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Legal Professional Privilege in EU Competition Proceedings Denied to In-House Lawyers: The Court of Justice Rules in *Akzo Nobel Chemicals Ltd* v. *Commission*

The Court of Justice of the European Union has rendered a final judgment in a long-running case concerning the extent of legal professional privilege (attorney-client privilege) in EU competition investigations. On 14 September 2010, in *Akzo Nobel Chemicals Ltd* v. *Commission,*[1] the Court ruled communications between in-house lawyers—even if members of a national Bar—and their clients will not attract privilege. The long-standing EU jurisprudence, confirmed in this judgment, is that privilege attaches only where the relevant documents concern the client's right of defence **and** where the exchange is with an independent lawyer. In *Akzo Nobel*, the Court ruled that the condition of independence was not fulfilled by a Dutch in-house lawyer, even though he was a member of the Dutch Bar and had certain employment protections as a result of his status. Because privilege did not attach to his communications with his client, they could lawfully be seized by the European Commission in the course of a dawn raid on the company's premises.

The Principle of Legal Professional Privilege in the EU Law Prior to the *Akzo Nobel* Case

The concept of legal professional privilege has been recognised since at least the 16th century. Its purposes are well summarised in a 19th century English case: "If the privilege did not exist at all, everyone would be thrown upon his own legal resources, deprived of professional assistance, a man would not venture to consult any skilful person, or would only dare tell his counsellor half his case".[2] It has therefore long been established that certain documents should be shielded from disclosure. This privilege attaches to documents, not people, and belongs to the client not the lawyer.

In the European Union, the extent of the principle of legal professional privilege was established by the Court of Justice in the *AM&S* case.[3] This case developed the

1 Case C-550/07P *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd* v. *Commission*.

2 *Greenough* v. *Gaskell* 1 My & K 98 (1833).

3 Case 155/79 *AM&S* v. *Commission*, [1982] ECR 1575.

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principle that, for the purposes of the Commission's power to inspect documents in the course of a competition law investigation, legal professional privilege only applies to written communications between lawyers and their clients if two cumulative conditions are met:

- The communications are drafted for the purpose, and in the interest, of the client's right of defence; and
- The communications are drafted by 'an independent lawyer, that is to say one who is not bound to his client by a relationship of employment.'

According to the Court of Justice in the *AM&S* case, a relationship of employment could compromise a lawyer's status, because in-house lawyers were not sufficiently independent from their employers. The Court of Justice stated that it is a lawyer's duty to collaborate with the courts in the administration of justice. Due to the bond between a client and an in-house lawyer, the latter would deal less effectively—according to the Court of Justice—with any conflicts of interest between his or her professional obligations and the aims and wishes of his or her client (the employer) than would an external lawyer. According to the Court's reasoning, in-house lawyers being economically dependent on their employers, would be unlikely to withdraw their services in the event of a conflict of interests with the client.

The Court in *AM&S* therefore ruled that legal professional privilege did not attach to communications of in-house lawyers with employees or officers of the company.

This did not exclude the possibility of privilege attaching to *any* communications of in-house lawyers. Documents written by them with the sole purpose of seeking external legal advice in the exercise of a company's rights of defence may be covered by privilege even if they have not been exchanged with an external lawyer or have not been created for the purpose of being sent to an external lawyer. Documents drafted for any other purpose, and documents simply shown to a lawyer, are not covered by privilege.

The approach of the Court in *AM&S* was based on the principles then common to the laws of the majority of EU Member States.[4]

4 Communications with in-house lawyers are protected currently in a minority of EU Member States (not all of whom were Member States at the time relevant to the *AM&S* judgment): the United Kingdom, Ireland, the Netherlands, Greece, Poland, and Portugal.

The Akzo Nobel Dawn Raid

The *Akzo Nobel* case arose as a result of a dawn raid carried out on 12 and 13 February 2003 by the European Commission, with the assistance of the UK Office of Fair Trading, at the UK premises of Akzo Nobel Limited (Akzo) and its subsidiary Akcros Chemicals Limited (Akcros).

