

This article first appeared in a slightly different form in *CLi in Brief*, 18 May 2010

IT'S BEEN A PRIVILEGE

By Stephen Smith and Ilaria Filippi

In the Akzo Nobel case, the advocate general has concluded that legal professional privilege should not apply to in-house lawyers

Advocate General Juliane Kokott's eagerly awaited opinion on the application of legal professional privilege (LPP) to in-house lawyers in EU antitrust proceedings was given to the Court of Justice of the European Union (previously, the European Court of Justice) on 29 April.

The advocate general recommended that, as regards EU law, LPP should not apply to communications between companies and their in-house lawyers. This opinion is in line with the ECJ's 1982 judgment in the *AM&S* case (Case 155/79 *AM & S v Commission* [1982] ECR 1575). While an advocate general's opinion is not binding on the Court of Justice, it is followed in most cases and there is consequently a sense of disappointment that an opportunity to extend LPP to in-house counsel has been missed.

The advocate general's conclusions

The facts of the present case concern a Commission decision (upheld by the General Court – previously the Court of First Instance) that two documents exchanged between the general manager of Akros Chemicals and a member of Akzo's in-house legal team (who was enrolled as an advocaat of the Netherlands Bar) were not privileged.

The appellants argued that the General Court was wrong to refuse their claim for LPP in respect of communications with in-house counsel, that such a refusal constitutes an infringement of the principle of equality (by treating in-house lawyers differently from external lawyers) and that member states alone are competent to determine the precise scope of LPP.

Lack of independence

AG Kokott decided that a salaried in-house lawyer, even if also a member of a national Bar or Law Society, does not enjoy the same degree of independence from their employer as a lawyer working in private practice does in respect of their client. AG Kokott considered that in-house lawyers identify more strongly with their company and they are more likely to face conflicts of interests between their professional obligations and the aims and wishes of their employer than independent external counsel. Given these differences, the General Court did not breach the principle of equality by treating in-house lawyers and external lawyers differently.

According to AG Kokott, the purpose of LPP is not only to protect a client's rights of defence, but is also based on the lawyer's specific role as a "collaborator in the administration of justice" which consists in providing advice in full independence and in the overriding interest of justice. Moreover, as set out in the *AM&S* case, the independence of a lawyer is also determined



Stephen Smith is a senior associate and **Ilaria Filippi** is an associate in the competition group at Mayer Brown.

IT'S BEEN A PRIVILEGE

by reference to the absence of an employment relationship. In-house lawyers are more economically dependent on their employer than external lawyers, undermining independence from their client.

The advocate general rejected a claim that since the coming into force of Regulation 1/2003, companies must increasingly self-assess their compliance with competition law and seek internal advice from in-house lawyers, who are not only able to give advice in a more timely and economical manner but who will also inevitably understand the business much better than external counsel. "It is," she says, "precisely that special proximity to the undertaking concerned and its business which calls the independence of the enrolled in-house lawyer seriously into question". The advocate general felt that her position would not have any impact on the provision of competition compliance programmes by in-house lawyers because these tend to be general in nature and are not connected with specific current or future rights of defence. They would therefore fall outside the scope of LPP in any event.

National variations in LLP rules

AG Kokott also rejected arguments that the lack of uniformity in the treatment of in-house lawyers in the EU created unacceptable uncertainties, given that whether LPP applied or not would depend on whether the investigation was carried out by a national competition authority or by the Commission. (In a number of member states, notably the United Kingdom, the Netherlands and Ireland, LPP explicitly applies to communications with in-house lawyers.)

The advocate general dismissed these arguments, saying that the current regime provided absolute certainty and clarity of the position under EU law. She also noted that, at present, there is no general trend among EU member states to extend LPP to cover in-house lawyers and she concluded that there were no

overriding reasons that required EU law to be brought into line with the legal position of a minority of member states. While it might simplify the legal position if the provisions dealing with LPP applicable to competition law proceedings were harmonised throughout the EU, whether such harmonisation should be introduced "is a question of legislative policy which it is for the European Union legislature alone to decide". Further, it is not for individual member states to determine the scope of LPP under EU law.

Lawyers from non-EU jurisdictions

This position is now clear, according to AG Kokott, who concludes that communications with in-house counsel can never enjoy the same degree of independence as an independent external lawyer. Consequently, under EU law, LPP does not apply to those communications. In a further blow to international businesses, AG Kokott also rejected arguments raised that LPP should extend to lawyers qualified in jurisdictions outside the EU. In an unequivocal statement, AG Kokott said that "the inclusion ... of lawyers from third countries would not under any circumstances be justified" as it cannot be the task of the European authorities to verify, on a case-by-case basis, whether the rules and practices in force in any given third country satisfy requirements to ensure that lawyers are able to exercise their profession in a sufficiently independent manner.

What happens now?

The final judgment of the Court of Justice is not expected for several months. While not bound by AG Kokott's opinion, the Court follows an advocate general's opinion in the great majority of cases. Assuming this to be the case here and without legislative change through the European parliament, this will be the end of the line for those wishing to see LPP extended to communications with in-house counsel under EU law.