CURRENT DEVELOPMENTS

EUROPEAN UNION LAW

Edited by Joe McMahon

EXPANDING *AKZO NOBEL*: IN-HOUSE COUNSEL, GOVERNMENT LAWYERS, AND INDEPENDENCE

A. Introduction

Following on from its judgment in *Akzo Nobel*,[1] the Court of Justice of the European Union (CJEU) on 6 September 2012 delivered its judgment in *Prezes*.[2] *Prezes* expanded the decision in *Akzo Nobel*, which held that communications between a client and its in-house legal counsel were not protected by legal privilege because the latter are not considered sufficiently independent from the former. Taking this holding one step further, the CJEU in *Prezes* held not only that corporations are unable to benefit from legal privilege regarding communications with their in-house counsel, but also that any lawyer in an employment relationship with its client is disqualified from representing their client before the CJEU. This article criticizes this holding and argues that the CJEU's interpretation of independence does two things: (1) unreasonably expands the scope of *Akzo Nobel* to include the representation of in-house counsel in all cases; and (2) does so in a way which is inconsistent in light of similar concerns of the independence of government lawyers, who seemingly maintain their right of privilege under the judgment.

B. Independence and In-House Counsel: From Akzo *to* Prezes

Drawing on its holding in *AM&S Europe*,[3] the CJEU in *Akzo Nobel* declined to apply legal privilege to communications between in-house counsel and their clients because of the alleged dependency of in-house counsel on their employers and, consequently, their perceived lack of independence.[4] Following the opinion of Advocate General Kokott, the CJEU emphasized the existence of a link between an employment relationship with the lawyer and his or her client and its questionable influence on an in-house counsel's legal practice. In order for legal privilege to attach, independence must be established by two factors: first, the application of professional ethical obligations, and second, the

[1] Case C-550/07 *Akzo Nobel Ltd and Akcros Chemicals Ltd v European Commission* [2010] ECR I-8301.

[2] Joined Cases C-422/11 P and C-423/11 P *Prezes Urzędu Komunikacji Elektronicznej and Republic of Poland v Commission* [2012] ECR [as yet unpublished].

[3] Case 155/79 *AM & S Europe v Commission* [1982] ECR 1575, paras 25–26. In para 21 of this case, the Court held that the confidentiality of communications between lawyers and their clients should be protected at the European level, subject to two conditions: (1) the communications must relate to the client's right of defence, and (2) they must come from an independent lawyer, ie, 'lawyers who are not bound to the client by a relationship of employment.'

[4] ibid, paras 40–51.

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absence of an employment relationship between the lawyer and his/her client.[5] If those two conditions are not met, the lawyer will not be considered sufficiently independent for the purposes of the application of legal privilege.

At the time of the case, it was unclear whether its holding was limited to the context of competition investigations by the European Commission. Some commentators have very clearly understood the case to be restricted in this way.[6] However, this position is no longer convincing, particularly as *Akzo Nobel* has now been expanded to affect the ability of in-house counsel to represent their clients before the CJEU generally.

Prezes was an appeal from a decision of the General Court that the legal advisers representing the applicant, *Prezes Urzędu Komunikacji Elektronicznej* (Chairman of the Electronic Communications Office), could not represent their client before the CJEU.[7] The facts on appeal were thus restricted to a determination of whether the legal advisers, who had signed the application on behalf of the Chairman, were bound by an employment relationship to the Chairman.[8]

1. Arguments of the appellant

Claiming that the Order of the General Court should be set aside, the appellants set forth five pleas, two of which will be considered here.[9] First, they argued that the General Court's interpretation of Article 19 of the Statute of the CJEU was incorrect. Article 19 explains that, although certain parties may represent themselves before the CJEU (eg Member States and EU institutions—so-called 'privileged parties'[10]), all other parties must be represented by a lawyer. In support of its contention, the Chairman argued that the legal advisers shared an employment relationship with the UKE (ie, the company) and not with the Chairman. This was significant because the Director General of UKE is responsible for employment issues concerning the legal advisers, such as the creation and continuation of the employment relationship.[11]

