CASE COMMENT

May the Commission Review Correspondence Between Outside Counsel?

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Introduction

In its Perindopril (Servier) decision of July 23, 2010,[1] the European Commission (the Commission) considered that it was entitled, during an inspection at the premises of an undertaking that it suspected to have infringed EU competition law rules, to seize a letter sent by outside counsel to another (Belgian) outside counsel,[2] and found at the premises of the recipient Belgian counsel's client. This decision raises again the issue of the scope of legal privilege that undertakings may rely on vis-a-vis the European Commission and national competition authorities. It may also have important practical consequences, both as regards communications between outside counsel and their clients, as well as for communications between outside counsel themselves, and the possibility for opposing parties to reach a settlement.

First, we propose to examine the factual elements of this case, as well as the legal arguments that the Commission relied on to conclude that neither "legal professional privilege" (or LPP), nor the confidentiality provisions recognised in various Member States prevented the Commission from taking custody of such correspondence, when it has been found at a client's premises. Secondly, we explain why the communication should have been considered to fall within the scope of LPP, and we analyse some of the arguments relied on by the Commission in relation to the confidentiality of exchanges between outside counsel in some of the EU Member States. Finally, we set out the practical consequences of this decision for outside counsel, as well as for their clients.

Summary of the Perindopril (Servier) Decision

The facts

In November 2008, the Commission (assisted by representatives of some national competition authorities) carried out an inspection at the premises of Servier, in particular its premises in France, in relation to an alleged infringement by Servier of the EU competition rules.

Notably, the Commission found an email sent by Servier's counsel to his client stating:

> "Please find enclosed a copy of a letter (confidential) from Teva's counsel. I suggest we discuss it at your earliest convenience".[3]

To this email was attached a letter from Teva's counsel (a competitor to Servier), in which Teva's counsel stated that Servier was acting in an anti-competitive way and that, if no settlement was reached between the parties, Teva would lodge a complaint with the Commission against Servier for violation of the competition rules.

Servier claimed that the correspondence was not only covered by LPP, but also by the confidentiality rules of the Belgian Bar Association which state that exchanges between outside counsel are confidential, and that, therefore, the Commission was not entitled to review the correspondence:

- **LPP:**

  The exchange between Servier's counsel and its client was made for the purposes and in the interests of Servier's rights of defence, and was therefore covered by LPP

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[1] European Commission Decision of July 23, 2010 (COMP/E-1/39612—Perindopril (Servier)). The non-confidential version of the decision is published on the Commission's website (*http://ec.europa.eu/competition/antitrust/cases/dec_docs/39612/39612_3076_9.pdf* [Accessed February 2, 2012]). The date of publication of the decision on the Commission's website is uncertain (but is probably around January 2011). The decision has not yet been published in the *Official Journal* of the EU.
[2] The decision states that receiving counsel was registered with a Belgian Bar. However, it does not state if sending counsel was also registered with a Belgian Bar.
[3] Commission's translation from the original French. Perindopril (Servier) Decision fn.4.

as recognised by the case law of the Court of Justice : "To decide otherwise would compromise Servier's rights of defence, as well as its right to receive independent legal advice."[4]

- **Confidentiality:**

  The Regulation from the Belgian Bar Association of May 8, 1980 and April 22, 1986 on the production of correspondence exchanged between outside counsel provides that correspondence between two counsel registered with a Belgian Bar is confidential, in the sense that it is "off the record" and may therefore not be used as evidence (unless both parties agree and, moreover, approval of the President of the Bar is received). According to Servier, similar rules also exist in France and, to some extent, in English law, indicating that confidentiality of exchanges between outside counsel is a fundamental principle of EU law, which the Commission should comply with.

On July 23, 2010, the Commission rejected both arguments and decided that it was entitled to review the said correspondence.

The Commission's position

LPP

The Commission stated that, under Regulation 1/2003,[5] it is entitled to take a copy of all documents found at the premises of an undertaking during an inspection, with the exception of documents that are covered by LPP as defined by the EU courts' case law.

