

## CFI REJECTS LEGAL PRIVILEGE FOR IN-HOUSE LAWYERS

On September 17, 2007 the Court of First Instance (“CFI”) expressly excluded, in the case of *Akzo Nobel Chemicals et Akros Chemicals v. Commission*, communications of in-house lawyers from the protection of confidentiality of communications between lawyers and their clients (“legal privilege”). The CFI also discussed the procedures that the European Commission (“Commission”) has to comply with when facing a potentially legally privileged document.

The CFI had already defined the concept of legally privileged documents 25 years ago in the *AM & S* judgment, where it acknowledged that, despite the Commission’s wide powers of investigation and of examination necessary to uncover infringements of competition law, certain documents are confidential in character. The confidentiality attached to documents exchanged with counsel complies with the principle that every person must be able to consult a lawyer whose profession entails the giving of independent legal advice. Such confidentiality is considered essential to the full exercise of the rights of defense.

As regards the procedure to be followed by the Commission during an investigation, the CFI confirms that the undertaking subject of the investigation does not have to reveal the contents of the documents in question when it presents the Commission with relevant material and appropriate reasons demonstrating the confidential nature of such documents. Consequently, the undertaking is entitled to prevent the Commission from taking even a “cursory look” at the documents that it claims to be privileged if it considers that such a cursory look automatically reveals the content of those documents.

Where the Commission considers that the material presented by the undertaking does not prove the confidentiality of the disputed documents, it may place a copy of those materials in a sealed envelope. It is not entitled to read the contents of the documents before it has adopted a decision allowing the undertaking to refer the matter effectively to the CFI. According to the CFI, reading the content of a confidential document would be in itself a breach by the Commission of the principle in question. Even if a confidential document is not used as evidence, the privileged information might be used by the Commission, directly or indirectly, in order to obtain new information or new evidence without the undertaking being able to identify or prevent such information or evidence from being used against it. Further harm can also result from the disclosure of such documents to third parties.

The CFI considers that this procedure avoids risks of a breach of legal privilege while at the same time enabling the Commission to retain a certain control over the documents and preventing the documents from subsequently disappearing or being manipulated.

In the current case, Akzo’s representatives informed the Commission during an investigation carried out by the Commission at Akzo’s premises that certain documents were likely to be legally privileged. The CFI held that the Commission infringed the procedure that applies when

an undertaking claims legal privilege for a document in two ways: first, by forcing the applicants to allow a cursory look at the documents, and second, by reading some of the documents without having given Akzo the opportunity to contest the rejection of its claim to protection in respect of those documents before the CFI.

From a substantive point of view, the CFI confirmed the principles laid out in the *AM & S* judgment stating that communication between lawyers and clients has to be protected, provided such communications are made for the purpose of the exercise of the client's rights of defense. To be covered by legal privilege, such written communications have to be exchanged after the initiation of the administrative procedure that might lead to a decision on the application of competition law.

However, the CFI expanded protection of legal privilege to preparatory documents, even if they were not exchanged with a lawyer or were not created for the purpose of being sent physically to a lawyer, if they were drawn up exclusively for the purpose of seeking legal advice from a lawyer in exercise of the rights of defense. However, as concluded in this case, the mere fact that a document has been discussed with a lawyer does not entitle it to such protection. Documents that were drawn up in relation to a compliance program that was put together and coordinated by an outside lawyer can also be considered as not legally privileged.

The second condition for the application of legal privilege is that such communication emanate from independent lawyers, who are not bound to their clients by a relationship of employment. The CFI did not expand the concept of independent lawyers as at first defined in *AM & S*. It still interprets legal advice provided "in full independence" as advice from a lawyer who, structurally, hierarchically and functionally, is a third party in relation to the undertaking receiving that advice.

The CFI expressly excluded communications from in-house lawyers from the protection of legal privilege even though it (i) accepted that the specific recognition of the role of in-house lawyers and the protection of communications with such lawyers is relatively more common today than at the time of the *AM & S* judgment and (ii) recognized that some EU Member States treat the role of in-house lawyers and the protection of their communications differently. However, due to the lack of a uniform tendency or a clear majority support it did not take any arguments relating to current national laws into consideration.

The proposal to adopt an approach based on whether an in-house lawyer is a member of the respective bar and therefore subject to disciplinary and ethical rules was also rejected by the CFI. This is not in line with the treatment of legal privilege in the United States, where in-house lawyers are members of a bar and therefore automatically covered by legal privilege. As a result of this judgment, only communications from external counsel remain protected under legal privilege in Europe.

Despite the Commission's infringements committed during the examination of the disputed documents, the CFI decided that Akzo was ultimately not deprived of the protection of those documents, because the Commission did not err in deciding that the disputed documents were not legally privileged.

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