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Legal privilege

Legal Privilege : An overview of EU and national case law

Procedures, Rights of Defence, Foreword, Legal privilege, Access to file, All business sectors

Note from the Editors: although the e-Competitions editors are doing their best to build a comprehensive set of the leading EU and national antitrust cases, the completeness of the database cannot be guaranteed. The present foreword seeks to provide readers with a view of the existing trends based primarily on cases reported in e-Competitions. Readers are welcome to bring any other relevant cases to the attention of the editors.

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How to write a Foreword about the protection of Legal Professional Privilege ("LPP") highlighting national cases and contrasting them with competition law jurisprudence in the European Union ("EU")? A Foreword is short by definition and the protection of LPP has become an extensive and complicated area of law in the EU and its Member States as illustrated by the various reports in *e-Competitions*.

Over time, the national competition rules in the various EU Member States have shown signs of what one could call “spontaneous harmonization”. Several EU Member States have looked at, were inspired by or even outright copied the EU competition rules into their national competition law. The Netherlands is a good example with its Competition Act ("CA") that entered into force in 1998. Article 1 CA defines certain key concepts like "undertaking", "agreement" and "concerted practice" by making reference to these concepts "within the meaning of" Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU").

There are fewer signs of such "spontaneous harmonization" to be seen in the case of the protection of LPP in the EU and its Member States. On the contrary, there are developments that indicate that several EU Member States have chosen to maintain a protection of LPP that is different and at times wider in scope than at the EU level. Again, the Netherlands is a good example. As we will see, contrary to EU competition law, communications between in-house attorneys registered at the Dutch bar are protected by LPP under Dutch law. This leads to important differences between the protection of LPP at EU and Member State level.

In short, LPP is the right to preserve the confidentiality of communications between client and attorney. Depending on the relevant jurisdiction, the mere existence and scope of the protection of LPP is dependent on various factors such as, for instance, whether the attorney in question is in-house or outside counsel, whether that counsel is a member of a national body that regulates the

in-house or outside counsel profession, the purpose and custodian of the communication and the use of the communication during proceedings. Different jurisdictions have placed varying degrees of importance on these factors. The disparity in protection is inconsistent at best and creates a complicated situation across the EU and amongst its Member States.

This Foreword starts with the current status of LPP under EU competition law. The focus will then shift to several examples of diverging interpretation of LPP in several EU Member States (as reported by *e-Competitions*).

LPP under EU competition law

The European Court of Justice ("Court of Justice") recognized and confirmed LPP in its *AM&S* judgment [1].The Court of Justice held that at the EU level the confidentiality of written communications between lawyers and clients should be protected under two conditions. The relevant communication must be connected to the client's right of defence. In addition, it needs to emanate from independent lawyers who are not bound to the client by a relationship of employment. The Court of Justice deemed that independence was required because of a lawyer's role in collaborating in the administration of justice and in order to be able to provide in full independence and in the overriding interest of that cause, such legal assistance as the client needs. The counterpart to that protection lies in the rules of professional ethics and discipline which are laid down and enforced in the general interest [2].

The question of the scope of LPP was revisited when objections were made against the European Commission seizing certain documents during a dawn raid at (a subsidiary of) AkzoNobel. The Commission rejected a claim for LPP for a communication between an in-house counsel registered at the Dutch bar and his client. In first instance, the General Court ("GC") applied *AM&S* [3]. However, the GC went on to indicate that LPP applies to preparatory documents which have been drawn up exclusively for the purpose of seeking legal advice from outside counsel in the exercise of rights of defence [4].

In 2010, the Court of Justice reconfirmed on appeal that a communication by in-house counsel (in this case registered at the Dutch bar) does not enjoy sufficient independence to meet the *AM&S* requirement [5]. The Court of Justice pointed out that independence means the absence of any employment relationship between the lawyer and his client. The Court of Justice dismissed the various provisions under Dutch law put in place to guarantee independence by stating that an in-house counsel cannot be treated in the same way as an outside counsel because he is an employee. This relationship by its nature, does not allow him to ignore the commercial strategies pursued by his employer, and this affects his ability to exercise professional independence. The Court of Justice concluded that because of the economic dependence and the close ties with the employer, in-house counsel does not enjoy "*a level of professional independence comparable to that of an external lawyer*" [6]. The Court of Justice seems to have followed the Opinion of Advocate General Kokott that the ("*particularly extensive*") provisions under Dutch law were not sufficient to guarantee independence given that in-house counsels are economically dependent on their employer; "*after all, extensive protection given in a document is not necessarily effective in practice*." [7].

