

THE RIGHT TO CONFIDENTIALITY OF COMMUNICATIONS BETWEEN A LAWYER AND A CLIENT DURING INVESTIGATION OF EU COMPETITION LAW VIOLATIONS: THE ASPECT OF THE STATUS OF A LAWYER

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***Abstract.** For the purposes of this article, the right to confidentiality of communications between a lawyer and a client (legal professional privilege) is analysed and understood as a rule under which, in judicial or administrative proceedings, the content of communications between a lawyer and his client shall not be disclosed; if this rule is breached, the content of the communications in question is not treated as evidence in the process. Legal professional privilege is related to several articles of the Convention for the Protection of Human Rights and Fundamental Freedoms. The European Court of Human Rights has found that the violation of the right of an accused to communicate with a lawyer without a third party departs from Article 6(3)(c) of the Convention for the Protection of Human Rights and Fundamental Freedoms which entitles to defend oneself in person or through a legal assistant. This kind of communication also relates to the Article 8 of the Convention, which provides a right to respect for private and family life, home and correspondence. In the opinion of the European Court of Human Rights, according to the Convention for the Protection of Human Rights and Fundamental Freedoms there is no difference if a lawyer representing a client is*

a practitioner or not. However, when dealing with the violations of EU competition law, the Court of Justice of the European Union acknowledges the protection of legal professional privilege only with regard to the communications between an accused companies and an independent lawyer (who does not work for his client on an employment contract basis). When the protection of legal professional privilege is not granted for communications of the accused company with its own legal personnel, a question may arise whether it is considered that sufficient level of confidentiality is ensured for these companies.

Keywords: *legal professional privilege, lawyer-client communication, EU competition law, European Convention on Human Rights.*

Introduction

When dealing with the violations of EU competition law, the European Court of Justice (hereinafter – ECJ) holds that legal professional privilege applies not only to the form of correspondence with lawyers, but also to internal documents of the company that reflect the content of the communications with lawyers and legal advice¹. In addition, preparatory documents, even if they were not exchanged with a lawyer or were not created for the purpose of being physically sent to a lawyer might be subject to legal professional privilege, provided that they were prepared for the sole purpose of seeking legal advice from a lawyer in exercise of the defence². Nevertheless, ECJ acknowledges the protection of legal professional privilege only for the communications between an accused company and an independent lawyer (who does not work for his client on an employment contract basis).

In this analysis, a term “lawyer” refers to advocates included in the list of the Bar Association. As for lawyers employed by companies (or in-house lawyers), the author does not mean lawyers who do not hold a status of an advocate, but the same advocates who fall within the above-mentioned concept but who work for the client-company on an employment contract basis. Such an explanation is relevant for distinguishing: (i) “independent” lawyers, serving customers under services contracts; (ii) “in-house” lawyers working under employment contracts; (iii) and the company’s jurists.

In the Republic of Lithuania, lawyers are forbidden to work for their clients on the employment contract basis, but in many EU countries this is common practice, therefore, a lawyer may be independent (“external” lawyer) or may work in a client company on the employment contract basis. It should be noted that the ECJ also does not acknowledge the protection of a legal professional privilege for correspondence with non-EU Member State lawyers.

1 Case T-30/89, *Hilti AG v. Commission of the European Communities* [1991] ECR II-01439, paras. 14–17.

2 Joined cases T-125/03 and T-253/03, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v. Commission of the European Communities* [2007] ECR II-03523, paras. 122, 123.

Meanwhile, the European Court of Human Rights (hereinafter – ECtHR) states that the right of an accused to communicate with a lawyer without a third party is derived from Article 6(3)(c) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – ECHR), which entitles to defend oneself in person or through a legal assistant. This type of communication also relates to the Article 8 of the Convention, which provides for a right to respect for private and family life, home and correspondence. As the EU will soon become responsible for the violations of human rights protected by the ECHR, it is important to understand how the right to confidentiality of communications between a lawyer and a client is interpreted by the ECtHR and if the exemptions from this right applied by the ECJ comply with the standards of the ECHR.

Attention needs to be drawn to the fact that in the Lithuanian legal literature, issues of legal professional privilege in EU competition law have not been analysed yet. Several foreign legal experts (Christoforou, T., Andreangeli, A., Gippini-Fournier, E., Leskinen, Ch., Stefanelli, J. Vesterdorf, B., Williams, N.) have focused on this aspect, but they have not analysed the case-law of the ECtHR with respect to legal professional secrecy, therefore they draw the conclusions different from those postulated by the author of this study.

