PROTECTION OF COMMUNICATIONS IN CARTEL INVESTIGATIONS

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I. The problem

The protection of communications between lawyers and their clients ('legal professional privilege') is the essential corollary to the client's rights of defence.[1] It is based on the specific role of the lawyer as 'collaborating in the interests of justice'[2] and as being required to provide, in full independence, and in the overriding interests of justice, such legal assistance as the client needs.[3] Lawyers would be unable to carry out satisfactorily their task of advising, defending and representing their clients, if they were obliged, in the context of judicial proceedings, to cooperate with the authorities by passing them information obtained in the course of related legal consultations.[4] However, the scope of the protection afforded by legal professional privilege has recently been disputed in the context of antitrust procedures. The question is whether and, if so, to what extent internal company communications, such as electronic mail etc., with enrolled in-house lawyers are covered by the protective scope of legal professional privilege. This paper examines, in particular, the way in which the legal professional privilege, guaranteed as a fundamental right under the law of the European Union, applies to internal exchanges of opinions and information between the management of an undertaking and an 'enrolled in-house lawyer' in

[1] See, *inter alia*, Case 155/79 *AM & S* v *Commission* [1982] ECR 1575, in particular paragraphs 20 and 23. See also, in the case-law of the European Court of Human Rights, *André and Other v France*, No. 18603/03, 24 July 2008, paragraph 41.

[2] Cf. the phrase 'collaborating in the interests of justice' used by the Court of Justice in *AM & S* (ibid.). A lawyer is more commonly described in German legal terminology as '*Organ der Rechtspflege*' (organ of the administration of justice).

[3] See, in the case-law of the European Court of Human Rights (ECtHR), *Niemietz v Germany*, 16 December 1992, Series A No. 251-B, paragraph 37.

[4] Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 32.

cartel investigations. The scope of the protection will ultimately determine the extent of the Commission's powers of investigation in antitrust proceedings.[5]

II. General legal framework

In EU law the protection of communications between lawyers and their clients has the status of a general legal principle in the nature of a fundamental right. This follows, on the one hand, from the principles common to the legal systems of the Member States:[6] legal professional privilege is currently recognised in all 27 Member States of the European Union. In some Member States this protection is enshrined in case-law alone,[7] but in most of which it is provided for at least by statute if not by the constitution itself.[8] On the other hand, the protection of legal professional privilege also derives from Article 8(1) of the ECHR (protection of correspondence) in conjunction with Article 6(1) and (3)(c) of the ECHR[9] (right to a fair trial) as well as

[5] Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1). Regulation 1/2003 replaced Council Regulation (EEC) No 17 of 6 February 1962, the first Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87). On the replacement of Regulation No 17 by Regulation No 1/2003, see Article 43(1) in conjunction with Article 45 of Regulation No 1/2003.

[6] See, for example, Case 155/79 *AM & S* v *Commission* [1982] ECR 1575, in particular paragraph 18. See also the Opinion of Advocate General Léger in Case C-309/99 *Wouters and Others* [2002] ECR I-1577, point 182; and the Opinion of Advocate General Poiares Maduro in *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, point 39. In addition, see the Order in Case T-30/89 *Hilti* v *Commission* [1990] ECR II-163, paragraphs 13 and 14.

[7] I.e. in the United Kingdom and Ireland.

[8] Legal professional privilege is enshrined in constitutional law in particular in Bulgaria (Article 30(5) of the Bulgarian Constitution) and Spain (Article 24(2) of the Spanish Constitution). Furthermore, legal professional privilege is also based on constitutional provisions in Italy, Portugal and Romania, among others, and on statutory provisions with the status of constitutional law in Sweden; Case C-550/07, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v Commission*, per Advocate General Kokott, 29 April 2010, fn. 34.

[9] The case-law of the European Court of Human Rights (ECtHR) usually refers only to Article 8 of the ECHR; in this regard, see, for example, *Campbell v UK*, 25 March 1992, Series A No. 233; *Niemietz v Germany*, 16 December 1992, Series A No. 251-B; *Foxley v UK*, No. 33274/96, 20 September 2000; *Smirnov v Russia*, No. 71362/01, 7 June 2007, ECHR 2007-VII; and *André and Other v France*, No. 18603/03, 24 July 2008. However, mention is sometimes also made of Article 6 of the ECHR (see, for example, *Niemietz v Germany*, op. cit., § 37, and *Foxley v UK*, op. cit., § 50).

