

Legal professional privilege after the Akzo Nobel appeal

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Outline

- Background: the AM&S rule
- The Akzo Nobel case: facts and decisions
- Outcome in CFI
- Appeal to ECJ
- Discussion

The AM&S rule (1)

- EU law protects the confidentiality of written communications between client and lawyer made for the purposes of the client's rights of defence provided that the lawyer is (a) “entitled to practise his profession in one of the Member States” and (b) independent i.e. not bound to client by employment relationship

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The AM&S rule (2)

- In competition context, this “privilege” covers
 - documents created after the opening of administrative procedure under Reg 17 [now Reg 1] (cf. litigation privilege)
 - and earlier documents having a relationship with the subject matter of the administrative procedure (cf. legal advice privilege)

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Akzo Nobel: facts

- Set A documents: one marked and one unmarked copy of an internal memorandum, the basis for telephone consultation with external counsel
- Set B documents:
 - (a) manuscript draft of Set A memo
 - (b) e-mail exchange with in-house counsel (Cohen advocaat, co-ordinator of competition compliance policy)

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Commission actions

- Investigation Decision
- “Cursory glance” or thorough read?
- Set A: in the envelope
- Set B: on the file
- Rejection Decision

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Appeal to CFI

- 2 actions: against Investigation Decision (inadmissible) and against Rejection Decision
- Interim measures and appeal
- Procedure: cursory glance? On the spot decisions? Envelopes?
- What communications are covered?
- In-house counsel

CFI judgment: procedure (1)

- Bare claims to privilege are not enough to prevent the Commission from reading a document [80]
- Co must provide Commission with “relevant material” demonstrating that document protected but not obliged to reveal content
- But not obliged to permit cursory glance if impossible to glance without revealing the content [82]

CFI judgment: procedure (2)

- Sealed envelope: appropriate [83]
- Preserves document [83] and prevents Commission reading it [85]
- Mere reading is a breach of LPP [86]
- Statements about the LPP principle: [77, 86, 87]
- Interim measures [88]
- Fines [89]

CFI judgment: scope

- Preparatory documents even if not actually or even intended to be sent to lawyer
- May be covered if drawn up “exclusively” for the purpose of seeking legal advice in exercise of rights of defence [120-123]
- But not enough that they are discussed with lawyer
- Akzo fails on the facts [125-135]

CFI judgment: in-house counsel

- AM&S upheld
- Member state position patchy [171]
- Modernisation irrelevant [172]
- Companies can get the advice they need [173]
- In-house lawyers and outside lawyers are in different positions so no discrimination [174]
- National law cannot govern [176]

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Appeal to ECJ

- Solely on in-house counsel point
- Interventions actual and attempted
- Hearing
- AG's Opinion

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Outcome and key quotations

- AM&S rightly decided: 45-49
- In-house lawyers different so no breach of equal treatment: 56-59
- No uniform or majority tendency in national law: 71-75
- Reg 1 makes no difference: 83-87
- Defence rights not affected by limitations on lawyer's practice (93-96) or different national law on LPP (102-105)

Overview of current position

- The EU notion of LPP in competition proceedings is generous (AM&S; Hilti; Akzo Nobel in CFI)
- The CFI clipped the Commission's wings as regards handling disputes about LPP; ECJ recognises that breach of LPP is reading, not use
- But as to LPP for employed lawyers, Akzo Nobel has not changed the law, but has changed the rhetoric

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In-house counsel: balance sheet

- The ECJ's pronouncements are not helpful for the in-house cause
- Goes beyond AM&S which sought to lay down a line acceptable to all legal traditions
- The judgment completely ignores the arguments of the interveners
- But trend is not all one way: it was a risky strategy

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The CCBE position

- Cf Sir Gordon Slynn AG in AM&S
- AM&S and the EU concept of LPP inevitably based on references to national professions: EU law recognises national differences in permissible extent of employed practice by full members of Bar/Law Society
- In those cases, should be regarded as independent and AM&S modified

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Where next?

- Strasbourg?
- Brussels?
- Guidelines from Commission?
- Take the argument to the national bars?

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And meanwhile

- Wake-up call for business
- Consider best practice
- Marking and storage of documents/records
- Third country advice
- Self-incrimination

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