Client Alert.

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The Highest EU Court Reaffirms that Communications with In-House Counsel Are Not Covered by Legal Privilege in EU Competition Proceedings

By Christopher Norall and Jonathan Entrena Rovers

In its September 14, 2010 *Akzo v. Commission*[1] judgment, the EU's highest court, the European Court of Justice ("ECJ"), has ruled—yet again—that internal communications with in-house counsel are not covered by legal professional privilege ("LPP"), even when in-house counsel are members of the bar of an EU Member State. The judgment upholds the General Court's ("GC") September 17, 2007 ruling in the same case[2] and the position originally taken in the ECJ's *AM&S v. Commission*[3] 1982 case law.

The Appellants, supported by several Member States ("MS") and bar organizations, invited the ECJ to rule that changed circumstances since 1982—in particular the adoption by some MS of bar rules specifically confirming LPP to in-house counsel who are members of the national bar, and the move towards a system of competition law self-assessment brought on by Regulation 1/2003—warranted a change in the *AMS* rule. The ECJ declined the invitation, on the ground that the trend towards granting LPP to in-house counsel at national level was not sufficiently "predominant". The judgment thus leaves open the possibility of change at EU level if there is enough change at the MS level.

The dispute dates back to a 2003 cartel investigation where Akzo Nobel and Akcros Chemicals (together referred to as "Akzo") challenged the right of the European Commission ("Commission") to seize two sets of documents. The documents included internal memos and manuscripts regarding Akzo's antitrust compliance program, and two e-mails between the General Manager and the in-house counsel, who was admitted to the Dutch bar.

While the GC's judgment ruled on several issues, the only issue before ECJ was whether the fact that the in-house counsel, although a member of the Dutch bar and entitled to LPP under Dutch law, was an employee of Akzo, was sufficient to render LPP inapplicable in an EU competition law proceeding.

Akzo and the various interveners raised a number of arguments, all of which the ECJ, following the Opinion of

[1] Case C-550/07P, dated September 14, 2010, not yet published.

[2] Cases T-125/03 and T-253/03 [2007] ECR II-3523.

[3] Case 155/79 [1982] ECR 1575.

Advocate General Kokott[4], rejected.

1. *No breach of AM&S rule or principle of equality: lawyers must be fully independent to be eligible for LPP*

The first argument on Akzo's appeal was that the GC "misinterpreted" *AM&S'* requirement that to qualify for LPP, a communication must emanate from an "independent lawyer." Akzo claimed that its in-house counsel should be considered "independent" because he was a member of the Dutch bar and was subject to the same deontological rules and discipline as an external lawyer. The ECJ countered that in-house counsel have a stronger economic dependence on an employer, and a closer personal identification with the company and its corporate strategy, so they have less independence than an external lawyer. Likewise, in-house counsel are in a fundamentally different position than external counsel, so treating them differently does not breach the principle of equality.

2. *No "predominant trend" in EU MS' protection of LPP or relevant change of EU competition law to justify departure from well established AM&S case law*

As in *AM&S*, the ECJ conceded that the definition of LPP in EU antitrust procedures must take into account the principles and concepts common to the laws of the MS. It recognized that protection of company communications with in-house counsel is now more common than when the *AM&S* judgment was handed down. Nevertheless, the ECJ did not find a "predominant trend" towards such protection in the legal systems of the 27 MS and concluded that the situation had not evolved to an extent that would justify a change in case law.

In addition, the ECJ held that the changes in procedural rules made by Regulation 1/2003, in particular regarding the self-assessment of the rule of reason principle in Article 101(3), and the reinforced powers of inspection, do not affect the scope of the LPP for in-house counsel.

3. *Denial of LPP does not violate right of defense or principle of legal certainty*

The ECJ replied to Akzo's invocation of the right of defense that the right to obtain legal advice may be subject to certain restrictions and conditions when in-house counsel are involved (as is the case in many MS), and that this includes restrictions and conditions on LPP.

Akzo claimed that the different treatment of LPP by the EU and some MS gives rise to a breach of the principle of legal certainty. The ECJ responded that the principle of legal certainty does not require that identical criteria be applied to LPP in national and EU inspection procedures and that the undertakings can determine with sufficient certitude their legal rights in light of the powers of each authority concerning the seizure of documents.

4. *No breach of the principles of national procedural autonomy and conferred powers*

The ECJ held that the principle of MS' autonomy to determine their own procedures does not affect EU rules concerning EU procedures. It also rejected an argument that an EU rule defining the scope of LPP in an EU proceeding exceeded the scope of the powers conferred on the EU institutions by the Treaty on the Functioning of the European Union ("TFEU").

[4] Opinion of Advocate General Kokott on Case C-550/07P, dated April 29, 2010.

In sum, the ECJ reaffirmed the position taken in *AM&S* on the ineligibility of in-house counsel for LLP. It did so using language that contrasts the position of in-house counsel with that of outside counsel in terms which are at odds with much corporate practice and which are likely to provoke justifiable criticism. Nevertheless, the ECJ left open the door for future changes to this approach towards in-house counsels' communications, when and if a "predominant trend towards protection under legal professional privilege of communication within a company or group with in-house lawyers [is] discerned in the legal systems of the 27 MS of the European Union." (§ 74).

Due to the limited scope of the appeal, some other important questions concerning the scope of LPP in EU competition law proceedings were not addressed.

The GC's judgment ruled that LPP protects preparatory documents "drawn up exclusively with the purpose of seeking legal advice from a lawyer in the exercise of the rights of defence." This formulation is somewhat imprecise, and may require further litigation to clarify.

An additional important question is whether communication with outside counsel who, although members of a third country bar, are not members of a bar or law society in an EU MS, is protected by LPP. The Courts did not rule on this point as this was not in question in this case, but it remains a key question given the array of worldwide investigations and consequent need for global antitrust legal advice.

Finally, taking into account the case law to date, we list below a number of practical suggestions to maximize the chance of success in claiming LPP in the event of a request for information or an on-the-spot investigation within the EU:

- Clearly label all internal notes and memoranda for which there is a reasonable basis for arguing that they are in preparation for seeking outside legal advice. Using a stamp displaying "prepared for the purpose of seeking the advice of competition law counsel" could be one way of labeling these documents.
- Involve outside counsel in any analysis of possible infringement of EU competition law, and ensure that the file contains a written record of the advice sought and/or given. Communications to outside counsel should be appropriately labeled to assert LPP.
- If possible, keep all materials for which LPP may be claimed in separate files.
- When an investigation occurs, insist on the *Akzo* GC procedure being applied to the letter. The facts of this case are a good example of a tendency by investigators to seek short-cuts which may not respect the rights of the company under investigation.
- Where outside counsel is not a member of an EU bar, it is advisable that the advice be co-signed by a lawyer who is a member of an EU bar.

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