The Development of General Principles for EU Competition Law Enforcement - The protection of legal professional privilege

Frese, M.J.

Citation for published version (APA):
The Development of General Principles for EU Competition Law Enforcement – The Protection of Legal Professional Privilege

Michael J. Frese

Amsterdam Center for Law & Economics Working Paper No. 2011-03

The complete Amsterdam Center for Law & Economics Working Paper Series is online at: http://ssrn.acle.nl
For information on the ACLE go to: http://www.acle.nl
The development of general principles for EU competition law enforcement – The protection of legal professional privilege

Michael J. Frese

Introduction
EU integration is not all about high politics and crisis management. Occasionally, significant moments in EU law can be spurred by insisting civil servants and lawyers fighting over issues, the significance of which might not be fully appreciated outside legal circles. The recent Akzo Nobel judgment1 of the European Court of Justice ('ECJ' or 'Court') is such a significant moment, where Commission officials and counsel for Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd (‘applicants’) were divided over the scope of legal professional privilege (‘LPP’) in the context competition law investigations. The term LPP refers to the confidential nature of certain written communications between lawyer and client. The significance of this judgment should not be sought in the legal development it produced. The ECJ effectively consolidated existing case law on the limitations of the Commission’s investigatory powers prompted by the protection of LPP. Certainly, this reconfirmation of the 1982 AM & S judgment2 is of interest in the light of the decentralised enforcement system for EU competition law put in place in 2004. However, extending the significance of this case beyond the narrow confines of the dispute at hand are the clarifications of the Court in relation to the mechanisms for creeping legal integration.

---

1 Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd, Case C-550/07 P, nyr (‘Akzo Nobel’).
This article discusses the scope of the EU principle of LPP, the mechanisms for legal integration underlying Akzo Nobel and the implications of this case for the system of decentralised enforcement of the Articles 101 and 102 of the Treaty on the Functioning of the EU (‘TFEU’).

The scope of the EU principle of LPP

The enforcement of EU competition law, more specifically the Articles 101 and 102 TFEU, is governed by a legislative framework providing for decentralised application. Pursuant to Council Regulation No 1/2003 (‘Reg. 1/2003’)3, the Commission and competition authorities of the EU Member States (national competition authorities, ‘NCAs’) may apply the Articles 101 and 102 TFEU in individual cases. The Commission derives its enforcement powers from Reg. 1/2003, NCAs rely on the powers granted by their national legislators. Together, they apply the Articles 101 and 102 TFEU in ‘close cooperation’.4 Enforcement actions are coordinated, investigations can be conducted jointly and evidence may be transferred and shared, all by virtue of EU law.5

The Commission is vested with various investigatory powers. Perhaps its most powerful instrument to obtain incriminating evidence is its power to conduct inspections in the business premises of undertakings and to take copies or extracts from books or records related to the business.6 Nowadays, this means that email inboxes can be examined and correspondence can be copied and taken.

The use of the Commission’s legal powers is subject to various conditions and limitations, some with a statutory foundation others on the basis of legal principles developed in the case law of the Court. Before entering any business premises for the purpose of an inspection, the Commission should, for instance, communicate to the undertaking concerned the subject matter and purpose of the inspection.7 This condition not only allows the undertaking to determine its duty of cooperation, it also functions as a means to ensure the proportionality of the Commission’s actions.8 The protection of LPP effectively limits the powers of the Commission. Certain written

---

3 OJ 04.01.2003, L 1/1-25.
4 Recital 15 of the preamble to Reg. 1/2003.
6 Article 20 Reg. 1/2003.
7 Article 20(3) and (4) Reg. 1/2003.
communications between the undertaking and its lawyer are privileged from examination by the Commission.

The scope of the limitations to the Commission’s powers of inspection thus depends, amongst others, on the scope of the protection of LPP. Precisely this issue caused the dispute in *Akzo Nobel*. On 12 and 13 February 2003 Commission officials and representative of the British competition authority raided Akzo’s and Akcros’ premises in the UK and examined documents, in search of evidence of a cartel in heat stabilizers for plasticised PVC products. A dispute arose over the privileged nature of various documents, amongst which two emails exchanged between the Director General of Akcros and an employee of Akzo (‘Mr. S.’) working in the latter’s legal department and member of the Netherlands’ Bar. The membership of Mr. S. to the Netherlands’ Bar gave him considerable professional independence and required him to observe the rules of professional ethics and discipline equally applicable to independent practitioners. The dispute centred round the question whether ‘lawyer’ for the purpose of LPP included ‘in-house counsel’, such as Mr. S., or was limited to independent practitioners. The outcome would decide whether the emails were caught by the Commission’s powers of inspection.

