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# Legal privilege for in-house lawyers in the light of AKZO: a matter of law or policy?

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### **Legal privilege for in-house lawyers in the light of AKZO: a matter of law or policy?**

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## Legal privilege for in-house lawyers in the light of AKZO: a matter of law or policy?

Luca Schicho (\*)

### 1. Introduction

This paper discusses the arguments in favour of extending legal privilege to in-house lawyers in the light of the CJEU's judgement in *AKZO*. The previous jurisprudence is unambiguous, as the Court clearly stated in *AM & S* that the confidentiality of written communications between an undertaking and its lawyer is protected under Union law only when two cumulative conditions are fulfilled: they must be connected to the exercise of the client's rights of defence and the lawyer must be independent, that is, "not bound to the client by a relationship of employment".<sup>1</sup> This protection also applies to internal notes confined to reporting the content of communications with independent lawyers containing legal advice.<sup>2</sup>

Scholars and practitioners have repeatedly criticized the Court's approach as restrictive and formalistic, calling for an extension of legal privilege to communications with in-house lawyers. An opportunity for doing so would have been the proceedings in *AKZO*. The case concerned an inspection in Manchester in February 2003 by officials of the Commission and the Office of Fair Trading. The officials gathered a series of documents which they categorized separately, namely the "series A documents", consisting of notes of the director with a note stating "discussed by phone with external lawyer", and the "series B documents", consisting of two emails and handwritten notes by the director to the undertaking's in-house lawyer. The Commission refused to grant legal privilege to the series B documents, invoking Art. 14(3) of Regulation 17.<sup>3</sup> Subsequently, the undertakings brought an action for annulment of the decision.

In their judgements, neither the CFI nor the CJEU felt an urgent need to reconsider their jurisprudence. To the contrary, they confirmed *AM & S* and thereby at least temporarily put an end to this debate, removing all doubts about the scope of legal privilege.<sup>4</sup> The paper briefly outlines the main arguments raised in favour of extending legal privilege as well as the judgement of the CFI and the Opinion delivered by AG Kokott, and then examines the passages of the CJEU judgement addressing each argument.

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<sup>1</sup> Case 155/79 *AM & S v Commission* [1982] ECR 1575, § 27.

<sup>2</sup> Case T-30/89 *Hilti v Commission* [1990] ECR II-163, §§ 13, 16-18.

<sup>3</sup> Corresponding to Art. 20(4) in Regulation 1/2003, which requires that undertakings submit to inspections ordered by decision of the Commission.

<sup>4</sup> D. VOILLEMOT, A.-G. HAIE, "L'arrêt « Akzo » : la Cour confirme que les correspondances entre un avocat interne et son entreprise ne sont pas couvertes par la confidentialité", [2010] *L'Observateur de Bruxelles* 26, at 30 ; in the words of the President of European Company Lawyer's Association, supporters of an extension of legal privilege were "back at square one" as in 1982, see ECLA, "ECJ Ruling Press Release" (14 September 2010, available at [http://www.ecla.org/wp-content/uploads/ECLA\\_Press\\_Release.pdf](http://www.ecla.org/wp-content/uploads/ECLA_Press_Release.pdf)).

## 2. Arguments for extending legal privilege to in-house lawyers

Three main arguments have been raised in favour of extending legal privilege to in-house lawyers, both by scholars and the applicants in *AKZO*. First, it is argued that the “independence gap” between external and in-house lawyers is often quite small, as in-house lawyers are also subject to professional rules imposed by bar associations or other professional associations when acting as legal counsel. These rules supposedly guarantee that in-house lawyers will de-facto enjoy a sufficient degree of independence from their employer. Furthermore, an external lawyer may be in a relationship of comparable economic dependence if his activities for the respective undertaking constitute an important share of his overall professional activities. Thus, there might be very little factual difference between the relationship of an undertaking to its external lawyer and its in-house lawyer.<sup>5</sup>

Second, while legal privilege was clearly limited to external lawyers at the time of *AM & S*, Member States are allegedly moving towards extending legal privilege, a tendency that should be reflected in Union law. This argument is linked to concerns of legal certainty arising from the differing scopes of legal privilege. When subject to an inspection, undertakings are presented the written authorization showing which agency authorised the inspection, together with an explanatory memorandum outlining their investigative powers.<sup>6</sup> However, it is not necessarily clear which competition authority will later take up the investigation.<sup>7</sup> Thus, the differing degrees of protection are said to undermine essential rights of defence.