The Commission stated that only the following documents are covered by LPP:

- communications between counsel and client provided that: (i) such communications are made for the purposes and in the interests of the client's rights of defence; and (ii) they emanate from an independent lawyer (as opposed to in-house counsel) (category 1);
- internal notes circulated within an undertaking which are confined to reporting the text or the content of communications with an independent lawyer containing legal advice (category 2);
- documents prepared internally by the client (even when they were not exchanged with counsel or were not created for the purpose of being physically sent to counsel), provided that they are prepared exclusively for the purpose of seeking legal advice from counsel in exercise of the rights of defence (category 3).

The letter did not fall within second or third categories as it was not a document prepared by Servier.

The Commission also decided that that the letter did not fall within the first category of documents covered by LPP as it did not *emanate* from Servier's counsel (but from a third party: Teva's counsel) and, therefore, it was not prepared for the purposes and in the interests of Servier's rights of defence. The Commission concluded that LPP is:

> "[N]ormally not applicable in the case of communications between lawyers acting for opposing parties, which were … found on the clients' premises during inspections."[6]

The Commission considered that the fact that this letter was attached to an email from Servier's external counsel to his client did not change the nature of this letter.

Confidentiality

The Commission stated that the legal basis for its powers to review documents found during an inspection is to be found in EU law, and that national laws cannot limit these powers.

In addition, the Commission argued that:

- there is no principle of EU law preventing the Commission from reviewing the document at stake in this case;
- in several of the Members States which confer some form of protection to correspondence between outside counsel, this protection disappears once the document is shared by recipient counsel with his client;
- this protection is generally provided for in the regulations of the local Bars which are not binding on third parties such as the Commission; and
- the balance of the interests protected by the confidentiality of exchanges between counsel as opposed to the interests protected by Commission competition law investigations is in favour of the latter.

The Commission made the points in the following terms:

- "[T]here is no principle of Union law that would prevent the Commission … from taking a copy of a document that was

[4] Perindopril (Servier) Decision recital 8(i).
[5] Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1. Articles 81 and 82 EC are now, respectively, arts 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).
[6] Perindopril (Servier) Decision recital 17.

allegedly exchanged in confidence between external lawyers of opposing parties when that document is found at the premises of the recipient lawyers client."[7]

- "[I]n several Member States … confidential exchanges between lawyers must not be passed on to the lawyer's own client. Where, as here, such a document has already been passed on … such rules of conduct are inapplicable..."[8]
- "Where it exists, the principle of protection of confidential exchanges between external lawyers, is primarily based on self-regulation of the bar associations. … Bar associations are able to enact binding rules for their members but cannot, in principle, bind third parties … This applies in particular to public authorities that act in the public interest, and all the more so when the limits to their powers are determined by Union law, and not national law."[9]
- "In Member States where correspondence between lawyers of opposing parties is protected, such protection is based on … considerations [that] open communication between lawyers may facilitate the settlement of civil or commercial disputes and this can alleviate the burden for civil courts … However when it comes to enquiries that pursue public interests such protection does not appear appropriate … principles of confidentiality intended to promote the settlement of commercial disputes cannot constrain the Commission's powers to obtain information..."[10]

The Commission concluded that the letter from Teva's counsel found at Servier's premises did not benefit from any confidentiality, and that it was entitled to review it.

The Commission's position as regards the status of correspondence between outside counsel, as such (i.e. outside the case when the correspondence is found at the client's premises), is not entirely clear from the decision. The Commission does not clearly state if it considers that such correspondence benefits, or not, from any protection under EU law. However, the Commission's statement that "when it comes to enquiries that pursue public interests such protection does not appear appropriate"[11] seems to suggest that the Commission considers that exchanges between outside counsel do not benefit from any form of protection—and that the only exceptions to its powers of investigation are the three categories of documents expressly mentioned in the EU courts' precedents as being covered by LPP.

Comments on the decision

This decision raises a number of legal and practical issues of some significance. We propose to analyse it both under the principles of LPP, as well as the principles of confidentiality. We will then set out the potential practical consequences that this decision may have, in particular for counsel and their clients.