During the proceedings leading up to the *Akzo* judgment, the European Commission argued repeatedly for a narrow scope of LPP protection and strict application of the *AM&S* criteria. It was

therefore not surprising that the Commission rejected LPP for correspondence between outside counsels of two competing companies Servier and Teva that was found during a dawn raid at the premises of Servier [8].The Commission rejected LPP and argued that the communication was not drawn up to defend Servier's rights and interests, given that it was written by a competitor's lawyer to complain about Servier's behaviour on the market. Furthermore, the Commission stated that the document was not prepared with the object of seeking legal advice.

Some examples of diverging EU member states

The requirement of independence not only plays a role on the EU level but also in several EU Member States. As already indicated, **the Netherlands** has put in place extensive provisions under Dutch law in order to guarantee independence. In 2013, only three years after the *Akzo* judgment, the Dutch Supreme Court assessed exactly those provisions under Dutch law in a matter that arose in the context of a preliminary witness hearing before a lower court in Groningen. The Dutch Supreme Court confirmed LPP for in-house counsel registered at the Dutch bar.

In its judgment, while emphasizing that the *Akzo* judgment is not applicable outside the context of EU competition law, the Supreme Court gave some historical perspective and highlighted various legal measures taken to enable lawyers registered at the Dutch bar with an employment relationship to function with independence so as to be afforded LPP. The Court held that in view of the Dutch practice and the guarantees that exist with regard to the practice of lawyers registered at the Dutch bar with an employment relationship, there is no ground to deprive such lawyer of LPP due to the mere fact that he is in an employment relationship with the client [9].

In addition, the Second Chamber of Parliament clarified (or could one say "expanded") the protection of LPP when it passed the proposed law *Stroomlijningswet*, which among others, states that it will be the "nature" of the document and not the place where it is located (whether the office of the company or the lawyer) that is decisive for LPP. The proposal is currently pending before the First Chamber of Parliament [10].

Recent case law in **Belgium** indicates that communications by in-house counsel registered at the in-house counsel institute are protected by LPP. The premises of Belgacom were inspected in 2010 and a considerable amount of documents were seized, among them internal emails that contained advice from their in-house counsel. The Competition Authority deemed the communication not protected and used it as evidence in the proceedings. The Court of Appeal found that in-house counsel communications were protected by Article 5 of the Law of 1 March 2000, which provided for the confidentiality of advice given by in-house lawyers who are registered members of the Belgian in-house counsel institute (*Institut de Juristes d'Entreprise*) in the same way that those communications with outside counsel registered at the Belgian Bar are protected [11].

The court interpreted the concept of advice broadly and deemed that it included correspondence, draft advice and preparatory documents used in the background of the advice. The Court of Appeal referred to EU Council Article 22(2) Regulation No. 1/2003, which states that the officials of the competition authorities of the Member States who are responsible for conducting these inspections as well as those authorised or appointed by them shall exercise their powers in accordance with their national law. The Court of Appeal stated that acting in accordance with national law means that acting contrary to Article 5 of the Law of 1 March 2000, would be illegal [12]. Thus, it remains

unclear whether in practice if the Belgian Competition Authority when acting on behalf of the European Commission would be required to abide by national law, thus affording privilege to communications with in-house counsel registered at the in-house counsel institute, in stark contradiction with the jurisprudence of the European Union [13]. Noteworthy is that the new dawn raid guidelines adopted on 17 December 2013, which set out the procedure for excluding LPP documents from the investigation, did not specifically clarify whether such documents will be protected when the Belgian authorities conduct investigations on behalf of the Commission [14]. In footnote 9 of the guidelines, the LPP right is explained as existing under both European and Belgian law provided that certain determined conditions are met under which a communication between an attorney and his client will merit protection. The guidelines also explain that this LPP right is a limit on the powers of investigation of the Competition Authority and that the provisions under Belgian law protect also communication with in-house lawyers who are registered at the institute for in-house counsel. In other words, it is not at this moment completely certain how the Belgian Competition Authority would conduct the search on behalf of the European Commission.

