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Legal Professional Privilege in EU Antitrust Enforcement: Law, Policy & Procedure

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This paper discusses the law, policy and procedure of legal professional privilege in EU antitrust enforcement. It focuses primarily on the enforcement of Articles 101 and 102 TFEU by the European Commission, but also touches briefly on the enforcement of EU antitrust law by the competition authorities of the EU Member States (addressing in particular the question whether those EU Member States that extend legal professional privilege to in-house lawyers are in breach of EU law), as well as on private enforcement.

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I. INTRODUCTION AND OVERVIEW

This paper discusses legal professional privilege in the context of EU antitrust enforcement.

EU antitrust law refers here to the prohibition of cartels and other restrictive agreements and the prohibition of abuse of a dominant position currently contained in Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).[1] It does not include merger control under the EU Merger Regulation,[2] which is not discussed in this paper.[3]

Legal professional privilege is the expression commonly used to describe what the EU Court of Justice has called the "principle of confidentiality of written communications between lawyer and client".[4] As has been pointed out repeatedly,[5] the expression "legal professional privilege" is a misnomer, because it is a right of the client, not a privilege of the legal profession. As has been pointed out by the EU Court of Justice, "the principle of confidentiality does not prevent a lawyer's client from disclosing the written communications between them if it considers that it is in his interest to do so".[6]

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1 These two prohibitions were earlier contained in Articles 85 and 86 of the Treaty establishing the European Economic Community (EEC) and in Articles 81 and 82 of the Treaty establishing the European Community (EC).

2 Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation), [2004] OJ L24/1 ("EU Merger Regulation").

3 At the time of the *AM & S Europe* v *Commission* judgment in 1982 (see note 4 below), the EU Merger Regulation had not yet come into existence. On the basis of the Judgments in *Europemballage and Continental Can* v *Commission*, 6/72, EU:C:1973:22, and in *BAT and Reynolds* v *Commission*, 142 and 156/84, EU:C:1987:490, Articles 101 and 102 TFEU could be applied to mergers or acquisitions under certain conditions. The *AM & S Europe* v *Commission* case law thus also applied to legal advice sought in connection with a current or future investigation by the European Commission of the compatibility of a merger or acquisition with Articles 101 and 102 TFEU. The EU Merger Regulation, the first version of which dates from 1989 and the current version from 2004, took away the power of the European Commission to apply Articles 101 and 102 TFEU to concentrations (mergers and acquisitions) as defined in the EU Merger Regulation; see Article 21(1) of the EU Merger Regulation, as note 2 above.

4 Judgment in *AM & S Europe* v *Commission*, Case 155/79, EU:C:1982:157. In its more recent judgment in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, C-550/07 P, EU:C:2010:512, the Court of Justice also used the expression "legal professional privilege".

5 See Lord Wilberforce in *Waugh* v *British Railways Board* [1980] AC 251, at 531; Opinion of Advocate-General Warner in *AM & S Europe* v *Commission*, Case 155/79, EU:C:1981:19, [1982] ECR 1619 at 1622 and 1633; and Opinion of Advocate-General Sir Gordon Slynn in *AM & S Europe* v *Commission*, Case 155/79, EU:C:1982:17, [1982] ECR 1642 at 1650.

6 Judgments in *AM & S Europe* v *Commission*, Case 155/79, EU:C:1982:157, paragraph 28, and in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, T-125/03 and T-253/03, EU:T:2007:287,

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Legal professional privilege constitutes a limitation on the European Commission's use of coercive powers of investigation under Regulation 1/2003.[7] Chapter V of this Regulation gives the European Commission a number of powers of investigation which it can use to obtain intelligence and evidence of violations of Articles 101 and 102 TFEU from companies that are suspected of having committed such violations,[8] the two main instruments being requests for information (Article 18 of Regulation 1/2003) and inspections (Article 20 of Regulation 1/2003).[9]

It follows from legal professional privilege, as recognised by the EU Court of Justice since its 1982 judgment in *AM & S Europe* v *Commission*, that the European Commission cannot use its powers of investigation to compel the disclosure of communications between lawyers and clients, provided that, on the one hand, such communications are made for the purpose and in the interests of the client's rights of defence and, on the other hand, the lawyers are independent lawyers, who are not bound to the client by a relationship of employment, and who are entitled to practise their profession in one of the EU (or EEA) Member States.[10]

In subsequent judgments, the EU General Court has recognised that internal documents of a company summarising advice received in exercise of the company's rights of defence from external lawyers are also protected.[11] Similarly, internal preparatory documents, even if they were not exchanged with a lawyer or were not created for the purpose of being sent physically to a lawyer, are protected if drawn up exclusively for the purpose of

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paragraph 90. See also Order in *Hilti* v *Commission*, T-30/89, EU:T:1990:27, paragraph 12.

Legal professional privilege does thus not stand in the way of lawyer-client communications being produced voluntarily to the European Commission by the client, for instance in the framework of leniency; see further my papers 'Self-incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis' (2003) 26 *World Competition* 567, 'Leniency in Antitrust Enforcement: Theory and Practice' (2007) 30 *World Competition* 25, 'The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles' (2008) 31 *World Competition* 335, and 'The Use of Leniency in EU Cartel Enforcement: An Assessment After Twenty Years' (2016) 39 *World Competition* 327, all also accessible at http://ssrn.com/author=456087.

7 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L1/1. This regulation replaced the earlier Council Regulation No 17, [1962] OJ 13/204 (Special English Edition 1959-62, p. 87).

8 The powers of investigation can also be used to obtain information from other undertakings or associations of undertakings which may have information relevant for the case; see Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, [2011] OJ C308/6, paragraph 32.

9 See further Kerse & Khan, *EU Antitrust Procedure* (6th edition; Sweet & Maxwell 2012), Chapter 3, and L. Ortiz Blanco (ed.), *EU Competition Procedure* (3rd edition; Oxford 2013), Chapters 7 and 8.

10 Judgment in *AM & S Europe* v *Commission*, Case 155/79, EU:C:1982:157, paragraphs 18 to 27. On the EEA, see text accompanied by note 52 below.