from Article 7 of the Charter of Fundamental Rights of the European Union[10] (respect for communications) in conjunction with Article 47(1), the second sentence of Article 47(2) and Article 48(2) of that Charter (right to be advised, defended and represented, respect for rights of the defence).[11]

In *AM & S*,[12] the Court recognised that 'the confidentiality of written communications between lawyer and client' must also be protected at Community level (now, at European Union level). For the purposes of reliance on that protection, the Court identified two cumulative conditions ('criteria') which it had drawn from a combination of the laws of all the Member States at that time:[13] First, the communication with the lawyer must have a connection with the exercise of the client's rights of defence: it must be a 'communication' made 'for the purposes and in the interests of the client's rights of defence' (*connection with the rights of defence*). Second, it must be a communication with an independent lawyer, that is to say with a lawyer who is 'not bound to the client by a relationship of employment' (*independence of the lawyer*). More problematic appears to be the second of these criteria, i.e. the independence of the lawyer with whom communications were exchanged. In *AM & S*, the requirement of independence is unequivocally linked to the fact that the lawyer in question must *not be in a relationship of employment* with his client. The explicit reference to this fact at two points in the grounds of the judgment[14] would have been redundant if the Court had intended that the formal act of admission to a Bar or Law Society and the professional ethical obligations associated with such admission would alone be sufficient to guarantee the independence of an in-house lawyer. In *AM & S*, the Court, therefore, deliberately interpreted legal professional privilege as meaning that the protection which it affords does not extend to internal company or group communications with enrolled in-house lawyers. This

[10] The Charter of Fundamental Rights of the European Union was solemnly proclaimed first in Nice on 7 December 2000 (OJ 2000 C 364, p. 1) and then again in Strasbourg on 12 December 2007 (OJ 2007 C 303, p. 1).

[11] See, *inter alia*, Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 37; Case C-540/03 *Parliament* v *Council* [2006] ECR I-5769, paragraph 38; and point 108 AG's Opinion in Case C-550/07, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v Commission*, per Advocate General, 29 April 2010.

[12] Case 155/79 *AM & S* v *Commission* [1982] ECR 1575.

[13] *Ibid.*, paragraphs 21 and 22.

[14] *Ibid.*, paragraphs 21 and 27.

becomes particularly apparent when the judgment is compared with the Opinion of Advocate General Sir Gordon Slynn. The Advocate General referred to the detailed discussion of the position of in-house lawyers which had taken place in that case and pronounced himself resolutely in favour of the proposition that legal professional privilege should also be granted to lawyers who are '*professionally qualified and subject to professional discipline*' and are '*employed full time ... in the legal departments of private undertakings*'.[15] The Court did not concur with that view in its judgment in *AM & S*.

In the judgment above the concept of the independence of lawyers is determined *not only positively* – by reference to professional ethical obligations[16] – *but also negatively* – by reference to the absence of an employment relationship.[17] It is only where an in-house lawyer is subject, as a member of a Bar or Law Society, to the professional ethical obligations commonly applicable in the European Union *and*, furthermore, is not in an employment relationship with his client that communications between the two are protected by legal professional privilege under EU law.

The reasoning behind this is that an enrolled in-house lawyer, despite his membership of a Bar or Law Society and the professional ethical obligations associated with such membership, 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 clients. Consequently, an enrolled in-house lawyer is less able to deal effectively with any conflicts of interest between his professional obligations and the aims and wishes of his client than an external lawyer. Militating against the proposition that an enrolled in-house lawyer is sufficiently independent is, first, the fact that, as an employee, such a lawyer is often required to follow work-related instructions issued by his or her employer and is in any event part and parcel of the structures of the company or group by which he or she is employed. In the words of the General Court, an enrolled in-house lawyer is

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[15] Opinion of Advocate General Sir Gordon Slynn in *AM & S* (*ibid.*) at p. 1655.

[16] *AM & S* (*ibid.*), paragraph 24.

[17] *Ibid.*, paragraphs 21 and 27. See also the Opinion of Advocate General Léger in Case C-309/99 *Wouters and Others* [2002] ECR I-1577, point 181: '[The independence of lawyers] must also be demonstrated vis-à-vis the client, who may not become his lawyer's employer.'

'structurally, hierarchically and functionally'[18] dependent on his or her employer, whereas this is not true of an external lawyer in relation to his or her clients.

