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Competition Policy Brief

Legal professional privilege in competition law investigations: has the status of in-house lawyers changed?

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This Competition Policy Brief discusses whether 'legal professional privilege' ('LPP') should be extended to cover certain in-house lawyer advice. It briefly outlines the position taken by the EU courts on this matter and the calls for such an extension of LPP in the context of the evaluation of Council Regulation (EC) No 1/2003 ('Regulation 1/2003'). It then provides an overview of the situation at Member State level and an assessment of whether an extension of LPP to in-house lawyers in the Commission's investigations would be warranted. It concludes that extending the protection of LPP to in-house lawyers would not be justified from the perspectives of EU law or of enforcement policy.

The EU case-law on legal professional privilege and the position of in-house lawyers

Broadly speaking, LPP is an expression used to describe rules that, based on links to a lawyer's professional role, protect certain correspondence from compelled disclosure to, for example, public authorities investigating suspected breaches of the law.

In line with well-established case-law of the EU courts, LPP in the context of the Commission's competition law investigations is the same throughout the EU and extends only to communications with, or advice from, independent, EU-qualified, lawyers.[1]

In 2010, in the well-known '*Akzo*' judgment[2], the Court of Justice confirmed that correspondence involving 'in-house' lawyers does not benefit from the protection granted by LPP in the context of the Commission's competition law investigations.

As discussed in more detail below, the main reasoning of the EU Courts behind such exclusion was that only correspondence that involves 'independent lawyers' who are not bound to a client by a relationship of employment is covered by LPP.

In a nutshell

In the context of the evaluation of Regulation 1/2003, some stakeholders argued that the principles set out in the Court of Justice's 2010 *Akzo* judgment should be revisited so that in-house lawyer correspondence can benefit from legal professional privilege. This Competition Policy Brief examines the arguments raised. It finds no reason to depart from the well-established principles in the case-law.

Recent calls for change in the context of the evaluation of Regulation 1/2003

The evaluation of Regulation 1/2003, which was completed in September 2024, looked back over the 20 years of that regulation's application. Feeding into that evaluation, some stakeholders – mostly, but not exclusively, representing views of industry and in-house lawyers – suggested that the introduction of 'in-house' legal privilege should be considered in any revision of Regulation 1/2003. Essentially two lines of argument were put forward.

First, some contributors argued that support for such introduction could be found in developments at national level, claiming that an increasing number of Member States recognise LPP for communications involving in-house lawyers.

[1] The categories of documents covered by LPP as recognised in the case-law of the EU courts relating to the Commission's competition law investigations are (i) written communications exchanged between a client and that client's independent, EU-qualified, lawyer for the purposes of the client's rights of defence (ii) documents circulated within an undertaking that do no more than report the text or content of such communications and (iii) preparatory documents created exclusively for seeking legal advice from an independent, EU-qualified, lawyer in the exercise of the rights of defence (see judgment of 18 May 1982, *AM & S Europe* v *Commission*, 155/79, EU:C:1982:157, paragraphs 21 to 27, 34 and 35; Order of 4 April 1990, *Hilti* v *Commission*, T-30/89, EU:T:1990:27, paragraphs 13 and 16 to 18; and judgment of 17 September 2007, *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, T-125/03 and T-253/03, EU:T:2007:287, paragraphs 117, 122 to 124 and 173).

[2] Judgment of 14 September 2010, *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, C-550/07 P, EU:C:2010:512. This judgment confirmed the earlier judgment of 18 May 1982, *AM & S Europe* v *Commission*, 155/79, EU:C:1982:157

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Second, it was argued that the emphasis on self-assessment in the context of Regulation 1/2003 made the protection of in-house correspondence from compelled disclosure even more important. In other words, extending the protection of LPP to in-house lawyers would enhance compliance with Articles 101 and 102 TFEU[3].

As LPP is not covered by Regulation 1/2003, the staff working document concluding the evaluation[4] did not examine the issue in detail. It merely indicated that, while significant time is sometimes spent on examining LPP claims made by investigated parties, in the view of the Commission's services, the current EU rules regarding LPP are well-established, appropriate and effective.

The staff working document also indicated that the arguments for extending LPP to in-house counsel remain unconvincing. The following sections elaborate on why, in our view, this is the case.

