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Concurrences Webinar LEGAL PRIVILEGE AND ANTITRUST IN THE EU AND THE US : What's new under the sky ?

Webinar – 27 November 2020*

Webinar organised by Concurrences in partnership with McDermott Will & Emery.

Jacques Buhart

Jacques Buhart introduced the webinar. He recalled that legal privilege has been a topic that has agitated the legal community for many years. The question of legal privilege is important not only in international cartels, being investigated in several jurisdictions but also multiple merger control proceedings and international criminal investigations. A good understanding of the webinar for everyone requires a definition of the essential legal concepts. It is important to distinguish the legal professional privilege (the "LPP"), from confidentiality and professional secrecy.

> **"THE LPP IS THE POSSIBILITY FOR A CLIENT TO REFUSE TO PRODUCE A DOCUMENT DURING COURT PROCEEDINGS. THE LPP IS CLOSELY CONNECTED TO THE EXTENSIVE DISCOVERY PROCEEDING IN THE US AND UK."**
> **JACQUES BUHART**

The LPP is the possibility for a client to refuse to produce a document during court proceedings. The LPP is closely connected to the extensive discovery proceeding in the US and UK. Indeed, the LPP has been developed as a protection against discovery. In comparison, confidentiality is a concept linked to the nature of a document exchanged between lawyers. This civil law concept is usually regulated by the Bar Associations. Finally, the duty of professional secrecy is a legal obligation of a lawyer similar to a priest or a doctor. When a lawyer has received confidential information from a client, he or she cannot disclose it. There is a balance to strike between access to information for the authorities to conduct an investigation and the protection of LPP, confidentiality and professional obligation of secrecy. First of all, in *AM&S* (Case 155/79), the Court of Justice of the EU ruled that in-house counsels do not enjoy LPP. The Court of Justice analysed the rules in each of the Member States and considered that a lawyer working in a company is bound by an employment agreement that the Court considers as incompatible with the requirement of independence of lawyers.

In the *Akzo* judgement (Case C-550/07 P), the Court analysed documents exchanged between business executives and an in-house lawyer who was a member of the Dutch Bar. The Court of Justice ruled that in-house lawyers cannot be treated in the same way as an external lawyer even if they are bound by the Bar ethical rules. Indeed, they cannot be

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independent of the commercial interests of the company. However, in *Hilti* (Case T-30/89), the General Court acknowledged the LPP does extend to a verbatim transcript of advice from an external lawyer drafted by an in-house counsel.

Elizabeth Kraus

Elizabeth Kraus presented the US perspective on this issue. Attorney-client privilege ("ACP") is one of the oldest and most important privileges under US law. The ACP was developed under common law to encourage frank communication between clients and their lawyers. The "work product" doctrine provides qualified immunity for works produced by, or under the supervision of, an attorney in anticipation of litigation. These principles are enshrined in the Federal Rules of Evidence and apply irrespective of the matter. As such, they are not limited to competition law investigations. Under US law, four conditions are required for privilege to apply. First, the person asserting the ACP must be a client. Second, the communication must be with or include advice of a lawyer. In that respect, communications with in-house lawyers are qualified for the ACP. Third, the communication is intended to be confidential. Fourth, the communication is made to seek or provide legal advice.

> **"THE US ANTITRUST AGENCIES HAVE MADE CLEAR THAT THEY WILL NOT USE THEIR ENFORCEMENT COOPERATION WITH OTHER ANTITRUST AGENCIES AS A BACK DOOR BY WHICH TO ACCESS MATERIALS THAT WOULD BE PRIVILEGED IN THE UNITED STATES."**
> **ELIZABETH KRAUS**

The "work product" doctrine provides for qualified immunity. Discovery is possible for these documents under several conditions. In particular, the opposing party has to prove a substantial need for the factual work product.

Application of these protections to foreign lawyers is not clear cut, and different courts rely on differing standards. Regarding in-house lawyers, for example, at least one Federal Court recognised privilege for an in-house French lawyer, based on a "functional equivalence" standard, though other key courts have rejected this approach. In the course of antitrust proceedings, the US federal competition agencies have a longstanding approach not to challenge LPP based solely on the fact that the communication is from a foreign lawyer or foreign in-house counsel. However, they scrutinise whether the other conditions of LLP are fulfilled.

Many companies and lawyers have expressed concern that international case cooperation can be used to overcome privilege protections. The FTC and the DoJ will not use international cooperation to bypass rules on ACP, as is made clear in the agencies' International Guidelines and Model Waiver of Confidentiality. The recent Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities between the competition agencies of the US, Australia, Canada, New Zealand and UK also illustrates how the agencies are developing provisions to ensure the maintenance of privilege protections in cooperating jurisdictions.