In the first part of this article, methods of historical analysis and case study are employed to analyse the case-law of the ECtHR with respect to legal professional secrecy, to highlight the standard of security applied by this Court, and to draw the attention to the assessment by the Court of the limits of this right and its possible restrictions. In the second part of this article, methods of historical analysis, case study and descriptive methods are applied to analyse the case-law of the ECJ with respect to legal professional secrecy in EU competition law cases, by drawing attention to the interpretation given by the Court of the aims and purposes of limitations to legal professional privilege. In the third part of this article, logic-analytical and comparative methods are used to analyse the scope of legal professional privilege recognised by the ECJ, attention is drawn to the assessment of such practice in existing legal literature, and a new criterion for the test usable to avoid possible abuse of this right is proposed.

1. Legal Professional Privilege in the Case-Law of the European Court of Human Rights

Traditionally, legal professional privilege, namely the right not to disclose the content of lawyer-client communications to third parties and the arbitrator in legal proceedings was considered to be an integral part of the lawyer-client communications confidentiality and, generally speaking, has gained practical and fundamental rights-based interpretation. Prohibition to disclose the content of such communications is recognised as an essential element to ensure the client's possibility to communicate openly with a counsel to ensure the effectiveness of legal assistance. Therefore, it is assumed that legal professional privilege was designed to ensure the effectiveness

of administration of justice. Meanwhile, according to the fundamental rights-based approach, such legal professional privilege is regarded as “a right to confidentiality afforded to the client”, derived from the client’s right to a fair trial.³

The right to confidentiality of communications between a lawyer and his client is not explicitly enshrined in the provisions of the ECHR. According to the European Court of Human Rights, if a person is not entitled to legal aid, an infringement of the right of access to a court (Article 6(1)) is recognised.⁴ In *S v. Switzerland* it was highlighted that the right to communicate with one’s advocate out of hearing of a third person was part of the basic requirements of a fair trial in a democratic society and followed from Article 6(3)(c) of the Convention⁵. If a lawyer were unable to confer with his client and receive confidential instructions from him without such surveillance, his assistance would lose much of its usefulness, whereas the Convention was intended to guarantee the rights that were practical and effective⁶.

The European Court of Human Rights also bases the right to professional secrecy on Article 8 of the ECHR. In *Kopp v. Switzerland* the applicant had challenged the permit of the state authorities to eavesdrop on to his law office and his private telephone conversations, even though the permit clearly stated that his professional calls (acting as an advocate) will not be taken into account. It should be noted that the applicant was not a suspect in the ongoing investigation. In the ECtHR’s view, attorney-client communication confidentiality is regarded as a sensitive area, which directly concerns the rights of the defence⁷ and it is clear that telephone calls made from or to business premises, such as those of a law firm, may be covered by the notions of “private life” and “correspondence” within the meaning of Article 8(1) of the ECHR⁸.

In deciding on the issues pertaining to the restrictions of lawyer and client confidentiality, ECtHR considers that the right to legal professional privilege is not absolute⁹. Interference with this right may be lawful if it is in accordance with the law¹⁰, has an aim or aims that is/are legitimate under Article 8(2) of the ECHR and is necessary in a democratic society in order to attain the aforesaid aim or aims.¹¹

3 Gippini-Fournier, E. Legal Professional privilege in competition proceedings before the European Commission. In: *International Antitrust Law & Policy: Fordham Corporate Law*. 2004, p. 970, 980, 982, 966. Also Williams, N. Four questions of privilege: the litigation aspect of legal Professional privilege. *Civil Justice Quarterly*. 1990, 9: 139 at 141.

4 *Golder v. United Kingdom*, 21 February 1975, Series A no. 18.

5 This provision provides that everyone charged with a criminal offense may defend himself or through legal assistance of his own choosing or, if he has insufficient means to pay, and where the interests of justice so require, receive free legal assistance.

6 *S. v. Switzerland*, 28 November 1991, §48, A220.

7 *Kopp v. Switzerland*, 25 March 1998, *Reports of Judgments and Decisions* 1998-II, § 74.

8 ECHR referred to its judgments in *Halford v. United Kingdom*, and, *mutatis mutandis*, *Niemietz v. Germany*.

9 *Campbell v. United Kingdom*, 25 March 1992, Series A No. 233.

10 *Ibid.*, §37. ECtHR holds that although the phrase “in accordance with the law” refers in the first place to national law, it is not, in principle, for the Court to examine the validity of secondary legislation. This is primarily a matter which falls within the competence of national courts.

11 *Ibid.*, § 34.

When analysing the first aspect, the ECtHR examines whether the act was available to the person in question, it also pays attention to the quality of legislation, such as whether the law is clear, or the scope of protection is clear, and whether from the legal rule a person can foresee the consequences of the violation of that law.¹² The ECtHR also verifies if the legal rule (in particular if a search and seizure is at stake) protects an individual against arbitrary interference with the guarantees protected by Article 8 of the Convention¹³.