No predominant trend towards recognising in-house LPP at Member State level

Proponents of the extension of LPP to in-house counsel advice claim that the situation at national level is evolving, with an increasing number of Member States recognising such protection in their national law. The suggestion is that an extension of LPP to in-house counsel advice under EU law would now be warranted.

However, this claim does not appear to be based on solid factual grounds.

As can be seen from the following table, drawn up in consultation with national competition authorities, at present only five EU Member States clearly recognise, subject to various conditions, some form of in-house LPP that applies in investigations by their competition law authorities (Belgium, Ireland, Hungary, the Netherlands and Portugal).[5]

In other Member States, national law does not recognise 'in-house' LPP in competition law investigations. Some Member States, such as Latvia and Finland, have very clear provisions to that effect and in 2023, Poland introduced legislation that specifically precludes a recognition of in-house LPP in competition law investigations. The practice in several Member States is, according to national competition authorities, based on *Akzo*.[6]

There is thus no predominant trend in Member States' national laws towards protection under LPP of communications within a company or group with in-house lawyers. On the contrary, the large majority of Member States do not recognise LPP for in-house lawyers in competition law investigations.

Member State	No recognition of in-house LPP for competition law investigations	In-house LPP recognised for competition law investigations
Belgium		X[7]
Bulgaria	X	
Czechia	X	
Denmark	X	
Germany	X	
Estonia	X	
Ireland		X[8]
Greece	X[9]	
Spain	X[10]	
France	X[11]	
Croatia	X	
Italy	X	
Cyprus	X	
Latvia	X	
Lithuania	X	
Luxembourg	X	
Hungary		X[12]
Malta	X[13]	

[3] The contributions to the evaluation process can be accessed here: https://competition-policy.ec.europa.eu/antitrust-and-cartels/legislation/regulation-12003_en

[4] SWD(2024)217, accessed at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13431-EU-antitrust-procedural-rules-evaluation_en.

[5] Before exiting the European Union, the United Kingdom, a Member State at the time of the *AM&S* and *Akzo* rulings, was the largest among the Member States that recognised in-house LPP.

[6] In particular, Bulgaria, Czechia, Denmark, Germany, France, Croatia, Italy, Cyprus, Lithuania, Luxembourg, Austria, Slovenia, and Slovakia.

[7] In investigations by the Belgian national competition authority, LPP applies to certain materials connected with the provision of legal advice by registered members of the professional body of in-house counsel acting as legal advisers.

[8] In Ireland, there are two main variants of LPP, both rooted in the 'common law': 'legal advice privilege' and 'litigation privilege'. The first extends only to communications containing or seeking pure legal advice, while the second covers lawyers' 'work product' produced in the context of litigation, as well as certain other communications (including communications between non-lawyers) made for the purposes of conducting litigation. As regards in-house lawyers, both variants of LPP are limited to registered in-house lawyers (in both the private and the public sectors) who are consulted in their capacity as professionally qualified lawyers.

[9] Greek case-law has so far not upheld the existence of in-house LPP in competition law investigations.

[10] Certain pending court challenges brought against measures of investigation of the Spanish national competition authority include allegations that Spanish law should extend LPP to cover 'in-house' exchanges.

[11] Some legislative initiatives in France over the years, most recently prior to the parliamentary elections in 2024, have sought to introduce forms of in-house LPP into French law. However, as things stand, there is no in-house LPP under French law.

[12] Hungary recognises in-house LPP since 2018, following legislative amendments allowing bar association membership for in-house lawyers.

[13] Under Articles 12A(7) and 13B(7) of the Maltese Competition Act, the Maltese competition authority and the Maltese courts must have recourse to EU case-law and the Commission's decision-making

Member State	No recognition of in-house LPP for competition law investigations	In-house LPP recognised for competition law investigations
The Netherlands		X[14]
Austria	X	
Poland	X	
Portugal		X[15]
Romania	X	
Slovenia	X	
Slovakia	X	
Finland	X	
Sweden	X	

A relationship of employment precludes the necessary 'full independence'

All that said, the situation in Member States is in any event not determinative of whether in-house lawyer communications should come within the scope of LPP in the Commission's competition law investigations.

