Legal Professional Privilege in Europe: a Missed Policy Opportunity

Julia Holtz*

I. Introduction

The European Commission, along with a number of Member States of the European Union, does not recognise Legal Professional Privilege for a wide range of lawyers. Only external counsel that have earned their qualification in the European Union enjoy Legal Professional Privilege. In-house lawyers (and, according to the opinion rendered before the latest judgment, outside counsel with a qualification earned outside the European Union) cannot provide advice without first assessing the risk of being ordered to disclose such advice in future Commission proceedings. This burden reduces the amount and/or quality of advice that such lawyers can give to business, and endangers compliance programmes. This creates a multitude of issues for companies, from daily (im)practicalities to questions of fundamental rights.

The Commission’s black-and-white approach has been heavily criticised in the past. This article will touch on an additional angle: the huge missed opportunity to costlessly improve competition compliance across Europe. The article is structured as follows: Section II gives an overview of European Legal Professional Privilege rules, both at the European Union and the national level. Section III enumerates the significant arguments that can be raised against the Commission’s current approach. Section IV discusses the missed policy opportunities that the Commission forgoes by adopting its approach. Section V concludes with a brief outlook.

II. The current status of European Professional Privilege

A. AM&S, Hilti, Akzo

In essence, the current status is the same as that established by the Court of Justice in AM&S v Commission1 in 1982, the first case of its kind at the European Union level, when the court ruled that written communications between a lawyer and a client are confidential provided two cumulative conditions are met:

- The communications ‘are made for the purposes and in the interests of the client’s rights of defence’, and
- The communications ‘emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment’.

In Hilti v Commission,2 the court expanded the scope of privilege to internal documents circulated within an undertaking which report the text or content of privileged communications, as ‘the principle of the protection of written communications between lawyer and client must, in view of its purpose, be regarded as extending also to the internal notes which are confined to reporting the text or the content of those communications’. In other words, the privilege attaches to the legal advice, and not merely to the document initially communicating it to the client. However, the concept was not expanded to in-house counsel.

In 2003, Akzo sought to expand the scope of Legal Professional Privilege following an on-site inspection by the Commission during which internal written communications from a Dutch Akzo in-house counsel were seized. The in-house counsel was a member of the Dutch Bar, and subject to specific rules under Dutch law aimed at guaranteeing the full independence of employed lawyers. Akzo took the view that Legal Professional Privilege should therefore apply, and that the relevant internal

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communications should be returned to it. The Commission refused to return the documents, and Akzo appealed the Commission’s decision to the General Court.3

The President of the Court of First Instance in Interim Measures confirmed the importance of Legal Professional Privilege, and suggested that privilege should also be recognised for communications seeking or providing legal advice by in-house counsel.4 The President considered that the applicants and interveners had produced evidence to demonstrate that developments in Community law since AM&S were such that the application of Legal Professional Privilege to communications between in-house counsel and their clients could not be excluded. He emphasised the role of Bar rules in a number of Member States in ensuring in-house counsel were subject to strict rules of professional conduct.5

Unfortunately, the Court did not follow the President. Akzo6 confirms the principles laid down in AM&S, clarifies the notion of ‘independence’ (reiterating the principle that in-house lawyers are not covered by privilege), expands the scope of privilege to preparatory documents,7 and introduces the Commission’s right to take a ‘cursory look’ at the documents in question8 and to take away documents in a sealed envelope if it remains unclear whether a document is covered by Legal Professional Privilege.9

Leaving the other aspects of the judgment aside, an independent lawyer is a lawyer who is ‘not bound to his client by a relationship of employment’. The court notes that ‘AM&S defined the concept of independent lawyer in negative terms in that it stipulated that such a lawyer should not be bound to his client by a relationship of employment, rather than positively, on the basis of membership of a Bar or Law Society or being subject to professional discipline and ethics.’ An independent lawyer is a ‘lawyer who, structurally, hierarchically and functionally, is a third party in relation to the undertaking receiving that advice’.10

The requirement that the communications in question emanate from an independent lawyer is an express rejection of Legal Professional Privilege for communications with in-house lawyers.

Akzo’s appeal against this judgment was unsuccessful. The Court of Justice confirmed that only exchanges emanating from ‘independent lawyers’ that is to say ‘lawyers who are not bound to the client by a relationship of employment’ enjoy Legal Professional Privilege. It argued that, in essence, in-house counsel could not be trusted. According to the court,

- an in-house lawyer does not enjoy the same degree of independence as an external lawyer because he would need to take the commercial strategies of his employer into account; and
- certain other functions that the in-house counsel potentially performs such as a ‘competition law co-ordinator’ may further strengthen these ‘close ties’.10

In relation to covered jurisdictions, AM&S had limited Legal Professional Privilege to members of a bar of an European Union Member State. While the final Akzo judgment stays silent on this issue, the Advocate General’s opinion denies Legal Professional Privilege to lawyers from third countries as there was no adequate basis for the mutual recognition of legal qualifications and lawyers’ professional ethical obligations.11

3 Then the Court of First Instance (the name changed on 1 December 2009). For ease of reference, this article only refers to the General Court.