From a procedural standpoint, those claiming ACP are responsible for screening and withholding privileged materials, as well as justifying the claim. Whereas marking documents "privileged" is important to identify the party's intent, it is not determinative to the assessment of the protection, and there is a tendency for over-marking documents, which can prove costly in terms of review timing and credibility with the agencies. To justify a claim, it is necessary to describe the nature of the document without revealing its content, via a privilege log. Agencies will assess the information in the context of other non-privileged material received from the parties and third parties, and will discuss any questions with the claimant. The vast majority of disputes are settled, in this way, without agency access to any protected materials. Those that aren't, can be brought before a judge who will review the claim directly against the documents, in camera, to make a determination.

Annemarie ter Heegde

Annemarie ter Heegde provided details on the way the European Commission and DG COMP handle LPP in practice. DG COMP fully respects companies´ right to LPP. The Commission generally is very careful because it does not want to risk an annulment before EU Courts and because it does not want to lose time litigating about this. The Commission respects LPP during antitrust inspections at business premises. Generally, a cursory look is sufficient to verify if LPP is likely to apply. In case of doubt, the Commission may use the "sealed envelope" procedure.

Inspectors do not read the document but secure it to protect the LPP. The undertaking then has time to justify the reasons why the document should be protected. If the Commission is not satisfied with the reasons, it may reply that it intends to reject the claim for LPP and suggest that the undertaking refers the case to the Hearing Officer. In the

end, the Commission will make a decision on the application of LPP which may be challenged before EU Courts. In such a case, Commission officials will not read the document before a final decision has been reached. However, it is not frequent for companies and DG COMP to reach court proceedings.

> **"THE COMMISSION RESPECTS LPP DURING ANTITRUST INSPECTIONS AT BUSINESS PREMISES. GENERALLY, A CURSORY LOOK IS SUFFICIENT TO VERIFY IF LPP IS LIKELY TO APPLY."**
> **ANNEMARIE TER HEEGDE**

Over recent years, DG COMP has developed its forensic IT investigation capacities, which pose different tion capacities, which pose different challenges for the protection of LPP. The standard forensic IT investigation occurs as follows. First, the Commission will take electronic copies of digital material of persons considered relevant for the scope of the investigation set out in the inspection decision. Then, DG COMP indexes the documents and searches them using keywords. Finally, copies of relevant documents are added to the Commission´s file. During this procedure, if a company claims LPP on certain digital information, DG COMP has different methods to set these documents apart. Companies will then have the opportunity to present their LPP arguments as in the sealed envelope procedure.

In *Nexans* (Case C-606/18 P), the Commission could not finish the forensic investigation at the company's premises. Inspectors, therefore, copied mail folders and files from relevant persons without prior indexation or search for further investigation in Brussels. The company challenged this decision before the General Court and the Court of Justice. The Court considered that the Commission was entitled to act in this way as it had ensured the rights of the defence. In particular, the Commission had put the copied data in a sealed envelope and only opened it at the Commission premises with the company's lawyers being present. In *Alcogroup* (C-403/18), there were successive inspections in different investigations. During the second inspection, the company claimed LPP for documents allegedly drafted following the first inspection, which had come up in the keyword search. The documents were not added to the file. The company and the Commission debated on whether this concerned an LPP breach. The Court of Justice recalled its stance on the matter that all events that occur during an inspection may not affect the legality of the prior inspection decision. Such events may only be brought in the debate regarding the legality of the final decision.

Javier Ramirez Iglesias

Javier Ramirez Iglesias provided background on the *Akzo* case. It is a repetition of what the Court of Justice had been saying in *AM&S*. At the end, the Court of Justice followed the same principles. Nevertheless, there is still a misunderstanding about what the *Akzo* case represents. Some consider that this judgment means that LPP is always available for external lawyers and never for in-house lawyers and that these principles apply to any competition law proceedings, also those run by national competition authorities, and even in other fields of law. Lawyer-client communication is protected under *Akzo* case law if (1) the communication is made for the purposes and in the interest of the client's rights of defence, (2) the communication emanates from an "independent lawyer". Advocate General Kokott provided some elements, which were generally followed by the Court of Justice, to conclude that in-house lawyers bound by a relationship of employment cannot be deemed to be "independent lawyers", even if they enrolled with a Bar and subject to certain professional and ethical obligations. First, the complete economic dependence of the in-house counsel on his employer, who alone provides most of his income in the form of salary, even if there is a protection against dismissal. In addition to this, in-house lawyers cannot ignore the company's commercial strategy, what affects his ability to exercise professional independence Moreover, according to the General Court and Advocate General, in-house lawyers are "structurally, hierarchically and functionally" dependent and integrated to their employer. Finally, they may be required to carry out other tasks at the company, reinforcing the close ties with the company.

> **"FURTHER DEVELOPMENT IN EU SECONDARY LEGISLATION MAY ALSO JUSTIFY A REVISION OF THE CONCEPT OF "INDEPENDENT LAWYER"."**
> **JAVIER RAMIREZ IGLESIAS**

A second important point is that there is a limited scope of this rule. Indeed, one may wonder what types of proceedings are covered. Applicant contended that the principle of legal certainty requires to apply the same criteria in assessing the LPP at the EU and national level. However, the Court of Justice rejected that argument and provided in paragraph 102 and 105 of the *Akzo* judgement that this rule applies only to competition proceedings run by the European Commission under Regulation no. 1/2003, but that national competition authorities can follow different legal professional rules in the proceedings that they handle.