For example, in *Sallinen and others v. Finland* a lawyer suspected of a serious crime challenged the legality of the search in his office. Computer hard drives, which included information about the applicant’s communication with customers, who never had any connection with the crime, had been recovered, copied and seized. Although the seized hard drives were returned to him, a copy of one disk was stored at the police for some time. The ECtHR stated that the measures undertaken in this case were implemented without adequate legal safeguards – the Court was shocked that in pursuance of such broad search and seizure, there was no independent or judicial oversight. Even if it would be possible to recognise that national law enshrined a general legal basis for the implementation of such measures, in the absence of precise regulation on the conditions under which privileged material might be subject to search or seizure, there was no guarantee of a minimum level of protection ensured in a democratic society¹⁴.

In *Stefanov v. Bulgaria*, which is also relevant to search and seizure in a lawyer’s office¹⁵, the ECtHR stated that it was not clear from national law, whether it prohibited the removal of material covered by legal professional privilege under all circumstances. It is therefore open to doubt whether the search and seizure were “in accordance with the law”.¹⁶ It was reminded that the ECtHR must also review the manner in which the search has been executed, and – *where a lawyer’s office is concerned* – whether it has been carried out in the presence of an independent observer to ensure that material subject to legal professional privilege is not removed.¹⁷

12 *Kopp v. Switzerland*, *supra* note 9, § 55–75 and *Foxley v. United Kingdom*, No. 33274/96, § 31–47.

13 *Petri Sallinen and others v. Finland*, No. 50882/99, § 82.

14 *Ibid.*, § 89, 92.

15 *Iliya Stefanov v. Bulgaria*, 65755/01. Upon arrival at the police station to represent his arrested client, an applicant, who was a lawyer, was questioned on the topic of investigated crime. Within an hour the applicant’s office door was sealed, and the officer responsible for the case went to court asking for a search warrant and without giving further details simply stated that on the basis of the available evidence it was reasonable to assume that the objects and documents relevant for the investigation could be found in the applicant’s office. A search warrant was issued and executed on the same day. The search was launched when the applicant was still absent and was monitored by two witnesses – the applicant’s neighbours. Applicant’s computer, printer and other devices, 33 floppy disks and other documents were seized. On the other hand, the Court did not consider it necessary to address this question because it recognised these measures as incompatible with Article 8 of the Convention in other respects.

16 On the other hand, the Court did not consider it necessary to address this question because he recognised these measures incompatible with Article 8 of the Convention in other respects. *Iliya Stefanov v. Bulgaria*, *supra* note 20, para. 36.

17 *Ibid.*, § 38.

However, the Court noted that neither the application for its issue nor the warrant itself specified what items and documents were expected to be found in the applicant's office, or how they would be relevant to the investigation. Moreover, in issuing the warrant, the judge did not touch at all upon the issue of whether privileged material was to be removed. According to the ECtHR's case-law, search warrants have to be drafted, as far as practicable, in a manner calculated to keep their impact within reasonable bounds¹⁸. It has been highlighted that this is all the more important in cases where the premises searched are the office of a lawyer, which as a rule contains material that is subject to legal professional privilege. Therefore, it was found that, in the circumstances, the warrant was drawn in overly broad terms and was thus not capable of minimising the interference with the applicant's Article 8 rights and his professional secrecy¹⁹.

The Court further observed that the warrant's excessive breadth was reflected in the way in which it was executed. While there is nothing in the facts to suggest that papers covered by legal professional privilege were touched upon during the search, it was noted that the police removed the applicant's entire computer, including its peripherals, as well as all floppy disks which they found in his office. Seeing that the computer was evidently being used by the applicant for his work, it was natural to suppose that its hard drive, as well as the floppy disks, contained material which was covered by legal professional privilege. The ECtHR noted that it was true that later the expert used keywords to sift through the data they contained, which somewhat limited the intrusion. However, this happened several days after the search, after the computer and the floppy disks had been indiscriminately removed from the applicant's office, whereas no safeguards existed to ensure that during the intervening period the entire contents of the hard drive and the floppy disks were not inspected or copied. This led the Court to conclude that the search impinged on the applicant's professional secrecy to an extent that was disproportionate in the circumstances²⁰.

In addition, the ECtHR noted that, while the search was carried out in the presence of two certifying witnesses, they were neighbours who were not legally qualified. The Court considered this issue problematic, as this lack of legal qualification made it highly unlikely that these observers were truly capable of identifying, independently of the investigation team, which materials were covered by legal professional privilege, with the result that they did not provide an effective safeguard against excessive intrusion by the police into the applicant's professional secrecy. This was especially true in respect of the electronic data seized by the police, as it did not seem that any sort of sifting procedure was followed during the search²¹.

In *Sorvisto v. Finland*, the applicant complained of the breach of Article 8 of the ECHR, because the applicant's correspondence with an attorney was seized during the search. ECtHR relied on the Recommendation of the Committee of Ministers Rec (2000)21, under which the States should take all necessary measures to ensure the

18 ECHR referred to its judgment in *Van Rossem v. Belgium*.

19 *Iliya Stefanov v. Bulgaria*, § 41.

20 *Ibid.*, § 42.