11 Order in *Hilti* v *Commission*, T-30/89, EU:T:1990:27, paragraph 18.

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seeking legal advice from an external lawyer in exercise of the rights of defence.[12] On the other hand, the mere fact that a document has been discussed with an external lawyer is not sufficient to give it protection.[13]

II. LEGAL NATURE, LEGAL BASIS AND RATIONALE

The legal nature, legal basis and rationale of legal professional privilege, as recognised in EU law, were summarized by Advocate-General Kokott in paragraphs 47 to 49 of her Opinion in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* (with numerous footnotes, omitted here) as follows:[14]

"*47. In EU law, the protection of legal professional privilege has the status of a general legal principle in the nature of a fundamental right. This follows, on the one hand, from the principles common to the legal systems of the Member States: legal professional privilege is currently recognised in all [28] Member States of the European Union, in some of which its protection is enshrined in case law alone, but in most of which it is provided for at least by statute if not by the constitution itself. On the other hand, the protection of legal professional privilege also derives from Article 8(1) of the ECHR [European Convention on Human Rights] (protection of correspondence) in conjunction with Article 6(1) and (3)(c) of the ECHR (right to a fair trial) as well as from Article 7 of the Charter of Fundamental Rights of the European Union (respect for communications) in conjunction with Article 47(1), second sentence of Article 47(2) and Article 48(2) of that Charter (right to be advised, defended and represented, respect for the rights of the defence).*

48. Legal professional privilege serves to protect communications between a client and a lawyer who is independent of that client. One the one hand, it is the essential corollary to the client's rights of defence and, on the other hand, it is based on the specific role of the lawyer as 'collaborating in the interests of justice' and as being required to provide, in full independence, and in the overriding interests of justice, such legal assistance as the client needs.

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12 Judgment in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, T-125/03 and T-253/03, EU:T:2007:287, paragraph 123.

13 Judgment in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, T-125/03 and T-253/03, EU:T:2007:287, paragraph 123.

14 Opinion of Advocate-General Kokott in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, C-550/07 P, EU:C:2010:229, paragraphs 47 to 49 (numerous footnotes omitted).

For a detailed analysis of the fundamental rights foundation of legal professional privilege, see E. Gippini-Fournier, 'Legal Professional Privilege in Competition Proceedings Before the European Commission: Beyond the Cursory Glance', in B.E. Hawk (ed.) *2004 Annual Proceedings of the Fordham Corporate Law Institute – International Antitrust Law and Policy* (Juris Publishing 2005), 587, at 606 to 626.

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49. Lawyers would be unable to carry out satisfactorily their task of advising, defending and representing their clients, who would in consequence be deprived of the rights conferred on them by Article 6 of the ECHR and by Articles 47 and 48 of the Charter of Fundamental Rights, if lawyers were obliged, in the context of judicial proceedings or the preparation for such proceedings, to cooperate with the authorities by passing them information obtained in the course of related legal consultations."

III. FIRST CUMULATIVE CONDITION: COMMUNICATIONS MADE FOR THE PURPOSE AND IN THE INTERESTS OF THE CLIENT'S RIGHTS OF DEFENCE

The first of the two cumulative conditions for communications between lawyers and clients to be protected under the *AM & S Europe* v *Commission* case law is that the exchange with the lawyer must be connected to the client's rights of defence, in that they are "made for the purposes and in the interests of the client's rights of defence".[15]

In the context of the enforcement of Articles 101 and 102 TFEU by the European Commission, this means that the protection covers "all written communications exchanged after the initiation of the administrative procedure under [Regulation 1/2003] which may lead to a decision on the application of [Articles 101 and 102 TFEU] or to a decision imposing a pecuniary sanction on the undertaking".[16]

It covers also "earlier written communications which have a relationship to the subject-matter of that procedure".[17] In *AM & S Europe* v *Commission*, the EU Court of Justice accepted on this ground the protection of communications that dated from several years before the initiation of proceedings but that were "drawn up during the period preceding, and immediately following, the accession of the United Kingdom to the [European Economic] Community, and that [were] principally concerned with how far it might be possible to avoid conflict between the applicant and the Community authorities on the

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15 Judgments in *AM & S Europe* v *Commission*, Case 155/79, EU:C:1982:157, paragraphs 21 and 22, and in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, C-550/07 P, EU:C:2010:512, paragraphs 40 and 41.

16 Judgment in *AM & S Europe* v *Commission*, Case 155/79, EU:C:1982:157, paragraph 23.

17 Judgment in *AM & S Europe* v *Commission*, Case 155/79, EU:C:1982:157, paragraph 23.

On the interpretation of the notion of "relationship with the subject matter of the procedure", see E. Gippini-Fournier, 'Legal Professional Privilege in Competition Proceedings Before the European Commission: Beyond the Cursory Glance', in B.E. Hawk (ed.) *2004 Annual Proceedings of the Fordham Corporate Law Institute – International Antitrust Law and Policy* (Juris Publishing 2005), 587, at 625.

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applicant's position, in particular with regard to the Community provisions on competition".[18]

Legal advice, for instance given under antitrust compliance programmes, that is general in nature and has no specific connection with the current or future exercise of the rights of defence is not protected.[19]

Finally, in the *Peridopril (Servier)* case,[20] the European Commission refused protection to a letter from the external lawyers of Teva (a competitor to Servier) to Servier's external lawyers, found during an inspection at Servier's premises, which warned that Teva would submit an antitrust complaint to the European Commission against Servier, unless an agreement was reached. This letter was in Servier's possession because it had been sent to Servier by Servier's external lawyers, in attachment to an email stating "*Please find enclosed a copy of a letter (confidential) from Teva's Counsel. I suggest we discuss at your earliest convenience*". Given that the letter originated not from Servier's but from Teva's external lawyers, the letter could not be said to have been prepared for the purpose and in the interests of Servier's rights of defence.[21] The fact that the letter was attached to an email from Servier's external lawyers did not change the nature of the letter, because the mere fact that a document has been discussed with an external lawyer is not sufficient to give it protection.[22]

IV. SECOND CUMULATIVE CONDITION: INDEPENDENT (NOT IN-HOUSE) LAWYERS, ENTITLED TO PRACTISE THEIR PROFESSION IN AN EU (OR EEA) MEMBER STATE

The second of the two cumulative conditions for communications between lawyers and clients to be protected under the *AM & S Europe* v *Commission* case law is that the

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18 Judgment in *AM & S Europe* v *Commission*, Case 155/79, EU:C:1982:157, paragraph 34.

19 Opinion of Advocate-General Kokott in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, C-550/07 P, EU:C:2010:229, paragraph 120; see also Judgment in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, T-125/03 and T-253/03, EU:T:2007:287, paragraph 127.

On antitrust compliance programmes, see my further paper 'Antitrust compliance programmes and optimal antitrust enforcement' (2013) 1 *Journal of Antitrust Enforcement* 52.

20 Decision C(2010)5044 of 23 July 2010 concerning a claim of legal privilege and/or protection of confidential correspondence between external lawyers in the context of an investigation pursuant to Article 20(4) of Council Regulation (EC) No 1/2003 in Case No COMP/E-1/39.612 – Perindopril (Servier), accessible at http://ec.europa.eu/competition/antitrust/cases/index.html.