III. The AKZO case

The background to this case was formed by a search (an 'investigation' or 'inspection') conducted by the European Commission, as competition authority, in February 2003 at the business premises of Akzo Nobel Chemicals Ltd (Akzo) and Akcros Chemicals Ltd (Akcros) in the United Kingdom. In the course of that search, the Commission officials took photocopies of certain documents, most notably two printouts of emails exchanged between the general manager of Akcros and a member of Akzo's in-house legal department, who was admitted as a lawyer to the Netherlands Bar. The representatives of Akzo and Akcros regarded those documents as being exempt from seizure because, in their view, they were covered by legal professional privilege.

This gave rise to a legal dispute between the two companies concerned and the Commission. Akzo and Akcros brought proceedings before the Court of First Instance (now: 'the General Court') against, on the one hand, the Commission's decision ordering the investigation and, on the other hand, the Commission's decision to place a number of disputed documents on the file. By judgment of 17 September 2007[19], the General Court dismissed the first action as inadmissible and the second action as unfounded. The General Court ruled that only communications between companies and their external lawyers are privileged and concluded that the Commission is therefore entitled to inspect communications with in-house counsel. On 30 November 2007, Akzo and Akcros together lodged an appeal against this judgment.[20] The appeal was concerned solely with the question whether or not the two emails exchanged between an in-house lawyer and Akcros' general manager were covered by legal

[18] Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* [2007] ECR II-3523, paragraph 168.

[19] *Ibid.*

[20] Case C-550/07, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v Commission*.

professional privilege. The appellants claim that the Court should set aside the judgment under appeal in so far as it rejected the claim for legal professional privilege in respect of communications with Akzo Nobel's in-house lawyer.

In her opinion, delivered on 29 April 2010, Advocate General Kokott takes the view that the protection of communications between lawyers and their clients under EU law applies solely to communications between a client and an external lawyer, and sees no reason to extend its scope to internal exchanges of opinions and information between the management of an undertaking and an in-house lawyer employed by that undertaking, even when he or she is a member of a Bar or Law Society. Her opinion rests essentially on the following two considerations:

First, in the Court of Justice's judgment in *AM & S*, in which the Court for the first time held that written communications containing legal advice from an external lawyer could not be seized when investigating suspected infringements of the competition rules, the concept of the independence of lawyers is determined not only positively – by reference to professional ethical obligations – but also negatively – by reference to the absence of an employment relationship. An in-house lawyer, despite his or her membership of a Bar or Law Society and the professional ethical obligations associated with such membership, 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 or her clients, given his contractual relationships with - and economic dependence on - his or her employer. Consequently, an enrolled in-house lawyer is less able to deal effectively with any conflicts of interest between his or her professional obligations and the aims and wishes of his or her employer than an external lawyer in relation to his or her clients. Given the difference in the degree of independence between in-house lawyers and external lawyers, Advocate General Kokott also dismisses Akzo and Akcros' claims that treating in-house lawyers differently from external lawyers infringes the principle of equal treatment and non-discrimination, which is a general principle of EU law.

Secondly, Advocate General Kokott finds that there is no need to extend the scope of legal professional privilege under EU law. Whereas legal professional privilege for an external lawyer is recognised in all 27 Member States, there is no identifiable general

trend in the legal systems of the 27 Member States towards extending legal professional privilege to in-house lawyers admitted to a Bar or Law Society since AM&S, nor are there overriding reasons which would require that EU law be brought in line with the legal position of a minority of Member States.

Essentially for these reasons, Advocate General Kokott proposes that the Court should dismiss the appeal. The Advocate General's opinion is certainly not binding on the Court of Justice, which must now decide on the appeal lodged by Akzo and Akros against the judgment of the General Court.

IV. Legal privilege and the modernisation of EU competition law

During the process of drawing up legislation to modernise European law governing antistrust proceedings (Regulation No 1/2003) and to revise the EC Merger Regulation (Regulation No 139/2004), members of the European Parliament tabled proposals aimed at extending legal professional privilege to in-house lawyers[21]. However, those proposals were ultimately not adopted by the legislature.[22] Eventually, the modernisation of the law governing antitrust proceedings carried out by Regulation No 1/2003 has led to an increasing need for internal corporate legal advice the role of which in preventing infringements of competition law is crucial.

The legal advice given by enrolled in-house lawyers in cartel investigations is particularly valuable in day-to-day business because it can be obtained more quickly and more economically and because it is based on an intimate knowledge of the undertaking concerned and its business. Moreover, there is a growing importance of

[21] With regard to Regulation No 1/2003, see Parliamentary Document A5-0229/2001 final (Evans Report), specifically Amendment 10 relating to Article 14(3) of the Commission's proposal for a regulation COM(2000) 582 final; with regard to Regulation No 139/2004, see Parliamentary Document A5-0257/2003 final (Della Vedova Report), specifically Amendment 5 relating to the 34th recital and Amendment 25 relating to Article 13(1) of the Commission's proposal for a regulation COM(2002) 711 final.

