Akzo: CFI denies in-house counsel legal privilege, but clarifies procedure and recognizes privilege for certain compliance audits

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On September 17, the European Court of First Instance ("CFI") issued judgment in AKZO v. Commission.1 The case concerned the question whether legal professional privilege ("LPP") attaches to communications from in-house legal counsel providing legal advice, or client communications with in-house counsel requesting such advice.

- The CFI held that privilege does not cover in-house counsel communications, even where counsel is a member of a Member State bar association – the Dutch Orde van Advocaten in this case.
- The CFI explicitly refused to clarify the position of non-EU in-house or outside lawyers (whose communications are not recognized as privileged in the EU).
- On the other hand, the judgment restricts the right of Commission officials to cast a "cursory glance" on documents during dawn raids. They are allowed to look at letterhead, signatures, and markings on documents, but are not allowed to scan or read the documents. Undertakings are entitled to refuse permission for the Commission officials to look at documents if appropriate justifications are provided. Disputed documents must be placed in sealed envelopes pending decision on their alleged privileged nature.
- Also, the CFI recognized that compliance audit documents are covered by LPP, if prepared "exclusively" for the purpose of obtaining legal advice from outside counsel "in exercise of the rights of defense."

The Akzo case, together with Microsoft,2 are the last judgments rendered by President Vesterdorf of Denmark (who issued an interim order in the Akzo case) and Garcia-Valdecesas y Fernandez of Spain (who was the reporting judge in the case), both of whom retired on September 17, 2007.

The Akzo case follows many years' work by the European Company Lawyers' Association ("ECLA", represented pro bono by Cleary Gottlieb) to overturn the AM&S rule, which reserved LPP to legal advice provided by outside counsel who were members of Member State bar associations. An appeal is being considered.

I. BACKGROUND

The right to consult the lawyer of one's choosing without fear of disclosure or breach of confidentiality is a fundamental right of law recognized by all modern legal systems, including the legal systems of all EU Member States. The corollary of that right is that documents prepared for the purpose of seeking legal advice, or in contemplation of pending litigation are privileged and may not be disclosed to third parties, subject to certain conditions. The question before the CFI was whether in-house counsel legal communications are covered by LPP, and whether, as ECLA argued, that as a policy matter it would be more effective and efficient for the Commission and the European courts to empower in-house counsel to play a stronger role in compliance.

A. DENIAL OF IN-HOUSE COUNSEL PRIVILEGE IN AM&S V. COMMISSION

LPP for outside counsel was recognized by the European Court of Justice ("ECJ") in 1982 in what remains the leading case on the subject: AM&S Europe Ltd. v. Commission ("AM&S").3 In recognition that Community law derives, in part, from the legal interpretation of the laws and principles of jurisprudence in the Member States, the ECJ stated that "any person must be able, without constraint, to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it" and, as such, "certain business records are of a confidential nature" and should not be disclosed to third parties.4

The right to LPP, however, is not absolute. In AM&S, the ECJ held that the right to LPP should be tempered by certain conditions. First, the documents in question must have been created for the purpose and in the interests of the client's rights of defense.5 Second, such communications must involve independent lawyers who were members of the Bar of a Member State.6

The ECJ's definition of "independence" in AM&S has been the subject of much discussion over the last 25 years. The ECJ stated that for a document to be covered by LPP, it must relate to legal advice being sought from "an independent lawyer, that is to say one who is not bound to his client by a relationship of employment" and in doing so, the ECJ limited the application of LPP to outside counsel.

Finally, the ECJ sought to establish a procedure by which LPP could be protected during the course of a Commission inspection. If an undertaking claimed LPP over a document, it was obliged to provide the Commission with "relevant material of such a nature as to demonstrate that the communications fulfill the conditions for being granted legal protection … although it is not bound to reveal the contents of the communications in question."7 If the Commission considered that such evidence was not provided, the document would be placed in a sealed envelope until the dispute was resolved. Such disputes were to be resolved by the European courts.

B. FACTS OF THE AKZO CASE

On February 12-13, 2003, Commission officials, assisted by representatives of the UK Office of Fair Trading ("OFT") raided the premises of Akzo, taking copies of a considerable number of documents. During the inspection, a dispute arose in relation to five documents. The first document, a typewritten internal memorandum prepared by Akzo, contained information obtained by the general manager for the purpose of obtaining legal advice from outside counsel in relation to Akzo's competition law compliance program. The second document was a copy of the same memorandum with handwritten notes made during a telephone conversation with outside counsel. As the Commission officials were unable to reach a final conclusion at that time as to whether the two documents were covered by LPP, they were placed in a sealed envelope and taken by the Commission pending resolution of the dispute ("Set A"). Despite Akzo's objections, the Commission considered, however, that the other three documents ("Set B"), consisting of internal notes used to prepare the memoranda in Set A, and two emails exchanged between the general manager and Akzo's in-house counsel (a member of the Dutch bar), were not privileged. Accordingly, copies of the three documents in Set B were placed directly in the Commission's file. The Commission later adopted a decision rejecting Akzo's request for the return of the documents in Sets A and B, and found that the documents in Set A were not covered by LPP.

