



EUROPEAN COMMISSION

Brussels, 23.7.2010
C(2010)5044final

COMMISSION DECISION

of 23.7.2010

concerning
a claim of legal privilege and/or protection of confidential correspondence between external
lawyers in the context of an investigation pursuant
to Article 20(4), of Council Regulation (EC) No 1/2003
in
Case No **COMP/E-1/39.612 – Perindopril (Servier)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty¹, and in particular Article 20(4) thereof,

WHEREAS:

- (1) By Decision of 13 November 2008 (C(2008) 6983/5) ("the Decision") the Commission required Les Laboratoires Servier and its parent company Servier SAS together with their respective subsidiaries, to submit to inspections pursuant to Article 20(4) of Regulation (EC) No 1/2003.
- (2) On 24 November 2008 the Decision was notified to Les Laboratoires Servier and Servier SAS (hereafter "Servier") as well as to its UK subsidiary. Immediately after the notification Commission officials and the officials of the national competition authorities concerned carried out the investigation. This Decision relates only to the inspection carried out in Servier's premises in France.
- (3) In the course of the inspections, Commission officials identified a number of documents, of which they wanted to take copies, but for which Servier claimed *inter alia* that they were protected by legal professional privilege (hereafter "LPP"). Servier's claims for LPP treatment have all been resolved except for a set of documents, which was placed in a sealed envelope No 1 (hereafter "the Envelope"). With respect to those documents Servier stated in the minutes of the inspection: *"It is a reply sent by [REDACTED] (counsel to a third party)² to [REDACTED] concerning Servier's compliance with competition law. The document in question contains explicit reference to competition rules of the Treaty. [...] This exchange of correspondence was done within the context of protecting Servier's interests with regard to competition law and is thus clearly covered by the legal privilege."³*
- (4) According to the information provided by Servier by letters of 10 December 2008 and 9 September 2009, the Envelope contains three documents: Document No 1 is

¹ OJ L 1, 4.1.2003, p. 1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ("TFEU"). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this Decision.

² In the subsequent course of the investigation the Commission learnt that the third party is Servier's generic competitor Teva.

³ Original: *"Il s'agit d'une réponse adressée par [REDACTED] (Conseil d'une société tierce) à [REDACTED] relative au respect du Droit de la Concurrence par Servier. Le document en question contient expresse référence aux règles de concurrence du Traité. [...] Cet échange de correspondance s'inscrit donc bien dans le cadre de la défense des intérêts de la société Servier au regard du Droit de la Concurrence et ce trouve donc clairement couvert par le legal privilege."*

a letter of 29 August 2008 from the law firm [REDACTED], representing Teva, addressed to the Belgian lawyers of Servier, Mr [REDACTED] and Mr [REDACTED] of the law firm [REDACTED], which warned that an antitrust complaint would be submitted to the Commission against Servier, unless an agreement was reached. Allegedly, that letter followed two previous communications sent to Teva's lawyers by Servier's external lawyers on 4 and 14 August 2008 concerning the defence of Servier's patents in Belgium. The other two documents (collectively referred to as Document No 2) are a chain of two cover emails, forwarding as an attachment Document No 1 to Servier and within Servier (including the legal department, Ms. [REDACTED], and the top management, Mr. [REDACTED] in whose office the document was found).

- (5) Servier sent a copy of Document No 2 to the Commission on 9 September 2009.⁴ Therefore this Decision concerns primarily Document No 1, as Servier no longer contests the Commission's right to copy Document No 2.
- (6) By letter of 16 October 2009 the Commission informed Servier of its belief that it had obtained a copy of Document No 1 from Teva, without Teva raising any claims to limit the Commission's use of the document as evidence. Whilst it is thus probable that Document No 1 is already in the Commission's possession, it is important to confirm this assumption by opening the Envelope and comparing the documents. It is also important for the Commission to take a position on Servier's legal arguments.
- (7) On 16 June 2009 a meeting was held in Brussels with a view to reaching a mutually acceptable solution (which also related to other documents, for which Servier had made LPP claims). In that meeting the Commission explained the preliminary view that Document No 1 was not protected by LPP as established by the case law. In reply, Servier maintained that the document was also protected by the principle that the confidentiality of correspondence between lawyers of two different parties needs to be safeguarded, as laid down, for example, by Belgian law.
- (8) Servier reiterated its position subsequently by letters of 30 June 2009 and 23 October 2009 and in its memorandum of 30 March 2010. In summary, Servier invokes two reasons why Document No 1 should be protected from the Commission's inspection powers:

(i) Regarding LPP, Servier claims that correspondence between their external legal counsel and the external legal counsel of third parties remains confidential, even if forwarded to Servier itself by its external legal counsel. To decide otherwise would compromise Servier's rights of defence as well as its right to receive independent legal advice (see letters of 5 and 24 February 2009).

⁴ The mail of Mr [REDACTED] of [REDACTED] reads: "Dear Ms [REDACTED], Please find enclosed a copy of a letter (confidential) from Teva's counsel. I suggest we discuss it at your earliest convenience. Kind regards, [REDACTED]" (original: "*Chère Madame [REDACTED], Veuillez trouver ci-joint copie d'une lettre (confidentielle) du conseil de Teva. Je propose que nous en discutons à votre meilleure convenance. Bien à vous, [REDACTED]*"). The mail of Ms [REDACTED] circulating the document within Servier reads: "For information the letter we just received from Teva / I will raise our way of replying with our lawyer tomorrow and I would like to discuss it again with you." (original: "*Pour info ce courrier que nous venons de recevoir de Teva / je fais le point sur la manière d'y répondre avec notre avocat demain et j'aimerais en reparler avec vous.*"

(ii) Servier also argued that Document No 1 is protected by the rules of the Belgian Bar Association⁵ that prohibit the disclosure of documents exchanged in confidence between two lawyers, unless both parties agree and, moreover, approval by the President of the Belgian Bar Association is received. Servier maintains that the rules applicable to the confidential exchange of correspondence between Belgian lawyers also exist in France and possibly other Member States, indicating that this reflects a fundamental principle of European law. Servier also refers to English law, where documents exchanged between external lawyers in the framework of settlement negotiations are protected.

Assessment of Servier's claims

- (9) In the context of an investigation within the meaning of Article 20 of Regulation (EC) No 1/2003, the Commission is empowered to require the production of the business documents relating to the subject-matter and purpose of the investigation, the disclosure of which it considers necessary, including written communications between lawyers and their clients and written communications between lawyers.
- (10) The undertakings concerned can, however, claim the benefit of LPP. The application of LPP operates as a restriction to the Commission's investigation powers, imposed by the need to protect confidentiality and aiming at protecting the rights of defence of the undertaking subject to the investigation. Therefore, it is for the undertaking claiming LPP to provide the Commission with relevant evidence that demonstrates that the communications fulfil the conditions for LPP.

Servier's claim that Document No 1 is protected by LPP

- (11) In order to properly assess Servier's LPP claim, Servier's description of Document No 1 must be borne in mind. It is described as a letter in which a generic competitor (i) complains of alleged anti-competitive behaviour by Servier and (ii) threatens to lodge a complaint before the Commission if Servier refuses to reach a settlement. The letter was written and sent by a lawyer who was not acting on behalf of Servier, but on behalf of the generic competitor. It was found at the premises of Servier because Servier's external lawyer forwarded it to Servier.
- (12) According to settled case law (*AM&S*⁶ and *Akzo*⁷), LPP protects the confidentiality of communications between lawyer and client provided that (i) such communications are made for the purposes and in the interests of the client's rights of defence, and (ii) they emanate from independent lawyers.⁸
- (13) In the subsequent *Hilti* decision⁹ the General Court extended the LPP protection to cover also internal notes circulated within an undertaking which are confined to

⁵ Regulation from the Belgian Bar Association of 8 May 1980 and 22 April 1986, Art. 1.

⁶ Case 155/79 *AM&S Europe Limited v Commission* [1982] ECR 1575.

