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EU Court Clarifies Limits on Legal Privilege in European Commission Investigations

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Many practitioners recognize the EU Court of First Instance's (CFI) recent *Akzo Nobel* judgment for the court's failure (or refusal) to extend privilege protection to communications between in-house counsel and their employers. The decision runs deeper than that, however: it provides important guidance to companies under investigation by the European Commission that wish to successfully invoke legal privilege and deny the Commission access to certain internal documents.[i]

Legal privilege in the European Union and the issues in *Akzo*

The scope and conditions of legal privilege are not harmonized in the European Union and are, in principle, a question of national law in each Member State. EU Member State privilege rules do not apply to EC investigations of potential EU competition violations, however. Accordingly, the European courts have developed separate EU rules governing such investigations.

Akzo is only the third case concerning legal privilege to come before the EU courts, and therefore has provided a rare opportunity for the courts to provide guidance concerning the scope and conditions of legal privilege for EC investigations.

The CFI made three important holdings in *Akzo*:

- Communications between in-house counsel and their employers are not protected by legal privilege.
- Internal documents prepared by a company specifically and exclusively for seeking legal advice from outside counsel are privileged.
- Once a company claims legal privilege, the Commission is prohibited from taking even a cursory look at the document concerned if cursory review would reveal the document's substantive contents.

Communications with in-house counsel are not covered by legal privilege

In 1982, the Court of Justice held in *AM&S* that only communications with independent lawyers could be protected by legal privilege.[ii] The European Commission had interpreted this to mean that communications with in-house counsel (even members of the local bar) were not protected

because in-house counsel are employees of their client and therefore not independent counsel.

Over the years, the Commission had come under increasing pressure to reconsider its position, particularly since many Member States have extended legal privilege to in-house counsel under their national rules. In addition, many argued that the EU competition rule's new emphasis on company self-assessment of agreements and practices militated for extending the legal privilege to communications between companies and their legal departments. In-house counsel play a key role in fostering a compliance culture, and denying them legal privilege creates a major impediment to establishing the kind of trust necessary for a legal department to function effectively within a company. The Commission, however, has never wavered in refusing to accept claims of legal privilege for in-house counsel.

The Court of First Instance in *Akzo* has fully backed the Commission's position. The judgment rebuts in detail each of the main arguments for extending legal privilege to in-house counsel. The court expressed no sympathy for in-house counsel's plight. Unless the Court of Justice reverses,[iii] there is little room to hope that the CFI will expand the legal privilege any time soon.

Documents prepared for outside counsel are privileged if prepared specifically and exclusively for purposes of seeking legal advice

Akzo also unsuccessfully claimed legal privilege for documents that it had prepared in connection with an internal investigation program. The company had established the program in consultation with outside counsel to determine whether it was complying with competition laws. Contrary to the rules of this program, however, Akzo employees had apparently first used the documents for internal discussions before forwarding them to outside counsel.

The court held that, given the circumstances, these documents were not privileged because Akzo had failed to demonstrate that they had been prepared **exclusively** for purposes of seeking outside legal advice. The fact that Akzo later provided the documents to outside counsel did not make them privileged.

Akzo makes clear that legal privilege will extend to a company's internal documents that were prepared before any communication with the company's external lawyers only when the internal documents were prepared specifically and exclusively for purposes of seeking legal advice from outside counsel.

How to claim legal privilege: limits to the Commission's investigatory powers

When the Commission conducts a dawn raid of a company's premises, it has the right to review and obtain copies of all company records that relate to the subject matter of its investigation. This right is, however, subject to legal privilege. The company invoking legal privilege must explain the grounds for and substantiate its claim, but it need not reveal the contents of the document for which it claims privilege. The company may--but is not required to--let the Commission conduct a cursory examination of a document (e.g., by showing the Commission that the document comes from, or is addressed to, an independent lawyer). If the Commission and the company disagree about the privilege status of a document, the company may go to court to challenge the Commission's order

to produce the document. To ensure that the document is protected pending the challenge, the company must request interim relief from the court as soon as possible within the two-month deadline to challenge the validity of the order.

The European courts have held that the Commission is prohibited from compelling the company to reveal the contents of the document until the end of the two-month filing deadline. In the meantime, the documents can be placed in a sealed envelope to preserve them.