Third, reference has been made to the detrimental effects of excluding in-house lawyers from legal privilege on the effectiveness of internal compliance schemes. A large part of competition law infringements do not result from official policies of undertakings but from covert practices that have developed in mid-level management. Thus, internal compliance schemes targeting such practices can make an important contribution to the effectiveness of competition law and should be encouraged. In-house lawyers are often best placed to operate such schemes, as they have better access to the enterprise and the necessary sectoral expertise.<sup>8</sup> Refusing them legal privilege discourages employees from thoroughly cooperating with them, as such cooperation could mean providing documents forming the basis for an eventual prosecution of the individual for competition law offences.<sup>9</sup> It also may lead in-house

<sup>5</sup> H. WOHLMANN, “Die Entscheidung “Akzo” des Europäischen Gerichtshofes, 1. Instanz, vom 17. September 2007 und seine Auswirkungen auf Unternehmensanwälte”, (2008) 5 *Zeitschrift für Gemeinschaftsrecht* 293, at 294; M. SCHMID-DRÜNER, “Legal Professional Privilege after Akzo - Case Closed, One Companies' Struggle Against Legal Uncertainty”, [2011] *Bucerius Law Journal*, 25, at 28.

<sup>6</sup> L. ORTIZ BLANCO ET AL., *EC Competition Procedure*, 2<sup>nd</sup> ed., Oxford University Press, Oxford, 2006, p. 298, 303.

<sup>7</sup> M. SCHMID-DRÜNER, “Legal Professional Privilege after Akzo - Case Closed, One Companies' Struggle Against Legal Uncertainty”, [2011] *Bucerius Law Journal* 25, at 30.

<sup>8</sup> C. SEITZ, “Ein Schritt vor und zwei zurück? – Zum letzten Stand des Anwaltsgeheimnisses für Unternehmensanwälte im Europäischen Kartellverfahren – Kurzbesprechung der Schlussanträge der Generalanwältin Juliane Kokott vom 29. 4. 2010 – C-550/07 P (Akzo Nobel/Kommission)”, [2010] *Europäische Zeitschrift für Wirtschaftsrecht* 524, at 526; M. BUNTSHECK, “Attorney-client correspondence - a contribution towards a well-ordered course of justice or rather a 'ticking bomb'”, [2007] *Wirtschaft und Wettbewerb*, 229, at 233.

<sup>9</sup> A. ZELHOFER, P. REICHERT, “Der Schutz von Anwaltskorrespondenz nach Akzo Nobel – ein Privileg externer Anwälte und ihrer Mandanten”, [2011] *Österreichische Zeitschrift für Kartell- und Wettbewerbsrecht* 43, at 45.

lawyers to refrain from directly and unambiguously raising competition law concerns, as any such concerns expressed in written form could be used against the undertaking in case they are seized during an inspection.

### 3. The judgement of the CFI

The judgement of the CFI did not uphold the arguments in favour of an extension of legal privilege. However, in the order on interim measures of 30 October 2003, the President seemed to hint that such an extension was being considered, cautiously noting that “evidence none the less appears *prima facie* to be capable of showing that the role assigned to independent lawyers of collaborating in the administration of justice [...] is now capable of being shared, to a certain degree, by certain categories of lawyers employed within undertakings on a permanent basis where they are subject to strict rules of professional conduct”<sup>10</sup> and then concluding, a little more boldly, that “there is no presumption that the link of employment between a lawyer and an undertaking will always, and as a matter of principle, affect the independence necessary” for enjoying legal privilege.<sup>11</sup>

