

## The Difficult Relationship Between Restraints to the Attorney-Client Privilege and Compliance with the Law by Companies – Commentary on the Judgment of the Court of Justice of the European Union in the *Akzo Nobel Chemicals and others vs. Commission* case of 14<sup>th</sup> September, 2010 (case C-550/07)

Patricia Pérez Fernández\*

### Abstract:

In his ruling of 14<sup>th</sup> September, 2010, in the *Akzo Nobel Chemicals and others vs. Commission* case, the Court of Justice of the European Union confirms that communications between a company and an in-house counsel are not covered by the confidentiality of communications between clients and lawyers (as he also stated twenty eight years ago in the *AM & Europe vs. Commission* case). In this case the problem is about conflicts generated over the access to certain documents by the European Commission, as part of an investigation in the area of competition law. The ECJ clarifies once again the scope and the limits of confidentiality of communications with lawyers, concluding that it may be only exercised with outside counsels. The problems caused by these issues have their origin in the absence of a rule that expressly regulates the protection of the documents or information prepared by a lawyer, in the context of defending the interests of the client. This legal professional privilege is recognized as a fundamental right and the present article aims to clarify the scope of that privilege, based on the last judgment of the ECJ related to this topic.

### I. Introduction

The ruling of the Court of Justice of the European Union (hereinafter ECJ) of 14<sup>th</sup> September 2010, was pronounced after an appeal brought by Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd<sup>1</sup>. This judgment of the ECJ confirms the Community case law maintained since the *AM & Europe vs. Commission* case (18th May 1982), in which the ECJ stated that communications between a company and an in-house counsel are not covered by the confidentiality of communications between clients and lawyers. The aforementioned case happened in the area of competition law and it dealt with conflicts generated over the access to certain documents as part of an investigation conducted by the European Commission. In this judgment of 14<sup>th</sup> September 2010, the ECJ once again clarifies the scope and the limits of confidentiality of communications with lawyers, twenty eight years

---

\* Research Fellow of the Spanish Ministry of Education, Faculty of Law, University of Castilla-la Mancha (Patricia. Perez@uclm.es).

<sup>1</sup> This appeal was brought by the claimants against the judgment of the European Court of First Instance (called “General Court” since the entry into force of the Lisbon Treaty on 1<sup>st</sup> December 2009) of 17<sup>th</sup> September 2007 in the *Akzo Nobel Chemicals and Akros vs Commission* case.

after its first statement regarding this matter. In this sense, the ECJ affirms that this legal professional privilege may be exercised only with outside counsel; as such, internal communications between a lawyer and businessmen will not be protected and so the European Commission may include documents related to the investigation of this in disciplinary proceedings. One of the main reasons for the problems caused by these issues related to the privilege of communications is the absence of a rule that expressly regulates that the documents or information prepared by a lawyer or his client (in the context of defending the interests of the client) are protected from inspections carried out by the European Commission. The judgment of the ECJ in *AM & S* in 1982 confirms that the confidentiality of communications between a client and his lawyers is a general principle of EU law and that it must be respected by Commission inspectors. The present judgment of the ECJ (foundation of this commentary) recognizes this principle as a fundamental right and the Advocate General, Julianne Kokott, clearly points out the grounds on which it is based. Although the General Court affirmed in its judgment in 2007, as well as in the *Akzo* case, that this privilege of confidentiality should only be limited to outside counsel, i. e. lawyers not bound by an employment relationship with the employer, in practice further disputes related to the documents which could eventually be incorporated in the files were raised, as they are not covered by the confidentiality of communications between lawyer and client. The aim of the present ruling is to clarify the issue related to the scope of that legal privilege.

## II. Facts in issue

The facts in the current case occurred in February of 2003, when Commission officials went to the offices of Akzo and Akcros in the United Kingdom and seized certain information and documents (in order to find evidence related to restrictive practices of competition). The Commission made two copies of e-mails exchanged between the General Director of Akcros and an employee of the legal department of Akzo, a member of the Dutch bar association, incorporating such copies to the file afterwards<sup>2</sup>. Both of the companies alleged that these documents were protected by professional secrecy and therefore could not be used in the investigation because the lawyer was bound to their customers by the mentioned professional duties, as part of the Dutch bar association. The officials of the Commission argued that they had to check the documents, even if briefly, in order to draw their own opinion on the degree of protection for themselves and, finally, were able to review such documents, upon threat of coercive sanctions.