In *Akzo Nobel*, the Court followed earlier case law by concluding that the scope of LPP does not cover communications emanating from in-house counsel. In *AM & S*, the Court concluded that the predecessor of Reg. 1/2003, Council Regulation No 17 of 1962 (‘Reg. 17/62’), had to be interpreted as protecting the confidentiality of written communications between lawyer and client subject to the conditions that such communications are made for the purpose and in the interests of the client’s rights of defence and they emanate from lawyers not bound to the client by a relationship of employment (‘independent lawyers’). The privileged status of any document was thus held to depend on its *ratione materiae* and its *ratione personae*. The personal scope of LPP was based on the principle’s dual function: protection of the rights of defence and recognition of the role of the lawyer as collaborator in the administration of justice. Counsel for the applicants, supported by all the intervening parties, argued for an expansion of the personal scope of this principle. It was argued that

---

9 *AM & S*, para. 21-22.
11 The first line of argument of counsel for the applicants was that the term ‘independent lawyer’ simply included lawyers of the type of Mr. S. The Court rejected this argument essentially by insisting
the term ‘independent lawyer’ had to be reinterpreted to cover lawyers of the kind of Mr. S. For this purpose, the applicants relied on the rationale of AM & S, legal developments since 1982 and various general principles of EU law. The Court insisted that the economic dependence of the in-house lawyer and its close ties with its employer made him unsuitable as collaborator in the administration of justice.\textsuperscript{12} Also developments in the EU legal system and the systems of the Member States were not considered of such a nature as to justify an adjustment to the personal scope of LPP.\textsuperscript{13} Finally, the Court was not convinced that the differential treatment of communications with independent practitioners, on the one hand, and in-house counsel, on the other, was contrary to the principles of equal treatment, rights of defence, legal certainty or procedural autonomy.\textsuperscript{14}

Much to the disliking of the applicants, the intervening parties and many scholars\textsuperscript{15}, the Court in \textit{Akzo Nobel} prevented further expansion of the protection of LPP. Critics generally adopt the following line of reasoning: privileges are recognised for external lawyers; the material scope of these privileges is justified by fundamental legal principles; the personal scope of these privileges is justified by various characteristics of the legal profession; these characteristics are not exclusive for external lawyers but may also apply to in-house counsel; therefore these privileges should extend to in-house counsel.

Even if one accepts the logic of this argument, it seems to step over the material scope of the privilege somewhat easily, thereby disregarding the balancing exercise between the undertakings’ rights of defence and the authority’s powers of investigation inherent to the privilege. Moreover, as Gippini-Fournier has argued eloquently, this balancing requirement begs for caution even when appraising the personal scope of the privilege:

---

\textsuperscript{12} \textit{Akzo Nobel}, para. 49.
\textsuperscript{13} \textit{Akzo Nobel}, para. 76 and 87.
\textsuperscript{14} \textit{Akzo Nobel}, para. 59, 95, 105 and 120.
‘a decision about the appropriate personal scope of legal privilege cannot stop at the functional overlap between in-house and external counsel. Because access to part of the truth is sacrificed at the altar of legal privilege, a careful analysis of systemic incentives and disincentives is required. And the incentives and disincentives faced by an external lawyer and an employed one are undoubtedly different.’

Indeed, in *Akzo Nobel* the Court justified the width of the personal scope of LPP by referring to the professional loyalties liable to influence in-house counsel.

As an unwritten limitation to the Commission’s statutory inspection powers, it is understandable that the Court adopted a restrictive interpretation to the personal scope of LPP. Breach of a legal interest worthy of protection is not readily apparent, or it should be the EU interest in stimulating competition in the market for legal services. In this respect, it should be borne in mind that this legal principle serves more diverse purposes in those jurisdictions which traditionally do recognise LPP to communications with in-house counsel. For instance, in England the principle of LPP to a large extent has developed in the context of discovery procedures in civil actions. As civil actions within the EU are reserved for the national jurisdictions, this dimension is not directly relevant for the EU principle of LPP. In fact, the dual rationale underlying the EU principle of LPP seems properly ensured by the earlier cases *AM & S, Hilti* and *Akzo Nobel (first instance)*. Protected under the EU principle of LPP are (i) all preparatory documents internal to the undertaking drawn up exclusively for the purpose of seeking legal advice from an independent lawyer entitled to practise his profession in one of the Member States in the exercise of the rights of defence and (ii) all written communications emanating from such a lawyer

---

17 *Akzo Nobel*, para. 47-49.
18 Cf: *Akzo Nobel*, para 95.
20 *AM & S*, per AG Warner, under V. AG Warner describes discovery procedures as ‘a procedure under which, at an interlocutory stage in a civil action, each party is required to disclose to the other all the documents in his possession, custody or power relating to matters in question in the action’.
23 *Akzo Nobel Chemicals Ltd and Akeros Chemicals Ltd v Commission*, Joined Cases T-125/03 and T-253/03, ECR 2007 p. II-3523 (‘*Akzo Nobel (first instance)*’).
24 The protection of these preparatory documents may include documents that were not exchanged with a lawyer or that were not created for the purpose of being sent physically to a lawyer. *Akzo Nobel (first instance)*, para. 123.
for the purpose and in the interests of the client’s rights of defence, as well as (iii) all internal notes which are confined to reporting the text or the content of these written communications.25 In all these cases the term ‘rights of defence’ is interpreted widely to cover any advice in relation to the avoidance of conflicts with EU competition law.26 This wide material scope of the privilege appears to allow outside counsel plenty possibility of taking care of the administration of justice and the protection of rights of defence.27 While this dual interest would not necessarily suffer from extending the privilege to communications emanating from in-house counsel28, any such conclusion would appear inadequate for extending the personal scope of LPP. After all, the general principle of LPP has to be balanced against the investigatory powers of the Commission. As any expansion of LPP would necessarily lead to a limitation of the Commission’s statutory powers, the relevant question seems instead: do the administration of justice and the protection of the rights of defence require the privilege of communications emanating from in-house counsel? This question cannot be answered positively without calling into question the services of ‘independent lawyers’.

