide services and then states that the protection of LPP must apply without distinction to any lawyer entitled to practise his profession in one of the Member States, regardless of the Member State in which the client lives. Thus the Court's reference to ''any lawyer entitled to practise his profession in one of the Member States''[32] may reasonably be read as seeking to ensure that the protection of LPP applies without discrimination as between all lawyers qualified in the EU Member States, and not as a statement excluding the possibility of LPP applying to advice from non-EU qualified lawyers who satisfy the condition of independence.

In *Akzo* the Court of Justice did not need to consider the specific issue of advice from non-EU lawyers, as this did not arise as an issue in that case. It remains to be seen whether, following the Court's judgment, the European Commission maintains its demands in relation to communications involving non-EU qualified lawyers. In circumstances where the Commission anticipates that the documents in question may contain useful incriminating information (for example, relating to an assessment of a potential infringement), the Commission may demand disclosure of this advice or work product.

U.S. companies must therefore be extremely careful about sharing with a European subsidiary sensitive communications with or advice from a non-EU qualified lawyer, as there is a risk that the Commission would regard such communications as not being privileged under the EU rules. On this basis it would not be sufficient merely to copy in external counsel in the EU in the hope that this would bless the communication with EU LPP.

Extra-territorial reach

The Commission has in certain cases taken the position that it is entitled to require companies based in the EU to provide documents stored outside the EU where they are accessible from servers based in the EU.[33] This

gal department of a company. I would reject any suggestion that lawyers (professionally qualified and subject to professional discipline) who are employed full time by the Community institutions, by government departments, or in the legal departments of private undertakings, are not to be regarded as having such professional independence as to prevent them from being within the rule''. Indeed in its pleadings in *AM&S* the European Commission had itself accepted the term ''lawyer'' to ''cover both a lawyer in private practice and a salaried lawyer employed by a company, so long as he is effectively subject to a comparable regime of professional ethics and discipline as is the lawyer in private practice in the Member State in which he practises''.

[27] *Akzo 2010 judgment*, paragraph 48.
[28] *Akzo 2010 judgment*, paragraph 45.
[29] *Akzo 2010 judgment*, paragraph 72.
[30] *Akzo 2010 judgment*, paragraph 86.
[31] *Akzo 2010 judgment*, paragraph 95.

[32] *AM&S*, paragraph 25.

[33] It has been reported, for example, that during the dawn raids that the European Commission conducted as part of its pharmaceutical sector inquiry, the inspectors requested pro-

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issue has not been tested before the European Courts, however.

The Commission's stance poses a significant dilemma for companies with both U.S. and European presences which seek to obtain coordinated U.S. and EU antitrust compliance advice. U.S. companies would normally take advice from their internal and external lawyers safe in the knowledge that their communications are protected from disclosure in the United States under the U.S. rules of privilege. Yet, if those documents are accessible in the EU, the European Commission has taken the position that there is no protection from disclosure of such advice, whether provided by an in-house or external lawyer.

Furthermore, the fact that communications which enjoy protection in the United States under attorney-client privilege or the work product doctrine may not enjoy equivalent protection in the EU has the potential to undermine the protection conferred by the U.S. rules within the United States itself.

This is because of the issue of the waiver of privilege. In the United States, privilege can be waived, even inadvertently, by failing to keep the documents confidential. Providing documents ''voluntarily'' may constitute a waiver of any privilege in the U.S., possibly extending beyond the documents in question to all documents concerning the same subject matter. There is a degree of uncertainty regarding the level of compulsion required to avoid the waiver of privilege in the U.S. context which presents companies with a serious dilemma when investigated by the European Commission. Should they hand over U.S.-privileged documents when requested to do so in an EU investigation, or should they refuse? How far does the refusal need to go in order to avoid the risk of waiver? Is it enough to have the company's disagreement noted in minutes of the investigation or does the company need to force the European Commission to issue a formal decision requiring disclosure and thereafter seek an appeal before the General Court of that formal decision? The stakes are high as the company faces the risk that it can be fined (or have its fine increased) on the basis of a lack of cooperation.

To date there has been no case where a company has been fined for having claimed LPP. Arguably there should be a defence before the General Court (if not before the Commission) that fines should not be applied if the claim of privilege (even if not ultimately upheld by the Court) was made sincerely and in good faith. Nevertheless the experience of Sanofi-Aventis during the European Commission's 2008 pharmaceutical investigation illustrates the potential risk. In order to ensure the preservation of U.S. privilege, Sanofi refused to provide the Commission inspectors with certain documents until they had obtained a French search warrant. In response the Commission launched an investigation against Sanofi for failing to cooperate with a Commission inspection.[34] The Commission subsequently closed the investigation on the basis that, following extensive discussions with the company, it was satisfied that Sanofi now fully understood its obligations.

The rights of defence

As noted above, in *AM&S* the Court held that, in order to benefit from LPP, the communication must have been ''made for the purposes and in the interests of the client's rights of defence''.[35] This has given rise to a question as to the scope of this requirement.

The Court had explained that (subject to the condition on lawyer independence), LPP must extend to ''all written communications exchanged after the initiation of the administrative procedure'' as well as to ''earlier written communications which have a relationship to the subject-matter of that procedure''.[36]

It is apparent that *AM&S* itself does not place any limits on the type of legal advice that can be regarded as being ''for the purposes and in the interests of the client's rights of defence'', although in that case the advice in question dealt broadly with competition law compliance. Nevertheless, a question has arisen as to whether the legal advice envisaged must relate to Articles 101 and 102 TFEU (the EU provisions dealing with cartels and abuse of dominance), or whether it would also encompass advice on non-competition law issues such as intellectual property law advice or corporate law advice which is related to the subject-matter of the investigation.

A robust view, given the fundamental purpose of LPP, would be that the Commission has no right to seize external legal advice from an EU-qualified lawyer on any legal issue. In any event, the test laid down in *AM&S* of ''earlier written communications which have a relationship to the subject-matter of that procedure'' is broad. Indeed, if the legal advice has no relationship with the subject-matter of the investigation it can be strongly argued to fall outside the scope of the investigation and to be unobtainable for that reason as well.

Conclusion

Whilst the *Akzo* judgment has finally settled the issue as to the non-availability of LPP to advice given by in-house lawyers, there remain significant lacunae in the EU case law, particularly concerning the status of advice from non-EU qualified lawyers and the subject matter scope of the protection which have, essentially, remained unresolved since the 1982 *AM&S* judgment.

Whilst this may not have been a significant concern in the initial period following that judgment, over a quarter of a century later, in the context of the Internet age where cross-border communications are both instant and permanent, the lack of clarity presents acute difficulties for U.S. and multinational businesses operating in the EU. Given, however, the aggressive stance adopted on occasion by the European Commission in relation to issues of disclosure, it may only be a matter of time before a contested case does make its way before the European Courts on this issue.

Until that time, companies will have to weigh up very carefully the risks of seeking to maintain privilege against the risks of foregoing privilege. For the time being, should they need robustly privileged legal advice on this issue, they can only seek that advice from their chosen EU-qualified external counsel.

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duction of electronic documents stored on servers located in the United States but accessible from Europe. They specifically requested emails exchanged between in-house lawyers and executives working at offices in the United States concerning matters of U.S. patent law.

[34] See Commission press release MEMO/08/357 of 2 June 2008.

[35] *AM&S*, paragraph 21.

[36] *AM&S*, paragraph 23.

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