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BRUSSELS

June 28, 2007

ECLA'S ORAL ARGUMENT BEFORE COURT OF FIRST INSTANCE

Cases T-125/03 and T-253/03 AKZO Nobel and Akcros v.Commission

Mr. President, Members of the Court,

I represent ECLA, the European Company Lawyers' Association. Via its member organizations, ECLA represent 30,000 company lawyers all over Europe.

ECLA supports the views of AKZO and the interveners who were heard earlier today. Clients are entitled to seek advice from a counsel whom they can trust to keep communications in confidence.

Because of the growing complexity of antitrust law, the greater need for self-reliance with the modernization of EC antitrust procedure, and the proliferation of national competition laws, the need to ensure this trust in confidentiality is more important than ever in the history of antitrust law.

I will not repeat the points ECLA has presented in writing on the question why AKZO's communications with its inhouse counsel should be privileged. Instead, I would ask the Court's indulgence to hear me for a few minutes on a related matter, namely,

- what the situation is and should be when a client selects a counsel who is excluded from membership of the bar or law society, because he or she is an employee.

President Vesterdorf specifically mentions this item as an issue to be reviewed in the main proceedings, in para. 129 of his Interim Order of October 30, 2003.

I realize that strictly speaking, this question need not be resolved in this case. But I am also aware that this case is of crucial importance for inhouse counsel even in countries where the bar closed to them. The court included an ambiguity in *AM&S* that for more than two decades has hampered the proper role of in-house counsel. It is time that ambiguity is resolved.

The Court said in *AM&S* that all self-employed bar members are independent enough to recognize LPP for their communications. That does not mean that all independent lawyers must by definition be self-employed -- but that is how it was widely read, even in situations were the employed lawyers were subject to clear ethical rules and a duty to give independent advice.

ECLA's support for confidentiality of communications with in-house counsel subject to ethical rules is based on the two foundations: A growing trend in Member State laws recognizing in-house counsel privilege, and the combination of a few key legal principles. These principles are as follows:

- **Right to consult in privacy**. First, under articles 6 and 8 of the European Convention of Human Rights, clients have a fundamental right to consult counsel in privacy in order to be advised on legal matters, during or in anticipation of possible investigation, to avoid an investigation by ensuring compliance, or to correct non-compliance.

- **Freedom to select counsel**. Second, under Article 6 ECHR, clients also have a right to counsel "of his own choosing". [*Croissant v. Germany* [1990] 16 EHRR 135, para. 27 and 29]

- **Proportionality**: Third, interference with art 6 and 8 ECHR must be proportionate. I refer to pages 5 and 19 of ECLA's Intervention Statement. I refer here also to an interesting judgment of the Irish High Court of December 21, 2005, which we did not mention in our written submission, Law Society of Ireland v the Irish Competition Authority [2005] IEHC455, O'Neill J. The High Court indicated that freedom of choice of a lawyer in competition proceedings should be respected and not interfered with save for the most grave and compelling of reasons.

- **Non-discrimination**: Finally, Article 20 of the EU Charter on Fundamental Rights protects against unequal treatment.

In countries where in-house counsel can be admitted to a Bar or Law Society, the application of these principles is simple. The client will have every incentive and right to ensure that its internal legal counsel is so admitted, so as to be able to seek legal advice in confidence. This is the case in many countries: Ireland, Spain, England, Scotland, the Netherlands, Germany, Denmark, and Portugal. I could add Norway.

In Belgium, the Bar does not admit in-house counsel, but a parallel Institute of Company Lawyers is established by law, with rules of ethics and independence, and an enforcement mechanism that is at least as strong as that of the Bar.

These Member States' laws recognize that employment status is not an impediment to independence. I refer to pages 12 to 17 of ECLA's Intervention Statement for an explanation. ECLA respectfully submits that the compatibility of employment and

independence (so long as proper codes of ethics apply) qualifies as a legal principle common to Member State laws.