Mechanisms for creeping legal integration

As indicated in the introduction, the significance of Akzo Nobel is in the Court’s clarifications of the mechanisms for ‘creeping legal integration’. Counsel for the applicants argued that the personal scope of the general EU principle of LPP had to be expanded, so as to recognise the evolution of the national legal systems. The Court dismissed this argument, by holding

---

26 Forrester has described it as follows: ‘it is not easy to imagine what documents containing legal advice from a lawyer in private practice could be both relevant to an EEC competition law investigation but unrelated to the company’s defence against such an investigation’, Forrester 1983, p. 84. Cf: Lasok, K.P.E., ‘AM&S – The Court Decides’, ECLR, 1982 (‘Lasok 1982’), p. 102; Christoforou 1985, p. 10.
27 This suggestion is convincingly demonstrated in Gippini-Fournier 2004-2005, pp. 967-1048.
28 Although it cannot be said that in-house counsel is by definition unqualified to collaborate in the administration of justice, the Court seems right in holding that an in-house lawyer ‘does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his client’. His position as employee ‘does not allow him to ignore the commercial strategies pursued by his employer’. Akzo Nobel, para. 45 and 47. This consideration seems in accordance with the maxim: “justice should not only be done, but should manifestly and undoubtedly be seen to be done”.

6
‘that the legal situation in the Member States of the European Union has not evolved, since the judgment in AM & S Europe v Commission was delivered, to an extent which would justify a change in the case-law and recognition for in-house lawyers of the benefit of legal professional privilege.’

The Court’s line of reasoning reconfirms its acceptance of the concept of ‘bottom-up integration’: the development of a rule or principle of EU law which derives from the domestic legal traditions of the Member States. Bottom-up integration implies that the legality of EU legislation or administrative actions by EU institutions is determined by reference to rules and principles originating in the laws of the Member States. The application of the criteria for bottom-up integration by the Court and its Advocate General (‘AG’) in Akzo Nobel, and by the General Court in Akzo Nobel (first instance), adds to our understanding of the method of this integration mechanism.

The EU Courts have recognised the application of many unwritten legal principles. The legal basis for this judicial activism, to date, can be found in Article 19 TEU:

> ‘it [the Court] shall ensure that in the interpretation and application of the Treaties the law is observed’. (emphasis added)

This task allows the EU Courts to draw inspiration outside the Treaty texts. Koopmans has distinguished two approaches that the Courts have followed in finding EU legal principles: i) formulating principles that underlie the Treaties’ provisions and basic elements; ii) transforming to EU law the principles which the legal traditions of the Member States have in common. It may be added that the Court exceptionally has applied legal principles without referring to their origin. The second approach, as distinguished by Koopmans, could be referred to as bottom-up integration. Eligible for bottom-up integration are the traditional fundamental rights

---

29 Akzo Nobel, para. 76.
32 Reference could be made to the principle of non bis in idem as applied in Gutmann v Commission, Joined Cases 18/65 and 35/65, ECR EN1966 p. 103.
and the gradually developed principles of legality. The protection of LPP could be grouped in this second class.\textsuperscript{33}

The origins of bottom-up integration can be traced back to \textit{Internationale Handelsgesellschaft}\textsuperscript{34}, where the Court held:

\begin{quote}
‘3. Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however, framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question. (…) \\
4. However, an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community. (…)’
\end{quote}

Earlier, the Court showed reticence in considering national legal principles.\textsuperscript{35} In this case, the Court managed to reconcile the EU principle of supremacy with this mechanism for legal integration, by recognising the existence of inherent EU principles.

The relevance of national law for the development of EU law was significantly reinforced by the Court in \textit{Nold}, essentially dealing with concentration control under the ECSC Treaty. On the application by a third party for annulment of the Commission decision authorising the new terms of business of a merged entity, the Court held:

\begin{quote}
\end{quote}

\textsuperscript{33} Koopmans 1991, p. 497.
\textsuperscript{34} Internationale Handelsgesellschaft, Case 11/70, ECR 1970 p. 1125 (‘\textit{Internationale Handelsgesellschaft}’)
\textsuperscript{35} Cf: Stork v High Authority, Case 1/58, ECR EN1959 p. 17; Sgarlata v Commission, Case 40/64, ECR EN1965 p. 215.
'As the Court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. In safeguarding these rights, the Court is bound to draw inspiration from the constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the constitutions of those states.'

