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In-house lawyers of NRAs may not represent their clients before the European Court of Justice

A case note on UKE (2011)

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A case note on UKE (2011)

Slawomir Bryska¹

It is not frequent for a National Regulation Authority (NRA) to bring an action against the Commission decision and, cynically speaking, case *Prezes Urzędu Komunikacji Elektronicznej² v Commission³* shows that the avoidance of a sweeping retaliation may be one of the reasons for it. The General Court followed the Commission's argument that, notwithstanding the peculiarities of the employment conditions of the Polish Regulator's legal counsel giving it virtually full independence, as well as the fact that the Polish law itself does not differentiate between in-house counsel and third party attorneys, the claim should be rejected on the grounds of inadmissibility. The GC based its judgment on Art 19 of the Statute of the Court of Justice⁴, which requires that, with the exception of the Member States' Governments and the EU Institutions, parties to the dispute must be represented by a lawyer. In so doing, the Court explicitly referred to the infamous *Akzo Nobel Chemicals and Akcros Chemicals v Commission⁵* and *EREF v Commission⁶*. Most importantly, the Court stated that the lawyers representing Prezes Urzędu Komunikacji Elektronicznej (UKE) are bound to enjoy a degree of independence inferior to that of lawyers who are not linked to their clients by an employment contract⁷.

I. The Judgment in T-226/10, Prezes Urzędu Komunikacji Elektronicznej v European Commission

The substance of the case concerns Telekomunikacja Polska S.A.'s discrimination in prices and quality of service in IP peering and IP transit. UKE tried to impose a set of regulatory obligations⁸ on TP S.A., which were subsequently prohibited by the Commission's decisions⁹. UKE then challenged the decisions before the General Court but its claim was unsuccessful on procedural grounds - Art 19 of the ECJ's Statute, which requires that, with

¹ Intern at the legal department of the Republic of Poland Office of Electronic Communications. I have not been involved in the case. Any views and opinions presented in this article are mine alone, and do not represent the position of UKE.

² Hereinafter referred to as 'UKE'.

³ Case T-226/10, *Prezes Urzędu Komunikacji Elektronicznej v Commission*, 23 May 2011, OJ C 204 from 09.07.2011, p.23.

⁴ Protocol No. 3 on the Statute of the Court of Justice of the European Union, C 83/210, OJ 30.3.2010.

⁵ Case C-550/07, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission*, 14 September 2010, OJ C 37, 9.2.2008.

⁶ Joined Cases C-74/10 P and C-75/10 P, *European Renewable Energies Federation ASBL v Commission*, 29 September 2010, OJ C 113, 1.5.2010.

⁷ UKE v Commission, para 21.

⁸ http://www.uke.gov.pl/_gAllery/44/06/4406/Rynek_1_projekt_decyzji_do_konsultacji_jawna.pdf;

http://www.uke.gov.pl/_gAllery/46/97/4697/Rynek_2_projekt_decyzji_do_konsultacji.pdf.

⁹ PL/2009/1019 and PL/2009/1020.

the exception of the Member States' Governments and the EU Institutions', parties to the dispute must be represented by an independent lawyer.

UKE argued that, notwithstanding the employment relationship between it and its lawyers, they remained fully independent in the exercise of their legal profession. This NRA based this argument on three heads¹⁰. First, the lawyers were formally employed by the Director General of UKE and not by its President. According to the Polish law, Director General and the President are two separate legal entities, whereby the former is in charge of the institution itself, which 'grants' its services to the latter. Second, their employment status was described as 'independent' reporting exclusively to the Director General. Third, the Polish Act regulating the legal profession explicitly states that in-house lawyers must always present an independent point of view and report only to the head of its department. Lastly, as UKE noted, the Act explicitly recognises such neutrality as the core of the legal profession.

The Court concluded that the established jurisprudence on Arts 19 and 21 of its Statute as well as Art 43(1) of its Rules of Procedure¹¹ clearly requires representation by a third party¹². It continued that such a requirement is in accordance with the principles of the legal profession, such as full independence, stewardship of the higher interests of justice and legal aid, and that it is common to the traditions of the Member States of the EU¹³. Most notably, by reference to *Akzo Nobel*, the GC stated that the Polish lawyers' behaviour constituted only half of the proof of their independence, the other half being lack of employment relationship with UKE¹⁴.

As for the latter part of the independence 'test', the Court remained unconvinced that the legal separation of UKE between its President, who was a party to the dispute, and the Director General, who was the formal employer of UKE's lawyers, was sufficient. The GC noted that UKE's only function was service to its President and this led to a situation where the lawyers enjoyed less independence than they would have enjoyed had they worked for a law firm representing UKE's President in the proceedings¹⁵. Lastly, the Court rejected the notion that a lawyer allowed to represent his client before any of the Member States' courts or tribunals automatically enjoys such privilege before the European Courts. Stopping short of criticising the Polish laws, it held that the existence of the legal profession at the national level does not guarantee the fulfilment of the independence criterion, since the Court is allowed to carry out its own autonomous assessment on a case-by-case basis, without reference to the national laws¹⁶.