Echoing the decision of the General Court, the CJEU responded to this argument by focusing on the meaning of independence as it relates to the definition of 'lawyer' in Article 19. The CJEU stated that the concept of 'lawyer' in the context of the EU implies that he or she must be able to provide legal assistance in full independence.[12] Drawing on *Akzo Nobel*, the CJEU stated that, as such, there must be no employment relationship between the lawyer and his/her client.[13] Even in cases such as the one at issue, where the

[5] *Akzo Nobel* (n 1) paras 44–45.

[6] See eg R Alexander, 'Does the Akzo Nobel Case Spell the End of Legal Professional Privilege for In-House Lawyers in Europe?' (2010) 310 Company Lawyer 4; S Bryska, 'In-House Lawyers of NRAs May Not Represent their Clients before the European Court of Justice: A Case Note on UKE' College of Europe Research Paper in Law 03/2011.

[7] Case T-226/10 *Prezes Urzędu Komunikacji Elektronicznej v Commission* [2011] ECR [as yet unpublished].

[8] The origin of the case is an order of the General Court in which it dismissed as inadmissible an action to annul a Commission Decision adopted under Article 7(4) of Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (Framework Directive). See para 1 of *Prezes*.

[9] In addition to the two arguments which will be described in this article, the appellant argued that the General Court: breached the principles of conferred powers and subsidiarity (paras 38–45); breached the principle of proportionality (paras 42–45); and failed to state adequate reasons for its order (paras 46–51).

[10] *Prezes* (n 2) para 35.

[11] ibid, para 12.

[12] ibid, para 23.

[13] ibid, para 24.

legal advisers are formally separate from the client, the existence of an employment relationship between the advisers and UKE was deemed likely to affect their independence because of shared interests between the two.[14] The CJEU went on to reject the Republic of Poland's practical arguments regarding additional costs and access to confidential information, stating that it is not only public authorities that will have to endure additional expenditures for external legal representation. Private individuals must also bear these additional costs. Moreover, it stated that there is no evidence that problems regarding access to confidential information will create an obstacle to the representation of public authorities before the CJEU.[15]

The appellants' second plea concerned the General Court's perceived disrespect of the particular features and independence of legal advisers in Poland.[16] Polish law does not distinguish between lawyers based on the existence of an employment relationship. Moreover, legal advisers are bound by a Code of Ethics for Legal Advisers,[17] which is specifically aimed at ensuring that they carry out their functions completely independently and not at all under the influence of their employment relationship.[18] The appellants additionally argued that differentiating between lawyers in this manner constitutes discrimination against a certain form of legal services and the people and entities that use it.

In response, the CJEU emphasized that its conception of what a lawyer is derives from the legal traditions common to the Member States but exists independently of the national legal frameworks.[19] Article 19 must therefore be interpreted not by reference to national law but in accordance with the autonomous concept of 'lawyer' under EU law.[20]

2. Analysis

In the decisions of both the General Court and the CJEU, each court refers to the EU concept of 'lawyer' as deriving from the common legal traditions of the Member States.[21] As it did in *Akzo Nobel*, the CJEU presumes that it is the common custom of the Member States to deny legal privilege to lawyers who share an employment relationship with their clients. It is unclear, however, how it comes to this conclusion, as it offers no evidence in support of its claim. In fact, it is far from evident that this issue is settled in a clear and uniform way—even among a majority of the Member States—so as to justify its statement. Several studies have been published on the application of legal privilege to in-house legal counsel in Europe,[22] and rather than presenting a clear

