

E-ALERT | EU Competition

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The AKZO Judgment of the Court of Justice Confirms the Scope of Legal Professional Privilege in EU Competition Investigations

INTRODUCTION

On 14 September 2010, the Court of Justice, the highest court in the European Union (“EU”), ruled that, in the context of EU competition law investigations, legal professional privilege (“LPP”) does not cover communications between in-house lawyers and other employees at a company, even where the lawyer is a member of a bar in an EU Member State.¹ The Court therefore confirmed its 1982 ruling in the *AM&S* case.

The long-anticipated judgment resulted from an appeal lodged by Akzo Nobel against the judgment of the Court of First Instance (now called the General Court) of 17 September 2007,² in which the General Court had held that, in the context of EU competition law investigations, LPP covers only communications between a client and outside counsel admitted to a bar. Supported by several lawyers associations and three Member States, Akzo Nobel argued that LPP should also cover communications with an in-house lawyer who is a member of bar. The Court of Justice flatly rejected the appeal based essentially on the same reasoning as that of Advocate General Kokott in her Opinion of 29 April 2010.

KEY FINDINGS

- In order for communications between a client and his lawyer to be covered by LPP, the communication must relate to the client’s rights of defence, and it must emanate from an “independent” lawyer.
- The requirement of independence means the absence of any employment relationship between the lawyer and the client; LPP does not therefore cover internal communications with in-house lawyers, even with those enrolled with a bar and who are thereby bound by professional ethical obligations, because they do not enjoy the same degree of independence as a lawyer working in an external law firm.
- There is no breach of the principle of equal treatment because in-house lawyers are in a fundamentally different position to external lawyers, and their respective circumstances are therefore not comparable.
- Neither the evolution of LPP under the law of the 27 EU Member States nor the modernisation of EU competition law enforcement (Regulation No 1/2003) justify a change in the case law on LPP as established by the Court’s judgment in *AM&S* in 1982.
- There is no violation of the rights of defence and the right to choose a lawyer.

¹ Case C-550/07 P, *Akzo Nobel Chemicals Ltd and Akrcos Chemicals Ltd v Commission*.

² Joined Cases T-125/03 and T-253/03, *Akzo Nobel Chemicals Ltd and Akrcos Chemicals Ltd v Commission*. The findings of the General Court on the subject matter and the dispute resolution procedure were not subject to the appeal.

- There is no violation of the principle of legal certainty or national procedural autonomy by virtue of the fact that national competition investigations in the 27 EU Member States are subject to different national rules on the scope of LPP; the scope of LPP in the context of EU competition investigations must be subject to uniform interpretation and application at EU level in order to ensure that Commission inspections in competition proceedings respect the principle of equal treatment.

PRACTICAL IMPACT

The Ruling is Limited to EU Competition Law Matters

The ruling only applies to competition investigations by the European Commission. Therefore, the rules applicable to LPP have not changed with respect to:

- investigations by national competition authorities or other national and local regulators;
- private civil law actions, including those relating to competition law violations;
- litigation before national courts relating to EU law matters outside the field of competition law;
- any other disputes in an EU member state among private parties or between a private party and a national authority; or
- any dispute pending in third countries or before international tribunals.

With respect to all of these disputes, LPP remains governed by the applicable national or international rules. The ruling is also unlikely to have a knock-on effect on such procedures, in particular as the Court confirmed the principle of procedural autonomy of Member States. However, it arguably cannot be excluded that the ruling will make it more difficult to persuade a national court to extend LPP to communications with in-house counsel in national competition law proceedings.

The Ruling Confirms Existing Case Law

As the Court's ruling in *Akzo Nobel* merely confirms its 1982 ruling in *AM&S*, it does not have any immediate practical impact. While the Court excluded the possibility for communications with in-house counsel, even if they are a member of the bar, to fall within the scope of LPP, it confirmed that correspondence with outside counsel are covered by LPP. For in-house counsel, this means:

- No need to change their practice, provided they had taken into account the ruling of *AM&S* in the past.
- Ensure that competition advice on sensitive issues originates with external counsel so that the advice will benefit from LPP.

LPP FOR COMMUNICATIONS WITH NON-EU EXTERNAL COUNSEL

In *AM&S*, the Court of Justice held that, in the context of EU competition law investigations, LPP applies only to communications with external lawyers who are a member of a bar of an EU Member State, but not to communications with external lawyers who belong to a bar of a third country. This ruling stood in remarkable contrast to rulings of U.S. courts that extended LPP to communications of a client with non-U.S. lawyers.

On the basis of the facts in the *Akzo Nobel* case, the Court of Justice did not have to rule on the issue whether that distinction is still justified. It also declined to address it in dicta. However, Advocate General Kokott addressed that question in her opinion and concluded that extending LPP to lawyers

from third countries would not be appropriate as there is no adequate basis for the mutual recognition of legal qualifications and lawyers' professional ethical obligations.

It is impossible to predict whether the Court of Justice would affirm its ruling in *AM&S* if faced with this question. However, companies are well advised to continue to operate under the rule that communications with external lawyers who are admitted in a country outside the EU are not covered by LPP in respect of EU competition investigations. For example, companies should ensure that sensitive documents, including electronic communications, coming from lawyers not admitted to an EU bar, are not kept on the company's European premises or on its European IT system. Rather, they should be channelled through EU counsel.

SUMMARY

LPP IN EU COMPETITION LAW INVESTIGATIONS AFTER THE AKZO CASE

- **Personal scope of LPP** – LPP covers communications between a client and an external lawyer who is admitted to a bar of an EU Member State. LPP does not cover communications with in-house lawyers and other employees at a company, even where the lawyer is a member of a bar in an EU Member State. As the law currently stands, LPP does not cover communications between a client and an external lawyer who is admitted to a bar of a country that is not an EU Member State.
- **Subject-matter scope of LPP** – LPP covers not only the communications seeking or providing actual legal advice, but also preparatory documents drawn up exclusively for the purpose of seeking legal advice from outside counsel in the exercise of the rights of the defence, even where such documents are not physically sent to outside counsel, but are instead used as a basis for telephone discussions. The legal advice must relate to the company exercising its rights of defence.
- **Dispute resolution procedure** – LPP is an access restriction, not a use restriction. In cases where there is a dispute concerning whether a document is covered by LPP, the Commission therefore is not entitled to take a “cursory look” at a document to decide on the dispute. Instead, the Commission must allow the company to seek judicial review before it may read the document.

WHAT'S NEXT?

Many companies and in-house counsel associations had hoped that the *Akzo Nobel* case would recognise the important role that in-house counsel play in modern corporate life. These hopes did not materialise and the ruling sends a clear signal that the rules on LPP in EU competition investigations are fairly settled as regards communications with EU external counsel for the foreseeable future. Absent dramatic changes at Member State level, it is unlikely that in the foreseeable future the Court would decide differently if faced with a new case. Therefore, any change in the law can only come through the legislative process.

Georg Berrisch and David Hull represented the American Corporate Counsel Association - European Chapter as an intervener in *Akzo Nobel* before the General Court and on appeal to the Court of Justice. Their contact details can be found below.

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