Among the EU Member States, **Germany** has one of the most rigid systems, where courts afford LPP protection exclusively under strict conditions. Under the German Code of Criminal Procedure ("CCP"), the German Constitution and Article 6(3) of the European Convention of Human Rights, the LPP right in Germany protects documents that have been produced by outside lawyers only after the initiation of competition proceedings and in connection thereto [15]. In non-competition proceedings, the Regional Court of Giessen stated that defence documents are also protected prior to the initiation of formal proceedings if they relate to certain criminal offenses [16]. Documents that are at the premises of the company itself are only protected by LPP if they have been produced under those conditions. Similar to the *Akzo* judgment, German courts have also pointed to the lack of independence to deny LPP protection for in-house counsel. However, a 2006 case from the Regional Court in Berlin, established that LPP may attach to in-house counsel only when there is evidence of a special relationship with the client, wherefore the client has given actual instructions for a specific case, and is not just an in-house attorney doing all types of legal questions [17]. This may ensure that the in-house counsel has a certain detachment or independence to be able to give legal advice on a very specific situation. It remains to be seen whether other courts in the country would follow suit [18].

In addition, the German courts have established that there must be a direct attorney-client relationship for LPP to attach. In a 2012 case, the requirement for the relationship between attorney and client to exist directly with the raided company was established by the Regional Court in Bonn [19]. In this case, a German subsidiary was audited for antitrust compliance by outside counsel on behalf of the UK parent company which had been raided by the EU Commission two years prior. The audits were conducted in relation to the EU proceedings and included interviews with the managing director.

Under Section 94(2) and 98(1) of the CCP, the German competition authority seized the interviews while investigating the company for resale price maintenance, among other anticompetitive practices. The Court reasoned that the German subsidiary had no formal defence relationship with the outside counsel and that it had been the object of the audit and not the client. The Court did not decide on whether any outside lawyers could accept mandates by subsidiaries of their clients and went on to find that the audits were conducted before the start of the investigations in Germany, which under German law is a requirement (as explained above). Thus, the communication was

unable to qualify as defence document and consequently not protected [20].

There has been a change in legislation in 2011 regarding Section 160a(1) of the CCP. According to the new version, an investigation measure directed at an attorney is inadmissible if it is expected to produce information in respect of which such person would have the right to refuse to testify. Previously, this applied only to criminal defense lawyers. As a consequence of this wider scope of Section 160a(1) CCP, the Regional Court of Mannheim decided that internal documents which are in the custody of an attorney and which are mandate-related may be protected under Section 97(1) No. 3 CCP even if they have been produced prior to the initiation of proceedings [21]. However, this decision does not refer to competition proceedings. The Regional Court of Bonn, which is competent to decide on appeals against seizure warrants in competition proceedings conducted by the Federal Cartel Office, rules more strictly on the scope of LPP in general. Thus, the Regional Court of Bonn will not necessarily follow the approach of the Regional Court of Mannheim with regard to the protection of mandate-related documents which do not constitute "defence documents" in a narrow sense.

In **Spain**, the courts have confirmed a limited LPP protection in the 2002 *Pepsi-Cola v Coca-Cola* case. The Spanish Competition authority asked the Spanish Coca-Cola bottlers (franchisees of The Coca-Cola Company) to submit responses to questionnaires prepared by outside legal counsel on behalf of The Coca-Cola Company for the purposes of defending itself before the EU [22]. The Competition Tribunal stated that LPP is rooted in the rule of law, with the objective of protecting the rights of defence and guaranteeing the fair administration of justice. The Tribunal established two criteria for the applicability of LPP: the nature and purpose of the document (the defence of the company) and the document should have been created with the help of outside counsel. In this case, the Tribunal found that the origin and purpose of the documents stemmed from the need to defend The Coca-Cola Company (even in the framework of a different procedure) and thus the communications should be afforded LPP protection, notwithstanding that there was no direct attorney-client relationship. The Tribunal determined that because the documents were created for the defence of The Coca-Cola Company, if there had been no such pending legal proceedings, such documents thus would not have existed and thus, they should be protected by LPP [23].

