

OPINION

Legal Privilege in the EU: Is the Balance Right?

*Akzo Nobel v Commission*¹

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Legal privilege is intended to promote law-abiding behaviour by allowing business people to seek legal advice without running the risk that the fact of seeking advice causes them prejudice. Legal privilege exists throughout the EU but takes many different forms, and its scope and sophistication is much more developed in countries with legal systems based on common law.

At EU level, legal privilege in competition cases is often crucial in allowing companies to undertake, for example, antitrust compliance programmes, and a distinct EU law of professional privilege has grown up. This law is based both on notions derived from the laws of the Member States and on notions of administrative fairness and efficiency.

It is fair to say that common law lawyers (and many others) find the present scope of legal privilege in EU competition cases to be shockingly narrow.

This has been exacerbated by the fact that on 17 September 2007 the EU's second highest court, the Court of First Instance ('CFI'), upheld the narrow scope of legal professional privilege in relation to documents seized in the context of EU competition cases. In particular, the CFI declined to extend legal privilege in EU competition cases to in-house counsel. The CFI also declined to extend legal professional privilege to outside lawyers who are not members of a Bar or Law Society in an EU Member State, on the grounds that this was not relevant to the case in hand.

The background is as follows. In February 2003, the European Commission, assisted by representatives of the UK Office of Fair Trading, dawn raided the premises of Akzo Nobel Chemicals Limited and Akcros Chemicals Limited (collectively referred to as 'Akzo') seeking evidence of anti-competitive behaviour. Akzo brought two main issues before the CFI: first, a request for annulment of the Commission's 2003 decision ordering the dawn raid investigation; and second, a request for annulment of the Commission's decision rejecting claims for legal privilege.

The CFI stated that an action for annulment is only admissible if the disputed act produces binding legal effects so as to affect the interests of the applicant by bringing about a distinct change in their legal position. In this case, the decision ordering the inspection did not produce such legal effects and, therefore, the action for annulment was inadmissible. The decision merely authorised the dawn raid, whereas the legal privilege issues disputed by Akzo clearly arose afterwards.

The CFI found the actions relating to the Commission's rejection of legal privilege to be admissible on the premise that where an undertaking relies on legal privilege to oppose the seizure of a document, the decision to reject that request produces legal effects for the undertaking by bringing about a distinct change in its legal position. On the substantive issues, the CFI provided the following clarification.

An undertaking is not required to reveal the contents of a disputed document to the Commission in order to justify legal privilege protection, provided that the undertaking produces relevant facts to support its position (such as the author of the document, for whom it was intended or the objective and context of the document). Alternatively, a cursory look at the document may provide sufficient information to satisfy the Commission of the legal privilege status. However, an undertaking is not required to allow the Commission even a cursory look at the document if it considers that this would be impossible without revealing the content of the document. Again, the undertaking must provide reasons for any refusal.

The CFI found that the Commission had infringed the procedure for legal privilege protection, as the Commission had effectively forced Akzo to allow it a cursory look at certain disputed documents. Akzo's representatives had claimed, with supporting justification, that a cursory look would not enable the Commission to assess the status of the documents without giving them the opportunity to read the contents. However, the Commission effectively compelled Akzo's compliance by emphasising the penalties for obstruction of an investigation.

Where the Commission considers that a certain document does not fall within the scope of legal privilege, it may place a copy of that document in a sealed envelope and take it away at the end of the investigation pending subsequent resolution of the dispute. However, the Commission is not entitled to read the disputed document

¹ Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v The Commission, Joined Cases T-125/03 and T-253/03, CFI 17 September 2007.

before adopting a decision enabling the undertaking to appeal the matter to the CFI. The CFI found that in this case the Commission had infringed the legal privilege procedure by placing the disputed documents on the file, without Akzo having the opportunity to apply to the court to prevent the Commission from reading them.

The CFI also followed existing precedent in holding that:

- Preparatory documents, even if not exchanged with an external lawyer or created for the purpose of being sent to a lawyer, may nevertheless be covered by legal privilege provided that they are drawn up exclusively for the purpose of seeking legal advice from a lawyer in exercise of the rights of defence.
- However, the mere fact that a document has been discussed with a lawyer is not sufficient to afford it such protection.
- The fact that a document has been put together under a competition law compliance programme is not sufficient, by itself, to grant that document legal privilege protection.
- Communications with in-house lawyers, that is, legal advisers bound to their clients by a relationship of employment, are expressly excluded from protection under legal privilege.

In a sense, the CFI's recent judgment merely confirms long-standing jurisprudence relating to the scope of legal privilege in EU competition cases. Therefore, it might seem reasonable to argue that the current system has at least the merit of being well understood and that practices do not need to be changed.

This is too rosy a picture

First, in-house counsel advising on antitrust matters have become much more widespread and sophisticated since the EU rules on legal privilege were first established. There are clearly benefits in having close contacts between the lawyer and the business person in terms both of access and understanding company politics. The rule that only communications from external counsel can benefit from legal privilege undermines the relationship that in-house counsel develop with their 'clients' and imposes the presence of a third party on them. This can be both unnecessary and inefficient and the choice should be left to the company.

Second, antitrust enforcement is increasingly harmonised and co-ordinated around the world. It is one-sided and unfair to prevent business people from fully involving their non-EU counsel in their legal affairs. Moreover, there is a considerable risk that the narrow scope of legal privilege in the EU is not fully appreciated and that parties are inadvertently assuming their communications are protected when they are not.

Third, business people turn not only to lawyers for advice in EU competition cases, particularly as competition policy becomes more focused on the effects of any given behaviour. Business people frequently seek the help of accountants, economists and other experts. There needs to be a clear explanation as to why these professionals are unable to have direct and privileged communications with their clients.

Finally, there is a risk that the principles described above will be set in stone, even though both antitrust enforcement practices and the role of in-house counsel move on. This would clearly be regrettable. However, not enough cases come before the Community courts to give sufficient confidence that this issue can be allowed to be developed on a case-by-case basis. Rather, the Commission needs to step in and conduct a formal and transparent consultation process with the objective of adopting legislation at the end of that process.