European and non-European companies operating in Europe benefit from a number of fundamental rights including those provided for in the Charter of Fundamental Rights of the European Union (the “Charter”). One of these rights, as recognized on numerous occasions by the European courts, is the right to legal professional privilege (“LPP”). LPP stems from both the right to be “advised, defended and represented” and the right of defence ex Articles 47 and 48 of the Charter respectively. However, the scope of this right, as interpreted by the European Court of Justice, the European Commission (hereinafter the “EC”) and National Competition Authorities (hereinafter NCAs), has at times been controversial.

On a narrow interpretation of the jurisprudence concerning LPP, only certain categories of documents would be protected from disclosure during antitrust proceedings, namely: (1) written communications between a client and an “independent lawyer” entitled to practise his or her profession in one of the Member States when such communications are connected to the client's rights of defence; (2) internal notes that are confined to reporting the text or the content of those communications; and (3) preparatory documents drawn up exclusively for the purpose of seeking legal advice from a lawyer in exercise of the rights of the defence.

The corollary of this narrow reading of the case law would be that the following documents would, allegedly, not to be covered by LPP under EU law and could therefore be inspected and used by the European Commission and/or NCAs: (1) legal advice rendered by non-EU qualified counsel, regardless of the rules governing those communications in the jurisdiction in which they are made; (2) requests for legal advice made by a business person to their in-house lawyer, even where the in-house lawyer elects to convey that request for legal advice directly to outside counsel, in circumstances where the same request for legal advice, if made directly to the outside counsel, would undoubtedly be covered by LPP; and (3) legal advice provided by an in-house lawyer without the input of an external counsel.

As submitted in this contribution, properly assessed, including by reference to the principles of international law that govern the EC in the exercise of its powers, at a minimum, the first two of these categories of documents and arguably the third can and should be protected by LPP under EU law, consistent with the case law on which the EC relies.

1. The requirement for the EC to respect public international law in the exercise of its powers

The Court of Justice of the EU has confirmed that, in the exercise of its powers, the EC must comply with international law. This duty is provided for in Articles 3(5) of the EU and 21(1) of the Treaty on the European Union. Furthermore, this duty exists...
independently in international law and the EU is thus bound by it as a consequence of its international personality. Accordingly, the EC’s investigative powers must be interpreted, and their scope limited, in light of the relevant rules of international law.

In particular, the EC has recognized that, where the application of EC law requires undertakings to act in any way contrary to the requirements of their domestic laws, so as to adversely affect important interests of a non-member State, international comity considerations should favour self-restraint in the exercise of jurisdiction by the EC. The EC has also stated that “active cooperation between the authorities concerned should iron out certain difficulties and at the same time help maintain fair competition in the interest of the continuing growth of international trade.”

Relying on these very principles, the EC has sought to resist the discovery of EU-privileged documents in US litigation on comity grounds, including intervening in courts proceedings in the US in cases where leniency applications have been sought by cartel damages claimants. The EU/US Cooperation Agreement of September 23, 1991 and the Positive Comity Agreement of June 4, 1998 recognize the importance of cooperation between the EU and US in competition law matters. It follows that the EU jurisprudence on LPP must be understood, and construed, in accordance with the principles of public international law that constrain the EC in the exercise of its powers.

2. EU jurisprudence on legal professional privilege

The European Courts first recognized LPP as a limit on the EC’s investigative powers in AM&S. AM&S had refused to hand over certain documents to the EC that it considered were covered by LPP. The EC insisted upon its right to read the documents over which AM&S claimed LPP, following which AM&S sought to challenge that decision before the Court of Justice.

The Court characterized the issue it had to decide as follows: “what limits, if any, are imposed upon the Commission’s exercise of its powers of investigation... by virtue of the protection afforded by the law to the confidentiality of written communications between lawyer and client.”