In Nold, the Court thus presented bottom-up integration as a kind of automatic process, taking place outside the Court’s discretion.

In relation to the enforcement of the Articles 101 and 102 TFEU, a first cautious application of this mechanism can be found in Transocean Marine Paint, dealing with the right to be heard. Here the Court effectively supplemented the Commission procedures by recognising the ‘general rule’ that a person directly affected by a decision taken by a public authority must be given the opportunity to make known his views. In doing so, the Court followed AG Warner, who had argued that:

‘review (…) of the laws of the Member States, must (…) on balance, lead to the conclusion that the right to be heard forms part of those rights which ‘the law’ referred to in [ex] Article 164 of the Treaty upholds, and of which, accordingly, it is the duty of this Court to ensure the observance.’

AG Warner reached this conclusion after a short study of the legal situation in the then nine Member States, during which he observed that under Italian and Netherlands’ law there did not exist a requirement for an administrative authority to inform those concerned of its objections.

Two methods for bottom-up integration have traditionally competed for recognition: the eclectic method and the common denominator method. The eclectic method has been suggested by Pescatore: if there is a reasonable degree of convergence between the various national solutions, an EU principle may be formulated on the basis of the national solution ‘most appropriate’ for EU purposes. This implies choosing for the

36 Nold v Commission, Case 4/73, ECR 1974 p. 491 (‘Nold’).
38 Transocean Marine Paint, per AG Warner.
highest denominator that can reasonably be defended as underlying the national solutions.\textsuperscript{39} This approach was implicitly followed in \textit{Transocean Marine Paint} and was also endorsed by AG Slynn in his Opinion in \textit{AM & S} in relation to the principle of LPP. Relying on an academic contribution of former President of the Court, Judge Kutscher, AG Slynn found:

‘Unanimity, as to a subject which is relevant to a Community law problem, may well be a strong indication of the existence of a rule of Community law. Total unanimity of expression and application is not, however, necessary. It is at best unlikely, not least as the Community grows in size. (…) In my opinion, what has to be looked for is a general principle, even if broadly expressed. If that is widely accepted then it may, if relevant, be found to be part of Community law. It is then for the Court to declare how that principle is worked out in the best and most appropriate way (…) in the context of Community proceedings.’\textsuperscript{40}

In \textit{AM & S}, the Court took a different approach. After verifying that the legal systems of the Member States generally recognise the protection of LPP, the Court concluded that only ‘such elements of that protection as are common to the laws of the Member States’ could be incorporated in EU law.\textsuperscript{41} This had the effect that only communications made for the purpose and in the interest of the client’s rights of defence and exchanged with a lawyer not bound to the client by a relationship of employment were privileged under the EU principle of LPP. This can be referred to as the ‘common denominator’ approach.\textsuperscript{42}

Meanwhile, the common denominator approach has become the dominant mechanism for bottom-up integration. The mechanism for bottom-up integration of enforcement procedures is conditional on the specific enforcement rule or principle being qualified as a \textit{common} constitutional tradition of the Member States. Domestic

\textsuperscript{39} Pescatore 1969, pp. 654-655.
\textsuperscript{40} \textit{AM & S}, per AG Slynn.
\textsuperscript{41} \textit{AM & S}, para. 22.
\textsuperscript{42} Lasok 1982, p. 101. This common denominator approach finds an analogy in the area of functional succession. The EU may functionally succeed its Member States as parties to an international treaty. One indispensable requirement appears to be that all the Member States are bound by the international treaty in question. See: Eckes, Ch., ‘Case C-188/07, Commune de Mesquer v. Total France and Total International Ltd., Judgment of the Court (Grand Chamber) of 24 June 2008 [2008] ECR I-4501; Case C-301/08, Bogiatzi v. Deutscher Luftpool, Société Luxair, European Communities, Luxembourg, Foyer Assurances SA, Judgment of the Court (Fourth Chamber) of 22 October 2009, not yet reported’, \textit{CMLRev} 47: 906, 2010.
rules, principles and interpretations not satisfying this condition will not be elevated to a general principle of EU law. This conclusion has been elaborated upon in subsequent case law.

