



Press and Information

Court of Justice of the European Union
PRESS RELEASE No No 90/10
Luxembourg, 14 September 2010

Judgment in Case C-550/07 P
Akzo Nobel Chemicals Ltd v Commission

In the field of competition law, internal company communications with in-house lawyers are not covered by legal professional privilege

By decision of 10 February 2003¹, the Commission ordered Akzo Nobel Chemicals and its subsidiary Akcros Chemicals to submit to an investigation aimed at seeking evidence of possible anti-competitive practices. The investigation was carried out by Commission officials assisted by representatives of the Office of Fair Trading ('OFT', the British competition authority), at the applicants' premises in the United Kingdom.

During the examination of the documents seized a dispute arose in relation, in particular, to copies of two e-mails exchanged between the managing director and Akzo Nobel's coordinator for competition law, an Advocaat of the Netherlands Bar and a member of Akzo Nobel's legal department employed by that company. After analysing those documents, the Commission took the view that they were not covered by legal professional privilege.

By decision of 8 May 2003², the Commission rejected the claim made by those two companies that the documents at issue should be covered by legal professional privilege.

Akzo Nobel and Akcros brought actions challenging those two decisions before the General Court, which were dismissed by its judgment of 17 September 2007³. They subsequently appealed against that judgment to the Court of Justice.

In support of their appeal, Akzo Nobel and Akcros claim essentially that the General Court wrongly refused to grant legal professional privilege to the two e-mails exchanged with their in-house lawyer.

The Court had the opportunity to give a ruling on the extent of legal professional privilege in *AM & S Europe v Commission*⁴, holding that it is subject to two cumulative conditions. First, the exchange with the lawyer must be connected to 'the client's rights of defence' and, second, that the exchange must emanate from 'independent lawyers', that is to say 'lawyers who are not bound to the client by a relationship of employment'.

As regards the second condition, the Court, in its judgment today, observes that the requirement that the lawyer must be independent is based on a conception of the lawyer's role as collaborating in the administration of justice and as being required to provide, in full independence and in the overriding interests of that cause, such legal assistance as the client needs. It follows that the requirement of independence means the absence of any employment relationship between the lawyer and his client, so that legal professional privilege does not cover exchanges within a company or group with in-house lawyers.

The Court considers that an in-house lawyer, despite his enrolment with a Bar or Law Society and the fact that he is subject to the professional ethical obligations, does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his client. Notwithstanding the professional ethical obligations applicable in the present case, an in-

¹ Commission Decision C (2003) 559/4 of 10 February 2003

² Commission Decision C (2003) 1533 of 8 May 2003

³ Case [T-125/03 Akzo Nobel Chemicals and Akcros v Commission](#), see also Press Release [62/07](#)

⁴ Case [155/79 AM & S v Commission](#)

house lawyer cannot, whatever guarantees he has in the exercise of his profession, be treated in the same way as an external lawyer, because he occupies the position of an employee which, 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. Furthermore, an in-house lawyer may be required to carry out other tasks, namely, as in the present case, the task of competition law coordinator, which may have an effect on the commercial policy of the undertaking. Such functions cannot but reinforce the close ties between the lawyer and his employer.

In those circumstances, the Court holds, as a result of the in-house lawyer's economic dependence and the close ties with his employer, that he does not enjoy a level of professional independence comparable to that of an external lawyer. It follows that the General Court did not commit an error of law with respect to the second condition for legal professional privilege laid down in the judgment in *AM& S Europe v Commission*.

Moreover, the Court considers that that interpretation does not violate the principle of equal treatment in so far as the in-house lawyer is in fundamentally different position from external lawyers.

Furthermore, the Court, responding to the argument put forward by Akzo Nobel and Ackros that national laws have evolved in the field of competition law, considers that no predominant trend towards protection under legal professional privilege of correspondence within a company or group with in-house lawyers may be discerned in the legal systems of the Member States. Accordingly, the Court considers that the current legal situation in the Member States does not justify consideration of a change in the case law towards granting in-house lawyers the benefit of legal professional privilege. Similarly, the evolution of the legal system of the European Union and the amendment of the rules of procedure⁵ for competition law are also unable to justify a change in the case-law established by the judgment in *AM& S Europe v Commission*.

Akzo Nobel and Akcros also argued that the interpretation by the General Court lowers the level of protection of the rights of defence of undertakings. However, the Court considers that any individual who seeks advice from a lawyer must accept the restrictions and conditions applicable to the exercise of that profession. The rules on legal professional privilege form part of those restrictions and conditions.

Finally, as regards the breach of the principle of legal certainty relied on by Akzo Nobel and Akcros, the Court considers that it does not require identical criteria to be applied as regards legal professional privilege. Consequently, the fact that in the course of an investigation by the Commission legal professional privilege is limited to exchanges with external lawyers in no way undermines that principle.

Therefore, **the Court dismisses the appeal brought by Akzo Nobel and Akcros.**

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery.

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⁵ 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 Treaty (OJ 2003 L 1, p. 1)