The claim that EU law is linked to the situation in the Member States is derived from the Court of Justice's approach in the 1982 *AM&S* ruling. There, for the first time, the Court of Justice recognised LPP as applying in the Commission's competition law investigations. In doing so, in line with its practice at the time, the Court took inspiration from the principles and concepts common to the Member States and concluded by recognising LPP as a corollary of the general principle of EU law of the protection of rights of the defence.

By doing so, the Court clarified that the protection granted by LPP is conditioned on the communications in question emanating from *independent lawyers*, that is, lawyers who are not bound to the client by a relationship of employment. According to the Court, that independence requirement '*is based on a conception of the lawyer's role as collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interests of that cause, such legal assistance as the client needs*.'[16]

In the 2010 *Akzo* judgment, the Court of Justice examined the requirement of 'full independence' again. In declining to relax this requirement so that, under certain circumstances, LPP could cover the advice of in-house lawyers, the Court ruled that '*the concept of the independence of lawyers is determined not only positively, that is by reference to professional ethical obligations, but also negatively, by the absence of an employment relationship*', that an '*in-house lawyer, despite his enrolment with a Bar or Law Society and the professional ethical obligations to which he is, as a result, subject, does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his client*' and that '*[c]onsequently, an in-house lawyer is less able to deal effectively with any conflicts between his professional obligations and the aims of his client*.'[17]

Accordingly, the Court in *Akzo* held that the regime applicable under Dutch law to in-house lawyers registered with the Dutch bar was irrelevant for determining the scope of LPP.[18]

The Court's interpretation of EU law in *Akzo* is based on the fundamental finding that, '*by its very nature*', a relationship of employment precludes the requisite full independence.[19] This point of principle is not liable to change. It remains as true today as it was in 1982 and in 2010, irrespective of developments at Member State level.[20]

Indeed, this point of principle is repeatedly emphasised in case-law on the representation of parties before EU courts. Echoing *Akzo*, this case-law indicates that both the 'positive' and the 'negative' elements of a lawyer's independence must be present.[21] Not only does the 'negative' element imply that there

practice when applying national competition rules and Articles 101 and 102 TFEU.

[14] The basis for in-house LPP under Dutch law is in substance the obligation on employers of in-house lawyers admitted to the bar to safeguard their independence and to promote undisturbed compliance by those lawyers with the code of conduct of their bar association.

[15] Following a first-instance court ruling in 2008, in-house LPP under Portuguese law extends to communications to and from in-house counsel, unless the communication relates to a crime for which counsel is under investigation.

[16] Judgment of 18 May 1982, *AM & S Europe v Commission*, Case 155/79, EU:C:1982:157, *AM&S Europe Limited v Commission* [1982] ECR 1575, paragraph 24.

[17] Judgment of 14 September 2010, *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, C-550/07 P, EU:C:2010:512., paragraph 45.

[18] Even in *Akzo*, which concerned the rules of professional organisations under Dutch law that may have strengthened the position of an in-house lawyer within the company, the Court found that these were not able to ensure a degree of independence comparable to that of an external lawyer. See Judgment of 14 September 2010, *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, C-550/07 P, EU:C:2010:512., paragraph 46.

[19] Judgment of 14 September 2010, *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, C-550/07 P, EU:C:2010:512., paragraph 47.

[20] The Court of Justice has handed down several judgments in recent years concerning the protection of communications between lawyers and clients guaranteed by Article 7 of the Charter of Fundamental Rights of the European Union (see, for example, judgments of 8 December 2022, *Orde van Vlaamse Balies and Others*, C-694/20, EU:C:2022:963, and of 26 September 2024, *Ordre des avocats du barreau de Luxembourg*, C-432/23, EU:C:2024:791). These judgments concern administrative cooperation in the field of taxation and relate to interactions between independent lawyers and their clients (see in particular, to that effect, judgment of 29 July 2024, *Belgian Association of Tax Lawyers and Other*s, C-623/22, EU:C:2024:639, paragraph 117). On the importance that the Court attaches in another context to the independence of lawyers, see also judgment of 19 December 2024, *Halmer Rechtsanwaltsgesellschaft* (C-295/23, EU:C:2024:1037, paragraphs 64 to 66).

