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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?

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This article discusses the current degree of protection afforded to legal professional privilege in the context of the framework for the enforcement of Articles 81 and 82 EC Treaty resulting from the 'Modernisation Regulation' No 1/2003. After examining the notion of lawyer-client confidentiality existing under both English law and the European Convention on Human Rights, it will assess the concept of privilege enshrined in Community law, according to the case law of the ECJ. Thereafter, the article will analyse the impact of Article 12 of Council Regulation No 1/2003, which allows for the exchange and use in evidence of information collected by the Commission and the National Competition Authorities on the present standards of protection of legal professional privilege. Finally, it will address the issue of whether these standards can be redefined in a manner which takes into account, on the one hand, the effective protection of privilege in the 'decentralised' enforcement framework established by Regulation 1/2003 and, on the other, the need for the application of binding ethical rules on legal advisers in the interest of the proper administration of justice.

1. INTRODUCTION

This paper aims to examine the current standards of protection of legal professional privilege (LPP) in Competition enforcement proceedings and, in particular, the impact of the provisions of Regulation No 1/2003 allowing for the exchange of information among the Commission and the National Competition Authorities (NCAs) on the treatment of privileged communications in the jurisdiction of the receiving authority.

The first part will examine the existing degree of protection afforded to Legal Professional Privilege by the European Convention of Human Rights (ECHR) and by English law, and will analyse its role as an essential component of the right to a "fair trial" and to a "fair procedure" enshrined in Article 6(1) of the Convention. The second

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section will then assess the present state of play as regards the safeguard of the privilege in EC law: particular attention will be paid to the *AKZO Nobel and Ackros Chemicals* interim order of the Court of First Instance, and to its implications for a future reformulation of the notion laid down by *AM & S v Commission*, which should encompass also communications between the undertakings concerned and their employed legal advisers.

The third part will be concerned with the provisions contained in Article 12 of Council Regulation No 1/2003, allowing for the exchange of information between the Commission and the National Competition Authorities, and among the NCAs themselves. In particular, their impact on the level of protection afforded to lawyer-client confidentiality by EC law and by the laws of the single Member States, especially of the United Kingdom, will be considered. In this respect, it will be argued that the cooperation between enforcement agencies could jeopardise the protection of LPP, since communications enjoying that safeguard in accordance with the law of the receiving authority could nevertheless be disclosed on the ground that they were not privileged in the jurisdiction in which they were originally collected.

It will be suggested that the application of Article 12 of Council Regulation No 1/2003 calls for the adoption of a new Community definition of legal professional privilege, applicable in the context of proceedings for the application of Articles 81 and 82 EC Treaty by both the Commission and the NCAs. This new Community principle should extend to communications emanating to all in-house counsel. The proposed change would avoid that, due to the inconsistent degree of protection granted to it by the various Member States, the protection of lawyer-client confidentiality could be "watered down". To this end, the position of the Office of Fair Trading will be considered in detail.

Thereafter, possible alternatives to the *AM & S* concept of privilege will be examined: in particular the "functional" approach laid down by the US Delaware District Court in its *Renfield v Remy Martin* judgment and the solution suggested by the President of Court of First Instance in *AKZO Nobel* will be discussed. Consequently, it will be considered whether, on the one hand, the concerns for an effective protection of privilege in the context of the functioning of the European Competition Network and, on the other, the need to enforce binding ethical standards on legal advisers can be reconciled.

2. LEGAL PROFESSIONAL PRIVILEGE AS AN ESSENTIAL CHARACTERISTIC OF A "FAIR PROCEDURE"

2.1. Lawyer-client confidentiality as an element of the right to a "fair trial"

The confidentiality of communications between a lawyer and his or her client has been granted legal recognition both at international and at domestic level.[1] Its effective safeguard was considered to be an "auxiliary principle serving to buttress the cardinal

[1] *Inter alia*, Passmore, 'The future of legal professional privilege', (1999) 3 *International Journal of Evidence and Proof* 71 at 72.

principles of unimpeded access to the courts and to legal advice".[2] By affecting "the ability of the one to seek and the other to give legal advice in confidence",[3] legal professional privilege has been regarded as "much more than an ordinary rule of evidence",[4] and rather as "a fundamental condition on which the administration of justice as a whole rests".[5]

The application of Articles 6, 8 and, to a more limited extent, 10 of the European Convention on Human Rights has guaranteed a high level of protection to the privilege. In this respect, the European Court of Human Rights regarded "an accused's right to communicate with his advocate out of hearing of a third person" [6] as "part of the basic requirements of a fair trial in a democratic society".[7] It was confirmed in *Campbell v United Kingdom*[8] that,

> "it is clearly in the general interest that any person who wishes to consult a lawyer should be free to do so under conditions which favour full and uninhibited discussion. It is for this reason that the lawyer—client relationship is, in principle, privileged".[9]

The Strasbourg Court was therefore concerned with ensuring that an individual could obtain effective legal advice in order to seek access to a court. Consequently, it held in *Golder*[10] that the refusal of the Home Secretary to grant leave to consult a solicitor with a view to considering the institution of civil proceedings for libel irremediably hindered the applicant's right to access to a Court,[11] which "constitutes an element … inherent in the right stated by Article 6(1)."[12]

Similarly, the House of Lords recognised that in an adversarial judicial system the confidentiality of lawyer client communications constitutes a "necessary corollary of the right to any person to obtain skilled legal advice about the law".[13] According to Lord Hoffmann, that "advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice."[14] With respect to its scope, privilege can be claimed, and as a result

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2 *R (Daly) v Secretary of State for the Home Department*, House of Lords, 24 April, 23 May 2001, [2001] 2 AC 532, per Lord Bingham of Cornhill at para 10.

3 *R v Derby Magistrates Court ex parte B*, [1996] 1 AC 487, per Lord Taylor CJ at p 507.

4 *Ibid.*

5 *Ibid.* See Hill, 'A problem of privilege: in-house counsel and the attorney-client privilege in the United States and the European Community', (1995) 27 *Case W Res J Int'l L* 145 at 168.

6 Appl. 12629/87, *S v Switzerland*, judgment of 28 November 1991, [1992] 14 EHRR 670 at para 48.

7 *Ibid.* See also *Golder v United Kingdom*, Ser. A-No 18, [1979-80] 1 EHRR 524 at para 26.

8 Appl. 13590/88, Ser. A-No 223, [1993] EHRR 137.

9 *Id.*, para 46.

10 *Golder v United Kingdom*, Ser. A-No 18, [1979-80] 1 EHRR 524.

11 *Id.*, para 26.

12 *Id.*, para 36.

13 *R (on the application of Morgan Greenfell & Co Ltd) v Special Commissioner of Income Tax*, [2002] HRLR 42 at para. 7.

