

LEGAL UPDATE

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CASE UPDATE

European Court Denies Legal Professional Privilege to Communications with In-House Lawyers

Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission of the European Communities (Joined Cases T-125/03 and T-253/03)

Executive Summary

The Court of First Instance of the European Communities (the “**European Court of First Instance**”) has ruled that communications between the employees of a company and its in-house counsel are not protected by legal professional privilege in a case involving an investigation by the Commission of the European Communities (the “**European Commission**”) into alleged price-fixing by Dutch chemical company Akso Nobel Chemicals Ltd (“**Akso Nobel**”) and Akcros Chemicals Ltd (“**Akcros Chemicals**”).

Background Facts

In February 2003, the premises of Akso Nobel and Akcros Chemicals (collectively, the “**Companies**”) in the United Kingdom (the “**UK**”) were raided at dawn by officials from the European Commission in connection with an investigation on potential price-fixing in the market for coating and plastics. The investigators perused and seized various internal company documents, despite the Companies’ protestations that legal privilege attached to certain items.

The first set of disputed documents (the “**Set A Documents**”) comprised materials which had been drafted in preparation for obtaining advice from external solicitors. They included a typewritten memo from the general manager of Akcros Chemicals to a superior and handwritten notes referring to contacts with a lawyer, including the lawyer’s name. The memo contained information gathered during internal discussions with other employees for the purpose of seeking external legal advice in connection with a competition law compliance programme. The Set A Documents were examined and put into a sealed envelope as the investigators were unable to reach an immediate conclusion as to the privileged character of these documents.

The second set of disputed documents (the “**Set B Documents**”) comprised handwritten notes made by Akcros Chemicals’ general manager for the purpose of preparing the abovementioned memo as well as e-mails between Akcros Chemicals and Akso Nobel’s in-house lawyer. The investigators took the view that these documents were not protected by legal professional privilege and placed copies on file.

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The Companies' Application to the European Commission

In April 2003, the Companies lodged an application with the European Commission requesting, among other things, for the Set A and Set B Documents to be returned or destroyed. It was the Companies' case that both sets of documents were protected by legal professional privilege. The European Commission ruled against the Companies in May 2003 and indicated that the documents would be added to the European Commission's files.

The Companies filed an appeal to the European Court of First Instance against the European Commission's decision.

Decision of the European Court of First Instance

The court upheld the European Commission's decision, ruling that the Set A and Set B Documents were not protected by legal professional privilege.

The Set A Documents

In accordance with principles established by case law, documents would be protected by legal professional privilege if they emanate from independent lawyers and are made for the purpose of the exercise of a client's right of defence. Documents created exclusively for the purpose of seeking advice from an independent lawyer in the exercise of a right of defence are also protected by legal professional privilege.

The court took the view that the Set A Documents did not meet the above criteria for the following reasons:

- the documents were not written communications with an independent lawyer;
- the documents did not form part of an internal note reporting the content of a communication with an independent lawyer;
- the documents were not prepared in order to be sent to an independent lawyer; and
- the documents were not proven to have been prepared for the exclusive purpose of seeking external legal advice (although evidence was tendered to show that the contents of the documents had been discussed over the telephone with an external lawyer).

The fact that Akcros Chemicals' general manager's memo had been drawn up pursuant to a competition compliance programme was insufficient to attract legal professional privilege. The court observed that such programmes, by their nature, "*often encompass in scope duties and cover information which goes beyond the exercise of the rights of the [sic] defence*".

The Set B Documents

The court ruled that the handwritten notes made by Akcros Chemicals' general manager for the purpose of preparing the memo in the Set A Documents were not privileged for the reasons stated above.

As for the exchange of e-mails with Akso Nobel's in-house lawyer, the court held that they were similarly not privileged because in-house lawyers are not deemed "independent lawyers". The court followed the position taken by the European Court of Justice in Case 155/79 *AM & S v Commission* [1982] ECR 1575, namely, that a lawyer cannot be regarded as independent if he is "bound to his client by a relationship of employment". It is immaterial that the lawyer might be a member of a Bar or a law society or subject to rules of professional ethics or disciplinary procedures.

Position in the UK and Singapore

The UK position as regards communications by in-house lawyers in the context of litigation privilege is set out in the UK Court of Appeal decision of *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No. 2)* [1972] 1 QB 102. Lord Denning M.R. observed as follows:

"... [salaried] legal advisers do legal work for their employer and for no one else. They are paid, not by fees for each piece of work, but by a fixed annual salary. They are, no doubt, servants or agents of the employer ... They are regarded by the law as in every respect in the same position as those who practise on their own account. The only difference is that they act for one client only, and not for several clients ... I have always proceeded on the footing that the communications between the legal advisers and their employer (who is their client) are the subject of legal professional privilege; and I have never known it questioned."

In Singapore, the position in the context of our competition law regime is governed by Paragraph 7.1 of the Competition Commission of Singapore's ("**CCS**") Guidelines on the Powers of Investigations which expressly provides that the power to require the disclosure of information or documents under Part III of the Competition Act does not extend to any communication between professional legal advisers and their clients which would be protected from disclosure in court proceedings on grounds of privilege. Paragraph 7.2 clarifies that "*communications with in-house lawyers ... can benefit from the privilege*".

Comment

This decision of the European Court of First Instance will generate debate about the confidential status of communications between in-house lawyers and their employers. If this decision is adopted as the legal position in Singapore, this will have a significant impact on investigations by the CCS as it will mean that more communications between in-house lawyers and their companies may have to be disclosed in competition investigations and dawn raids. While the CCS guidelines presently recognise legal professional privilege in respect of communications by in-house lawyers, it remains to be seen whether the CCS will change their position going forward in light of the recent development in Europe.

The position in the UK should also be monitored closely to see if it departs from the position taken by the UK Court of Appeal, perhaps by creating an exception to the general rule for competition investigations.

In the meantime, in-house lawyers in Singapore may well have to exercise greater caution with respect to their internal communications. External counsel may have to be more involved in order to preserve legal professional privilege and to provide a more secure basis for asserting the privilege in competition investigations.

If you would like more information about this case or wish to discuss how it may potentially affect you or your business, please feel free to contact the dispute resolution lawyers in Drew & Napier LLC (please refer to the Directors' Profiles on our website), or either of the following lawyers:

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