Whatever expectations applicants and scholars may have had after this observation,<sup>12</sup> the final judgement of the CFI stood by the Court’s previous restrictive approach. The CFI first recalled the conditions required by the Court in *AM & S*, namely that legal advice was provided in full independence, that is, by a lawyer structurally, hierarchically and functionally a third party in relation to the undertaking receiving that advice.<sup>13</sup> It further noted that it was not possible to “identify tendencies which are uniform or have clear majority support in that regard in the laws of the Member States”<sup>14</sup> and that “a large number of Member States still exclude in-house lawyers from protection” or even prohibit in-house counsel from being members of the respective bar or law society while being employees of their client-corporation.<sup>15</sup> Finally, with regard to the allegedly comparable situation of external and in-house lawyers, the CFI held that they are “clearly in very different situations, owing, in particular, to the functional, structural and hierarchical integration of in-house lawyers within the companies that employ them.”<sup>16</sup>

Besides the central question of legal privilege for in-house lawyers, the CFI also made other important statements on the scope of legal privilege. It rejected the summary examination of what documents are subject to privilege undertaken by the Commission.<sup>17</sup> Furthermore, it discussed the applicant’s contention that documents created in the context of the compliance

<sup>10</sup> Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals and Akcros Chemicals v Commission* [2007] ECR II-3523, § 125.

<sup>11</sup> *Ibid.*, § 126.

<sup>12</sup> G. MURPHY, “CFI Signals Possible Extension of Professional Privilege to In-house Lawyers”, (2004) 25 *European Competition Law Review* 447, at 469.

<sup>13</sup> Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals and Akcros Chemicals v Commission* [2007] ECR II-3523, § 168.

<sup>14</sup> *Ibid.*, § 170.

<sup>15</sup> *Ibid.*, § 171.

<sup>16</sup> *Ibid.*, § 174.

<sup>17</sup> *Ibid.*, § 101.

programme should not be excluded from the possibility of enjoying legal privilege, in particular due to the necessity to undertake a fact-finding exercise and gather material evidence for a leniency application, which would then be subject of communication with an external lawyer.<sup>18</sup>

The Commission opposed this view, observing that legal privilege must be limited to written communications between lawyer and client and subsequent reports on the contents of such communications, excluding preceding preparatory documents.<sup>19</sup> In particular, legal privilege could not be understood as extending to documents created within the context of a compliance programme, since such programme has the purpose “of ascertaining whether the undertaking is complying with competition law and has a pedagogical, disciplinary and supervisory dimension, and thus is not limited to protection of the rights of the defence.”<sup>20</sup>

The CFI held that for being able to effectively consult an external lawyer, “it may be necessary [...] for the client to prepare working documents or summaries, in particular as a means of gathering information which will be useful, or essential, to that lawyer for an understanding of the context, nature and scope of the facts for which his assistance is sought” and that the protection of such documents may be necessary to safeguard the rights of defence.<sup>21</sup> This would be the case were such preparatory documents were drawn up “exclusively for the purpose of seeking legal advice from a lawyer in exercise of the rights of the defence” even if they were neither exchanged with the lawyer nor created for the purpose of being physically sent to him.<sup>22</sup> However, legal privilege as an exception to the Commission’s powers of investigation must be construed restrictively and it is thus for the undertaking to prove that documents “were drawn up with the sole aim of seeking legal advice from a lawyer”.<sup>23</sup> In the light of this burden of evidence, the CFI finally held that the undertakings had failed to prove this and thus rejected the plea concerning legal privilege for these documents.<sup>24</sup> While these findings enjoyed less spotlight than the central debate over in-house lawyers, they nonetheless represent important contributions to outlining how legal privilege imposes procedural constraints on inspections<sup>25</sup> further developing the *AM & S* jurisprudence.<sup>26</sup>

#### 4. The Opinion of AG Kokott

AG Kokott first noted that *AM & S* required two cumulative conditions to be fulfilled for documents to be covered by legal privilege: connection with the rights of defence and independence of the lawyer. With regard to the latter, she emphasized that the requirement was “unequivocally linked to the fact that the lawyer in question must *not be in a relationship*

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<sup>18</sup> *Ibid.*, § 108.

<sup>19</sup> *Ibid.*, §§ 113, 114.

<sup>20</sup> *Ibid.*, § 116.

<sup>21</sup> *Ibid.*, § 122.

<sup>22</sup> *Ibid.*, § 123.

<sup>23</sup> *Ibid.*, § 124.

<sup>24</sup> *Ibid.*, § 134.