In delineating the protection afforded to such communications under EU law, the Court reasoned as follows:

- EU law must take into account the principles and concepts common to the laws of the Member States, including the principle recognized in all Member States that any person must be able, without constraint, to consult a lawyer.11
- While the criteria for protecting written communications between lawyer and client varied as between the Member States, a set of common criteria could be identified, namely that (1) the communications are to be made for the purposes and in the interests of the client’s rights of defence; and (2) the communications emanate from independent lawyers (i.e., lawyers who are not bound to the client by a relationship of employment).12
EU law should therefore protect the confidentiality of written communications between lawyer and client subject to those two conditions, thereby incorporating those elements of protection that are common to the laws of the Member States.¹³

As regards the first criterion, the Court confirmed that the protection covered “all written communications exchanged after the initiation of the administrative procedure ... which may lead to a decision on the application of Articles [101] and [102] of the Treaty or to a decision imposing a pecuniary sanction on the undertaking ... [and] to earlier written communications which have a relationship to the subject-matter of that procedure.”¹⁴

As regards the second criterion, the Court confirmed that the protection “must apply without distinction to any lawyer entitled to practise his profession in one of the Member States, regardless of the Member State in which the client lives.”¹⁵

The exclusion of advice from in-house counsel from the scope of LPP was met with sharp criticism. The International Chamber of Commerce, for example, concluded: “As long as communications with [in-house] lawyers can be seized and used as the basis for sanctions, [...] the quality of the advice will suffer, because corporate clients will be reluctant to put the full facts before their lawyers, and the lawyers will be reluctant to give frank advice. The net effect will be to make it more difficult for these corporations to comply with the law.”¹⁶

The EU courts revisited the question of LPP in Hilti.¹⁷ In that case, Hilti sought to claim confidentiality not only over documents that were covered by LPP as delineated in AM&S, but also internal communications that reported the content of legal advice received from external legal advisers. The General Court upheld LPP over such documents, saying that “the principle of the protection of written communications between lawyer and client may not be frustrated on the sole ground that the content of those communications and of that legal advice was reported in documents internal to the undertaking.”¹⁸

The third occasion on which the EU courts considered the question of LPP was in Akzo.¹⁹ Akzo claimed LPP over documents in its files that the EC wished to inspect during a dawn raid. In particular, Akzo sought protection for documents that although not themselves communications with a lawyer, nor created for the purpose of being sent physically to a lawyer (as in AM&S), nor reporting the contents of communications with a lawyer (as in Hilti), were prepared for the purposes of seeking legal advice from a lawyer, in the exercise of the rights of defence.

“EU courts and the EC should respect the confidentiality of communications between in-house and external lawyers and clients outside the EEA.”

The General Court held that LPP should in principle attach to such “preparatory documents,” but it did not accept Akzo’s claim to LPP for the particular documents in question. The Court held that “preparatory documents, even if they were not exchanged with a lawyer or were not created for the purpose of being sent physically to a lawyer, may none the less be covered by LPP, provided that they were drawn up exclusively for the purpose of seeking legal advice from a lawyer in exercise of the rights of the defence.”²⁰

In the same judgment, the General Court rejected Akzo’s claim that EU law should now regard LPP as extending to communications with in-house counsel, at least where the in-house counsel was

¹³ AM&S, para. 22.
¹⁴ AM&S, para. 23.
¹⁵ AM&S, para. 24.
¹⁸ Hilti, para. 18.
²⁰ Akzo, para. 123.
a member of a bar or law society guaranteeing the same level of independence as lawyers who were not bound to the client by a relationship of employment. The General Court upheld the limits on LPP set by the Court of Justice in AM&S.

Akzo appealed to the Court of Justice on the second issue, namely whether LPP could attach to communications with in-house counsel. The Court of Justice rejected Akzo’s appeal, agreeing with the General Court that changes since the AM&S judgment did not justify extending LPP at the EU level to advice from in-house counsel.21 According to the Court, “an in-house lawyer is less able to deal effectively with any conflicts between his professional obligations and the aims of his client.”22

Following this line of case law, there may be a temptation to interpret the EU jurisprudence to be limited to the following general principles:

- LPP under EU law is concerned only with legal advice from external, EEA-qualified lawyers. This could be said to follow from AM&S.
- The protection for documents reporting legal advice would extend only to documents confined to reporting the text or content of that advice (i.e., advice from external, EEA-qualified lawyers). This could be said to follow from Hilti.
- The protection for preparatory documents would extend only to documents drawn up exclusively for the purpose of seeking legal advice from a lawyer (i.e., an external, EEA-qualified lawyer) in the exercise of the rights of the defence. This could be said to follow from the General Court judgment in Akzo.

