

Legal privilege in-house counsel rejected again

AKZO decision of the EC Court of First Instance denies legal privilege to in-house counsel, but extends scope to certain internal documents.

On 17 September 2007, the Court of First Instance issued judgement on the scope of legal professional privilege protecting the confidentiality of communications between in-house counsel and their clients in competition law proceedings.

One of the main questions was whether the personal scope of the legal privilege should be extended to the protection of communications between a company and its in-house counsel. In earlier case law (*AM&S*), the Court of Justice expressly held that this protection only applies to the extent that the lawyer is independent, that is to say, not bound to his client by a relationship of employment, and expressly excluded communications with in-house lawyers. The Court of First Instance in this decision refused to extend the scope of the protection beyond the communications with an external lawyer, notwithstanding the fact that it acknowledges that the role of in-house counsel and the protection of communications with such lawyers is relatively more common today than when the judgment in *AM&S* was handed down. According to the Court, it is however not possible to identify trends which are uniform or have clear majority support in that regard in the laws of the Member States. The evolution of competition law since that judgment also does not justify an alteration of that case law. Consequently, the Court held that the exchange of e-mails between a member of AKZO Nobel's legal department should not be covered by the protection of confidentiality of communications between lawyers and their clients.

In another respect, however, the Court did extend the scope of the legal privilege, as regards the types of privileged documents. In earlier judgements, the Court had limited the documents covered by legal privilege to communications made for the purposes of the exercise of the client's rights of defence that emanate from independent lawyers. This was meant to cover all written communications exchanged after the initiation of a competition law proceeding and earlier written communications which have a relationship to the subject-matter of that procedure. In the *Hilti* decision, legal privilege was also accepted for internal notes circulated within an undertaking which are confined to reporting the text or the content of communications with independent lawyers containing legal advice.

In the AKZO case, the Court agreed to a further protection of internal notes. Internal company documents, even if they have not been exchanged with a lawyer or have not been created for the

purpose of being sent to a lawyer, may nonetheless be covered by protection of confidentiality of communications between lawyers and their clients, provided that they were drawn up exclusively for the purpose of seeking legal advice from a lawyer in exercise of the rights of defence. The exclusive aim of seeking legal advice is interpreted restrictively by the Court. The existence of this exclusive aim should follow from the text of the preparatory document. The mere fact that a document has been discussed with a lawyer is not sufficient to give it such protection. The Court added that the fact that a document has been put together under a competition law compliance programme does not suffice by itself to confer protection on that document.

Apart from these decisions relating to the scope of the legal privilege, the Court made an important statement concerning the procedure relating to legal privilege claims during an investigation at the premises of a company. The Court found that the Commission had infringed this procedure, first, by forcing the companies to allow it a cursory look at certain documents, even though their representatives claimed, and provided supporting justification, that such an examination would require the contents of those documents to be disclosed. Secondly, an infringement was found in the fact that the Commission had read certain documents without having given the companies the opportunity to contest the rejection of their claim to protection in respect of those documents before the Court of First Instance.

The lessons to be learned from the AKZO decision are that it is important to always indicate on communications with external lawyers that it concerns privileged correspondence with a view toward obtaining competition law advice. Internal documents that are made in preparation of such communications should make explicit reference to the sole aim of obtaining external legal advice or should make clear that it concerns a report of the text or the content of communications with independent lawyers containing such legal advice.

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