

The below analysis was prepared by Georg Berrisch and David Hull of Covington, Brussels Office, appellate counsel representing ACC's interests since 2007 in this case:

**LEGAL PROFESSIONAL PRIVILEGE IN EU COMPETITION INVESTIGATIONS
AFTER THE AKZO JUDGMENT OF THE COURT OF JUSTICE**

I. Introduction

On 14 September 2010, the Court of Justice, the highest court in the European Union ("EU"), issued its long-anticipated judgment in Appeal lodged by *Akzo Nobel* case¹ against the judgment of the Court of First Instance (now called the General Court) of 17 September 2007² concerning the personal scope of legal professional privilege ("LPP"). The Court of Justice rejected the appeal based on essentially the same reasons already set out by Advocate General Kokott in her Opinion of 29 April 2010. ***Thus, the Court of Justice confirmed that in the context of EU competition law investigations, LPP does not cover communications between in-house lawyers and other employees at a company, even where the lawyer is a member of a bar in an EU Member State.***

The key findings of the Court are as follows:

- In order for communications between a client and his or her lawyer to be covered by LPP, the communication must relate to 'the client's rights of defence' and, second, that it must emanate from 'independent lawyers'.
- The requirement of independence means the absence of any employment relationship between the lawyer and his or her client, so that LPP does not cover communications within a company or group with in-house lawyers
- An in-house lawyer, even if enrolled with a Bar or Law Society and the professional ethical obligations to which he or she is, as a result, subject, does not enjoy the same degree of independence from his or her employer as a lawyer working in an external law firm does in relation to his or her client. Consequently, an in-house lawyer is less able to deal effectively with any conflicts between his professional obligations and the aims of his client. It follows, both from the in-house lawyer's economic dependence and the close ties with his or her employer, that he or she does not enjoy a level of professional independence comparable to that of an external lawyer.
- There is no breach of the principle of equal treatment because in-house lawyers are in a fundamentally different position from external lawyers, so that their respective circumstances are not comparable.

¹ Case C-550/07 P *Akzo Nobel Chemicals Ltd and Akrcos Chemicals Ltd v Commission*.

² Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals Ltd and Akrcos Chemicals Ltd v Commission*. The findings of the General Court on the subject matter and the dispute resolution procedure were not subject of the appeal proceedings.

- The legal situation in the Member States of the European Union has not evolved, since the 1982 judgment in *AM & S* to an extent which would justify a change in the case-law and recognition for in-house lawyers of the benefit of LPP. It is not possible to discern a predominant trend towards protection under LPP of communications within a company or group with in-house lawyers in the legal systems of the 27 Member States of the European Union.
- The amendment of the rules of procedure for competition law, resulting in particular from Regulation No 1/2003, is unable to justify a change in the case-law established by the judgment in *AM & S*. Regulation No 1/2003 does not aim to require in-house and external lawyers to be treated in the same way as far as LLP is concerned, but aims to reinforce the extent of the Commission's powers of inspection, in particular as regards documents which may be the subject of such measures.
- Not extending LPP to communications with in-house lawyers does not breach the principle of the rights of defence and the right of a party to choose its lawyer. Any individual who seeks advice from a lawyer must accept the restrictions and conditions applicable to the exercise of that profession and the rules on LPP form part of those restrictions and conditions.
- Not extending, in the context of EU competition law investigations LPP to communications with in-house lawyers who enjoy LPP under national law also does not violate the principle of national procedural autonomy. The uniform interpretation and application of the principle of legal professional privilege at European Union level are essential in order that inspections by the Commission in anti-trust proceedings may be carried out under conditions in which the undertakings concerned are treated equally.

II. Immediate Impact of the Judgment

A. Limited to EU Competition Law Matters

While the Court of Justice's confirmation holding that in-house lawyers are not eligible for the protections afforded by LPP is disappointing, it is important to remember that this ruling only applies to competition investigations by the EU Commission. Therefore, the rules applicable to LPP have not changed with respect to investigations by national competition authorities or other national and local regulators or with respect to private actions brought under the competition law. More generally, the ruling does not directly affect the scope of LPP outside of the field of competition law.

B. Confirmation of the existing law

In 1982, the Court of Justice had ruled that LPP only applies to communications between a client and its outside counsel who is admitted to a bar of a member state of the EU but

not to communications between in-house counsel and their clients. The *Akzo Nobel* case presented the Court of Justice with an opportunity to extend LPP to include in-house lawyers, or at least to create a clear standard for determining when an in-house lawyer is sufficiently independent for LPP to apply. Regrettably, the Court of Justice confirmed its earlier judgment in *AM&S*. As a consequence, for the purposes of EU competition law investigations, communications between a company's employees and its in-house lawyers remain not protected by LPP.