This line of interpretation should not be endorsed. First, EU courts and the EC should respect the confidentiality of communications between in-house and external lawyers and clients outside the EEA, where those communications are protected as part of the fundamental rights enjoyed by the company in the relevant jurisdiction. Second, the case law can and should be read as protecting purely internal communications between business persons and their in-house lawyers, in particular where the in-house lawyer is discharging his/her role as a conduit for the business to obtain advice from external counsel (whose advice is undoubtedly covered by LPP under EU law).

3. EU law can and should protect communications covered by LPP in other jurisdictions

The possible narrow reading of the EU jurisprudence on LPP would disregard any claim to LPP where the advice of a non-EEA-qualified lawyer is concerned. The argument would be that such an approach follows from AM&S, where the Court of Justice first assessed the limits of LPP under EU law. There is nothing in that judgment, however, indicating that LPP should be construed in such a narrow fashion.

In applying LPP to external lawyers in EU law related proceedings, the Court of Justice in AM&S was seeking to identify what could be said to be the common features of LPP in the laws of the Member States, from which to extract a common EU definition of LPP. In that regard, the Court held that only the protection for communications with external lawyers could be said to be part of the common legal tradition in each of the Member States.

In its reasoning, the Court identified that “the protection thus afforded by Community law… to written communications between lawyer and client must apply without distinction to any lawyer entitled to practise his profession in one of the Member States, regardless of the Member State in which the client lives.”23 In other words, EU LPP covered legal advice from (external) lawyers entitled to practice in one of the Member States.

It could be argued from this that the Court thereby excluded the possibility to recognize LPP as regards (external) lawyers entitled to practice in a third country, such as the United States. However, this interpretation would ignore the operative conclusion of the judgment in AM&S, which provided for a negative qualification, namely the absence of an employment relationship between the lawyer and the client. Arguably, the Court did not impose a positive obligation as to the place of qualification of the independent lawyer.

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22 Akzo, Court of Justice Judgment, para. 45.

23 AM&S, para. 25.
Moreover, as the Court was seeking to identify the “elements of [LPP] common to the laws of the Member States,”24 the judgment did not entail a wholesale rejection of the standard of LPP afforded by non-Member States, as this was not the question the Court was addressing.

In any event, the legal basis for the distinction drawn in AM&S between lawyers whose communications could qualify for privilege, and other individuals whose communications do not qualify for privilege, is irrelevant to non-EEA lawyers. In the case of a legal adviser established in the EU, it may be appropriate to refer to “the principles of the Treaty concerning freedom of establishment and the freedom to provide services”.25

No conclusions can be drawn from this reasoning, however, with respect to lawyers established outside the EEA, to whom the rules on mutual recognition within the EEA do not apply. There is no basis for relying on EU law principles of mutual recognition of qualifications to treat lawyers established outside the EU as non-lawyers for the purpose of determining whether attorney-client communications are capable of benefiting from privilege. Rather, as will be explained in further detail below, recognizing that attorney-client communications involving lawyers established outside the EU are capable of benefiting from privilege is incumbent on the EC in light of its obligations under international law.

Furthermore, the subsequent judgments in Hilti and Akzo similarly lack any explicit “place of qualification” requirement for LPP to be recognized in EU proceedings. These judgments were both concerned with the application of LPP to advice from in-house lawyers, rather than advice from external lawyers that did not have an EEA qualification.26

In Hilti, the General Court summarized the judgment in AM&S as recognizing LPP “provided that, on the one hand, such communications are made for the purposes and in the interests of the client’s right of defence and, on the other hand, they emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment.”27

In finding that the document over which LPP was claimed was indeed covered, the Court simply noted that it was a letter “sent to the applicant by an independent lawyer, after the initiation of the administrative procedure before the Commission, for the purposes and in the interests of the applicant’s right of defence.”28 That was sufficient to bring it within the scope of EU LPP without any discussion of the place of qualification of the independent lawyer in question.