21 *Ibid.*, § 43.

confidentiality of client and lawyer communications²² and found that, even if it could be assumed that national law provided a general legal basis for the measures under consideration, nevertheless it was not enough to clearly specify the circumstances under which a legal professional privilege protected material could be confiscated. Therefore, the applicant was deprived of the minimum level of protection, guaranteed in a law of the democratic society²³.

When considering the necessity of interference within the legal professional privilege, the ECtHR examines whether an interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued. Such legitimate objectives include national security, public safety or the economic well-being of the country, prevention of disorder or crime, protection of health or morals, or protection of the rights and freedoms of others.²⁴

In *Smirnov v. Russia*, the Court held that during the search and seizure of a lawyer's office the applicant²⁵ was not granted any protection with regard to his legal professional privilege, for example, the prohibition of confiscation of documents protected by a lawyer-client communications privilege or the participation of an independent overseer in the search who, regardless of the investigation team, could identify the documents protected by professional secrecy. Given the nature of the documents seized, in the ECtHR's view, this level of infringement of professional secrecy could not be proportionate to *any* legitimate purpose.²⁶

In *Foxley v. United Kingdom*, the applicant complained that his correspondence, including correspondence with his legal advisers, was examined at the post office following orders of Trustee in Bankruptcy. The ECtHR has pointed out that the implementation by authorities of the measures against an applicant must be accompanied by adequate and effective safeguards that ensure minimum impairment of the right to respect his correspondence. This is particularly true where, as in the case at issue, correspondence with the bankrupt's legal advisers may be intercepted. The Court noted in this connection that the lawyer-client relationship is, in principle, privileged and correspondence in that context, whatever its purpose, concerns matters of a private and confidential nature²⁷. The Court found that there was no pressing social need for the opening, reading and copying to file of the applicant's correspondence with his legal advisers and that, accordingly, the interference was not "necessary in a democratic society" within the meaning of Article 8 § 2²⁸. This case is also significant

22 *Sorvisto v. Finland*, No. 19348/04, §114.

23 *Ibid.*, § 120.

24 Article 8(2), Convention on Human Rights and Fundamental Freedoms.

25 The applicant complained that he represented three persons in the same case, and although any allegations had not been brought against him, his home and office was searched, computer and documents (including those which have relevance in other civil cases, quite apart from the investigated case) were seized.

26 *Smirnov v. Russia*, No. 71362/01, § 46–48.

27 *Foxley v. United Kingdom*, *supra* note 12, § 43.

28 *Ibid.*, § 46.

for another reason – it has shown that the ECtHR recognises legal protection privilege for correspondence with legal advisers who do not have the status of an advocate.

The striking case in this context is *AB v. the Netherlands*, in which the applicant complained that prison administration was examining his correspondence with the legal trustee, protected by legal professional privilege²⁹. In response to the allegations, the Government stated that the prison staff did not know that the legal trustee represented the applicant of the complaint to the European Commission of Human Rights, in addition, this person was a former convict who served his sentence in the same prison, and the prison rules applicable at the time forbade prisoners' correspondence with former prisoners³⁰. And although it was not disputed that the applicant's legal trustee had not been registered as an advocate at all, the ECtHR stated briefly and clearly that neither the Convention nor the Rules of Procedure of the European Commission of Human Rights at the material time required the representatives of applicants to be practising lawyers³¹.

As can be seen from the ECtHR case-law, confidentiality of a lawyer-client relationship is recognised as to the rights of the defence-related sensitive area³², the interference into which, according to the facts of the case, can be considered as a violation of the right to a fair trial or the right to privacy. The Court considers that the lawyer-client communications are privileged and correspondence in that context, *whatever its purpose*, is private and confidential. In addition, the protection applies not only to correspondence with lawyers, but also to one with jurists: neither the Convention nor the previously applicable rules of the European Human Rights Commission required that the clients' representatives should be practicing lawyers³³.

Another important aspect is that the ECtHR requires that searches and seizures are supervised independently or by judicial review and precisely regulated, for instance, the conditions under which the material protected by legal professional privilege may be subject to search or seizure must be enshrined³⁴, and therefore, when issuing a search warrant it is very important to clarify the possibility of seizure of the material protected by professional secrecy³⁵, meaning that search warrant cannot merely give the right to seek "objects and documents significant for the investigation", giving investigators the right to decide for themselves what exactly is "significant for the investigation"³⁶. In other words, the scope of the legislation must accurately and clearly set out the

29 Despite the fact that a criminal case he was represented by two advocates, the applicant had appointed in writing a familiar person (who was not an advocate), a "true and legitimate lawyer-trustee" on his behalf to exercise certain powers in the criminal case.

30 *A.B. v. Netherlands*, No. 37328/97, § 77.

31 *Ibid.*, § 85–88.

32 *Kopp v. Switzerland*, *supra* note 7, §74.