14 *Ibid.* Cf., *inter alia*, appl. No 21497/93, *Mantovanelli v France*, judgment of 17 March 1997 (HUDOC Ref. No. 8/1996/627/810), [1997] 24 EHRR 370 at para 33.

the disclosure withheld, with respect to "communications between [the] party and his legal advisers in which legal advice is sought and given".[15]

The privileged nature of the correspondence aimed at providing legal advice was upheld by the European Court of Human Rights also in relation to measures of surveillance imposed on a lawyer by public authorities. In *Kopp v Switzerland*,[16] the Court took the view that the interception of telephone conversations aimed at monitoring a legal adviser constituted an interference with the applicant's right to respect for "private and family life, home and correspondence", enshrined by Article 8 of the ECHR. Nevertheless, the interference at issue in the particular case did not comply with the requirements of the second paragraph of that provision, i.e. being "prescribed by law" and "necessary in a democratic society" for the achievement of a legitimate aim, as listed by the Convention.[17]

In the opinion of the Court, the insufficient clarity and precision of the national law allowing for phone-tapping meant that the applicant "as a lawyer did not enjoy the minimum degree of protection required by the rule of law in a democratic society".[18] Accordingly, the measure in question violated Article 8, in as much as the Authorities failed to safeguard "the special status of lawyers"[19] and their "central position in the administration of justice as intermediaries between the public and the Courts". [20]

However, it is submitted that the protection of that "special status" does not appear to be dependent on the condition that the legal adviser be a member of the local Bar or Law Society. In *AB v Netherlands* the search and seizure by the prison authorities from a prisoner's cell of correspondence between the applicant and his representative—a former inmate—in proceedings before the Strasbourg organs was incompatible with Article 8. [21] The Court emphasised 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 lawyers."[22]

On occasions, Article 10 ECHR has successfully been invoked to protect the lawyer's right to free speech in the context of judicial proceedings. Cases in which a defence counsel had been the target of libel actions for comments and other statements made before the courts were of particular concern. Nevertheless, the European Court of Human Rights clearly affirmed that the "restriction of defence counsel's freedom of expression can be accepted as necessary in a democratic society"[23] only in exceptional circumstances.[24] In addition, the fact that the applicant was not a member of the local

15 Passmore, 'The future of legal professional privilege', (1999) 3 *International Journal of Evidence and Proof* 71 at 72.

16 Appl. No 23224/94, [1999] 27 EHRR 91.

17 *Id*, para 75.

18 *Ibid.*

19 Appl. No 31611/96, *Nikula v Finland*, [2004] 38 EHRR 45 at para 45.

20 *Ibid.*

21 Appl. No 37328/97, *AB v Netherlands*, [2003] 37 EHRR 48 at para 82-83.

22 *Id*, para 86.

23 *Id*, para 55.

24 *Ibid.*

"Bar" or "law Society" was not considered decisive by the Court for the purpose of granting her the protection enshrined in Article 10(2) of the Convention.[25]

The European Convention of Human Rights therefore affords to legal advisers a high level of protection in order to ensure that they can effectively exercise their function of providing legal advice to the best of their ability.[26] To this end the requirement that communications with their clients be kept secret is considered essential to allow adequate legal representation and assistance and thereby full and effective access to the courts. [27] Legal professional privilege therefore contributes to the efficient administration of justice in a system inspired to rules of adversarial litigation and consistent with Article 6 ECHR.

2.2. Legal professional privilege in the corporate context: are Human Rights standards applicable to undertakings?

The position of both the English courts and the Strasbourg organs indicates that the confidentiality of communications between lawyer and client constitutes an essential element of a "fair trial" within the meaning of Article 6 ECHR. The protection of that confidentiality was also linked to the more general concept of secrecy of correspondence enshrined in Article 8 of the Convention and was regarded as an expression of the "special status" enjoyed by lawyers in a democratic society as intermediaries between the public and the Courts. However, a more general question should perhaps be addressed, namely, to what extent these principles are applicable when the client is not a natural person, but a corporate entity.

In general, the European Court of Human Rights has already recognised that the safeguards provided by the ECHR are applicable to individuals and legal persons alike, that operate in the commercial contexts, in order to protect their rights and freedoms in the exercise of business activities. In the *Niemitz* case[28] the Court took the view that the notion of "private life" could not be restricted "to an 'inner circle' in which the individual may live his own personal life as he chooses",[29] and should also encompass his or her "right to establish and develop relationships with other human beings".

Consequently, it was held:

> "there appears…to be no reason in principle why this understanding of the notion of 'private life' should be taken to exclude activities of a professional or business nature since it is, after all, in the course of their working lives that the majority of people have a significant, if not the greatest, opportunity of developing relationships with the outside world."[30]

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[25] *Id*, para 53.

[26] Hill, 'A problem of privilege: in-house counsel and the attorney-client privilege in the United States and the European Community', (1995) 27 *Case W. Res. J. Int'l L.* 145 at 171.

[27] *Golder v United Kingdom*, Ser. A-No 18, [1979-80] 1 EHRR 524 at para 26.

[28] Appl. No 13710/88, *Niemitz v Germany*, Ser. A No 251-B, [1993] 16 EHRR 17.

[29] *Id*, para 29.

[30] *Ibid.*

Similarly, the Court constructed the concept of "home" as comprising also the applicant's business premises, namely his legal office. In its view, to take any more restrictive view of the scope of the notions of "private life" and "home" would hinder the function of Article 8, which is to protect individuals against the arbitrary interference of the public authorities.[31]

Furthermore, the Convention's safeguards have also been sought in the context of the protection of freedom of commercial speech and expression, including advertising. In *Markt Intern*[32] the Court held that information of a commercial nature could not be excluded from the scope of Article 10, since the latter "does not apply solely to certain types of information or ideas or forms of expression."[33] On the contrary, an active specialised press was regarded as an essential factor in a market economy, in as much as, by ensuring a degree of scrutiny of the [undertaking's] practices by its competitors",[34] it would foster "the openness of business activities".[35] In the later *Casado Coca* judgment,[36] the Strasbourg Court reiterated that Article 10 protected the freedom to impart information of whatever nature, and hence even "information of a commercial nature…and even light music and commercials transmitted by cable".[37]

The Court has therefore adopted a purposive approach in the interpretation of the Convention to ensure that the function of its provisions is not defeated in its essence. Consequently, in judgments such as *Niemitz* and *Markt Intern* it extended the safeguards provided by Article 10 of the ECHR to individuals and legal persons engaged in economic activities, namely to undertakings. However, it should be noted that the authorities of the Contracting States have been allowed a wider margin of appreciation as regards the adoption of restrictive measures on commercial speech, as opposed to the stricter scrutiny to which "interferences" with "political" speech are subjected by the court in Strasbourg.[38]

With respect to legal professional privilege, no ruling has been handed down to date as regards communications between lawyer and a corporate client. However, it is worth noting that the (now defunct) European Commission on Human Rights declared admissible a complaint brought by a Swedish company and concerning the seizure of documents exchanged between the applicant and its lawyers and stored in the office of the law firm.[39] Although the case was settled out of court,[40] the Commission's report

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[31] *Id*, para 31.

[32] *Markt Intern Verlag GmbH and Klaus Bermann v Germany*, judgment of 20 November 1989,Ser. A No 165, [1990] 12 EHRR 161.

[33] *Id*, para. 26.

[34] *Id*, para 35.

[35] *Ibid.*

[36] Appl. No 15450/89, *Casado Coca v Spain*, Ser. A No 285, [1994] 18 EHRR 1.

[37] *Ibid.*

[38] Cf. *Markt Intern Verlag GmbH and Klaus Bermann v Germany*, judgment of 20 November 1989,Ser. A No 165, [1990] 12 EHRR 161 at para 33, 35 and 37 with *Lingens v Austria*, judgment of 8 July 1986, Ser. A No 103, [1986] 8 EHRR 103 at para 41-42.