21 Idem, paragraph (15)(i).

22 Idem, paragraph (15)(ii); see (text accompanying) note 13 above and notes 56 and 57 below.

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lawyers are independent lawyers, who are not bound to the client by a relationship of employment, and who are entitled to practise their profession in one of the EU (or EEA) Member States.[23]

The EU Court of Justice explained in *AM & S Europe* v *Commission* that "the requirement as to the position and status as an independent lawyer, which must be fulfilled by the legal advisor from whom the written communications which may be protected emanate, 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. […] Such a conception reflects the legal traditions common to the Member States and is also found in the legal order of the [European Union], as is demonstrated by Article [19] of the Protocol on the Statute of the Court of Justice of the [European Union]", according to which only a lawyer authorised to practise before a court of an EU Member State or another State which is a party to the Agreement on the European Economic Area (EEA) may represent or assist a party before the EU Court of Justice and EU General Court.[24]

The EU Court of Justice added that "such protection may not be extended beyond those limits, which are determined by the scope of the common rules on the exercise of the legal profession as laid down in Council Directive 77/249/EU […], which is based in its turn on the mutual recognition by all the Member States of the national legal concepts of each of them on this subject".[25]

A. The exclusion of in-house lawyers

Following lengthy debate among practitioners and scholars, the EU Court of Justice, following the Opinion of its Advocate-General Kokott,[26] confirmed in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* the exclusion of in-house lawyers from legal professional privilege, even if those in-house lawyers are enrolled with a Bar or Law Society and subject to the corresponding professional ethical obligations.[27]

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23 Judgments in *AM & S Europe* v *Commission*, Case 155/79, EU:C:1982:157, paragraphs 21 to 26, and in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, C-550/07 P, EU:C:2010:512, paragraphs 40 to 119. On the EEA, see text accompanied by note 52 below.

24 Judgment in *AM & S Europe* v *Commission*, Case 155/79, EU:C:1982:157, paragraph 24.

25 Judgment in *AM & S Europe* v *Commission*, Case 155/79, EU:C:1982:157, paragraph 26.

26 Opinion of Advocate-General Kokott in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, C-550/07 P, EU:C:2010:229.

27 Judgment in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, C-550/07 P, EU:C:2010:512.

In-house lawyers, including those that are enrolled with a Bar or Law Society, are similarly excluded from representing parties (other than the EU or EEA Member States and the EU or EEA institutions)

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This exclusion of all in-house lawyers, even if enrolled with a Bar or Law Society and subject to the corresponding professional ethical obligations, is not discriminatory. Indeed, in-house lawyers are in a fundamentally different position from external lawyers, because of the economic dependence and personal identification of a lawyer in an employment relationship with his undertaking.[28]

As explained by Advocate-General Kokott:

"*There is a structural danger that an enrolled in-house lawyer – even if, as is usually the case, he is himself of good character and has the best intentions – will encounter a conflict of interests between his professional obligations and the aims and wishes of his company.*

The susceptibility of an enrolled in-house lawyer to conflicts of interest also makes it difficult for him to raise an effective opposition to any abuses of legal professional privilege. Such abuse may, for example, consist in handing over evidence and information to an undertaking's legal department, under cover of a request for legal advice, for the sole or primary purpose, ultimately, of preventing the competition authorities of gaining access to that evidence and information. At worst, the functional departments of an undertaking may be tempted to misuse the company's internal legal department as a place for storing illegal documents such as cartel agreements and records of meetings between the parties to those cartels and of the modus operandi of a cartel".[29]

In EU law, the requirement of independence of the lawyer is thus determined not only positively – by reference to professional ethical obligations – but also negatively – by reference to the absence of an employment relationship.[30]

What is required for legal professional privilege to apply is that the lawyer is "structurally, hierarchically and functionally, […] a third party in relation to the undertaking receiving [the] advice".[31]

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before the EU Courts; see Judgment in *Prezes Urzędu Komunikacji Elektronicznej and Republic of Poland* v *Commission*, C-422/11 P and C-423/11 P, EU:C:2012:553.

28 Judgment in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, C-550/07 P, EU:C:2010:512, paragraphs 56 to 58 and Opinion of Advocate-General Kokott in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, C-550/07 P, EU:C:2010:229, paragraphs 83 and 58 to 71.

29 Opinion of Advocate-General Kokott in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, C-550/07 P, EU:C:2010:229, paragraphs 149 and 150.

30 See Opinion of Advocate-General Kokott in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, C-550/07 P, EU:C:2010:229, paragraph 60.

31 Judgment in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, T-125/03 and T-253/03, EU:T:2007:287, paragraph 168, confirmed by Judgment in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, C-550/07 P, EU:C:2010512, paragraph 50.

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Several attempts have been made to argue that the exclusion of in-house lawyers would somehow be contrary to the European Convention on Human Rights (ECHR).[32] These arguments were cogently rejected by Advocate-General Kokott in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*.[33] The European Court of Human Rights has not expressed any support for extending legal professional privilege to communications inside a company involving legal advice provided by an in-house lawyer employed by that company.[34]

As I have argued elsewhere,[35] both the fundamental-rights arguments and the instrumental arguments for extending legal professional privilege to in-house lawyers are very weak.

Indeed, it is difficult to see how the possibility to consult in confidence an independent lawyer would be insufficient to guarantee fundamental rights, thereby creating a need to extend legal professional privilege to in-house counsel.[36] There is a wide choice of

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32 On the relationship between the European Convention on Human Rights and EU law, see generally my paper 'EU Antitrust Enforcement Powers and Procedural Rights and Guarantees: The Interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights' (2011) 34 *World Competition* 189, also accessible at http://ssrn.com/author=456087; see also Opinion 2/13 (Accession of the EU to the ECHR) of the EU Court of Justice, EU:C:2014:2454.

33 Opinion of Advocate-General Kokott in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, C-550/07 P, EU:C:2010:229, in particular paragraphs 47, 141, 148 and 152.

34 Idem, paragraph 141; see further the judgments of the European Court of Human Rights of 6 December 2012 in *Michaud v France* (Application no. 12323/11), of 2 April 2015 in *Vinci Construction and GMT génie civil et services* v *France* (Applications no. 63629/10 and 60567/10), and of 26 July 2002 in *Meftah and Others* v *France* (Applications no. 32911/96, 35267/97 and 34595/97), paragraphs 45 to 47.

35 See my papers 'Powers of investigation and Procedural Rights and Guarantees in EU Antitrust Enforcement: The Interplay between European and National Legislation and Case law' (2006) 29 *World Competition* 3, text accompanied by footnotes 75 to 81, and 'EU Antitrust Enforcement Powers and Procedural Rights and Guarantees: The Interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights' (2011) 34 *World Competition* 189, text accompanied by footnotes 100 and 101; both also accessible at http://ssrn.com/author=456087.