[14] ibid, para 25.
[15] ibid, para 27. [16] ibid, paras 29–37. [17] ibid, paras 2 and 12.
[18] ibid, para 2. [19] ibid, para 34. [20] ibid, para 35. [21] ibid, paras 16, 22 and 34.
[22] See eg J Fish for Council of the Bars and Law Societies of the European Union (CCBE), 'Regulated Legal Professionals and Professional Privilege within the European Union, the European Economic Area and Switzerland, and Certain Other European jurisdictions' [2004] <http://elixir.bham.ac.uk/Free%20Movement%20of%20Professionals/Links_docs/fish_report_en.pdf> accessed 28 November 2012; European Company Lawyers Association, 'Legal Privilege for In-House Lawyers' [2003] <http://www.ecla.org/media/2056/comparative_table.pdf> accessed 28 November 2012; and Crowell & Moring, 'What Every Corporation Needs To Know About In-House Legal Privilege (or Lack of It) in Europe' <http://www.crowell.com/NewsEvents/Publications/Articles/1349694> accessed 28 November 2012.

picture of the application of legal privilege to salaried lawyers, the studies demonstrate that there is a fairly even split among the Member States. This split not only concerns whether the privilege even applies at all, but also the conditions under which it is permitted. As the Crowell & Moring study indicates, although the split generally corresponds to whether the Member State is a common-law or civil-law country, it is by no means definite that all civil-law countries deny legal privilege to in-house counsel. It would seem, rather, that the decisive factor is whether the lawyer is regulated by a Bar or some other licensing authority, and therefore is subject to conduct and ethical obligations. In Germany, in particular, one cannot be admitted to the Bar without demonstrating that the employment relationship does not jeopardize his/her independence when exercising legal duties.[23] Other states, such as Belgium and Greece, do not include within the legal profession a separate category of salaried lawyers, although they may be regulated slightly differently.[24] Others, such as Ireland, Netherlands, Portugal, Spain and the United Kingdom do not distinguish between salaried and non-salaried lawyers at all.[25] Bearing that in mind, it is difficult to understand how the CJEU could have come to the conclusion that the absence of an employment relationship with the client is a necessary component of independence and, hence, being a lawyer to which legal privilege applies.

It is also troublesome that the CJEU has expanded the holding in *Akzo Nobel* not only beyond its application to in-house counsel, but also to encompass the ability of salaried lawyers to represent their clients before the EU courts. It based this new principle on its case law concerning self-representation, *Lopes* and *Vaupel*.[26] These cases stand for the proposition that no party may represent him/herself (except, of course, in the case of privileged parties) where the lawyer and the party are identical. Subsequently, this line of case law was expanded to include representation by lawyers with a degree of control over the entity they were representing, for example, by being a director, trustee or an officer.[27] In *Euro-Lex v OHIM* the CJEU explicitly discussed the concept of 'independence' in view of the holding in *AM&S*, stating that, according to the Statute, the term 'represented' in the third paragraph of what was then Article 17, implies that the applicant must be represented by a third party. A lawyer who represents himself or who is also an agent of the applicant cannot therefore be considered a lawyer for purposes of representation.[28] Essentially, 'represented' means represented by someone other than the party itself. In *Prezes*, the CJEU took the opportunity to expand its principles on self-representation in light of its definition of 'independence' under the *AM&S* line. For the CJEU, an entity that is represented by a salaried lawyer-employee, is essentially representing itself. It is now evident that this interpretation is impermissible at the EU level. Although States may hire external legal representation in certain circumstances, generally, they are represented by their salaried government lawyers. This therefore raises the question why States should be entitled to represent themselves under Article 19 of the Statute if the Court is basing its assessment of the

[23] CCBE study (n 22) 28. [24] Ibid 18 and 31. [25] ibid 33, 39, 42, 44 and 48.

[26] *Peter Vaupel v Court of Justice of the European Communities* (131/83), 15 March 1984 [unpublished] and Case C-174/96 *Orlando Lopes v Court of Justice of the European Communities* [1996] ECR I-6401.

[27] See Case T-79/99 *Euro-Lex European Law Expertise GmbH v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* [1999] ECR II-3555.