[39] Appl. No 14369/88, *Noviflora Sweden AB v Sweden*, Commission Decision, [1993] 15 EHRR CD6; para 2(b) and 4.

constitutes a clear indication that the protection of the confidentiality of lawyer-client correspondence enshrined, *inter alia*, in Article 8 ECHR also extends to cases where the client is not a natural person.[41]

It is submitted that this conclusion is compatible with the goal and function of legal professional privilege as it has been protected under the Convention. The public interest clearly requires that undertakings are also guaranteed the right to seek legal advice in order to obtain full and effective access to the courts for the protection of their interests, in accordance with Article 6.[42] Also, the notion of "correspondence" contained in Article 8 is not made subject to any qualification: accordingly, the protection of its secrecy cannot be excluded on the basis of the professional nature of the communications between a legal adviser and his client.[43]

The demands of an efficient administration of justice the "special status" enjoyed by lawyers in a democratic society[44] therefore support the view that lawyer-client confidentiality should be secured regardless of the nature of the "client"—namely, regardless of whether the latter is a natural or legal person—and of the nature of the dispute, i.e. whether the latter is of a criminal, civil or commercial nature.

3. THE PROTECTION OF LEGAL PROFESSIONAL PRIVILEGE IN EC LAW

3.1. The present state of play: 'AM & S v Commission': lawyer-client confidentiality as a "general principle of Community law"

After having considered the notion of legal professional privilege in the context of the protection of human rights both in the context of the European Convention of Human Rights and in that of English law, it is necessary to assess the current standards of protection in the Community legal system. In the well-known *AM & S Europe v Commission* case, the ECJ recognised that, in the absence of an express provision protecting the privilege, the general exception of confidentiality, enshrined, *inter alia*, in Article 287 of the Treaty, could be invoked by the undertakings affected by a competition investigation in order to prevent disclosure of written communications between a lawyer and his client for the purpose of legal assistance. [45]

The Court was mindful of the importance of legal professional privilege as a means to ensuring a fair procedure, by enabling "any person … without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it" .[46] At the same time, however, the Community concept of privilege had to take into account the variance of its scope and of the criteria governing it in each of the

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40 Report of the Commission adopted on 8 July 1993; para 13-16 of the report.

41 *Inter alia*, Riley, 'The ECHR implications of the investigation provisions of the Draft Competition Regulation', (2002) 51 (1) 55 at 68.

42 *Golder v United Kingdom*, Ser. A-No 18, [1979-80] 1 EHRR 524 at para 26. *Supra*, para 1.1.

43 *Inter alia*, appl No 13710/88, *Niemitz v Germany*, Ser. A No 251-B, [1993] 16 EHRR 17 at para 32.

44 *Inter alia*, appl No 31611/96, *Nikula v Finland*, [2004] 38 EHRR 45 at para 45.

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

46 *Ibid.*

Member States, [47] and especially of the differing conceptions of the legal profession itself.[48]

Accordingly the ECJ took the view that the exception of confidentiality could prevent disclosure only of those communications which are made for the purpose of protecting the client's rights of the defence, and emanate from independent counsel, namely, counsel who are not employed by the client, and who are entitled to practice the legal profession in one of the Member States. [49] Despite recognising legal professional privilege in Community law, *AM&S* leaves open several issues as regards its scope. First, the ECJ expressly refers to communications between lawyer and client,[50] and not also to communications with third parties, including expert reports made for the main purpose of litigation.[51] Hence, litigation privilege would not seem to be protected.

Nonetheless, the conditions governing the privilege appear more problematic. The independence of the legal adviser was justified by the Court on the basis of the very nature of the legal profession, and of the role of the counsel as auxiliary to the Courts in the administration of justice, who are "required to provide, in full independence, and in the overriding interests of that cause, such legal assistance as the client needs".[52] In order to fulfil that function, it is necessary that the lawyer be bound by binding rules of professional ethics, whose enforcement is entrusted with institutions endowed with the necessary powers in the general interest.[53] By contrast, in some Member States in-house legal advisers, by reason of their relationship of employment with their "client", are considered as having waived their ethical autonomy, [54] which is considered as a precondition to the privilege. [55]

However, the *AM & S* test, due to its general character, withholds privilege to communications originating from employed counsel who are allowed to be members of the legal profession under the law of Member State where they are authorised to exercise their profession, and are accordingly both subject to the same ethical rules and entitled to the same legal protection as independent counsel. [56] This outcome contrasts also with the Opinion of AG Slynn in *AM & S*, according to which, "provided he is

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[47] *Id*, para 19.

[48] *Id*, para 20.

[49] *Id*, para 21.

[50] *Ibid.*

[51] Pattenden, 'Litigation privilege and expert opinion evidence', (2000) 4 *Int'l J of Ev and Proof* 213.

[52] *Id*, para 24.

[53] *Ibid.*

[54] Daly, 'The cultural ethical and legal challenges in lawyering for a global organization: the role of the general counsel', (1997) 46 *Emory J* 1057 at 1102.

[55] Fennelly, 'Lawyers and employed lawyers: the application of legal professional privilege', (1998) 1 *Irish Bus* 2 at 7.

[56] *Inter alia*, Faull, 'In-house lawyers and legal professional privilege: a problem revisited', (1998) 4 *Colum J of Eur L* 139 at 142.

subject to rules of professional ethics, the salaried lawyer should … be treated in the same way as the lawyer in private practice",[57] *inter alia*, for privilege purposes.

In addition, the role of in-house lawyers has received increasing recognition, in as much as it is believed that, from their "privileged" position within the company, they are "best placed to encourage compliance with the law". [58] Denying the protection of confidentiality to communications emanating from employed counsel is therefore likely to jeopardise that function. It would also appear to hinder the achievement of one of the goals of Regulation No 1/2003, namely to increase the self-compliance with Community competition rules, and especially of Article 81 EC Treaty in a framework where the "safe harbour" of exemptions and, to a more limited extent, of negative clearances is no longer available. [59]

The *AM & S* concept of privilege could also be detrimental to the smooth running of international commercial transactions, and to the overall competitiveness of the business environment within the EU, in as much as it compels undertakings established in non Member States where in-house counsel's communications are privileged, as in the United States of America, to employ an independent local counsel through which advice can be channelled only in order to protect it from disclosure. [60] Accordingly, it could be disputed whether *AM & S* constitutes an adequate response both to the needs of the reformed structure for the application of EC competition law, resulting from the "Modernization" Regulation No 1/2003 and to the changing role of in-house counsel in the present business environment.[61]

2.2. The 'AKZO Nobel' interim order: towards a reformulation of legal professional privilege?

The current position of the ECJ as regards legal professional privilege, by withholding protection to the confidentiality of communications emanating from employed counsel, could hinder the effectiveness of the rights of the defence of the undertakings concerned. It is submitted that this danger would appear well-founded given the increasing importance of in-house counsel in the modern reality of business. Moreover, the features of the globalised economy have called for closer cooperation between the Commission and the US Department of Justice.[62] However, the CFI could tackle these concerns by providing a more extensive definition of LPP.

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[57] Case 155/79, *AM & S Europe Limited v Commission of the European Communities*, [1982] ECR 1575, per AG Slynn at p 1611.

[58] Faull, 'In-house lawyers and legal professional privilege: a problem revisited', (1998) 4 *Colum J of Eur L* 139 at 140.

[59] Power, 'Representing clients after the Modernisation of EC Competition law', (2003) 14 *ICCLR* 335 at 336.

[60] Daly, 'The cultural ethical and legal challenges in lawyering for a global organization: the role of the general counsel', (1997) 46 *Emory L J* 1057 at 1108.

[61] *Id*, p 1058.

[62] *Inter alia*, Lambert, 'Parallel Antitrust investigations: the long arm of the DOJ from the perspective of an EU defense counsel', (2002) 14 *Loy Consumer L Rev* 509 at 514-515.