B. Putting the judgments into context

AM&S has often been criticised for its limited scope of application. However, it is important to note that the court granted Legal Professional Privilege despite the fact that Regulation No 17/62 did not provide for any such protection, and against the European Commission’s pleadings that Legal Professional Privilege should not be afforded at all. Therefore, it would be more appropriate to focus on the groundbreaking nature of this decision, establishing Legal Professional Privilege for the first time at the European level rather than the restrictions that AM&S contains.

The fact that this judgment was groundbreaking is also evident in light of the legal backdrop at the time: in cases where community law is silent on a certain legal issue, the courts look at the ‘common legal traditions’ of the Member States. However, common law countries with a Legal Professional Privilege regime such as the United Kingdom were in the minority at the time of the judgment. Nevertheless, the Court of Justice recognised the need for Legal Professional Privilege, clearly influenced by UK case law, combined with the right to a fair trial. A logical path would have been to fine tune this approach over time, rather than cement it.

The Akzo judgments are disappointing considering the various changes that have occurred between 1982 and 2010, ignoring policy developments as well as a changed legal environment (see Section III below).

C. Overview: Legal Professional Privilege at Member State level

As the European courts should evaluate the ‘common legal traditions’ of Member States in the absence of Community Laws, it is instructive to review the situation vis-à-vis in-house privilege rules at the national level (Table 1).

Table 1 indicates that within Europe there are:
- twelve countries with in-house Legal Professional Privilege;
- thirteen countries without in-house Legal Professional Privilege;
- three countries where there is unclear or no case law.

To summarise, the number of countries affording Legal Professional Privilege for in-house counsel has increased—they are almost equal in number which those that do not. This is a significantly higher number, in absolute and relative terms, than when AM&S was decided in 1982, and despite the fact that the Akzo judgment may have had unintended reverse effects (see Section IV.D).

Also, the number of countries drawing a distinction between lawyers admitted to a bar (who enjoy Legal Professional Privilege) and those who do not, outnumbers those Member States without such a distinction.

The changed global nature of antitrust investigations, with waivers being common practice (see Section III) also mitigates in favour of expanding the concept of Legal Professional Privilege to outside counsel from other jurisdictions.

III. The case against denying Legal Professional Privilege to in-house counsel and non-European Union outside counsel

There are numerous opinions criticising the current decisional practice. The main arguments are as discussed in the following subsections.


15 The analysis contained in this section is based, originally, on the Legal Privilege Handbook edited by DLA Piper. This Handbook is publicly available at: <http://www.dlapiper.com/files/Publication/3fba305-6bb-4b57-b0f-4cb84890abaf6/Presentation/PublicationAttachment/6de429a0-e91f-4a9b-861e-866f9b9d4d1/Legal_Privilege_Handbook_2012_v2.pdf> accessed 17 May 2013. Verifications have been made by the author with local counsel. For the sake of clarity, the overview simplifies the situation in several respects. Some disagreement may exist in the interpretation of local laws.