33 *Foxley v. United Kingdom*, *supra* note 12, § 43; *A.B. v. Netherlands*, *supra* note 30, § 85–88.

34 *Petri Sallinen and others v. Finland*, *supra* note 13, § 89, 92.

35 ECHR referred to its judgment *Van Rossem v. Belgium*.

36 *Aleksanyan v. Russia*, No. 46468/06, § 214, 216, 217.

conditions under which privileged material may be subject to search or seizure³⁷, in addition, when deciding on the relevant interferences, national courts must take into account the terms and conditions set out in the legal norms.

There is no evidence to suggest that this strict approach of the ECtHR regarding the seizure of documents protected by legal professional secrecy would be different if a lawyer was not a member of the Bar.

2. Limits of Professional Secrecy in the EU Competition Case-Law: Lawyer's Status

Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty³⁸ contains no provision for the protection of secrecy of the accused company's communications with lawyers. There was no such provision in Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty³⁹ either, although the European Parliament had recommended establishing that documents and information protected by legal professional privilege should have immunity from forced disclosure⁴⁰. On the other hand, it does not mean that during investigations of EU competition law violations the confidentiality of communications between companies and their lawyers is not protected at all: in 1978, in its reply to the parliamentary question on the legal protection of documents the Commission stated that, while such protection was not provided for in Regulation 17/62, the Commission should take a number of national competition laws into account and was not going to regard strictly legal documents drawn up in order to get or give an opinion on legal issues, or preparing and planning for the defence as evidence of EU competition law infringement. On the other hand, in its view, to assess whether the document can be stored, is the prerogative of the Commission, which can be inspected by the ECJ⁴¹. Nevertheless, since 1982 the European Union courts consistently refer to this right.

Already in 1982, in *AM&S* the ECJ held that legal professional privilege applied only to company's correspondence with independent lawyers, rather than employment-related jurists⁴². The requirement of an independent status of the lawyer was based on a concept of the lawyer's role as collaborating in the administration of justice by the courts and as being required to provide in full independence, and in the overriding

37 *Petri Sallinen and others v. Finland*, *supra* note 13, § 89, 92.

38 OJ 2003 L 1, p. 1.

39 OJ 1962, 13, p. 204. English special edition: Series I Volume 1959.

40 Deringer Report. Doc. 104/1960-61, § 85–88.

41 Question of Mr. Cousté to the European Commission No. 63/78, OJ C 188/30 (1978). Vesterdorf, B., Legal Professional Privilege and the Privilege Against Self-Incrimination in EC Law: Recent Developments and Current Issues. *Fordham International Law Journal*. 2004, 28, p. 1184.

42 Case 155/79, *AM&S Europe Limited v. Commission of the European Communities* [1982] ECR 1575, § 18–21.

interests of that cause, such legal assistance as the client needs. It was said that the counterpart of that protection lied in the rules of professional ethics and discipline, laid down and enforced in the general interest by institutions endowed with the requisite powers for that purpose. Such a conception reflects legal traditions common to the Member States and is also to be found in the legal order of the Community.⁴³ The ECJ has also held that the protection of legal professional privilege with regard to correspondence with non-EU Member State lawyers does not apply.⁴⁴ After more than 20 years, when *Akzo* case was in front of the ECJ, general advocate J. Kokott gave brief reasons for such treatment⁴⁵. In her opinion, unlike in the relationship between the Member States, in the relationship with third countries there is, generally speaking, no adequate basis for mutual recognition of legal qualifications and obligations of professional ethics to which lawyers are subject in the exercise of their profession. In many cases, it would not even be possible to ensure that the third country in question has a sufficiently established rule-of-law tradition which would enable lawyers to exercise their profession in an independent manner required and thus to perform their role as collaborators in the administration of justice. It cannot be the task of the Commission or the Courts of the European Union to verify, at considerable expense, that this is the case on each occasion by reference to the rules and practices in force in the third country concerned, particularly since there is no guarantee that there will be an efficient system of administrative cooperation with the authorities of the third country on every occasion⁴⁶.

Although in its order on the appointment of interim measures the President of the Court of First Instance noted that the applicant and the interveners had presented arguments that, in his opinion, at first glance, could justify a broader interpretation of legal professional privilege⁴⁷, the Court of First Instance rejected that approach.

43 *Ibid.*, § 24.

44 *Ibid.*, § 25–26.

45 Case C-550/07 P, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v. European Commission* [2010] I-08301, Opinion of Advocate General Kokott, 29 April 2010, § 60–61.

46 *Ibid.*, § 190.