The client's right to confidentiality of legal advice from inhouse counsel in these countries is an acquired right under national law, and cannot and should not be taken away by the EC Commission. Doing so would discriminate against clients who employ properly qualified internal counsel. There is no objective justification for such discrimination, because in house counsel in these countries meet the same conditions as outside counsel. They are:

- trained and qualified as a lawyer
- acting in the capacity of a lawyer, providing independent legal advice
- subject to and in compliance with adequate rules of professional ethics, discipline and independence, laid down and enforced in the general interest. [Case 155/79 AM&S v. Commission ECR 01575, para.24]

Now let us turn to other countries where the Bar excludes internal lawyers, and there is no parallel Institute established by law. This is the case in France, Italy, Luxembourg, Sweden, Finland, Austria, and the 12 new Member States.

The situation in some of these countries is actually consistent with protection of LPP. In Finland and Sweden, for instance, non-Bar-member have the right to appear in court and their client-counsel communications in that context are protected by LPP.

When assessing the legal principles common to Member States laws, ECLA respectfully submits that the laws of the new

Member States should be seen as “neutral” on the question. Their recent political, economic and legal history until they joined the EU did not leave much room for the development of principles such as legal professional privilege. When they joined, they applied the *acquis communautaire* as they found it – including the too-strict reading of the reasoning in *AM&S*. It would be circular reasoning to count these legal systems as opposing the recognition of privilege for communications between client and in-house counsel.

In countries where the Bar excludes internal counsel, in-house counsel have in many cases organized themselves in associations to ensure compliance with laws and rules of ethics, and guarantee quality. The fact that they are not allowed to join the national Bar is not a proportional justification for discriminating against clients in these countries by withholding privilege for their communications.

Of course, the communications should be privileged only if internal counsel meets the same conditions as members of the Bar. In particular, counsel must be “subject to and in compliance with adequate rules of professional ethics, discipline and independence, laid down and enforced in the general interest.”

The Commission argues that it will be difficult to determine whether the rules of professional ethics, discipline and independence are adequate. Not so. The Commission rightly accepts that the Code of Ethics of the CCBE and the national Bar Associations are adequate, and these are therefore perfect benchmarks and points of comparison.

Before I close, ECLA urges the Court to recognize the growing importance of internal audit programs as a tool for compliance with law. Companies establishing such programs gather facts

for new documents that would not have existed but for the compliance program, with the dominant purpose of seeking legal advice from counsel on how to comply with the law. Denying privilege in such circumstances would hamper the ability to self-assess and ensure compliance with competition law.

This was recently recognized in an interesting Spanish case (Tribunal for the Defense of Competition, July 23, 2002, case r-508/02 v, *PepsiCo v Coca Cola*). Although the case involved outside counsel, it is interesting for three reasons,

- first, it involved compliance questionnaires (which in that case were created in the context of a parallel EC case);
- second, these were found privileged even though shared with outsiders with a common legal interest.
- Third, the case confirms that civil law jurisdictions with an inquisitorial tradition nowadays recognize privilege on a similar basis as common law jurisdictions.

Enabling clients to engage in an audit to obtain advice in confidence fosters greater compliance with law. That reduces the Commission's enforcement work, and benefits everyone. By demanding that companies reveal compliance program documents, the Commission discourages them from seeking legal advice fully informed by the outcome of a compliance audit. The Commission shoots itself in the foot.

In sum, "Any person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice". ECLA therefore invites the Court to draft its judgment in such a way as not to discriminate between legal

communications from outside counsel, inhouse counsel who are Bar members, and inhouse counsel excluded from the Bar.

The sole relevant criteria for privilege are whether the counsel are subject to and comply with properly enforced rules of ethics and independence, laid down and enforced in the general interest. Such a rule will lower the barriers for clients to obtain legal advice and representation. That is in the general interest of the effective administration of law, and fosters clients' compliance with the law. That, in the end, is also in the Community interest.

If the Court does not wish to address this question, ECLA respectfully requests it to leave this question open, and avoid an *obiter dictum* that would close the door in those countries for another 25 years or so.

Thank you.

Maurits Dolmans