In the cases, *Colgate Palmolive España, L'Oreal, and Stanpa*, [24] the Spanish Competition authority copied and removed several documents that the companies claimed were drafted by their outside counsel, containing legal advice. The Competition Authority found that the companies did not sufficiently explain the reasons for which the documents should have been protected, despite allegations that documents had been taken in bulk and seized indiscriminately. However, when the *Stanpa* case was taken before the Spanish National Court, the Court found that only if the documents seized are actually used as evidence against a party is there a breach of defence rights [25].

On appeal, the Spanish Supreme Court confirmed that if documents are not used against a party, the right of defence is not breached by simply removing the documents. In addition, the Supreme Court held that if there is privilege, it must be proven even if the searches are indiscriminate. The Supreme Court upheld the validity of the seizure of documents which ought to have been protected by LPP, including a legal opinion drafted by outside counsel, because Stanpa did not prove sufficiently that they were protected and because they were not used in the proceedings [26].

The **UK** distinguishes between legal advice privilege and litigation privilege. The former, provided that the communication relates to legal advice between a lawyer and a client, applies irrespective of pending or contemplated litigation and the latter applies only in the context of pending or contemplated litigation [27]. Both types of professional privilege apply to solicitors, barristers and in-house counsels [28]. In 2012, the UK Competition Appeal Tribunal ruled that litigation privilege can attach to communications with outside counsel during a Competition Act investigation conducted by the OFT, provided the investigation had reached a stage where it could be regarded as sufficiently adversarial. The OFT had submitted that the administrative part of the proceeding was not adversarial in nature. However, the Appeal Tribunal disagreed, recognizing that proceedings under the UK Competition Act may not be "wholly adversarial" or "wholly inquisitorial". In this case, the Appeal Tribunal found that by the time the relevant communications had taken place, an SO and supplementary SO had been issued and that the company stood accused of wrongdoing. As such, if the proceedings can be regarded as sufficiently confrontational and adversarial, then documentation prepared in anticipation thereof may benefit from protection under litigation privilege [29].

In **France**, the approach is more in line with EU case law in that it affords protection to outside legal counsel only [30]. It used to be that the French Competition Authority ("FCA") could conduct global seizures of documents irrespective of their protected nature and then the defence would have to file for an annulment of the inspection decision and restitution of the protected documents. However, in 2013 the French Supreme Court held that the rights of defence limit the prerogative of the French Competition Authority in conducting global seizures during raids [31]. In that case, the French Competition Authority had done a global seizure of electronic documents during a dawn raid on Medtronic without regard to the question of whether they were protected by LPP or not. The Supreme Court quashed an order by the Paris Court of Appeal and held that the rights of defence attach at the moment of seizure and therefore the damage cannot be cured by simply returning the documents. The Paris Court of Appeal should have analyzed whether the LPP right was violated before it upheld the legality of the global search. The Supreme Court remanded the case to the Versailles Court of Appeal for a new ruling on this specific question. Whether this decision by the French Supreme Court will impact the way the French Competition Authority will conduct its search and seize operations in the future largely depends on the order of the Versailles Court of Appeal, which is much anticipated.

Concluding remarks

As indicated in the *AM&S* judgment: *"it is apparent from the legal systems of the Member States that, although the principle of such protection is generally recognized, its scope and the criteria for applying it vary"* [32].

Some EU Member States follow the EU approach that independence necessarily requires a lack of an employment relationship with the client. Other EU Member States outright rejected that approach. There are divergences also in relation to the emphasis placed on the content, custodian, and the stage in the legal proceeding in which the communication developed. There is even uncertainty in Belgium as to whether national rules on LPP will apply when the national competition authorities conduct investigations on behalf of the European Commission.

