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A legal update from Dechert's Antitrust Group

## European Court Refuses to Recognize the Confidentiality Between In-house Lawyers and Their Employers

The *Akzo Nobel* judgment, issued by the European Court of First Instance (CFI) on September 17, 2007, weakens the relationship between in-house lawyers and their employers by upholding previous case law and the European Commission's stance that communications with in-house lawyers are not protected by legal professional privilege.

The case concerned documents seized by the European Commission during a dawn raid of an Akzo Nobel subsidiary in the UK. The raid was carried out by the European Commission in 2003 to search for evidence as part of an investigation into suspected breaches of European competition law. During the raid, Akzo resisted production of five documents it claimed were privileged, but provided them to the investigators after being threatened with obstructing the investigation. The claim of privilege was rejected on the spot as to three of the documents, and they were added to the investigatory file. The other two documents were placed in a sealed envelope and later determined by the Commission not to be privileged after considering Akzo's submissions on the question. Akzo Nobel challenged the European Commission's decision that these documents were not protected by legal privilege.

The CFI's decision confirms that, during European Commission investigations of suspected breaches of competition law, companies have a different level of protection depending on whether they have received legal advice internally or from an external law firm. The President of the CFI had previously suggested in an interim order that the protections afforded

### Legal Professional Privilege in EU Competition Law

Documents will be privileged if they are:

- communications made for the purpose of a company's rights of defense sent to or received from an independent (not in-house) lawyer qualified to practice within an EEA Member State;
- a document made for the exclusive purpose of seeking this advice; or
- a document made for the exclusive purpose of reproducing this advice.

to communications with external law firms might be extended to communications with in-house lawyers. Nevertheless, the CFI has ultimately upheld the two-tier system of protection. This means that the European Commission will have free access to documents prepared by in-house counsel, even though the same documents would remain confidential if they had been prepared by an external law firm.

### Background

Although the concept of legal professional privilege (professional secrecy) is enshrined in the national laws of EU Member States, there

## Legal Professional Privilege Best Practice in the EU

If the criteria for legal privilege are met, clearly mark on the face of a document that it is either:

- a privileged client-attorney communication; or
- a privileged document made for the purpose of seeking or reproducing legal advice from a qualified outside lawyer.

is no black-letter EU legislation governing this area. Consequently, companies facing EU-level competition investigations have faced uncertainty when deciding whether they are entitled to withhold documents from European Commission investigators. Over time, the case law of the European Court of Justice (ECJ) has established the parameters of a fundamental right to the confidentiality of legal advice. The recent *Akzo Nobel* case is the latest stage in the development of this area of law.

The ECJ's landmark *AM&S* judgment, in 1982, accepted that legal professional privilege should be respected in EU proceedings because it is a concept common to the laws of all Member States. However, it held that the right to this protection is limited and only applies if certain criteria are met:

- the protection only applies to communications made for the purpose and in the interests of a client's rights of defense (either before or after an investigation is initiated); and
- the protection only applies to communications with "independent" lawyers who are qualified to practice within an EEA Member State and who are not employed by the client.

This meant that communications with lawyers not qualified to practice within the EEA (including U.S. and Swiss lawyers) and with in-house counsel were not afforded legal privilege.

The European Parliament has attempted to pass legislation to extend legal privilege to communications with

in-house lawyers. So far, it has been unsuccessful. However, Competition Commissioner Mario Monti took steps to provide in-house lawyers and their clients with a certain degree of protection: where the Commission finds in the course of an investigation that in-house counsel had warned clients about potential competition law breaches and those warnings had been ignored, it would not consider this prior knowledge of the breaches an aggravating factor when calculating fines.

### **The *Akzo Nobel* Case**

*Akzo Nobel* asked the CFI to decide whether certain documents seized during the dawn raid were protected by legal professional privilege. The documents included two e-mails between *Akzo Nobel*'s internal competition lawyer and the general manager of the subsidiary. Although the internal competition lawyer is a member of the Netherlands bar, he is also an employee of *Akzo Nobel*.

### **Judgment of September 17, 2007**

*Akzo Nobel* challenged the European Commission's decision to reject the claim of privilege and asked the CFI to extend legal professional privilege to communications with in-house lawyers and to find that the e-mails should be withheld from the investigators.

*Akzo Nobel* argued that the laws of Member States have changed since the *AM&S* decision in 1982. Member States, such as the UK and Belgium, recognize the role of in-house lawyers and, increasingly, afford legal privilege to communications between in-house lawyers and their clients. Although the CFI accepted that this was the case, it found that the trend was not common to the laws of all, or even a majority, of Member States. Consequently, it decided to uphold the *status quo* established in the *AM&S* case and confirmed that legal professional privilege only applies to "independent" lawyers. It added that the key factor in deciding whether a lawyer is "independent" from his/her client is whether they have an employer-employee relationship; and membership of a bar or law society is not sufficient to establish the required level of "independence."