The first action brought by both companies was dismissed in 2007 by the Court of First Instance, in consideration of the fact that the lawyer was not independent because of the employment relationship with the investigated company. The judg-

---

<sup>2</sup> See Klengel, J. and Mückenberger, O.: "Internal Investigations – typische Rechts- und Praxisprobleme unternehmensinterner Ermittlungen" in *Corporate Compliance Zeitschrift*, n° 3, 2009, pages 81-87, regarding the different parts of documents which can be incorporated into the files as part of the investigations made in companies.

ment of 17<sup>th</sup> September, 2007<sup>3</sup>, followed the provisions of the judgment of the ECJ in *AM & S Europe vs. Commission* in 1982, which were also followed by the Order of the Court of First Instance of 4<sup>th</sup> April, 1990, in *Hilti* and also related to the scope of protection of confidentiality of communications between lawyers and clients.

In these cases it was stated that such protection is subject to two cumulative conditions, such as the linking of the correspondence to the exercise of “rights of the customer advocacy” and the fact that it must involve “independent counsels”, i. e. “unrelated to his client by an employment relationship”. Both companies filed an appeal in November 2007, against the judgment of 17 September, 2007, requesting the annulment of this decision and the return of the e-mails to the interested parties, because, in their opinion, they should be covered by the privilege of communications between lawyer and client (including in-house lawyers in the scope of confidentiality of communications).

### III. Concept of confidentiality of communications (legal professional privilege) and its importance in competition law and with respect to the client’s rights

The right to confidentiality of communications between lawyer and client can be defined as the right of the customer to prevent the disclosure of the contents of these communications to third parties, which are then kept confidential<sup>4</sup>. It can also be defined as the legal principle under which the disclosure of certain communications between lawyer and client cannot be required, as part of an administrative or judicial proceeding<sup>5</sup>. It is therefore a necessary element of the right of defence of any client, based on the lawyer’s role as a “collaborator of justice” and on the fact that lawyers should provide legal assistance independently. The ECJ already considered in 1982, in its judgment in *AM & S* that the confidential communications between lawyers and clients are privileged when “it refers to correspondence related to the right of defence of the client and with independent counsels”.

The interesting area in *Akzo* is competition law and in this area the legal professional privilege is gathering momentum<sup>6</sup>, in addition to which, it is important

<sup>3</sup> This refers to the ruling of the Court of First Instance (now “General Court”) of 17<sup>th</sup> September, 2007. In this judgment, the General Court dismissed the appeal of the two companies against the refusal of the Commission in the case 253/03.

<sup>4</sup> This right is also known by the expressions “attorney-client privilege” or “legal (professional) privilege”.

<sup>5</sup> In case of a discovery of these communications without the agreement of the client, it would not be a valid piece of evidence or proof in these proceedings. See *Allendesalazar, R.*: “Confidencialidad de las comunicaciones abogado y cliente y eficacia de la labor inspectora: dos principios a la búsqueda de un equilibrio” in *Revista General La Ley*, n° 7, 2009, pages 83-95, page 84. The author mentioned stresses the importance of distinguishing the confidentiality of communications between lawyer and client regarding other possible figures, which are important in this judgment, i. e. antitrust law, and with which it can be confused. In this sense, he refers to the confidentiality of certain information or documents because of its purpose, scope or recipients, as it is regulated in article 42 of the Spanish Competition Act (Act 15/2007, 3<sup>rd</sup> July), and also the secrecy provisions of article 43 of the same Act.

<sup>6</sup> The possibility of extending this privilege to in-house counsel has been a highly debated issue as noted, for example in *Gippini Fournier, E.*: “Legal professional privilege in Competition Proceedings before the European Commission: Beyond the cursory Glance” in *Fordham International Law Journal*, Vol. 28, Book 4, 2005, p. 989. Cited by *Suderow, J.*: “Nota sobre la sentencia del TJCE Akzo Nobel y otros de 14 de septiembre de 2010: Límites al

to point out that since the introduction of the current Spanish Competition Act (from 2007), competition law is seen as playing an essential role in promoting the productivity and competitiveness of the economy. Article 39.1 of the Spanish Competition Act contemplates duties of assistance and information to the competition authorities<sup>7</sup> and article 40 confers many inspection powers on the investigation officials of these competition authorities, always under the scope of compliance and respect for competition rules. These duties include the permission to check books and other documents related to the specific business, and also the possibility of making copies of such books and documents and to ask any representative or member of the staff of the company for explanations on facts related to the object and purpose of the inspection and to record their answers. However, despite these provisions, the attorney-client privilege has been recognized as a limitation on the inspection powers of the competition authorities<sup>8</sup>, which means that this privilege is based on the need to safeguard legal rights equal to, or more important than, competition. In this context, ensuring the confidentiality of communications between lawyer and client is related to a better implementation of the Law and Administration of Justice. It is recognized that this privilege encourages open communication between lawyer and client, which results in advice, as complete and independent as possible, as well as, theoretically, a greater respect for the law<sup>9</sup>. The guarantee of the attorney-client privilege is also an essential complement to the right of defence, especially the right to be legally represented and the right against self-incrimination, as stated in the General Court's ruling of 17<sup>th</sup> September, 2007, in *Akzo Nobel Chemicals Ltd* (following the judgment of the ECJ in *AM & S vs. Commission* in 1982)<sup>10</sup>. Both competition authorities<sup>11</sup> and judicial courts have admitted that by safeguarding the attorney-client privilege, not only is a private