The protection of LPP in the EU and its Member States is still very much in flux and does not seem to converse. Instead, there seems to be an increasing divergence in LPP protection - another good

reason to follow developments in this area in the upcoming reports in *e-Competitions*!

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[1] Case 155/79 *AM&S Europe v Commission*, [1982] ECR 1575 [cited as *AM&S*].

[2] *AM&S* , para 21, 22, 24, 27. See **Frederic Depoortere, James S. Venit**, The European Court of Justice holds that in-house lawyers are not protected by legal professional privilege in antitrust investigations (Akzo), 14 October 2010, e-Competitions Bulletin, October 2010, Art. N° 45408

[3] Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission* [2007] ECR II-3523, para 166 [cited as *Akzo* GC].

[4] *Akzo* GC, para 128.

[5] Case C-550/07 P *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission* [2010] ECR I-8301 [cited as *Akzo*]. See **Rein Wesseling, Miranda Aldrich de Savorgnani**, The EU Court of Justice confirms that communications with an in-house lawyer are not legally privileged (AKZO), 14 september 2010, e-Competitions Bulletin, September 2010, Art. N° 34843

[6] *Akzo*, para 45-49. See **Christopher Bellamy, Dario Dagostino, Gerwin Van Gerven**, The EU Court of Justice confirms that legal professional privilege under EU law does not extend to communications with in-house lawyers (AKZO), 14 September 2010, e-Competitions Bulletin, September 2010, Art. N° 41021

[7] Opinion of Advocate General Kokott, 29 April 2010, Case C-550/07 P *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission* [2010] ECR I-8301, para 56, 63-67. See **Martin Favart**, The ECJ Advocate General Kokott advises against the extension of legal professional privilege to in-house lawyers (Akzo Nobel), 29 April 2010, e-Competitions Bulletin, April 2010, Art. N° 41554

[8] Commission Decision of 23 July 2010, Case 39.612, *Perindopril (Servier)*. See **Martin Favart**, The European Commission rejects legal privilege protection for correspondence between outside counsel of opposing companies (Servier, Teva), 23 July 2010, e-Competitions Bulletin, July 2010, Art. N° 41258

[9] HR 15 March 2013, *Delta v Stichting H9 Invest* , NJ 2013/388 [cited as *Delta*]. See in this context also Christof R.A. Swaak, Paper “Legal Professional Privilege for “independent lawyers” revisited”, 2014 ABA/IBA International Cartel Workshop in Rome (19-21 February 2014).

[10] Article 12g *Stroomlijningswet*. See, Kamerstukken I, vergaderjaar 2013–2014, 33 622, A, p 6.

[11] Brussels Court of Appeal, 5 March 2013, Case 2011/MR/3, *Belgacom* [cited as *Belgacom*]. See **Valérie Lefever, Johan Van Acker**, The Brussels Court of Appeal recognises legal professional privilege to in-house lawyers (Belgacom), 5 March 2013, e-Competitions Bulletin, March 2013, Art. N° 51812

[12] *Belgacom* 60-61

[13] An appeal is pending before the Belgian Supreme Court.

[14] Richtsnoeren van de Belgische Mededingingsautoriteit Betreffende de Huiszoekingsprocedure. 17 December 2013. http://stibbe.m17.mailplus.nl/gener...

[15] See **Isabel Oest**, A German Regional Court refuses to extend the protection of legal privilege to internal audit documents, 12 June 2012, e-Competitions Bulletin, June 2012, Art. N° 49699

[16] Regional Court of Giessen, Decision of 25 June 2012, 7 Qs 100/12

[17] See Marion Schmid-Drüner, Legal Professional Privilege after Akzo- case closed? Bucerius Law Journal February 2011 Heft 1/2011 Seiten 1-41, p. 32, *citing* LG Berlin, wistra2006, 158 para 15/16. See also Regional Court of Bonn, Decision of 29 September 2005, 37 Qs 27/05

[18] See Regional Court of Bonn, Decision of 10 September 2010, 27 Qs 21/10

[19] Regional Court Bonn, Decision of 12 June 2012, 27 Qs 2/12. See **Isabel Oest**, A German Regional Court refuses to extend the protection of legal privilege to internal audit documents, 12 June 2012, e-Competitions Bulletin, June 2012, Art. N° 49699