Relying on the rationale of *AM & S,* according to which the scope of legal professional privilege is linked to the lawyers' obedience to binding rules of professional ethics[63] aimed at ensuring that they "provide independent legal advice"[64] in the interest of the administration of justice, the President of the CFI considered in the recent *AKZO Nobel and Ackros Chemicals*[65] interim application whether written communications between the second applicant and a member of the legal department of the first applicant could be covered by legal professional privilege, the adviser being

> "a member of the Netherlands Bar, subject to professional obligations as regards independence and respect for the rules of the Bar comparable to those of an external lawyer".[66]

The applicants had pointed to the "numerous changes in the professional rules of the Member States … tending … to extend the cover of professional privilege to the activities of certain in-house lawyers".[67] The President noted that, on the basis of the evidence before the Court,

> "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.".[68]

Accordingly, it was concluded that the pleas presented by the applicants and the interveners were:

> "not wholly unfounded and … 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 to rules of professional conduct equivalent to those imposed on an independent lawyer."[69]

Although the order in *AKZO Nobel* may be seen as merely a "modest procedural victory for the applicants",[70] it demonstrates the existence of significant momentum for a future redefinition of LPP. The reasoning of President Vesterdorf suggests that the scope of professional privilege should be defined solely on the basis of the allegiance on the part of the lawyer to binding rules of ethics. The approach envisaged by the

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63 Faull, 'In-house lawyers and legal professional privilege: a problem revisited', (1998) 4 *Colum J of Eur L* 139 at 142.

64 *Ibid.*

65 Case T-125/03, *AKZO Nobel Chemicals Ltd and Ackros Chemicals Ltd v Commission* [2003] ECR II-4771.

66 *Id*, para 80.

67 *Ibid.*

68 *Id*, para 126.

69 *Id*, para 127.

70 Murphy, 'CFI signals possible extension of professional privilege to in-house lawyers', (2004) 25 *ECLR* 447 at 453.

order could bring evident benefits, first of all, in terms of effective compliance with competition law. In fact, it would prevent disclosure of communications provided by employed counsel in the course of the legal self-assessment of practices giving rise to *prima facie* anti-competitive concerns.

Furthermore, the suggested definition would improve legal certainty across the EU, in as much as it would ensure that communications will not be disclosed if they originate from counsel bound by rules of ethics in the country in which he or she is authorised to practice, regardless of the existence of a link of employment with the client.[71] As a result, the in-house counsel could effectively exercise his or her function as a "facilitator" in achieving autonomous compliance with the law.

The fact that the ECJ annulled the CFI interim order[72] should not be interpreted as too much of a blow on the expectations for a reformulation of the privilege: the Court, far from addressing the substantive issues of the protection of lawyer-client confidentiality,[73] quashed the order on the ground that it did not satisfy the condition of urgency,[74] thus leaving open the substantive question as to the definition of privilege.

It could be queried whether additional support for a reformulation of the privilege could be gathered from the case law of the European Court of Human Rights.[75] Its recent judgments in fact seem to focus on the pivotal role of the legal adviser as an intermediary between the public and the courts[76] and on the need to ensure a practical and effective right to a "fair trial".[77] It is thus suggested that allegiance to the national Bar or Law Society does not seem to be considered by the Strasbourg court as an essential condition for the protection of the "special status" conferred to the lawyer in a democratic society.[78]

However, the Strasbourg court appears to have adopted a view of the legal profession as exercising auxiliary function to the administration of justice exercised before the courts, which therefore requires the existence and the enforcement of rules of professional conduct by independent bodies in the public interest. It was held in *Casado Coca v Spain* that, "such a position explains the usual restrictions on the conduct of members of the Bar and also the monitoring and supervisory powers vested in Bar councils."[79]

Indeed, later developments seem to have relaxed this position, at least to some degree. The Court held in *Nikula v Finland* that the primary duty of counsel should be "to

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71 *Id*, p 454.

72 Case C-7/04 P (R), *Commission v AKZO Nobel and Ackros Chemicals*, order of 27 September 2004, [2004] 5 CMLR 24.

73 *Id*, para 29.

74 *Id*, para 44.

75 *Supra*, para 1.

76 *Inter alia,* appl No 31611/96, *Nikula v Finland*, [2004] 38 EHRR 45 at para 45.

77 *Inter alia*, appl 12629/87, *S v Switzerland*, judgment of 28 November 1991, [1992] 14 EHRR 670 at para 48.

78 Appl No 31611/96, *Nikula v Finland*, [2004] 38 EHRR 45 at para 55.

79 Appl No 15450/89, *Casado Coca v Spain*, Ser. A No 285, [1994] 18 EHRR 1 at para 54.

defend their clients' interests zealously".[80] Accordingly, their "special status" and particularly their freedom of expression in the court room, should be protected in any case, regardless of the circumstance that they are not members of the local Bar or Law society.[81]

In reaching those conclusions, the Strasbourg court regarded as relevant the fact that, although the applicant was not subject to the disciplinary powers of the Bar Council, she was nevertheless subject to the supervision of the trial court.[82] The *Nikula* judgment seems therefore to suggest that, although allegiance to the national Bar or Law Society is not considered as an essential condition for the protection of his or her "special status", a certain degree of control should nonetheless be exercised on the lawyer to ensure the integrity of his or her function as auxiliary to the proper administration of justice.[83]

Having regard to the position of employed legal advisers, it could be argued that, since they are not subject to supervisory bodies in all the Member States, that requirement of control supposedly envisaged by the European Court of Human Rights is not met. At the same time, however, the role of in-house counsel has received, as the *AKZO Nobel*[84] interim order itself demonstrates, increasing recognition which has gained them admission to the local Bar in some of the EU states. As it was held by the President of the CFI, the current developments of the national laws of the Member States support the view that a link of employment may not always exclude the independence required for the function of counsel to be fulfilled.[85]

Accordingly, it cannot be excluded that the "special status" of lawyers in a democratic society, so strongly advocated by the European Court of Human Rights, cannot attach to an employed legal adviser, provided that, as it was suggested by the CFI order, the latter is "subject to strict rules of professional conduct, which where necessary require that he observe the particular duties commensurate with his status."[86]

It is submitted that in *Nikula* the European Court on Human Rights appears to have taken the view that an individual will enjoy the protections enshrined in the "special status" of lawyer, including LPP, provided that he or she is acing as an "advocate" in defence of the accused and is subject to the supervision of a court.

It may therefore be concluded that the case law of the Strasbourg organs could be read as to suggest that the *AM & S* test should perhaps be replaced with a more flexible set of conditions allowing for a consideration of whether, in the particular circumstances of the case, the lawyer, notwithstanding his or her relation of employment with the client, is subject to binding rules which preserve his integrity and independence.

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[80] Appl No 31611/96, *Nikula v Finland*, [2004] 38 EHRR 45 at para 54.

[81] *Id*, para 55.

[82] *Id*, para 53.

[83] *Id*, para 45.

[84] Case T-125/03, *AKZO Nobel Chemicals Ltd and Ackros Chemicals Ltd v Commission*, [2003] ECR II-4771.

[85] *Id*, para 80.

[86] *Id*, para 126.

4. THE EUROPEAN COMPETITION NETWORK: WHAT FUTURE FOR THE PROTECTION OF LEGAL PROFESSIONAL PRIVILEGE?

4.1. Preliminary remarks

The argument in support of the reformulation of a wider notion of legal professional privilege in Community law becomes extremely compelling in the context of the decentralised enforcement of EC competition law introduced by Regulation 1/2003.[87] The abolition of the notification procedure has forced the undertakings to rely increasingly on self-assessment of their practices and therefore has called for a more proactive role of the legal advisers than in the past.[88] It is therefore submitted that those communications should be adequately shielded from disclosure to both the Commission and the national competition authorities[89] (hereinafter referred to as NCAs).

