

No legal professional privilege for in-house lawyers in EU competition cases

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The long-awaited decision in *Akzo Nobel Chemicals Ltd and Akcros Chemicals Limited v Commission of the European Communities* has maintained the European Court of Justice's restrictive approach to legal professional privilege (LPP) in relation to European Commission investigations under EC competition rules. Applying the principles laid down in *AM&S Europe Ltd v European Commission (AM&S)* the Court has confirmed the inapplicability of LPP to in-house lawyers.

Highlighting the importance of the case, several organisations intervened including The Council of the Bars and Law Societies of the European Union, the European Company Lawyers Association, the American Corporate Counsel Association and the International Bar Association.

Background

The Court of First Instance of the European Communities considered Akzo Nobel and Akcros Chemicals' (the Applicants) claim that the Commission had infringed their LPP. The claim arose following the 'forced' disclosure of various documents during an on-the-spot investigation at the Applicants' premises. The Commission reviewed, copied and seized several documents including those which the Applicants claimed were protected by LPP. The documents over which claims of LPP were made fell into two categories: (i) Set A documents, comprised of two copies of a typewritten memorandum, one of which bore manuscript notes referring to contacts with a lawyer; and (ii) Set B documents, comprised of a handwritten note made by Akcros Chemicals' General Manager and two e-mails exchanged between Akcros Chemicals' General Manager and a member of Akzo Nobel's in-house legal department.

Following a 'cursory look' at the documents, the head of the Commission's investigating team took the decision at the time of the investigation that the Set B documents were definitely not protected by LPP and placed them on the investigation file. Being unsure as to the status of the Set A documents, she took copies and placed them in a sealed envelope.

Court of First Instance Judgment

The Court ruled that, according to the judgment in AM&S, LPP applies under Community law to communications between a lawyer and client provided that:

0. the communications are made for the purposes of the exercise of the client's rights of defence; and
0. they emanate from independent lawyers.

The Court, however, extended AM&S by finding that preparatory documents, even if they were not exchanged with a lawyer or not created for the purpose of being sent to a lawyer, may still be covered by LPP provided that they were prepared exclusively for the purpose of seeking legal advice from a lawyer in exercise of rights of defence.

The Court held, on the facts, that the Set A documents did not fall within the original AM&S test, as they did not constitute a written communication with an independent lawyer or an internal note reporting the content of a communication with such a lawyer. The Court also held that the Set A documents were not created 'exclusively' for the purpose of obtaining legal advice and as such could not be protected by LPP under its extension to AM&S. Instead the documents reflected internal discussions that the General Manager had had with other employees in the context of the Applicants' compliance programme and had been drawn up with the primary purpose of seeking the agreement of the General Manager's superior to a recommended course of conduct. The mere fact that the documents had then been discussed with a lawyer was not sufficient to give them LPP protection.

The Court also held that the Set B documents failed to qualify for LPP. The Court ruled that the primary purpose of the handwritten note contained within Set B was as a preparatory note for the memorandum in Set A. Had the documents in Set A been protected by LPP, so too would the note. Since the Court had ruled that LPP did not extend to the Set A documents, it followed that the protection could not be extended to the handwritten note within Set B.

The Court considered the two e-mails contained within the Set B documents separately. The Applicants argued that, despite the ruling in AM&S stating that LPP did not extend to communications between companies and their in-house lawyers, LPP should apply to these documents as the lawyer in question, Mr. S, was a member of the Netherlands Bar Association and as such was subject to the Association's disciplinary and ethical rules, reinforcing Mr. S's independence from his employer. The Court dismissed this argument. Applying AM&S, the court held that Mr. S was bound to Akzo Nobel by way of employment, was not therefore independent and thus the emails were not covered by LPP.

The Court did, however, rule that the Commission had committed 'various irregularities' in the procedure used during its on-the-spot investigation and had breached confidentiality procedures in forcing the Applicants to allow the Commission a ' cursory look ' at the documents.

Comment

Whilst this case relates to the application of LPP in the context of European competition investigations, it maintains support for a narrower application of LPP than is enjoyed in many Member State legal systems, including England and Wales. Presently, under English Law confidential legal advice from in-house lawyers is protected by legal advice privilege. Conversely, the Court's extension of AM&S to documents prepared exclusively for the purpose of seeking legal advice (whether or not the documents are exchanged with a lawyer) may now open the door for English legal advice privilege to be extended. Internal communications within a company relating to legal advice have previously come under scrutiny in the English Courts. In *Three Rivers District Council & Ors v The Governor & Company of the Bank of England (No. 5)*, the English Court of Appeal considered whether communications created for the 'dominant purpose' of obtaining legal advice should be privileged. The documents in question in that case were internal documents prepared by the Bank of England with the intention that they be sent to the Bank's solicitors. The Court of Appeal held that the communications did not fall into any category of LPP and, in any event, would have failed the dominant purpose test. Whilst that case turned on very specific facts, practitioners were left with an unsatisfactory position as to the application of legal advice privilege. The *Akzo Nobel* case may help to clarify this issue in the future.

Going forward, companies should be aware that communications with their in-house legal teams will not be privileged in relation to competition investigations. When obtaining advice on competition law issues companies should consider conducting all necessary communications orally or through external lawyers. Further, comments or summaries of external legal advice prepared by an in-house lawyer may not be protected and could ultimately be seized by the Commission in a European competition investigation. In-house lawyers, therefore, need to be particularly wary when dealing with and discussing such advice.

This case is a first instance judgment and it remains to be seen whether it will be appealed.

Case References:

Akzo Nobel Chemicals Ltd and Akcros Chemicals Limited v Commission of the European Communities (Cases T-125/03 and T-253/03) [2007] All ER (D) 97 (Sep)

AM&S Europe Ltd v European Commission: 155/79 [1983] 1 All ER 705

Three Rivers District Council & Ors v The Governor & Company of the Bank of England (No. 5) [2003] EWCA Civ 474