47 He acknowledged that principles developed in the *AM&S* judgment were based on at that time current professional ethical rules, which might have already been changed. The President pointed out that the parties of the case presented evidence that, since 1982, a number of Member States adopted rules designed to protect written communications with a lawyer employed by an undertaking on a permanent basis, provided that he was subject to certain rules of professional conduct. Overall, after considering the presented evidence, the President has concluded that the evidence tends to show that increasingly in the legal orders of the Member States and possibly, as a consequence, in the Community legal order, there is no presumption that the link of employment between a lawyer and an undertaking will always, and as a matter of principle, affect the independence necessary for the effective exercise of the role of collaborating in the administration of justice by the courts if, in addition, the lawyer is bound by strict rules of professional conduct, which where necessary require that he observe the particular duties commensurate with his status.

In his opinion, it must therefore be held that the applicants and the interveners have presented arguments which are not wholly unfounded and which are apt to justify raising again the complex question of the circumstances in which written communications with a lawyer employed by an undertaking on a permanent basis may possibly be protected by professional privilege, provided that the lawyer is subject

First, the Court of First Instance refused to accept the company's argument that because of recent trends in the Member States' legal systems it was necessary to revise previous practice, stating that although the applicants and some of the interveners were right to assert that the role of corporate lawyers and communications with such lawyers under legal professional privilege was relatively more common now than when the judgment in *AM&S* was handed down, it was not possible, nevertheless, to identify tendencies that were uniform or had clear majority support in that regard in the laws of the Member States.⁴⁸

Then, on the argument that it is necessary to review the judgment in *AM&S* because of the EU competition law developments, the Court of First Instance noted that the modernisation of competition law did not necessarily mean that the respective roles of outside lawyers and in-house lawyers had changed substantially in this respect since the judgment in *AM&S*. In any event, since Community competition law is aimed at undertakings, in the opinion of the Court, it would not be permissible, in principle, for purely internal communications within a particular undertaking to fall outside the Commission's investigatory powers, with the exception, as has been stated above, of notes which do no more than report the text or the content of communications with outside lawyers containing legal advice, and of preparatory documents drawn up exclusively in order to seek legal advice from an outside lawyer in exercise of the rights of defence.⁴⁹

As regards the arguments of the applicants and of certain interveners to the effect that differential treatment of in-house lawyers in *AM&S* is contrary to the principle of equal treatment and raises problems from the point of view of the free movement of services and the freedom of establishment, the Court of First Instance has noted that it is settled case-law that the principle of equal treatment is infringed only where comparable situations are treated differently or different situations are treated in the same way, unless such difference in treatment is objectively justified. The Court pointed out, however, that in-house lawyers and outside lawyers were clearly in very different situations, owing, in particular, to the functional, structural and hierarchical integration of in-house lawyers within the companies that employed them. Accordingly, no infringement of the principle of equal treatment arises from the fact of treating such professionals differently in respect of protection under legal professional privilege. Moreover, as regards the applicants' claim as to the harm which might be caused to the free movement of services and the freedom of establishment by restricting the personal

to rules of professional conduct equivalent to those imposed on an independent lawyer. Joined cases T-125/03 R and T-253/03 R, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v. Commission of the European Communities*. [2003] ECR II-04771, § 122–127.

48 Judgment of the Court of First Instance of 17 September 2007. *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v. Commission of the European Communities*. Joined cases T-125/03 and T-253/03. European Court Reports 2007. Page II-03523, § 170.

49 *Ibid.*, § 172, 173.

scope of protection of confidentiality, in the Court's view, it suffices to say that this claim has not been substantiated⁵⁰.

The applicants also claimed that, since the correspondence in question was protected under their respective national laws, Community law should also afford them such protection under legal professional privilege. It was also maintained that the personal scope of the Community concept of confidentiality should be governed by national law. In that respect, the Court of First Instance recalled that the protection of legal professional privilege was an exception to the Commission's powers of investigation. Therefore, the protection directly affects the conditions under which the Commission may act in a field as vital to the functioning of the common market as that of compliance with the rules on competition. For those reasons, the Court of Justice and the Court of First Instance have been at pains to develop a Community concept of legal professional privilege. In the opinion of the Court, the argument of the applicants and the interveners is at odds both with the development of that Community concept and with the uniform application of the Commission's powers in the common market and must therefore be rejected.⁵¹

The applicants appealed to the ECJ, but the latter confirmed that no predominant trend towards protection under legal professional privilege of communications within a company or group with in-house lawyers might be discerned in the legal systems of the 27 Member States of the European Union. The ECJ therefore considered that the legal situation in the Member States of the European Union had not evolved, since the judgment in *AM&S* was delivered, to an extent that would justify a change in the case-law and recognition for in-house lawyers of the benefit of legal professional privilege⁵².