<table>
<thead>
<tr>
<th>Member State</th>
<th>LPP outside counsel?</th>
<th>LPP in-house counsel?</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>Yes</td>
<td>No</td>
<td>No LPP (not even for outside counsel) for documents in client’s possession.</td>
</tr>
<tr>
<td>Belgium</td>
<td>Yes</td>
<td>Yes</td>
<td>Recently confirmed by the Brussels Court of Appeal.</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>Yes</td>
<td>Unclear</td>
<td>No cases regarding in-house LPP, but court expected to follow Akzo.</td>
</tr>
<tr>
<td>Cyprus</td>
<td>Yes</td>
<td>Yes</td>
<td>In-house counsel needs to be admitted to bar.</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>Yes</td>
<td>No</td>
<td>No LPP (not even for outside counsel) for documents in client’s possession. Only bar-admitted lawyers enjoy LPP and in-house counsel cannot be a member of the bar.</td>
</tr>
<tr>
<td>Denmark</td>
<td>Yes</td>
<td>Unclear</td>
<td>No cases.</td>
</tr>
<tr>
<td>Estonia</td>
<td>Yes</td>
<td>No</td>
<td>Only bar-admitted lawyers enjoy LPP and in-house counsel cannot be a member of the bar.</td>
</tr>
<tr>
<td>Finland</td>
<td>Yes</td>
<td>No</td>
<td>Appears to have been inspired by Akzo.</td>
</tr>
<tr>
<td>France</td>
<td>Yes</td>
<td>No</td>
<td>Only bar-admitted lawyers enjoy LPP and in-house counsel cannot be a member of the bar.</td>
</tr>
<tr>
<td>Germany</td>
<td>Yes</td>
<td>No</td>
<td>No LLP (not even for outside counsel) before a criminal investigation has commenced. In-house counsel is not considered ‘counsel’ for the company s/he works for.</td>
</tr>
<tr>
<td>Greece</td>
<td>Yes</td>
<td>Yes under certain circumstances</td>
<td>In-house counsel needs to be admitted to bar (in some edge cases, privilege may be denied).</td>
</tr>
<tr>
<td>Hungary</td>
<td>Yes</td>
<td>No</td>
<td>Only bar-admitted lawyers enjoy LPP and in-house counsel cannot be a member of the bar.</td>
</tr>
<tr>
<td>Ireland</td>
<td>Yes</td>
<td>Yes</td>
<td>only bar-admitted lawyers enjoy LPP and in-house counsel cannot be a member of the bar.</td>
</tr>
<tr>
<td>Italy</td>
<td>No</td>
<td>No</td>
<td>Only bar-admitted lawyers enjoy LPP and in-house counsel cannot be a member of the bar.</td>
</tr>
<tr>
<td>Latvia</td>
<td>Yes</td>
<td>Yes under certain circumstances</td>
<td>In-house counsel needs to be ‘Sworn Attorney’ which means no normal employment relationship.</td>
</tr>
<tr>
<td>Lithuania</td>
<td>Yes</td>
<td>Yes under certain circumstances</td>
<td>Only bar-admitted lawyers enjoy LPP and in-house counsel cannot be a member of the bar. However, exclusive arrangement for outside counsels (without employment relationship) are tolerated.</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>Yes</td>
<td>No</td>
<td>Only bar-admitted lawyers enjoy LPP and in-house counsel cannot be a member of the bar.</td>
</tr>
<tr>
<td>Malta</td>
<td>Yes</td>
<td>Yes</td>
<td>In-house counsel needs to be a member of the bar. and employer must have signed statement guaranteeing independence of in-house counsel. Recently confirmed by the Dutch Supreme Court.</td>
</tr>
<tr>
<td>The Netherlands</td>
<td>Yes</td>
<td>Yes under certain circumstances</td>
<td>In-house counsel needs to be a member of the bar.</td>
</tr>
<tr>
<td>Norway (EEA)</td>
<td>Yes</td>
<td>Yes</td>
<td>In-house counsel needs to be a member of the bar.</td>
</tr>
<tr>
<td>Poland</td>
<td>No</td>
<td>No</td>
<td>Does not recognise LPP in the traditional sense (but is disputed).</td>
</tr>
<tr>
<td>Portugal</td>
<td>Yes</td>
<td>Yes</td>
<td>In-house counsel needs to be a member of the bar.</td>
</tr>
<tr>
<td>Romania</td>
<td>Yes</td>
<td>No</td>
<td>In-house privilege is recognised for matters other than competition law. Unclear if in-house counsel is nominally independent but works exclusively for one company.</td>
</tr>
<tr>
<td>Slovakia</td>
<td>Unclear</td>
<td>Unclear</td>
<td>No clear law but authority likely to follow EC, ie, Akzo.</td>
</tr>
<tr>
<td>Slovenia</td>
<td>Yes</td>
<td>No</td>
<td>Only bar-admitted lawyers enjoy privilege and in-house counsel cannot be a member of the bar.</td>
</tr>
<tr>
<td>Spain</td>
<td>Yes</td>
<td>Yes</td>
<td>In-house counsel needs to be a member of the bar.</td>
</tr>
<tr>
<td>Sweden</td>
<td>Yes</td>
<td>No</td>
<td>Only bar-admitted lawyers enjoy privilege and in-house counsel cannot be a member of the bar.</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>Yes</td>
<td>Yes</td>
<td></td>
</tr>
</tbody>
</table>
A. The recent judgments do not take a different judicial landscape into account

There are at least two significant changes that should alter the assessment of the courts post-AMEsS: the introduction of Regulation 1/2003 and human rights legislation:

1. Regulation 1/2003

Regulation 1/2003 render Article 81(3) (now Article 101(3) TFEU) ‘directly applicable’. Before this regulation entered into force, potentially anticompetitive agreements had to be notified to the Commission (which was consequently flooded with such applications, and responded by handing out ‘comfort letters’ rather than binding negative or clearance decisions). The company notifying the agreement was immune against fines until the Commission reacted. This situation was untenable, requiring the Commission to devote huge resources to the process while not capturing any significant illegal activity, since clear-cut cartels were obviously not notified. This resulted in the policy shift of putting companies in charge of evaluating the legality of their agreements themselves starting in 2003.