Similarly, in Akzo, the judgment records the EC as having argued that the judgment in AM&S and the order in Hilti meant that LPP only covered “written communications between lawyer and client which are made for the purposes of and in the interests of the client’s rights of defence, and internal notes which do no more than report the text or the content of those communications.”29 The Akzo judgment makes no record of the EC as having argued in that case that EU law would impose a further requirement that the external lawyer be qualified in a Member State.

To the contrary, the General Court in Akzo identified that the operative provisions of the AM&S judgment were paragraphs 21, 22, 23 and 27 of that judgment.30 The General Court in Akzo made no reference to paragraph 25 of AM&S, which is purportedly the basis for the additional requirement that the lawyer in question be EEA-qualified.

Later in the General Court’s judgment in Akzo, one of the interveners, the ACCA, is recorded as having argued that the AM&S ruling “discriminates against non-Community lawyers, since such protection is only accorded to lawyers who are entitled to practise in a Member State (paragraph 25 of the judgment).”31 Notably, however, the Commission’s response to that argument was simply to say that the ACCA “raises a new issue which was not raised by

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24 AM&S, para. 21.
25 AM&S, para. 25.
26 In his opinion in Akzo, Advocate General Kokott stated “unlike in the relationship between the Member States, in the relationship with third countries there is, generally speaking, no adequate basis for the mutual recognition of legal qualifications and professional ethical obligations to which lawyers are subject in the exercise of their profession.” However, this was in relation to the recognition of LPP over communications with in-house lawyers who are members of a Bar or Law Society in a third country, rather than external lawyers who are members of a Bar or Law Society in a third country. Akzo, Opinion of Advocate General Kokott, delivered on April 29, 2010, paras. 188-190.
27 Hilti, para. 13.
29 General Court judgment in Akzo, para. 112.
30 General Court judgment in Akzo, para. 116.
31 General Court judgment in Akzo, para. 158.
the applicants, which is therefore inadmissible and, in any event, not the subject-matter of the present proceedings.” The Court did not address the issue either, saying that “the arguments advanced by ACCA regarding the protection afforded to lawyers who are not members of a Bar or Law Society in a Member State are not at all relevant to the present proceedings.”

Were there any doubt, by the time that the Akzo case reached the Court of Justice, the EC’s position was clear. As the judgment records:

“The Commission submits that in AM & S Europe v Commission the Court placed lawyers in one of the following two categories: (i) employed salaried lawyers and (ii) lawyers who are not bound by a contract of employment. Only documents drafted by lawyers in the second category were regarded as being covered by legal professional privilege.”

In other words, the EC in Akzo did not distinguish between independent lawyers qualified in an EEA Member State and independent lawyers qualified elsewhere.

“Compliance with EU competition rules necessitates that a company can obtain information from its employees in strict confidence.”

4. The need to comply with public international law further warrants the extension of LPP to advice from non-EEA qualified lawyers

While the EU courts’ jurisprudence does not require an outright rejection of LPP claims over legal advice rendered by non-EEA lawyers, the EU is in any event required to comply with those principles of public international law that prevent it from unreasonably interfering with fundamental rights and protections afforded by foreign legal systems.

By denying LPP protection to communications between a company and its non-EEA lawyers, and insisting that it would be entitled to compel the production of such documents, in circumstances where the company has a fundamental right to LPP with regard to those documents in their home jurisdiction, the EC would be unjustifiably interfering with those rights, and breaching the public international law principle of comity.

For example, under U.S. law, attorney-client privilege is a fundamental right of defence designed “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” Under U.S. law this privilege extends to both U.S. in-house and outside counsel; both categories of lawyers are members of U.S. State bars and both groups have clear ethical obligations to the U.S. court system.

The EC accepts that it must respect a company’s fundamental right of defence in the EU, including the right to maintain the confidentiality of attorney-client communications with EU attorneys. The EC should thus accord equal respect to the company’s fundamental right to LPP afforded in another jurisdiction. AM&S, which is relied upon to justify a distinction between lawyers registered to practice in the EEA and lawyers practicing in a third country, does not alter this conclusion:

