



Are your documents safe?

Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission

September 2010

Key Points

Communications between in-house lawyers and their employers are not protected by legal professional privilege ("LPP") in competition proceedings before the European Commission (the "Commission") and must, therefore, be handed over during a dawn raid.

This is important for companies with a presence in more than one EU Member State as competition investigations are likely to be conducted by the Commission.

Background

LPP protects communications between clients and their legal advisors to ensure a client can be completely honest and open with their lawyer without fear of self-incrimination. If communications are protected by LPP they cannot be read by investigating authorities in the course of a dawn raid.

Under English law, LPP applies regardless of whether the advice is given by a lawyer employed by the company being raided (ie in-house counsel) or an external advisor. However, since the case of AM&S in 1982, under European law companies have only been able to claim LPP for communications between external lawyers and the company relating to their rights of defence.

The Akzo case brought that inconsistency before the courts for consideration.

Facts

In February 2003, the Commission and Office of Fair Trading carried out a dawn raid on the premises of Akzo Nobel and Akcros Chemicals. During the raid, the application of LPP to various documents was raised. Akzo claimed privilege for a set of communications between Akzo's General Manager and the in-house lawyer, a member of the Dutch bar, regarding Akzo's competition compliance programme. The Commission disputed the claim to privilege. The Court of First Instance (now the General Court) rejected Akzo's claim that the documents were privileged so Akzo then appealed to the ECJ.

Judgment

The ECJ saw no reason to overturn its previous case law and upheld the existing position that legal advice from an in-house lawyer to the company he or she works for is not protected by privilege. Their view was that the employment relationship between in-house lawyers and a company means that the lawyer is not truly independent and cannot provide entirely impartial advice. While there are professional rules relating to the conduct of an in-house lawyer, he or she is still economically bound up with their employer and the employer's commercial objectives.

Their view was further reinforced by the fact that LPP is not afforded to in-house counsel in a number of EU member states so extending LPP would not have removed the inconsistency between national and EU law in any case.

Practical steps to take

Involve external and in-house lawyers in the production of sensitive or important documents to ensure full LPP protection.

Structure work flows so that privilege can be maintained and mark all relevant documents as confidential and privileged.

Train staff on the dawn raid process and the importance of LPP so that documents are not inspected before a decision is made on whether they are privileged or not.

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