The ECJ has also confirmed that despite the fact that he may be enrolled with a Bar or Law Society and that he is subject to a certain number of professional ethical obligations, an in-house lawyer does not enjoy a level of professional independence equal to that of external lawyers. That difference in terms of independence is still significant, even though the national legislature seeks to treat in-house lawyers in the same way as external lawyers. After all, such equal treatment relates only to the formal act of admitting an in-house lawyer to a Bar or Law Society and the professional ethical obligations incumbent on him as a result of such admission. On the other hand, in the ECJ's view, that legislative framework does not alter the economic dependence and personal identification of a lawyer in an employment relationship with his undertaking.⁵³

The ECJ has stated that the concept of independence of lawyers is determined not only positively, that is by reference to professional ethical obligations, but also negatively, by the absence of an employment relationship. An in-house lawyer, despite his enrolment with a Bar or Law Society and the professional ethical obligations to which he is, as a result, subject, does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to

50 *Ibid.*, § 174.

51 *Ibid.*, § 176.

52 *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd*, C-550/07 P, § 74–76.

53 *Ibid.*, § 56–59.

his client. Consequently, an in-house lawyer is less able to deal effectively with any conflicts between his professional obligations and the aims of his client. In the Court’s view, 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.⁵⁴

3. The Assessment of the Lawyer’s Status as a Restriction of Legal Professional Privilege

The EU case-law, recognising legal professional privilege only in respect of “external” lawyers has been assessed ambiguously in legal literature. For example, it was argued that in fact certain guarantee of objectivity should be required from in-house lawyers, because such a lawyer economically depending on his employer normally carries out the latter’s instructions, therefore may be forced to argue that some of the documents are prepared for the realisation of the rights of defence even though such a statement may not correspond to reality⁵⁵.

This argument cannot be totally rejected, but it cannot be confirmed either that the absence of an employment relationship (the independence of “external” lawyers) warrants another outcome of the above-mentioned situation. It may be argued that particularly client’s permanent status can often trigger the willingness of a lawyer to adopt any useful information for the client. A company which does not have its own legal department but handles all its legal matters to an independent lawyer, one could say, in essence employs him as a company’s permanent legal advisor. The only difference is that in such case a lawyer can serve several companies that “have employed him” in such a way, but an “in-house” lawyer will typically have only one employer. Therefore, it cannot be denied that an independent lawyer providing services for his permanent client will have less interest in the execution of client’s orders than a lawyer bound by employment contract. A criterion of “null and void” could be called upon for assuring independence if, for example, a lawyer is not formally employed by a company, i. e. if he is not bound by the employment contract but the company would be his only (or at least the main) client.

And vice versa – an in-house lawyer does not necessarily carry out his functions strictly dependent on his employer’s orders. His contract of employment may have

54 *Ibid.*, § 45–47.

55 Leskinen, Ch. *An evaluation of the rights of defense during antitrust inspections in the light of the case-law of the ECtHR: would the accession of the European Union to the ECHR bring about a significant change?* [interactive] [accessed on 27-06-2011]. <http://globalcampus.ie.edu/webes/servicios/descarga_sgd_intranet/envia_doc.asp?id=9697&nombre=AccesoDatosDocumentoIE.Documento.pdf&clave=WPLS10-04>.

a condition of independence and disobedience, or he may be entitled to have more clients, which undoubtedly would reduce its dependence on a single employer.

A. Andreangeli suggested that the test for the protection of legal professional privilege used in *AM&S* judgment should be replaced by a more flexible one, which would suggest an answer according to the fact whether in a concrete case a lawyer was bound by the binding rules, which ensured his integrity and independence, despite the character of his relationship with the client (i.e. whether the company is his employer or client).⁵⁶

Meanwhile, the European Court of Human Rights finds that for the purposes of the Convention, there is no difference whether the person representing a client is a practicing lawyer or not⁵⁷. According to this position, protection of legal professional privilege should apply not only to independent lawyers or in-house lawyers, but also to company's jurists. Presumably, it would be quite logical, bearing in mind the ECJ's judgment in *AM&S*⁵⁸, which was reaffirmed by the Court of First Instance in *Akzo*⁵⁹, stating that that EU law should be interpreted as protecting confidentiality of lawyer-client communications *if they communicate for the purpose of the client's rights of defence*. This means that if the company claims that the documents, which Commission seeks to evaluate, are made up for the purpose of the company's defence, then they should be covered by legal professional privilege even despite the fact that it is the company's written correspondence with its jurists. Namely, not the status of a lawyer but the purpose (or aim) of the document should be a decisive factor in deciding on the issue of lawyer-client confidentiality protection.

In summary, with regard to a possibility for companies accused of EU competition law violations to rely on the protection of confidentiality of lawyer-client communications, the following conclusions can be made: it is doubtful whether professional secrecy constraints recognised by the ECJ can be considered proportionate to the declared objective. Given the fact that the ECtHR recognises the protection of legal professional privilege even for those who are not practicing lawyers, it is doubtful whether this Court would agree that for ensuring the independence of lawyers it is necessary to refuse recognition of legal professional privilege for lawyers employed by his client on an employment contract basis. It may be assumed that professional independence could be assured by drawing attention to the content of the document which the company does not want to grant access to, rather than the mere status of a lawyer. In such way, the purpose of this restriction would be achieved by less restrictive means, i.e. in a more proportionate way.

