

Legal Professional Privilege in the European Union

I. Introduction

This chapter discusses legal professional privilege (“LPP”) under European Union law and as defined by the EU courts (“EU LPP”) and how it relates to in-house counsel involvement in pro bono work in Europe.¹ LPP is a special status granted to correspondence exchanged with a legal advisor. A document protected by LPP cannot be seized by a government authority, and its content cannot be used as evidence in proceedings.

LPP has long enjoyed protection under European law as solidified through several decisions:

- In *AM&S*, the Court of Justice of the European Union (the “**Court of Justice**”) held that EU LPP covers written communications between a client and an external lawyer qualified to practice in the EEA in connection with the client’s rights of defence.² This judgement was clarified in two subsequent decisions.
- In *Hilti*, the Court of Justice ruled that EU LPP applies to internal records (i.e., internal notes, working documents or summaries) of a company that reflect legal advice received from an external lawyer as long as the records summarise that legal advice.³
- In *Akzo*, the Court of Justice clarified that, in the context of a company, in-house counsel that are employed by that company are in a fundamentally different position from “external lawyers” (as defined below) and are not sufficiently independent for their communications to benefit from EU LPP.⁴
- The *Orde van Vlaamse Balies and others* judgment solidified the scope of EU LPP as they confirmed that EU LPP – enshrined in Articles 7, 47 and 48 of the Charter of Fundamental Rights of the European Union (the “**Charter**”) – applies to any legal advice (i.e., regardless of the area of law) and covers the very existence of legal advice, not only its content.⁵ EU LPP no longer necessitates demonstrating that the client’s communication with their external lawyer was intended to prepare for or exercise their rights of

¹ Although their situation regarding EU LPP may be similar to in-house counsel, this chapter does not discuss the situation of external lawyers not qualified in the EEA. For reference, the EEA consists of the following countries: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Iceland, Liechtenstein, and Norway.

² Case 155/79, 18 May 1982, *AM&S Europe v. Commission*, ECLI:EU:C:1982:157.

³ Case T-30/89, Order of 4 April 1990, *Hilti v Commission*, ECLI:EU:T:1990:27.

⁴ Case C-550/07, 14 September 2010, *Akzo Nobel Chemicals and Akros Chemicals v. Commission*, ECLI:EU:C:2010:512.

⁵ Case C-694/20, 8 December 2022, *Orde van Vlaamse Balies and Others v Vlaamse Regering*, ECLI:EU:C:2022:963.

defence. Finally, in the *Belgian Association of Tax Lawyers and Others* judgment clarified that the *Orde van Vlaamse Balies and others* judgment is applicable solely to individuals who conduct their professional activities under one of the professional titles mentioned in Article 1(2)(a) of Directive 98/5.⁶ This means that the lawyer must play a part in collaborating in the administration of justice and that the *Orde van Vlaamse Balies and others* judgment does not apply to other professionals who do not possess these characteristics, even if they are authorised by Member States to provide legal representation.

The scope and limitations of these judgments are discussed in Sections II and III. For reasons explained below, this chapter also briefly touches upon the issue of LPP in the national EU Member States (Section IV) and provides some practical suggestions for dealing with LPP under EU law (Section V).

II. Outline of Legal Professional Privilege under European Union Law

This section sets out the main features of EU LPP (as set out in the judgment of the Court of Justice in *AM&S* and further established in subsequent decisions).

EU LPP covers all communications exchanged between a client and independent lawyers; i.e., lawyers, registered with the Bar of an European Economic Area (“**EEA**”) Member State, who are not bound to the client by a relationship of employment (“**external lawyer**”).⁷ EU LPP applies to any communications between external EEA-admitted lawyers and their clients that involve the provision of legal advice regardless of the area of law to which it relates and of whether such advice relates to the clients exercising their rights of defence.⁸ Clients can argue that their communications with external EEA-admitted lawyers that involve legal advice with respect to any subject matter cannot be captured by requests for information from the European Commission (the “**Commission**”) targeting internal documents.

However, EU LPP does not extend to pre-existing documents (e.g., internal communications among executives on business matters, notes of business meetings, commercial documents) and, accordingly, does not concern original internal business documents, even if they have been selected and copied in response to a request by external counsel who require them in order to provide legal advice on matters that may have a relationship to the subject matter of a subsequent procedure. It is, however, unclear whether EU LPP extends to such collections of copies of pre-existing internal documents when they are attached as an integral part of “preparatory documents.” In the absence of precise indications from either the EU Courts or the Commission on this specific issue, a cautious approach should be adopted in the day-to-day approach to these issues. Indeed, the Commission’s current

⁶ Case C-623/22, 29 July 2024, *Order of Flemish Bars and others*, ECLI:EU:C:2024:639.

⁷ For the purposes of this chapter, an in-house lawyer who is registered with the Bar of an EEA and who provides pro bono services to a client to whom it is not bound by a relationship of employment is considered to be an “external lawyer.”