The approach of the Court in AM & S, and indeed in Akzo Nobel, dealing with the principle of LPP, is very similar to the approach in the field of the principle of the inviolability of one’s home. The right to private and family life and inviolability of one’s home and correspondence was recognised as a general principle of EU law in National Panasonic.\(^\text{43}\) The Court interpreted the Commission’s enforcement powers in the light in Article 8 of the ECHR. In Hoechst, the Court had to deal with the question whether this principle would also extend to business premises. This was at a time when the European Court of Human Rights (‘ECtHR’) had not yet definitively settled this issue. AG Mischo conducted a comparative study into the laws of the Member States, demonstrating the various approaches towards business premises, to then conclude:

‘Above and beyond those differences, however, a general trend is discernible in the national legal systems towards the assimilation of business premises to a home. In any event, in the great majority of Member States, the inspection of business premises is made subject, by virtue of special legislation, to more or less stringent formal or procedural conditions. I therefore propose, as the Commission does, that it should be expressly accepted that there is at Community level a fundamental right to the inviolability of business premises.’\(^\text{44}\)

The Court took another approach and held:

‘that, although the existence of such a right [the fundamental right to the inviolability of the home] must be recognized in the Community legal order as a principle common to the laws of the Member States in regard to the private dwellings of natural persons, the same is not true in regard to undertakings, because there are not inconsiderable divergences between the legal systems of the

\(^{43}\) National Panasonic (UK) Ltd v Commission, Case 136/79, ECR 1980 p. 2033 (‘National Panasonic’).

\(^{44}\) Hoechst, per AG Mischo, para. 103.
Member States in regard to the nature and degree of protection afforded to business premises against intervention by the public authorities.\textsuperscript{45}

Although arriving at opposite conclusions, the practical consequences of both approaches for the Commission’s powers may have been less significant, however. While AG Mischo recognised that this right was not absolute in nature, the Court made entry of business premises subject to the protection against arbitrary and disproportionate intervention. Yet, the difference in approach towards bottom-up integration is clear.

Also in relation to the right to remain silent, the Court has turned to the traditions in the domestic legal orders of the Member States. Not yet able to draw inspiration from established case law of the ECtHR in this field, in \textit{Orkem} the Court followed AG Darmon and held:

\begin{quote}
‘29 In general, the laws of the Member States grant the right not to give evidence against oneself only to a natural person charged with an offence in criminal proceedings. A comparative analysis of national law does not therefore indicate the existence of such a principle, common to the laws of the Member States, which may be relied upon by legal persons in relation to infringements in the economic sphere, in particular infringements of competition law.’\textsuperscript{46}
\end{quote}

The fact that in some Member States derogations to the right not to incriminate oneself applied in the context of competition law withheld the Court from formulating an EU principle, like it did in \textit{AM & S}.\textsuperscript{47} In \textit{Orkem}, the Court did recognise that the Commission could not force an admission.\textsuperscript{48}

\textit{Akzo Nobel} seems to be the latest confirmation of the prevalence of the common denominator approach. The attempt of counsel for the applicants to convince the Court that the current legal reality in the EU warranted a reconsideration of the LPP principle as formulated in \textit{AM & S} has been endorsed in the literature and even found support of the Court itself. Christoforou suggested already in 1985 that the

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{45} \textit{Hoechst}, para. 17.
\item \textsuperscript{46} \textit{Orkem} v Commission, Case 374/87, ECR 1989 p. 3283 (‘\textit{Orkem}’).
\item \textsuperscript{47} \textit{Orkem}, per AG Darmon, para. 122.
\item \textsuperscript{48} \textit{Orkem}, para. 34-35.
\end{itemize}
\end{footnotesize}
Community might be willing to extend protection of confidentiality to in-house lawyers' if the latter are brought within rules of professional ethics and discipline similar to those of independent lawyers. Also Vesterdorf, both in his capacity of President of the General Court and as a contributor to the academic debate, showed sympathy for reconsidering this issue. Vesterdorf argued that

‘there is no reason to believe that once the scope of a right is set, it will remain cast in stone for ever. The evolutionary nature of these rights seems indeed particularly logical when they are rooted in the national laws of the Member States: these laws evolve, and so does the number of Member States. As a consequence, the evolutionary nature of such rights, although it does not necessarily materialise often, is nonetheless inherent in the EU legal system.’

This opinion is also present in the Order handed down by Judge Vesterdorf in Akzo Nobel (interim measures):

‘122. (…) the solution in AM & S v Commission (…) is based, inter alia, on an interpretation of the principles common to the Member States dating from 1982. It is therefore necessary to determine whether (…), taking into account developments in Community law and in the legal orders of the Member States since the judgment in AM & S v Commission (…), it cannot be precluded that the protection of professional privilege should now also extend to written communications with a lawyer employed by an undertaking on a permanent basis.’

Vesterdorf indeed concluded that it could not be precluded that the protection of LPP had to be extended to in-house counsel subject to strict rules of professional conduct.

Supported from many sides, counsel for the applicants effectively relied on the eclectic method for bottom-up integration by arguing that

---

49 Christoforou 1985, p. 38.
52 Akzo Nobel (interim measures), para. 123-127.
‘Notwithstanding the lack of a uniform tendency at national level, European Union law could set legal standards for the protection of the rights of defence which are higher than those set in certain national legal orders.’53

The Court did not entertain this argument and dismissed it by holding:

‘74. (…) no predominant trend towards protection under legal professional privilege of communications within a company or group with in-house lawyers may be discerned in the legal systems of the 27 Member States of the European Union. 75. In those circumstances (…) the legal regime in the Netherlands cannot be regarded as signalling a developing trend in the Member States, or as a relevant factor for determining the scope of legal professional privilege. 76. The Court therefore considers that the legal situation in the Member States of the European Union has not evolved (…) to an extent which would justify a change in the case-law and recognition for in-house lawyers of the benefit of legal professional privilege.’54 (emphasis added)

Although the Court did not demand uniformity of national legal traditions, the strict requirement of a predominant trend in a Union of 27 is very much in line with the common denominator approach taken in earlier cases. With an expanded Union since AM & S, and still expanding, it will be ever more difficult to make comprehensive comparisons of domestic traditions, let alone to distillate a common denominator. Consequently, one may therefore expect that bottom-up integration will become ever more exceptional.