- First, AM&S is almost thirty years old and predates the entry into force of the European Charter on Fundamental Rights, which fundamentally changed the law in the EU in that it requires the EC to comply with fundamental rights that are not territorially limited. Article 3(5) of the TEU stipulates that the EU “shall uphold and promote its values” and “shall contribute to […] the protection of human rights” and Article 21(1) states that the EU’s “action on the international
Second, the Court of Justice’s reference to confidentiality of attorney-client communications “incorporating such elements of that protection as are common to the laws of the Member States” provides no basis to discriminate between properly qualified lawyers practicing in the EU with respect to EU law, and properly qualified lawyers established in another jurisdiction with respect to that jurisdiction’s law. The distinguishing criterion, to determine whether consultation of such lawyers in confidence is a fundamental right, ought not to be whether the lawyer is qualified and a member of a bar or law society in the EU, but whether the lawyer is qualified and a member of the bar in the country where he or she is established and practices law. Indeed, it is on this basis that courts in the UK have consistently respected privilege attached to communications with foreign lawyers.

Documents created by U.S. lawyers and U.S. business people seeking and providing U.S. legal advice would carry the full expectation that the documents would remain confidential. Compelling production of such documents and not affording LPP undermines the legitimate expectations of U.S.-based companies as to the legal rules governing their communications in the United States with U.S. counsel and interferes with the right of the United States to guarantee the confidentiality of written communications in the United States between U.S. companies and lawyers who are qualified members of a U.S. State bar. In these circumstances, the international public law principle of comity as well as the European Convention of Human Rights, Article 6, which guarantees the right to a fair trial, would require the EC to give deference to US privilege rules.

5. Current issues regarding the implementation of the European courts’ case-law on LPP

Besides the issues relating to the application of LPP to communications between non-EEA lawyers and their clients, the question arises whether LPP should cover requests for legal advice to external EEA lawyers, where those requests are first communicated by a company employee to the company’s in-house counsel.

On one view, communications between two employees of a company are incapable of being covered by LPP unless and/or until that communication reports external counsel legal advice or takes place with a view to seeking external legal advice. This would include communications between a business person and an in-house counsel relating to the legality of certain business practices.

For instance, in cases where, in a document or in an email, a business person raises a legal query with the company’s in-house lawyer, and the company’s in-house lawyer solicits legal advice from an external counsel, rather than advise the business person on the query themselves, the EC could, quod non, adopt the following approach:

- The initial request from the business person to the in-house lawyer would not be covered by LPP, on the basis that the EC does not recognize LPP with respect to in-house lawyers (the first link of the “upward chain”).

- The subsequent request from the in-house lawyer to the external counsel, and the subsequent report of that advice by the in-house lawyer to the business person, would be covered by LPP on the basis that the EC recognizes LPP with respect to external counsel and internal communications reporting the text or content of communications with external counsel (the “downward chain”).

37 See Lorand Bartels, “The EU’s Human Rights Obligations in Relation to Policies with Extraterritorial Effects,” The European Journal of International Law (2014), Vol. 25 No. 4, pp.1071-1091, p. 1074. (Notes that Article 21(3)(1) TEU extends the application of the EU’s external human rights obligations to the external aspects of the EU’s internal policies.)

38 AM&S, para. 22.

39 This principle was expressed in 1859, in Lawrence v Campbell, 4 Drew 485, in respect of a Scottish solicitor and his client, and has since been repeated many times, including in Garfield v Fay (1968) 2 All ER 395 (treating as privileged communications between foreign legal advisers and their clients) and Great Atlantic Insurance Co v Home Insurance Co (1981) 2 All ER 485. In R (Prudential PLC) v Special Commissioner of Income Tax [2011] 2 WLR 50, the Court of Appeal reiterated that the common law legal professional privilege applied to members of foreign legal professions.
This approach would therefore deny any protection to communications between a business person and in-house lawyers (i.e., the first link of the “upward chain”), even where the in-house lawyer is merely acting as a conduit for the business person to obtain legal advice from the company’s external counsel.

