Global Privilege and Professional Secrecy Guide - European Union

10 - European Union Competition Investigations

| Contents |
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| To generate table of contents, right-click here and select **Update Field.** |

# Note

Privilege is a subject of European Union (EU) law in addition to the laws of individual Member States. Rather than repeating this information in each jurisdictional chapter, we have prepared this separate chapter covering relevant EU laws. As the EU is not a single jurisdiction, we have followed a different format in this chapter than in the jurisdictional chapters.

# Introduction

EU law respects legal professional privilege ("**LPP**") between external EU-qualified lawyers and their clients.

EU LPP traditionally applied in proceedings of a criminal or sanctioning nature, conducted by an EU institution or body. This includes EU Commission investigations into competition matters (including investigations carried out by national regulators as agents for the Commission) and competition law proceedings before the European Court of Justice (ECJ). It is highly likely that nowadays LPP also applies to requests for information in the context of EU merger control and proceedings under the Digital Markets Act.

In September 2010, the ECJ, the highest court of the EU, ruled that under EU competition law, legal professional privilege does not extend to communications with in-house lawyers (case of *Akzo Nobel Chemicals and Akcros Chemicals*). As a result, regardless of any privilege rules that may apply in domestic proceedings within EU Member States, communications with in-house lawyers are not protected in EU Competition Commission investigations involving those states or ECJ proceedings relating to such investigations. Therefore, companies will need to consult with external EU-qualified lawyers at an early stage to protect privilege whenever potentially contentious matters involving EU competition law may be at stake. Whenever advice is needed on a contentious matter of EU competition law, procedures should be implemented in order to ensure that sensitive legal advice is, as far as possible, not susceptible to disclosure to the European Commission (for practical tips, see below). Indeed, it may be prudent to take precautionary measures even if, at first glance, there is no EU competition law issue. At the “fact-finding” stage, a company will rarely know whether a competition issue will be genuinely domestic or end up being prosecuted by the Commission. Special care therefore has to be applied in any case where advice is needed on an issue relating to a highly regulated issue (e.g., competition or tax).

For a long time, *Akzo Nobel Chemicals and Akcros Chemicals* was the leading case relating to EU LPP. The scope of EU LPP was rather narrow. It only covered communications with EU-qualified lawyers made for the purpose, and in the interest of, the client's right of defense in competition proceedings. In other words, LPP only covered communication related to the subject matter of an existing or anticipated investigation. Legal advice generally, such as regulatory or commercial legal advice, was not protected.

With its decision in *Orde van Vlaamse Balies v Commission,* the ECJ in December 2022 broadened the scope of LPP, marking a tremendous shift from the restrictive approach in its previous ruling in *Akzo Nobel Chemicals and Akcros Chemicals*. In *Orde van Vlaamse Balies v Commission,* the ECJ found that EU LPP covers not only the activity of defense but also legal advice and even the very existence of legal advice. However, important questions remain open: Is communication with non-EU-qualified lawyers protected? Is EU LPP limited to certain areas of law or certain types of proceedings? Also, the ruling does not deal with the position of in-house lawyers.

# General principles

EU legal professional privilege ("**LPP**") is based solely on case law. The Commission summarized the case law relating to EU LPP in its Commission notice on best practices for the conduct of proceedings concerning articles 101 and 102 of the Treaty on the Functioning of the European Union (Official Journal of the European Union, C 308/6, dated 20 October 2011, paragraph 51 et seqq.).

EU law respects LPP between external EU-qualified lawyers and their clients (regardless of the jurisdiction in which the client lives). In addition, lawyers from the EEA are treated equally to lawyers from the EU. LPP does not extend to other professional advisers such as patent attorneys, accountants, external consultants etc.

The core of EU LPP is that correspondence prepared for the purpose of the defense (or related thereto) in EU Competition Commission investigations is protected. Whether this includes notes of interviews with employees and other documents produced during investigations is doubtful. Depending on the specific circumstances of the case, it may be argued that those documents are prepared for the defense in the Commission investigation and are part of the correspondence between the client and its external EU-qualified lawyer. Then, the notes would be privileged. However, it may also be held that such interview notes are not primarily directed to the defense but that the company on its own looks into suspicious circumstances. There is thus a significant risk that interview notes are not regarded as privileged. This still applies in light of the ruling in *Orde van Vlaamse Balies v Commission* because the notes may not be regarded as legal advice.

Privilege also applies to the internal documents of a company if these documents (i) set out the content of the communication with external lawyers or (ii) are created exclusively for the purpose of obtaining legal advice from an external EU lawyer. It should, however, be noted that if those documents are provided to third parties with the company's knowledge and consent, privilege will most likely be lost. The same applies in the event of deliberate and voluntary transmission to the Commission or publication. Existing documents, which have only been discussed with an external lawyer, are not protected.