However, a significant threat to the confidentiality of lawyer-client communications is posed by the creation of the European Competition Network and in particular from the provision for the exchange of information between the Commission and the NCAs and among the national authorities themselves, due to, first of all, the lack of a common definition of privilege across the EU, and, second, to the absence in Regulation 1/2003 of any rule governing the use in evidence of the information obtained as a result of that exchange. Accordingly, after having examined the scope of Article 12 of the Modernization Regulation, the impact of that provision on the protection of transferred privileged communications will be assessed with reference especially to the position of the Office of Fair Trading.

4.2. Article 12 of Regulation 1/2003: the use in evidence of information exchanged between the Commission and the National Competition Authorities

The exchange of information within the European Competition Network was regarded by the Council as an essential factor to ensure that the Commission and the NCAs apply "the Community competition rules in close cooperation".[90] In this respect, the Commission viewed the "power of all the competition authorities to exchange and use information…collected by them for the purpose of applying Article 81 or Article 82" as a "precondition for efficient and effective allocation and handling of cases."[91]

Accordingly, Article 12(1) of Regulation 1 authorises, "the Commission and the competition authorities of the Member States … to provide one another with and use in evidence any matter of facts or of law, including confidential information" in proceedings enforcing Articles 81 and 82 EC Treaty. Paragraph 2 further establishes that evidence so obtained can be deployed as evidence only "for the purpose of

87 Para 12.

88 Power, 'Representing clients after the Modernisation of EC Competition law', (2003) 14 *ICCLR* 335 at 336.

89 *Id*, p 337. Also, *infra*, para 4.1.

90 Recital XV of the Preamble to Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003, L1/1.

91 Para 26 of the Commission Notice on cooperation within the Network of Competition Authorities, OJ 2004, C101/43.

applying Article 81 or Article 82 of the Treaty and in respect of the subject matter for which it was collected by the transmitting authority". An exception to that rule is provided by paragraph 3, according to which exchanged information may be used by the receiving Authority in order to enforce national competition law when the latter is applied in parallel with the Community rules and does not "lead to a different outcome."

Article 12, even though it "creates a legal basis for the exchange of any information within the network",[92] does not provide any rule governing the use of the evidence so obtained. In particular, it is not clear whether the receiving NCA could use in evidence information obtained as a result of the application of Article 12 which it could not have collected itself, because that information was protected from disclosure during the competition investigations. On the point, the Commission stated in its "Network Notice"[93] that "the question whether information was gathered in a legal manner by the transmitting authority is governed on the basis of the law applicable to this authority."[94]

The position of the Commission seems therefore to support the view that, once the information has been lawfully gathered by the transmitting authority, and constituted admissible evidence in its jurisdiction, then the receiving authority should be empowered to deploy it in the course of its own proceedings, although the rules applicable in the latter's jurisdiction may differ, and especially may be more protective as regards the question of the admissibility of that information as evidence.

This interpretation of Article 12 was justified by the Commission on the basis of the "equivalent protection"[95] granted by the Member States to the rights of defence of the undertakings and of the safeguards contained in Regulation 1/2003, and in particular of the rule preventing that evidence from being relied upon to impose custodial sanctions on individuals.[96] Nevertheless it could be argued that the suggested approach may result in exposing the undertakings concerned to a considerable amount of uncertainty as to the use of evidence collected in competition investigations against them, given the differing standards for the protection of confidentiality applicable across the Union.[97]

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92 Van der Woude, 'Exchange of information within the European Competition Network: scope and limits', in Ehlermann and Atanasiu (eds), *European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities*, Oxford, Hart Publishing, 2003, 369 at 378. Cf. Case C-67/91, *Direccion General de la Defensa de la Competencia v Asociacion Espanola de Banca Privada and others*, [1992] ECR I-4785 at para 41; for commentary, *inter alia*, Willis, 'Transfer of information between authorities in the modernised network', (2004) 2(4) *Competition Law Journal* 310 at 319.

93 Commission Notice on cooperation within the Network of Competition Authorities, OJ 2004, C101/43.

94 Para 26.

95 Recital XVI of the Preamble to the Council Regulation 1 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003, L1/1.

96 Wils, 'The EU Network of Competition Authorities, the European Convention on Human Rights and the Charter of Fundamental Rights of the EU', in Ehlermann and Atanasiu (eds), *European Competition Law Annual 2002: Constructing the EU Network of Competition Authorities*, Oxford, Hart Publishing, 2003, 433 at 457-458.

97 Van Der Woude, 'Exchange of information within the European Competition Network: scope and limits', in Ehlermann and Atanasiu, op cit (n 92), p 369 at 384.

In this respect, the limits provided by Article 12 would not seem sufficient to redress the balance between the NCAs and the investigated undertakings, in as much as the latter would still be exposed to proceedings and the consequent threat of fines in a different jurisdiction. It is therefore submitted that the "criminal nature" of some of the essential features of competition proceedings and the deterrent character of the financial penalties threatened for infringements of Articles 81 and 82 EC Treaty,[98] can justify "higher standards" for the protection of confidentiality. In particular, it should be avoided that the exchange of information allowed under Regulation 1/2003 be "used as a tool to circumvent procedural safeguards"[99] available under national law.

4.3. Exchange of information and the protection of legal professional privilege

The issues arising from the varying procedural standards and rules governing the exclusion of evidence in the various Member States become all the more relevant with respect to the protection of confidentiality of lawyer-client communications, the boundaries of which may vary significantly across the Member States.

On the point, the President of the CFI observed extra-judicially that Article 12 appears to have been intended by the Council as allowing information to be deployed against the investigated undertakings "even if it has been collected under rules which are less protective than those of the Commission or the receiving NCA", [100] subject only to the limits established by Article 12(3) for the protection of individuals. Therefore, it could have unpleasant consequences for undertakings, since it would permit national competition authorities, or indeed the Commission itself, to use evidence "collected … under a specific standard of LPP"[101] although the law applicable in their jurisdiction grants higher protection to it.

The application of Article 12 to confidential communications containing legal advice is likely to lead to worrying results particularly with respect to correspondence exchanged between an undertaking and its in-house counsel, whose secrecy is protected only in some Member States. According to the updated Report produced by the Council of the Bars and Law Societies of the European Union (hereinafter referred to as the "CCBE Report"),[102] communications emanating from in-house counsel are protected against disclosure only in England and Wales[103]—although the question is still disputed in

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[98] Appl No 11598/85, *Stenuit v France*, Commission Report, [1992] ECC 401 at para 57. Cf. also, *mutatis mutandis*, appl No 37971/97, *Stes Colas Est and others v France*, judgment of 16 April 2002 (HUDOC Ref. No 00003563), [2002]-III Reports of Judgments and Decisions; [2004] 39 EHRR 17.

[99] Van Der Woude, 'Exchange of information within the European Competition Network: scope and limits', in Ehlermann and Atanasiu, op cit (n 92), p 369 at 385.

[100] Vesterdorf, 'Legal Professional Privilege and the Privilege against self-incrimination in EC Law: recent developments and current issues', (2004) Fordham Corporate Law Institute, *XXXI Annual Conference on International Antitrust Law and Policy,* p 19.

[101] *Id*, p 20.

[102] CCBE, *Regulated legal professionals and professional privilege within the European Union, the European Economic Area and Switzerland, and certain other European jurisdictions* — John Fish (February 2004), available at: http://www.ccbe.org/en/comites/in_house_en.htm

[103] *Id*, p 48.