Comments in relation to LPP

As the Commission stated in its decision, the Court of First Instance (CFI, now General Court) recognised in *Akzo*[12] that three categories of documents are expressly covered by LPP, and therefore cannot be seized by the Commission (see above).

A strict application of these principles to the letter from Teva's counsel (although it is, in our view, not justified)[13] could lead to the conclusion that the letter was not covered by LPP, for the reasons set out in the Commission's decision.

However, the position taken by the Commission does not take into account the fact that the letter was attached to an email from Servier's counsel to his client, and formed part of a course of correspondence between them concerning Servier's relations with Teva and possible litigation.

As the Commission itself stated in its decision, the Court of Justice has previously ruled that:

[7] Perindopril (Servier) Decision recital 20.
[8] Perindopril (Servier) Decision recital 22
[9] Perindopril (Servier) Decision recital 23.
[10] Perindopril (Servier) Decision recital 24.
[11] Perindopril (Servier) Decision recital 24.
[12] Court of First Instance (now General Court) in *Akzo Nobel Chemicals Ltd v Commission of the European Communities* (T-125/03 & T-253/03) [2007] E.C.R. II-3523; [2008] 4 C.M.L.R. 3. At the time of the adoption of the Perindopril (Servier) Decision, the Court of Justice had not yet issued its judgment in the *Akzo* case. Since then, the Court of Justice has expressly confirmed the three categories of documents covered by LPP: see Court of Justice, *Akzo Nobel Chemicals Ltd v European Commission* (C-550/07 P) [2011] 2 A.C. 338; [2011] 3 W.L.R. 755; [2010] 5 C.M.L.R. 19
[13] Contrary to what the Commission seems to consider, the categories of documents potentially covered by LPP are not limited to the three categories expressly referred to in *Akzo* [2011] 2 A.C. 338; [2011] 3 W.L.R. 755; [2010] 5 C.M.L.R. 19. First, these categories can evolve as results from the jurisprudence of the EU courts which, in the past, has expanded the categories of documents expressly covered by LPP (category 1 was recognised in *Australian Mining & Smelting Europe Ltd v Commission of the European Communities (AM&S Europe)* [1982] E.C.R. 1575; [1982] 2 C.M.L.R. 264; category 2 was recognised in Order of the President of the CFI in *Hilti AG v Commission of the European Communities* (T-30/89) [1990] E.C.R. II-163; [1990] 4 C.M.L.R. 602; category 3 was recognised in *Akzo*). These extensions of the categories of documents covered by LPP were made by the Court against the Commission's submissions. Secondly, when issuing their judgements, the EU courts only dealt with the facts of the cases, and therefore did not enumerate in an exhaustive way all the documents that could potentially be covered by LPP. The *Akzo* judgments therefore do not exclude that other categories of documents may benefit from LPP under EU law. For example, the concept of "joint defence privilege" or "common interest privilege" (a well-recognised exception of the traditional attorney-client privilege, which applies when a client, by or in the presence of his counsel, shares privileged communications among represented co-defendants for the purpose of forming a common defence strategy) has not yet been addressed by the EU courts. Furthermore, the authors question the exclusion of LPP when external counsel is registered with a non-EU Bar (e.g. a US Bar).

> "[A]ny person must be able, *without constraint*, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it."[14]

In order for the client to be able to consult counsel "without constraint", and for counsel to be able to give meaningful legal advice to his client, it is necessary that the client be informed of the arguments raised by the opposing party.

Obviously, the best way to fulfil this objective is for the client to be able to examine the letter from the opposing party; it is for this reason that Servier's counsel passed it onto his client.[15]

It is true that, instead of passing on the letter to his client as an attachment to the email, Servier's counsel may have used other "technical" means, such as:

- reading the letter to his client over the phone, in which case the Commission would not have found the letter at Servier's premises;
- summarising the letter in the body of his email or in a document attached to his email (for example on the law firm's letterhead paper), marked "Privileged—Lawyers' Work Product";
- reproducing the content of the letter in the body of his email or in a document attached to his email, and marked "Privileged—Lawyers' Work Product".

