

0.

Akzo Nobel v Commission: CFI confirms that legal professional privilege in competition cases does not apply to in-house lawyers

Berwin Leighton Paisner

<http://www.lexology.com/library/detail.aspx?g=c704e272-5c4f-46dd-b7be-25423da55bd9>

European Union

September 17 2007

The European Court of First Instance (CFI) has upheld prior case law, finding that, in European Commission antitrust investigations, legal professional privilege does not apply to internal communications with in-house lawyers. The CFI's decision also provides some guidance on how the Commission must treat documents discovered during a dawn raid that may be privileged. The case stems from a dawn raid by the European Commission and the UK's Office of Fair Trading in February 2003 during which Akzo Nobel contested the Commission's ability to review and have access to certain documents it believed were privileged, including emails exchanged between a manager and Akzo Nobel's in-house counsel.

In-House Lawyers & Legal Professional Privilege

The CFI's decision acknowledges the indisputable right to consult independent legal advisers and exercise one's full rights of defence. It also recognises that during the course of the European Commission's investigations, including dawn raids, the confidentiality of communications between lawyers and their clients must be protected. Internal company documents may be protected, even if they had not been exchanged with a lawyer or had not been created to be sent to a lawyer, so long as they were exclusively drawn up to seek legal advice from a lawyer in the exercise of the rights of defence. However, merely discussing a document with a lawyer is insufficient to receive such protection.

The CFI followed the European Court of Justice's ruling in the 1982 AM & S case, reserving such privilege to communications with independent lawyers not employed by their clients as in-house lawyers. While not expressly mentioned in this case, the AM & S case also reserves such privilege to communications with independent counsel affiliated with an EU bar association. The CFI's ruling came despite the intervention of several European and American bar associations and will be seen as a defeat for those seeking to extend such privilege to in-house lawyers, as already afforded in many major jurisdictions.

Dawn Raid Procedure

The CFI clarified the procedures for companies and competition authority officials to follow during a dawn raid concerning disputed documents. Companies can demonstrate the confidential nature of documents without revealing those documents' contents. Companies can refuse to give officials even a cursory look at the disputed documents, if a cursory look would necessarily reveal the contents. Instead, the documents can be placed in a sealed envelope to be held unopened by the European Commission and the dispute can be resolved at a later date. The Commission may not read those documents until the matter is resolved, if necessary by the CFI. The Commission may not simply read the documents and then promise not to rely on those documents as evidence in a decision penalising a company.

In *Akzo Nobel's* case, the CFI found that the European Commission had breached these procedures by requiring more than a cursory look which disclosed the documents' contents, despite the company showing that the documents were protected. The European Commission had also read the documents without allowing *Akzo Nobel* to seek the CFI's ruling on whether the documents were protected.

Under *Akzo Nobel*, companies must continue to be mindful that communications with internal counsel will not be protected from disclosure during a Commission dawn raid and that only communications with external EU-qualified counsel will be protected. The Court's guidance on handling disputed documents also underlines the importance for companies to prepare in advance a comprehensive dawn raid preparedness programme and document retention policy.