



Euro court rules on in-house legal professional privilege

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In its Akzo Nobel judgment this week, the European Court of First Instance refused to confer legal privilege protection on communications between in-house lawyers and their internal clients.

At the same time, the CFI placed the Commission under significantly stricter procedural obligations where there is a genuine dispute over whether a document is legally privileged.

Background

Historically, EC law has not recognised in-house lawyers' advice to internal clients as protected by legal professional privilege.

This may be contrasted with the position in the UK, which recognizes such a right in competition investigations under UK competition laws.

The Akzo Nobel case was widely seen as a test case with the aim of removing the differential treatment between in-house and external lawyers.

Although the court refused to reverse previous case law, it made some useful comments on the extent of legal privilege and outlined the specific procedural rules which the Commission has to follow in case of disputed documents.

What material will be privileged?

In order to claim legal privilege, the company must be able to demonstrate that the material in question was drawn up exclusively for the purposes of seeking legal advice from an external lawyer.

This may also cover documents that have not been sent to a lawyer or were not created for the purpose of being sent to a lawyer, if they were nevertheless drawn up for the purpose of seeking such advice.

What material will not be privileged?

The court made it clear that merely discussing a document with an external lawyer is not sufficient to confer it with legal privilege status. It is essential that such communications are made for the purposes of seeking legal advice. Therefore, simply copying an external lawyer into an email or adding to the circulation list for a document will also be insufficient.

The fact that a document has been put together under a competition law compliance programme, albeit with the help and under the supervision of an external lawyer, equally does not suffice by itself to confer protection on that document.

(While not part of the Akzo judgment, it is also worth remembering that advice provided by non-EU lawyers may also fail to receive privilege protection.)

Stricter procedural obligations on the European Commission

The CFI also usefully clarified the procedural requirements the Commission investigators must follow where there is a genuine dispute over whether a document is legally privileged.

This significantly enhances the companies' bargaining power in cases of dispute.

What do I need to demonstrate legal privilege?

The court held that a company does not have to reveal the contents of the documents if it can demonstrate the privileged nature of the material by providing:

- ▶ Information as to the author and recipient(s) of the material;
- ▶ An explanation as to their respective duties and responsibilities;
- ▶ Information as to the objective of the material and the context in which the material was drawn up, discovered and/or filed.

Moreover, the court held that usually a mere cursory look by the Commission officials at the general layout, heading, title or other superficial features of the document will confirm the accuracy of the reasons.

Can I refuse a cursory glance?

According to the CFI a company is entitled to refuse Commission officials to read or take a cursory look at the documents, where (i) there is a genuine dispute over whether the document is legally privileged (i.e. it is not clear from the face of the document); and (ii) the company provides an explanation to the officials that would make the document privileged (i.e. provides the information above, even where this cannot be verified by the officials) and (iii) it is impossible to verify that information from the document without revealing its content.

In this case, if the investigator is not satisfied with the company's explanation or evidence, especially where the cursory glance is refused, the Commission ought to place the (unread) document in a sealed envelope before removing it. It must then adopt an appealable decision rejecting a request by the company that the material is treated as legally privileged.

If the Commission nevertheless reads the document any breach of process is cured if, as in *Akzo*, the document subsequently turns out to lack legal privilege. More importantly, however, the court was very clear that if the document turns out to be privileged, it is insufficient to cure the breach of procedural rights, simply by not relying on the particular document.

Conclusion – Form Matters!

Despite the very helpful observations from the court on the procedural rights, it is clear that a company will be in a better position if it avoids, as best it can, the danger that a dispute could arise in respect of a sensitive document.

In that respect form does matter. While it will not confer privilege on a document which does not comply with the rules of privilege, a company's position in a dawn raid will be significantly stronger if sensitive or important notes of advice and connected documents are appropriately formatted, labelled and filed.

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