---

privilegio legal de las comunicaciones entre abogados y sus clientes" in Cuadernos de Derecho Transnacional, Vol. 3, n° 1, 2011, pp. 316-325, p. 319.

<sup>7</sup> Article 39.1 foresees that "any natural or legal bodies and any public administration are subject to duty of collaboration with the National Competition Commission and are required to provide, at the request of this authority and in time, all sorts of data and information that they have and which may be necessary for the correct implementation of this Act. This period shall be 10 days, unless because of certain circumstances a different period is given".

<sup>8</sup> See *Allendesalazar, R.*: "Confidencialidad de las comunicaciones..." cited, page 85. Full implementation of the legal privilege was confirmed in Spain by the Decision of the Competition Court on 22<sup>nd</sup> July, 2002, in *Pepsi-Cola vs. Coca-Cola*.

<sup>9</sup> The utilitarian view of the attorney-client privilege was clear in the judgment of the U.S. Supreme Court in *Commodity Futures Trading Commission vs. Weintraub*, 471 U.S. 343 (1985), where the Supreme Court stated that "the attorney-client privilege serves the function of promoting full and frank communications between attorneys and their clients. It thereby encourages observance of the law and aids in the administration of justice". See *Allendesalazar, R.*: "Confidencialidad de las comunicaciones..." cited, page 86.

<sup>10</sup> In 2007, the General Court stated that "this confidentiality is an answer (...) to the requirement accepted by all Member States that every litigant must be able to go freely to his lawyer (...). Similarly, the Court held that the protection of confidentiality of correspondence between lawyers and clients is a necessary complement to the full exercise to the right of defence". This judgment also links this privilege with the public interest in proper administration of justice, saying that "this protection is intended to ensure the public interest of a proper administration of justice so that every person has the freedom to go to his lawyer without the fear that confidential information may be disclosed subsequently".

<sup>11</sup> In Spain with the cited Decision of the Court of Defence of Competition on 22<sup>nd</sup> July 2002, in *Pepsi-Cola vs. Coca-Cola*; this indicates the dual purpose of protecting any person who needs the assistance of a lawyer to defend his rights and freedoms and to guarantee the fair and proper administration of justice.

interest of some of these parts protected, but private interests that are directly linked to the public interest of the proper administration of justice.

#### **IV. The judgment of the Court of Justice of the European Union in *Akzo Nobel and others vs. Commission* in line with the conclusions of the Advocate General**

The General Court considered in its judgment in *Akzo* (2007) the admission of the attorney-client privilege, provided that “on the one hand this correspondence occurs in practice in the context of the right of defence of the client and, on the other hand, it emanates from independent lawyers”. European case law has again in 2010 re-emphasized that this privilege pertains to outside counsel, i. e. “unrelated to his client by an employment relationship”. Both *Akzo* and *Akcros* appealed the judgment of September 2007, on the basis of three reasons but essentially they maintained that the General Court acted improperly by denying the possibility of invoking this privilege in connection with the e-mails written to the in-house lawyer of the *Akzo* group. The ground of appeal is clearly the extent of the protection of legal privilege, since the different parties are in no doubt as to its existence. Indeed, what shall be clarified in this judgment of the ECJ is whether EU law admits that communications with in-house lawyers within the firm or group of companies are covered by professional secrecy and its possible extent<sup>12</sup>.

With regard to this, the EU – Advocate General, Julianne Kokott<sup>13</sup> states in her conclusions that in-house lawyers do not have the same protection of confidentiality as any other independent lawyer, although they may be entitled to freely exercise the legal profession. The essence of the conclusions of the Advocate General is based on the reason that an in-house lawyer, who works for one single client, does not have the same independence from his client-employer (because this client represents his employer at the same time) as that of an outside counsel in relation to his clients or customers. This debate about the attorney-client privilege therefore constitutes the core of the dispute between *Akzo Nobel Chemicals* and *Chemicals Akcros* and the EU Commission due to concerted practices that are alleged contrary to EU Competition Law<sup>14</sup>. According to Kokott, the purpose of this legal privilege is not only to guarantee the right of defence of the client, but it also has to satisfy the specific role assigned to lawyers as “collaborators of justice”, in providing such legal assistance to customers with complete independence whilst keeping in mind the primarily interest of the correct administration of justice. This is the reason why Kokott maintains that both types of lawyer should not have the same treatment with

---

<sup>12</sup> The scope of the verification authority of the EU Commission in competition cases depends ultimately on the answer to this question (article 14 of Regulation 17, 1962, then in force, now it corresponds to articles 20 and 21 of Regulation 1/2003).