[28] Joined Cases C-74/10 P and C-75/10 P *EREF v Commission* [2011] OJ C 80, 9.

capacity to appear before the CJEU (and indeed to assert privilege) on whether the lawyer is sufficiently independent.

C. Independence and Government Lawyers

It is clear from paragraph 1 of Article 19 of the Statute that, in terms of representation before the Court, some parties are treated differently than others. We have already seen above that in-house counsel are not allowed to represent their employer-clients before the Court, and we have also seen that lawyers holding a position in the company that they are representing are not permitted to appear before the CJEU either. According to the *AM&S* line of cases, the former difference in treatment is justified by the EU concepts of 'lawyer' and 'independence'. A lawyer is not sufficiently independent if he/she shares an employment relationship with his/her client. Of course, this refers to an employment relationship in which the client is the sole employer of the lawyer.

When one considers how the EU uses independence to define what a lawyer is for the purposes of the application of privilege and the ability to appear before the Court, it is unclear why the Member States are considered to fall within the category of 'privileged parties' under Article 19(1). Like in-house counsel, government lawyers are salaried employees for one employer only. They are valued for their specialized knowledge, their familiarity with the internal workings of their employer-client and they often possess confidential knowledge of their employer-client's business activities. They would therefore arguably feel similar pressures to those of in-house counsel, which may in turn affect their ability to offer independent legal advice. In fact, comparisons between in-house counsel and government lawyers have been made for years in relation to legal privilege in the United Kingdom and the United States.

In the early 1970s in England, Lord Denning, when establishing the applicability of legal privilege to in-house counsel, considered that:

> Many barristers and solicitors are employed as legal advisers, whole time, by a single employer. Sometimes the employer is a great commercial concern. At other times it is a government department or a local authority. It may even be the government itself, like the Treasury Solicitor and his staff. In every case these legal advisers do legal work for their employer and for no one else. They are paid, not by fees for each piece of work, but by a fixed annual salary. They are, no doubt, servants or agents of the employer. For that reason Forbes J thought they were in a different position from other legal advisers who are in private practice. I do not think this is correct. They are regarded by the law as in every respect in the same position as those who practise on their own account. The only difference is that they act for one client only, and not for several clients . . . I have always proceeded on the footing that the communications between the legal advisers and their employer (who is their client) are the subject of legal professional privilege.[29]

It would seem that, in the United Kingdom, Lord Denning's conclusion has been widely accepted.[30] The subject has been given much more attention in the United States, perhaps given the confusing development of privilege in the government setting. In the federal context, the law of privilege is derived from case law and the federal circuit courts had been split for some time regarding whether legal privilege should apply to government entities. Before the mid-1960s, only two federal circuit courts upheld legal

[29] *Alfred Crompton Amusement Machines Ltd v Customs & Excise Comrs (No 2)* [1972] 2 QB 102, 129 (CA). [30] B Thanki QC (ed), *The Law of Privilege* (2nd edn, OUP, Oxford 2011).

privilege between government lawyers and their clients.[31] But finally in 1963 a federal court upheld government privilege based on its case law on legal privilege and in-house counsel.[32] This was implicitly supported by the US Supreme Court in 1975,[33] and further reinforced by the Office of Legal Counsel (OLC) in the Department of Justice when it stated that 'the attorney-client privilege . . . functions to protect communications between government attorneys and client agencies or departments . . . much as it operates to protect attorney-client communications in the private sector'.[34] In support of this contention, the OLC cited *Upjohn Co v United States*,[35] the case which firmly established the application of legal privilege to corporations and their in-house counsel.