If Servier's counsel had done so, the Commission should in principle have considered that, under the EU courts' case law, the email (and, where applicable, the attachment to the email) was covered by LPP as it would have "emanated" from Servier's counsel.

Assuming that is indeed the Commission's position, the practical difficulties that this poses are obvious. Making a distinction between the "technical" means of communication used by counsel to convey to his client the arguments raised by the opposing party to determine whether or not the letter is covered by LPP is, in our view, artificial and contrary to the policy objectives that LPP is designed to protect.

Communications between counsel and his client should be looked in the context of the course of correspondence between counsel and client, and in their entirety: the cover email and the attachment[16] form, together, the counsel-client communication.

The communication between Servier's counsel and his client was aimed at informing Servier of Teva's allegations (formulated through its counsel), in order to allow Servier's counsel to discuss the matter with his client and ensuring that his client was fully informed of the matter. It is only through such communication that counsel could have a meaningful discussion with Servier, and could therefore provide meaningful legal advice to Servier as to the position it should adopt in response to the letter.[17]

This communication was therefore made for the purposes and in the interests of Servier's rights of defence (even if the Commission had not yet initiated competition law proceedings against Servier).[18]

Therefore, the Commission should have concluded that the communication, as a whole (i.e. the cover email and the attached letter from Teva's counsel), was covered by LPP pursuant to the case law of the EU courts and that, consequently, it was not entitled to review this counsel-client communication.[19]

Comments in relation to confidentiality

The Commission decided that exchanges between counsel, when found at the premises of the recipient counsel's client, do not benefit from any confidentiality under EU law.[20]

[14] *AM&S* [1982] E.C.R. 1575; [1982] 2 C.M.L.R. 264 at [18]; (Emphasis added). See also the Opinion of A.G. Kokott in *Akzo* [2011] 2 A.C. 338; [2011] 3 W.L.R. 755; [2010] 5 C.M.L.R. 19: "the freedom to engage in *unimpeded* and *reliable* communications with his client which legal professional privilege creates for a lawyer" (at [148]; (Emphasis added)).

[15] This is precisely the reason why, in some countries, despite the principle of confidentiality of exchanges between outside counsel, outside counsel is authorised and sometimes even required to share the correspondence with his client, provided that certain conditions are complied with—as regards, e.g. the Brussels Bar, see below.

[16] Or, in the case of postal mail, the cover letter and the enclosures.

[17] This is evidenced by the fact that the addressee of the email (an employee of Servier), in turn, circulated the email that he had received from outside counsel within the company, with the following message: "For information the letter we just received from Teva / I will raise our way of replying with our lawyer tomorrow." (Commission translation).

[18] The Court of Justice previously stated that "such protection must, if it is to be effective, be recognized as covering all written communications exchanged after the initiation of the administrative procedure … It must also be possible to *extend it to earlier written communications which have a relationship to the subject-matter of that procedure*" (*AM&S* [1982] E.C.R. 1575; [1982] 2 C.M.L.R. 264 at [23], (Emphasis added)). See also the Court of First Instance (now General Court) in *Akzo* [2007] E.C.R. II-3523; [2008] 4 C.M.L.R. 3 at [114].