During the dawn raid, discussions arose between Akzo staff and the Commission officials about whether five documents in a file were exempt from examination or copying by the officials because they were privileged.

The documents were divided into two sets. The first group of documents (Set A) comprised two copies of a memorandum:

- A typewritten memorandum from the general manager of Akcros to one of his superiors, containing information gathered during internal discussions with other employees for the purpose of obtaining outside legal advice in connection with a competition law compliance programme; and
- A copy of this memorandum with handwritten notes referring to contact with an external lawyer, who was mentioned by name.

The Commission officials considered they were not in a position to conclude whether these documents were privileged, so they were copied and placed in a sealed envelope, which was taken away at the end of the dawn raid.

The second set of documents (Set B) were considered by the Commission officials **not** to attract legal professional privilege. They were copied by the Commission and added to the file of documents removed from the premises. This Set B comprised:

- Handwritten notes made by Akcros' general manager, written during discussions with employees and used for the purpose of preparing the memorandum in Set A; and
- Two emails between the general manager and a member of the Akzo legal department, a lawyer qualified in the Netherlands. The dispute that was finally ruled on by the Court of Justice was restricted to these two emails.

Appeal to the Court of First Instance

After the dawn raid, both Akzo and Akcros asked the Court of First Instance (CFI, now the General Court) to annul the Commission's decision to reject Akzo's request

to destroy or return the Set A and Set B documents.[5] Akzo Nobel was supported by a number of European and US Bars and lawyers associations,[6] and by the UK and the Netherlands governments.

The CFI held that the documents were not covered by legal professional privilege and could therefore be added to the Commission's file. The CFI acknowledged that communications between companies and their in-house lawyers could be privileged as long as the main purpose of the documents was to seek external legal advice, but that this condition did not apply to the Set A and Set B documents.

The CFI refused to extend the scope of EU legal professional privilege to in-house lawyers, because it regarded them as not having satisfied the condition of independence required by the *AM&S* judgment. It did acknowledge that the position and responsibilities of in-house lawyers had changed since the *AM&S* judgment, but not to an extent requiring a change in approach.

The CFI also decided—following a survey of national laws and practice—that it still could not identify uniform tendencies throughout the EU to grant in-house lawyers the benefit of legal professional privilege. It found no clear support to extend privilege, under EU law, to in-house lawyers in all EU Member States. Even though some Member States applied this privilege in their national legal systems, the CFI did not believe that EU law should be in line with the legal position in a minority of the EU Member States. There was no compelling need to do so, nor did the parties provided evidence of a clear growing trend throughout the EU in favor of such extension of privilege.

Appeal to the Court of Justice

Akzo appealed the judgment of the CFI to the Court of Justice (the Court). Advocate General Kokott issued her opinion on 29 April 2010, rejecting all the arguments raised by Akzo[7] and recommending that the Court of Justice should dismiss the appeal in its entirety. The Court issued its judgment on 14 September 2010. It too rejected all the arguments of the applicants and reasserted the *AM&S* judgment without amendment.

The Court did, however, acknowledge that Akzo Nobel and Akcros had an interest in bringing the proceedings even though the substantive case, on the breach of competition law by Akzo, was already closed, and even though the documents in question had not been used in that case. As the Court said, any breach of privilege occurs when a document is seized, and not when it is relied on by the Commission in its decision on the merits.

But Akzo and Akcros were less successful with their substantive arguments. Together with the intervening parties, they proposed a number of arguments in support of an extension of legal privilege to in-house lawyers. The first was an attempt to re-state the sufficiency of the independence of in-house lawyers, particularly those operating under Dutch rules that provided broad employment protection and other guarantees of independence to employed lawyers. The Court refused to accept that in-house lawyers had a "degree of independence comparable to that of an external lawyer" (judgment, paragraph 46). This is because the employment relationship "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" (paragraph 47).