<sup>13</sup> The conclusions were filed on 29 April, 2010. An online version (in Spanish) is available at [http://www.icam.es/docs/web3/doc/ABOGEMP\\_SecretoJULIANE\\_KOKOTT.pdf](http://www.icam.es/docs/web3/doc/ABOGEMP_SecretoJULIANE_KOKOTT.pdf).

<sup>14</sup> Collusive agreements are foreseen as illegal at European level in Article 101 of the Treaty on the Functioning of the European Union.

regard to confidentiality. Later on, according to counsel, structural risks may arise in practice under which in-house lawyers face a conflict of interests between their professional obligations and the objectives of the employer. In addition, an in-house lawyer is economically more dependent on the employer and identifies himself more with his employer than an external lawyer does.

Taking into account the conclusions of the Advocate General, it is not surprising that some authors raise doubts as to whether an in-house lawyer is “less lawyer” than an external one<sup>15</sup>. This undermines also an essential feature of the legal profession, namely the professional secrecy, when lawyers provide consultancy services within a company. All these cases (including the *Akzo* case, as we shall now see), call into question the compatibility of the duty to denounce unlawful conduct within the company with the duty of secrecy in the attorney-client relationship.

Kokott certainly acknowledges that “the protection of professional secrecy has the rank of a general principle of law with fundamental character” as follows from the common principles of the legal systems of the Member States. The 27 Member States recognize the legal privilege, ensuring however its protection only in case law, despite having at least the rank of an ordinary law or even a constitutional law. Moreover, the attorney-client privilege can also be deducted from article 8.1 of the European Convention on Human Rights (ECHR) (this provision refers to the protection of correspondence) in connection with article 6.1 and 6.3, letter c) of the ECHR (right to a fair trial) and article 7 of the Charter of Fundamental Rights of the European Union (respect for communications) and, finally, also with articles 47 and 48.2 of the same Charter of Fundamental Rights of the European Union<sup>16</sup> (rights to legal advice and respect of the defence). Kokott accepts that this privilege is intended to protect the confidentiality of the correspondence between the client and the independent lawyer. In these cases, the legal professional privilege would be the necessary complement of the clients’ rights to legal advice, representation and defence. The client would be deprived of the rights conferred by the ECHR<sup>17</sup> in case of being obliged to cooperate with judicial authorities to pass the information obtained in the course of legal consultations to his lawyer. This privilege for lawyers is indeed a necessary tool for an efficient and balanced process and legal model because it provides the legal profession with instruments to properly manage their procedural action, thus benefiting the whole system. That is the reason why this

<sup>15</sup> See *Sánchez-Calero Guilarte, J.* in <http://jsanchezcalero.blogspot.com/2010/05/abogados-secreto-profesional-y-derecho.html>.

<sup>16</sup> The Charter of Fundamental Rights of the European Union was proclaimed on 7<sup>th</sup> December 2000, in Nice and again on 12<sup>th</sup> December 2007 in Strasbourg.

<sup>17</sup> Within the ECHR and under the law deriving from the Treaties of the EU two different legal traditions have found a common ground, such as the *legal professional privilege*, which is characteristic of countries that share the historical and legal tradition of *common law*, and the *secret professionnel*, belonging to the codifications of continental Europe, covering more than just the activity of the lawyer and legal advice. This is an example of the convergence experienced by the legal traditions of the Member States which had to find a meeting point in the legal system derived from the EU and its institutions. See Barletta, A., *El Legal Privilegio como derecho fundamental en la UE y sus límites: el caso de la normativa sobre blanqueo de capitales* in Díez-Picazo, L.M./Nieto Martín, A., *Los Derechos Fundamentales en el Derecho Penal Europeo*, Madrid, 2010, pages 442 and ff.

privilege has been recognized in the legal systems established in the tradition of rule of law<sup>18</sup>.