During its dawn raid at Akzo's premises, the Commission refused to accept Akzo's claims that certain documents might be privileged and demanded to see the documents. (The UK Office of Fair Trading, which was also present at the dawn raid, supported the Commission's position.) The Commission refused Akzo the opportunity to go to court to keep the Commission from reviewing the documents. Akzo gave in, and the Commission examined the documents.

The CFI ruled that the Commission had infringed Akzo's rights by denying it an opportunity to seek privilege protection from a court. Except for a partial award of Akzo's legal costs, however, the court found that the Commission's actions should go unsanctioned, given that the court ultimately held that the documents in question were not covered by legal privilege.

The CFI also held that if a company seeks to invoke privilege in an abusive manner, the Commission can deem the company's behavior an aggravating circumstance (refusal to cooperate) in its ultimate fining decision.

Lessons from *Akzo*

The *Akzo* judgment confirms that legal privilege is a valid base defense to refuse the Commission access to lawyer-client communications. The court also made clear, however, that in close cases, the legal privilege will be narrowly construed in favor of the Commission's investigatory powers. For example, the court's requirement that internal documents must be prepared for the **exclusive** purpose of seeking outside legal advice is stricter than the rule in the United States, where a document generally is deemed privileged if its **primary** purpose is to seek legal advice.

Whether to extend legal privilege to in-house counsel communications was, by contrast, not a borderline issue but a question of principle. The court's reasons for refusing to extend the privilege are highly questionable. The court gave short shrift to the fact that many Member States have extended the privilege to in-house counsel because they believe that in-house counsel have the requisite independence and integrity to be treated like external counsel. The judgment raises the question whether national competition authorities in these Member States will now be authorized to review in-house counsel communications that the Commission has seized and provided to them, even though they would not have been authorized to seize the documents themselves under their own national legal privilege rules.

From a practical standpoint, the judgment emphasizes that companies seeking to maintain the privilege must be extremely disciplined and precise in managing documents during compliance efforts. Thus, all documents that might be subject to a privilege claim should be clearly marked as a privileged communication. (For emails, it is a good practice to indicate privilege in the subject line.)

Most EU competition lawyers routinely mark all of their client communications with a privilege notation, but companies often overlook this basic precaution. Also, if possible, all potentially privileged documents should be kept separate from normal business records.

In-house counsel play a critical role in ensuring competition compliance, and they need to continue to play that role. They are well advised, however, to take precautions, including making sure that work for which their company intends to claim privilege can be fairly characterized as preparatory to a request for outside legal advice, and ensuring that it can be demonstrated that this was the sole purpose of the work. This is particularly important in the context of internal compliance investigations, where outside counsel will need to play a central role (with in-house counsel clearly preparing documents only for outside counsel's benefit). It is crucial to keep these rules in mind during major transnational investigations. This is particularly true for investigations having a transatlantic dimension, given that US and EU privilege rules diverge radically on this point.

The *Akzo* case also confirms that companies wishing to claim legal privilege should do so at the earliest possible moment in the investigation and should not let the Commission review--no matter how cursorily--the contents of the documents concerned. This is particularly crucial given that such cursory review may constitute a waiver of legal privilege in other jurisdictions, including the United States. If the Commission refuses to accept a privilege claim, the company must be prepared to go to court to defend its rights. To avoid allegations that the company has abused its right to claim privilege, it is important to obtain legal advice before finally determining to refuse access to privileged documents. To the extent possible, the company should segregate in separate physical and computer files all privileged communications, which should facilitate control over the company's assertions of privilege during a Commission investigation.

The *Akzo* judgment may be appealed to the Court of Justice, specifically on the crucial question of the status of in-house counsel communications. In the meantime, however, *Akzo* sends a clear signal that companies cannot take the legal privilege for granted in the European Union.

[i] Joined cases T-125/03 and T-253/03, *Akzo Nobel v. Commission*.

[ii] Case 155/79, *AM & S v. Commission*, [1982] ECR 1575.

[iii] An appeal may be brought within two months to the Court of Justice. The Court of Justice can only review the first instance judgment on issues of law, not of fact.

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