36 See also Judgment in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, C-550/07 P, EU:C:2010:512, paragraphs 95 and 96: "even assuming that the consultation of in-house lawyers employed by the undertaking or group were to be covered by the right to obtain legal advice and representation, that would not exclude the application, were in-house lawyers are involved, of certain restrictions and rules relating to the exercise of the profession without that being regarded as adversely affecting the rights of the defence. Thus, in-house lawyers are not always able to represent their employer before all the national courts, although such rules restrict the possibilities open to potential clients in their choice of the most appropriate legal counsel. It follows from those considerations that any individual who seeks advice from a lawyer must accept the restrictions and conditions applicable to the exercise of that profession. The rules on legal professional privilege form part of those restrictions and conditions"; see also Judgment of the European Court of Human Rights of 26 July 2002 in *Meftah and Others* v *France* (Applications no. 32911/96, 35267/97 and 34595/97), paragraphs 45 to 47.

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independent lawyers companies can turn to, and those companies that can afford to have in-house counsel can also afford to pay an independent lawyer.[37]

Instrumental arguments, to the effect that extending legal professional privilege to in-house lawyers would lead to better compliance with Articles 101 and 102 TFEU, are not convincing either. These arguments were brought up in the legislative process leading to the adoption of Regulation No 1/2003. Indeed, the Economic and Monetary Committee of the European Parliament initially adopted an amendment providing for the extension of legal professional privilege to in-house counsel,[38] but this amendment, which was strongly opposed by the European Commission, was subsequently rejected in plenary session of the Parliament by 404 votes against and 69 votes in favour.[39] The EU Council also declined to include any such extension in Regulation No 1/2003. The European Parliament, EU Council and European Commission thus rejected the arguments that extension of legal professional privilege to in-house counsel would be beneficial for the enforcement of Articles 101 and 102 TFEU.

More generally, neither the economic literature nor the (inevitably anecdotal) empirical evidence support the proposition that legal professional privilege furthers compliance or that enlarging the scope of legal professional privilege leads to more compliance.[40]

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37 In fact extension of legal professional privilege to in-house lawyers might lead to less protection of fundamental rights, in that it could lead large undertakings to use only in-house counsel, thus reducing the availability of independent lawyers on the open market, to the detriment of smaller companies that cannot afford in-house counsel.

See also, on legal aid for companies, Judgment in *DEB v Bundesrepublik Deutschland*, C-279/09, EU:C:2010:811.

38 Amendment No 10 contained in the Evans Report, EP Session document of 21 June 2001, PE 296.005.

39 Plenary of 6 September 2001, PE 308.749, page 35; see also Opinion of Advocate-General Kokott in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, C-550/07 P, EU:C:2010:229, paragraph 106.

40 See E. Gippini-Fournier, 'Legal Professional Privilege in Competition Proceedings Before the European Commission: Beyond the Cursory Glance', in B.E. Hawk (ed.) *2004 Annual Proceedings of the Fordham Corporate Law Institute – International Antitrust Law and Policy* (Juris Publishing 2005), 587, at 596-606; L. Kaplow and S. Shavell, 'Legal Advice About Information to Present in Litigation: Its Effects and Social Desirability' (1989) 102 *Harvard Law Review* 565; L. Kaplow and S. Shavell, 'Legal Advice About Acts Already Committed' (1990) 10 *International Review of Law and Economics* 149; S. Shavell, 'Legal Advice', in P. Newman (ed.), *New Palgrave Dictionary of Economics and the Law*, Volume 2 (1998), 516-520; I. Baum, 'Attorney Corporate Client Privilege: Who Represents the Corporation?' (2007) *Review of Law & Economics*, Vol. 3, Iss. 1, Article 5; and C.E. Parker, R.E. Rosen and V. Lehmann Nielsen, 'The Two Faces of Lawyers: Professional Ethics and Business Compliance With Regulation' (2009) 22 *Georgetown Journal of Legal Ethics* 201.

A piece of anecdotal evidence: it turned out that AM & S Europe continued infringing Article 85 EEC (now Article 101 TFEU) for five years after it received the legal advice at stake in the *AM & S Europe* v *Commission* case (as note 10 above); see European Commission Decision of 6 August 1984 in Case IV/30.350 *Zinc Producer Group*, [1984] OJ L 220/27.

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Finally, the American model cannot be invoked as an argument for extending legal professional privilege to in-house lawyers under EU law. Indeed, no direct comparison can be drawn with the enforcement system in the USA.

In the EU system, extending legal professional privilege to in-house lawyers would be detrimental to the effectiveness of inspections and thus the possibility to detect and collect evidence of cartels and other infringements of Articles 101 and 102 TFEU. Inspections are a crucial instrument in EU antitrust enforcement.[41] European Commission decisions heavily rely on documentary evidence which must be collected on the spot and cannot be complemented by summoning witnesses.

Extending legal professional privilege to in-house lawyers would be detrimental to the effectiveness of inspections in two ways. First, it would reduce the universe of the documents which can be found during an inspection that may contain useful evidence of the suspected infringement. More so than legal opinions of in-house lawyers,[42] the descriptions of facts contained in, and documents attached to, the communications to in-house lawyers from other members of staff regularly contain useful evidence. Secondly, extending legal professional privilege to in-house lawyers would significantly complicate and slow down inspections, as difficult and time-consuming discussions would take place between the inspectors and the company's lawyers to determine which communications with in-house lawyers are privileged. Speed in inspections is often of great importance in practice.

If legal professional privilege were extended to in-house lawyers, it would indeed be difficult to define its precise scope in a way which does not invite abuse.[43] In the US, where in-house lawyers are not as a matter of principle excluded from attorney-client privilege protection, the law appears to be rather uncertain. The problem is that unqualified application of the privilege to communications between all corporate employees and in-house counsel risks leading to zones of silence, through which the corporation could potentially channel all potentially incriminating documents and information. Lower court judgments and academic writing have proposed lots of

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41 The success of leniency does not reduce the need for effective inspections; rather to the contrary, effective investigation powers and effective sanctions are pre-conditions for operating a successful leniency programme; see further my papers 'Leniency in Antitrust Enforcement: Theory and Practice' (2007) 30 *World Competition* 25, 'The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles' (2008) 31 *World Competition* 335, and 'The Use of Leniency in EU Cartel Enforcement: An Assessment After Twenty Years' (2016) 39 *World Competition* 327, both also accessible at http://ssrn.com/author=456087.

42 As to the legal opinions of in-house lawyers, the European Commission stated in paragraph 37 of its *XXXIInd Report on Competition Policy 2002* (2003) that it "will in future not consider, pursuant to its guidelines on the method of setting fines, as an aggravating circumstance to be taken into account in determining the amount of a pecuniary penalty to be imposed on a company, the fact that in-house legal advisers had warned the management of the illegality of the conduct forming the subject-matter of the Commission's decision. Such a communication may, however, be used as evidence of the existence of an infringement". On the European Commission's method of setting fines, see further my paper 'The European Commission's 2006 Guidelines on Antitrust Fines: A Legal and Economic Analysis' (2007) 30 *World Competition* 197, also accessible at http://ssrn.com/author=456087.

