



EU court clarifies legal privilege in European competition investigations

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Introduction

In its judgment in Joined Cases T-125/03 and T-253/03 Akzo Nobel, the European Court of First Instance (CFI) has stressed the importance of confidentiality of communications between clients and their lawyers, to ensure unrestricted access to independent legal advice to those in need of it. The judgment has also:

- ▶ confirmed that legal professional privilege (LPP) protects written communications regarding the subject-matter of a Commission investigation exchanged between a client and its external lawyer after the Commission has started that investigation – and clarified that the protection also applies to prior written communications prepared exclusively for the purposes of seeking legal advice from a lawyer in exercise of the rights of defence;
- ▶ specified the procedure to be followed in Commission dawn raids where there is a dispute over whether a document is protected by LPP; and
- ▶ rejected any extension of legal professional privilege to cover communications between a company and its in-house lawyers. This means that the Commission can call for production of such communications during its investigations.

Akzo's claim to privilege

The Commission dawn raided Akzo's premises in Manchester in February 2003. During the investigation, a dispute arose over whether the Commission had the right to inspect two categories of documents. Akzo claimed they were protected by LPP; the Commission disagreed.

The two categories were:

- ▶ set A: a memorandum prepared by the general manager on the basis of interviews with employees and a further copy of the memorandum annotated by the general manager following a call with an external adviser; and
- ▶ set B: handwritten notes of the general manager's interviews with employees for the purpose of preparing the memorandum in set A and emails from the general manager to Akzo's in-house counsel (who was a member of the Dutch Bar).

The CFI had to decide:

- ▶ to what extent internal documents prepared for the purpose of seeking legal advice should be protected by LPP;
- ▶ whether the Commission had complied with the appropriate procedures for resolving the LPP dispute – in particular, whether it was correct to insist that it could have a cursory look at the documents to assess whether they were privileged; and
- ▶ whether and to what extent LPP should be extended to cover communications with in-house lawyers (ie the emails in set B).

The CFI judgment

Access to independent legal advice Before dealing with these three points, the CFI stressed the importance of observing confidentiality of communications between lawyers and their clients, which it regarded as safeguarding the right of every person to consult, without restriction, a lawyer whose profession entails giving independent legal advice to all those in need of it.

Which internal company documents are privileged?

The CFI confirmed that all written communications exchanged between a client and its external lawyer after the Commission has started a competition law investigation are privileged. It also stated that LPP may also extend to written communications prepared

before an investigation has begun if the communications relate to the subject matter of that investigation. These 'preparatory documents' will be protected by LPP if they are prepared exclusively for the purposes of obtaining legal advice from an external lawyer in exercise of rights of defence. That the document was prepared exclusively for this purpose should be unambiguously clear from the content of the document itself or the context in which the document was prepared.

Applying these criteria, the CFI found that the set A documents and the hand-written notes in set B were not prepared exclusively for the purposes of obtaining legal advice. They were, therefore, not privileged.

Dawn raid procedures: how to deal with LPP disputes The requirement that communications between lawyers and their clients remain confidential has significant consequences for the procedure to be followed in cases where the status of a document is disputed during a dawn raid.

Importantly, Akzo persuaded the CFI that LPP could be irreparably harmed by the Commission even casting a cursory glance at the disputed documents to verify a claim to LPP. Contrary to the Commission's assertion, the CFI held that harm caused by such disclosure cannot be undone simply by excluding the document from the investigation.

The CFI gave the following clear guidance on the procedures to be followed in the event of LPP disputes during dawn raids.

- ▶ If an undertaking considers that the dispute can be resolved by allowing the Commission to take a cursory look at the general layout, heading, title or other superficial features of the document, this should be done. If the Commission does not agree with the LPP claim, the disputed document should be placed in a sealed envelope, which the Commission can take away.
- ▶ There may, however, be occasions when even a cursory glance will prejudice LPP. In such cases, the contents of the document in question need not be shown to the Commission and the document should be placed directly in a sealed envelope.

Once the documents are in a sealed envelope, if the Commission disputes the claim to LPP, it must adopt a decision rejecting that claim. If the undertaking wishes to maintain the claim, it must challenge the Commission's decision before the CFI. However, because such challenges lack suspensory effect, interim relief may also need to be sought suspending the operation of the Commission's decision. The Commission may not examine the documents until either interim relief has been denied or the CFI has determined that the documents are not privileged.

Communications with in-house lawyers are not privileged in European competition investigations An important aspect of the judgment concerned the question of whether communications with in-house lawyers are also covered by LPP. The ECJ's judgment of 1982 in AM&S (Case 155/79) was the authority for the proposition that only communications with an external independent lawyer entitled to practise in one of the EU member states are protected by LPP.

Akzo, supported by the Council of Bars and Law Societies of Europe (CCBE), the Dutch Bar and other interveners, submitted that the ruling in AM&S did not preclude the claim for LPP over documents emanating from in-house lawyers registered at the national Bar and subject to the disciplinary regime resulting from such registration. Alternatively, it was submitted that AM&S required reconsideration, particularly in view of developments in many member states regarding the status of in-house lawyers and that the position should be modified to permit the extension of LPP to certain inhouse lawyers.

The CFI did not accept these arguments, despite recognising the developments that had taken place in the member states since 1982. It therefore remains the case that communications from in-house lawyers are, in the context of EU competition proceedings, not covered by LPP, even if the in-house lawyer is registered with the local bar of one of the EU member states. Accordingly, the emails in set B were not privileged.

Practical implications

Much attention will doubtless be focused on the refusal of the CFI to extend LPP to communications with inhouse counsel. This outcome is to be regretted and is of significance to all in-house advisers. Their exclusion from LPP protection is increasingly significant given the range of important tasks they fulfil, in particular self-assessment of the compatibility with competition law of particular agreements (now that the article 81(3) notification procedure has been removed by Regulation 1/2003).

The judgment does however provide a welcome clarification that certain internal documents prepared for the purpose of seeking legal advice are protected by LPP. Whether or not an internal document merits such protection will depend on the factual circumstances concerned.

Akzo failed to establish that the documents in set A had been prepared exclusively for the purposes of seeking external legal advice. Perhaps one lesson that will, therefore, be emphasised by the judgment is the potential benefit of marking such documents clearly so that the intent of the author is apparent on the face of the document. Wording such as 'Privileged and confidential. Prepared for the purposes of obtaining external legal advice' could perhaps become the norm for email headers and the like. That said, the CFI addressed the Commission's concerns that undertakings would make unjustified privilege claims to disrupt or delay the Commission's procedures by making it clear that such abuse could be punished with fines.

Finally, the judgment should be welcomed for setting out the procedures to be followed when LPP is claimed for documents during dawn raids. Some undertakings may still be concerned at the Commission's control of the sealed envelope and the difficulty of obtaining effective redress if the envelope is opened. That issue remains, however, to be determined on another occasion. At present, we must wait to see whether the judgment is appealed to the Court of Justice.

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