


Sector 	Practice 	Location 
--	--	--

[About the firm](#)
[Lawyers](#)
[Office directions](#)
[Press releases](#)

Publications

[Books and articles](#)
[Newsletters](#)
[Case reports](#)
[Subscribe](#)

[Events](#)
[Careers](#)
[Search](#)

 
Legal Professional Privilege and the Akzo judgment

25-09-07

Jeremy Robinson and Jonathan Speed

Important - The information in this article is provided subject to the **disclaimer**. The law may have changed since first publication and the reader is cautioned accordingly.

Introduction

Documents that are protected by “legal professional privilege” (LPP) are exempt from disclosure in legal proceedings. This is to allow clients to take legal advice without fear that communications with their lawyers will be disclosed. This rule is essential to the proper administration of justice. The recent judgment in the Akzo case (joined cases T-125/03 and T-253/03, judgment of 17th September 2007) comments in some detail on the ambit of LPP in the context of dawn raids by the European Commission and has many important consequences for lawyers and clients, but it also leaves further important questions unanswered.

The European Commission and the competition authorities of Member States may investigate and punish infringements of European competition law (Articles 81 and 82 of the EC Treaty, enforced through Regulation 1/2003). The authorities can seize, read and use in evidence, documents that are relevant to whether the law has been broken. However, the investigating authority has no right to read and use in evidence, documents to which LPP applies. The basic rule, established in the case of *AM & S v Commission*, is that documents to or from independent lawyers, created for the purpose of seeking or giving legal advice in the interests of a company’s defence, need not be disclosed.

In the Akzo case, Akzo and the Commission disagreed about whether certain documents, which the Commission had sought (during an investigation into alleged anti-competitive practices), were protected from disclosure. In brief, Akzo argued that:-

- The Commission had not followed the proper procedure established in law for resolving a dispute about whether documents were “privileged”; and
- The Commission wrongly refused to apply LPP to particular documents involving a lawyer employed by Akzo but who was regulated under the rules of the Netherlands bar.

In judgment, the European Court of First Instance (CFI) found that the Commission had in part failed to apply the proper procedure, but that it was correct to reject the claim for privilege for an in-house lawyer’s correspondence with its internal client.

Procedural questions

For any client, it is very important to know what is protected from disclosure and what is not. It is also important to know how far you can challenge the Commission’s actions without suffering a penalty (civil or criminal) for obstructing an investigation. Perhaps less obvious but no less important, how far can you stop the Commission reading a document cursorily to decide whether or not it should be allowed to read it properly? How can a client be sure that, even if such a document were privileged, the Commission would not be irreversibly influenced, in its investigation, by having been able to see that document?

These questions are relevant in the “grey area” where a document is neither plainly privileged, nor plainly disclosable. The CFI tried to balance the interests of clients and the Commission: it held that, to resist producing a document and to prevent the Commission reading a document, a client must do more than merely assert that a document is privileged. It must produce

evidence to prove that it is so – who wrote it and for whom, what are the responsibilities of author and reader, what is the context and objective of the document? If the company considers that the question can be answered by the Commission taking a “cursory look” at the layout or title of the document, this should be done, but if it considers that a “cursory look” is impossible without revealing the content of the documents, it must give the Commission appropriate reasons for this view. In such a case the document need not be shown to the Commission but should be put in a sealed envelope and taken away by the Commission.

An important finding by the CFI was that if the Commission disagreed with the client’s view of privilege, it could not act upon the information (for example, by putting the documents on file and using them in evidence) before giving the client a chance to challenge that decision in the CFI. If a client makes an application to the CFI, it may also have to obtain an interim order preventing the Commission from reviewing the documents until the CFI gives its ruling. As a result, the Commission will not be able to use the documents until either the interim order is refused or the CFI rules that the documents are not covered by LPP.

Privilege questions

The CFI confirmed that communications between a client and an external lawyer are subject to LPP once the Commission has started an investigation. However, the CFI went further and indicated that in certain circumstances, communications between non-lawyers could be covered by LPP, but this would be the case only if they were prepared exclusively for the purposes of obtaining legal advice from an external lawyer. This might apply where documents were produced internally to enable the external lawyer to give advice. However, this test will be a difficult one to satisfy. Clients should ensure that documents that are produced in this context are marked appropriately and their dissemination is limited as much as possible to avoid dilution of the exclusive purpose.

Separately, the CFI maintained the existing law that communications between an in-house lawyer and internal client are not protected from disclosure. Akzo’s principal argument was that what counts in LPP is not the identity of the lawyer’s employer, but the degree of independence of that lawyer: an in-house lawyer who is regulated by a bar association would, on that view, be no less independent than an external lawyer. For policy reasons, the CFI rejected the argument, finding that there was insufficient justification for a change of approach, when several Member States of the EU have the same view (and in fact many have adapted their law to be consistent with AM & S).

This does mean that the Commission’s rules on LPP continue to be inconsistent with those of some Member States, for example the UK, which does accept that communications between in-house lawyer and internal client are privileged. This can create the risk of confusion: if the UK OFT is investigating under its own powers under the Competition Act 1998, LPP for in-house lawyers’ work will be recognised. If the UK OFT investigates as agent for the Commission, LPP for in-house work will not be recognised. The safest course would be to act as if in-house LPP did not exist at all: that way, documents could be prepared or organised to get maximum protection from disclosure, through discussion between in-house and external lawyers. This approach would work in some cases, where work processes can be aligned to one principle, but in others it would be unsatisfactory, because it would not make full use of a client’s legal rights. To make full use of legal rights to LPP in both UK and EU contexts, it is even more important to consider very carefully what document is being created by whom, for whom, in what context, and who needs to see it. In this, in-house and external lawyers must work together to create a “privilege strategy” for legal advice to the client.

It is also plain that the courts will look at the intended purpose of the document in determining whether it is privileged. Internal counsel and their internal clients must ensure, not only that the purpose of the document is clearly marked as Legally Privileged or for the sole purposes of obtaining external legal advice (although this will not of itself be determinative), but also keep a record of who wrote the relevant document, in what capacity, for whom and why. This may make it more difficult for the Commission to justify taking a “cursory look” at the document and easier for the client to justify to the Commission at the outset that the document is subject to LPP.



Copyright Notice