

ACC ANALYSIS

AN OVERVIEW OF THE LEGAL PROFESSIONAL PRIVILEGE IN EU COMPETITION INVESTIGATIONS AFTER THE AKZO JUDGMENT

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*Executive Summary*¹

- By refusing to extend legal professional privilege (LPP) to communications with in-house counsel in its *Akzo Nobel* judgment, the European Court of First Instance (CFI) failed to recognize the important role that in-house counsel play and discriminated against in-house counsel as compared to outside counsel
- In-house counsel provide independent legal advice to their clients just like outside counsel. In fact, in-house lawyers, protected by employment laws and bound by ethical rules, are often more independent than outside counsel, whose livelihood depends upon pleasing the client. Indeed, outside counsel are deemed far more “fungible” than in-house lawyers when it comes to clients who would “shop” for legal advice that pleases them. Clients don’t hire in-house lawyers because they wish to avoid the law; they hire them to counsel compliance with it.
- The failure to recognize LPP for in-house lawyers limits their ability to advise their clients on the proper application of the EU competition rules and jeopardizes compliance with those rules. With the ever-increasing fines imposed on companies for competition law violations, it is critical that in-house lawyers are in a position to play a leading role in handling compliance issues, which is more difficult to do if they do not benefit from LPP.
- LPP is part of a company’s fundamental right to consult freely with an attorney of its choosing and not a limitation of the Commission’s investigatory powers.
- The CFI’s decision to extend LPP to documents prepared as a preliminary step in seeking advice from outside counsel is a welcome development, but it also places a significant burden on companies, which are now required to demonstrate that such preparatory documents were created solely for the purpose of obtaining external legal advice.
- The CFI correctly struck down the Commission’s practice of taking a “cursory look” at legally-privileged documents, clarifying that it was for the Community Courts, not the Commission, to decide whether legal privilege applies.

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An overview of the Case and its Context

I. Introduction

On 17 September 2007, the European Court of First Instance (“CFI”), the second-highest court in the European Union (“EU”), issued its judgment in the *Akzo Nobel* case (Joined Cases T-125/03 and T-253/03) concerning the issue of legal professional privilege (“LPP”) in the context of EU competition law investigations. This judgment had been highly anticipated as a potential clarification of the 25-year-old *AM&S* ruling (Case 155/79 *AM&S v Commission* [1982] ECR 1575) by the European Court of Justice (“ECJ”) in which the ECJ held that LPP does not apply to communications with in-house counsel.

The *Akzo Nobel* case arose from a dispute during a Commission investigation in 2003 of Akros Chemicals Ltd, a UK subsidiary of Akzo Nobel Chemicals Ltd, over whether certain documents were covered by LLP. The CFI addressed three main issues: (i) the personal scope of LPP, (ii) the subject-matter scope of LPP, and (iii) the procedure to be applied in the event of a dispute. ACC filed arguments on this case as an intervener on behalf of the in-house legal community and their clients.

II. The Personal Scope of LPP

The most important aspect of the present decision for in-house lawyers is the CFI’s holding that LPP does not cover communications between in-house lawyers and other employees at a company, even where the lawyer is a member of a bar in an EU Member State. *Akzo Nobel* and the various bar organizations intervening in its favor argued that the key criterion as laid down in the *AM&S* judgment, was whether the lawyer was independent. They argued that in-house lawyers were independent, particularly when they belonged to a Member State bar. The CFI rejected this argument, holding that the ECJ had defined the concept of an independent lawyer in negative terms. Thus, a lawyer is not “independent” if the lawyer “is bound to his client by a relationship of employment ” (at ¶168 of the judgment).. According to the CFI, in *AM&S*, the ECJ had defined an “independent” lawyer as one who “structurally, hierarchically and functionally, is a third party” in relation to the undertaking receiving [the lawyer’s] advice.” (at ¶168 of the judgment).

The CFI rejected arguments that it should extend the scope of LPP because the laws of the Member States and the role of in-house lawyers have evolved since the ECJ ruling in *AM&S*. Specifically, the CFI found that, despite some developments, it is still not possible to identify tendencies in the laws of the Member States regarding LPP which are uniform or have clear majority support. Further, changes in EC competition law that place a heavier burden on companies to determine whether they are in compliance with the law does not justify extending LPP to in-house counsel. According to the CFI, outside counsel may assist companies in their compliance efforts and in-house counsel may bring their knowledge of the company to bear in these efforts through cooperation with outside counsel.