Currently, the legal systems of the 27 Member States do not seem to extend the legal privilege to in-house lawyers<sup>19</sup>, as is fully recognized by Kokott who only mentions the protection in case law. Under Spanish law, however, legal professional privilege is perceived in a much broader sense<sup>20</sup>, and is not only limited to the actions of the lawyer before the court or tribunal<sup>21</sup>. Despite this, there are examples in the economy that reveal how, in practice, attempts are made to assert superior interests over and above those intended to be protected by the duty of professional secrecy. One area where this happens is the repression of activities contrary to competition law.

The ECJ noted that the requirement for independent counsel comes from the role of the lawyer as a collaborator of justice, who has to act independently, ensuring thus the legal assistance required by his client. In the opinion of the ECJ, this requirement of independence implies the absence of any employment relationship between the lawyer and his client (following the conclusions of Advocate General Kokott). The ECJ considers that an in-house lawyer still does not have the same independence as advocates from an outside law firm, although he may be a member of a bar association (in the case discussed, the lawyer belonged to the Dutch bar association). Thus, in-house lawyers cannot assimilate the role of external counsel owing to their situation as wage earners of the company, even though the guarantees provided in the exercise of their profession may be the same. This situation does not allow a separation of the in-house lawyer from the business strategies pursued by the company he works for as an employee, thus challenging his independence. In this case, the lawyer also coordinates the area of competition law, which affects the company's business policy, reinforcing further still the links of the lawyer with the company. Given these circumstances based on the economic dependency of in-house counsel in relation to the employer and the close union with them, the ECJ considers that he does not have the same independence as that of outside counsel. The ECJ also considers that this interpretation does not infringe the principle of

<sup>18</sup> See *Barletta, A*, *El LegalPrivilege...* cited, page 443.

<sup>19</sup> Only a few states such as Great Britain, Ireland and the Netherlands apply this privilege to in-house lawyers.

<sup>20</sup> The strong wording is contained in article 542.3 of the Spanish Act of the Judiciary: "Lawyers must keep secret any facts or news known during their work and may not be compelled to testify on them". There are specific rules in the area of the criminal procedure designed to enforce the compliance with that duty, providing exemptions in articles 263 and 416.2 of the Criminal Procedure Act (exemptions from reporting crimes known because of the legal profession and to declare facts told by the client). These rules make a testimony of a lawyer against his client unlawful, declaring invalid the pieces of evidence derived from the breach of secrecy of the accused. See *Sánchez-Calero Guilarte, J.*, *Abogados y sociedades cotizadas. (Pequeñas reflexiones ante un gran problema)*, in: *Documentos de Trabajo del Departamento de Derecho Mercantil, Universidad Complutense de Madrid*, Abril 2009, pages 36 and ff. Available online in [http://eprints.ucm.es/8747/1/Abogados\\_y\\_sociedades\\_cotizadas.pdf](http://eprints.ucm.es/8747/1/Abogados_y_sociedades_cotizadas.pdf).

<sup>21</sup> However, there are also judgments advocating a more restrictive view of legal privilege, such as for example the ruling of the provincial court of Baleares, of 12 July, 2000, in which this court pointed out that in Spain, the protection of this legal privilege "is confined only to the aspects which may affect the intimacy and privacy of people, but not when referring to any other activities, such as trade or economic ones, and even less if, as occurs in this case, the lawyer tries to hide the actions taken with others and not with the clients, stating further that "professional secrecy cannot represent harm to others under no circumstances". See *Sánchez-Calero Guilarte, J.*, *Abogados y sociedades cotizadas...* cited., page 38.



equal treatment because an in-house lawyer is in an essentially different position from that of outside counsel. Regarding the allegation of Akzo and Akcros that national legal systems have evolved in these aspects, the ECJ argues that in the legal systems of the different EU Member States<sup>22</sup> there is not an overriding tendency concerning the protection of the confidentiality of communications within companies or groups of companies and with their in-house lawyers<sup>23</sup>. Hence, the current legal situation does not allow the case law of the different Member States to recognize a development of this legal privilege to in-house lawyers<sup>24</sup>. In this same sense, the evolution of European community law and the amendment of the procedural rules of law in defence of free competition do not justify a review of the case law initiated in *AM & S Europe vs. Commission*<sup>25</sup>. Both companies also argued that the mentioned interpretation of the General Court in 2007 does not appropriately protect the right of defence. The ECJ answered that any defendant who wants to have a legal advice must accept the restrictions and conditions for the exercise of the legal profession. Part of these restrictions and conditions refer to the procedures for protecting the confidentiality of communications between lawyers and clients. Akzo and Akcros also invoked the violation of the principle of legal certainty. The ECJ stated that this principle does not require the same criteria with regard to confidentiality of communications between lawyers and clients (in cases of national and European investigation procedures). Consequently, as part of a procedure conducted by the EU Commission, the fact that this legal privilege is limited

<sup>22</sup> In Spain there is still an express recognition of the corporate lawyer as a form of exercise of the profession (article 27.3 of the General Act regulating the legal profession, which provides that “the practice of law as an employee under a special collaboration has to be expressly agreed in a written contract, settling the special conditions, the duration, scope and the financial system of this cooperation”). These lawyers are thereby subjected to the corporate and legal norms that govern the legal profession. Hence it is said that, in Spain, in house-lawyers are “lawyers like any other”. See <http://www.cga.e.es/portalCGAE/archivos/ficheros/1289406206921.pdf>.