¹⁰ UKE v Commission, para 9.

¹¹ Consolidated version of the rules of procedure of the Court of Justice (2010/C 177/01).

¹² UKE v Commission, para 16.

¹³ Ibid, para 17.

¹⁴ Ibid, para 18.

¹⁵ Ibid, para 21.

¹⁶ Ibid, para 22.

II. The Formation of the Jurisprudence

Given the General Court's analysis, there appear to be two interconnected threads of precedent leading to the judgment of *UKE v Commission*. One of them starting with *A. M. & S v Commission*¹⁷ and leading to the very recent *Akzo Nobel* where, after nearly three decades since its original stance, the ECJ reaffirmed its refusal to grant the protection of secrecy to communications between clients and their in-house lawyers. The other one starting with, inter alia, *Vaupel v Court of Justice*¹⁸, including *Lopes v Court of Justice*¹⁹, *Euro-Lex v OHIM*²⁰, *Sulvida v Commission*²¹, leading to *EREF v Commission*, concerns the prohibition of self-representation before the Court which, ultimately, evolved into a prohibition of representing a client in the event of the existence of employment relationship between the lawyer and the said client.

The *Akzo* strand, so widely covered in the recent literature²², remains of critical significance. Although the *UKE* judgment itself did not concern the attorney-client privilege, the Court did not hesitate to implant the solution created for the needs of dawn-raids performed by the Commission. Most notably, at para 18, the GC borrowed the ECJ's reasoning from *Akzo*²³ to deny *UKE*'s counsel their 'independent' status required by Art 19 of the ECJ Statute. Following the dicta of *A. M. & S.*²⁴ confirmed once more in *Akzo*, the Court understands the notion of independence both positively, determined by how the lawyer fulfills his professional ethical obligations, as well as negatively, by reference to his employment relationship with the party to the dispute²⁵. In other words, the Court is not prepared to recognise any in-house lawyer as 'fully' independent and allow him to represent his employer in a litigation.

The *EREF* strand appears to have evolved from the notion that, with the exception of the EU Institutions and the Member States, no party may represent itself before the Court of Justice. This rule was first invoked in *Vaupel* and confirmed in *Lopes*²⁶. However, all of the initial cases concerned situations, where one of the parties to the proceedings and its representative were one and the same person. It was not until *Euro-Lex v OHIM* that the Court extended this reasoning to lawyers having some degree of control of the undertaking

¹⁷ Case C-155/79, *A.M. & S. Europe Ltd. v Commission*, 1982, ECR 1575.

¹⁸ Case *Vaupel v Court of Justice* (131/83, unpublished).

¹⁹ Case C-174/96, *Lopes v Court of Justice* [1996] ECR-SC II-185.

²⁰ Case T-79/99 *Euro-Lex v OHIM* [1999] ECR II-3555.

²¹ T-184/04 *Sulvida v Commission* [2005] ECR II-85.

²² See, inter alia, A. Lordi 'The Attorney-Client Privilege In the European Union and Italy: Time for a Change', *Business Law Journal – Doquesne University School of Law*, Vol 11/2009, pp. 47-60.

²³ *Akzo Nobel Chemicals* (2010), paras. 44-45.

²⁴ Paras. 20 and 27.

²⁵ The phrasing 'interpreted positively and negatively' seems to have been coined by AG Kokott in her Opinion in *Akzo*, at para. 60.

²⁶ *Lopes v Court of Justice*, paras 8 and 11.

they represented in the proceedings. It referred to the principle of lawyer's independence from *A. M. & S*²⁷ and concluded that the lawyer representing the applicant could not be considered as a 'third' party because he was one of the two directors within the applicant's undertaking. The Court subsequently introduced the concept of the 'controlling organ'²⁸. A very similar situation occurred in *EREF*, where the lawyer bringing the case before the GC on behalf of the federation also happened to be one of its directors.

Thus, the Court rejected UKE's claim on two inter-related grounds: that the Polish NRA tried to represent itself (*EREF*), and that its lawyers were not independent within the alleged meaning of the ECJ's Statute (*Akzo*).

III. The Doubts

Since UKE's lawyers work in a separated department and their exclusive role amounts to the provision of legal services, the *EREF* case law, i.e. 'self-representation/controlling organ', does not appear to be applicable in the strict sense. However, the Court's refusal to acknowledge them as independent within the meaning of Art 19 of its Statute and *Akzo* due to their employment contracts poses the main problem. Moreover, it does not seem remotely possible to expect an overturning of such a landmark precedent shortly after its affirmation by the ECJ. Thus, the only real hope appears to be that the Court limits the rule of *Akzo*, and includes in its definition of 'independence' those situations where, notwithstanding the existence of the employment contract, the representatives can show a complete functional separation from the decision-making mechanism of their employer.