As disappointing as that ruling is, it is important to bear in mind that the Court of Justice simply confirmed the existing rule. Thus, in-house counsel will not have to amend their practices, but will need to continue to be vigilant to ensure that competition advice on sensitive issues originates with outside counsel so that the advice will benefit from LPP. This does not necessarily mean that it would make sense to go to outside counsel every time that a competition issue arises during the course of a company's operations. In-house counsel can well deal with routine issues concerning matters such as distribution agreements or pricing practices. However, if an issue arises that could subject the company to significant exposure under the competition rules, such as the discovery that a manager has been involved in inappropriate discussions with competitors, it would seem worthwhile to bring in outside counsel to ensure that the documents generated during the investigation of the problem are covered by LPP.

The Court of Justice did not explicitly address the issue of whether communications with lawyers who do not belong to an EU bar are covered by LPP. Advocate General Kokott had addressed that question in her opinion in an *obiter dicta* and concluded that extending LPP to lawyers from third countries would not be appropriate as there is no adequate basis for the mutual recognition of legal qualifications and professional ethical obligations to which lawyers are subject in the exercise of their profession. One may speculate whether the Court of Justice, when faced with the question, would come to a different conclusion than Advocate General Kokott. The strong emphasis that the Court placed on the distinction between a lawyer bound by his or her client through an employment relationship, on the one hand, and an external lawyer, on the other may suggest that the decisive criterion for the Court is the absence of an employment relationship rather than the membership of a bar of the EU. Nevertheless, prudent companies should operate under the rule that communications with outside lawyers who are admitted in a country outside the EU are not covered by LPP. Thus, companies should ensure that advice on EU competition matters—particularly on the kinds of matters that could result in significant exposure for the company—comes from lawyers who are admitted to an EU bar. For example, if a U.S.-based company discovers that managers in one of its divisions are involved in a global price-fixing cartel and hires a U.S. law firm to investigate the matter, it should ensure that EU counsel are involved in the investigation as communications with its U.S. counsel will not benefit from LPP in the EU. Otherwise, records of the investigations, including interviews with managers, would be subject to seizure in the event of a dawn raid by the European Commission.

III. Potential Further Action

The Court of Justice's refusal to extend LPP to communications with in-house counsel is very disappointing, as it perpetuates the unjustified discrimination against in-house counsel and fails to recognize the important role played by in-house counsel. While there are practical solutions to deal with the consequences of the judgment, the fact remains that the judgment will make the work of in-house counsel more difficult and raise compliance costs for companies with exposure to EU competition law.

It is particularly disappointing that both EU Courts gave short shrift to the detailed evidence that ACA has put forward regarding the changing the role of in-house counsel. Both Courts failed to recognize the important role that in-house play in helping their clients to comply with their legal obligations.

Contrary to what the Commission suggested in its pleadings before the General Court and the Court of Justice, extending LPP to in-house counsel also would not have limited the Commission's investigative powers in any material way. It is highly unlikely that the result of a Commission investigation, for example in a cartel case, depends on communications with in-house counsel, in particular as most investigations today are initiated following a leniency application by one cartel member who normally already provides the Commission with the necessary evidence. On the other hand, protecting the ability of in-house counsel to provide confidential legal advice would further the Commission's overall goal of compliance with EU competition law.

These and many other arguments for extending LPP to in-house counsel were put before the CFI, not only by the applicant AKZO, but also by the various lawyers organisations that intervened in support of AKZO. The Court of Justice, as before the General Court, rejected all of these arguments. It therefore does not appear promising to plead the issue again before the EU courts. Therefore, the most promising way forward is likely to be legislative action at EU or Member State level.

EU Legislative Action. A major practical hurdle to any legislative change is that the Commission is the EU institution charged with initiating legislation. As the Commission views LPP as a limitation of its investigative powers, it is unlikely that it would voluntarily undertake such an action. Therefore, it will be necessary to pressure the Commission in order for an EU legislative action to be successful.

The most obvious institution that could pressure the Commission into introducing legislation on LPP is the European Parliament. In 2003, it proposed amendments to the draft EC Merger Regulation establishing LPP for in-house lawyers where that lawyer was subject to adequate rules of professional ethics and discipline. While these amendments were not included in the final version of the Regulation that was eventually adopted, it may nevertheless be possible in the future to extend LPP indirectly through the European Parliament.

It may also be possible to have the Council of Ministers pressure the Commission to introduce legislation on LPP. In particular, in the proceedings before the Court of Justice, Ireland and the UK intervened in support of AKZO, making very powerful submission for extending the personal scope of LPP to communications with in-house counsel. These Member States could take the lead in the Council. On the other hand, it needs to be recognized that levels of LPP granted under the laws of the Member States vary considerably and that there likely is a large group of Member States opposed to extending LPP.

In order to be successful, Individual companies and industry organizations taking on this issue need to effectively communicate the benefits of extending LPP to in-house counsel and changed role that in-house counsel play in modern corporations.

National Legislative Action. Bar groups should continue to look for opportunities at the national level to extend LPP to in-house counsel in national investigations, in particular by national competition law authorities. One of the reasons that the CFI declined to extend LPP to cover in-house counsel was that there was no clear consensus on the issue at the national level. Thus, if the laws of the Member States continue to evolve in a way that provides greater protection to in-house counsel, this evolution may influence future cases in front of the EU courts involving LPP. It would also provide support for legislative action at EU level.