Scotland[104] and is subject to the verification on the part of the court of an adequate professional qualification by the courts of Northern Ireland[105]—and in Ireland.[106]

Other countries, such as the Netherlands,[107] Portugal[108] and Spain,[109] allow salaried legal professionals to become members of the national Bar, sometimes subject to an undertaking given by both the lawyer and its employer that the independence of the former will be maintained. As a result of their admission to the Bar, they are therefore treated as "regulated legal professionals" for the purpose of privilege. However, in Germany[110] privilege has not been acknowledged to communications emanating from a salaried legal professional, when the latter acts for his employer in the context of the employment relationship, although the issue is still widely debated.[111]

This superficial overview demonstrates that the protection of confidentiality of lawyer-client communication remains uneven across the European Union.[112] As a result, there exists a real danger that Article 12 could be deployed by the National Competition Authorities, or indeed by the Commission itself to defeat higher standards of legal professional privilege in their own jurisdiction. The position of the Office of Fair Trading supports that conclusion. According to the OFT *Guidelines governing powers of investigation*,[113]

> "Whilst UK privilege rules would apply to cases being investigated in the UK by the OFT on its own behalf under national and EC law, the OFT could be sent the communications of in-house lawyers by a NCA from another Member State where the communication of in-house lawyers are not privileged. Under those circumstances, the OFT may use the documentation received from the other NCA in its investigation."[114]

Consequently, if the Commission, or a NCA in whose jurisdiction that material is not shielded against disclosure, were to transmit communications between an investigated undertakings and its in-house counsel to the OFT, the latter would still be able to deploy that evidence in the proceedings, regardless of the higher degree of protection afforded in its jurisdiction to lawyer-client confidentiality.

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[104] *Id*, p 51.

[105] *Id,* pp 52-53.

[106] *Id*, pp 33-34.

[107] *Id.* p 39.

[108] *Id*, p 42.

[109] *Id*, p 44.

[110] *Id*, p 28.

[111] *Id* p 29.

[112] *Inter alia,* Burnside and Crossley, '*AM & S, AKZO* and beyond: legal professional privilege in the wake of Modernisation', paper presented at the 2005 IBA Conference: "Antitrust Reform in Europe: a year in practice" (5th roundtable: 'Due process in the face of divergent national procedures and sanctions'), held in Brussels, March 9-11. Available at: http://www.ibanet.org/images/downloads/A04824516v1.IBA_burnside_crossley.pdf.

[113] Office of Fair Trading, *Powers of Investigation,* Draft competition law guidelines for consultation, April 2004, OFT 404a.

[114] Para 6.3.

The *Guidelines* of the Office of Fair Trading, despite appearing justified by the need to ensure the "useful effect" of the provisions of Regulation 1/2003,[115] raise significant concerns as to the effectiveness of the right to a "fair trial" and to a "fair procedure" of the undertakings concerned in proceedings for the application of Articles 81 and 82 of the EC Treaty.

On that point, it was argued that in the context of the decentralised enforcement of EC competition rules, the NCAs "will be obliged to respect at least the Community law standard, pursuant to the *Wachauf* case law", [116] according to which the standards laid down by the general principles of EC law as regards the protection of fundamental rights are binding on Member States when implementing rules of Community law.[117] The consequences arising from the application of Article 12 in the manner envisaged by the OFT to in-house counsel's communications would however appear to remain within the boundaries of the existing case law of the ECJ as regards Privilege. [118]

In addition, the position expressed by both the Commission in the "Network Notice" and the Office of Fair Trading in its *Guidelines* could be justified on the grounds that, once undertakings are aware of the fact that communications with their in-house counsel are not protected in the jurisdiction where they have been or are likely to be collected, they should not be entitled to expect that, in the event of documents being transmitted to another NCA, the higher standards for the protection of privilege available in the receiving authority's jurisdiction would apply.

However, it is submitted that this argument seems misconceived, since it appears to disregard the circumstance that to allow that use of the exchanged evidence would place the undertakings concerned at a significant disadvantage vis-à-vis other firms affected by competition proceedings before the receiving NCA the evidence against which was not located outside the authority's jurisdiction. Whereas the latter could successfully claim privilege on communications with their legal adviser, the former would not be able to do so, although proceedings are carried out in the same jurisdiction and by the same NCA, and therefore the position of the two groups of undertakings can be considered comparable. [119] Accordingly, it could be argued that this hypothetical scenario would constitute a violation of the right against discrimination in the enjoyment of fundamental rights to privacy and fair procedure as enshrined, *inter alia*, in, respectively, Articles 6, 8 and 14 of the ECHR.[120]

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[115] Bloom, 'Exchange of confidential information among members of the EU network of competition authorities', in Ehlermann and Atanasiu, op cit (n 92), 389 at 399.

[116] Lage and Brokelmann, 'The possible consequences of a relatively broad scope for exchange of confidential information on national procedural law and Antitrust sanctions', in Ehlermann and Atanasiu, op cit (n 92), 405 at 416.

[117] Case 5//88, *Wachauf v Bundesamt fur Ernahrung und Fortwirtschaft*, [1989] ECR 2609 at para 19.

[118] Case 155/79, *AM & S Europe Limited v Commission of the European Communities*, [1982] ECR 1575 at para 21.

[119] Cf., *inter alia*, *Fredin v Sweden*, judgment of 18 February 1991, Ser. A-No 192, [1991] 13 EHRR 784.

[120] *Inter alia* (*mutatis mutandis*), *Belgian Linguistics Case*, judgment of 23 July 1968, Ser. A-No 6, [1979-80] 1 EHRR 252, sect. I B, para 9.

It is submitted that it is open to question whether reasons of expediency in the conduct of investigations could constitute a "legitimate aim" capable of justifying the differential treatment of the communications between the lawyer and the client-undertaking as it would result from the application of Article 12 of Regulation 1/2003.[121] Also, it is disputable whether the restriction of the protection of the privileged nature of that correspondence would be proportionate to the aim pursued—if any such aim can indeed be found—in as much as the restriction would in effect result in thwarting the protection of the legal professional privilege as guaranteed by the national law of the receiving jurisdiction.[122]

The provision for the exchange and the use in evidence of information among the members of the European Competition Network therefore appears to raise serious questions as regards its conformity with general principles of Community law, and especially with the right to non-discrimination on grounds of nationality enjoyed by the undertakings established in any of the Member States. In addition, withholding the higher standards of protection of legal professional privilege provided by the domestic laws of some Member States could hinder the attainment of the self-compliance with competition law by undertakings, in as much as it could jeopardise the role of the legal adviser in assessing the legality of their market practices.[123]

However, it could be wondered whether, were the case to come before the Court today, *AM & S* would have been decided in the same way. As *AKZO Nobel* suggests, the laws of some Member States have shown increasing consideration for the role and purpose of the in-house counsel, and accordingly have accepted that legal professional privilege could attach to communications emanating from employed lawyers who are allowed to become members of the local Bar. [124]

It is respectfully suggested that, although no decision has been adopted on the point, additional support for a construction of privilege capable of embracing communications with employed counsel could be gathered from the principles laid down by the European Court of Human Rights as regards the protection of the "special status of lawyers"[125] in the interest of both the sound administration of justice and the right of individuals and undertakings to receive legal advice and assistance, in accordance with Article 6 of the Convention.

The position adopted by the Strasbourg Court would appear to suggest that the allegiance of the legal advisers to their national "Bar" is not an essential precondition for the protection of that "special status" and, therefore, of the secrecy of their

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[121] Cf., *mutatis mutandis*, *id*, para 10.

[122] Cf., *mutatis mutandis*, *inter alia*, *Lithgow and others v United Kingdom*, judgment of 8 July 1986, Ser. A-No 291-B, [1994] EHRR 329 at para 177.