This competition law ‘self-assessment’ therefore became an important part of day-to-day business activity in Europe. While this has led to an increase in the hiring of in-house competition law expertise, the existing Legal Professional Privilege rules stymie these lawyers’ effectiveness. The importance of this issue can, for example, be measured by the number of comments that were submitted in the 2008 public consultation on the preparation of the report on the functioning of Regulation 1/2003: even though the Commission’s questionnaire on the regulation remained silent on the topic of Legal Professional Privilege, approximately half the respondents described the difficulties arising from the lack of Legal Professional Privilege for in-house counsel and/or inconsistent application of the principle across Europe. With increased responsibilities, it seems only logical that companies should be afforded the means to comply with this additional task: Legal Professional Privilege is crucial in this regard.

2. Binding nature of human rights legislation

The entry into force of the Lisbon Treaty (2009) made the Charter of Fundamental Rights of the European Union binding for European institutions including the Commission, and the European Union is also pursuing accession to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). While the European Union’s institutions have always acknowledged the significance of the Charter as source and benchmark for their legal acts, there is of course a difference between using these texts as a source of interpretation on the one hand and being legally bound to a document, with a status equal to the Treaties, on the other. Witness the implicit acknowledgement of the difference by the fact that the Commission’s Legal Service has created a position internally that is specifically tasked to ensure the compatibility of the institution’s legal acts with human rights, and that did not exist prior to the Lisbon Treaty.

A central dispute between the Commission and defendants is the criminal nature of antitrust fines. The Commission acknowledges that its fining decisions would be of a criminal nature under the ECHR. However, it maintains that they are of an administrative nature under the European Union Treaties, and that these fines, as well as the procedure leading to their imposition, are in compliance with the standards mandated under human rights. However, it remains to be seen if the ECtHR would agree that the existing restrictions of Legal Professional Privilege can be maintained in light of due process rules, especially considering the severity of the consequences.

While a discussion on the legality of the Commission’s past actions would be beyond the scope of this article, these two developments—companies’ duty to self-assess their compliance, and the increased significance of human rights aspects in Community law—should lead to an acceleration of access. This ad hoc group has so far held five meetings in 2012 and 2013. See, <http://hub.coe.int/what-we-do/human-rights/eu-accession-to-the-convention (accessed 17 May 2013); >http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/default_en.asp> accessed 17 May 2013.

20 “The application of these “Engel criteria” to the Commission’s antitrust fining procedures leads to the conclusion that these procedures are ‘criminal’ within the autonomous meaning of Article 6 ECHR, is no longer news today’, see Wouter PJ Wils, ‘The Increased Level of EU Antitrust Fines, Judicial Review, and the European Convention on Human Rights’ p. 13, available at <http://www.euical.org/data/media/increased.pdf> accessed 17 May 2013.

21 See, Turno and Zawłocka-Turno, ‘Legal Professional Privilege’ (n 16) 198.

22 For an instructive discussion, see Turno and Zawłocka-Turno, ‘Legal Professional Privilege’ (n 16).
to strengthened due process rules, to which Legal Professional Privilege squarely belongs.

The need to evolve was recognised by Bo Vesterdorf, then-President of the Court of First Instance, when he stated in 2003:

[there] is no reason to believe that once the scope of a right is set, it will remain cast in stone for ever. The evolutionary nature of these rights seems indeed particularly logical when they are rooted in the national laws of the Member States: these laws evolve, and so does the number of Member States. As a consequence, the evolutionary nature of such rights, although it does not necessarily materialise often, is nonetheless inherent in the EU legal system. In addition, even when a right is not rooted in the national laws of the Member States, the increasingly pervasive influence of the European Convention creates additional leeway for evolution. . . . [T]he evolution of the privilege against self-incrimination illustrates the instrumental role by the European Convention in this field.23

3. Free choice of legal representation

In addition, each person should be free to choose which legal adviser he wishes to consult on how to exercise rights of defence in competition matters. The refusal to extend Legal Professional Privilege to those in-house lawyers who qualify as ‘independent’ prejudices the freedom of persons to organise their legal advisors as they see fit or consult freely with their preferred legal adviser and increases the legal costs to businesses in receiving appropriate legal advice for the exercise of rights of defence.