The Court was hardly in a position to expand the personal scope of LPP without abandoning its established common denominator test and frustrating the EU’s institutional balance. On this latter point it should be noted that on both occasions for incorporating LPP for in-house counsel in the Commission’s enforcement framework, the Council disregarded suggestions to this effect. The protection of LPP (to communications with in-house lawyers) has neither been incorporated in Reg. 17/62, nor in Reg. 1/2003, despite voices to this effect by the Parliamentary Committees

53 Akzo Nobel, para. 66.  
54 Akzo Nobel.
involved in the drafting of these procedural regulations. AG Kokott has recognised the relevance of these facts, by arguing:

‘it is precisely when called upon to develop EU law by recognising general legal principles that the Court cannot disregard the opinions of the European Union institutions motivated by legislative policy.’

This legislative history could have supported the Court’s intention to leave any further expansion of the scope of LPP to the Council.

The strict approach to bottom-up integration adopted in Akzo Nobel will not necessarily limit EU integration by means of judicial activism. AG Kokott has suggested that for the purpose of recognising legal principles, due account should be taken of the aims and tasks of the EU and the special nature of European integration and of EU law. To fall back on the distinction suggested by Koopmans: while national legal principles may not easily be transformed into EU legal principles, the latter may well be formulated as inherent in the Treaties’ provisions. This prevailing scope for judicial activism could, for instance, be recognised in relation to the treatment of discrimination on grounds of age. In other words, the Court may permit itself greater liberty in finding EU legal principles that underlie the Treaties than in finding EU legal principles that underlie national constitutional traditions.

LPP and the implications for decentralised enforcement

AM & S was the first case in the field of EU competition law where the Court firmly embraced bottom-up integration as a mechanism for legal development. The mechanisms for bottom-up integration have been further developed in later cases, with Akzo Nobel as its latest progeny. The recognition of an EU principle of LPP begs the question to its scope of application: is the application of this principle limited to the investigatory actions of the Commission, or does it extend to the enforcement


56 Akzo Nobel, per AG Kokott, para. 107.

57 This deference of the Court to the EU legislator is in accordance with suggestions made in the legal literature, cf: Christoforou 1985, p. 36; Gippini-Fournier 2004-2005, p. 987.

58 Akzo Nobel, per AG Kokott, para 94 et seq.


60 Cf: Akzo Nobel, per AG Kokott, para. 96.
actions by the NCAs? In other words, is the EU principle of LPP eligible for top-down integration?

The Court has left considerable uncertainty whether ‘its’ LPP principle applies solely to Commission procedures, or to any procedure under the Articles 101 and 102 TFEU. The following considerations from Akzo Nobel are the source for this uncertainty:

‘102. The Commission’s powers under (…) Regulation No 1/2003 may be distinguished from those in enquiries which may be carried out at national level. Both types of procedure are based on a division of powers between the various competition authorities. The rules on legal privilege may, therefore, vary according to that division of powers and the rules relevant to it.

103. The Court has held in that connection that restrictive practices are viewed differently by European Union law and national law. (…)

(…)

115. The uniform interpretation and application of the principle of legal professional privilege at European Union level are essential in order that inspections by the Commission in anti-trust proceedings may be carried out under conditions in which the undertakings concerned are treated equally. If that were not the case, the use of rules or legal concepts in national law and deriving from the legislation of a Member State would adversely affect the unity of European Union law. Such an interpretation and application of that legal system cannot depend on the place of the inspection or any specific features of the national rules.’

While para. 102 of the Court’s judgment seems to reserve the EU principle of LPP to the procedures of the Commission, para. 103 seems to favour a division along the lines of substantive provisions rather than enforcement institutions, thus extending the scope of application to the decentralised enforcement of the Articles 101 and 102 TFEU. Para. 115, finally, in language is limited to the Commission. Yet, the Court considerations suggest that different solutions to LPP would adversely affect the unity of EU law. While this latter concern seems primarily directed at the EU principle of LPP, this essentially relates to the unity in the application of the Articles 101 and 102 TFEU.