[21] See, to that effect, among others, judgments of 14 September 2010, *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, C-550/07 P, EU:C:2010:512, paragraphs 44 to 47, of 6 September 2012, *Prezes Urzędu Komunikacji Elektronicznej and Poland* v *Commission*, C-422/11 P and C-423/11 P, EU:C:2012:553, paragraphs 23, 24 and 26, of 14 July 2022, *Universität Bremen* v *REA*, C-110/21 P, EU:C:2022:555, paragraph 49, as well as of 4 September 2025, *Studio*

must be no employment relationship, characterised by the existence of a tie of subordination, between the lawyer and his or her client,[22] but that independence is also ruled out if a lawyer is employed by an entity connected to the party he or she represents.[23] As explained by the Court, '*[t]here is a risk that the professional opinion of those advisers would be, at least partly, influenced by their working environment*'.[24]

Self-assessment brought in by Regulation 1/2003 does not justify a change to the requirement of 'full independence'

As indicated above, a second type of argument made in the evaluation of Regulation 1/2003 is that the emphasis on self-assessment, in the context of that regulation, makes the protection of in-house correspondence from compelled disclosure even more important and that 'in-house LPP' would in fact increase compliance with competition rules.

However, the *Akzo* judgments post-date the entry into force of Regulation No 1/2003. They already take into account the contribution that in-house lawyers can make to compliance by their employers with EU competition law rules.

At the same time, they expressly reject claims that the need for companies to self-assess justifies a further extension of LPP to cover material linked solely with in-house lawyers.[25]

In addition, the proximity of in-house lawyers to their employers is a '*double-edged sword*'[26] in terms of ensuring compliance. While it does allow for in-depth knowledge of the business, which is certainly positive, it is precisely that proximity and close involvement in the business that may, in an employment situation characterised by the existence of a relationship of subordination, preclude a candid assessment of compliance and make firm opposition to plans of questionable compliance more difficult. Where useful, any in-depth knowledge of the businesses concerned may be conveyed to an external lawyer by the relevant departments of the client, including its internal legal department.

Moreover, to our knowledge, there is no evidence that companies operating in jurisdictions that do recognise in-house lawyer LPP are overall more compliant with competition laws than those operating in those jurisdictions that do not.

Likely impact on competition investigations of any extension of LPP to in-house lawyers

In light of the previous sections, assertions that in-house LPP improves compliance are unsubstantiated and unconvincing. At the same time, it is clear in the minds of the authors that extending LPP to in-house lawyers would most likely hamper the effectiveness of EU competition law investigations and proceedings.

First, it would be challenging to define the precise scope of in-house LPP protection in a way that is not prone to abuse.[27] Owing to the structural risk stemming from the integration of in-house lawyers within the corporate structure, in-house LPP is liable to be abused – albeit not necessarily by in-house lawyers themselves - to conceal, or even facilitate, wrongdoing. This is confirmed by the fact that, in real-life cases, evidence of wrongdoing has been found in in-house counsel correspondence. Some infringements might never have been uncovered if such in-house correspondence were protected by LPP.[28]

Second, in any event, the extension of LPP to in-house counsel would likely make investigations lengthier and more cumbersome. Very often, in-house lawyers have roles that are not limited to the provision of legal advice.[29] They are likely to

Legale Ughi e Nunziante v *EUIPO*, C-776/22 P, EU:C:2025:644, paragraph 62.

[22] See, among others, judgments of 4 February 2020, *Uniwersytet Wrocławski and Poland* v *REA*, C-515/17 P and C-561/17 P, EU:C:2020:73, paragraph 63, of 24 March 2022, *PJ and PC* v *EUIPO*, C-529/18 P and C-531/18 P, EU:C:2022:218, paragraphs 66 and 67, as well as of 4 September 2025, *Studio Legale Ughi e Nunziante* v *EUIPO*, C-776/22 P, EU:C:2025:644, paragraphs 62 and 65..

[23] See judgments of 24 March 2022, *PJ and PC* v *EUIPO*, C-529/18 P and C-531/18 P, EU:C:2022:218, paragraph 68, as well as of 14 July 2022, *Universität Bremen* v *REA*, C-110/21 P, EU:C:2022:555, paragraph 51.