The CFI declined to address the issue of whether lawyers who are not admitted to an EU bar are protected by LPP. At present, the Commission treats communications with such lawyers as outside the scope LPP in the context of an EU competition investigation.

III. The Subject-Matter Scope of LPP

Another significant aspect of the *Akzo Nobel* judgment concerns the CFI's extension of LPP to cover preparatory documents drawn up exclusively for the purpose of seeking legal advice from outside counsel, even where such documents are not physically communicated to the outside counsel, but are used as the basis for a conference call. However, the CFI explicitly stated that protection under LPP is an exception to the Commission's powers of investigation and must therefore be construed restrictively. Thus, the company relying on LPP has the burden of proving that the relevant documents were drawn up with the sole aim of seeking legal advice from a lawyer.

In *Akzo Nobel*, the CFI found that Akzo Nobel did not adequately prove that the relevant documents were drawn up exclusively for the purpose of seeking legal advice, and therefore were not subject to LPP. In particular, the CFI found that it was not enough to simply show that the documents were discussed with outside counsel. Following this decision, companies should ensure that they have in place mechanisms to document and file such preparatory documents in a manner that proves that they were drawn up exclusively for the purpose of seeking legal advice from external counsel.

IV. The Procedure to be Applied in Case of Dispute

A. No "Cursory Look"

The CFI also addressed the procedure to be applied in case of a dispute between the Commission's investigators and a company as to whether a document is protected by LPP. As a first step, the CFI found that even a "cursory look" by the Commission could be a violation of LPP where it could reveal the contents of a document, and is therefore not an appropriate mechanism for resolving whether a document is protected by LPP.

The CFI clarified the appropriate standard, stating: "[A]n undertaking subject to an investigation ... is entitled to refuse to allow the Commission officials to take even a cursory look at one or more specific documents which it claims to be covered by LPP, provided that the undertaking considers 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" (at ¶82 of the judgment). The CFI suggested that company could show that it is entitled to refuse the Commission even a cursory look by informing the Commission of the author of the document and for whom it was intended, by explaining the respective duties and responsibilities of each, and by explaining the purpose of the document and the context in which it was created.

B. "Sealed Envelope" Procedure

While rejecting the cursory look, the CFI accepted the procedure followed by the Commission in the case of two documents where the investigating team was not satisfied that LPP applied. With

regards to such documents, the investigators decided not to immediately read them (apart from the cursory look discussed above) or place them into the file, and instead placed copies in a sealed envelope pending a formal decision as to whether LPP applied. As this formal decision allowed Akzo Nobel the chance to appeal the decision to the Community Courts, the CFI found that the Commission did not violate the rights of Akzo Nobel with regards to these documents.

With regards to other contested documents, the Commission's investigating team immediately took the view that they were definitely not privileged during the investigation, and consequently placed them into the file and did not follow the envelope procedure discussed above. The CFI upheld Akzo Nobel's claims that such action constituted a breach of LPP with regards to these documents, as "the Commission did not give the applicants an opportunity to bring the matter effectively before the Court in order to prevent the Commission from reading the contents of the documents...."

The CFI clarified the appropriate standard: "the Commission must not read the contents of the document before it has adopted a decision allowing the undertaking concerned to refer the matter to the Court of First Instance, and, if appropriate, to make an application for interim relief." While this is a favorable decision for companies faced with an investigation, companies should be careful not to unfairly hinder investigations by making unfounded LPP claims. As the CFI pointed out, the Commission has other tools available to discourage companies from abusing LPP such as by increasing any eventual fines imposed upon the company.

V. Next Steps

Both Akzo Nobel and the interveners can appeal the judgment. Such an appeal is limited to points of law and will be decided by the ECJ. ACC intends to file an appeal as an intervener and will coordinate with other interveners or the company, as appropriate.

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If you would like to read ACC's brief as an intervener in the case, or any of the documents or other analysis of this decision, it's all online at: <http://acc.com/php/cms/index.php?id=364>

For more information on ACC's work on this case or on privilege issues in general, visit www.acc.com or contact ACC's general counsel, Susan Hackett, at hackett@acc.com.