Legal Professional Privilege in the European Union

I. Introduction

This chapter discusses whether and to what extent legal professional privilege ("**LPP**") under European Union law and as defined by the EU courts ("**EU LPP**") is an obstacle to in-house counsel involvement in pro bono work in Europe.[1] LPP is a special status granted to correspondence exchanged with a legal advisor. A document protected by LPP cannot be seized by a government authority, and its content cannot be used as evidence in proceedings. In the well-known *Akzo* judgment, the Court of Justice of the European Union (the "**Court of Justice**") confirmed that, in the context of a company, in-house counsel that are employed by that company are in a fundamentally different position from "external lawyers" (as defined below) and are not sufficiently independent for their communications to benefit from LPP.[2]

However, it should be noted that the *Akzo* ruling is limited to investigations, most notably antitrust investigations, carried out by the European Commission (the "**Commission**"). Most pro bono projects will not involve issues relating to these investigations, and as such *Akzo* is not normally relevant and in fact does not generally form an obstacle to pro bono work in Europe.

The scope and limitations of the *Akzo* judgment are discussed in Sections II and III. For reasons explained below, this chapter also briefly touches upon the issue of LPP in the national EU Member States (Section IV) and provides some practical suggestions for dealing with LPP under EU law (Section V).

II. Outline of Legal Professional Privilege under European Union Law

This section sets out the main features of EU LPP (as set out in the judgment of the Court of Justice in *AM&S*[3] and confirmed in *Akzo*).

EU LPP only covers written communications exchanged between a company and an independent lawyer; i.e., a lawyer, registered with the Bar of an European Economic Area ("**EEA**") Member State, who is not bound to the client by a relationship of employment ("**external lawyer**").[4] EU LPP applies both to such communications themselves and to internal notes circulated within a company that reflect the content of legal advice given by the external lawyer.[5]

Additionally, the respective documents (communications or internal notes) must have been produced for the purpose and in the interest of the exercise of the rights of defense and must have a potential relationship to the subject matter of any subsequent procedure under Articles 101 and 102 of the Treaty on the Functioning of the EU ("**TFEU**").[6]

However, EU LPP does not extend to pre-existing documents (e.g., internal communications among executives on business matters, notes of business meetings, commercial documents) and, accordingly, does not concern original internal business documents, even if they have been selected and copied in response to a request by external counsel who require them in order to

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[1] Although their situation regarding EU LPP may be similar to in-house counsel, this chapter does not discuss the situation of external lawyers not qualified in the EEA. For reference, the EEA consists of the following countries: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom, Iceland, Liechtenstein, and Norway.

[2] Case C-550/07 P, Akzo Nobel Chemicals and Akcros Chemicals v. Commission, 2010 E.C.R. I-8301.

[3] Case 155/79, AM&S Europe v. Commission, 1982 E.C.R. 1575.

[4] For the purposes of this chapter, an in-house lawyer who is registered with the Bar of an EEA and who provides pro bono services to a client to whom it is not bound by a relationship of employment is considered to be an "external lawyer".

[5] Case T-30/89R, Hilti v. Commission, 1990 E.C.R. II-163 (Order).

[6] Articles 101 and 102 of TFEU relate to antitrust matters (cartels and abuse of dominance cases).

provide legal advice on matters that may have a relationship to the subject matter of a subsequent procedure. It is, however, unclear whether EU LPP extends to such collections of copies of pre-existing internal documents when they are attached as an integral part of "preparatory documents." In the absence of precise indications from either the EU Courts or the Commission on this specific issue, a cautious approach should be adopted in the day-to-day approach to these issues. Indeed, the Commission's current approach to pre-existing documents that are annexed to legally privileged memoranda is not to consider them covered by EU LPP.

A refusal to produce a certain document to the Commission on the grounds that it is covered by EU LPP must be supported by evidence demonstrating that EU LPP protection is actually applicable. Parties may submit their claims to the so-called "Hearing Officer" regarding documents requested by, but withheld from, the Commission on the basis of EU LPP.

