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Akzo Judgment: The CFI Clarifies Scope and Procedural Safeguards for Claims of Legal Professional Privilege

On 17 September 2007, in its *Akzo vs Commission* ruling, the Court of First Instance (CFI) of the EU clarified the conditions in which undertakings may exercise their right not to disclose information covered by legal professional privilege to the European Commission during a dawn raid or when responding to a formal request for information under Regulation 1/2003.¹

In a long-anticipated judgment, the CFI applied (and confirmed) the previous case law related to legal professional privilege that protects the confidentiality of communications between lawyers and their clients (notably the European Court of Justice's judgment in *AM&S*, C-155/79).

However, the ruling goes further and sheds light on a number of important procedural issues and on the scope of legal professional privilege. In particular, while applying the *AM&S* doctrine, which denies legal professional privilege to correspondence exchanged between in-house lawyers (bound by a relationship of employment) and non-lawyers in the company, the CFI expands the material scope of legal professional privilege to cover preparatory documents. Legal professional privilege therefore applies also to documents that were not exchanged with a qualified

outside lawyer, nor were created for the purpose of being sent to such a lawyer, provided that the documents were drawn up exclusively for the purpose of seeking legal advice from an outside lawyer in exercise of the rights of the defense.

The ruling also provides a firm rejection of the Commission's approach in dawn raids of insisting that it has the right to take a "cursory look" at documents over which an undertaking claims legal professional privilege.

Legal Professional Privilege Does Not Apply to In-house Lawyers

In *Akzo*, the CFI applied—without signaling any exception—the approach of the European Court of Justice in *AM&S* according to which legal professional privilege applies only to communications exchanged with independent lawyers, *i.e.*, legal advisers registered with the Bar of an EU Member State and not bound to their clients by a relationship of employment.

This outcome was reached despite the intervention of important legal profession associations, such as The Council of the Bars and Law Societies of the European Union and the European Company Lawyers

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Association, which argued for an extension of the privilege to in-house lawyers. Their main argument, rejected by the Court, was that in-house lawyers, *if* registered with a Bar Association or Law Society, have the same professional obligations, follow the same ethics rules and are subject to the same sanctions applicable to outside lawyers. It had, in particular, been hoped by some observers that the CFI would have distinguished between in-house counsel who are subject to the full regulatory powers of legal professional regulators, and in-house counsel who must suspend their bar membership while employed. Such a ruling would, however, have operated to the disadvantage of many in-house counsel on the Continent where full bar membership for employed lawyers is not recognized.

The ruling in *Akzo* will come as a significant disappointment for in-house legal counsel, in particular as they are increasingly subject to substantial compliance obligations (such as under securities trading and stock exchange regulations) and must on a daily basis assess compliance with competition law under the new self-assessment regime of Regulation 1/2003.

In effect, this extended chamber of the CFI appears to be signalling that it will require a decision by the European Court of Justice or some legislative intervention for there to be a change in the CFI's approach to legal professional privilege.

Legal Professional Privilege Applies to Internal Documents Solely Prepared to Seek Advice from an Outside Lawyer in the Exercise of the Undertaking's Rights of Defense

The previous case law recognized the applicability of legal professional privilege to:

- written communications exchanged with independent lawyers in exercise

of the undertaking's right of defense related to an ongoing or foreseeable investigation; and

- internal communications that merely reproduce the content of the advice given by an outside lawyer.

In the *Akzo* case, the CFI clarified that legal professional privilege also covers another category of internal communications:

- "working documents or summaries" and, possibly, "handwritten notes;"
- even if not sent to a lawyer, or not created for the purpose of being physically sent to a lawyer;
- as long as they are drawn up **exclusively** for the purpose of seeking legal advice from an outside lawyer, in exercise of the undertaking's rights of defence.

The CFI recognized that legal professional privilege for such documents as they were found to be related to the exercise of the outside lawyer's functions. The CFI described the scope of the legal professional privilege as documents prepared "as a means of gathering information [...] useful for [outside lawyers to understand] the context, nature and scope of the facts for which the assistance [of an outside counsel] is sought."

The CFI stressed that the legal professional privilege claim is an exception to the Commission's power of investigation, and therefore must be construed restrictively. As a result, the CFI found in *Akzo*:

- it is for the undertaking to prove that the documents were drawn up with the sole aim of seeking legal advice from a lawyer. This should be unambiguously clear from the content of the documents themselves or the context in which those documents were prepared and found; and
- documents prepared under a general antitrust compliance program are not automatically covered by legal professional privilege, even if such compliance program has been put

together and/or coordinated by an outside lawyer.

The Commission Cannot Take Even a cursory Look at Documents with Respect to Which Legal Professional Privilege is Claimed

The CFI clarified the procedural steps that the Commission must observe when seizing documents during a dawn raid:

- in doing so, the CFI observed that there is a risk that even a cursory look may allow the Commission to gain access to information covered by legal professional privilege. Even if the Commission does not technically use such information as evidence, the undertaking may suffer harm from the fact that the Commission could read the content of the confidential documents;
- for this reason, an undertaking is entitled to refuse to allow the Commission officials to take even a cursory look at documents with respect to which it claims legal professional privilege;
- the Commission does not infringe procedural rules by placing the controversial documents in a sealed envelope and removing the envelope from the undertaking's premises if it finds this necessary to protect possible evidence;
- in case of doubt or dispute about whether a document is protected by legal professional privilege, before reading the documents in any way, the Commission must adopt a formal decision rejecting the request for protection under legal professional privilege, in order to allow the undertaking to bring the matter before the CFI. It is for the CFI to decide disputes concerning legal professional privilege.

In order to prevent abuses, the CFI subjected the claim of legal professional privilege to certain conditions. As a result, undertakings have the discretion to allow the Commission to take a cursory view of their documents, but any refusal of such possibility should be supported by relevant material and suitable explanation. Abuse of such right of refusal may be subject to sanctions from the Commission.

Implications of the Court's Decision

The *Akzo* decision brings some clarity to a complicated and under-developed area of EU procedural law. The implications are far-reaching for the day-to-day business of in-house counsel and may require changes in internal procedures, record-keeping, identification and segregation of communications. Such changes will need to be adapted to the specific circumstances of each company and should ideally be implemented on the basis of legally privileged advice.

Endnotes

- ¹ Joined Cases T-125/03 and T-253/03, *AKZO Nobel Chemicals Ltd. and Akcros Chemicals Ltd. v. Commission*.

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