[19] The Commission was, however, entitled to obtain a copy of the correspondence through other means. For example, it could have requested a copy from Teva (actually, it is indicated in the decision that the Commission may already have received a copy of the letter from Teva) and/or could have requested Servier to waive legal privilege on the correspondence (on this point, see the CFI in *Akzo* [2007] E.C.R. II-3523; [2008] 4 C.M.L.R. 3: "Finally, it must be observed, as the Court of Justice pointed out in AM & S, that the principle of LPP does not prevent a lawyer's client from disclosing the written communications between them if he considers that it is in his interests to do so"—at [90]). It is interesting to note that in Case *Pepsi Cola v Coca-Cola* (Decision r508/02v of the Spanish NCA of July 22, 2002, available at *http://www.cncompetencia.es/Inicio/Expedientes/tabid/116/Default.aspx?numero=r%20508/02v&ambito=Recursos* [Accessed February 2, 2012]), the Spanish NCA adopted a decision diametrically opposed to that of the Commission in the Perindopril (Servier) Decision. It is worth noting that the Commission does not make reference to this Spanish decision in its decision. The NCA had opened an investigation against TCCC (Coca-Cola). For the purposes of the preparation of its defence, Coca-Cola had requested its outside counsel to collect information from bottling companies in Spain. The Spanish competition service had requested from the bottling companies a copy of the responses that they had provided to Coca-Cola's outside counsel. The bottling companies opposed the production of these documents on the basis of legal privilege. The Spanish NCA decided that the responses to the questionnaires were indeed covered by legal privilege as, following the jurisprudence of the Court of Justice: (1) the questionnaires had been prepared for the purposes of the rights of defence (those of Coca-Cola); and (2) they had been prepared by outside legal counsel (that of Coca-Cola). According to the Spanish NCA, the fact that the questionnaires emanated from outside counsel to another party than the party which claimed the benefit of legal privilege did not prevent this party from relying on legal privilege.

[20] However, the Commission did not take an express clear position about the protection that would attach, under EU law, to correspondence between outside counsel as such (i.e. as opposed to correspondence found at the client's premises).

Servier relied on the fact that, in some Member States (including Belgium, France and, to some extent, England and Wales), exchanges between counsel are protected (be they "confidential" or "privileged"), which could suggest the existence of a fundamental principal of EU law and that, consequently, the Commission would not be entitled to review this correspondence, even when found at the client's premises.

The main argument of the Commission, i.e. that the legal basis for its powers is EU law (in particular Regulation 1/2003) and that national rules cannot restrict these powers, has merit.[21]

However, for the reasons set out below, the Commission's reasoning is flawed in relation to, first, the absence of a fundamental principle of confidentiality under EU law and, secondly, how the balance should be struck between "public policy" and the underlying considerations of national rules that grant protection to inter-counsel correspondence.

Superficial analysis of the principles applicable in the Member States

In *Akzo*, the CFI stated that:

> "Community law, which derives from not only the economic but also the legal interconnection between the Member States, must take into account the principles and concepts common to the laws of those States concerning the observance of confidentiality, in particular as regards certain communications between lawyer and client."[22]

In its decision, the Commission states that, "in several Members States",[23] communications received by one counsel from another counsel must not be passed on by the recipient counsel to his client; otherwise confidentiality is "inapplicable". The Commission relies in particular on the "Edward Report", the Italian Code of Ethics, and the Memorandum to the CCBE's Code of Conduct.[24] Following a superficial analysis of these national rules, the Commission comes to the conclusion that there is no fundamental principle of EU law that would prevent the Commission to review and copy a document exchanged between counsel, when that document is found at the premises of the recipient counsel's client.

However, the CCBE circulated a questionnaire to various authorities around the EU precisely in order to assess the legal position on legal privilege/confidentiality throughout the EU. It appears from the version of the compiled responses that we have seen, dated June 28, 2010, that, not only is correspondence between outside counsel covered by legal privilege or at least a form of confidentiality in the vast majority of the EU Members States and surrounding jurisdictions, but that in most countries outside counsel receiving correspondence from counsel to another party is *under a duty to disclose the letter to his client* (the main exceptions being essentially France and Belgium—addressed below). This CCBE survey therefore flatly contradicts the Commission's assertions.[25]

Even as regards Belgium and France, which as indicated above are the main exceptions (at least ostensibly) and which were expressly relied on by Servier, the position in those Member States does not support the Commission's position:

- In Belgium, the Regulation from the Belgian Bar Association of May 8, 1980 and April 22, 1986, provides that correspondence between counsel is confidential and must therefore, in principle, not be passed on to the client. However, a very broad exception is foreseen: recipient counsel may pass on the correspondence to his client provided that, in summary, he draws his client's attention to the confidentiality of the inter-counsel correspondence, so that confidentiality is preserved.[26] Furthermore, it has been decided on several occasions that, if such correspondence is produced before a Belgian court by one of the parties, the court must consider this correspondence as confidential and must exclude it from the pleadings.
- In France, art.66-5 of Law 71-1130 of December 31, 1971 (as amended by Law 97-308 of April 7, 1997) provides that correspondence exchanged between outside counsel and his client, as well as between opposing outside counsel with the exception of correspondence marked "official" (i.e.