43 See also text accompanied by notes 28 and 29 above.

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competing tests to determine the acceptable scope of protection, mostly by limiting who is to be considered as the "client" to whom communications are confidential (only the board, not other staff, etc.). In *Upjohn*,[44] the US Supreme Court opted for a case-by-case approach under which each case has to be judged in the light of the rationale of legal privilege protection. This approach arguably leaves a lot of legal uncertainty.

One can easily imagine this borderline problem being much more serious in the case of the European Union, in the absence of a common practice or understanding concerning the role and nature of in-house lawyers in the EU Member States. In the US at least, in-house counsel is a well-established function, present in all (large) corporations.

The US investigation system does not in any event rely to the same extent as that of the EU on on-the-spot inspections to collect documentary evidence. The US enforcement agencies work with discovery orders and witnesses. Disputes on the scope of legal professional privilege are not impinging directly on the powers of the US Department of Justice to gather the necessary evidence. This is partly explained by the extensive investigatory powers at the US Department of Justice's disposal, in particular the power to perform secret recordings by informants of telephone calls and meetings. Furthermore, the basic features of the US system, including criminal sanctions on individuals, grand jury and plea bargaining give the US Department of Justice a very important leverage to obtain admissions from direct witnesses.[45]

As legal professional privilege for in-house lawyers has a long-standing tradition in US law, its impact has been factored into the design of the enforcement powers in the US system. The enforcement powers of the European Commission have been designed on the basis of an equally long-standing continental-European tradition of a different treatment of employed and independent lawyers.

B. The exclusion of non-EEA lawyers

The EU Court of Justice made it very clear in *AM & S Europe* v *Commission* that legal professional privilege only applies to "any lawyer entitled to practise his profession in one of the [EU or EEA] Member States",[46] and that "such protection may not be extended beyond those limits, which are determined by the scope of the common rules on the exercise of the legal profession as laid down in Council Directive 77/249/EU […], which

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44 *Upjohn Co.* v *United States*, 449 U.S. 383 (1981).

45 For a critical assessment of the US system from a defence perspective, see L.W. Jacobs, 'Criminal Enforcement of Antitrust Laws – Problems with the U.S. Model', in B.E. Hawk (ed.) *2006 Annual Proceedings of the Fordham Corporate Law Institute – International Antitrust Law and Policy* (Juris Publishing 2007), 25.

46 Judgment in *AM & S Europe* v *Commission*, Case 155/79, EU:C:1982:157, paragraph 25.

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is based in its turn on the mutual recognition by all the Member States of the national legal concepts of each of them on this subject".[47]

As the Court pointed out, the same limitation is also reflected in Article 19 of the Protocol on the Statute of the Court of Justice of the European Union, according to which only a lawyer authorised to practise before a court of an EU Member State or another State which is a party to the Agreement on the European Economic Area (EEA) may represent or assist a party before the EU Court of Justice and EU General Court.[48]

Advocate-General Kokott further explained in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* why "the inclusion, in addition, of lawyers from third countries would not under any circumstances be justified"[49]:

"*For, unlike in the relationship between the Member States, in the relationship with third countries there is, generally speaking, no adequate basis for the mutual recognition of legal qualifications and professional ethical obligations to which lawyers are subject in the exercise of their profession. In many cases, it would not even be possible to ensure that the third country in question has a sufficiently established rule-of-law tradition which would enable lawyers to exercise their profession in the independent manner required and thus to perform their role as collaborators in the administration of justice. It cannot be the task of the Commission or the Courts of the European Union to verify, at considerable expense, that this is the case on each occasion by reference to the rules and practices in force in the third country concerned, particularly since there is no guarantee that there will be an efficient system of administrative cooperation with the authorities of the third country on every occasion*".[50]

Under EU law, third-country lawyers could thus only be included in legal professional privilege protection on the basis of an international agreement based on mutual recognition of legal qualifications and professional ethical obligations.

In 1984, shortly after the *AM & S Europe* v *Commission* judgment, the European Commission submitted to the EU Council a recommendation for a Council decision authorizing the Commission to open negotiations with a view to the conclusion of such international agreements.[51] The EU Council never granted any such authorization,

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47 Idem, paragraph 26.

48 Idem, paragraph 24; see also Order in *FTA and Others* v *Council*, T-37/98, EU:T:2000:52, paragraph 25.

49 Opinion of Advocate-General Kokott in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, C-550/07 P, EU:C:2010:229, paragraph 189.

50 Idem, paragraph 190.

51 European Commission, Recommendation of 9 October 1984 for a Council decision authorizing the Commission to open negotiations with a view to the conclusion of agreements between the European Economic Community and certain third countries concerning the protection of legal papers in connection with the application of the rules on competition, COM/84/548final; see also European Commission, *Fourteenth Report on Competition Policy 1984* (1985), paragraph 48.

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however, and the European Commission withdrew this recommendation as obsolete in 1998.

The Agreement on the European Economic Area, concluded in 1993, led to the extension of EU legal professional privilege to cover lawyers of the EEA/EFTA states (Norway, Iceland and Lichtenstein) under the same conditions as lawyers of the EU Member States.[52]

From a fundamental rights perspective, the exclusion of third-country lawyers does not appear problematic. Those (relatively rare, and usually large) non-EEA-based companies that are in need of legal assistance in connection with actual or potential EU antitrust enforcement proceedings can no doubt find and afford the services of EU or EEA lawyers.[53]

V. INTERNAL PREPARATORY DOCUMENTS AND INTERNAL DOCUMENTS SUMMARISING ADVICE FROM EXTERNAL LAWYERS

In *Hilti* v *Commission*, the EU General Court has recognised that internal documents of a company summarising advice received in exercise of the company's rights of defence from external lawyers are also protected under legal professional privilege.[54]

In *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, the EU General Court similarly recognised that internal preparatory documents, even if they were not exchanged with a lawyer or were not created for the purpose of being sent physically to a lawyer, are protected if drawn up exclusively for the purpose of seeking legal advice from an external lawyer in exercise of the rights of defence.[55]

On the other hand, the mere fact that a document has been discussed with an external lawyer is not sufficient to give it protection.[56]

Finally, also according to the EU General Court:

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52 Declaration by the European Community on the rights of lawyers of the EFTA States under Community law, attached to the Agreement on the European Economic Area, [1994] OJ L1/567.

53 See also (text accompanied by) notes 36 and 37 above.

54 Order in *Hilti* v *Commission*, T-30/89, EU:T:1990:27, paragraph 18.

55 Judgment in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, T-125/03 and T-253/03, EU:T:2007:287, paragraph 123.