Akzo commenced this action by way of two applications: the first seeking an annulment of the Commission's decision ordering the investigation and the return of the disputed documents, and the second seeking an annulment of the Commission's subsequent decision to reject Akzo's request for protection of those documents on grounds of LPP.

Due to the importance of the issues, several organizations intervened as interested third parties in support of Akzo: the Council of the Bars and Law Societies of the European Union ("CCBE"); the Algemene Raad van de Nederlandse Orde van Advocaten (the Netherlands Bar Council or "NOVA"); ECLA; the American Corporate Counsel Association ("ACCA"); and the International Bar Association (the "IBA").

Akzo sought interim measures. On October 30, 2003, Judge Vesterdorf partially granted interim relief in an Order providing detailed reasons as to why LPP should be recognized for in-house counsel.8 While the ECJ eventually annulled the order, it did so on grounds unrelated to Judge Vesterdorf's reasoning.9

C. RECENT EUROPEAN DEVELOPMENTS

Although the main action commenced in 2003, it has taken the court some time to consider the case. During this time, two major developments occurred that had an impact on the case.

- Since Akzo lodged its applications, the European Union has grown from 15 to 27 Member States. With the accession of the new Member States, the nine Member States recognizing in-house counsel LPP were suddenly in the minority.10
- Another equally significant development was the entry into force of Regulation 1/200311 in 2004 that introduced significant changes in the application of European antitrust law. The removal of ex ante notification of agreements and the creation of a leniency program have increased the burden on in-house counsel, who are now obliged to be more knowledgeable on competition law compliance. In the context of a global trend toward the increased regulation of commerce (see e.g., Sarbanes-Oxley), modernization of EC competition law has meant that the role of in-house counsel has become ever more critical to the proper functioning of all companies.

ECLA and the other interveners argued that these developments mean that the time was right for the court to revisit the principles established in AM&S and assess whether the boundaries set by the ECJ were still appropriate today.

II. THE JUDGMENT

A. IN-HOUSE COUNSEL DENIED LPP

In AM&S, the ECJ held that only documents concerning an independent lawyer (i.e., one that is not "bound to his client in a relationship of employment") are covered by LPP. In the instant case, Akzo, NOVA, and the CCBE took the position that in-house counsel, who are members of a Bar or Law Society, are subject to the same rights and obligations as independent lawyers. ECLA addressed the more difficult point concerning the treatment of in-house counsel who, due to rules in their home jurisdictions, cannot

be members of their respective Bars. ECLA argued that if these lawyers can show that they are subject to the rules of equivalent associations that provide equivalent systems of professional ethics and disciplinary oversight, they too should be covered by LPP.

The court made clear that it was for the ECJ, and not for the CFI, to overturn AM&S. It emphasized that the ECJ in AM&S expressly and deliberately excluded inhouse counsel communications from protection under LPP. The Akzo court thus reiterated the AM&S test that only legal advice provided "in full independence," which it identified as "that provided by a lawyer who, structurally, hierarchically and functionally, is a third party in relation to the undertaking receiving that advice," would be protected by LPP.12

The CFI acknowledged that the situation had changed since AM&S, but not sufficient to justify departure from AM&S: "even though it is the case … that specific recognition of the role of in-house lawyers and the protection of communications with such lawyers under LPP is relatively more common today than when the judgment in AM&S was handed down, it is not possible, nevertheless, to identify tendencies which are uniform or have clear majority support in that regard in the laws of the Member States."13

Similarly, "even if the adoption of Regulation No 1/2003 and of the Commission Notice on Immunity from fines … may have increased the need for undertakings to examine their conduct and to define legal strategies in respect of competition law with the help of a lawyer who has in-depth knowledge of the particular undertaking and of the market in question, the fact remains that such exercises of self-assessment and strategy definition may be conducted by an outside lawyer in full cooperation with the relevant departments of the undertaking, including its internal legal department."14

The CFI, agreeing with the Commission, also rejected arguments put forth by ACCA that AM&S discriminated against non-Community lawyers as LPP protection applied only to lawyers entitled to practice in a Member State. The CFI noted that such arguments were "not at all relevant to the present proceedings."15