[123] *Supra*, para 2.1. *Inter alia*, Faull, "In-house lawyers and legal professional privilege: a problem revisited', (1998) 4 *Colum J of Eur L* 139 at 140.

[124] Case T-125/03, *AKZO Nobel Chemicals Ltd and Ackros Chemicals Ltd v Commission*, [2003] ECR II-4771 at para 80.

[125] Appl No 31611/96, *Nikula v Finland*, [2004] 38 EHRR 45 at para 45.

communications with clients.[126] Henceforth, it is submitted that the interpretation of Article 12 of Regulation 1/2003 envisaged by the Office of Fair Trading, despite appearing consistent with that suggested by the Commission in its Network Notice[127] would not secure a degree of protection of privilege equivalent to that required by the "special status" conferred to lawyers by the European Court of Human Rights. [128]

5. MODERNIZATION AND LAWYER-CLIENT CONFIDENTIALITY: IN SEARCH OF A COMMON SOLUTION?

5.1. An alternative solution to 'AM & S': proposals from overseas

It is submitted that the analysis of the impact of Article 12 of the Modernization Regulation on the circulation and use in evidence of information covered by lawyer-client confidentiality raises serious issues as to the fairness of the proceedings before the receiving NCA, and highlights a clear risk that the protection of legal professional privilege may be "watered down", to the detriment of the right of the undertaking concerned to receive effective legal assistance. The root cause of that risk seems to lie in the lack of a harmonized notion of privilege across the Member States.

The forthcoming judgment in the *AKZO Nobel* case therefore constitutes an invaluable "window of opportunity" for the reformulation of a EU notion of privilege which would take account of the developments of the laws of the Member States on the issue, and which could become applicable to all proceedings for the application of Articles 81-82 EC Treaty, before both the Commission and the NCAs, in accordance with the *Wachauf* principle.[129] What is not clear is which solution will be adopted by the CFI. A test similar to that of *AM & S*, based on a "common notion" of privilege drawn from the relevant national rules in force across the Member States, and suggested also by the wording of the interim order is by no means the only option available, as the US legal experience suggests.

In *Renfield v Remy Martin*,[130] the Delaware District Court had to decide "whether the privilege is available to protect the secrecy of communications emanating from a French "in-house counsel".[131] The plaintiff had relied on the fact that in France, unlike the United States, no such communication would be protected, since an employed lawyer could not be a member of the legal profession.[132] However, the Court took the different view that, since "the organization of the French legal profession is unlike that in the United States",[133] the criterion of "membership in a "bar"[134] was not decisive.

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126 Appl No 37328/97, *AB v Netherlands*, [2003] 37 EHRR 48 at para 86.

127 Commission Notice on cooperation within the Network of Competition Authorities, OJ 2004, C101/43 at para 26.

128 Appl No 31611/96, *Nikula v Finland*, [2004] 38 EHRR 45 at para 45.

129 Case 5//88, *Wachauf v Bundesamt fur Ernahrung und Fortwirtschaft*, [1989] ECR 2609 at para 19. *Supra*, para 3.3.

130 *Renfield Corp and Renfield Importers, Ltd v E. Remy Martin & Co, SA, Remy Martin Amerique Inc, Glenmore Distilleries Co and Foreign Vintages Inc*, US District Court, D. Delaware, (1982) 98 FRD 442.

131 *Id*, para 2.

132 *Ibid.*

133 *Ibid.*

Consequently, it was stated that "the requirement is a functional one of whether the individual is competent to render legal advice and is permitted by the law to do so",[135] and concluded that the communications in question should be privileged:

> "French 'in-house counsel' certainly meet this test; like their American counterparts, they have legal training and are employed to give legal advice to corporate officials on matters of legal significance to the corporation." [136]

The test laid down in *Renfield*, by resting on the question "whether the individual is competent to render legal advice and is permitted by law to do so",[137] represents a reasonable and balanced alternative to the *AM & S* test. In its context, the admission to a "bar", far from being the decisive element of the test, as implied in *AM & S*, constitutes "just one of the elements to be weighed up in deciding whether the communication involves legal advice"[138] for privilege purposes. It would therefore have the advantage of not requiring total convergence of the legal systems of the various Member States as regards the admission of in-house counsel to the legal profession, and would take into account the circumstance that in the reality of business, "a link of employment may not always exclude independence".[139]

Accordingly, it is submitted that a uniform approach to the definition of Legal Professional Privilege similar to that adopted by the Delaware District Court could constitute an adequate response to the characteristics of the framework for the enforcement of Articles 81 and 82 EC Treaty. As a result of the mutual recognition brought about by the Directives on the free movement of legal professionals,[140] a lawyer qualified to provide legal services in one Member State would not have difficulty in meeting the conditions laid down by the judgment of the Delaware District Court, i.e. that counsel be skilled to provide legal advice and be authorised by the law to do so. [141]

Those requirements would also appear to be sufficiently flexible to protect the confidentiality of lawyer-client communications in the context of the decentralised application of EC competition law. Particularly, in the event of documents being

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[134] *Ibid.*

[135] *Ibid.*

[136] *Ibid.*

[137] Joshua, 'Privilege in multi-jurisdictional cartel investigations: are European courts missing the point?', (2004) 7 *Global Comp Review* 39 at 40.

[138] *Ibid.*

[139] *Id*, p 41.

[140] Council Directive 77/249 of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, OJ 1977, L78/17; Directive 98/5 of the European Parliament and of the Council of 16 February 1998 to facilitate the practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, OJ 1998, L77/36. Cf. Case 155/79, *AM & S Europe Limited v Commission of the European Communities*, [1982] ECR 1575 at para 26. For commentary, *inter alia*, Fennelly, 'Lawyers and employed lawyers: the Application of Legal Professional privilege', (1998) 1 *Irish Bus L* 2.

[141] *Renfield Corp and Renfield Importers, Ltd v E. Remy Martin & Co, SA, Remy Martin Amerique Inc, Glenmore Distilleries Co and Foreign Vintages Inc*, US District Court, D. Delaware, (1982) 98 FRD 442 at para 2.

exchanged in accordance with Article 12 of Regulation 1/2003, the legal adviser would be able to resist successfully the disclosure of his or her communications with the client in proceedings before the receiving NCA. In addition, the concerned undertaking could foresee the consequences of the transmission of information in the context of the network and to benefit from the more extensive level of protection available under national law of the collecting authority. [142]

Nevertheless, it may be argued that the application of a "functional" test could give rise to legal uncertainty as regards the boundaries of privilege. Admittedly, one of the positive features of *AM & S* is that its outcome is fairly predictable: legal professional privilege will not be recognised of the documents relate to legal advice emanating from employed counsel. It was suggested that, due to his role within the corporate structure of the undertaking, it could sometimes be difficult to distinguish between legal and business advice given by an employed lawyer. [143]

On that point, it is respectfully objected that drawing that distinction would appear to be already required by the *A M & S* judgment. In fact, in order to determine whether lawyer-client communications should be privileged, it is necessary to assess whether they have been "made for the purposes and in the interests of the client's rights of defence". [144] Business advice would not therefore appear to fulfil that condition.

However, it is submitted that the actual crux of the *Renfield* set of conditions lies in its failure to address the issue of how to protect the ethical integrity and the independence of counsel, which ensure that legal advice and assistance can be given in the interest of the proper administration of justice. In particular, the test, by not regarding allegiance to the local Bar as a decisive condition for the protection of the privilege, does not solve the problem of how to ensure that appropriate ethical standards are enforced on the employed legal adviser in the public interest, especially so as to avoid that lawyer-client confidentiality may be used as a "shield" to withhold disclosure of evidence of episodes of corporate malpractice.