<sup>23</sup> The Advocate General, Kokott, recognizes that there are differences in the legal systems of the EU Member States, but despite the developments of these legislations and the modernization of Competition Law with Regulation 1/2003 in Europe, there is still no general trend to reform these rules. She therefore states that “if the vast majority of the EU Member States do not foresee a need to protect the communications between a company and its counsel, it can be stated that in the EU there does not exist an urgent need to extend the attorney-client privilege”. See paragraph 99 of the conclusions of the Advocate General.

<sup>24</sup> The attorney-client privilege in Germany is described in *Schmid-Drüner, M.*, Legal professional privilege after Akzo – case closed? – On companies’ struggle against legal uncertainty” in *Bucerius Law Journal*, n° 1, 2011, pages 25-32. Especially, pp. 29-32, where the author states that “in Germany, the scope of legal professional privilege is even less than in EU law” (page 29). It has been noted that there are still Member States that exclude in-house lawyers from the protection of confidentiality of communications between in-house lawyers and clients. In some countries, they are not even allowed to be a member of the bar association and therefore they do not attribute them the status of a lawyer. Hence, “this is an essential reason for a court whose duty it is to maintain a difficult balance between the different legal systems of the EU Member States”. It has been said that internal rules should be preferred in these cases, even though the problem arises in a European procedure like in *Akzo Nobel vs. Commission*. Thus, the “condition and legal status of lawyers should be governed exclusively by the domestic legal systems of the Member States, as it is a professional content which is not homogenized at European level”. See <http://www.cga.e.es/portalCGAE/archivos/ficheros/1289406206921.pdf>.

<sup>25</sup> In the course of the legislative work, previous to the adoption of Regulation 1/2003, the European Parliament proposed an amendment (number 10 to article 14, paragraph 3 of the draft Regulation, in connection with the Evans report), extending the privilege of confidentiality to in-house lawyers, provided that they were subject to the code of professional conduct or ethics. The amendment was rejected and the references to this issue disappeared from the final text of the Regulation. See *Allendesalazar, R.*, *Confidencialidad de las comunicaciones...* cited, page 87.



to external counsel does not violate this principle. In light of all these arguments, the ECJ finally dismissed the appeal brought by Akzo and Akcros.

## V. Consequences of limiting the legal privilege to communications with regard to in-house lawyers

The clear conclusion of the judgment of the ECJ of 14<sup>th</sup> September, 2010, is the limitation of the attorney-client privilege (confidentiality of communications) only to outside or external lawyers. Some authors have marked out the practical nature of this issue as one of the obvious reasons for limiting this privilege to communications with external counsel, as in the case of extending this privilege to in-house lawyers as well, conflicts related to inspections could significantly increase. Moreover, without a minimum knowledge of a certain document, it would be very difficult for inspectors to determine whether they are protected or not<sup>26</sup>. Nowadays, as already mentioned, there is still no regulation that specifically expresses that documents or information prepared by a lawyer or his client regarding a legal matter are protected from the investigations of the EU Commission or the competent national authorities of each of the Member States<sup>27</sup>.

However, one of the aspects which is perhaps worth mentioning here relates to the relative success of “compliance” programs (designed to ensure compliance with competition rules, etc.) within companies. The appellants of *Akzo Nobel vs. Commission* stated as one of their reasons that the modernization of the European procedural rules of competition (with Regulation 1/2003) had increased the need for internal legal advice<sup>28</sup> and consequently one should not underestimate the preventive function of breaches of competition rules. This fact would justify an extension of this privilege to communications with in-house lawyers within a company or group of companies. Legal advice from in-house lawyers is certainly very valuable in the everyday running of the company because they are perfectly versed in the business and obtaining their advice is considerably quicker and cheaper than it would be in the case of external counsel. The appellants and interveners in this case argue that the effectiveness of this internal advice and the success of “compliance” programs necessitate the possibility of maintaining confidential communications with in-house lawyers<sup>29</sup>. With regard to compliance programs, the European Competition Commissioner, Joaquín Almunia, has reaffirmed his determination to promote a

<sup>26</sup> See *Allendesalazar, R.*, Confidencialidad de las comunicaciones... cited, page 88.

