

CFI ruling in Akzo – No privilege for in-house lawyers

In its ruling of 17 September 2007 in the long awaited [Akzo case](#), the Court of First Instance (CFI) has refused to extend the protection of legal privilege for communications between a company and its external lawyers to communications with in-house lawyers. The CFI has chosen to follow the European Court of Justice (ECJ) which, in the AM&S case, held that 'the protection only applies to the extent that the lawyer is independent, that is to say not bound by a relationship of employment'. In respect of the rights of defence however, the CFI makes it clear that companies are entitled to refuse to allow Commission officials to take even a cursory look at those documents which they claim to be privileged, provided they give the Commission officials appropriate reasons for their view.

Background

The case, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission*, arose from a dispute over privilege of a series of documents uncovered during the course of a Commission investigation.

The first group of documents, set A, consisted of a memo from one of the general managers to his superiors with information gathered for the purpose of obtaining legal advice in connection with a competition law compliance programme, and a second copy of this memo with handwritten notes referring to contacts with one of the lawyers representing the companies. The Commission agreed to place these documents in a sealed envelope until a final conclusion as regards their status could be reached. After reviewing the companies' arguments, the Commission adopted a decision in respect of set A, stating its intention to open the sealed envelope and to add the documents to the Commission's file.

The second group, set B, consisted mainly of email exchanges between the company and its in-house lawyer, who was enrolled as an Advocaat of the Netherlands Bar and was employed by Akzo on a permanent basis. The Commission officials took the view that this group was definitely not the subject of legal professional privilege and took copies of the documents, placing them with the rest of the file without isolating them in a sealed envelope. Akzo and Akcros appealed to the CFI for annulment of the Commission's decision rejecting their request for protection of those documents on grounds of legal professional privilege. They also applied for interim measures to prevent the Commission from viewing the set A documents until the case was decided.

To subscribe or unsubscribe

To enquire about further Herbert Smith publications or to unsubscribe from this e-bulletin, please email [Miriam Donnellan](mailto:Miriam.Donnellan).

Contacts

Stephen Wisking - London

+44 20 7466 2825
[email](mailto:stephen.wisking@herbertsmith.com)

Kyriakos Fountoukaos - Brussels

+32 2 518 1840
[email](mailto:kyriakos.fountoukaos@herbertsmith.com)

Jacques Buhart - Brussels & Paris

+32 2 511 7450
 +33 1 5357 7076
[email](mailto:jacques.buhart@herbertsmith.com)

Kristien Geurickx - London

+44 20 7466 2544
[email](mailto:kristien.geurickx@herbertsmith.com)

Related links

[Herbert Smith website](http://www.herbertsmith.com)

[Herbert Smith EU, competition and regulation homepage](http://www.herbertsmith.com/eu-competition-and-regulation)

[More Herbert Smith EU, competition and regulation publications](http://www.herbertsmith.com/eu-competition-and-regulation-publications)

In an interim order, the President of the CFI ordered the sealed envelope to be kept at the Registry of the CFI pending the outcome of the case and suspended that part of the Commission's decision stating they would open the envelope. This order was subsequently annulled by the ECJ on the basis that the urgency test required for interim measures was not satisfied. The Commission had accepted that, if its decision were held to be unlawful, it would be required to remove from its file the documents affected and would be unable to use them as evidence. The ECJ therefore took the view that the possibility of the unlawful use of the set A documents was purely theoretical and that, in any event, the Commission officials had already examined, albeit cursorily, the documents in set A during the investigation.

The CFI's ruling in the main proceedings

Procedure to be followed during an investigation

In their first plea, the applicants alleged a breach by the Commission of procedures relating to the application of the principle of legal privilege. They submitted that during the investigation, the Commission forced them to divulge the contents of the documents at issue, even though they had claimed that they were covered by privilege. They complained in particular that the Commission officials examined those documents on the spot, in spite of protests on the part of their legal representatives.

Although the Commission has been given wide powers of investigation, the ECJ, in the AM&S ruling, set out the procedure to be followed by the Commission in cases where an undertaking subject to an investigation refuses to produce certain business records by relying on legal privilege. Following the ECJ's case law, the CFI confirms that, despite the Commission's wide powers of investigation, the fact remains that confidentiality of communications between lawyers and their clients must be protected, subject to certain conditions. That confidentiality serves the requirement that every person must be able to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it, and is an essential corollary to the full exercise of the rights of defence. An undertaking concerned does therefore not have to reveal the contents of such documents for which it claims privilege, as long as it presents the Commission officials with relevant material which demonstrates their confidential nature justifying protection.

The CFI further clarifies that an undertaking is entitled to refuse to allow the Commission officials to take even a cursory look at the documents which it claims to be privileged, provided that such a cursory look is impossible without revealing the content of those documents and that it gives the Commission officials appropriate reasons for its view.

