

Insight

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In-house lawyers - No protection when faced with the EU Commission

One of England & Wales' fundamental legal protections has just suffered a blow at the hands of the European judiciary. In certain circumstances, legal professional privilege will not apply to communications between in-house counsel and their internal clients.

This decision ended a saga that has run since early 2003 when the European Commission ["the Commission"] suspected Akzo Nobel Chemicals Ltd A ["Akzo"] and Akcros Chemicals Ltd ["Akcros"] of anti-competitive practices.

Commission investigation

In February 2003, the Commission decided to investigate both companies and, with the UK Office of Fair Trading, carried out a dawn raid at their premises in Eccles, Manchester. During that on-site investigation the Commission's officials seized documents including some which Akzo and Akcros claimed were privileged.

Over the following nineteen months Akzo and Akcros and the Commission battled over the basis for this investigation and the Commission's entitlement to seize allegedly privileged documents. The Commission rejected Akzo's and Akcros' request for interim measures – i.e. to return or destroy, unread, the disputed documents. It had decided that privilege did not apply and that the disputed documents formed part of the Commission's file and investigation.

Akzo and Akcros fought the Commission's rejection in the European Court of First Instance ["CFI"]. The CFI President conceded that as the dispute involved "a delicate question of principle" on the scope of legal professional privilege, any Commission right to read and use the disputed documents was suspended until the CFI finally decided on the seizing of those documents and the basis of the investigation.

The Commission appealed this suspension to the European Court of Justice (ECJ). Akzo and Akcros cross appealed, seeking the annulment of the CFI's order dismissing their application for interim measures. In September 2004, the ECJ halted this in-fighting by reversing the interim suspension imposed on the Commission and by dismissing Akzo's and Akcros' cross appeal. It now remained for the CFI to adjudicate the status of the disputed documents, the Commission's refusal to return or destroy, unread, those documents and the manner in which they investigated Akzo and Akcros.



In Brief

- In the Akzo Nobel case, the European Court of First Instance confirmed that in-house lawyers' communications are not protected by legal professional privilege when their internal client, the entity, is under EU Commission investigation.
- Privilege continues to apply to communications from and to external lawyers if those communications relate to the entity's rights of defence.
- While this decision is unwelcome, it impacts in limited circumstances. Beyond this, the English legal position remains that all legal advice communications between clients and their lawyers in England and Wales, whether in private practice or in-house, are protected from disclosure and inspection by legal professional privilege.

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The status of the disputed documents

Where the communications are between an independent (i.e. external lawyer) and the client entity, the CFI confirmed that privilege applies as long as their purpose is to seek legal advice on the client entity's right of defence. This privilege covers:

- all such written communications with independent lawyers after a Commission's decision to investigate suspected anti-competitive practices;
- written communications with independent lawyers prior to such a decision where they relate to the subject matter of that investigation; and
- internal notes circulated within a client entity, if those notes only report the text or the content of communications with independent lawyers containing legal advice.

Thus the CFI ruled that the disputed documents here were not privileged as:

- they were not written communications with an independent lawyer;
- they did not form part of an internal note reporting the content of communications with an independent lawyer; and
- they were not prepared in order to be sent to an independent lawyer.

What about preparatory documents?

The CFI conceded that preparatory documents may be privileged if created exclusively to seek legal advice from an independent lawyer in the exercise of the entity's rights of defence, even if those documents had not actually been exchanged with an independent lawyer. Privilege applies restrictively in these circumstances and it is for the entity relying on that privilege to prove the purpose of such preparatory documents, which should be obvious in the context and on the face of the relevant documents.

Were these disputed documents of such a preparatory nature? Unsurprisingly, no. As they were created under an internal competition compliance policy, they included information extending beyond the exercise of the entity's rights of defence. Even where an independent lawyer compiles such a policy for their client entity, privilege will not necessarily apply to all documents created under that policy.

Furthermore, some of the disputed documents were not privileged as they were created to assist in preparing non-privileged documents.

While Akzo and Akcros did show they had discussed the content of at least one of the disputed documents with an independent lawyer, the CFI ruled that mere discussion will not, of itself, attract privilege.

Did the Commission breach investigation procedure?

Essentially, yes, but those breaches provided no comfort for Akzo and Akcros once the CFI pronounced on the status of the disputed documents.

Status of in-house counsel

The CFI confirmed that legal professional privilege under EU law only applies where the advising lawyer is independent of his client, thus excluding lawyers who are in their client's employ. Therefore, communications between in-house counsel and their internal client do not attract privilege protection. The lawyer's relationship to his client is pivotal, not his membership of a professional body to whom he is bound by a code of professional ethics or disciplinary procedures.

The CFI's distinction between in-house counsel and independent lawyers is based on a number of factors. First, the various EU jurisdictions do not uniformly approach the status of in-house counsel. The fact that English in-house lawyers satisfy onerous ethical requirements imposed on the entire English legal profession and

the fact that their communications with clients, for English jurisdictional purposes, are privileged did not sway the CFI.

Second, the CFI's view is that compliance with competition law can be assessed by external lawyers, whose correspondence with an in-house legal department (or with others within the entity) can attract privilege protection.

Third, as EU competition law is aimed at business entities, the Commission's investigatory powers are vital. Therefore, for those investigation purposes, any claim to privilege in relation to relevant documents is a fetter on the Commission's investigatory powers which will only ever be allowed in the strictest circumstances, i.e. where the document is of a preparatory nature which merely reports a communication with an independent lawyer as part of the entity seeking legal advice on the client's defence.

English privilege v EU privilege

In the context of a Commission investigation where the Commission is using its powers within the EU market, the EU judiciary has developed an EU concept of legal professional privilege which takes precedence over any national approach to privilege such as that in England.

Is this unequal treatment between lawyers?

No. According to the CFI, in-house counsel and external lawyers are by their nature in different situations so there is no problem treating them differently.

Therefore, the CFI upheld the Commission's February 2003 decision and rejected Akzo's and Akcros' claim of privilege over the seized documents in issue.

Implications

In the case of Commission investigations, communications between in-house counsel and their internal clients will not generally attract the protection of privilege. This EU position, for the moment, only applies to Commission investigations. The English position remains that communications between a lawyer, whether in-house or independent, and his client for the purposes of seeking legal advice are privileged.

Any good news?

Not much. The CFI held that where there is a dispute between the Commission and the entity under investigation, the Commission has no right to read the disputed documents until the entity has had the opportunity to ask a court to determine that dispute. That said, the CFI confirmed that the Commission retains power:

- to impose sanctions under Article 23(1) of Regulation 1/2003 on entities claiming privilege as a delaying tactic; and
- to treat such tactics as an aggravating factor when assessing any fine they may ultimately impose as a consequence of their investigation.

This decision does need to be put in context. To the extent there is any silver lining, it is that this ruling only applies where the Commission is undertaking an investigation and seeks production of documents. It does not affect claims to privilege made in commercial litigation between two corporate entities. In those circumstances, under English law, an in-house lawyer will not be treated any differently to an independent lawyer.

However, in the specific context of a Commission investigation, companies must be aware that sensitive communications between company executives and in-house counsel will not be protected by privilege. The concern in many quarters is that this will discourage recourse to in-house counsel to the detriment of corporate governance or require the use of independent counsel so as to enable a claim to privilege.

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