

News brief



Legal professional privilege

In-house lawyers out of luck

On 14 September 2010, the European Court of Justice (ECJ) in *Akzo Nobel Chemical Ltd and Akros Chemical Ltd v European Commission* rejected a bid to change the legal status of advice given by in-house counsel, confirming that, in the context of European Commission (Commission) investigations into competition law breaches, legal professional privilege (LPP) should extend only to communications with external lawyers qualified in one of the EU member states (*Case C-550/07*).

The background

In 2003, Commission officials, assisted by officials of the UK Office of Fair Trading, conducted an investigation at the premises of Akzo Nobel (Akzo) and Akros Chemical (Akros) (together, the companies). The companies claimed the protection of LPP for two emails between Akros's general manager and Akzo's competition law co-ordinator (who was admitted to the Netherlands Bar) (the in-house lawyer). The head of the Commission investigation team reviewed the documents, rejected the companies' case and took copies of the documents away at the end of the investigation.

The Commission rejected the companies' requests for the return of the documents and confirmation that all copies had been destroyed, relying on the ECJ's 1982 decision in *AM & S v Commission (Case C-155/79)* (*see box "The AM & S decision"*).

The companies' appeal to the General Court was dismissed, on the basis that the communications were not with an

The AM & S decision

In *AM & S v Commission (Case C-155/79)*, the European Court of Justice held, taking into account the common criteria and similar circumstances existing at the time in the then EU member states, that the protection of communications between lawyer and client was subject to two cumulative conditions:

- The communication must be connected to the client's right of defence.
- The communications must be between an independent lawyer (that is, a lawyer who is "not bound to the client by a relationship of employment") and a lawyer who is EU qualified.

external lawyer (*see News brief "EC privilege rules: in-house counsel out in the cold"*, www.practicallaw.com/9-376-3973). The companies appealed to the ECJ.

In April 2010, Advocate General (AG) Kokott recommended that the appeal be dismissed (*see News brief "Legal professional privilege: in-house lawyers still out in the cold"*, www.practical-law.com/7-502-3564).

A number of parties intervened in the proceedings, including the UK, Irish and Netherlands governments and a number of Bar Associations.

Employment relationship vs professional obligations

The companies argued that the existence of an employment relationship does not override the lawyer's obligations of professional conduct and discipline. In Akzo's case especially, its contract with the in-house lawyer required: Akzo to respect the in-house lawyer's freedom to perform his func-

tions independently; and the in-house lawyer to comply with all the professional requirements imposed by the Netherlands Bar.

The ECJ rejected this argument, on the basis that the requirement of independence meant the absence of any employment relationship between lawyer and client. Citing the AG's opinion, the ECJ held that "an in house lawyer cannot, whatever guarantees he has in the exercise of his profession, be treated in the same way as an external lawyer, because he occupies the position of an employee which, by its very nature... affects his ability to exercise professional independence." It found that economic dependence on, and close ties with, the employer reduce this independence below the level enjoyed by an external lawyer.

Equal treatment

The companies' other primary argument was that refusing privileged status to communications with an in-house lawyer breached the general EU

principle of equal treatment, given that the professional obligations on in-house and external lawyers are the same. The ECJ rejected this argument, on the basis that the level of independence differs significantly between an in-house and external lawyer; the fundamental differences between the two therefore justified the differential treatment.

Developments since *AM & S*

As an alternative to its primary arguments, the companies argued that, even if the ECJ upheld the principle established by *AM & S*, this principle should be reinterpreted in light of significant developments since 1982 in:

- The approach to in-house privilege in the national legal systems of member states.
- The environment for enforcement of EU law (through the Modernisation Regulation (1/2003/EC)).

However, the ECJ held that it was not possible to identify any predominant trend towards protection of in-house legal advice among the member states. It found that many member states continue to exclude correspondence with in-house lawyers from the scope of LPP and do not allow in-house lawyers to be admitted to their national Bars, nor recognise them as having the same status as external lawyers.

The ECJ also found that the Modernisation Regulation did not require a change in the status of in-house lawyers or that they should be treated in the same way as their external counterparts regarding LPP.

Other arguments

Addressing further arguments put forward by the companies, the ECJ found that the absence of LPP did not breach rights of defence, nor the principles of legal certainty and national procedural autonomy.

Non-EU lawyers

Non-EU lawyers expressed a good deal of interest in clarifying their status during these proceedings. However, unlike the AG (who, in her opinion, took the stance that the protection under LPP of lawyers from third countries would not under any circumstances be justified), the ECJ did not take the opportunity to comment on whether LPP applies to communications between clients and external counsel qualified in countries outside the EU.

Nevertheless, the ECJ's silence on this point is a clear indication that communications between clients and external counsel who are members of a Bar or Law Society in a third country outside of the EU will continue not to attract LPP.

Practical implications

Although widely expected following the AG's opinion, this judgment will come as a blow to the international business and legal communities. It confirms the ability of the Commission to request and review documents and advice prepared by in-house counsel (and communications with lawyers from third countries) in the course of a competition investigation. (It should, however, be remembered that the judgment relates only to investigations under EU competition law led by the Commission itself: where the investiga-

tion is carried out by national competition authorities, even on behalf of the Commission, then national law concerning LPP will apply; in the case of the UK, this would mean that in-house counsel would be protected by LPP.)

Given the categorical nature of the ECJ's decision, this position seems unlikely to change for some time. As a consequence, companies will need to continue to take care over the way in which sensitive in-house legal advice is sought and recorded, in the knowledge that it cannot be shielded from regulatory oversight. In particular, they should:

- Be wary of allowing in-house lawyers to deal with information that is potentially sensitive regarding competition law (particularly in relation to internal investigations). To ensure LPP is available in all circumstances would require this to be handled by external EU lawyers.
- Ascertain at the outset of a dawn raid whether it is taking place under the auspices of the Commission or of national authorities, so that the position on LPP for in-house counsel during the raid is clear.
- Bear in mind that, when dealing with potential competition law infringements that are multi-jurisdictional, communications with any non-EU advisers, even if external counsel, will not be afforded LPP.

Gillian Sproul is a partner, and Stephen Smith is a senior associate, at Mayer Brown International LLP.