

Legal professional privilege in the context of EC Competition Law

As expected, the European Court of First Instance has confirmed today in its judgment in the *Akzo* case¹ that **only communications from external lawyers can be protected by legal professional privilege in cases under EC law**. As a result, companies are obliged to disclose communications from in-house lawyers in the event of an inspection (dawn raid) by the European Commission and in administrative and court proceedings under EC law.

In its judgment, the Court criticises the Commission's approach during the raid and makes some important procedural points. It also clarifies the scope of what can be privileged at EC level.

Scope of what is covered by legal privilege at EC level

Communications from **external** legal advisers made for **the purposes and in the interests of the company's rights of defence** will be privileged. This covers all written correspondence exchanged after the Commission starts an investigation which may lead to a decision under Article 81 or 82 EC Treaty or a decision to impose fines on the company, and any earlier written communications which have a relationship to the subject matter of that procedure. This includes:

- internal documents drawn up exclusively for the purpose of seeking such communications (even if such documents were not exchanged with an external legal adviser) and

- internal notes confined to reporting the text or the content of those communications.

Note that communications relating to a competition compliance programme will not necessarily be privileged – they will be privileged only if they are in the interests of the company's rights of defence.

Procedure in the event of a dawn raid

The Court set out clearly the procedure to be followed in the event of a dawn raid if the company claims that certain documents are privileged:

- The company is entitled to refuse to allow the Commission to take even a cursory look at a document if it would allow the Commission to gain access to privileged information.
- The company must give appropriate reasons to the Commission, explaining why such documents are considered to be privileged. For example, it may inform the Commission of the author of the document and for whom it was intended, explain the respective duties and responsibilities of each and refer to the objective and context in which the document was drawn up.
- If the Commission is not convinced by the company's explanation of why a document is privileged, it can place the document in a sealed envelope and remove it from the premises.
- The Commission must take a formal decision to reject a request for privilege in respect of a document, which the company can appeal to the Court of First Instance. The Commission must not read that document until the time limit for bringing such an action has expired. Note that bringing an action does not in itself have a suspensory effect and therefore any company wishing

¹ Judgment of the Court of First Instance in Joined Cases T-125/03 & T-253/03 *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. Commission of the European Communities*.



to prevent the Commission from reading the document would have to apply for interim relief.

The Commission has the power to penalise a company for any unreasonable obstruction of an investigation and/or can take such circumstances into account as an aggravating factor when calculating fines to be imposed in the context of an infringement decision.

Practical advice – protecting privileged communications

As the Court acknowledges in its judgment, the fact that the Commission cannot use privileged documents as evidence in a decision imposing a penalty does not eliminate the harm which may have resulted from the Commission reading a document in the first place. In order to ensure the greatest possible protection of privileged documents, companies should ensure that:

- instructions to external lawyers on competition issues and any documents put together in connection with these instructions (even if they are not actually sent to the lawyer) are clearly marked “privileged and confidential – prepared for the purposes of seeking legal advice” (or words to that effect)
- any internal notes made of the advice of external lawyers are clearly marked “privileged and confidential”
- any such correspondence or advice is circulated with care (it might be easier to control documents circulated in hard copy rather than by email) with a clear indication that the contents are “privileged and confidential”

- as far as possible, privileged communications are kept in a separate file or email folder, which is itself clearly labelled “privileged and confidential”, and is therefore easily identifiable in the event of a dawn raid (note that the Commission often downloads computer files on to discs which are taken away to review)
- such advice is not amended, added to or quoted from by company employees (as this could remove privilege).

Legal professional privilege in the UK

The *Akzo* case does not apply where a national competition authority conducts an investigation under national law. Under UK law, communications prepared by both in-house and external lawyers can be privileged. Such communications will be privileged provided that they are confidential and relate to the company’s rights, liabilities, obligations or remedies under private or public law. Companies are not obliged to disclose privileged communications with their in-house lawyers in the event of an investigation by the UK’s Office of Fair Trading.

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