III. Scope and Limitations of Legal Professional Privilege under European Law

It follows that the scope of EU LPP is limited to written communications between an independent lawyer and his/her client after the initiation of a *Commission administrative procedure* (most notably Commission antitrust investigations) and which are related to the procedure.

This means that the scope of and room for EU LPP are in practice quite narrow. EU LPP is limited to the enforcement of EU law through EU administrative (i.e. Commission) procedures; it has no impact on a company's right to withhold privileged documents from private parties during litigation or other government authorities; and in-house counsel cannot be compelled to testify as to privileged matters.

Pro bono matters will not typically involve issues relating to Commission administrative procedures, and as such it is unlikely that work product may be seized by the Commission, even though it may not always be easy or sometimes possible to identify whether work done will become subject to a Commission investigation in the future.

Given the limitations of EU LPP, post-*Akzo,* national LPP rules will continue to be relevant in all national administrative procedures, i.e., where national authorities investigate.

IV. Differences Regarding Legal Professional Privilege in the National European Union Member States

The protection granted by the EU LPP may differ substantially from the protection granted by LPP in other jurisdictions.[7] Companies and in-house counsel need to be aware of these possible differences and should understand the risks they are exposed to in their jurisdictions of operation. There are commonalities but also significant discrepancies between the scope of EU LPP and LPP under national legislation/regulation.[8] In general terms, the scope of EU LPP is narrower than LPP under national legislation/regulation. This chapter focuses on two possible significant differences between EU LPP and LPP under national legislation/regulation.

A. Legal Advice From In-House Counsel

As explained above, *Akzo* reaffirmed the rule (based on the judgment of the Court of Justice in *AM&S*) that EU LPP applies only to communications exchanged with external

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[7] For instance, the U.S. attorney-client privilege applies equally to in-house counsel. See, e.g., J. Brady Dugan, Jordan W. Cowman & Allison Walsh Sheedy, NEGOTIATING THE PRIVILEGE MINEFIELD: SOME DIFFERENCES BETWEEN ATTORNEY-CLIENT PRIVILEGE IN THE U.S. AND EUROPE, 6 STATE BAR OF TEXAS CORPORATE COUNSEL SECTION NEWSLETTER, (2011), with a reference to United States v. United Shoe Machinery, 89 F. Supp. 357, 360 (D. Mass. 1950) ("On the record as it now stands, the apparent factual differences between these in-house counsel and outside counsel are that the former are paid annual salaries, occupy offices in the corporation's buildings, and are employees rather than independent contractors. These are not sufficient differences to distinguish the two types of counsel for purposes of the attorney-client privilege.").

[8] The ECJ itself has described these discrepancies in Akzo (see above footnote 2), mn. 71 et seq.; a helpful overview of LPP under the different EU member states' legislation/regulation can be found in DLA Piper's and ECLA's Legal Professional Privilege Global Guide, available at http://www.dlapiperlegalprivilege.com/#handbook/world-map-section/2/c1_DE (last visited on April 29, 2019).

lawyers. But the Court of Justice did not consider the impact of its ruling in the context of parallel investigations by Member States.[9]

Whilst the general rule is that the LPP protection offered by Member States does not extend to in-house counsel[10], there are some exceptions.[11] In Ireland and in the UK, in-house counsel benefit from the same protection as external counsel, because in-house counsel are considered to be sufficiently independent. In that sense, the UK's system is similar to the U.S. attorney-client privilege. In addition, certain countries such as Poland, Portugal and the Netherlands recognize LPP protection for communications with in-house counsel provided they are admitted to the Bar.

B. Correspondence, Work Products and Other Situations Covered

As mentioned above, *Akzo* limited the scope of EU LPP to work product created for the exclusive purpose of seeking legal advice from an external lawyer and to reproductions of the text or the content of legal advice given (in writing or orally) by an external lawyer. While the approach taken in a number of EU Member States is consistent with that of the EU,[12] this is not always the case. Some countries extend LPP protection to: (a) correspondence that is not made for the purposes and in the interests of the client's right of defense (e.g., Ireland and the UK); (b) communications with lawyers established outside the EEA area (e.g., Netherlands, and the UK); and (c) oral communications (e.g., Lithuania, Malta, and Portugal).[13] On the other hand, some EU Member States do not recognize LPP in certain situations (e.g., Germany in the case of merger control proceedings, and Estonia in the case of national antitrust investigations, where although LPP is acknowledged in principle, it is common practice that the antitrust/competition authority seizes the documents in bulk, which often includes privileged material. In order to prevent the investigator from reviewing privileged documents, the subject of the investigation should clearly indicate which documents are privileged).