The CFI concludes that the Commission infringed this procedure for protection under legal privilege, first by forcing the companies to allow a cursory look at certain documents, despite claims and supporting justification by their legal representatives that such examination would require the contents of those documents to be disclosed, and secondly by reading the documents in set B without having given the companies the opportunity to contest the rejection of their claim to protection before the CFI.

Types of documents protected by privilege – Preparatory documents

In order to benefit from legal privilege in accordance with the principles as set out in the AM&S case, communications must be made for the purpose of the exercise of the client's rights of defence as well as emanate from independent lawyers. This includes all written communications exchanged after the initiation of an administrative procedure which may lead to a decision on the application

of Articles 81 and 82 EC Treaty, and can also extend to earlier written communications which have a relationship to the subject-matter of that procedure.

The CFI explains that the possibility of treating a preparatory document as privileged should be construed restrictively, and that it should be for the undertaking claiming the privilege to prove that the documents in question 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 the documents were prepared and found.

The applicants argued that the memorandum in set A was drawn up in connection with their competition law compliance programme by an external lawyer and should therefore clearly benefit from the protection of legal privilege. The CFI however concludes that the applicants failed to prove in this case that the memorandum was drawn up for the exclusive purpose of seeking legal advice from a lawyer in exercising rights of defence. The mere fact that a document has been put together under a competition law compliance programme does not suffice in itself to confer protection on that document. Compliance programmes often cover information which goes beyond the exercise of the rights of defence and the fact that an external lawyer has put together and coordinated a compliance programme does not automatically mean that all of the documents drawn up under the programme are privileged. In this case, the CFI finds that the evidence provided did not prove that the memorandum was drawn up for the exclusive purpose of seeking legal advice, and therefore concludes that the Commission did not err in considering that the memorandum was not protected under legal privilege.

Extension of the scope of legal professional privilege to in-house lawyers

In claiming privilege in respect of the email exchanges between the company and its in-house lawyer (the set B documents), the applicants argued that communications with in-house lawyers who are members of the bar or Law Society of a Member State must be protected under the principles laid down in AM&S. In the alternative they argued that the scope of the protection provided in AM&S should be widened so as to extend the protection of legal privilege to communications with in-house lawyers.

As regards the first argument, the CFI points out that in AM&S, the ECJ expressly held that the protection accorded to legal privilege under Community law only applies to the extent that the lawyer is independent, that is to say, not bound to his client by a relationship of employment. It reached a conscious decision on the exclusion of communications with in-house lawyers, given that the issue had been debated at length during the proceedings, and could therefore not be interpreted in such a way as to include communications with in-house lawyers who are members of the bar or Law Society.

As regards the argument that it should extend the scope of privilege beyond that which the ECJ had accepted in AM&S, the CFI points out that, although specific recognition of the role of in-house lawyers and the protection of communications with such lawyers under legal privilege is relatively more common today than when the AM&S judgment was handed down, it is not possible to identify tendencies which are uniform or have clear majority support in that regard in the laws of the Member States. A large number of Member States still exclude in-house lawyers from protection under legal privilege, and various Member States have in fact aligned their regimes with the EU system. The Court also refused to accept the applicants' argument that the evolution of competition law since that judgment justifies an alteration of that case-law, given that it is neither contrary to the principle of equal treatment nor to that of the free movement of services.

The CFI therefore held that the exchange of emails with a member of Akzo's

legal department should not be covered by the protection of legal privilege.

Finally the Court held that the procedural infringement committed by the Commission has not unlawfully deprived the applicants of the protection of privilege in respect of the disputed documents, as the Commission did not err in deciding that none of those documents fell within the scope of that protection.

Comment

Despite the Court's refusal to extend the scope of legal privilege to communications with in-house lawyers, its findings in respect of the procedure to be followed by the Commission during an investigation will be welcomed by companies and their advisers. It spells a clear end to the current procedure whereby Commission officials claim that they can read the documents over which a company claims privilege, without the company's consent, in order to check that they are indeed privileged. All too often companies feel pressured into submitting to such requests as they fear that failure to do so may result in a breach of their duty not to obstruct the investigation, which can result in penalty charges. The CFI makes it clear that pending resolution of disputes on legal privilege, which is to be resolved by the CFI itself, the Commission does not have the right to read the content of the documents in question.

The CFI's judgment also provides clarification on the types of preparatory documents covered by legal privilege. It serves as a useful reminder that companies should take great care when preparing documents in the context of seeking legal advice by external lawyers. This should be accurately and expressly recorded on the documents themselves so that they are easily identifiable during Commission investigations and privilege for such documents can be more easily claimed on the spot.

Akzo and Akcros were advised by Christof Swaak of Stibbe, our Dutch alliance firm. Jacques Buhart of our Paris office represented the IBA, an intervener in the case.

The content of this article does not constitute legal advice and should not be relied on as such. Specific advice should be sought about your specific circumstances.

Herbert Smith LLP, Gleiss Lutz and Stibbe are three independent firms that have a formal alliance.

© Herbert Smith LLP 2007