[21] This had already been confirmed by the CFI in *Akzo* ([2007] E.C.R. II-3523; [2008] 4 C.M.L.R. 3 at [176]). Since the Commission's decision, this principle was confirmed by the Court of Justice in *Akzo* ([2011] 2 A.C. 338; [2011] 3 W.L.R. 755; [2010] 5 C.M.L.R. 19 at [115] and [119]).

[22] *Akzo* [2007] E.C.R. II-3523; [2008] 4 C.M.L.R. 3 at [77]. The CFI proceeded with an examination of the national rules on legal privilege in the various Member States (more particularly the national rules on the legal privilege attached to communications with in-house counsel), before concluding that, on the date of its judgment (September 17, 2007), "it is not possible … to identify tendencies which are uniform or have clear majority support in that regard in the laws of the Member States" (at [170]).

[23] Perindopril (Servier) Decision recital 22.

[24] It is striking that, despite the fact that the Belgian rules were specifically relied on by Servier, the Commission does make reference to the Belgian Bar rules (at least the Brussels Bar rules), which allow outside counsel to share with his client the correspondence received from another counsel under certain conditions.

[25] The Commission relied in particular on the CCBE Code of Conduct. However, the Memorandum to this Code states that: "In certain Member States communications between lawyers … are *normally* regarded as to be kept confidential as between the lawyers. This means that the content of these communications cannot be disclosed to others, cannot *normally* be passed to the lawyers' clients." (Page 30, emphasis added, available at *http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/EN_Code_of_conductp1_1306748215.pdf* [Accessed February 2, 2012]). The use of the word "normally" should have raised the Commission's attention to the fact that there are Member States where counsel is allowed, or even required, to share with his client a letter that he has received from opposing counsel, without confidentiality being lost.

[26] Something which Servier's counsel, a member of a Belgian Bar according to the decision, had done in his cover email to his client. The decision from the Bar Council dates from 1973 and still refers to photocopies. We believe that, taking into account the evolution of technical means of communications since 1973 and in particular the email, Servier's counsel acted in line with the conditions set out the decision—at least their spirit.

'on the record'), are covered by "legal privilege".[27] Thus, exchanges between counsel found at the client's premises remain in principle "privileged", despite the fact that they have been communicated by recipient counsel to his client, in violation of the French ethical and legal rules.

It follows from the above that the Commission's analysis of national rules was erroneous in several respects and inadequate, and could not in itself lead to the conclusion that there is no fundamental principle of the Member States, and therefore of EU law, granting some form of protection to exchanges between outside counsel (as such and/or when found at the client's premises).

Contrary to what the Commission decided, should the EU courts have to rule on the issue of correspondence between counsel, it cannot be excluded that, in view of the above mentioned national rules, they would conclude that correspondence between counsel should be granted some form of protection, under EU law, against the Commission's investigative powers.[28]

Balance of the interests

The Commission states that the protection (be it confidentiality or privilege) afforded by national rules to communications between outside counsel is justified by the objective to "facilitate the settlement of civil or commercial disputes", but that "when it comes to enquiries that pursue public interests such protection does not appear appropriate".[29] The Commission's view is that its investigative powers must necessarily prevail over the interests which these national rules are aiming to protect.

First, it is not axiomatic that the public policy of preserving the Commission's investigative powers so that it can "access to information … to ascertain the truth"[30] should prevail over the policy of promoting the settlement of civil and commercial disputes, which, as the Commission recognises, is provided in order to "alleviate the burden for civil courts"[31] and therefore to make best use of scarce public resources.

Furthermore, within the scope of competition proceedings by some NCAs[32], the NCAs are not entitled to have access to exchanges between outside counsel—at least in those Member States where the confidentiality/privilege is provided for by law[33] (as opposed to e.g. a Bar regulation). This is the case despite the fact that these national competition proceedings also concern "a matter of public policy". Therefore, the Commission's argument that "when it comes to enquiries that pursue public interest such protection does not appear appropriate" is debatable.