⁸ Case C-694/20, 8 December 2022, *Orde van Vlaamse Balies and Others v Vlaamse Regering*, ECLI:EU:C:2022:963.

approach to pre-existing documents that are annexed to legally privileged memoranda is not to consider them covered by EU LPP.

A refusal to produce a certain document to the Commission on the grounds that it is covered by EU LPP must be supported by evidence demonstrating that EU LPP protection is applicable. Parties may submit their claims to the so-called “Hearing Officer” regarding documents requested by, but withheld from, the Commission on the basis of EU LPP.

III. Scope and Limitations of Legal Professional Privilege under European Law

It follows that EU LPP protects all correspondence between an independent EEA-admitted lawyer and his/her client involving the provision of legal advice. Going far beyond its holdings in *AM&S* and *Akzo*, the Court of Justice found in *Orde van Vlaamse Balies and others* that EU LPP does not only protect communications related to the activity of legal defence, but goes further and protects any legal advice across all areas of law provided by an external EEA lawyer.

This means that the scope of and room for EU LPP are in practice quite broad. Any limitations to the EU LPP must be in line with the principle of proportionality and must therefore be necessary and genuinely serve the objectives of general interest recognised by the EU. However, EU LPP is limited to the enforcement of EU law; it has no impact on a company’s right to withhold privileged documents from private parties during litigation or other government authorities (except when they apply EU law); and in-house counsel cannot be compelled to testify as to privileged matters.

In addition to EU LPP, national LPP rules will also continue to be relevant in national administrative procedures, i.e., where national authorities investigate. That said, the ruling in *Orde van Vlaamse Balies and others* does not only bind the EU institutions but is also applicable to Member States when they apply EU law.

IV. Differences Regarding Legal Professional Privilege in the National European Union Member States

The protection granted by the EU LPP may differ substantially from the protection granted by LPP in other jurisdictions.⁹ Companies and in-house counsel need to be aware of these possible differences and should understand the risks they are exposed to in their jurisdictions- of operation. There are commonalities but also significant discrepancies

⁹ For instance, the U.S. attorney-client privilege applies equally to in--house counsel. See, e.g., J. Brady Dugan, Jordan W. Cowman & Allison Walsh Sheedy, *Negotiating the privilege minefield: Some Differences between Attorney--Client Privilege in the U.S. and Europe*, 6 State Bar of Texas Corporate Counsel Section Newsletter, (2011), with a reference to *United States v. United Shoe Machinery*, 89 F. Supp. 357, 360 (D. Mass. 1950) (“On the record as it now stands, the apparent factual differences between these in-house counsel and outside counsel are that the former are paid annual salaries, occupy offices in the corporation’s buildings, and are employees rather than independent contractors. These are not sufficient differences to distinguish the two types of counsel for purposes of the attorney-client- privilege.”).

between the scope of EU LPP and LPP under national legislation/regulation.¹⁰ This chapter focuses on two possible significant differences between EU LPP and LPP under national legislation/regulation.

A. Legal Advice from In-house Counsel

As explained above, *Akzo* reaffirmed the rule (based on the judgment of the Court of Justice in *AM&S*) that EU LPP applies only to communications exchanged with external lawyers. The *Orde van Vlaamse Balies and others* ruling did not specify what constitutes an external lawyer and seemingly does not restrict LPP to interactions with external counsel qualified within the EEA, as it only mentions the broader term "lawyer." However, since the case involved only EEA-qualified lawyers, it remains uncertain whether LPP will extend to communications with lawyers not qualified in the EEA, such as those from the US, and with in-house counsel within the EEA. Future case law will need to clarify whether European courts might broaden the personal scope of LPP in the EEA.

Whilst the general rule is that the LPP protection offered by Member States does not extend to in-house counsel¹¹, there are some exceptions.¹² In Ireland, in-house counsel benefit from the same protection as external counsel, because in-house counsel are considered to be sufficiently independent. In addition, certain countries such as Poland, Portugal and the Netherlands recognise LPP protection for communications with in-house counsel provided they are admitted to the Bar.

B. Correspondence, Work Products and Other Situations Covered

As mentioned above, the Court of Justice observed that Article 7 of the Charter guarantees the secrecy of that legal consultation, both regarding its content and to its existence.¹³ Individuals and companies can therefore expect their communications with their lawyers to be kept private and confidential.

While a number of EU Member States limited the scope of LPP to work products created for the exclusive purpose of seeking legal advice from an external lawyer and to reproductions of the text or the content of legal advice given (in writing or orally) by an external lawyer¹⁴ this is not always the case. Some countries extend LPP protection to: (a) correspondence that is not made for the purposes and in the interests of the client's right of defence (e.g., Ireland); (b) communications with lawyers established outside the EEA area (e.g. Netherlands); and (c) oral communications (e.g., Lithuania, Malta, and Portugal).¹⁵ On the other hand, some EU Member States do not recognise LPP in certain situations (e.g., Germany which requires correspondence under sole possession of a

¹⁰ The ECJ itself has described these discrepancies in *Akzo* (see above footnote 2), mn. 71 et seq.; a helpful overview of LPP under the different EU member states' legislation/regulation can be found in DLA Piper's and ECLA's Legal Professional Privilege Global Guide, available at https://www.dlapiperintelligence.com/legalprivilege/#handbook/world-map-section/2/c1_DE (last visited on February 5, 2025).