61 This question has also been raised by Christoforou 1985, pp. 36-37.
Absent any clear direction by the Court, there are strong arguments in favour of the idea that NCAs can be bound by the EU principle of LPP in applying the Articles 101 and 102 TFEU. Although originally phrased as an inherent limitation to the investigatory powers granted by virtue as Reg. 17/62, the protection of LPP should be considered as a general principle of EU law. These principles qualify as a primary source of EU law and may even be considered higher in hierarchy than the Treaties.62 Rules and principles deriving from primary sources of EU law are generally applicable to the administration of EU law, whether centralised or decentralised.63 Indeed, it would be surprising if the application of the EU principle of LPP could be circumvented simply by diverting the power to enforce the Articles 101 and 102 TFEU to the Member States.

This dual mechanism of bottom-up and top-down integration is demonstrated by *Internationale Handelsgesellschaft*64 and *Wachauf*.65 In the earlier *Internationale Handelsgesellschaft* the Court, for the first time, held that fundamental rights form an integral part of the general principles of EU law. These rights, although they must be ensured within the framework of the structure and objectives of the EU, are inspired by the constitutional traditions common to the Member States (see *supra*). This allowed the Court to review EU legislation in the light of the common constitutional traditions of the Member States and amounted to a form of bottom-up integration. In *Wachauf*, the Court effectively extended the possibilities for top-down integration. The Court first considered that the fundamental rights recognised by the common constitutional traditions form an integral part of the general principles of EU law and that measures incompatible with these rights may not find acceptance in the EU. It then held:

> ‘Since those requirements are also binding on the Member States when they implement Community rules, the Member States must, as far as possible, apply those rules in accordance with those requirements.’66

---

62 See to this effect: Schmidberger, Case C-112/00, ECR 2003 p. I-5659.
64 *Internationale Handelsgesellschaft*, para 4.
66 *Wachauf*, para. 19.
In *Berlusconi*\(^67\), the working of this mechanism is demonstrated in a single case. The dispute before the Court related to the implementation of an EU directive, more specifically to the domestic sanctions for an undertaking’s failing to publish annual accounts. The Court considered:

‘66. (…) it should be noted that, under Article 2 of the Italian Criminal Code, which sets out the principle that the more lenient penalty should be applied retroactively, the new Articles 2621 and 2622 of the Italian Civil Code ought to be applied even if they entered into force only after the commission of the acts underlying the prosecutions brought in the cases in the main proceedings.

(…)

68. The principle of the retroactive application of the more lenient penalty forms part of the constitutional traditions common to the Member States.

69. It follows that this principle must be regarded as forming part of the general principles of Community law which national courts must respect when applying the national legislation adopted for the purpose of implementing Community law and, more particularly in the present cases, the directives on company law.’

*Berlusconi* demonstrates how domestic constitutional principles can first be elevated to a general principle of EU law, and then have their effect on the Member States’ implementation efforts. This interplay between national law and EU law is also recognised in the legal literature.\(^68\)

The above analysis suggests that irrespective of the ambiguous language used in *Akzo Nobel*, undertakings may rely against NCAs on the EU principle of LPP in procedures under the Articles 101 and 102 TFEU. Gippini-Fournier has indicated that certainly in Spain and Germany, competition authorities and courts recognise this principle, thus far foreign to their national legal systems.\(^69\)

Another question is whether NCAs may (or should!) rely on the EU principle of LPP against undertakings in disrespect of national rules on privilege.\(^70\) If they could, undertakings could be deprived of rights granted by national jurisdictions. If they

\(^{67}\) *Berlusconi* et al, Joined Cases C-387/02, C-391/02 and C-403/02, ECR 2005 p. I-3565.

\(^{68}\) Koopmans 1991, p. 505. Koopmans points out that the obligatory dimension of this mechanism is reinforced by the willingness of national institutions to adopt EU principles.

\(^{69}\) Gippini-Fournier 2004-2005, pp. 1039-1040. While there are more NCAs that apply the EU principle of LPP, this often is the result of *domestic* legislation or parliamentary deliberations.

\(^{70}\) This issue has also been touched upon in Gippini-Fournier 2004-2005, pp. 1042-1043.
could not, the protection of LPP in proceedings under the Articles 101 and 102 TFEU could very well still differ per authority. This might limit the uniformity and effectiveness of the decentralised enforcement. The latter argument does not seem compelling, however. The uniformity and effectiveness would only be affected indirectly, via the investigatory powers of the various institutions; the more extensive the protection of LPP, the more limited the investigatory powers. As the investigatory powers have not been harmonised, the mere divergence in the protection of LPP cannot affect the uniformity and effectiveness of the enforcement. Moreover, by applying a more generous notion of LPP, national jurisdictions do not affect EU rights either. This seems significant. While AM & S, Internationale Handelsgesellschaft, Wachauf and Berlusconi all ensured the protection of EU rights, the legal interest affected by generously protecting LPP is more abstract and uncertain. The suggested distinction in the binding effect of general principles of EU law, according to whether or not they confer EU rights, finds its confirmation in the case law of the Court. Reference (by analogy) could be made to the General Court’s (‘GC’) treatment of domestic interpretations of the concept of ‘repeated infringements’ and of the general principle of legality. In Groupe Danone, the GC first considered that for the purpose of applying the principle of deterrence, repeated infringements of EU competition law warrant an increased penalty71, to continue stating:

‘362. It should be noted that the concept of repeated infringements, as understood in certain national legal systems, implies that a person has committed new infringements after having been penalised for similar infringements (…).