As mentioned above, LPP does not extend to in-house communications, as the EU’s highest court, the ECJ ruled on 14 September 2010 in the highly publicized case of *Akzo Nobel Chemicals and Akcros Chemicals*. The judgment came as no surprise, as it simply confirmed the views previously expressed by the Attorney-General of the EU in their advisory opinion to the court.

The key factor the ECJ cited in the long-awaited judgment was an alleged lack of independence due to the economic reliance of an employee on their employer. The ECJ downplayed the counterbalancing effect of strict ethical rules applying to lawyers admitted to a local bar or law society. According to the ECJ:

“[…] an in-house lawyer cannot, whatever guarantees he has in the exercise of his profession, be treated in the same way as an external lawyer, because he occupies the position of an employee which, by its very nature, does not allow him to ignore the commercial strategies pursued by his employer, and thereby affects his ability to exercise professional independence.”

In-house lawyer communications thus do not benefit from LPP under EU competition rules. As a consequence, the European Commission can inspect these potentially sensitive documents when it is conducting an investigation. The case in *Orde van Vlaamse Balies v Commission* did not raise questions as to the position of in-house lawyers. Therefore, the situation has not changed in this respect.

# Main arguments of the ECJ in Akzo/Akcros

In the ruling of *Orde van Vlaamse Balies v Commission* the ECJ clarified that EU legal professional privilege (“**LPP**”) applies to all communications with external EU-qualified lawyers that involve legal advice. The ECJ confirmed this understanding in *Akzo Nobel Chemicals and Akcros Chemicals* holding that the requirement of independence means the "absence of an employment relationship." According to the ECJ, being an employee always entails an inherent conflict between the lawyer's own professional obligations and the commercial strategies pursued by their employer. The ECJ added that the professional rules applying to Akzo's in-house lawyer would not ensure a degree of independence comparable to that of an external lawyer.

The ECJ also brushed aside Akzo's claim that refusing to apply LPP to communications with an in-house lawyer violates the principle of equal treatment. Even if an in-house lawyer is subject to certain professional ethical obligations, they do not enjoy a level of professional independence equal to external lawyers. In-house lawyers thus are, in the ECJ's view, in a fundamentally different position from external lawyers and may thus be treated differently.

Further, the ECJ did not accept the argument that the personal scope of LPP should be widened on the ground that national laws are not unanimous and unequivocal in recognizing LPP for communications with in-house lawyers. The ECJ found that it was not possible to identify a uniform tendency in the Member States toward protecting communications with in-house lawyers.

According to Akzo, the modernization of EU competition rules in 2004 increased the need for in-house advice, which should justify a change in the EU rules on LPP. The ECJ rejected this on the grounds that procedural reforms designed to bolster the Commission's power of inspection could not justify a change in the case law on LPP.

In addition, the ECJ reasoned that failure to recognize LPP for in-house communications would not effectively damage a company's right of defense. The ECJ held that a company seeking advice from an in-house lawyer must accept the restrictions applying to the exercise of that profession.

The ECJ was not persuaded that the differing approach of the Commission as compared with that of certain national competition authorities breached the principle of legal certainty. The stated reason for this approach is the clear division of competencies between EU and national authorities.

Finally, the ECJ rejected Akzo's claim that the EU approach to LPP violated national procedural autonomy. The ECJ pointed out that the question of which documents and business records the Commission may examine as part of its inspections under antitrust legislation is determined exclusively in accordance with EU law.

# Extension of scope of LPP in Orde van Vlaamse Balies v Commission

In the ruling of *Orde van Vlaamse Balies v Commission* the ECJ clarified that LPP applies to all communications with external EU-qualified lawyers that involve legal advice. LPP therefore is no longer limited to advice relating to the exercise of the rights of defense. This means that correspondence with EU-qualified external lawyers that took place before the initiation of an investigations is also protected.

The ECJ also held that LPP covers not only the content but also the very existence of legal advice. As a result, the Commission can no longer review (even in a cursory manner) documents covered by LPP.

The ruling in *Orde van Vlaamse Balies v Commission*, however, does not define external counsel, but only refers to communication with a "lawyer". The question thus remains whether LPP will protect communication with non-EU qualified lawyers. Furthermore, the ruling does not discuss whether LPP is limited to certain areas of law or certain types of proceedings. Yet, the legal basis on which the ECJ relied in its ruling, supports the argument that LPP should apply in a wider context. In previous case law, the ECJ had based the LPP on the client's right of defense. Contrary to that, in *Orde van Vlaamse Balies v Commission*, the ECJ relied on a different legal basis. It stated that it was

"apparent from the case-law of the ECtHR [= European Court of Human Rights] that Article 8(1) ECHR protects the confidentiality of all correspondence between individuals and affords strengthened protection to exchanges between lawyers and their clients (…). Like that provision, the protection of which covers not only the activity of defence but also legal advice, Article 7 of the Charter necessarily guarantees the secrecy of that legal consultation, both with regard to its content and to its existence. As the ECtHR has pointed out, individuals who consult a lawyer can reasonably expect that their communication is private and confidential."