B. DAWN RAID PROCEDURE CLARIFIED FOR CLAIMING LPP

Akzo claimed that the Commission violated the AM&S procedure for protection under LPP during its inspection. The Commission routinely takes a "cursory glance" at disputed documents in the context of an inspection to ascertain whether, in the Commission's view, they are covered by LPP. If a cursory glance revealed that, in the Commission's view there was no doubt that the documents were not covered by LPP, the documents are copied and added to the Commission file (as was the case, the Commission argued, with the Set B documents). If doubts as to the application of LPP persist after a cursory glance, the documents are placed in a sealed envelope pending independent resolution of the dispute (as was the case with the Set A documents).

The CFI considered that Commission officials were precluded from taking even a "cursory glance" at documents over which an undertaking claims LPP, provided that the undertaking: (i) considers that such a cursory glance would be impossible without revealing the content of those documents (which is possible if the letterhead properly identifies the document as coming from legal counsel, or if the documents are properly marked); and (ii) presents Commission officials with relevant material to demonstrate the privileged nature of such documents. The undertaking is not required, however, to disclose the content of such documents.16 The court suggested that, in such circumstances, undertakings might provide the Commission with information such as the author of the document, the addressee, the duties and responsibilities of each of the correspondents, the objective and the context in which the document was drafted and/or filed, and any related documents.17

The CFI concluded that the Commission should have neither glanced at nor read the disputed documents without giving Akzo "an opportunity to contest the rejection of their claim to protection in respect of those documents before the Court of First Instance."18 However, the CFI found that this infringement "has not unlawfully deprived the applicants of that protection in respect of the disputed documents, since … the Commission did not err in deciding that none of those documents fell within the scope of that protection."19 Nonetheless, the court ordered the Commission to pay two-fifths of the applicant's costs due to procedural "irregularities" in this case.

ECLA had suggested in its submissions that the Hearing Officer might be an appropriate arbitrator of the "sealed envelope" process.20 Article 3 of the Hearing Officers' Mandate provides that "the hearing officer may present observations on any matter arising out of any Commission competition proceeding to the competent member of the Commission."21 Accordingly, the Hearing Officer could play a vital role as arbitrator in disputes involving access to the Commission file.22 Unfortunately, the CFI did not address this issue.

C. APPLICATION OF LPP UNDER AKZO TO ANTITRUST COMPLIANCE AUDITS

As discussed above, the European courts have thus far restricted their consideration of LPP to documents requesting or providing outside counsel legal advice, or prepared in contemplation of pending litigation.23 In this case, the Set B documents included internal compliance audit notes used in the preparation of the memorandum requesting legal advice in Set A. Akzo, ECLA, and others argued that if the Commission wants to encourage competition law compliance, such documents should be privileged.

The court recognizes that compliance audit documents may be covered by LPP, provided that they were drawn up "exclusively" for the purpose of seeking legal advice from outside counsel "in exercise of the rights of the defence."24 This is the case even if such documents were not exchanged with outside counsel or were not created for the purpose of being sent physically to outside counsel.

Therefore, documents prepared before the Commission commences an investigation of an undertaking may be privileged if such documents were relevant to the Commission's later investigation, or if they provide input for a later request for outside counsel legal advice. In this case, the court considered that the Set B documents, used for the purpose of preparing the Set A documents, were not protected under LPP because the Set A documents were not themselves protected.

There is some concern that the Commission will narrowly interpret the criterion of "exclusive purpose" and "in exercise of the rights of the defence." Companies will wish to ensure that outside counsel is involved in compliance audits, and that internal audit documents are marked appropriately, and not intended for any purpose other than obtaining legal advice from outside counsel.

III. CONCLUSION

By refusing in-house counsel legal privilege, even where in-house counsel are members of a bar or professional organization with properly enforced and appropriate ethical rules, the CFI missed an opportunity to improve the effectiveness and efficiency of the antitrust compliance process. Similarly, it is regrettable that the CFI did not use the opportunity to state in an obiter dictum that communications from non-EU outside counsel should be privileged.

The CFI's procedural clarifications are welcome, in particular the clear finding that the Commission is not allowed to review or take a "cursory look" at documents during a dawn raid if the undertaking can provide preliminary indications that such documents are privileged.

Also welcome is the CFI's recognition that compliance audit documents can be privileged, so long as they are intended to seek outside counsel legal advice. There is some concern, however, that the criteria will be interpreted too narrowly to be practical, but undertakings can proceed with compliance audits with some comfort provided they are properly organized, documents are appropriately marked, and outside counsel is involved.