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Press and Information

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Judgment of the Court of First Instance in Joined Cases T-125/03 & T-253/03

Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission of the European Communities

THE COURT OF FIRST INSTANCE CLARIFIES THE RULES PROTECTING THE CONFIDENTIALITY OF COMMUNICATIONS BETWEEN LAWYERS AND THEIR CLIENTS IN THE CONTEXT OF COMMUNITY COMPETITION LAW

Clarification is provided on the procedure to be followed when, during an investigation, an undertaking claims that certain documents are confidential, and on the matters and persons covered by that protection.

By decision of 10 February 2003, the Commission ordered Akzo Nobel Chemicals Ltd and its subsidiary, Akcros Chemicals Ltd, to submit to an investigation seeking evidence of any anti-competitive practices. That investigation was carried out by Commission officials, assisted by representatives of the Office of Fair Trading (OFT, the British competition authority), on 12 and 13 February 2003 at the premises of Akzo Nobel and Akcros in Eccles, Manchester (United Kingdom).

In the course of the investigation the applicants' representatives informed the Commission officials that certain documents were likely to be covered by the rule protecting the confidentiality of communications between lawyers and their clients. Following a long discussion, it was decided that the head of the investigating team would briefly examine the documents in question, with a representative of the applicants at her side.

During the examination of the documents, a dispute arose in relation to five documents, which were ultimately treated in two different ways.

The first of group of documents ('Set A') comprised two memoranda: a typewritten memorandum from the general manager of Akcros Chemicals to one of his superiors, which, according to Akzo Nobel and Akcros, contains information gathered by the general manager in the course of internal discussions with other employees for the purpose of obtaining outside legal advice in connection with a competition law compliance programme. A second copy of the memorandum bears handwritten notes referring to contacts with a lawyer, mentioning, in particular, his name. Since the Commission officials were not in a position to reach a final conclusion on the spot as to whether the documents should be privileged, they took copies of

them and placed them in a sealed envelope which they took away with them on completion of the investigation.

The head of the investigating team took the view that the second group of documents ('Set B') was definitely not the subject of legal professional privilege protecting them from disclosure, and, consequently, took copies of them and placed the copies with the rest of the file, without isolating them in a sealed envelope. The Set B group is made up of a number of handwritten notes made by Akcros' general manager, written during discussions with employees and used for the purpose of preparing the typewritten memorandum in Set A, and two e-mails, exchanged between the general manager and Akzo Nobel's coordinator for competition law, who was enrolled as an Advocaat of the Netherlands Bar and was a member of Akzo Nobel's legal department, employed by that undertaking on a permanent basis.

On 11 April 2003, Akzo Nobel and Akcros brought an action before the Court of First Instance for the annulment of the decision of 10 February ordering the investigation (Case T-125/03).

On 8 May 2003, the Commission adopted a decision rejecting the claim of legal privilege for the documents and giving notice of its intention to open the sealed envelope. The Commission stated, however, that it would not do so before expiry of the time-limit for bringing an action against the decision.

On 4 July 2003, the two undertakings also submitted a request to the Court to annul that decision (Case T-253/03).

Case T-125/03

The Court points out that only measures which produce binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his legal position may be the subject of an action for annulment. It concludes that, where an undertaking relies on legal professional privilege for the purpose of opposing the seizure of a document in the course of an investigation, the decision whereby the Commission rejects that request produces legal effects for that undertaking.

In the present case, it was, first, the tacit rejection decision expressed through the physical act of seizing and placing certain documents on the file without placing them in a sealed envelope, and, secondly, the formal rejection decision of 8 May 2003 – concerning all the disputed documents – which produced the legal effects in question, and not the decision of 10 February 2003 ordering the investigation.

The Court thus rejects the action in Case T-125/03 as inadmissible.

Case T-253/03

First of all, the Court of First Instance points out that, as the Court of Justice has already held in its ruling in *AM & S*[1], although the Commission has been given wide powers of investigation and of examination in order to uncover infringements of competition law, and may, in particular, require production of business records relating to undertakings' activities, the fact remains that confidentiality of communications between lawyers and their clients must be protected in that context, subject to certain conditions. That confidentiality serves the requirement that every 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 is an essential corollary to the full exercise of the rights of defence.

