



## CFI declines to extend rules on privilege to cover in-house lawyers

The rules on legal professional privilege (“LPP”) in EC competition law were clarified – but not fundamentally changed – on 17 September 2007, when the Court of First Instance (the “CFI”) handed down its eagerly-awaited judgment in *Akzo Nobel v Commission*<sup>1</sup>.

- The CFI rejected Akzo's arguments that LPP protection should be extended to cover communications with in-house counsel. The result is a continuing disparity between EU and national laws. In the UK, for example, communications between in-house counsel and their clients are privileged, in the same way as communications with external lawyers.
- The CFI also ruled that an undertaking is entitled to refuse the Commission even a cursory look at a document which it claims is covered by LPP, where this would result in disclosure of the contents of the document. Where LPP is disputed, Commission officials should put a copy of the document in a sealed envelope and remove it from the premises. It must then adopt a decision rejecting the application for LPP, thus allowing the undertaking concerned to appeal the decision to the CFI. Only when the dispute is resolved in the Commission's favour may it look at the document.

### Background

The Commission, with the assistance of the Office of Fair Trading, carried out dawn raids at the UK premises of Akzo Nobel Chemicals Limited (“Akzo”) and Akcros Chemicals Limited (“Akcros”) (together the “Applicants”) in February 2003. During the raids, the Applicants' representative informed the Commission officials that certain documents were likely to be covered by LPP. The Commission officials insisted on examining these documents to form their own view. Faced with a threat of fines for obstruction of the investigation, the Applicants compromised: the head of the investigating team examined the documents in the presence of the Applicants' representative.

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<sup>1</sup> Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission of the European Communities, joined cases T-125/03 & T-253/03

There were five disputed documents:-

■ The “Set A Documents”:-

- a memorandum containing information gathered for the purpose of obtaining outside legal advice in connection with Akzo’s competition compliance programme; and
- a copy of the above memorandum bearing manuscript notes referring to contacts with an external lawyer.

The Commission officials could not determine whether these were privileged.

■ The “Set B Documents”:-

- handwritten notes made by Akcros’ general manager, used for the purposes of preparing the memorandum in Set A above; and
- two emails exchanged between the general manager and Akzo’s competition law coordinator, who was a lawyer qualified in the Netherlands and a permanent member of Akzo’s legal department.

The Commission decided that these were definitely not privileged.

The Commission officials put copies of the Set A Documents in a sealed envelope, which they took away with them on completion of the investigation. They put copies of the Set B Documents with the rest of the file they took, without sealing them in an envelope.

## The extent of LPP

The CFI reiterated the principle set out in the 1982 *AM & S* case<sup>2</sup> on the extent of LPP: that written communications between a lawyer and his client are to be considered confidential, provided that the following two conditions are met:

1. the communications must have been made for the purposes of the exercise of the client’s right of defence, even if they pre-date the start of the investigation; and
2. they must be with an independent EU-qualified lawyer.

### The Set A Documents

The CFI ruled that the Set A Documents were not protected by LPP. They were not prepared with a view to being sent physically to an independent lawyer. Although they were drawn up for the purpose of a conference call with an independent lawyer, they were not addressed to the lawyer, nor did they contain a request for legal advice. The CFI found that they were not drawn up exclusively for the purposes of seeking independent legal advice in exercise of the Applicants’ rights of defence.

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2 *Case 155/79 AM & S v Commission* [1982] ECR 1575

### The Set B Documents

The CFI also ruled that the Set B Documents were not protected by LPP. The handwritten notes had been drawn up with a view to preparing the memorandum in Set A and could not be covered by LPP. The two emails had been exchanged between the general manager of Akros and Akzo's in-house counsel and, although they contained legal advice on issues that had arisen in the context of the Akros compliance programme, they had not involved communication with an independent lawyer. The CFI rejected arguments from the Applicants, supported by professional bodies such as the International Bar Association, that in-house counsel could be considered just as 'independent' as external lawyers. It pointed to the fact that the European Court of Justice (the "ECJ") expressly held in the *AM & S* case that independence precluded a lawyer being bound to his client by a relationship of employment. The ECJ's position had been a conscious decision, given that the issue had been debated at length during the proceedings.

### Procedure

The CFI confirmed the three-step procedure to be followed where an undertaking claims LPP during a Commission investigation, as set out by the ECJ in the *AM & S* case:

1. The undertaking must provide the Commission officials with relevant material of such a nature as to demonstrate that the documents fulfil the conditions for LPP, although it is not bound to reveal the contents of the documents in question.
2. If the Commission considers this evidence insufficient, it must order the production of the documents in question or, alternatively, put copies of the documents in question in a sealed envelope.
3. If the undertaking concerned continues to maintain that the documents are privileged, the question must be referred to the EC courts for determination.

The CFI went on to state the following:

- The mere fact that an undertaking claims that a document is protected by LPP is not sufficient to prevent the Commission from reading the document if the undertaking produces **no** relevant material to prove this.
- In many cases, Commission officials will be able to confirm whether LPP applies by taking a mere cursory look at the general layout, heading, title or other features of the document in question.
- However, an undertaking is entitled to refuse to allow Commission officials even a cursory look at documents where this would give the Commission access to privileged information.

The CFI ruled that the Commission had breached this procedure in two ways: (i) by forcing the Applicants to allow the head of its investigation team to look at the documents in question, even though the Applicants had claimed, and provided support for their claims, that this would result in the contents of the documents being disclosed; and (ii) by reading the Set B Documents before making a formal decision rejecting the claim for protection under LPP.

## What does this mean for in-house lawyers preparing for the possibility of a dawn raid?

The law in this case only applies to investigations carried out by the Commission. Businesses may also be investigated by national competition authorities (“NCAs”) which will each apply their own rules on LPP when seizing documents. As mentioned above, in the UK communications between in-house counsel and their clients are currently treated as privileged.

Nevertheless, all firms should, where practicable, take the following steps:

- Keep legal advice from internal and external lawyers on separate files.
- Mark both files of advice file clearly as “Legally Privileged Documents”.
- Mark all correspondence between the firm and its external and internal counsel clearly as “Legally Privileged. Prepared for the purpose of seeking legal advice”.
- To the extent possible, address internal sensitive issues orally or through external lawyers.
- During a dawn raid, supervise carefully access to any privileged documents and where the Commission or NCA requests copies of privileged documents, ensure these are kept, unread by the investigators, in a sealed envelope until the issue of privilege is resolved.

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