Whether privilege applies to government entities also varies among the states. However, the majority apply it in the same way as it is applied in the corporate context, reasoning that, '. . . if the privilege is available to corporations—which, like the government, can only act through its agents—then the government, as an entity, should be entitled to a comparable privilege'.[36] Although it is clear that there is some level of disagreement among federal and state courts, as Sparkes writes:

> Nevertheless, courts and practitioners commonly assumed that the attorney-client privilege should apply to government clients. They further assumed that government could assert the attorney-client privilege in much the same way that corporations and other organizational clients could.[37]

Most literature on the independence of in-house counsel provides three main explanations for why they are less independent than other lawyers: (1) in-house counsel are employed, paid and given performance reviews by their employer-client and, as a result, they may feel pressure to ensure client satisfaction at the expense of their duty to provide independent legal advice;[38] (2) spending years working for one client and being exposed to their business objectives and ideals can potentially induce in-house counsel to 'go native' and develop an identity that is more in line with the corporation rather than his/her role as a provider of independent legal advice;[39] and (3) in-house counsel often have a role going beyond that of providing legal advice, for example, they may be advisers on business matters as well, which could lead to them sacrificing legal and

[31] *Connecticut Mutual Life Insurance Co v Shields*, 18 FRD 448 (SDNY 1955) and *Rowley v Ferguson*, 48 NE2d 243 (Ohio Ct App 1942).

[32] *US v Anderson*, 34 FRD 518, 522–23 (Dist Colo 1963).

[33] *NLRB v Sears, Roebuck & Co*, 421 US 132, 148–149.

[34] 6 Op Off Legal Counsel 481, 495 (1982). A more recent affirmation of privilege in the government context is *In re County of Erie*, 473 F3d 413 (2d Cir 2007) in which the court stated: '. . . the government's claim to the protection of the attorney-client privilege is on par with the claim of an individual or a corporate entity' (418).

[35] 449 US 383, 386 (1981).

[36] MB Leslie, 'Government Officials as Attorneys and Clients: Why Privilege the Privileged?' (2002) 77 IndLJ 469, 481.

[37] PM Sparkes, 'Not Any Ordinary Agent, Not Any Ordinary Attorney: The Government Lawyer and Confidentiality' (2007) 7 and esp. fn 45, on file with the author of this article. The paper is an expansion of remarks made by Professor Sparkes at the continuing legal education seminar at Frankfort, Kentucky, 4 June 2008. See also Leslie, ibid 473.

[38] P Jenoff, 'Going Native: Incentive, Identity and the Inherent Ethical Problem of In-House Counsel' (2012) 112 West Virginia Law Review 20–1; S Le Mire, 'Testing Times: In-House Counsel and Independence' (2011) 14 Legal Ethics 23; AP Hemingway, 'The Government Attorney's Conflicting Obligations', Selected Works, Widener University School of Law (Jan 2000) 227, 229.

[39] Jenoff (n 38) 22.

ethical obligations in order to achieve business goals.[40] Each of these explanations can apply equally to government lawyers. Like in-house counsel, government lawyers rely on their client-employer for employment compensation and review, and must sometimes 'follow instructions in all ethical and professional matters unless they are prepared to take an employment-threatening stance'.[41] Moreover, there is no discernible reason to argue that government lawyers are not also at risk of 'going native' after working for the government for a number of years, especially in view of the experience in the US with the so-called 'Torture Memos'.[42] Finally, government lawyers are also expected to exercise duties in addition to the provision of legal advice, such as advising on policy or holding office.[43]

Whether government lawyers share qualities with in-house counsel for purposes of the application of legal privilege has not really been the subject of debate among European scholars. Perhaps this is because, like the UK (and indeed, Article 19 of the Statute of the CJEU) most EU Member States would consider government lawyers on the same footing as other practising (ie, non-in-house) lawyers. Despite this, it is clear that there are similarities and shared concerns regarding their independence. Like in-house counsel, government lawyers are not freely operating legal advisers with multiple clients. They are government employees. This seems especially at odds with the holdings in *AM&S*, *Akzo Nobel* and *Prezes*, particularly when one considers the Principle (a) on freedom in the European Charter for the Legal Profession, which states:

> A lawyer needs to be free–politically, economically and intellectually–in pursuing his or her activities of advising and representing the client. This means that the lawyer must be independent of the *state and other powerful interests*, and must not allow his or her independence to be compromised by improper pressures from business associates. The lawyer must also remain independent of his or her own client if the lawyer is to enjoy the trust of third parties and the courts.[44]

This provision could be read as applying equally to in-house counsel and government lawyers. Its sentiment seems to follow that of the CJEU in its conceptions of 'lawyer' and 'independence'. Yet, despite these similarities, the CJEU is treating in-house counsel and government lawyers differently. Perhaps it is not wholly correct to criticise the CJEU for this, in light of the fact that it is Article 19 of the Statute that distinguishes between the two and creates the privileged parties in paragraph 1. However, it is the CJEU that has chosen to interpret 'lawyer' as not including in-house counsel, despite their many similarities to government lawyers and the attendant concerns surrounding

[40] Ibid 12; Le Mire (n 38) 23.

[41] AC Hutchinson**,** '"In the Public Interest": The Responsibilities and Rights of Government Lawyers' (2009) 10 German Law Journal 629, 981–1000.

[42] The Torture Memos are a widely recognized example of 'going native' because of the lack of independence on the part of the government lawyers who drafted them: 'Given that the memos were prepared by agencies . . . that traditionally employ some of the best lawyers in government, it is unlikely that the authors lacked technical legal skills. The explanation for the deficiencies in reasoning is more likely that the authors did not want to regard the law as constraining their client's end, so they approached the law in an excessively adversarial stance, in effect adopting the attitude that they would make the law into what they wanted it to say.' (WB Wendel**,** 'Professionalism as Interpretation' in NB Rapoport, JD Van Niel and BG Dharan (eds), *Enron and Other Corporate Fiascos: The Corporate Scandal Reader* (2nd edn, Thomson Reuters 2009) 1038–54).

[43] Sparkes (n 37) 6.

[44] Council of Bars and Law Societies of Europe, 'Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers' (2010 edn) 7 (emphasis added).

the exercise of their role and provision of legal advice. In the author's view, it does not make sense to allow privilege and representation for one, but not the other. To be more consistent and fair, it should either treat government lawyers and in-house counsel alike, or it should consider reversing its case law on salaried lawyers. If it wishes to continue with the distinction, it must provide clear and convincing reasons as to why government lawyers do not present the same concerns regarding independence. Otherwise, the CJEU risks generating an unacceptable level of legal uncertainty, which could result in parties (both public and private) being unable to defend their interests without confusion and uncertainty.

D. Conclusion

The aim of this article is twofold. First, it intended to illustrate how, in *Prezes*, the CJEU has expanded its holdings in *AM&S* and *Akzo Nobel* not just to encompass competition law proceedings and the application of legal privilege to in-house counsel, but also to prevent in-house counsel from appearing before the EU Courts. Moreover, it did so without supporting its contention that the legal traditions in the Member States are such that a common treatment of in-house counsel can be discerned. Second, the article used *Prezes* to demonstrate that the CJEU has interpreted the concepts of 'lawyer' and 'independence' so as to unfairly exclude in-house counsel, while preserving the special privilege of government lawyers to appear before the EU Courts. The CJEU attempts to objectively justify its treatment of in-house counsel by referring to the existence of an employment relationship with their employer-clients, but it is this very connection which is at the heart of the relationship between government lawyers and the government for which they work. Considering the many similarities between government lawyers and in-house counsel, especially in the context of what it means to be an independent lawyer, it is unreasonable for the CJEU to treat such similar classes of lawyer differently.

JUSTINE N STEFANELLI*

CITIZENSHIP OF THE EUROPEAN UNION

A. International Law and Citizenship

The relationship between EU law and international law has, again, recently occupied the European Court of Justice with respect to the compatibility of the EU Treaty with international obligations. It will be recalled that in the *Kadi* judgment[1] the Court

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[1] Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351.

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