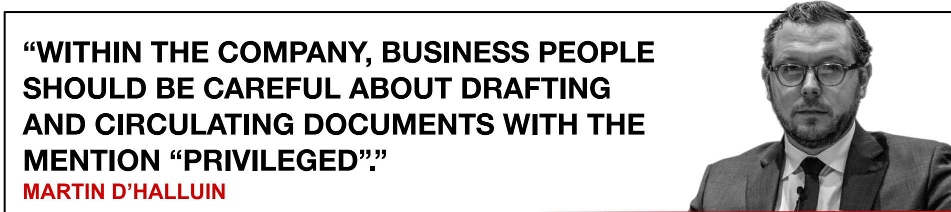
Finally, the Court assessed whether the evolution of the national legal systems and the evolution of EU law justified a change in the case law to recognise LPP to in-house lawyers. To do so, it relied on Advocate General who performed a detailed analysis of LPP rules at the national level regarding in-house counsels. Given the lack of consistency among Member States on that issue, the Court refused to expand the scope of the LPP. And in connection with the evolution of EU law, Advocate General Kokott had noticed that when Regulation no. 1/2003 was being adopted, some Members of the European Parliament had proposed to expand LPP to in-house lawyers. However, their amendment was rejected, and this reflected legislative policy considerations that the Court could not ignore.

However, many changes have occurred over the last decade that could justify a change in the jurisprudence of the Court of Justice. Now, it is useful to have a broader view of the evolution of LPP at the national level. In some Member States, the LPP framework has changed. Belgium has granted LPP to in-house counsels even when they are not enrolled at the Bar but subject to their membership to the association of corporate counsels. And additional legal or court developments occurred in other Member States such as The Netherlands, Hungary, Portugal, Spain and Finland. As of today, 13 EU Member States provide some sort of LPP for in house lawyers, 14 refuse it. At EEA level (including the UK under the Withdrawal Agreement), 16 Member States provide LPP for in-house counsels, vs. 15 that do not provide. And at OECD level, the situation is even more blatant: 21 States grant LPP to in house lawyers, whilst only 13 refuse it (and then there are 2 Member States – Japan and Korea – that do not provide LPP even to external lawyers).

Moreover, EU law has also evolved. First, under art. 6 TEU, the Charter of Fundamental Rights has the same legal value as the EU Treaties themselves, and when the Charter contains rights that stem from the European Convention of Human Rights, their meaning and scope are the same (art. 52.3 of the Charter). In such regard, the case-law of the European Court of Human Rights protects LPP under Article 8 of the Convention, which is the right to privacy. In that respect, LPP is covered not only under the rights of the defence. Further development in EU secondary legislation may also justify a revision of the concept of "independent lawyer". For example, the GDPR and the specific status of Data Protection Officers may extend some kind of protection to in-house counsels, given that it is acknowledged that independence can exist even in situations where the concerned professional (1) is bound by a relationship of employment and (2) may be required to perform additional duties on top of those for which professional secrecy and protection against disclosure is provided.

Martin d'Halluin

Martin d'Halluin provided a practical view on LPP from both lawyers and in-house counsels perspective. Before a document is even created, the in-house counsel has to think of whether the document could be disclosed through discovery. The job of an in-house counsel is to keep track of document creation. Without LPP for in-house counsels, their job would be very difficult in the US. In addition to this, the application of LPP to in-house counsels is important in the context of compliance programs. The DoJ requires companies to demonstrate the robustness and effectiveness of the compliance program. It is, therefore, necessary for in-house counsels to be protected in their communications with the staff as this ensures effective and swift implementation of compliance.



It shall also be recalled that LPP is a strict regime that is not as broad as most staff members believe. In practice, copying a lawyer in an email is not sufficient. This would even create a false sense of security. It is therefore important to have good communication between legal and business. From an international perspective, there is a lack of clarity in LPP rules. Only a few companies can retain a high level of expertise in every jurisdiction. This issue may be very important, not only for antitrust investigations but also for merger control proceedings. In case of doubt, an external local counsel is a more secure solution.

Within the company, business people should be careful about drafting and circulating documents with the mention "Privileged". Sharing documents too broadly may threaten the privilege, which is then waived. First, there may be an explicit waiver, when the document is voluntarily shared with an external source with the view of disclosing it. Second, there may be inadvertent waiver: without thinking about it, someone sends an email to a consultant, who is external to the company and is not protected under the LPP. In that respect, it is worth reminding that LPP only applies to clients of the lawyer: consultants, economists, bankers that are not retained by counsel do not benefit from the privilege. Third, there may be an implied waiver, when the document is essential to the opposing party's case. For all these reasons, in-house counsels should be careful. ■