Consequences of the Perindopril (Servier) Decision[34]

The Commission's decision has potentially very important legal and practical consequences. As indicated above, the Commission's position as regards the status of correspondence between outside counsel as such (i.e. outside the case when the correspondence is found at the client's premises) is not entirely clear. Moreover, the Commission's decision has significant implications as regards the way in which outside counsel and client communicate, and the possibility of reaching settlements. The decision also creates a further and unhelpful difference between the rights and duties of the parties depending on whether they are involved in Commission or NCA proceedings. We address these consequences below.

For outside counsel and their clients

When outside counsel receives correspondence from outside counsel to another party, he should either discuss this correspondence orally with his client (to prevent the correspondence potentially being seized by the Commission at the client's premises), or prepare a document that "emanates" from him so that the Commission cannot claim that the document emanates from a third party and, therefore, does not relate to his client's rights of defence. Thus outside counsel could prepare:

- either an email in which he integrates or summarises the content of the correspondence that he has received (either in the body of his email, or in a document annexed to his email);
- a legal memorandum, covered by legal privilege, within which he includes, as appropriate, extracts from the correspondence that he has received.

By all means, if the client wants to be in a position to claim legal privilege, outside counsel should avoid sending the correspondence that he has received, as such, to his client.

[27] It results from art.66-5 of Law 71-1130 of December 31, 1971, a provision of "*ordre public*", that exchanges between counsel that are not marked as "official" are, without exception, confidential and must accordingly be excluded from the discussions before a court. Article 3.1 of the "Règlement Intérieur National" provides that correspondence between outside counsel cannot be produced in court, and that privilege in relation to these documents cannot be waived.
[28] Whether this protection is "legal privilege" as such, or another form of protection such as, for example, the English "without prejudice privilege"—either automatically (as in certain Member States) or only when sending counsel mentions expressly that the correspondence is confidential (as stated in the CCBE Code of Conduct).
[29] Perindopril (Servier) Decision recital 24.
[30] Perindopril (Servier) Decision recital 24.
[31] Perindopril (Servier) Decision recital 24.
[32] Be it on the basis of arts 101 and/or 102 TFEU (like the Commission) and/or of the national competition rules.
[33] Such as in France, for example.
[34] During its meeting of February 22, 2011, the Brussels French-speaking Bar Council discussed the possibility of seeking the annulment of the Commission's decision before the General Court. After deliberation, the Council decided not to initiate these proceedings but decided to write to all the "*avocats*" of the Brussels Bar to inform them of the risks resulting from the Perindopril (Servier) Decision.

Likewise, instead of sending an email/letter to opposing counsel which could be transferred by opposing counsel to his client and therefore reviewed by the Commission following an inspection at the premises of recipient counsel's client, outside counsel should instead discuss orally with opposing counsel their respective positions.

If written correspondence is required, sending counsel should require that recipient counsel does not transfer the correspondence, as such, to his client, but that he applies one of the above mentioned techniques.

This is arguably not very practical but is, unfortunately, the consequence of the Commission's decision.

Reaching settlements is made more difficult

The principle espoused by legal privilege is that:

> "[A]ny person must be able, *without constraint*, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it."[35]

This principle, combined with the fact that in certain Member States communications between outside counsel are confidential/privileged, have developed in particular in order to facilitate the conclusion of settlements between opposing parties, thereby avoiding prolonged litigation in the courts and an expensive call on public resources.

In its decision, the Commission determined that it was entitle to review a letter which contained the threat of a complaint should a settlement not be reached. By analogy, the Commission presumably considers that it would be entitled, within the scope of an inspection at Teva's premises, to review a correspondence from Servier's counsel to Teva's counsel which would contain settlement proposals from Servier, and that Teva's counsel would have transmitted to his client.[36] If that is the case, the decision may have as a practical consequence that, in the future, undertakings will be less inclined to formulate in writing settlement proposals.