56 Idem, paragraph 123.

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"*It must be borne in mind that protection under [legal professional privilege] is an exception to the [European] Commission's powers of investigation, which are essential to enable it to discover, bring to an end and penalise infringements of the competition rules. Such infringements are often concealed and usually very harmful to the proper functioning of the common market. For this reason, the possibility of treating a preparatory document as covered by [legal professional privilege] must be construed restrictively. It is for the undertaking relying on this protection to prove that the documents in question were drawn up with the sole aim of seeking legal advice from a lawyer. This should be unambiguously clear from the content of the documents themselves or the context in which those documents were prepared and found*".[57]

Pre-existing documents that are attached to a request for legal advice addressed to an independent lawyer, or to the legal opinion of such a lawyer, are thus not covered by legal professional privilege, unless those pre-existing documents were drawn up with the sole aim of seeking legal advice.

VI. PROCEDURE AND PRACTICE

A. Inspections

Where during an inspection by the European Commission under Article 20 of Regulation 1/2003 a company refuses, on the ground that it is entitled to legal professional privilege, to produce, among the business records demanded by the European Commission, written communications between itself and its lawyer, it must provide the Commission's authorized agents with relevant material of such a nature as to demonstrate that the communications fulfil the conditions for being granted legal protection, although it is not bound to reveal the contents of the communications in question.[58] The company may, in particular, inform the Commission of the author of the document and for whom it was intended, explain the respective duties and responsibilities of each, and refer to the objective and the context in which the document was drawn up. Similarly it may also mention the context in which the document was found, the way in which it was filed and any related documents.[59]

The mere fact that a company claims that a document is protected by legal professional privilege is not sufficient to prevent the European Commission from reading that

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57 Idem, paragraph 124.

58 Judgment in *AM & S Europe* v *Commission*, Case 155/79, EU:C:1982:157, paragraph 29.

59 Judgment in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, T-125/03 and T-253/03, EU:T:2007:287, paragraph 80.

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document if the company produces no relevant material of such a kind as to prove that it is actually protected by legal professional privilege.[60]

In a significant number of cases, a mere cursory look by the Commission officials at the general layout, heading, title or other superficial features of the document will enable them, when deciding whether to put it aside, to confirm the accuracy of the reasons invoked by the company and to determine whether the document at issue is confidential. Nevertheless, on certain occasions, there would be a risk that, even with a cursory look at the document, in spite of the superficial nature of their examination, the Commission officials would gain access to information covered by legal professional privilege. That may be so, in particular, if the confidentiality of the document in question is not clear from external indications.[61] If the company considers that a cursory look is impossible without revealing the content of one or more specific documents, and the company gives the Commission appropriate reasons for its view, the company is entitled to refuse the Commission officials to take even a cursory look.[62]

If the Commission considers that the material presented by the company is not of such a nature as to prove that the documents in question are confidential, the Commission officials may place a copy of the document or documents in question in a sealed envelope and then remove it with a view to as subsequent resolution of the dispute. This procedure enables risks of a breach of legal professional privilege to be avoided while at the same time enabling the Commission to retain a certain control over the documents forming the subject-matter of the investigation and avoiding the risk that the documents will subsequently disappear or be manipulated.[63]

The solution of the dispute between the company and the European Commission as to whether the contested document or documents are protected by legal professional privilege cannot be left to an arbitrator or to a Member State authority, but must be sought at the EU level.[64]

If the European Commission wants to open the sealed envelope and read the contents of the document, it must first adopt a decision rejecting the company's legal professional privilege claim, thus allowing the company concerned to refer the matter to the EU General Court, and to make an application for interim measures seeking suspension of operation of the decision rejecting the legal professional privilege claim.[65]

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60 Idem, paragraph 80.

61 Idem, paragraph 81.

62 Idem, paragraph 82.

63 Idem, paragraph 83.

64 Judgment in *AM & S Europe* v *Commission*, Case 155/79, EU:C:1982:157, paragraph 30.

65 Judgment in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, T-125/03 and T-253/03, EU:T:2007:287, paragraph 85 and 88.

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Only if the company either does not bring such an application before the EU General Court or after its application has been rejected by the EU Courts (General Court as well as, on a possible further appeal on points of law, Court of Justice) can the European Commission open the sealed envelope and read the contents of the document.[66]

This procedure being cumbersome and time-consuming, it could be feared that companies may abuse this procedure by making requests, merely as delaying tactics, for protection under legal professional privilege which are clearly unfounded, or by opposing, without objective justification, any cursory look at the documents during an inspection. However, the European Commission has the means to discourage and penalise such conduct. Indeed, such conduct may be penalised under Article 23(1)(c) of Regulation 1/2003 (which provides for fines of up to 1 % percent of the undertaking's total turnover in the preceding business year for producing business records in incomplete form during an inspection or for refusing to submit to an inspection) or be taken into account as aggravating circumstances when calculating any fine imposed for the infringement of Article 101 or 102 TFEU in the course of the investigating of which the inspection took place.[67]

In practice, the full procedure, with a decision of the European Commission formally rejecting the legal professional privilege claim and subsequent proceedings before the EU Courts, is only very rarely pursued to the end. Often substantial time is however spent on discussions between Commission officials and the company's lawyers before the matter is resolved.[68]

B. Requests for information

Disputes concerning legal professional privilege can also arise in the context of requests for information. The procedure follows the same principles as described above for disputes during inspections.[69]

Article 18 of Regulation 1/2003 provides for two types of requests for information: by simple request pursuant to Article 18(2) or by decision pursuant to Article 18(3). While companies are under an obligation to supply, in complete form, information requested by

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66 Idem, paragraphs 86 to 88; and Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, [2011] OJ C308/6, paragraph 57.

67 Judgment in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, T-125/03 and T-253/03, EU:T:2007:287, paragraph 89. The obligation to submit to an inspection only applies to inspections ordered by decision pursuant to Article 20(4) of Regulation 1/2003, not to inspections by simple authorisation pursuant to Article 20(2) of Regulation 1/2003. However, if the company choses to submit to an inspection by simple authorisation, the obligation to produce the required business records in complete form applies. In practice, most inspections, including all surprise inspections, conducted by the European Commission are ordered by decision pursuant to Article 20(4).

68 See also text accompanied by notes 42 and 43 above.

69 Text accompanied by notes 58 to 68 above.

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decision, there is no obligation to respond to a simple request.[70] In most cases, the European Commission first sends a simple request pursuant to Article 18(2), and only later, if the company has refused to respond to the simple request, sends a request by decision pursuant to Article 18(3), possibly combined with a decision pursuant to Article 24(1)(d) of Regulation 1/2003 imposing periodic penalty payments to compel compliance with the request for information.