<sup>25</sup> E.G. FOURNIER, “The Modernisation of European Competition Law, First Experiences with Regulation 1-2003” (Report to FIDE Congress 2008, available at: <http://ssrn.com/abstract=1139776>), p. 67.

<sup>26</sup> L. TOMÉ FÉTEIRA, “Legal professional privilege and Competition Law”, [2007] *European Law Reporter* 392, at 397.

of employment with his client”.<sup>27</sup> This strict requirement is explained by the fact that whatever professional ethical obligations may be associated with membership to a bar or law society, an enrolled in-house lawyer is still “less able to deal effectively with any conflicts of interest between his professional obligations and the aims and wishes of his client than an external lawyer”.<sup>28</sup> Even where schemes of professional ethics are exemplary, they are not capable of guaranteeing that in-house lawyers are “genuinely free from direct or indirect pressure and influence in the course of day-to-day business”, a question determined “rather by the conduct and attitude adopted by his employer on each individual occasion”.<sup>29</sup> While conceding that even external lawyers may enjoy de-facto limited independence vis-à-vis particularly important clients, an in-house lawyer still remains economically more dependent and more closely tied to the undertaking by personal identification.<sup>30</sup>

Concerning the development of the legal framework in the Member States, AG Kokott affirmed that there was “no evidence of a clear – let alone growing – trend towards” extending legal privilege.<sup>31</sup> Concerns about legal certainty due to differing degrees of protection in the different legal system are “entirely understandable [but] none the less untenable from a legal point of view”: the respective rules are not harmonised by the Union legislator and harmonisation cannot and should not be brought about indirectly by a broad judicial interpretation of the rights of defence.<sup>32</sup>

With regard to the role of in-house lawyers in internal compliance schemes, AG Kokott expressed scepticism about the extent to which this should determine the scope of legal privilege. First, she observed that the in-house lawyer’s close relationship to the undertaking may be a “double-edged sword” undermining his ability to give the genuinely independent legal advice necessary for these purposes.<sup>33</sup> Furthermore, she raised an important objection to linking compliance and legal privilege, as communications exchanged with an in-house lawyer for compliance purposes would be general in nature and have no specific connection with the exercise of the rights of defence. It would therefore be very difficult to prove that the first condition laid down in *AM & S* was fulfilled.<sup>34</sup>

## 5. The judgement of the CJEU

### 5.1. The de-facto equivalence argument

With respect to de-facto equivalence in the light of professional obligations, the CJEU stated that “the concept of the independence of lawyers is determined not only positively, that is by reference to professional ethical obligations, but also negatively, by the absence of an

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<sup>27</sup> Opinion of AG Kokott, Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals v Commission* [2010], not yet reported, § 58.

<sup>28</sup> *Ibid.*, § 61.

<sup>29</sup> *Ibid.*, § 64.

<sup>30</sup> *Ibid.*, § 66, 67, 70.

<sup>31</sup> *Ibid.*, § 100.

<sup>32</sup> *Ibid.*, § 132, 134.

<sup>33</sup> *Ibid.*, § 118.

<sup>34</sup> *Ibid.*, § 120.

employment relationship”.<sup>35</sup> This derives from the fact that his position as an employee “by its very nature, does not allow him to ignore the commercial strategies pursued by his employer, and thereby affects his ability to exercise professional independence”.<sup>36</sup> Consequently, whatever professional ethical obligations he might be subject to, these do not “alter the economic dependence and personal identification of a lawyer in an employment relationship with his undertaking”.<sup>37</sup> Thus, differences between in-house- and external lawyer are too profound to make the two comparable and precluding any possible breaches of equal treatment as suggested by applicants.<sup>38</sup>

Deciding to ignore these differences would not only mean ignoring the strict line that the Court consciously and expressly drew in *AM & S*. It would also fail to increase legal certainty, as an extension on a case by case basis would require taking into account the different professional ethical obligations imposed by each bar association and balancing these with the provisions of each employment contract.<sup>39</sup> This would result in highly casuistic, unpredictable decisions rather than contributing to legal certainty for undertakings.<sup>40</sup>

