

Briefing Note

Legal Professional Privilege and In-house Lawyers



Azko Nobel Chemicals Ltd and Akcros Chemicals Ltd –v- European Commission

The Court of Justice of the European Union has handed down an important judgment in *Azko Nobel Chemicals Ltd and Akcros Chemicals Ltd –v- European Commission* on the extent to which legal professional privilege attaches to written communications between in-house lawyers and their employers.

Legal professional privilege is a right to privacy belonging to persons and corporations in connection with communications between them and their lawyers containing or relating to legal advice. Under English common law, this right extends to communications between an in-house lawyer and his or her employer as well as to communications between a lawyer in private practice and his or her client.

However, the Court of Justice of the European Union has now conclusively confirmed a decision in September 2007 of the General Court that legal professional privilege does not extend to written communications between an in-house lawyer and his or her employer in respect of investigations by the European Commission.

The Facts

In February 2003 Azko and its subsidiary Akcros were investigated by Commission officials in conjunction with the Office of Fair Trading, in connection with alleged anti-competitive practices. The officials seized a large number of documents during the course of a raid on the companies' premises, including written internal communications and notes prepared by and for their in-house lawyers.

The companies claimed that certain documents were covered by legal professional privilege and commenced actions for their return. The companies' actions were dismissed by judgment of the General Court of 17 September 2007.

The companies appealed to the Court of Justice in connection with two documents, being e-mails exchanged between the Director General of Akcros and Mr S., a member of the Netherlands Bar employed in the legal department of Azko. The first e-mail was a request for comments on a draft letter to be sent to a third party. The second e-mail contained changes to the wording of the draft letter.

The Decision of the Court of Justice of the European Union

The case was subject to existing case law as set out in *AM & S Europe –v- European Commission* [1982] ECR 1575. The companies argued that the Commission had incorrectly interpreted that case and, as an alternative, sought to persuade the Court of Justice that national laws relating to legal professional privilege had evolved sufficiently to justify the Court of Justice ignoring *AM & S Europe –v- European Commission*.

Independence

In rejecting the companies' appeal, the Court of Justice held that for legal professional privilege to apply to communications between a lawyer and his or her client, the lawyer must be independent of the client. In its view the existence of a contract of employment governing the relationship between the lawyer and the client is sufficient to prevent the lawyer being independent.

The Court justified this interpretation by reference to the concept that in advising and acting for a client a lawyer in private practice is subject to his or her professional ethics and obligations and, through compliance with those, collaborates in the administration of justice generally, whereas an employed lawyer may be subject to conflicts between his or her professional ethics and obligations and the aims of his or her employer.

Equality of treatment

The companies argued separately that the differentiation in treatment of lawyers in private practice and in-house lawyers created by this distinction offended against the principle of equal treatment and that the independence guaranteed by the professional ethics and obligations imposed on all lawyers by their respective professional regulatory bodies should be the benchmark for determining how all are treated.

Equal treatment is a general principle of European Union law, as set out in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union. The principle requires that comparable situations must not be treated differently unless such treatment is objectively justified.

However the Court of Justice accepted the Commission's argument that the position of employed lawyers was fundamentally different to the position of lawyers in private practice such that the principle of equality of treatment was not breached by the differentiation of treatment with regard to legal professional privilege.

Evolution of national laws

The Court of Justice also declined to modify the existing case law as it saw no evidence of any tendency amongst national laws within the Union towards the application of legal professional privilege to in-house lawyers.

Other arguments

The Court of Justice declined to find in favour of the companies in respect of a number of other arguments including legal certainty and conferred powers.

Comment

The decision will come as a disappointment but no surprise to in-house counsel throughout the European Union, following the prior opinion given by the Advocate General. It is to be noted that the decision does only impact on the question of legal professional privilege in connection with the exercise of the European Commission's powers over persons and corporations within the Union and primarily that means the implementation of the European Commission's powers relating to competition issues.

So the law on this issue as it stands within national jurisdictions remains unaffected by this decision. In England and Wales that means that written communications between in-house counsel and their employers are covered by legal professional privilege.



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This note does not constitute legal advice but is intended as general guidance only. It is based on the law in force on 14 September 2010.

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