The issue emerged prominently in the United States of America as a result of the ENRON scandal, and prompted the adoption by Congress of the Sarbanes-Oxley Act.[145] Section 307 of the Act imposes on corporate lawyers the duty to report evidence of certain forms of corporate misconduct committed by directors to "the chief legal counsellor" or the chief executive officer of the company, and, if no appropriate

[142] Joshua, 'Privilege in multi-jurisdictional cartel investigations: are European courts missing the point?', (2004) 7 *Global Comp Review* 39 at 41. Cf. Vesterdorf, 'Legal Professional Privilege and the Privilege against self-incrimination in EC Law: recent developments and current issues', (2004) Fordham Corporate Law Institute, *XXXI Annual Conference on International Antitrust Law and Policy,* p 20.

[143] Cohen, 'In-house counsel and the attorney-client principle: how Sarbanes-Oxley misses the point', (2004) 9 *Stanford Journal of Law, Business and Finance* 297 at 317.

[144] Case 155/79, *AM & S Europe Limited v Commission of the European Communities*, [1982] ECR 1575 at para 21.

[145] For commentary, *inter alia*, 'Developments in the Law—Corporations and Society: IV. Lawyer conduct and corporate misconduct', (2004) 117 *Harvard Law Review* 2227.

measures are taken on the basis of that evidence, to the audit committee of the board of directors of the company.[146]

Although it could be queried whether a similar obligation should be imposed on European in-house counsel, once they are granted the benefit of Legal Professional Privilege, it is submitted that the introduction of a rule similar to section 307 in the EU context would not be viable or indeed necessary to reinforce the counsel's observance of appropriate rules of professional conduct. In fact, privilege will not attach to advice aimed at aiding the commission of criminal acts.[147] Therefore, the general crime-fraud exception, inherent to the essence and function of the privilege, could allow for the disclosure of those communication and ultimately for the reporting of evidence of episodes of corporate misfeasance.[148]

It was argued that as a result of the Sarbanes Oxley Act, US in-house lawyers are now required to assume the role of "corporate gatekeepers"[149] in order to avoid the commission of serious forms of corporate fraud by public companies' managers. Commentators defined Section 307 as "clear and necessary legislative authority … that corporate lawyers are not to act as facilitators and legalistic justifiers of managerial schemes that violate legal or fiduciary duties."[150] However, the peculiar characteristics of the role of employed counsel, and especially his economic dependence on the single client threaten the efficacy of the reporting duty as a means to secure his allegiance to rules of professional conduct. As Cohen put it,

> "ultimately the lawyer will weigh his own ethics against possibilities of being fired or professionally black-listed. The deterrent on both sides is the loss of livelihood. While we hope lawyers will choose ethics over the possibilities being caught, the likelihood of this result is slim at best."[151]

In substance, the effectiveness of the obligation introduced by Section 307 can be seriously questioned first, because the adoption of any measure aimed at investigating the evidence and, if the allegations are well-founded, at pursuing those responsible for the instance of malpractice would always be dependent on the action of officers of the corporation; and second, because the inherent economic dependence of the counsel on his client-employer may act as a deterrent to reporting, due to perceived risk of the possible loss of employment.

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146 Cohen, 'In-house counsel and the attorney-client principle: how Sarbanes-Oxley misses the point', (2004) 9 *Stanford Journal of Law, Business and Finance* 297 at 308-309.

147 *Inter alia*, Maher, 'Professional privilege — Without prejudice letters and statutory inroads on the common law', (1990) 35(3) *Journal of the Law Society of Scotland* 108 at 110.

148 Hill, 'A problem of privilege: in-house counsel and the attorney-client privilege in the United States and the European Community', (1995) 27 *Case W Res J of Int'l L* 145 at 191.

149 *Id,* p 308.

150 Konstant, 'Sarbanes-Oxley and changing the norms of corporate lawyering', (2004) *Michigan State Law Review* 541 at 558.

151 Cohen, 'In-house counsel and the attorney-client principle: how Sarbanes-Oxley misses the point', (2004) 9 *Stanford Journal of Law, Business and Finance* 297 at 318.

5.2. Predicting the outcome of 'AKZO Nobel': tentative conclusions

The implementation of the Modernization Regulation on Competition enforcement raises pressing procedural issues which cannot be overlooked. The lack of harmonization of procedural and evidential rules, and especially of a uniform notion of legal professional privilege, is likely to play havoc with legal certainty and to undermine the effectiveness of the right of the investigated undertakings to be subjected to a "fair procedure" both at Community and at national level. That problem is made even more difficult to ignore by the incorporation of the EU Charter of Fundamental Rights in the Constitutional Treaty, especially in as much as, according to Article 52(3), the European Convention on Human Rights will become the "minimum standard" of protection of those rights which are common to both instruments. [152]

The forthcoming developments of the case law of the CFI therefore offer a tremendous opportunity to meet the concerns arising from the provisions on the exchange of confidential information within the European Competition Network: the *AKZO Nobel* order, suggests that perhaps momentum exists for a reformulation of the Community concept of legal professional privilege as to include communications with employed counsel. In this respect, it could be argued that a "functional test" akin to the one laid down in *Renfield*, would constitute a solution capable of meeting the concerns raised by the application of the Modernization Regulation, in as much as it would allow for the extension of privilege to communications emanating from employed counsel in most cases, regardless of the absence of a common ground on the issue across the Member States. [153]

However, and as the CFI interim order indeed suggests, before the protection of the confidentiality can be granted to documents originated from employed legal advisers, it is necessary to ensure that the latter are subject to a degree of control as to their ethical integrity, by means of the enforcement of binding professional rules in the public interest. [154] Accordingly, it appears likely that in-house counsel will benefit from privilege subject to the condition that they be allowed membership to their local professional bodies competent for the application of those ethical rules. [155]

The adoption of a similar approach would have far-reaching consequences, in as much as it would then be for the Member States to decide whether or not to allow in-house counsel to be admitted to the national Bar or Law Society. Nevertheless, it is submitted that, given the resistance with which similar proposals have been met with in some Member States, the solution envisaged in the interim order could perhaps increase the

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[152] Lemmens, 'The relation between the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights — substantive aspects', (2001) 8 *Maastricht J of Eur and Comp L* 49 at 51.

[153] Joshua, 'Privilege in multi-jurisdictional cartel investigations: are European courts missing the point?', (2004) 7 *Global Comp Review* 39 at 41.

[154] Case T-125/03, *AKZO Nobel Chemicals Ltd and Ackros Chemicals Ltd v Commission*, [2003] ECR II-4771 at para 127.

[155] *Inter alia*, appl No 15450/89, *Casado Coca v Spain*, Ser. A No 285, [1994] 18 EHRR 1 at para 54.

fragmentation in the protection of privilege, at least until such time as more convergence is reached on the issue.

In substance, although moving away from the "independence" requirement established in *A M & S* could be a positive development, since by doing so the CFI would recognise that for the purpose of LPP, a link of employment between lawyer and client does not in principle exclude the lawyer's autonomy,[156] the condition that in-house counsel be subject to binding rules of ethics, enforced in the public interest by supervisory bodies, could lead to an—at least temporary—uneven safeguard of lawyer-client confidentiality. Accordingly, it is not clear whether *AKZO Nobel* is likely to mark an actual progress towards the effective protection of lawyer-client confidentiality, especially in consideration of the challenges posed by the "Modernised" framework for the enforcement of Community competition law established by Regulation 1/2003.

[156] Case T-125/03, *AKZO Nobel Chemicals Ltd and Ackros Chemicals Ltd v Commission*, [2003] ECR II-4771 at para 126.