The CFI also rejected *Akzo Nobel*'s argument that the evolution of EU competition law has increased the general awareness of competition law and intensified

the need for legal assistance, which, Akzo Nobel proposed, justified the extension of legal privilege to in-house lawyers.

## **Additional Constraint on Commission Investigators**

Additionally, the CFI found that, where a company claims a document is protected by legal professional privilege, it may be justified in refusing European Commission investigators even a cursory look at the document. If the Commission is not satisfied that a document is privileged, it can make use of the established “sealed envelope procedure.” This allows the investigators to take a sealed copy of the document,

### **Legal Professional Privilege During an EU Dawn Raid**

- Inform the investigators that a document is legally privileged.
- Attempt to persuade investigators that this is the case by:
  - disclosing certain non-substantive parts of the document, such as an external lawyer's e-mail address; or
  - producing other documents which show that it is privileged.
- Where investigators insist that they receive the document:
  - there is no requirement to allow investigators even a cursory look at a document;
  - ensure that the document is placed in a sealed envelope; and
  - at a later date, the company's lawyers will be able to argue that the document should not be disclosed.

which they are not permitted to review until its non-confidential status has been confirmed. An independent member of the Commission not attached to the investigation will make an initial judgment, and the company, if it disagrees with the outcome, will be able to apply to challenge it before the EU courts. This procedure is recognized as providing a practical compromise between the objective of protecting legal professional privilege and the need for the Commission to safeguard documents which may prove crucial to an investigation.

## **Internal Documents**

The CFI confirmed that a company, as well as being able to assert legal professional privilege for documents sent to or from an external lawyer, may also claim privileged status for certain documents which were not sent to a lawyer and/or were never intended to be sent to a lawyer. Legal privilege will only apply to these documents if they were produced for the exclusive purpose of seeking legal advice from an external lawyer in the exercise of the company's rights of defense. If they were produced—even in part—for any other purpose, legal professional privilege will not apply.

The result in Akzo demonstrates that these requirements for establishing the privilege will be strictly applied. The documents at issue there included two copies of a memorandum from a business manager to his immediate superior recommending certain actions relating to compliance with competition law, together with notes of the manager's interviews with some employees which formed the basis for the memorandum. Although it was clear that the superior had later discussed the subject of the memorandum with an outside lawyer, the CFI denied the privilege on the basis that the document had not been prepared exclusively for that purpose. Rather, the CFI concluded, it had probably been drawn up “with the primary purpose of seeking the agreement of [the author's] immediate superior on the recommendations he put forward regarding the conduct he identified.” In reaching this conclusion, the CFI noted that the memorandum made no mention of seeking legal advice or of any follow-up action reflecting legal advice.

The CFI's treatment of the privilege issue in Akzo points out the importance to clients of marking clearly all documents which could be protected by legal professional privilege. This should prevent any confusion

or uncertainty about the status of a document in the event of a dawn raid. This is particularly important for internal documents created for the purpose of seeking legal advice, but also applies to communications with external lawyers.

## Going Forward

This decision clarifies the position of in-house lawyers in a competition law context and delineates their role and the role of external law firms. General counsel and in-house competition lawyers need to be aware that there may come a point after which it is no longer in a client's best interests for them to continue giving advice.

This will be particularly important in Member States where the CFI's decision in *Akzo Nobel* is at odds with the local approach to in-house lawyers and legal professional privilege. In some jurisdictions, such as the UK, communications with in-house lawyers will be privileged, provided national law criteria are met and any investigation is carried out by the national competition authority. However, these communications will have to be disclosed if an investigation is carried out by the European Commission. Where this is the case, an in-house lawyer who chooses to ignore the *Akzo Nobel* case and consider national laws alone will be taking a considerable risk.

It is important that the risks highlighted by this case are understood not only by in-house lawyers, but by companies as well. Companies should recognize that e-mails and memos sent to internal lawyers, seeking advice regarding a possible case against the company, will not be protected, whereas the same documents might have been legally privileged if they had been sent to external lawyers.

Where companies suspect that they may have been, or may become, involved in a breach of European competition laws, they will have to decide whether they should accept the risk of disclosure and seek legal advice internally, or whether advice should be sought externally, in order that they will have the option to assert legal professional privilege in the course of any future investigation.



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