## 5.2. The uniformity and legal certainty argument

The CJEU held that while comparatively more Member States are now granting legal privilege to in-house lawyers than at the time of *AM & S*, there is still no majority or “dominating tendency” in this direction: the majority of Member States still excludes correspondence with in-house lawyers from legal privilege, and a considerable number even prohibits in-house lawyers from being admitted to the bar.<sup>41</sup> Thus, the CJEU considered 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”.<sup>42</sup>

With regard to the legal certainty argument, it noted that undertakings cannot invoke legal certainty to demand an extension of the principle, as there is a clear *ratione materiae* division of competences between national competition law authorities and the Commission as well as between EU competition law and national competition law.<sup>43</sup> Thus, while there can indeed be

<sup>35</sup> Case C-550/07 P. *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission* [2010], not yet reported, § 45.

<sup>36</sup> *Ibid.*, § 47.

<sup>37</sup> *Ibid.*, § 57.

<sup>38</sup> *Ibid.*, § 58.

<sup>39</sup> As implied by AG Kokott in her reference to “circumstances on each individual occasion”, see Opinion of AG Kokott, Case C-550/07 P *Akzo Nobel Chemicals and Akros Chemicals v Commission* [2010], not yet reported, § 64.

<sup>40</sup> A. ANDREANGELI, “Joined Cases T-125/03 and 253/03, *AKZO Nobel Chemicals Ltd v Ackros Chemicals Ltd v Commission*, Judgment of 17 September 2007”, [2008] *European Business Law Review* 1141, at 1157.

<sup>41</sup> Case C-550/07 P. *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission* [2010], not yet reported, § 71, 72; in particular in Bulgaria, the Czech Republic, Estonia, Greece, France, Italy, Cyprus, Luxembourg, Hungary, Austria, Romania, Slovenia, the Slovak Republic, Finland and Sweden, see Opinion of AG Kokott, Case C-550/07 P *Akzo Nobel Chemicals and Akros Chemicals v Commission* [2010], not yet reported, § 100.

<sup>42</sup> Case C-550/07 P. *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission* [2010], not yet reported, § 76.

<sup>43</sup> *Ibid.*, § 102.



a different degree of protection for different investigations, undertakings subject to investigations are capable of assessing these differences, based on the written authorisation presented by the officials during the investigation.

The judgement squarely rejects the argument of a “tendency towards legal privilege for in-house lawyers”. However, its reference to the fact that the legal situation “has not evolved to an extent justifying a change in the case-law” signals that in case such a broad shift towards extending legal privilege should indeed occur in the future, the CJEU would consider mirroring that development in Union law.<sup>44</sup>

### 5.3. The effects argument: Effect on internal compliance schemes

The effect of legal privilege for in-house lawyers on compliance schemes was also raised as an argument by applicants. They argued that an extension of legal privilege should result from “the development of European Union law, resulting in particular from the entry into force of Council Regulation (EC) No 1/2003” and the “need for in-house legal advice, the importance of which should not be underestimated in preventing infringements of competition law, since in-house lawyers are able to rely on intimate knowledge of the undertakings and their activities”.<sup>45</sup>

The CJEU noted that the introduction of Regulation 1/2003 resulted in many changes of procedure, but these “do not suggest that they require lawyers in independent practice and in-house lawyers to be treated in the same way with respect to legal professional privilege, since that principle is not at all the subject-matter of the regulation”.<sup>46</sup> Furthermore, the CJEU emphasized that the Regulation is not meant to ensure equal treatment of in-house and external lawyers, but to the contrary, it defines the powers of the Commission broadly, aiming to “reinforce the extent of the Commission’s powers of inspection, in particular as regards documents which may be the subject of such measures”.<sup>47</sup>

The arguments with regard to prevention and internal compliance are not without merit. However, they are based less on considerations of principle than on “utilitarian or instrumental considerations relating to the effectiveness and efficiency of antitrust enforcement”.<sup>48</sup> This understanding of legal privilege is neither uncontested nor, if taken further, necessarily very satisfactory: If the utilitarian approach is applied radically, “there is a case to be made for withdrawing any privilege whatsoever for legal communications involving completed or even ongoing conduct, and for protecting only communications containing legal advice about future

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<sup>44</sup> Reflecting the fact that legal privilege derives from the general principles of law common to all Member States, see Case 155/79 *AM & S v Commission* [1982] ECR 1575, §§ 18-22, 24-27; Case C-550/07 P. *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission* [2010], not yet reported, §§ 69, 71-76.