If the company that is the addressee of the request for information claims professional legal privilege with regard to a requested document or documents, it must provide the European Commission with appropriate justification and relevant material to substantiate its claim, while not being bound to disclose the contents of such documents. Redacted versions removing the parts covered by legal professional privilege should be submitted.[71]

If the Commission is not convinced by the company's arguments, it must adopt a decision rejecting the legal professional privilege claim, thus allowing the company concerned to refer the matter to the EU General Court, and to make an application for interim measures seeking suspension of operation of the decision rejecting the legal professional privilege claim.[72]

As with claims made in the context of inspections,[73] in practice, the full procedure, with a decision of the European Commission formally rejecting the legal professional privilege claim and subsequent proceedings before the EU Courts, is only very rarely pursued to the end. Often substantial time is however spent on discussions between Commission officials and the company's lawyers before the matter is resolved.[74]

C. The role of the Hearing Officer

In 2011, the possibility was created for companies to bring disputes about legal professional privilege in antitrust cases before the European Commission's Hearing Officer.[75]

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70 If a company choses to respond to a simple request pursuant to Article 18(2), it can however be fined under Article 23(1)(a) of Regulation 1/2003 for supplying incorrect or misleading information.

71 Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, [2011] OJ C308/6, paragraph 52.

72 See (text accompanying) notes 65 an 66 above.

73 See text accompanied by note 68 above.

74 See also text accompanied by notes 42 and 43 above.

75 Article 4(2)(a) of Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, [2011] OJ L275/29.

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Article 4(2)(a), read in conjunction with Article 3(7), of Decision 2011/695/EU,[76] provides that, where a company has withheld from the European Commission a document (including where the document has been put in a sealed envelope)[77], claiming that it is covered by legal professional privilege within the meaning of the case law of the EU Courts, the company may, after having raised the matter with the Commission's Directorate-General for Competition, ask the Hearing Officer to examine the claim. The Hearing Officer may only review the matter if the company making the claim consents to the Hearing Officer viewing the information claimed to be covered by legal professional privilege as well as related documents that the Hearing Officer considers necessary for his review. Without revealing the potentially privileged content of the information, the Hearing Officer must communicate to the Director responsible in the Directorate-General for Competition and to the company concerned his preliminary view, and may take appropriate steps to promote a mutually acceptable resolution. Where no resolution is reached, the Hearing Officer may formulate a reasoned recommendation to the Competition Commissioner,[78] without revealing the potentially privileged content of the document. The company making the claim is to receive a copy of this recommendation.

The Hearing Officer's recommendation has no binding force.[79] If, after the intervention of the Hearing Officer, the company maintains its claim, and the European Commission still wants to read and use the document, then the European Commission must do what it would also have to do if the intervention of the Hearing Officer had not been asked, namely take a decision rejecting the legal professional privilege claim, thus allowing the company concerned to refer the matter to the EU General Court, and to make an application for interim measures seeking suspension of operation of the decision rejecting the legal professional privilege claim.[80]

The Hearing Officer is a member of the European Commission's staff, who is not part of the Commission's Directorate-General for Competition, and who has been entrusted by the President of the European Commission with a number of powers and functions in order to safeguard the effective exercise of procedural rights in antitrust and merger proceedings before the European Commission. Article 3(1) of Decision 2011/695/EU provides that "in exercising his or her functions, the Hearing Officer shall act independently".

See further my paper 'The Role of the Hearing Officer in Competition Proceedings before the European Commission', accessible at http://ssrn.com/author=456087.

76 As note 75 above.

77 See text accompanied by note 63 above.

78 The European Commission is a collegiate body composed of a number of Commissioners equal to the number of EU Member States. One of these Commissioners has special responsibility for competition ("the Competition Commissioner").

79 Article 288 TFEU.

80 See text accompanied by notes 65 and 66 and by note 72 above.

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While in a few cases companies have contacted the Hearing Officer about a possible use of the procedure laid down in Article 4(2)(a) of Decision 2011/695/EU, this procedure has at the time of writing not yet been used in any antitrust case.[81]

VII. ENFORCEMENT OF EU ANTITRUST LAW BY THE COMPETITION AUTHORITIES OF THE EU MEMBER STATES

Under Regulation 1/2003, Articles 101 and 102 TFEU are enforced not only by the European Commission but also by the competition authorities of the EU Member States, forming together the European Competition Network. Indeed, more than 85 % of the public enforcement of Articles 101 and 102 TFEU is nowadays done by the competition authorities of the EU Member States.[82]

In most EU Member States, national law provides for legal professional privilege under the same or very similar conditions as under EU law.

It would be contrary to EU law for competition authorities or courts of the EU Member States in cases of enforcement of Articles 101 or 102 TFEU to grant legal professional privilege under more restrictive conditions than those laid down in the case law of the EU Courts.[83]

Indeed, as mentioned above, in EU law, the protection of legal professional privilege has the status of a general legal principle in the nature of a fundamental right, deriving *inter alia* from the Charter of Fundamental Rights of the EU.[84] The Charter of Fundamental Rights of the EU is also applicable to the enforcement of Articles 101 or 102 TFEU by the national competition authorities.[85] The same holds for general principles of EU law.

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81 One request pursuant to Article 4(2)(a) of Decision 2011/695/EU has however been made in a case concerning proceedings under Article 14 of the EU Merger Regulation.

82 See my paper 'Ten Years of Regulation 1/2003 – A Retrospective' (2013) 4 *Journal of European Competition Law & Practice* 293, also accessible at http://ssrn.com/author=456087.

83 See text accompanied by notes 15 to 25 and by notes 54 to 57 above; see also my paper 'EU Antitrust Enforcement Powers and Procedural Rights and Guarantees: The Interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention on Human Rights' (2011) 34 *World Competition* 189, also accessible at http://ssrn.com/author=456087

84 See text accompanied by note 14 above.

85 See Article 51(1) of the Charter ("The provisions of this Charter are addressed […] to the Member States […] when they are implementing Union law"); Judgments in *Stefano Melloni* v *Ministerio Fiscal*, C-399/11, EU:C:2013:107, paragraph 60, and in *UBS Europe and Others*, C-358/16, EU:C:2018:715, paragraph 51; and Article 3(1) of the proposed Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (Provisional agreement resulting

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According to the case law of the Court of Justice, "the requirements flowing from the protection of fundamental rights in the [EU] legal order are also binding on the Member States when they implement [EU] rules".[86]

The competition authorities of the EU Member States and the courts of the EU Member States must thus in cases concerning the enforcement of Articles 101 and 102 TFEU grant legal professional privilege whenever the conditions laid down in the case law of the EU Courts are fulfilled, even if the conditions for legal professional privilege under national law may not be fulfilled. Companies can directly invoke EU law to ensure their rights in this respect.