Given that not only the number of Member States recognising in-house Legal Professional Privilege has increased, but also that human rights aspects deserve more attention by the institutions, the recognition of Legal Professional Privilege is overdue.

B. International comity and the Commission’s aggressive interpretation of jurisdictional powers calls for the recognition of in-house Legal Professional Privilege

In recent years, two enforcement trends can be clearly observed in Europe: large document productions and expanded waiver practices, touching on comity and jurisdictional issues.

1. Large document productions

The Commission is not only seizing documents in dawn raids, but also sends Article 11 (mergers) and Article 18 (antitrust) decisions24 to companies in the EU, requesting the production of large numbers of internal documents. While these documents are not always physically located in Europe, the Commission takes the view that it has jurisdiction as long as it can compel a subsidiary that is incorporated in a Member State (and it does not accept the argument that a subsidiary is unlikely to be able to force its parent to disclose such documents).25

Again, this was not the issue at hand when AMÉS (or, for that matter, Akzo) was decided, so it would appear even more appropriate to take the ‘evolutionary’ nature of Legal Professional Privilege requirements into account that President Vesterdorf recognised in 2003. However, in addition to the jurisdictional difficulties, the Commission seeks to apply European Union Legal Professional Privilege rules even for documents that were drafted and are physically located outside the EU. This is exacerbated by the fact that the relevant documents may have been written in the expectation that they would be privileged. The principle of comity should give deference to the privilege rules of the country of origin. Otherwise, the Commission undermines the legitimate expectations of non-European Union based custodians as to the legal rules governing their communications with their counsel; deprives existing local Legal Professional Privilege rules of their application within their own territorial scope; and effectively force non-European based companies to seek day-to-day legal advice from outside counsel based in the European Union(!).

2. Waivers exacerbate the situation

The Commission routinely requests waivers from companies, allowing it to exchange information and enter into close collaboration with other antitrust agencies, especially the Department of Justice or the Federal Trade Commission in the United States. Companies grant waivers because it helps speed up transatlantic merger control proceedings; it may be viewed as a fundamental

23 See, Vesterdorf (n 16).
waiver of privilege as to all communications relating to the same subject matter.

3. Document disclosures are becoming more of an issue in the EU

In Europe, disclosure is increasingly becoming an issue in private antitrust litigation as well, notably in cartel follow-on lawsuits.28 Conservative Legal Professional Privilege rules could lead to clashes with the procedural rules of certain Member States (ie, those with more generous Legal Professional Privilege rules such as England and Wales).

D. There is no justification to assume that an in-house lawyer is less suited for objective advice than outside counsel, and may often be the more effective choice

For many tasks, in-house counsel are better placed than outside counsel. Since in-house lawyers often have the best understanding of a company’s business and competitive environment and are more cost-effective than external lawyers (particularly for ad hoc practical business advice), the system of self-assessment established by Regulation 1/2003 has inevitably led to many companies employing in-house competition lawyer applicants (and a consequent shift in the type of work that is outsourced to external lawyers, eg, big merger projects). An in-house competition lawyer will typically advise mainly on the application of competition rules to new business propositions and contractual obligations, and may be more effective than outside counsel for the following reasons:

1. Early involvement and effective communication

Business people are more likely to consult and listen to an in-house lawyer with whom they have an established relationship, inevitably ensuring better compliance with competition law for day-to-day decision making. In-house lawyers are embedded in the business in such a way that they typically have access to proposed plans or ideas at a very early stage in the development process, and are thus able to assess the legal implications more quickly, and therefore more cost-effectively, than his or her external counterpart. Accordingly, in-house lawyers

precludes disclosure of the same documents in other administrative litigation. The attorney–client privilege is not designed for such tactical employment.


27 In The Permian Corporation and Occidental Petroleum Corporation v United States of America, 665 F.2d 1214, the United States Court of Appeals, District of Columbia Circuit held that: ‘The client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit. . . . In the present case, Occidental has been willing to sacrifice confidentiality in order to expedite approval of the exchange offer, and now asserts that the secrecy of the attorney–client relationship

26 See also, Turno and Zawlocka-Turno, ‘Legal Professional Privilege’ (n 16) 207.
are able to ensure that competition law compliance is taken into consideration at a very early stage. Proximity to the business also enables in-house competition lawyers to provide legal advice in a way that best suits the business—and indeed individuals—and is therefore more likely to be understood and followed. For example, in-house competition lawyers tend to give more practical advice rather than a mere analysis of the legal risks that may be hard to implement.