This line of argument strongly suggests that EU LPP should not be limited to specific areas of law or types of proceedings. This view is further supported by the ECJ's ruling in *Ordre des avocats du Barreau de Luxembourg v Administration des contributions directes*. Building on the explanations in *Orde van Vlaamse Balies v Commission*, the ECJ states that

"whatever the area of law to which it relates, legal advice given by a lawyer enjoys the strengthened protection guaranteed by Article 7 of the Charter to communications between lawyers and their clients."

In the Opinion of the Advocate General on this case, Mrs. Kokott had pronounced the view that the principles on privilege for legal advice would apply not only to lawyers

"but also to tax advisers and other groups of professionals, in so far as these, as independent collaborators in the interests of justice, are treated in the same way as lawyers under the relevant national law and are therefore authorised to give legal advice to clients and represent them in court."

However, the court did not take this up as it was not required for the decision of the case. It thus remains open whether also nonlegal professionals advising on legal issues relating to their field, e.g., accountants or tax consultants, would benefit from EU LPP.

The judgments will impact national authorities' enforcement proceedings when implementing EU law, as article 3(1) of Regulation 1/2003 requires national authorities to apply EU competition law alongside national competition law in antitrust proceedings.

# Does the use of AI by lawyers raise issues of privilege or professional secrecy?

The European Bars Federation issued guidelines in September 2024 on how lawyers should take advantage of the opportunities offered by large language models and generative AI. Guideline 5 deals with maintaining attorney-client privilege. It points to the fact that the use of GenAI carries risks of improper processing or disclosure of client data. Safeguards have to be taken in order to ensure that client information is protected.

Data stored on public AI platforms may not be regarded as entirely private. However, privacy is a cornerstone of confidential communication protected by EU legal professional privilege ("**LPP**"). As a consequence, importing legal advice into an AI model could be considered a waiver of LPP. In addition, improper disclosure of client data violates the lawyer's obligation to maintain professional secrecy. This problem can arise when AI is used to take notes during meetings with legal counsel, most notably if videoconferencing platforms are used. It may be advisable not to use the notetaker application during meetings in which sensitive legal advice is discussed to minimize the risk that notes are inadvertently handled in a way that privilege is waived.

As with other breaches, AI-related confidentiality breaches can lead to severe consequences for lawyers. Moreover, in light of the recently introduced EU AI Act, it is advisable that lawyers disclose the use of AI in handling client information. The EU AI Act does not contain specific regulations for lawyers' use of AI systems. However, AI systems intended to be used by or on behalf of law enforcement authorities are considered high-risk AI systems pursuant to article 6 (2) of the EU AI Act (Annex III, No. 6 of the EU AI Act). For these systems, strict regulations apply. It is conceivable that Annex III will be changed in the future so that AI systems used by lawyers would be included.

# Does the law of privilege or professional secrecy protect generative AI content produced by (or at the prompting of) lawyers?

As EU legal professional privilege ("**LPP**") is solely based on case law and as it is rare that cases dealing with LPP are brought before the ECJ, there are no specific findings on the protection of generative AI content yet. Therefore, one has to apply general principles. A lawyer should review AI-generated content and communication to ensure that it stays within the scope of LPP. In addition, legal advice provided on the basis of AI-generated content should be marked as privileged.

# Practical tips to protect sensitive legal advice

In-house advice relating to EU competition law should be drafted carefully or given orally.

External EU-qualified lawyers should be involved at the outset.

Legal advice should only be shared if absolutely necessary.

While labels should not be overused, privileged communications should be clearly marked as such (e.g., "Lawyer-Client Privileged Communication from External Counsel"). This suggestion is particularly relevant if advice from external counsel is forwarded within a company or summarized for internal purposes (for instance, those documents could be marked as "Privileged Report on Advice Received from External Counsel").

Documents prepared exclusively for the purpose of obtaining legal advice from an external EU lawyer should be marked as well. Further, it needs to be made clear that the document is prepared for this sole purpose (e.g., by including a statement as to the purpose and possibly also by naming the external EU lawyer for whom the document is being prepared).

Privileged communications should be filed separately.

Communications discussing legal matters should be kept separate to those discussing commercial/business matters.

In particular transactions, it may be considered advisable to store sensitive documents, such as documents relating to the analysis of the relevant markets, in an extranet provided by external EU-qualified lawyers.

If non-EU lawyers are consulted, an external EU lawyer should coordinate the obtaining of advice. This is because there is still a risk that advice from non-EU lawyers will not benefit from LPP.

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