<sup>27</sup> See *Suderow, J.*, Nota sobre la sentencia del TJCE Akzo Nobel y otros de 14 de septiembre de 2010: Límites al privilegio legal de las comunicaciones entre abogados y sus clientes"... *op. cit.*, page 317.

<sup>28</sup> Regarding to the problems that could arise the cooperation mechanisms foreseen in Regulation 1/2003, see *Frese, M.J.*: The Development of General Principles for EU Competition Law Enforcement – The Protection of Legal Professional Privilege in: *European Competition Law Review*, April, 2011. Available at <http://srn.com/abstract=1762046>.

<sup>29</sup> Kokott states in paragraph 15 of her conclusions that the appellants in this judgment argue that if communications with in-house lawyers are not protected, company directors could be reluctant to entrust sensitive facts to their counsels and these in-house lawyers would tend to provide information orally rather than written, thus reducing the quality and usefulness of their legal advice.

culture of compliance within companies, thus minimizing the need for sanctions because “a successful compliance program has its own reward”, based on the fact that the firm does not get involved in unlawful conduct in addition to not having to face significant fines<sup>30</sup>. In this particular case, Kokott reiterates that the Commission had pointed out (and no one said otherwise) that much of the internal legal advice given in companies and within the framework of these compliance programs is very general and not linked to the exercise of the right of defence. Thus, communications “for purposes of compliance” between the company and its in-house lawyers do not, therefore, meet the first requirement settled in *AM & S Europe vs. Commission*. Under this requirement, to be protected by legal professional privilege, communications with the lawyer should be related to the exercise of the right of defence of the client, i.e. “in the frame and in the interests of the right of defence of the client”. It could not be only a general legal advice like this case. For this reason, the General Court pointed out in its judgment in 2007, that this type of internal legal advice has not had a direct impact on professional secrecy<sup>31</sup>.

## VI. The restriction of the legal privilege to communications in other policy areas

This tendency to limit the privilege of secrecy also exists in other policy areas, such as, for example, money-laundering. Indeed, the Directive 2005/60/EC, of the European Council and Parliament, of 26<sup>th</sup> October, 2005, (regarding the prevention of using financial systems for money laundering and terrorist financing) lists cases in which lawyers are forced to report incidents to the police as if they were public officials. This is a clear limitation of the independence of the defence attorney and also constitutes an important limitation to their professional privilege. The present legislative measure just seeks to do just this (i.e. limit lawyers’ professional secrecy), introducing the aforementioned obligations which have a decisive affect on their independence, as by making use of legal advice may, in turn, uncover tracks relating to the lawyer’s own involvement in a crime<sup>32</sup>. Another example is the Sarbanes-Oxley Act of 30<sup>th</sup> July, 2002 (field of the US joint-stock companies). Section 307 of this act grants the SEC (Securities and Exchange Commission) the regulatory development of certain rules related to the professional responsibility of lawyers<sup>33</sup> who act before this Commission in any way and on behalf of a firm. The

<sup>30</sup> See [europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/...](https://eur-lex.europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/...) The Commissioner said the 14th of April 2011 in Berlin that a company involved in a cartel should not expect a reward from the Commission to establish a compliance program as it would be a failed one.

<sup>31</sup> See Section 172 of the judgment of the General Court of 17 September, 2007 (*Akzo Nobel and others vs. Commission*). German authors have affirmed that the legal privilege is not extendible to documents developed by a lawyer as part of a compliance program. See Vid. Kapp, T./Löwenkamp, K., Kein Schutz der Vertraulichkeit der Kommunikation zwischen Syndikusanwalt und Mandant” in *Corporate Compliance Zeitschrift*, n° 6, 2010, pages 233–237, page 236. For an overview of the current importance of compliance programs see Janssen, H.: “Kartellrechts-Compliance” in Wecker, G/ Van Laak, H. (Hrsg.), *Compliance in der Unternehmerpraxis*, Wiesbaden, 2009, pages 199–219. Especially, page 218.

<sup>32</sup> See Barletta, A., *El Legal Privilege como derecho fundamental... op. cit.*, page 450.

subjective scope of this Act is very broad, including in-house lawyers as well<sup>34</sup>. In the United States, however, this legal privilege has been widely defined, deeming it also acceptable when lawyers play an advisory role or when they represent their clients in lawsuits (apart from if they go to a lawyer to seek out investment opportunities), thus including in-house lawyers<sup>35</sup>.