[20] Regional Court Bonn, Decision of 12 June 2012, 27 Qs 2/12, See **Isabel Oest**, A German Regional Court refuses to extend the protection of legal privilege to internal audit documents, 12 June 2012, e-Competitions Bulletin, June 2012, Art. N° 49699

[21] Regional Court of Mannheim, Decision of 3 July 2012, 24 Qs 1/12

[22] Tribunal for the Defence of Competition, 22 July 2002, Case r 508/02 v, *Pepsi-Cola v Coca-Cola*. See **Paloma Martínez-Lage**, The Spanish Competition Authority defines the scope of protection of legal privilege (Pepsi-Cola/Coca-Cola), 22 July 2002, e-Competitions Bulletin, July 2002, Art. N° 20061

[23] [[Tribunal for the Defence of Competition, 22 July 2002, Case r 508/02 v, *Pepsi-Cola v Coca-Cola*. See **Paloma Martínez-Lage**, The Spanish Competition Authority defines the scope of protection of legal privilege (Pepsi-Cola/Coca-Cola), 22 July 2002, e-Competitions Bulletin, July 2002, Art. N° 20061

[24] Spanish Competition Authority, 3 October 2008, Case no. R/0004/08, *Colgate Palomlive España*; Spanish Competition Authority, 3 October 2008, Case no. R/0005/08, *L'Oreal*; Spanish Competition Authority, 3 October 2008, Case no. R/0006/08, Stanpa. See **Aitor Montesa Lloreda, Angel Givaja Sanz**, The Spanish Competition Authority launches dawn-raids giving rise to controversy over defense rights (Colgate Palmolive España, L'Oreal, Stanpa), 3 October 2008, e-Competitions Bulletin, October 2008, Art. N° 25119

[25] Spanish National Court, 30 September 2009, *Stanpa v Spanish Administration*. See **Jaime Garcia-Nieto**, The Spanish National Court finds that the ANC has exceeded its powers in taking copies of company employees hard drives and therefore breached the principle of domicile inviolability, thus putting at question the NCA's powers of inspection (Spanish Cosmetic Toiletry and Perfumery Association - Stanpa), 30 September 2009, e-Competitions Bulletin, September 2009, Art.

N° 30034

[26] Spanish Supreme Court, 27 April 2012, Case no. STS 6552/2009, *Asociación Nacional de Perfumería y Cosmética ("Stanpa")* . See **Albert Pereda Miquel, Cristina Vila Gisbert**, The Spanish Supreme Court validates the seizure of documents protected by legal privilege and documents beyond the scope of the inspection order, if they are not used in the administrative proceedings (STAMPA), 27 April 2012, e-Competitions Bulletin, April 2012, Art. N° 48618

[27] **Frances Murphy, Lynette Zahn**, The UK Competition Appeal Tribunal clarifies scope of litigation privilege in Office of Fair Trading investigations (Tesco), 20 March 2012, e-Competitions Bulletin, March 2012, Art. N° 50041

[28] The Law Society. Chapter 6: Legal Professional Privilege. 22 October 2013. http://www.lawsociety.org.uk/advice...

[29] UK Competition Appeal Tribunal, 20 March 2012, *Tesco* **Frances Murphy, Lynette Zahn**, The UK Competition Appeal Tribunal clarifies scope of litigation privilege in Office of Fair Trading investigations (Tesco), 20 March 2012, e-Competitions Bulletin, March 2012, Art. N° 50041

[30] Jean-Christophe Grall and Thomas Lamy, France: Protecting Legal Privilege. 1 October 2010. International Financial Law Review. http://www.iflr.com/Article/2710015...

[31] French Supreme Court, Criminal Chamber, 24 April 2013, 12-80.331 and 12-80334, *Medtronic*. See **Martin Favart**, The French Supreme Court rules that globally seizing electronic mailboxes is limited by the principle of legal professional privilege (Medtronic), 24 April 2013, e-Competitions Bulletin, April 2013, Art. N° 56908

[32] *AM&S*, para 19.

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