2. Consistent education and awareness
One of the principal roles of an in-house competition lawyer is to raise awareness of potential competition law issues (and the possible consequences of inertia) among management and employees. The education of staff on competition issues is achieved not only through the implementation of a compliance programme, but also through day-to-day interaction between in-house lawyers and business people regarding various types of competition law issues. Business people would largely be deprived of regular contact with competition lawyers, if companies are forced to outsource legal work to ensure that the advice provided is privileged.

3. Better knowledge of the company and industry
To be able to ensure effective and consistent compliance with competition rules, a lawyer needs to have an intimate knowledge of the company’s businesses. In-house lawyers working day-to-day alongside those businesses are able to obtain this type of knowledge more easily than external lawyers that become involved on an *ad hoc* basis in order to deal reactively with specific legal issues. The in-house competition lawyer can provide advice on the applicability of competition rules to the companies businesses more quickly and succinctly than the external lawyer because (1) he/she often has a more detailed understanding of how competition law applies to his/her company’s businesses and the industry in which the company operates, (2) he/she has directly interacted with regulatory authorities around the world on behalf of the company, and (3) he/she has focused on systematically collecting and reviewing relevant precedent cases worldwide.

4. Instructing external lawyers is often too cumbersome and costly for the type of *ad hoc* legal advice that the business demands
Denying Legal Professional Privilege to in-house counsel is often justified with the argument that companies can resort to external counsel who would then work in cooperation with in-house counsel. However, there are many practical deficiencies with such an approach: business people are more reluctant to seek advice if it systematically involves instructing external lawyers, as they are concerned not only about the impact on their budget, but also about the delays this normally causes—delays that are caused not least by the need to explain the dynamics of the market, the products, and the issue at hand. Systematically involving external counsel solely for the purpose of obtaining Legal Professional Privilege is a costly and time-consuming process.

5. Resorting to oral advice is not a solution
In-house lawyers need to be able to provide confidential assessments of the risks raised by commercial propositions in a written format in order to help the business focus on the issue and persuade them to adopt compliant solutions. In today’s fast-moving international commercial environment, oral statements and warnings risk going unheeded, and it is only when matters are put in writing that the message is likely to be acknowledged by the recipient (especially if that person is not located in the same office and/or time zone).

E. There is no reason to believe that outside counsel is more or less ‘dependent’ on the client than an in-house counsel

1. Similarity of independence
The degree of independence of both in-house counsel and external advisor is actually quite similar. Both lawyers are paid by the company and thus economically dependent—in some cases, where the company accounts for a large proportion of the outside counsel’s fees, the degree of dependency may even be greater (it is easier to fire a law firm than an employee in most Member States).

2. Profession is by definition conservative
Lawyers are generally rather careful professionals and tend to err on the side of caution—there is no fundamental difference between an in-house lawyer and an outside counsel as they are equally likely to point out the risks attached to certain projects.

Furthermore, fears of in-house counsel facilitating illegal behaviour seem far-fetched. There is no evidence of, for example, in-house lawyers aiding employees engaged in a cartel by hiding ‘hot’ documents under an Legal Professional Privilege label. Even if there are singular cases, the Commission has the legal means to find such documents (referral to the General Court) and fine the persons involved. Ethical rules apply to both in-house and external counsel (see Section IV on this point in particular).
3. Inconsistent benchmarks

Finally, in the context of dawn raids, the Commission deems the presence of in-house counsel sufficient in order to preserve the concerned company’s rights of defence, as the inspection team would not await the arrival of external counsel in that case. This appears to be a rather inconsistent approach.

F. The Commission’s investigative powers would not be impeded

There is not a single case where the Commission relied on evidence that was available solely in documents from in-house counsel that would have been out of reach if Legal Professional Privilege were afforded to in-house counsel. The Commission should balance the entirely hypothetical added value of obtaining evidence in one particular case that may be found only in the correspondence of the in-house counsel against the very practical and daily-felt loss of effectiveness that this person (who is generally an ally for the Commission in compliance matters) and every other in-house competition lawyer is suffering as a result.

To summarise, there are numerous arguments, not least based on fundamental rights, that suggest a revision of the current application of the Legal Professional Privilege rules. The current implementation likely infringes due process rules, especially considering ECtHR standards. However, the Commission should also have self-interested reasons to change its approach to Legal Professional Privilege. The following section sets out the attractions of a reformed system.