One cannot help but express disappointment over the Court's simplistic approach towards the notion of independence. The ECJ refuses to look beyond the employment status which is not only a very formalistic solution, but it may also prove misleading. In reality, many in-house lawyers enjoy much more autonomy in their work due to the professional stability guaranteed by their employment contracts and the labour law. This is even more apparent in the situations of lawyers employed by institutions, such as UKE, where their professional position remains safe so long as they do not commit an act of a major misconduct. This also means that their situation is entirely unaffected by the outcome of the proceedings. On the other hand, so called 'independent' lawyers need to actively compete for their clientele, their success fees are directly linked to their performance, and they may be bound by advance payments. Furthermore, currently most law firms, especially those doing corporate work, do

²⁷ Euro-Lex, para 28.

²⁸ Ibid, para 29.

not stop at interpretation of the law, but their role extends to the sphere of business advice²⁹ which, if we were to follow the Court's reasoning, could put them in the *EREF* category.

Another disappointing element of the judgment is the Court's complete disregard for the Polish laws regulating the legal profession³⁰. These laws, recognised by the Council of Bars and Law Societies of Europe, through a list of criteria regulating professional conduct, already insure the lawyers' independence, irrespectively of their professional status. In fact, it is common practice for the in-house lawyers to represent their clients in the Polish courts, as they are bound by exactly the same rules as the third party lawyers. Nevertheless, the Court acts as if it was sending a message to the Member States to harmonise the area, where it may not be necessary.

UKE v Commission thus serves as a good example of a statement taken out of its context and transformed into a general rule. The over-interpretation of Art 19 of the ECJ's Statute was utilised in *Akzo* to grant the Commission access to the necessary correspondence for the purposes of antitrust investigations. Now it serves as a rule limiting professional privileges.

IV. The Consequences

UKE recently lodged its appeal to the ECJ. Should it be dismissed, the net result of the judgment would be a complete exclusion of the in-house lawyers, except for the agents of the Member States and the EU Institutions, from representing their clients before the European Courts. Such a blanket prohibition does not only affect the entire world of business, but also all the institutions independent from the central government, such as the NRAs.

A. M. & S and *AKZO* had already placed a heavy burden on the private sector. The in-house lawyers are experts in the law that governs the company's work, they know the parties involved and the functioning of their organisations, and they are most able to address the complexities of corporate behaviour. In other words, due to their specialisation, they can offer better services, faster, at a lower price. The only differences between them and the law firms are found in their payment methods, as well as the fact that they work for one client only.

UKE now stretched this burden onto the public sector at decentralised and specialised level. The fact that *UKE*'s regulatory efforts are being nullified on purely

²⁹ Alan B. Bernstein and Princeton Review Publishing Staff (2004), 'Corporate Lawyer, Guide to Your Career' (The Princeton Review).

³⁰ Ustawa z dnia 6 lipca 1982 r. o radcach prawnych (tekst jedn. z 2010 r. Dz. U. Nr 10 poz. 65 ze zm.), and Uchwała Nr 8/VIII/2010 Prezydium Krajowej Rady Radców Prawnych z dnia 28 grudnia 2010 r. w sprawie ogłoszenia tekstu jednolitego Kodeksu Etyki Radcy Prawnego.

procedural grounds, regardless of their merit, is a separate problem resulting from this particular case worth addressing in more detail elsewhere. The most obvious general implication of the judgment is the additional strain on the public resources in general, and the NRA's budgets in particular. While certain regulation authorities may not be concerned by this, others have to limit their expenditure much more severely³¹. Thus, hiring costly 'European' law firms in addition to having highly qualified in-house counsel bound by employment contracts does not seem to be the optimal solution. In addition, depending on the national laws, hiring an independent law firm by an institution may require a call for tenders or an auction. Such procedure takes time which goes directly against one of the core principles of *ex ante* regulation: speed. In addition, in most cases the main or, indeed, the only criterion of selection in such tenders is the price offered by the parties. This, in turn, could lead to a situation where the NRA, bound by the rules on public procurement, contracts a party whose quality of service is suboptimal, especially in comparison with its own experienced and highly specialised in-house counsel.

The last argument is especially significant in the electronic communications sector, where the lawyer is required to understand the principles of economics and engineering in addition to his legal knowledge. This particular decision concerned complex issues involving the responses of the national regulation to the reality of the national IP peering and IP transit markets. It involved delicate weighing and balancing of the economic and engineering data, and the choice whether regulatory obligations are necessary or not. It is questionable, to say the least, whether forcing a NRA to put its hopes in the external counsel is fully justified when its own counsel has the unmatched knowledge of the matters at stake.

Procedurally, all decentralised institutions of the Member States are thus treated by the European Courts as private undertakings with, moreover, no public interest orientation. The latter is said to guarantee the independence of the EU Institutions and, therefore, allow them to use the services of their own specialised counsel. On the other hand, the regulation authorities which primarily follow the goals of the EU agenda through the use of the EU tools, whether requiring their transposition or not, do not enjoy the same privilege. Perhaps their independence is somehow lost in translation.

³¹ The budget at UKE's disposal amounted to 44 602 000 zł in 2010 (approx. 10,1 mln Euros as of 27.09.2011); http://www.uke.gov.pl/uke/index.jsp?place=Lead24&news_cat_id=361&news_id=6793&layout=9&page=text.



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