This approach would not respect a company’s fundamental right to obtain legal advice covered by LPP. Denying LPP to any communication between a company’s employees and in-house legal counsel with a view to seeking advice on the legality of a given business practice or conduct would contradict the case law of the EU courts, undermine companies’ efforts to comply with the competition rules, and could expose employees to criminal prosecution and retaliation in circumstances where they had a legitimate expectation that their communications would be protected.

a. Purely internal communications are capable of benefiting from LPP under EU law

As a practical matter, the effect of such an approach would be that in order for a request for legal advice by a business person ever to be protected by LPP, such request for legal advice would need to be addressed directly to external counsel, bypassing in-house lawyers altogether. There can be no doubt that an individual’s initial request to its external counsel is protected by LPP, as it is a communication made for the purposes of obtaining legal advice. That protection cannot be negated simply because the request has been channelled through a company’s in-house lawyers, in particular when, in fact, the in-house lawyer proceeds immediately to pass on that request to external counsel.

The case law limiting LPP in the EU to external counsel does not deny protection to requests for legal advice made by a business person to in-house lawyers (in fact, as described below, it requires it). The case law limiting LPP protection to external counsel exclusively relates to a situation where a company is seeking protection for legal advice rendered by the in-house lawyer; it does not exclude LPP where a request for legal advice, which is then communicated to the company’s external counsel, is channelled through the company’s in-house lawyer (whose role is to act as the intermediary between the company and its external counsel).

This approach would be, in particular, inconsistent with the General Court judgment in Akzo, which accepted that preparatory documents are capable of being covered by LPP even where they were not exchanged with a lawyer. LPP extends beyond communications with a lawyer, or notes reporting on communications with lawyers, as it encompass other preparatory documents. Any rejection of LPP in relation to a document on the basis that it concerned purely internal communications between company employees, whether or not they include an in-house lawyer, would be therefore unfounded.

“The narrow application of the AM&S judgment threatens the rights and freedoms which it sought to protect.”

As the General Court held in Akzo:

“However, so that a person may be able effectively to consult a lawyer without constraint, and so that the latter may effectively perform his role as collaborating in the administration of justice by the courts and providing legal assistance for the purpose of the effective exercise of the rights of the defence, it may be necessary, in certain circumstances, for the client to prepare working documents or summaries, in particular as a means of gathering information which will be useful, or essential, to that lawyer for an understanding of the context, nature and scope of the facts for which his assistance is sought. Preparation of such documents may be particularly necessary in matters involving a large amount of complex information, as is often the case with procedures imposing penalties for breaches of Articles 81 EC and 82 EC. In those circumstances, the Court holds that the fact that the Commission reads such documents during an investigation may well prejudice the rights of the defence of the undertaking under investigation and the public interest in ensuring that every client is able to consult his lawyer without constraint.
Accordingly, the Court concludes that such preparatory documents, even if they were not exchanged with a lawyer or were not created for the purpose of being sent physically to a lawyer, may none the less be covered by LPP, provided that they were drawn up exclusively for the purpose of seeking legal advice from a lawyer in exercise of the rights of the defence. On the other hand, the mere fact that a document has been discussed with a lawyer is not sufficient to give it such protection.40

The Akzo judgment therefore confirms that documents drawn up with the aim of seeking legal advice from a lawyer are protected, without distinction as to the type of lawyer in question, and without it being necessary for such documents to have been communicated directly to external counsel, or even created for that purpose. A fortiori, the Akzo judgment confirms that documents drawn up with the aim of seeking legal advice from outside counsel but channelled through in-house counsel are also protected. Furthermore, not protecting such communications would fail to recognize the corporate entity as a separate legal personality that, distinctly from its individual employees, enjoys the protections provided by both the Charter and the ECHR, as such lines of communication are an essential part of how a corporate entity comes to seek legal advice from an external lawyer.41

Communications between two employees of a company are therefore capable of being protected by LPP, and to deny that possibility would impair a company’s ability “effectively to consult a lawyer without constraint.” There is therefore no reason why communications with an in-house lawyer should not be capable of being protected. Given that communications between two ordinary business employees in preparation for seeking external legal advice are capable of being protected by LPP, the position that first link communications with in-house lawyers cannot be protected by LPP is incoherent at best. The logical, and untenable, conclusion of this position is that such protection is denied solely on the basis that the communication involved a lawyer. Furthermore, such an approach would contradict the reasoning of the Court of Justice in Akzo. The Court held that advice from an in-house lawyer does not benefit from LPP in a similar fashion to advice from an external lawyer because of the existence of an “employment relationship between the lawyer and his client.”42 Viewed in this light, communications with an in-house lawyer should therefore at least receive the same protection as do communications between any other employees in contemplation of seeking external legal advice, since, in the eyes of the Court, an in-house lawyer can be equated with any other company employee.

b. Any different approach would also undermine competition law compliance and potentially harm employees

This restrictive approach of LPP, in denying protection to requests for legal advice by business people channelled through a company’s in-house lawyers would also very likely undermine companies’ efforts to promote compliance with the competition rules, and expose employees to harm.