IV. A huge missed opportunity

A. An end to the Commission’s and Courts’ black-and-white approach would allow more granular Legal Professional Privilege rules to be developed

There is surprisingly little case law on Legal Professional Privilege considering it was recognised more than 30 years ago. The strict stance that the Commission applies, thus far supported by the courts, leads to less nuance and granularity as, for example, in the United States. For instance, while it is relatively clear when a company will receive Legal Professional Privilege, it is unclear whether it can lose it again afterwards. It would appear more appropriate to put the emphasis on what the conditions for obtaining (and losing) privilege are, rather than arbitrarily covering the advice from some individuals but not others. Questions that have not been brought explicitly before the Courts include the following: will Legal Professional Privilege be afforded to a United States antitrust outside counsel? to outside counsel advising on areas other than antitrust? to a European Union outside counsel, but who is seconded to a company? None of these groups should be denied Legal Professional Privilege, but anecdotal evidence suggests that the Commission asserts that none of them enjoy it, on the basis of the AMÉS and the Advocate General’s Opinion in Akzo.31

B. Maximising compliance efforts

While the post-Akzo legal risk analysis needs to acknowledge the Commission’s right to see documents from in-house counsel, the authority could decide to exercise its rights reasonably and in a manner consistent with fundamental rights (due process and right to select counsel) and in a wise fashion: for example, by stating publicly that the Commission will not exercise the right unless there is indication of abuse, it would encourage the use of in-house counsel in order to foster compliance. By explicitly reserving the right, the Commission does the opposite—and undermines the goals it should be interested in achieving.

It is not clear how many companies take a conscious decision not to hire in-house competition specialists on the basis that they produce non-privileged materials, but denying Legal Professional Privilege is certainly not spurring such investments. The same is true for compliance programmes. While the Commission officially supports such programmes, it relies solely on deterrence and recidivism (‘[a]nd, in line with our overall objective of deterrence, this approach [on parental liability], together with that on recidivism, should spur undertakings to roll out compliance programmes throughout the group’). The British OFT has recently taken a more flexible approach,

29 This is also the conclusion of Turno and Zawłocka-Turro, ‘Legal Professional Privilege’ (n 16) 211.

30 Eg, there have been several instances where the Commission sent formal request for documents that were located in the United States, and contained communications seeking or providing advice on United States laws, between an American client and American (in-house and external) lawyers established in the United States and members of State Bars.

31 See note 11.

allowing up to a 10 per cent reduction of any fine if the company has rolled out an effective compliance programme.33 Awarding Legal Professional Privilege to in-house counsel appears to be a low-hanging fruit to maximise both companies’ incentives to hire such specialists, as well as to allow them to work most effectively.

C. Open a long overdue discussion of what ‘independent’ really means, and optimise organisational structures

A lawyer’s independence is, indeed, crucial in order to ensure effective advice. By denying Legal Professional Privilege to all in-house counsel across the board, the Commission misses an opportunity to set out the conditions under which an in-house lawyer can be assumed to be independent. Assessing this question in a more flexible manner could have a large impact in two key respects: the way that companies structure their legal departments, and the way that Member States adapt their bar and ethics rules.

1. Independent design of the legal department

While not implying that lawyers reporting into the business are necessarily less reliable, it would appear worthwhile examining whether a certain organisational structure of the legal department enhances independence. For example, if the Commission accepted that members of an in-house legal department are ‘independent’ if they all ultimately report to the General Counsel, whose job it is to minimise legal difficulties, companies may be incentivised to create a strong legal function which operates as its own organisational entity. A lawyer who reports to a local business person (who decides, eg, the annual bonus) may be more readily influenced than a lawyer whose salary is unconnected to the performance of the local subsidiary. A shift in the Commission’s policy could potentially lead to more independent legal departments across Europe, a goal which appears worthwhile not only from a competition law perspective.

2. Independence criterion linked to bar membership

As is evident from Table 1 in Section II, a significant number of European Union Member States do not currently allow in-house lawyers to be member of the bar. The General Court in Akzo used this fact as a reason why in-house counsel should not be afforded Legal Professional Privilege (‘[t]he fact remains that, in a considerable number of Member States, employment and membership of the Bar or Law Society are incompatible’34). If the Commission decided to deviate from its current policy, it would have two choices: first, accept that on the basis of the arguments set out in the previous section, lawyers who are not members of a bar are nevertheless ‘independent’ enough for objective advice, especially if the legal department is structured in a way that enables such independence. Alternatively, the Commission could insist on bar membership (with the attached ethical rules) for in-house lawyers’ documents in order to enjoy Legal Professional Privilege (this approach would appear to be supported by the majority of Member States’ legal traditions). While that would temporarily lead to a different treatment of documents depending on who has authored them, it would send an important signal to Member States to align their ethics rules. This could also be an important step towards achieving more uniform rules in private antitrust litigation, a project that has long been pursued by the Commission. It would appear desirable to expand bar membership to all in-house counsel in order to make ethical rules directly applicable to all in-house counsel.

