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## Competition - Portugal

### Scope of legal professional privilege in competition investigations

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#### Introduction

*Unilever JM*

Comment

#### Introduction

On September 14 2010 the European Court of Justice (ECJ) issued its ruling in *Akzo v Commission*,<sup>(1)</sup> in which it confirmed that internal company communications with in-house lawyers are not covered by legal professional privilege in European Commission competition law investigations. As part of an investigation, commission officials copied two emails exchanged between Akcros Chemicals Ltd's general manager and Akzo Nobel Chemicals Ltd's coordinator for competition law who, at the time, was a member of Akzo's legal department and therefore a permanent employee. The parties considered that the emails were covered by legal professional privilege, but the commission - and subsequently the ECJ - refused such protection.

In Portugal, on the contrary, the legal protection conferred on communications between lawyers and their clients is wider than that confirmed by EU case law, as it also covers written communications between in-house lawyers and clients.

#### *Unilever JM*

The Lisbon Commercial Court considered the issue following an appeal against a decision by the Competition Authority, which refused to return certain documents seized in a dawn raid.<sup>(2)</sup>

Unilever Jerónimo Martins was subject to a dawn raid by the authority. In the course of the investigation, documents were seized from several divisions of the company, including the office of the in-house lawyer, who was enrolled as an advocate with the Portuguese Bar Association.

The court began by confirming that national procedural rules apply to enquiries conducted in the national territory by the authority, even if the potential infringement of Articles 101 and 102 of the Treaty on the Functioning of the European Union is at stake.

Accordingly, the court carefully analysed the extent of legal professional privilege under national legislation. In particular, it highlighted that such protection does not depend on the characteristics of the documents or information, but rather on the protection of such places where lawyers conduct their activities, and on the communications exchanged (irrespective of content) between them and their clients.

Furthermore, the court emphasized that under Articles 70 and 71 of the Statute of the Portuguese Bar Association, searches of a lawyer's office - or any other place where a record is made - are subject to the following conditions:

- A search may be authorized only by a judge, who must also be present during the search;
- The lawyer and a representative of the Portuguese Bar Association must be notified so that they can be present during the search; and
- Correspondence exchanged between lawyers and their clients in the exercise of their functions cannot be seized, regardless of the type of correspondence, unless it relates to a criminal act of which the lawyer stands accused.

As regards the status of in-house lawyers, for the purposes of protection of legal professional privilege, the court recognized that they enjoy the same status as lawyers who are not bound to the client by a

relationship of employment, provided that the in-house lawyer was engaged to exercise his or her professional activity as a lawyer and that he or she is a member of the Portuguese Bar Association.<sup>(3)</sup> In such cases, in-house lawyers are subject to the same professional rules as external lawyers, including the same binding principle of confidentiality. Therefore, in order to safeguard this principle, the protection of legal professional privilege must apply to in-house lawyers. The court concluded that the EU rule created by the courts does not apply to proceedings under national law.

The court specified that according to applicable national rules, such protection automatically covers a lawyer's office, files and personal computer. However, the court admitted the existence of effective limits to this automatic protection. On the one hand, it affirmed that the premises of a law firm are fully protected by legal professional privilege. However, if an archive or record is made off the premises, protection is not automatic and must be invoked.

The court stated that if an in-house lawyer exercises his or her activity on the employer's premises, but is given his or her own office, that physical space is also automatically covered. Consequently, all documents located in the office are subject to such protection. If the in-house lawyer does not have an independent office in the company's premises, the places where he or she has exclusive domain (eg, the desk, computer or files) are also subject to protection. However, other documents located in places where the in-house lawyer does not have exclusive domain are not automatically covered.

In addition, information and documents that were drafted by the in-house lawyer, but were seized in other offices or places are in principle covered by legal professional privilege; however, their content may have to be further analysed in order to confirm that they are subject to such protection.

## Comment

Although controversial, the ruling in *Akzo v Commission* clarified the applicable law for European Commission investigations for the foreseeable future. When the commission is conducting an investigation, internal company communications with in-house lawyers are not covered by legal professional privilege and may therefore be used against the companies under investigation.

However, if the investigation is being carried out by a national competition authority, national legislation on this issue is applicable and different rules may come into play. The Portuguese courts have expressly recognized that internal communications with in-house lawyers (who are enrolled at the bar and are subject to the same ethical rules as external counsel) benefit from legal privilege in competition law investigations, and that EU case law on legal professional privilege does not apply to proceedings under Portuguese law.

The Lisbon Commercial Court has confirmed that although documents or information physically located in the office of an in-house lawyer are automatically protected by legal professional privilege, documents drafted by the lawyer but seized in different locations (eg, a document or email seized in the office or from the computer of another company employee) are neither automatically protected nor exempt from further analysis.

Given the differences between EU and national laws (and between the respective national laws of EU member states) regarding the standard of protection of legal professional privilege, companies operating in Portugal and other jurisdictions should assess carefully whether in-house advice is protected - and to what extent - in each relevant jurisdiction. Having identified the countries in which legal privilege issues may arise, companies should define appropriate policies to handle internal communications with in-house lawyers in order to protect their interests and ensure the effectiveness of competition compliance programmes.

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## Endnotes

(1) Case C-550/07 P.

(2) Case 572/07.9TYLSB.

(3) Following the conclusion of the General Counsel of the Bar Association (for further details please see "[Dawn raids: legal professional privilege limits regulator's powers](#)").

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