

Client Alert

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Legal privilege under EU competition law: In-house communications not covered, says Advocate General

In the most recent instalment of the Akzo saga, Advocate General Kokott has upheld the views of the Commission and the General Court, concluding that EU legal professional privilege (LPP) does not extend to in-house communications.

Although not binding on the Court of Justice, which is expected to give final judgment on this long-running debate later this year, the AG's Opinions tend to be followed in most cases. This is especially the case in relation to the opinions of AG Kokott.

Lack of independence - due to the economic reliance of an employee on its employer - was the spoiling factor in the AG's mind, giving rise to a *"...structural danger that an enrolled in-house lawyer ... of good character and of the best intentions...will encounter a conflict of interests between his professional obligations and the aims and wishes of his employer"*.

The effect of strict ethical rules applying to lawyers admitted to the local Bar/Law Society was downplayed by the AG whose view was that an in-house lawyer leaves their independence at the door when they accept paid employment.

The Opinion will be disappointing for in-house lawyers who feel that their ability to explore and advise on potentially contentious competition law issues is undermined by the fact that their communications do not attract LPP.

As disappointing as the Opinion may be, it comes as no surprise. The EU caselaw leaves little room for extending the EU notion of LPP. Even at Member State level the position regarding in-house communications is a patchwork of sometimes ambiguous rules making it difficult to argue that the EU is out of step with the practice of the EU's constituent members. These divergent approaches may also mean that legislative changes - perhaps the only way of really protecting in-house communications - are difficult to achieve.

As a result, companies will need to continue to bring external EU lawyers into the loop at an early stage to protect privilege whenever potentially contentious matters involving EU competition law may be at stake (even when this may seem an unnecessary step). Although the position at a national level may be more generous, e.g. in the UK where the Office of Fair Trading does recognise in-house LPP, this will be of no consolation when the Commission conducts a dawn raid, or when a seemingly domestic matter ends up being prosecuted by the Commission because of wider effects across the EU. In any event, a company will rarely know at the 'fact-finding' stage whether an

uncovered competition issue will turn out to be genuinely domestic or the tip of a European iceberg.

The judgment of the Court of Justice is awaited but a sea-change is unlikely.

Practical tips on how to attract and retain legal privilege are contained in our previous [Client Alert relating to the General Court's judgment in 2007](#).

Background

EU law has always respected LPP between external EU lawyers and their clients - acknowledging that this is an essential corollary to the client's right of defence. But the European Commission has never accepted that LPP should also cover communications between an in-house lawyer and its employer.

The Akzo case is the most famous case on this issue. In a 2003 dawn raid, the Commission controversially added a number of documents to its file, including emails between a Dutch in-house lawyer and their employer, despite claims that the documents attracted LPP.

In a long-awaited judgment in 2007, the EU General Court upheld the Commission's approach, confirming the orthodoxy that the EU principle of LPP does not cover in-house communications.

Yesterday's AG Opinion considers the appeal being brought against that finding. Although not binding on the Court of Justice, such opinions tend to be followed.

Yesterday's Opinion

There were three strands to Akzo's appeal:

- Under EU case law, LPP applies when (i) communications relate to a client's right of defence; and (ii) the lawyer is independent. Akzo argued that the General Court should have interpreted this so as to cover in-house communications. In particular, Akzo argued that ethical obligations applying to lawyers admitted to a Bar/Law Society should be sufficient to safeguard independence.

The AG disagreed, noting that the requirement of independence is unequivocally linked to the fact that the lawyer "*must not be in a relationship of employment with his client*". To the AG, 'being employed' connoted complete economic dependence precluding an ability to act independently - in contrast with the position of an external lawyer who, in the event of a conflict of interest, can withdraw their services to safeguard their independence. Even ethical rules taking precedence over employment law considerations (as was the case in the Netherlands) were not enough to shift the AG from this view, who considered that it was doubtful that this guaranteed real independence: "*There is a real danger that, in eagerness to show obedience to their employer, enrolled in-house lawyers will 'choose' to give legal advice the substance of which will be acceptable to that employer*".

- Secondly, Akzo argued (in the alternative) that the Court should depart from the existing EU case law by extending the EU principle of LPP so as to cover in-house communications. However, the AG was unconvinced that EU law should be brought into line with the legal position in only a minority of Member States (which implied that most Member States saw no need to deny their competition authorities access to in-house communications); that there was no evidence of a trend towards

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protecting such communications; and that there was no evidence of the EU legislature being in favour of such an approach. Nor was the AG persuaded that the differing approach of the Commission as compared with that of certain national competition authorities breached the EU principle of legal certainty given the clear division of competences between the Commission and national competition authorities.

- Thirdly, Akzo argued that, in the absence of express EU law, the scope of LPP should be left to Member States to determine. The AG rejected this, noting that the interpretation and application of LPP in a uniform manner across the EU was essential for the purposes of the Commission's competition law investigations. The uniform application of EU law would obviously be hampered if decisions on the lawfulness of Commission acts fell to be determined by national law.

Conclusion

Overall, the AG's Opinion will come as a blow to anyone hoping that the Commission might be forced to adopt a more generous approach to in-house communications. Legislation may be the only way to extend LPP but the lack of harmonisation across EU Member States in this areas suggests that this would be an uphill struggle.

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