⁷ Joined Cases T-125/03 and T-253/03 *Akzo Nobel Chemicals and Akros Chemicals v Commission*, [2007] ECR II-3523.

⁸ *Akzo*, paragraph 117.

⁹ Case T-30/89 *Hilti v Commission* [1990] ECR II-163.

reporting the text or the content of communications with independent lawyers containing legal advice.¹⁰

- (14) Finally in *Akzo* the General Court stated that LPP may also extend to preparatory documents, even if they were not exchanged with a lawyer or were not created for the purpose of being sent physically to a lawyer, provided that they were drawn up exclusively for the purpose of legal advice from a lawyer in exercise of the rights of defence.
- (15) Document No 1 does not fall into any of the categories for which LPP has been recognised in the existing case law for the following reasons:
- (i) whilst the document originates from an independent lawyer within the meaning of *AM&S*, that lawyer is not the lawyer acting on behalf of Servier, but the lawyer of an opposing party; it thereby follows that the communication was not made with a view to defending Servier's rights and interests;
 - (ii) the fact that Document No 1 is attached to the communication between an external lawyer and his client (Servier), does not change the nature of Document No 1, which was not prepared for the purposes and in the interests of the client's rights of defence; the *Akzo* judgment clarifies in this respect that "*the mere fact that a document has been discussed with a lawyer is not sufficient to give it such protection*" (paragraph 123);
 - (iii) Document No 1 does not summarise legal advice given by an external lawyer working for Servier in the sense of the *Hilti* order;
 - (iv) Document No 1 was not prepared within Servier for the purpose of seeking legal advice from an independent lawyer.
- (16) Moreover, as set out in the *AM&S* judgment, the rationale for LPP protection is that every person must be able, without constraint, to consult a lawyer, whose profession entails the giving of independent legal advice to all those in need of it.¹¹ This principle is closely linked to the concept of the lawyer's role as collaborating in the administration of justice by the courts.¹²
- (17) This rationale, and the need to protect such communication as a corollary of the rights of defence, is normally not applicable in the case of communications between lawyers acting for opposing parties, which were submitted to the respective clients and found on the clients' premises during inspections.
- (18) Document No 1 is therefore not protected by LPP.

Servier's claim that Document No 1 is protected by the principle of confidentiality of correspondence between lawyers of different parties

- (19) The legal basis for the Commission's inspection powers is Union law. National law is not applicable to the definition of the scope of the documents that the

¹⁰ *Akzo*, paragraph 117, with reference to paragraphs 13 and 16-18 of the order in *Hilti*.

¹¹ *AM&S*, paragraph 18.

¹² *AM&S*, paragraph 24.

Commission may copy during an inspection. It is for the Commission, subject to review by the Court of Justice of the European Union, to decide if it can copy a particular document, and not for a national authority or an arbitrator.¹³ Therefore, Belgian law, which was relied upon by Servier as a justification not to disclose the document, is not applicable.¹⁴ The scope of the Commission's powers to gather evidence therefore does not depend on the consent of the President of a national Bar Association and the parties.

- (20) Moreover, there is no principle of Union law that would prevent the Commission, in the context of an inspection, from taking a copy of a document that was allegedly exchanged in confidence between external lawyers of opposing parties when that document is found at the premises of the recipient lawyer's client.
- (21) On this point Servier has relied on the situation under Belgian, French and English law, implicitly suggesting that there is a European principle protecting the confidential exchange of correspondence between lawyers.
- (22) In this respect, however, the codes of conduct for lawyers in several Member States provide that confidential exchanges between lawyers must not be passed on to the lawyer's own client.¹⁵ Where, as here, such a document has already been passed on to the lawyer's client and is found at the client's premises during the inspection, such rules of conduct are inapplicable, especially when the document was sent with the consent of the recipient lawyer to the client and the client keeps a copy of the document in its files.
- (23) Where it exists, the principle of protection of confidential exchanges between external lawyers, is primarily based on self-regulation of the bar associations. For example the Belgian rule is based on the *Règlement de l'ordre national*, which has regulatory powers pursuant to Article 494 of the *Code Judiciaire*.¹⁶ Bar associations are able to enact binding rules for their members but cannot, in principle, bind third parties and thus extend their powers as regards those third parties.¹⁷ This applies in particular to public authorities that act in the public interest, and all the more so when the limits to their powers are determined by Union law, and not national law. A breach of the duty to keep the letters confidential may thus have disciplinary consequences for the lawyer, but the rules do not bind the client or an investigative authority.