[1] Case 155/79 *AM & S* v *Commission* [1982].

As regards **the procedure to be followed during an investigation**, the Court confirms that the undertaking concerned does not have to reveal the contents of the documents in question when it presents the Commission officials with relevant material to demonstrate their confidential nature justifying protection. Consequently, the undertaking is entitled to refuse to allow the Commission officials to take even a cursory look at the documents which it claims to be privileged, provided that the undertaking considers that such a cursory look is impossible without revealing the content of those documents and that it gives the Commission officials appropriate reasons for its view. Where the Commission considers that the material presented by the undertaking is not of such a nature as to prove that the documents in question are confidential, its officials may place a copy of the document in question in a sealed envelope and then remove it with a view to a subsequent resolution of the dispute. The Court considers that this procedure enables risks of a breach of legal professional privilege to be avoided while at the same time enabling the Commission to retain a certain control over the documents and avoiding the risk that the documents will subsequently disappear or be manipulated.

Furthermore, the Court observes that the Commission is not entitled to read the contents of the document before it has adopted a decision allowing the undertaking concerned to refer the matter effectively to the Court of First Instance. It considers that the fact that the Commission reads the content of a confidential document is in itself a breach of the principle in question. The mere fact that the Commission cannot use privileged documents as evidence in a decision imposing a penalty is not sufficient to make good or eliminate the harm which resulted from the Commission's reading the content of the documents.

In this case, the Court finds that **the Commission infringed this procedure, first, by forcing the companies to allow a cursory look** at certain documents, even though their representatives claimed, and provided supporting justification, that such an examination would require the contents of those documents to be disclosed, and **secondly, by reading the documents in Set B** without having given the companies the opportunity to contest the rejection of their claim to protection in respect of those documents before the Court of First Instance.

As regards the **types of privileged documents,** the Court holds that internal company documents, even if they have not been exchanged with a lawyer or have not been created for the purpose of being sent to a lawyer, may nonetheless be covered by protection of confidentiality of communications between lawyers and their clients, provided that they were drawn up exclusively for the purpose of seeking legal advice from a lawyer in exercise of the rights of defence. On the other hand, the mere fact that a document has been discussed with a lawyer is not sufficient to give it such protection. The Court adds that the fact that a document has been put together under a competition law compliance programme does not suffice by itself to confer protection on that document. Such programmes often encompass in their scope duties and information which go beyond the exercise of the rights of defence.

In that context, the Court considers, after examining the contents of the memorandum in Set A and the material and explanations provided by Akzo Nobel and Akcros, that the document is not protected by confidentiality of communications between lawyers and their clients. In addition, the Set B handwritten notes, which were made with the main aim of preparing the memorandum in Set A, are not covered by such protection either.

Finally, the Court **rejects** the argument advanced by Akzo Nobel and Akcros concerning **extension of the personal scope of protection of confidentiality of communications between lawyers and their clients** beyond the limits laid down by the Court of Justice. In that regard, the Court of First Instance notes that the Court of Justice expressly held that the protection only applies to the extent that the lawyer is independent, that is to say, not bound to his client by a relationship of employment, and expressly excluded communications with in-house lawyers. The Court states that, even though it is the case that specific recognition of the role of in-house lawyers and the protection of communications with such lawyers 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. The evolution of competition law since that judgment does not justify an alteration of that case-law either, it not being contrary to the principle of equal treatment or the free movement of services. Consequently, the Court holds that the exchange of emails with a member of Akzo Nobel's legal department should not be covered by the protection of confidentiality of communications between lawyers and their clients.

The Court concludes that the infringements on the part of the Commission found to have been committed during the procedure for examination of the documents for which Akzo Nobel and Akcros claimed protection as confidential communications between lawyers and their clients did not result in unlawfully depriving them of that protection in respect of those documents, since, as has been held, the Commission did not err in deciding that none of those documents in fact fell within the scope of that protection.

The action in Case T-253/03 is therefore dismissed.

REMINDER: An appeal, limited to points of law only, may be brought before the Court of Justice of the European Communities against a decision of the Court of First Instance, within two months of its notification.

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