In summing up, it can be said that these legislative and judicial decisions pretend to connect the activity of lawyers with broader interests than the particulars of a client and this fact seeks to change the professional responsibility of lawyers<sup>36</sup>. This trend of limiting legal privilege is clear in the area of inspection activity in competition law<sup>37</sup>. What underlies this all is a conflict of interests of in-house lawyers, but we must not forget that “the freedom to consult a lawyer of your own choice without creating admissible pieces of evidence is a fundamental right in a society governed by the rule of law”<sup>38</sup>. Moreover, in this area, public and private interests should not be opposed, because both the European case law and competition authorities have placed the attorney-client privilege (also with in-house lawyers) within the scope of public interest of the fair administration of justice<sup>39</sup>.

<sup>33</sup> An example of this is the aspiration that the lawyer provides evidence of a breach of the law of the securities market, the lawyer becoming a complainant of his client, providing documents or any other form of evidence he has had access to because of his activity as a lawyer. Section 307 and the duty established for the in-house lawyer is very important, although the Act's overall purpose is to carry out a thorough control of the companies listed on stock exchanges, protecting investors and avoiding frauds and bankruptcies. The U.S. doctrine has argued that this Act seeks a mechanism of control of executive directors of the companies. See *Bainbridge, S. M./Johnson, C. J., Managerialism, Legal Ethics and Sarbanes-Oxley Section 307*, available at <http://ssrn.com/abstract=434721>, page 6. In this area, the regulation passed by the SEC in 2003 and entitled “Implementation of Standards of Professional Conduct for Attorneys” is also very important. See *Sánchez-Calero Guilarte, J., Abogados y sociedades cotizadas... op. cit.*, pages 16–19.

<sup>34</sup> The Sarbanes-Oxley Act was strengthened by the Dodd-Frank Act, passed in July, 2010, which aims to protect potential whistleblowers. This new law emphasized the need for additional regulation of the SEC, which was presented and submitted to public consultation in November, 2010 (available at <http://www.sec.gov/rules/proposed/2010/34-63237.pdf>).

<sup>35</sup> See the judgment of the U. S. Court of Appeals, IX Circuit, in *US vs. Chen.*, 4 November, 1996. However, legal professional privilege is not recognized when the communications were carried out to support an already committed, fraudulent behaviour or the course of some form of criminal conduct. This is the so-called “crime-fraud exception”, which is an essential limitation to legal privilege in the USA. See *Barletta, A., El Legal Privilegio como derecho fundamental... op. cit.*, page 449. This privilege within the U.S. legal system is explained in *Chapdelaine, P. The Regulation of In-House Counsel: Opening the Pandora's Box of Professional Independence*, available at <http://ssrn.com/abstract=1714087>.

<sup>36</sup> See *Sánchez-Calero Guilarte, J., Abogados y sociedades cotizadas... op. cit.*, page 7. In relation to this issue treated in the United States see *Mackintosh, J. T./Angus, K. M.: Conflict in Confidentiality: How E. U. Laws Leave In-House Counsel Outside the Privilege*, in: *International Lawyer* Vol. 38, n° 1, 2004, pages 35–54.

<sup>37</sup> U.S. authors have called them “whistleblowers” in these cases. See *Dyck, A./Morse, A./Zingales, L., Who Blows the Whistle on Corporate Fraud?*, in: *The University of Chicago Booth School of Business, Working Paper n° 3, 2008*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=891482](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=891482).

<sup>38</sup> See *Temple Lang, J., The AM & S Judgement* en AAVV: *A True European*, Essays for Judge David Edward, Oxford, 2003, page 160. Cited by *Barletta, A., El Legal Privilegio como derecho fundamental... op. cit.*, page 452.

<sup>39</sup> In relation to the treatment of the attorney-client privilege by the Spanish Competition Authority, see *Allendesalazar, R., Confidencialidad de las comunicaciones... op. cit.*, pages 92–95. Thus, the effectiveness of the inspection work as the safeguard of the rights of defence of the companies has to be protected. It is evident that as a result of these inspections (within companies) conflicts can emerge in practice between these two conceptions. From the standpoint of the companies, a risk of being fined exists if they make the inspections difficult. But also from the standpoint of the authorities that carry out this work, as these investigations may be the reason for appeals which can paralyze administrative procedures or be nullified by courts. Hence, the author mentioned believes it is necessary, taking into account the poor regulation of this matter contained in the Competition Act 2007 and in Regulation 1/

---

2003, to publish a “communication” or “indications” in relation to the procedure that should be followed for site inspections. These indications should clarify the rights and obligations of the inspected companies, the powers of the inspectors and the limits to which these powers extend, thus providing the legal framework of an appropriate balance between the necessary efficiency of inspections and the protection of the fundamental right to confidential communications between lawyer and client (“attorney-client privilege”).