

Litigation, competition and EU law briefing

ECJ decision in *Akzo Nobel*: no legal privilege for in-house lawyers

On 14 September 2010, the European Court of Justice (ECJ) handed down its decision in the case of *Akzo Nobel Chemicals Limited and Akcros Chemicals Limited -v- Commission of the European Communities*¹ (*Akzo*). This important case concerns the ability of businesses to withhold documents from the European Commission during an investigation into a suspected breach of EU competition law on the basis that those documents are subject to legal professional privilege (LPP).

Upholding the decision of the Court of First Instance (CFI), the ECJ affirmed existing EU case law that communications with in-house lawyers within a company or group are not covered by LPP.

LPP in EU competition law

Under English law, the concept of LPP is well established and includes the recognition of a client's fundamental right to be able to communicate freely with their lawyer, whether the lawyer be an external adviser or an in-house lawyer, without fear that the information divulged in those communications might subsequently be used against them. Under EU competition law, the principle of LPP was not considered until 1982 in *AM&S Europe Limited -v- Commission of the European Communities*² (*AM&S*), and was formulated more narrowly.

In *AM&S*, the ECJ considered the Commission's powers to require disclosure of a business's documents during the course of an investigation and held that those powers did not extend to communications covered by LPP. However, crucially, the ECJ held that, in order for a communication between a lawyer and client to be protected by LPP, the communication must be made for the purposes, and in the interests, of the client's rights of defence, and the lawyer must be "...independent... that is to say... not bound to the

client by a relationship of employment". As a result of this judgment, under EU competition law, communications between an in-house lawyer and other members of his or her employer's staff were not covered by LPP.

Akzo – the facts and first instance decision

In *Akzo*, during an investigation by the Commission into alleged anti-competitive practices, the undertakings subject to the investigation asserted LPP over certain documents including emails exchanged between non-legal employees and an in-house lawyer. The LPP claims were rejected by the Commission and the dispute went to the CFI (now the General Court).

The CFI also dismissed *Akzo's* arguments, finding that none of the documents were covered by LPP. In relation to the emails exchanged between non-legal employees and an in-house lawyer, the CFI applied the principle established in *AM&S* that communications between an in-house lawyer and other members of his or her employer's staff were not protected by LPP.

Akzo appealed the CFI's judgment solely on the issue of whether the communications with the in-house lawyer should be protected by LPP.

Judgment of the ECJ

The ECJ affirmed the decision of the CFI holding that, under EU competition law, communications with in-house lawyers within a company or group were not covered by LPP, essentially because such lawyers did not have the requisite degree of "independence".

The ECJ observed that the requirement that a lawyer be independent (as set out in *AM&S*) was based on a conception of the lawyer's role as collaborating in the administration of justice and as being required to provide, in full independence and in the overriding interests of that cause, such legal assistance as the client required. It followed that "independence"

required the absence of any employment relationship between the lawyer and his client.

The ECJ held that as a result of the in-house lawyer's economic dependence and close ties with his employer, he did not enjoy a level of professional independence comparable to that of an external lawyer. The ECJ considered that whatever guarantees of independence might be provided by the in-house lawyer's professional ethical obligations, he should not be treated in the same way as an external lawyer. An in-house lawyer occupied the position of an employee which, by its very nature, did not allow him to ignore his employer's commercial strategies. This constrained his ability to exercise professional independence. Furthermore, an in-house lawyer might be required to carry out "other tasks" (in *Akzo*, the in-house lawyer also acted as "competition law coordinator"), which might have an effect on the commercial policy of the employer. The ECJ thought that such functions reinforced the close ties between the in-house lawyer and his employer.

The ECJ was also not persuaded by Akzo's arguments that refusing to apply LPP to communications with an in-house lawyer violated the principle of "equal treatment". The ECJ held that an in-house lawyer was in a fundamentally different position from an external lawyer; therefore, there was no requirement that in-house lawyers and external lawyers should be treated in the same way.

Furthermore, the ECJ considered that no predominant trend could be discerned in the legal systems of the Member States towards protection under LPP of communications with in-house lawyers within a company or group which might justify a change in the case law established by the judgment in *AM&S*.

In addition, the ECJ was not persuaded that the interpretation of the CFI lowered the level of protection of the rights of defence of a business. The ECJ considered that any business seeking advice from a lawyer must accept the restrictions and conditions applicable to the exercise of that profession, including the rules on LPP.

Finally, the ECJ held that the principle of legal certainty did not require that identical criteria be applied as regards LPP in investigations carried out by the Commission and in investigations carried out by national competition authorities. The ECJ held that a business could determine its position with sufficient legal certainty in light of the powers of the particular authority carrying out the investigation.

Comment

The ECJ's decision not to extend LPP to communications with in-house lawyers will no doubt be met with widespread dissatisfaction within the English legal community and is arguably a missed opportunity. The ability of in-house lawyers to provide independent legal advice is not a material issue in many EU Member States and the ECJ has unfortunately not recognised that. In England & Wales, for instance, the regulatory regime ensures that in-house lawyers adhere to the same high standards as private practice lawyers and English law rightly affords LPP to in-house lawyers. In those jurisdictions where valid concerns as to the independence of in-house legal advice might arise, the doctrine of privilege is sufficiently flexible to deal with the independent nature of the advice given on a case-by-case basis. Moreover, there has never been any suggestion that investigations carried out by the OFT under the Competition Act 1998 are impeded by the fact that the OFT may not examine communications with in-house lawyers because they are privileged. The ECJ's judgment confirms the muddled status quo for companies who must continually second guess whether advice from their in-house team may end up before the Commission and perpetuates the unhappy position whereby the in-house lawyers, who generally know their client's business very well, are constrained from playing their full part in advising on competition law issues.

Notes:

- 1 Case C-550/07 P
- 2 Case C-155/79

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