<sup>45</sup> *Ibid.*, § 78, 79; also see, with regard to this alleged impact of Regulation 1/2003 on the role of in-house lawyers, V. POWER, “Representing clients after the Modernisation of EC Competition law”, (2003) 14 *International Company and Commercial Law Review* 335 at 336.

<sup>46</sup> *Ibid.*, § 83.

<sup>47</sup> *Ibid.*, §§ 85, 86.

<sup>48</sup> W.P.J. WILS, “Powers of Investigation and Procedural Rights and Guarantees in EU Antitrust Enforcement, The Interplay between European and National Legislation and Case-Law”, (2006) 29 *World Competition* 3, at 21.

conduct”, as it is only concerning such future conduct that clients could be encouraged to have recourse to expert legal advice and respectively adapt their behaviour.<sup>49</sup>

The Court’s *AM & S* jurisprudence, on the other hand, is founded on a non-utilitarian conception of legal privilege, concerned with the rights of defence of the undertaking under investigation, rather than the wider implications on antitrust enforcement.<sup>50</sup> This not only derives from the Court’s understanding of legal privilege as a fundamental rights-based exception to the Commissions investigative powers. It also expresses a deeper feeling that with regard to the scope of legal privilege, “extracting a rule from balancing competing policies is more appropriately the realm of the legislature”.<sup>51</sup>

## 6. Conclusions and Outlook

Overall, the strongest argument in favour of extending legal privilege of in-house lawyers is not one of competition law, but rather of antitrust enforcement policy. It should also be kept in mind in this respect that, as AG Kokott emphasized, general compliance-related communications would often already fail to fulfil the first criterion of connection to the exercise of defence rights. Legal privilege is considered to apply to correspondence concerning matters at least dealt with informally by the Commission before the opening of the file.<sup>52</sup> The very purpose of correspondence concerning compliance, on the other hand, is to avoid that the Commission ever has a reason to look into the matter.

Consequently, the Court is not willing to broaden its concept of legal privilege to accommodate compliance concerns. Instead it seems to hint that it is up to the legislator to decide whether the beneficial effects on internal compliance and prevention outweigh the negative effects on enforcement arising from a restriction of investigative powers. Should there be a broad consensus that this balancing justifies an extension of legal privilege to in-house lawyers under Union law, this could be laid down unambiguously by an amendment of Art. 20 of Regulation 1/2003.<sup>53</sup> It is doubtful, however, whether initiating a proposal for such an amendment would be among the legislative priorities of the Commission.<sup>54</sup>

Alternatively, such a consensus may be reflected in a modification of national competition law provisions extending legal privilege, which the Court would be willing to follow by equally extending the scope of legal privilege under Union law. Until that happens, however, the Court will stand by its restrictive approach to legal privilege for in-house lawyers.

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<sup>49</sup> E.G. FOURNIER, “Legal Professional Privilege in Competition Proceedings Before the European Commission: Beyond the Cursory Glance”, (2005) 28 *Fordham International Law Journal* 967, at 981.

<sup>50</sup> *Ibid.*, at 1031-1032.

<sup>51</sup> *Ibid.*, at 988.

<sup>52</sup> L. ORTIZ BLANCO ET AL., *EC Competition Procedure*, 2<sup>nd</sup> ed., Oxford University Press, Oxford, 2006, p. 319-320.

<sup>53</sup> As envisaged by an amendment proposal when the Regulation was adopted, which was, however, rejected by a vote of 404 to 69, with 9 abstentions in the European Parliament, see Opinion of the Economic and Social Committee on the “Regulation implementing Articles 81 and 82 of the Treaty” of 29 March 2001, OJ C/2001/155/73 and European Parliament Opinion in Single Reading of 6 September 2001, OJ C E/2002/72/311.

<sup>54</sup> N. TUOMINEN, “Commentaire de l’Arrêt ‘Akzo Nobel v. Commission’”, *Revue du Droit de l’Union Européenne* nr. 4/2010.



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