

INFORMATIVE NOTE

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EU AND COMPETITION LAW

ECJ CONFIRMS THAT LEGAL PROFESSIONAL PRIVILEGE DOES NOT COVER IN-HOUSE LAWYERS

On 14 September the European Court of Justice (“ECJ”) issued its much awaited judgment on the Akzo Case¹, confirming the EC rule that communications with in-house lawyers – unlike those exchanged with external lawyers – are not protected by Legal Professional Privilege (“LPP”), and can thus be used to support infringement proceedings.

With this ruling, the ECJ has confirmed the position defended by the Commission and the General Court, and has followed the Opinion of Advocate General Kokott, issued on April 2010.

Background

The EC rule regarding legal privilege was established by the ECJ as long ago as 1982, by its judgment in the AM&S case², and provides that legal professional privilege applies only to communications (i) which relate to the client’s “right of defence” and (ii) which emanate from an “independent lawyer”, i.e., “one who is not bound to his client by a relationship of employment”. Communications which satisfy both requirements cannot be seized and examined by the Commission and can thus not be used within the scope of infringement proceedings.

¹ Decision of 14.09.2010 in Case C-550/07 P – Akzo Nobel Chemicals Ltd and Akros Chemicals LTD v European Commission.

² Case 155/79 – AM&S Europe Ltd v Commission of the European Communities.

This rule was based on the view that external lawyers are part of the administration of justice and on the fact that there was a significant discrepancy between Member States on the precise rules of privilege, not all of them treating in-house counsel as a lawyer for the purpose of claiming privilege for the communications with their client/employer. Thus, EU law has always respected LPP between external EU-qualified lawyers and their clients, but has never accepted that it should also cover communications between an in-house lawyer and his employer. In the Akzo case, the ECJ was required to reassess this rule, thirty years after it was first laid down.

The judgement in Akzo

The case regarded a set of e-mails exchanged between the companies and their in-house lawyer (a member of the Netherlands Bar), which were seized by the EC Commission within the scope of a dawn-raid investigation

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conducted in the premises of Akzo and of Akcros in February 2003. The Commission examined these documents and included them in its files. The General Court having upheld the Commission's decision to use these documents, and the companies having appealed the decision to the ECJ, this was a much awaited moment, in which the Court had either to confirm the pre-existing rule or to change it and extend LPP to in-house counsel.

Despite the several arguments put forth by the companies, the Court has decided not to extend LPP to in-house counsel.

The ECJ supported this decision by arguing that the "in-house lawyer does not enjoy a level of professional independence comparable to that of an external lawyer", due to his "economic dependence and the close ties with his employer". The Court also considered that the legal situation in the Member States has not evolved since the AM&S case to an extent that would justify a change in the case-law, as there is "no predominant trend towards protection under LPP of communications within a company or group with in-house lawyers (...) in the legal systems of the 27 Member States".

The ECJ noted that the evolution of procedural regulations in competition law, requiring more self-assessment – and thus, according to the appellants, more involvement from in-house counsel – does not warrant a change in the case-law.

Finally, the Court underlined that a

company which seeks advice from a lawyer must accept the restrictions and conditions applicable to the exercise of the legal profession: when it chooses to seek advice from its in-house lawyer, "it is not dealing with an independent third party, but with one of its employees, notwithstanding any professional obligations resulting from enrolment at a Bar".

Consequences

In what specifically regards Portugal, it should be mentioned that – at least in principle – the non-extension of the LPP to in-house counsel is not applicable to investigations led by the Portuguese Competition Authority (PCA). In fact, by judgement of January 2009, the Court of Commerce had explicitly recognised that within the scope of purely-national competition investigations, the documents of qualified internal lawyers (or addressed to them) are considered privileged and cannot be inspected or seized by the PCA's inspectors.

However, the judgement of the ECJ in the Akzo case determines that this is not the case in what regards investigations led by the EC Commission: in such situations, companies must take into account that all their internal communication, including correspondence with in-house counsel may be seized by the European Commission or by the PCA, when this Authority is not leading the investigation but is providing its assistance to the Commission in order to apply EU competition law.

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