The Court noted in particular that some roles of the in-house lawyer "may have an effect on the commercial policy of the undertaking" (paragraph 48), including acting as a competition law co-ordinator. The Court found that this reinforces the close ties between the in-house lawyer and his or her employer/client. This appears to be the least convincing section of the Court's judgment; the bond between an external lawyer and a long-term client can lead to equally close ties. It is also likely that competition advice rendered by an external lawyer will influence the commercial policy of the undertaking; that, after all, is its intent. The notion that the ties of employment cause the lawyer/client relationship to be fundamentally different in character appears to take insufficient account of the way in which law is practised, particularly in connection with large and sophisticated clients. Nevertheless, the Court

5 Joined Cases T-125/03 and T-253/03, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd* v. *Commission*.

6 The Council of the Bars and Law Societies of the European Union, the Dutch Bar, the European Company Lawyers Association, the American Corporate Counsel Association and the International Bar Association.

7 Other than agreeing that Akzo Nobel and Akcros still had an interest in bringing the appeal even if the Commission did not use the documents concerned in reaching its final decision.

concluded that "in-house lawyers are in a fundamentally different position from external lawyers" (paragraph 58).

The applicants also argued that the distinction made by the court infringed the principle of equal treatment under the EU Charter of Fundamental Rights. The Court rejected this on the basis that in-house and external lawyers were not in a comparable position for the reasons set out above.

The applicants' further argument that *AM&S* should be re-interpreted also found no agreement by the Court. The applicants argued that a re-interpretation was necessary to take account of changes that have since occurred, or even to enable EU law to set a higher standard than national laws, where the latter are not unanimous or unequivocal on the topic. But the Court could find no uniform trend to a broader level of protection at a national level: a large number of Member States still exclude in-house lawyers from the circle of privilege, and prohibit employed lawyers from being admitted to a Bar or Law Society.

The Court also rejected the argument that the 'modernisation' of EU competition law, which requires self-assessment by undertakings and the consequent enhancement of the role of in-house lawyers, was relevant to the question of privilege.

Finally, the applicants relied on the requirement for respect of the rights of defence, arguing that this must include a freedom of choice as to the lawyer who will provide advice on competition law issues. However, the Court—pointing to other limitations affecting in-house lawyers (such as appearance before national courts)—found that rights of defence were not impaired by differences in the application of privilege. Undertakings remained free to select lawyers, but had to take account of the restrictions and conditions of the profession when selecting the most appropriate lawyer.

The Practical Impact of *Akzo Nobel*

Although the *Akzo Nobel* case signals "no change" in the protection of in-house lawyers' documents, it is important reminder for undertakings and their in-house lawyers to re-examine internal procedures and protocols, especially where there is a difference between applicable national law and EU law.

This does not merely concern the manner in which undertakings handle dawn raids, but applies more broadly in document creation and retention policies. There is clearly a need for in-house lawyers to advise frankly and in detail in matters such as the design of competition law compliance programmes, the execution of competition law audits, the assessment of relations with suppliers, competitors and customers, and of unilateral conduct by dominant employers. However, this need must continue to be tempered by the necessity to avoid creating documents that may place the undertaking at a higher level of risk than it would otherwise have been.

It would be both self-serving and impractical for an external lawyer to advise that he or she should replace the role of the in-house lawyer wherever competition concerns may arise. More usefully, however, the *Akzo Nobel* judgment might be used by undertakings as a reminder to develop protocols to avoid the unnecessary production of documents, and to ensure that privileged documents (including those of in-house counsel where applicable) are kept secure and separate from non-privileged documents. Where relevant and feasible, undertakings should also consider the merits of applications for immunity or leniency, where at least some of the potentially damaging impact of non-privileged documents can be limited.

We hope that you have found this advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:

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