[24] Judgment of 6 September 2012, *Prezes Urzędu Komunikacji Elektronicznej and Poland* v *Commission*, C-422/11 P and C-423/11 P, EU:C:2012:553, paragraph 25.

[25] Judgment of 17 September 2007, *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, T-125/03 and T-253/03, paragraphs 172 and 173, upheld on appeal in judgment of 14 September 2010, *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, C-550/07 P, EU:C:2010:512., paragraphs 83 to 89.

[26] Opinion of Advocate General Kokott of 29 April 2010, *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, C-550/07, EU:C:2010:229, paragraph 118.

[27] An example of a possible abuse of in-house LPP rules that is in the public domain emerges from the August 2024 ruling of Justice Mehta in *United States, et al. v. Google, LLC* (No. 20-cv-3010 (APM) (D.D.C. Aug. 5, 2024), Dkt. No. 1033) which refers to '*flagrant misuse of the attorney-client privilege*', including a finding that *'Google trained its employees to add its in-house lawyers on "any written communication regarding Rev Share [RSA] and MADA."'* More recently, the U..S. District Court, Western District of Washington, in the context of class action antitrust litigation (*De Coster et al v. Amazon*), found that '*Amazon improperly designated operational, business, and strategic documents as attorney-client communications or attorney-work product*' and that, in '*many of these communications, in-house attorneys [were] simply copied on emails*' (2:21-cv-00693-JHC (W.D. Wash. Mar. 25, 2025).

[28] For example, in Case AT.40588, *Teva Copaxone*, of 31 October 2024, involving misuse of the divisional patent system and the spreading of misleading information by Teva about a competing product, the Commission '*relied on documents from Teva's in-house lawyers who were involved in the design of its abusive strategy to protect Copaxone*'. See https://ec.europa.eu/commission/presscorner/detail/en/ip_24_5581. Similarly, in Case S/0026/19 Merck Sharp Dohme, decision of 21 October 2022 of the Spanish national competition authority, important evidence of the infringement, which involved unjustified litigation under the pretext of protecting a patent, came from *'handwritten notes of the [in-house] legal director of MSD*' (authors' translation of paragraph 505).

[29] See, in a context other than competition law investigations, Opinion of Advocate General Kokott of 30 May 2024, *Ordre des avocats du*

frequently be party to internal exchanges that are not linked or limited to the provision of legal advice and it would be very difficult to distinguish legal advice from other types of communications, such as those concerning purely commercial matters that do not contain legal advice. External lawyers on the other hand, who are engaged in the provision of services as legal advisers, are inherently less likely to be party to such internal exchanges. Having to verify whether internal correspondence truly amounts to legal advice would be significantly more cumbersome and resource-intensive than the current process for assessing LPP claims under the *Akzo* criteria and may thus have an impact on the effectiveness and efficiency of EU competition law investigations, which would in turn have a negative impact on EU businesses and citizens who may have been harmed by anticompetitive conduct.

Conclusion

Some stakeholders have taken the opportunity of the evaluation of Regulation 1/2003 to raise again the topic of in-house LPP. The arguments for such an extension of LPP rules are in essence the same as those already made in the context of the *Akzo* litigation and rejected by the EU courts.

Even if there were a predominant trend in Member States' national laws towards 'in-house LPP' – which is not the case, as seen above – such a trend would not be determinative. Full independence from the client is a key requirement for LPP to be recognised in EU competition proceedings and the Court of Justice has ruled that 'by its very nature', a relationship of employment precludes the required full independence.

In addition, the EU courts have already ruled that the self-assessment regime brought in by Regulation 1/2003 did not warrant extending the case-law to introduce in-house LPP.

The arguments for such an extension remain unconvincing and vague as regards the claimed potential benefits. On the other hand, the risks for the effectiveness of competition investigations are very clear. In the view of these authors, extending LPP to in-house lawyers would likely hamper the effective enforcement of EU competition rules to the detriment of consumers and businesses, without any apparent benefit in terms of increased compliance.

Barreau de Luxembourg, C-432/23, EU:C:2024:791, paragraph 60 and footnote 29.