¹³ *AM & S*, paragraph 30.

¹⁴ See in this respect also the Opinion of Advocate General Kokott delivered on 29 April 2010 in Case C-550/07P *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, paragraphs 133 and 172, which reads: "national legal principles and the protection of fundamental rights at national level may not extend beyond national spheres of competence"; "the question of which documents and business records the Commission may examine and copy as part of its searches under antitrust legislation is determined exclusively in accordance with EU law."

¹⁵ See Explanatory Memorandum to CCBE's Code of Conduct, on section 5.3, as well as the Edward Report (1977) noted that "For the same reasons, correspondence which is in principle confidential should not be shown by the lawyer to his client". The situation appears to be same in Italy, where the Code of Ethics prevents disclosure of certain letters between lawyers even to the client itself (see Article 28 of the *Codice Deontologico Forense*).

¹⁶ Similarly, French law mentions correspondence between lawyers as covered by the "secret professionnel" (Article 66-5 of Law of 31 December 1971, as amended in 1997) and English law provides a measure of protection to communications exchanged for the purpose of arriving at a compromise in civil litigation.

¹⁷ See, for Belgian law, P. Lambert, *Régies et usages de la profession d'avocat du barreau de Bruxelles*, 1994, at 148.

- (24) Finally, the underlying rationale of such a rule needs to be taken into account. In Member States where correspondence between lawyers of opposing parties is protected, such protection is based on public policy considerations rather than on fundamental rights. Open communication between lawyers may facilitate the settlement of civil or commercial disputes and this can alleviate the burden for civil courts that would otherwise be called upon to decide on the matter. However when it comes to enquiries that pursue public interests such protection does not appear appropriate, and it is more rarely provided for, as access to information is necessary to ascertain the truth. To the extent that a commercial dispute is relevant to a Commission investigation under the competition rules of the Treaty, principles of confidentiality intended to promote the settlement of commercial disputes cannot constrain the Commission's powers to obtain information arising in the context of that dispute, beyond the recognised exception of LPP.
- (25) Since competition enforcement concerns a matter of public policy, there is no overriding public interest in giving recognition to principles developed for other purposes, in particular where this would diminish the possibilities for the Commission to investigate a potential competition infringement.
- (26) Therefore, it is concluded that Document No 1 is not protected from disclosure pursuant to the Commission's investigative powers under the competition rules of the Treaty by a principle of national law protecting confidential correspondence between lawyers of opposing parties to commercial disputes, in particular in view of the fact that Document No 1 was passed on by the recipient lawyer to his client, at whose premises the document was found.
- (27) The Commission will not open the Envelope before the time period during which an appeal can be lodged against this Decision expires, unless the addressees confirm in writing before that date that they do not intend to challenge this Decision.

HAS ADOPTED THIS DECISION:

Article 1

The Commission will open the sealed envelope No 1, containing documents that Commission officials found in the course of an inspection carried out by the Commission between 24 and 27 November 2008 on the premises of Les Laboratoires Servier and Servier S.A.S., and will join the documents to the Commission's file.

The Commission will not open the Envelope before the time period during which an appeal can be lodged against this Decision expires, unless the addressees confirm in writing before that date that they do not intend to challenge this Decision.

Article 2

This Decision is addressed to:

Les Laboratoires Servier

22, rue Garnier
92200 Neuilly sur Seine
France

Servier S.A.S.

6, place des Pléiades
92415 Courbevoie cedex
France

Proceedings against this Decision may be instituted before the General Court in accordance with Article 263 of the Treaty.

Done at Brussels, 23.7.2010

For the Commission
Joaquin ALMUNIA
Vice President