56 Andreangeli, A. The Protection of Legal Professional Privilege in EU Law and the Impact of the Rules on the Exchange of Information within the European Competition Network on the Secrecy of Communications between Lawyer and Client: one step forward, two steps back? *Competition Law Review*. 2005, 2(1), p. 42.

57 *Nikula v. Finland*, No. 31611/96, ECHR 2002-II, § 53; also *A.B. v. Netherlands*, *supra* note 30, § 82–83.

58 *AM&S Europe Limited*, *supra* note 42, § 21, 22 ir 27.

59 *Akzo Nobel Chemicals Ltd*, *supra* note 2, § 117.

Conclusions

1. Confidentiality of a lawyer-client relationship is recognised by the ECtHR with regard to the rights of the defence-related sensitive area, the interference in which, according to the facts of the case, can be considered as violation of the right to a fair trial or the right to privacy. The protection applies not only for correspondence with lawyers, but also for one with jurists.

2. The ECtHR is very strict with the requirement that searches and seizures are supervised independently or by judicial review and that the conditions under which the material protected under legal professional privilege may be subject to search or seizure are precisely regulated. There is no material to suggest that strict approach of the ECtHR regarding the seizure of documents protected by legal professional secrecy would differ depending on the status of a lawyer.

3. As far as the ECJ recognises that EU law should be interpreted as protecting confidentiality of lawyer-client communications *if they communicate for the purpose of the client's rights of defence*, not the status of a lawyer but the purpose (or aim) of the document should be a decisive factor in determining on the issue of protection of lawyer-client confidentiality in EU competition law cases.

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TEISĖ Į ADVOKATO IR KLIENTO BENDRAVIMO KONFIDENCIALUMĄ ES KONKURENCIJOS TEISĖS PAŽEIDIMŲ TYRIMŲ METU: ADVOKATO STATUSO ASPEKTAS

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Santrauka. *Teisė į advokato ir kliento bendravimo paslaptį (profesinė paslaptis) šiame straipsnyje nagrinėjama ir suprantama kaip taisyklė, pagal kurią teisminiuose ar administraciniuose procesuose negali būti reikalaujama atskleisti tam tikro advokato ir kliento bendravimo turinio; jei be kliento sutikimo toks turinys atskleidžiamas, jis negali būti laikomas įrodymu procese. Draudimas atskleisti tokio bendravimo turinį pripažįstamas esminiu elementu siekiant užtikrinti kliento galimybę atvirai bendrauti su advokatu taip užtikrinant teisinės pagalbos veiksmingumą. Teisė į advokato ir kliento bendravimo paslaptį yra susijusi su keliais Žmogaus teisių ir pagrindinių laisvių apsaugos konvencijos straipsniais. Europos*

Žmogaus Teisių Teismas laiko, kad kaltinamojo teisės bendrauti su advokatu nedalyvaujant trečiajam asmeniui ribojimas neatitinka Žmogaus teisių ir pagrindinių laisvių apsaugos konvencijos 6 straipsnio 3 dalies c punkto, kuris įtvirtina teisę gintis pačiam arba padedant savo paties pasirinktam gynėjui arba, jei asmuo neturi pakankamai lėšų gynėjui atsilyginti ir, kai tai reikalinga teisingumo interesams, nemokamai gauti advokato pagalbą, reikalavimų. Toks advokato ir kliento bendravimo konfidencialumo reikalavimas taip pat susijęs su Konvencijos 8 straipsniu, kuris suteikia teisę į tai, kad būtų gerbiamas jo privatus ir šeimos gyvenimas, būsto neliečiamybė ir susirašinėjimo slaptumas. Europos Žmogaus Teisių Teismo nuomone, atsižvelgiant į Žmogaus teisių ir pagrindinių laisvių apsaugos konvencijos tikslus, nėra jokio skirtumo, ar klientui atstovaujantis asmuo yra praktikuojantis advokatas, ar ne. Tuo tarpu Europos Sąjungos Teisingumo Teismas byloje dėl Europos Sąjungos konkurencijos teisės pažeidimų pripažįsta, kad advokato ir kliento bendravimo konfidencialumo paslaptis taikytina tik dokumentams su advokatu, kuris nedirba kaltinamoje įmonėje pagal darbo sutartį. Kai profesinės paslapties apsauga nėra pripažįstama ES konkurencijos teisės pažeidimu kaltinamos įmonės korespondencijai gynybos klausimais su jos teisės skyriaus personalu, keltinas klausimas, ar tokiu atveju tinkamai užtikrinama tokių įmonių teisė į advokato ir kliento bendravimo konfidencialumą.

Reikšminiai žodžiai: *advokato ir kliento bendravimo konfidencialumas, profesinė paslaptis, ES konkurencijos teisė, Žmogaus teisių ir pagrindinių laisvių apsaugos konvencija.*

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