

Court of Justice hears key case on privilege in EU competition law cases

The rules on legal professional privilege (“LPP”) in EU competition law cases will be debated before the Court of Justice on 9 February, providing another opportunity for the status of communications with in-house lawyers to be brought into line with the status of communications with external counsel. The outcome of the case will have important consequences for the extent to which companies can protect documents from disclosure to the competition authorities, and consequently the way in which they manage their communications.

The current law on LPP

The case in front of the Court of Justice¹ is an appeal of an earlier judgment by the Court of First Instance (the “CFI”) of September 2007. The CFI upheld the principle stated by the Court of Justice in *AM & S*²: that written communications between a lawyer and his client are covered by LPP and are therefore to be considered confidential in EU competition law investigations by the European Commission (the “Commission”), 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 CFI confirmed the long-held view that communications with an in-house lawyer do not fulfil the requirements of independence in the second of these criteria. In so doing, it rejected arguments from the appellants, Akzo Nobel Chemicals Limited (“Akzo”) and Akcros Chemicals Limited (“Akcros”), supported by professional bodies such as the International Bar Association, that in-house counsel could be considered just as ‘independent’ as external lawyers. It repeated

the finding in the *AM & S* case, that independence precluded a lawyer from being bound to his client by a relationship of employment. This had been a conscious decision in *AM & S*, given that the issue had been debated at length during the proceedings.

The main arguments for a change in the law

The appellants claim that the Court of Justice should find that communications between the general manager of Akcros and Akzo’s in-house lawyer that were seized by the European Commission in a dawn raid are protected from privilege and that the Commission had no right to take them. Arguments in support of a change in the law are as follows:

- In a number of Member States, such as the UK, external and in-house lawyers are regulated in the same way and generally have a core duty of independence, regardless of their employment status.
- It is discriminatory to treat external and in-house lawyers differently when both are subject to the same ethical rules.
- Unrestricted access to in-house counsel would help to improve companies’ compliance with EU competition law.
- The current position encourages companies not to keep accurate internal records for fear of creating evidence which is not privileged.

The appellants have considerable support for their case. A number of bodies, including the Law Society of England and Wales and the American Bar Association, applied for leave to intervene in the appeal, in support of the appellants, although their applications were denied on the basis that they did not have a direct interest in the result of the case.

Practical considerations

The law set out above applies only 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. In the UK, communications between in-house counsel and their clients are currently treated as privileged.

It is not possible to predict with any certainty how the Court of Justice will rule in this case and it may take a considerable amount of time to issue its judgment. A decision to afford privilege to communications with in-house lawyers would end nearly three decades of differential treatment and harmonise the EU competition law position with the position in many EU Member States. A decision to uphold the current principle, set out in the *AM & S* case, is likely to fix the existing position for years to come. The question is whether the Court of Justice might find a middle way and prescribe the conditions an in-house lawyer would have to satisfy before his or her advice can be afforded LPP and whether introducing a further level of complexity into this already complex area would be desirable.

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- 1 Case C 550/07 *Akzo Nobel Chemicals and Akcros Chemicals v Commission and Others*
 - 2 Case 155/79 *AM & S v Commission* [1982] ECR 1575

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