[22] In the case of Regulation No 1/2003, the Parliament as a whole did not itself support the amendments proposed by its own members. With regard to Regulation No 139/2004, while the amendments were approved by the Parliament, the Council did not include them in the Regulation.

'compliance programmes' within undertakings, which serve to ensure that the undertaking conducts itself in accordance with the law and the relevant rules and regulations. The effective provision of internal corporate legal advice and a successful compliance programme are dependent on the possibility of free and faithful internal company or group communications with enrolled in-house lawyers. Otherwise, the company's management will be averse to disclosing sensitive information to an enrolled in-house lawyer and the enrolled in-house lawyer will be inclined to give advice orally rather than in writing, thus compromising the quality and usefulness of the legal advice required.

The question, however, remains whether the increased importance of enrolled in-house lawyers or the indisputable usefulness of their legal advice under the scheme of Regulation No 1/2003 supports the proposition that internal company or group communications should be placed under the protection of legal professional privilege. At this juncture, Advocated General Kokott considered that an extension of scope of legal professional privilege to in-house lawyers cannot be justified by reference to the advantages and significance of internal corporate legal advice or to the procedural-law reform carried out by Regulation No 1/2003.[23]

V. Final Remarks

Both the General Court and Advocate General preferred to adopt a 'literal' interpretation of the judgment of the Court of Justice in *AM & S* instead of interpreting and applying it in accordance with its spirit and purpose. The question whether an enrolled in-house lawyer is in fact able to give independent legal advice was answered by adopting an excessively formalistic approach and of losing sight of the principles underlying the criterion of independence. The objection to this approach relates to the professional and ethical obligations to which lawyers admitted to a Bar

[23] The Commission's powers of investigation in reviewing mergers of European companies under Article 13 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation, OJ 2004 L 24, p. 1) are similar to, and only slightly less extensive than, those under Article 20 of Regulation No 1/2003.

or Law Society are generally subject.[24] Due to the professional ethical obligations applicable to him or her, an in-house lawyer who is also a member of a Bar or Law Society automatically enjoys the same independence as an external lawyer who pursues his or her profession on a self-employed basis or as an employee of a law firm. The guarantees as to the independence of a qualified lawyer under many Member States' law are in fact particularly extensive. For instance, differences of opinion relating to the nature and substance of legal advice provided by an enrolled in-house lawyer do not entitle the employer to take disciplinary measures against the enrolled in-house lawyer and certainly not to terminate the employment relationship. On the other hand, external lawyers are also economically dependent to some extent on their clients, while enrolled in-house lawyers are protected against dismissal under employment law.

The opinion of Advocate General Kokott is a setback for the rights of defence. The role of the in-house lawyer has developed very considerably since the *AM & S* judgment 28 years ago. Today, a large number of corporations have extensive in-house legal departments staffed by highly ethical lawyers who are members of their Bar or Law Society, and whose professional obligations take precedence over their obligations to their employer. Very often such lawyers are in the front line in securing the undertaking's compliance with the law. One would have thought that it was appropriate to reinforce that role, not undermine it.

On a 'teleological interpretation' of *AM & S*, the Court of the EU would concluded that internal company communications with enrolled in-house lawyers in cartel investigations are covered by the protective scope of legal professional privilege. In the light of their crucial importance, the fundamental right of legal privilege must in principle be interpreted extensively. However, irrespective of Court's pending ruling in AKZO case, it is submitted that the Commission should take an *ad hoc* approach, by ascertaining on a case-by-case basis whether a given in-house lawyer satisfies the

[24] See, e.g. in Greece, articles 38, 39 62 and 63(3) and (4) of the Lawyers' Code of Conduct, and article 94 of the Code of Civil Procedure; cf. Decision of the Athens Court of Appeal 1466/2003. Ireland goes further than this, in that it seems to want to extend the protection afforded by legal professional privilege even to in-house lawyers whose 'independence' is guaranteed by provisions of employment law alone (paragraph 12 of the statement in intervention in Case C-550/07, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v Commission*.

requirement of independence. In any case, it seems disproportionate to refuse to extend the protection afforded by legal professional privilege to internal company communications with enrolled in-house lawyers as a general principle. Information about the provisions governing the profession of lawyer in a particular Member State would itself be sufficient to make it possible to determine conclusively whether an in-house lawyer is independent or not.

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