This decision will potentially make it more difficult for parties, in practice, to have discussions with a view to reaching a settlement, instead of e.g. introducing judicial proceedings or lodging a complaint with the Commission. It is not certain that the Commission had perceived these potential negative consequences when it adopted its decision.[37]

Further divergence between Commission proceedings and national proceedings

The *Akzo* judgments have confirmed that exchanges within a company with in-house counsel are not covered by LPP. However, in certain Member States (e.g. the Netherlands, the United Kingdom), these communications with in-house counsel are covered by LPP. In these Member States, the NCA is in principle not allowed to review communications with in-house counsel. There is thus already a difference of treatment between Commission investigations and NCA investigations.[38]

As indicated above, within the scope of an NCA investigation in a Member State that provides for the protection of exchanges between outside counsel, the NCA will in principle not be entitled to review this correspondence during an inspection—at least when this protection is provided for in a law (as opposed to a Bar regulation, for example). On the contrary, according to the Commission's decision in *Perindopril (Servier)*, this correspondence may be reviewed by the Commission.[39]

This decision therefore creates, as far as some Member States are concerned, another difference in the rights granted to undertakings under investigation, depending on whether it is a Commission investigation or an NCA investigation.

This further difference of treatment between Commission proceedings and NCA proceedings is unhelpful and, for the reasons identified above, arguably unjustified. One can reasonably question why the safeguards offered to undertakings within the scope of Commission investigations should be lower than those offered within the scope of some NCA investigations. There is no obvious satisfactory justification for this difference of treatment, and certainly no convincing explanation in the Commission's decision.[40]

Conclusion

In conclusion, we consider that correspondence between outside counsel, particularly when it concerns allegations and settlement proposals, that is transferred by recipient counsel to his client should properly be determined to be covered by legal privilege by virtue of the jurisprudence of the EU courts. Accordingly, the Commission was not entitled to have access to this communication in the case at hand.

[35] *AM&S* [1982] E.C.R. 1575; [1982] 2 C.M.L.R. 264 at [18].

[36] As mentioned above, recipient counsel should apply the abovementioned methods to mitigate the risk of the Commission being entitled to review the document found at the premises of his client.

[37] While it is the case that the Commission's investigation against Servier relates precisely to settlements in relation to patents with various generic manufacturers that the Commission considers as potentially anti-competitive, this is not a valid justification to limit, in a very general way, the possibility for undertakings to enter into settlements in order to bring disputes to an end.

[38] Although, as indicated above, Commission inspections and NCA investigations are often based on a violation of the same legal provisions (arts 101 and/or 102 TFEU) and, moreover, on the same "public policy" objectives. However, the Court of Justice considered in *Akzo* that this difference of treatment did not amount to a violation of the principle of legal certainty ([2011] 2 A.C. 338; [2011] 3 W.L.R. 755; [2010] 5 C.M.L.R. 19 at [102]–[106]).

[39] The confusion is accentuated by the fact that, very often, during an inspection, agents of both the Commission and the NCA are present (whether it is the NCA assisting the Commission, or to the contrary the Commission assisting the NCA).

[40] The exchange of information between the Commission and the NCAs, as foreseen in Regulation 1/2003 art.12, also raises issues. In principle, it would be possible for NCAs to circumvent the limitations imposed by the national rules by receiving information from the Commission. The Court of Justice did not rule on this issue in *Akzo*, however this is a risk in relation to which it is important to remain vigilant. See the Opinion from A.G. Kokott in *Akzo* [2011] 2 A.C. 338; [2011] 3 W.L.R. 755; [2010] 5 C.M.L.R. 19 para.137.

If this decision is a precedent to be routinely applied by the Commission, it will require outside counsel and their clients to use unnecessary and artificial techniques in their communication, as well as in the communications with opposing counsel, in order to avoid certain information potentially being reviewed by the Commission following an inspection. It may also prejudice undertakings entering into a settlement, rather than launching court proceedings and/or lodging a complaint.

Moreover, this decision creates another difference in the prerogatives granted to undertakings being investigated by the Commission rather than an NCA, for which we cannot see any objective justification.