More delicate is the question whether EU Member States are allowed to grant legal professional privilege more broadly than under EU law.

This question arises in particular in relation to the few EU Member States, notably the United Kingdom (still an EU Member State at the time of writing, and possibly after its exit from the EU still bound by EU law during a transitional period), Ireland, the Netherlands, Belgium and Portugal, which also grant legal professional privilege protection to exchanges with in-house lawyers.

Under EU law, Member States are under an obligation to ensure the effective and uniform application of Articles 101 and 102 TFEU by their competition authorities.[87] As explained above,[88] one of the reasons why under EU law legal professional privilege has not been extended to in-house lawyers, even if those in-house lawyers are enrolled with a Bar or Law Society and subject to the corresponding professional ethical obligations, is that such an extension would undermine the effectiveness of the enforcement of Articles 101 and 102 TFEU by the European Commission. There is no sound basis for assuming that the extension of legal professional privilege to in-house lawyers would not similarly affect the effectiveness of the enforcement of Articles 101 and 102 TFEU by the competition authorities of the Member States.[89]

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from interinstitutional negotiations; European Parliament document PE632.968v01-00 AG\1157771EN.docx of 20 June 2018).

86 Judgment of 13 April 2000 in Case C-292/97 *Karlsson and Others* [2000] ECR I-2760, para 37.

87 See Article 35(1) of Regulation 1/2003 and Judgment in *Schenker*, C-681/11, EU:C:2013:404, paragraphs 36, 46 and 49.

88 See text accompanied by notes 26 to 45 above.

89 In none of the Member States concerned do the competition authorities, when enforcing Articles 101 and 102 TFEU, have criminal enforcement powers similar to those of the US Department of Justice that might counterbalance the weakening of enforcement powers resulting from the extension of legal professional privilege to in-house lawyers; see text accompanied by notes 40 to 45 above.

See also Article 13(1) of of the proposed Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (Provisional agreement resulting from interinstitutional negotiations; European Parliament document PE632.968v01-00 AG\1157771EN.docx of 20 June

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In my view it follows that those Member States that currently recognise legal professional privilege for in-house lawyers in the context of the enforcement of Articles 101 and 102 TFEU by their national competition authorities are in breach of EU law.

I am not necessarily arguing that the competition authorities or courts of those Member States can directly invoke EU law to deny legal professional privilege to all exchanges with in-house lawyers, as this may offend against the principle of legal certainty, which is a general principle of EU law.[90] In my view the Member States concerned are however under an obligation to enact the necessary legislation to exclude all in-house lawyers from legal professional privilege in cases of enforcement of Articles 101 or 102 TFEU by their national competition authorities.[91] The European Commission could bring proceedings pursuant to Article 258 TFEU against those Member States that fail to do so.

VIII. PRIVATE ENFORCEMENT

Apart from the public enforcement by the European Commission and the competition authorities of the EU Member States, Articles 101 and 102 TFEU are also invoked in litigation between private parties in the courts of the EU Member States (private enforcement).[92]

2018), which will oblige EU Member States to provide for the effective imposition of fines for violations of Articles 101 and 102 TFEU in non-criminal proceedings.

90 See Judgments in *X*, C-60/02, EU:C:2004:10, paragraph 61, and in *Berlusconi*, Joined Cases C-387/02 etc., EU:C:2005:270, paragraph 74.

91 Under UK law, legal professional privilege can be overridden or modified by statute; see UK House of Lords, *Three Rivers District Council and others (Respondents)* v *Governor and Company of the Bank of England (Appellants) (2004)*, [2004] UKHL 48, paragraph 25; Opinion of Advocate-General Warner in *AM & S Europe* v *Commission*, Case 155/79, EU:C:1981:19, [1982] ECR 1619 at 1634 and 1636; and Opinion of Advocate-General Sir Gordon Slynn in *AM & S Europe* v *Commission*, Case 155/79, EU:C:1982:17, [1982] ECR 1642 at 1658.

In Belgium, the extension of legal professional privilege to in-house counsel results from Article 5 of the Law of 1 March 2000, and could thus be reversed by repealing or amending this provision; see Judgment of the Brussels Court of Appeals of 5 March 2013 in Case 2011/MR/3.

It would not appear that in those Member States that extend legal professional privilege to in-house counsel this extension is in the nature of a constitutional or fundamental right. In any event, according to the case law of the EU Court of Justice, by virtue of the principle of primacy of EU law, which is an essential feature of the EU legal order, rules of national law, even of a constitutional order, cannot be allowed to undermine the effectiveness of EU law, and the application of national standards of protection of fundamental rights cannot compromise the primacy, unity and effectiveness of EU law; see Judgment in *Stefano Melloni* v *Ministerio Fiscal*, C-399/11, EU:C:2013:107, paragraphs 59 and 60.

92 See my paper 'Private Enforcement of EU Antitrust Law and its Relationship with Public Enforcement: Past, Present and Future' (2017) 40 *World Competition* 3, also accessible at http://ssrn.com/author=456087.

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Article 5(6) of the EU Damages Directive,[93] which applies to actions for damages for infringement of Articles 101 or 102 TFEU before the courts of the EU Member States,[94] provides that "Member States shall ensure that national courts give full effect to applicable legal professional privilege under [European] Union or national law when ordering the disclosure of evidence".

This provision leaves open the question what the applicable EU or national law is.[95]

As to EU law, it is unclear whether or how the *AM & S Europe* v *Commission* case law, which has its origin in the quasi-criminal context of the enforcement of Articles 101 and 102 TFEU by the European Commission, could be transposed to the context of private enforcement.

A comparison with the *Otto v Postbank* case law,[96] according to which the privilege against self-incrimination as recognised in the case law of the EU Courts in the context of the enforcement of Articles 101 and 102 TFEU by the European Commission cannot be transposed to private enforcement before the courts of the EU Member States, might suggest that the *AM & S Europe* v *Commission* case law can similarly not be transposed to private enforcement.[97]

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93 Directive 2014/102/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and the European Union, [2014] OJ L349/1.

94 Idem, Articles 1 and 2.

95 See also F. Wagner-von Papp, 'Access to Evidence and Leniency Materials' (18 February 2016), accessible at http://ssrn.com/abstract=2733973, at pages 49-50.

96 Judgment in *Otto v Postbank*, C-60/92, EU:C:1993:876, paragraphs 15 to 17.

97 On the link between legal professional privilege and the privilege against self-incrimination, see E. Gippini-Fournier, 'Legal Professional Privilege in Competition Proceedings Before the European Commission: Beyond the Cursory Glance', in B.E. Hawk (ed.) *2004 Annual Proceedings of the Fordham Corporate Law Institute – International Antitrust Law and Policy* (Juris Publishing 2005), 587, at 614-621 and 625.

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