First, if a business person is concerned that seeking advice from their in-house lawyers will result in discoverable communications, they are less likely to come forward and raise potential antitrust issues. It would be unreasonable to expect potentially hundreds of employees to determine independently, and without communicating internally, whether an issue requires external counsel advice and to solicit that advice directly, without the involvement of the company’s in-house lawyers, who are uniquely positioned to determine when and from whom to seek legal advice on a given matter. This would be an unworkable approach.

Second, such an approach would contradict the EU courts’ case law. The General Court in Akzo acknowledged the practical reality that, in order for a person to “effectively perform his role as collaborating in the administration of justice by the courts and providing legal assistance for the purpose of the effective exercise of the rights of the defence, it may be necessary, in certain circumstances, for the client to prepare working documents or summaries, in particular as a means of gathering information which will be useful, or essential, to that lawyer for an understanding

40 General Court judgment in Akzo, paras 122-123 (emphasis added).
42 Akzo, Court of Justice judgment, para. 44.
of the context, nature and scope of the facts for which his assistance is sought.”

Indeed, as the General Court also recognized, this is especially likely to be the case “in matters involving a large amount of complex information, as is often the case with procedures imposing penalties for breaches of Articles 81 EC and 82 EC.”

In short, compliance with EU competition rules necessitates that a company can obtain information from its employees in strict confidence, without automatically being compelled to disclose those materials to the EC.

Third, the restrictive approach to LPP would expose employees to significant risks, if the approach in good faith their company’s in-house legal advisors with concerns about potentially unlawful conduct, in the reasonable and legitimate expectation that those communications would be protected from disclosure. Were it the case that the EC could potentially expose the details of employee communications to their employer’s in-house lawyers, which are made in the course of seeking legal advice, any incentive for employees to disclose these matters would be undermined and individuals who have already made such disclosures, in the expectation of confidentiality, would be exposed to a risk of retaliation and even prosecution.

This situation would be analogous to that identified by the Court of Justice in the Adams case, where the Court held that the EC is bound by a duty of confidentiality in circumstances where information is provided voluntarily but accompanied by a request for confidentiality that the EC accepts:

“As regards the existence of a duty of confidentiality it must be pointed out that Article 214 of the EEC Treaty lays down an obligation, in particular for the members and the servants of the institutions of the Community not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components. Although that provision primarily refers to information gathered from undertakings, the expression ‘in particular’ shows that the principle in question is a general one which applies also to information supplied by natural persons, if that information is ‘of the kind’ that is confidential. That is particularly so in the case of information supplied on a purely voluntary basis but accompanied by a request for confidentiality in order to protect the informant’s anonymity. An institution which accepts such information is bound to comply with such a condition.”

6. Conclusion

The 1982 judgment in AM&S, in formally recognizing the existence of LPP as a right under EU law, sought to protect the ability of a company to consult freely, openly, and frankly with its lawyers. Unfortunately, in the thirty-five years that have since passed, there has been a temptation to apply this judgment in a restrictive fashion. This narrow application of the judgment threatens the rights and freedoms which that judgment sought to protect. Furthermore, the application of the judgment in a rigid fashion has denied the protection of LPP to a significant number of attorney-client communications, such as those with in-house counsel or those with non-EU qualified lawyers, that now arise increasingly frequently in the context of EC antitrust investigations.

While the judgment in AM&S was, in ways, groundbreaking at the time, both the legal profession and the nature of EC antitrust investigations have undergone drastic changes over the last three decades, and this necessitates a more thoughtful approach to the protection of LPP in the present day. A more appropriate approach to LPP would, in addition to those categories of communications and documents already recognized as protected, include, at minimum, (1) legal advice rendered by non-EU qualified external counsel and (2) requests for legal advice made by a business person to their in-house lawyer.