363. However, it is important to state that, bearing in mind the objective it pursues, the concept of repeated infringements does not necessarily imply that a fine has been imposed in the past, but merely that a finding of infringement has been made in the past.’72

This suggests that domestic interpretations of the concept of repeated infringements may exist alongside the – diverging – concept applicable to the EU’s internal regime. It also confirms that the binding nature of top-down judicial integration in relation to EU rights does not necessarily apply to more abstract EU obligations.

---

72 Groupe Danone.
It follows from the above that NCAs may not rely on the EU principle of LPP against undertakings in disrespect of national rules on privilege.

The EU principle of LPP provides a floor below which neither the Commission nor the NCAs may operate irrespective of their enforcement powers. There is no uniform principle of LPP governing the enforcement of the Articles 101 and 102 TFEU. This situation adds to the enforcement discrepancies throughout the EU. Some undertakings may be worse (or better!) off than others, depending on the authority leading the investigation. The Court seems to accept this situation when it considers that the various types of enforcement procedures are based on the division of powers peculiar to the various competition authorities, ‘[t]he rules on legal professional privilege may, therefore, vary according to that division of powers and the rules relevant to it.’\(^\text{73}\) This appears convincing and, in fact, there is little the Court could have done to equalise the position of undertakings active on the EU market.

Yet, the assumption that any power of compulsion is justified by the division of powers peculiar to the institutional setting of each jurisdiction is eroded by the decentralised enforcement system of Reg. 1/2003. Article 12(1) Reg. 1/2003 foresees in the exchange of information between the various competition authorities by providing:

‘For the purpose of applying Articles 81 and 82 of the Treaty the Commission and the competition authorities of the Member States shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information.’\(^\text{74}\)

Communications that cannot be seized by one authority may nonetheless be transmitted to and used by the latter. In principle, there is no other limitation to the use of information than the obligation to use it for the purpose for which it was collected.\(^\text{74}\) The privileged nature of a document thus depends on the authority conducting the inspection, rather than on the authority pursuing the case. The privileged status of a document will to some extent be the result of coincidence; every inspection by an NCA under the Articles 101 and 102 TFEU could also have been

\(^{73}\) Akzo Nobel, para. 102.
\(^{74}\) Recital 16 to the preamble of Reg. 1/2003.
undertaken by the Commission. The latter may even be assisted by staff of the NCA in whose jurisdiction it operates. It cannot be excluded on beforehand that coincidence turns into strategy and that enforcement procedures will follow the line of least resistance. As the various authorities apply the Articles 101 and 102 TFEU in close cooperation and may carry out inspections on behalf of their colleagues, circumvention of national safeguards is inherent in the system. The Council has justified this possibility with the accurate statement that ‘[t]he rights of defence enjoyed by undertakings in the various systems can be considered as sufficiently equivalent.’ There can be no doubt that all the competition authorities are subject to this fundamental right, as further developed in the case law of the Court and laid down in the EU Charter of Fundamental Rights, the various national constitutions and international treaties. Yet, this common framework of rights of defence does not necessarily protect the balance sought by the various jurisdictions in providing for an enforcement system. Member States with more intrusive investigatory powers will generally foresee in stronger legal safeguards, while the latter may be less important in jurisdictions relying on more limited forms of compulsion. In this light, undertakings affected by the dealings of the network of EU competition authorities may occasionally experience an erosion of the legal safeguards granted by national law on which they assumed to could have relied.

**Conclusion**

In Akzo Nobel the Court resisted the sizeable pressure to expand the personal scope of LPP. In doing so, the Court struck an appropriate balance between the Commission’s powers of inspection and the undertakings’ rights of defence. This judgment reinforces the common denominator approach to bottom-up integration and suggests that the latter mechanism of creeping legal integration will become ever more exceptional. The practical outcome leads to further puzzles for the decentralised

---

77 The Commission may request NCAs to undertake inspections under Article 22 Reg. 1/2003. The NCAs will exercise their powers in accordance with national law. The Commission may also undertake inspections itself and ask for assistance by staff of the NCAs under Article 11(5) Reg. 1/2003. In this case, the national officials enjoy the same powers are the Commission officials.
78 Articles 11(1) and 22 Reg. 1/2003.
79 This point has also been made in Vesterdorf 2005, pp. 1205-1206. Vesterdorf indicates that this ‘interpenetration of the national procedural laws’ may lead to spontaneous harmonisation.
80 Recital 16 to the preamble of Reg. 1/2003.
enforcement of the Articles 101 and 102 TFEU. Yet, every alternative the Court could have chosen would have lead to complicated new questions as well. Absent further harmonisation of the enforcement procedures, whether spontaneous harmonisation or not\textsuperscript{81}, the cooperation mechanism foreseen in Reg. 1/2003 is likely to prompt further litigation in the future.