V. Practical Suggestions for Dealing with Legal Professional Privilege under European Union Law

The *Akzo* ruling highlights the need for companies to assess the practical measures they should take to maintain confidentiality over communications, and the circumstances in which external, rather than in-house, counsel should be instructed. As noted, pro bono matters normally do not become subject to Commission investigations, and as such the risk that work product may be seized by the Commission is not normally a problem. This Section sets out some basic practical suggestions to deal with issues relating to LPP.

A. Increase In-House Counsel's Awareness

The limitations on the applicability of EU LPP to in-house counsel should not prevent in-house counsel from functioning and providing day-to-day legal advice to the company and its employees, or from providing assistance on pro bono matters in Europe. In-house counsel should simply be aware that their written documents may be disclosed in a Commission proceeding. As a result, when advice is required to be in writing, in-house

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[9] There have been cases of parallel investigations in the past; e.g., the so-called Marine Hoses investigation where the UK's OFT, the Commission and the U.S. DOJ have coordinated their actions, and carried out contemporaneous on-site inspections. There are likely to be more cases of this nature in the future, particularly if Member States expand the scope of criminal sanctions for infringements of antitrust laws.

[10] Austria, Czech Republic, Croatia, Denmark, Estonia, Finland, France, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Romania, Slovakia, Slovenia, Spain (disputed and left open by the Spanish Surpreme Court) and Sweden.

[11] Belgium, Cyprus (if admitted to the Bar), Greece, Ireland, The Netherlands (if admitted to the Bar), Norway, Poland (if admitted to the Bar), Portugal (if admitted to the Bar) and the UK.

[12] Following are some countries that in the case of a national antitrust investigation have an approach regarding LPP similar to the EU: Finland, France, Hungary, Italy, Latvia, Slovakia, Slovenia and Spain.

[13] Similarly, the U.S. attorney/client privilege is also extended to oral communications.

counsel should be careful to use precise and accurate language that is difficult to misinterpret or quote out of context.

B. Identify Documents

Internal documents covered by LPP should be immediately and unambiguously identifiable as having been prepared exclusively in order to obtain legal advice from an external lawyer in connection with matters that may have a relationship to the subject matter of a foreseeable subsequent procedure**.**

It should also be kept in mind that during unannounced inspections, the first port of call for officials of the Commission and Member State authorities is the place where e-mails and documents are stored on the central server, as well as the laptops and other electronic storage devices of individual executives. Electronic correspondence is therefore treated in exactly the same way as paper correspondence and will require particular attention given the extent of electronic communications in most companies and organizations today.

All legal correspondence dealing with legally-sensitive issues should be collected in separate folders and ideally kept in the office of the in-house counsel. Folders should be labeled as "*Legally Privileged – Documents used for consultation with external lawyer."* The same recommendation applies to e-mails and electronic folders, so that they can be omitted from an electronic search. If pre-existing legally sensitive documents are organized and copied for use by external counsel, and if a copy of that collection must remain with the company, the discussions with external lawyers should be recorded by way of a brief note, mentioning the name of the external lawyer involved, the date of the discussion and the topic (in general terms). This brief note should be kept in the same folder as each of the documents/materials discussed. Finally, legal documents on sensitive issues should have limited distribution within the company.

VI. Conclusion

The *Akzo* ruling is limited to investigations, most notably antitrust investigations, carried out by the Commission. On the rare occasion that pro bono work involves some possible elements of Commission investigations this should not discourage in-house counsel from providing assistance on pro bono matters. The LPP rules in each relevant national EU Member State should also be taken into consideration. Awareness that correspondence and work products may possibly be seized by the Commission, and awareness of the matters for which external counsel may need to be involved, will substantially lower the risk of any possible future problems.

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