D. Preventing a reverse impact on the rules of certain Member States

Overall, it is important for the Commission to recognise that its policy decisions, and the Luxembourg Courts’ decisions, are not always a reflection of the ‘common legal tradition of Member States’, but that these decisions can have a direct reverse impact on Member States’ actions.

- For example, inspired by the Luxembourg Courts, the Auditorate of the Belgian Competition Authority in 2008 stated in a letter35 to the Instituut voor Bedrijfsjuristen (amicus curiae in a case involving Belgacom) that it would apply the Akzo rules instead of Belgian statutory law (Article 5 of the law of 1 March 2000 on

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33 See, Drivers of Compliance and Non-compliance with Competition Law—An OFT report (para 1.14), ‘Where, in an individual case, we consider that the existence or adoption of a compliance programme should be regarded as a mitigating factor, we will generally reduce the financial penalty by up to 10 per cent,’ available at <http://www.oft.gov.uk/shared_ofi/reports/comp_policy/ofi1227.pdf> accessed 17 May 2013.


35 ‘Bien qu’il soit sensible à l’argument selon lequel le juriste d’entreprise pourrait participer dans une certaine mesure à la défense de l’entreprise, l’Auditorat a reconsidéré sa position suite à l’analyse qu’il a menée depuis lors, compte tenu notamment de différents avis dont il a pris connaissance ainsi que des enseignements qui peuvent être tirés de l’arrêt du Tribunal de première instance de l’Union européenne dans l’affaire Akzo. L’Auditorat vous informe en conséquence qu’il a décidé qu’aucune protection ne sera plus accordée aux communications de et vers le juriste d’entreprise (autres que celles couvertes par le légal privilège des avocats) dans le cadre des procédures initiées sous la loi sur la protection de la concurrence économique, coordonnée le 15 septembre 2006.’
the establishment of an Institute for in-house counsel) which affords Legal Professional Privilege. Thankfully, on 5 March 2013, the Brussels Court of Appeal decided that the law, rather than the Akzo regime, applied and handed a victory to the IBJ.36

- Similarly, in its recent decision upholding privilege for in-house lawyers that are members of the bar,37 the Dutch Supreme Court felt the need to justify its deviation from Akzo, which demonstrates the influence of the Luxembourg decisions. It held that Akzo applied to the European Union level only, and that the long-standing practice of employers subscribing to a ‘professional statute’ in the Netherlands was sufficient to ensure in-house counsel independence.38

- In Romania, in-house Legal Professional Privilege is widely recognised for most areas of the law, but not for antitrust. Government Emergency Ordinance no.75/2010, which entered into force in August 2010 transposed the Akzo case law of the Court of Justice into Romanian law, deviating from the legal tradition of that country.

- In Bulgaria and Slovakia, no clear national legislation exists, but both countries are expected to follow Akzo should the issue arise.

E. Leading rather than following the policy

Finally, the argument that the Commission cannot depart from the Courts’ jurisprudence is not applicable in the present circumstances. First, the Courts have long afforded the Commission a large margin of discretion. Secondly, and more importantly, there is no reason for the Courts to deny companies enhanced rights of defence. Existing case law defends the Commission’s current position, but it does not preclude at all improved due process rules for the future.

In addition, there are no financial hurdles, as no resources would need to be spent on additional programmes. The attractions of a new Legal Professional Privilege system would be so obvious that companies would probably rush to implement them.

V. Conclusion

Legal Professional Privilege is in a dire state in Europe. The Commission’s current practice is questionable under human rights, jurisdictional, and comity aspects. However, even more importantly, the policy undermines effective compliance and stymies the hiring of in-house experts as their added value is significantly diminished. Finally, the Commission misses the opportunity to shape a nuanced and balanced Legal Professional Privilege regime that would enhance the independence of legal departments across Europe, and would likely lead to more consistency in ethical and bar rules in Member States.

Since the Courts have decided on the matter relatively recently, the only realistic ways to change the situation in relation to Legal Professional Privilege appear to be a successful appeal to the ECtHR, or legislative change at the European level. Sadly, the latter option does not appear to be likely given the Commission’s apparent lack of appetite to amend Legal Professional Privilege rules.39

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36 Belgacom v Auditorate of the BCA, Case 2011/MR/3, Brussels Court of Appeal.
37 See X v Delta and others, LJN: BY6101, Hoge Raad, 12/02667, 15 March 2013.
38 The employer must sign the ‘professional statute’ to guarantee both application of the ethical rules promulgated by the Dutch Bar Association and the independence of the in-house counsel member of the Bar.