¹¹ Austria, Czech Republic, Croatia, Denmark, Estonia, Finland, France, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Romania, Slovakia, Slovenia, Spain (disputed and left open by the Spanish Supreme Court) and Sweden.

¹² Belgium, Cyprus (if admitted to the Bar), Greece, Ireland, The Netherlands (if admitted to the Bar), Norway, Poland (if admitted to the Bar) and Portugal (if admitted to the Bar).

¹³ Case C-694/20, 8 December 2022, *Orde van Vlaamse Balies and Others v Vlaamse Regering*, ECLI:EU:C:2022:963, paragraphs 27 and 32.

¹⁴ Such as Finland, France, Hungary, Italy, Latvia, Slovakia, Slovenia, and Spain.

¹⁵ Similarly, the U.S. attorney/client privilege is also extended to oral communications.

lawyer in ongoing investigations, and Estonia in the case of national antitrust investigations, where although LPP is acknowledged in principle, it is common practice that the antitrust/competition authority seizes the documents in bulk, which often includes privileged material. In order to prevent the investigator from reviewing privileged documents, the subject of the investigation should clearly indicate which documents are privileged).

V. Practical Suggestions for Dealing with Legal Professional Privilege under European Union Law

The *Akzo* ruling highlights the need for companies to assess the practical measures they should take to maintain confidentiality over communications, and the circumstances in which external, rather than in-house, counsel should be instructed. As noted, pro bono matters normally do not become subject to Commission or EU national authorities' investigations, and as such the risk that work product may be seized by these authorities is not normally a problem. This Section sets out some basic practical suggestions to deal with issues relating to LPP.

A. Increase In-House Counsel's Awareness

The limitations on the applicability of EU LPP to in-house counsel should not prevent in-house counsel from functioning and providing day-to-day legal advice to the company and its employees, or from providing assistance on pro bono matters in Europe. In-house counsel should simply be aware that their written documents may be disclosed in a Commission or national proceeding. As a result, when advice is required to be in writing, in-house counsel should be careful to use precise and accurate language that is difficult to misinterpret or quote out of context. In case of doubt, they should involve EEA-qualified external lawyers.

B. Identify Documents

Internal documents covered by LPP should be immediately and unambiguously identifiable as having been prepared exclusively in order to obtain legal advice from an external lawyer in connection with matters that may have a relationship to the subject matter of a foreseeable subsequent procedure. For instance, emails and documents should be labelled as "privileged & confidential" or "request for advice from external EEA-qualified counsel." Privileged documents and communications should only be shared on a "need to know" basis. When forwarding privileged information, one should make sure that this communication (i) is necessary to develop external lawyers' advice, (ii) directly relates to the subject matter of the external lawyers' advice/request, and (iii) properly labels the chain as "privileged & confidential."

It should also be kept in mind that during unannounced inspections, the first port of call for officials of the Commission and Member State authorities is the place where e-mails and documents are stored on the central server, as well as the laptops and other electronic storage devices of individual executives. Electronic correspondence is, therefore, treated in the same way as paper correspondence and will require particular attention given the extent of electronic communications in most companies and

organisations today. As such, where possible, include EEA-qualified external lawyer's email address in the "To" field of the email correspondence. Electronic correspondence should also have neutral titles for email subjects, document titles, or meeting invites to ensure that regulators such as the EC cannot misinterpret if they seize or receive them. Titles can reveal the content of the privileged information.

All legal correspondence dealing with legally sensitive issues should be collected in separate folders and ideally kept in the office of the in-house counsel. Folders should be labelled as "*Legally Privileged – Documents used for consultation with external lawyer.*" The same recommendation applies to emails and electronic folders, so that they can be omitted from an electronic search. If pre-existing legally sensitive documents are organised and copied for use by external counsel, and if a copy of that collection must remain with the company, the discussions with external lawyers should be recorded by way of a brief note, mentioning the name of the external lawyer involved, the date of the discussion and the topic (in general terms). This brief note should be kept in the same folder as each of the documents/materials discussed. Finally, legal documents on sensitive issues should have limited distribution within the company.

VI. Conclusion

On the rare occasion that pro bono work involves some elements of Commission investigations this should not discourage in-house counsel from providing assistance on pro bono matters. The LPP rules in each relevant national EU Member State should also be taken into consideration. Awareness that correspondence and work products may be seized by the Commission or authorities in EU Member States, and awareness of the matters for which external counsel may need to be involved, will substantially lower the risk of possible future problems.