

The Court of First Instance clarifies the extent of legal professional privilege in European Commission competition cases

By: J. Armstrong

Issue

On Monday 17 September 2007, the European Court of First Instance (CFI) published its long-awaited judgment in the Akzo Chemicals Limited v Commission case and has clarified the extent of legal professional privilege in European Union cases, in particular the status of communications from and to in-house lawyers.

The Akzo case is one that Eversheds LLP has had a particular interest in. We acted for Akzo during the defence of the dawn raid investigation carried out by the Commission at the premises of Akcros Chemicals Limited (an Akzo subsidiary) in Salford in 2003. The Commission was investigating an alleged cartel in the tin stabilisers market.

In the course of the investigation a file containing documents that the company believed could be covered by legal professional privilege was identified by the Commission. Despite objections from both Eversheds and the company, the Commission officials examined the file briefly in order to form their own opinion on whether the contents were privileged.

It subsequently seized two categories of documents. The first (set A) consisted of two copies of a memorandum prepared by Akcros' general manager from discussions with his sales personnel. This was prepared in the context of a competition law compliance programme. The memorandum had subsequently been discussed with an external lawyer and one of the copies was annotated with the name of the external lawyer in question.

Following a cursory examination by the Commission officials, Akzo's claim for privilege in respect of the set A documents was disputed and the documents were placed in a sealed envelope so that their status could be established by the court.

The second category of documents (set B) contained notes from discussions held by the general manager with his staff for the purpose of compiling the set A memorandum, as well as two e-mails exchanged between the general manager and an Akzo in-house lawyer, who was a member of the Netherlands Bar.

Having reviewed these documents, the Commission refused to accept Akzo's claim for privilege and seized the documents.

Summary

On the issue of whether or not the documents were privileged:

In relation to the e-mail exchange between the business and its in-house lawyer, the CFI followed the previous judgment of the European Court of Justice (ECJ) in AM&S v Commission. The CFI held that legal privilege applies only to the extent that the lawyer in question is an independent EU-qualified practitioner and is not bound to their client by a relationship of employment.

In relation to the set A documents and the handwritten notes in set B the CFI held that internal company documents, even where they have not been exchanged with a lawyer or have not been created for the purpose of being sent to a lawyer, are capable of being privileged, provided that they are drawn up exclusively for the purpose of

seeking legal advice from a lawyer.

The mere fact that the contents of the document are shared with a lawyer is not sufficient to confer protection to it. The CFI decided that, on the facts, the set A documents were not privileged because they were not produced exclusively for the purpose of seeking external legal advice; neither, therefore, were the remaining set B documents.

On the question of the procedure adopted by the Commission:

The CFI clarified that where potentially privileged documents are identified the Commission may not force a company to disclose part of a document or conduct even a cursory examination. If the Commission does not accept a company's claim for privilege, the officials may place the document in question in a sealed envelope and remove the envelope with a view to subsequent resolution by the court.

The CFI found that the Commission infringed this principle - first, by forcing the undertaking to allow it to carry out a cursory examination of the documents (despite the fact that the undertaking's representatives claimed, with justification, that a cursory examination would necessarily involve disclosure). Second, by reading the contents of the set B documents without allowing the company the opportunity to contest the rejection of their claim for privilege before the CFI.

Comment

It is disappointing that the CFI has decided not to extend the scope of legal professional privilege to advice given by in-house lawyers. We have felt for some time that the legal distinction between advice given by external and in-house advisers is no longer appropriate. It would have been difficult for the CFI to make a new law in this case, in the light of the previous AM&S case.

(Note that it remains the case that privilege extends only to EU-qualified lawyers and would not, for example, extend to communications with external lawyers outside of the EU retained to consider anti-trust implications elsewhere.)

The CFI's recognition that legal privilege extends to internal company documents is welcome. However, the 'exclusive purpose' test seems, to us, to be unnecessarily stringent and extremely difficult to execute in practice.

This approach will make it very difficult to give companies workable guidelines to ensure that the results of internal compliance exercises remain subject to legal privilege.

Ensuring strict control of the use of documents produced in the context of such exercises will be critical to showing exclusive purpose. The challenge for private practice lawyers will be to work with in-house lawyers to help them do their jobs without risking disclosure of sensitive legal advice.

The CFI was rightly critical of the Commission's 'shoot first - ask questions later' approach to deciding whether documents were privileged in this case. As was the position in the Akzo case, deciding whether a document is privileged may require an understanding of the context in which the document was produced, which may not be apparent on its face.

Equally, in the heat of a dawn raid it is important that the company concerned should be able to assert legal privilege without fear of being seen to obstruct the investigation (a criminal offence in the UK punishable by a prison sentence of up to 2 years). Accordingly, from our position as the dawn raid lawyers on the ground, we support the CFI's conclusion that the Commission overstepped the mark.

The implications of the judgment are clearly significant and Akzo and the interveners in the case (representing various parts of the legal profession) will clearly be looking carefully at the judgment to see whether there may be grounds for appeal.

For further information please contact:

Jonathan Sinclair, partner and head of commercial litigation
Tel: 0845 498 4686
E-mail; jonathansinclair@eversheds.com

Adam Ferguson, senior associate
Tel: 0845 497 8157
E-mail: adamferguson@eversheds.com