

Joined Cases T-125/03 and T-253/03

Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd

v

Commission of the European Communities

(Competition — Administrative procedure — Commission's powers of investigation — Documents seized in the course of an investigation — Legal professional privilege protecting communications between lawyers and their clients — Admissibility)

Judgment of the Court of First Instance (First Chamber, Extended Composition), 17 September 2007 II - 3532

Summary of the Judgment

1. *Actions for annulment — Actionable measures — Measures producing binding legal effects — Acts bringing about a change in the applicant's legal position*
(Art. 230, fourth para., EC)

2. *Competition — Administrative procedure — Commission's powers of investigation — Refusal by the undertaking to produce a communication with a lawyer on grounds of confidentiality — Powers of the Commission*
(Council Regulation No 17, Art. 14)
3. *Competition — Administrative procedure — Commission's powers of investigation — Power to require production of a communication between a lawyer and client — Limits — Legal professional privilege protecting such communications — Objectives*
(Council Regulation No 17, Art. 14)
4. *Competition — Administrative procedure — Commission's powers of investigation — Power to require production of a communication between a lawyer and client — Limits — Legal professional privilege protecting such communications — Scope*
(Council Regulation No 17, Art. 14)
5. *Competition — Administrative procedure — Commission's powers of investigation — Power to require production of a communication between a lawyer and client — Limits — Legal professional privilege protecting such communications — Scope*
(Council Regulation No 17, Art. 14)
6. *Competition — Administrative procedure — Commission's powers of investigation — Power to require production of a communication between a lawyer and client — Limits — Legal professional privilege protecting such communications — Community concept of confidentiality*
(Council Regulation No 17, Art. 14)

1. Where an undertaking relies on legal professional privilege for the purpose of opposing the seizure of a document in the course of an investigation pursuant to Article 14 of Regulation No 17, the decision whereby the Commission rejects that request produces legal effects for that undertaking, by bringing about a distinct change in its legal position. That decision, the possible illegality of which has no effect on the lawfulness of the decision ordering the inspection of which it forms a part, in effect withholds from the undertaking the protection provided by Community law and is definitive in nature and

independent of any final decision making a finding of an infringement of the competition rules.

In that regard, the opportunity which the undertaking has to bring an action

against a final decision establishing that the competition rules have been infringed does not provide it with an adequate degree of protection of its rights. First, it is possible that the administrative procedure will not result in a decision finding that an infringement has been committed. Second, if an action is brought against that decision, it will not in any event provide the undertaking with the means of preventing the irreversible consequences which would result from improper disclosure of documents protected under legal professional privilege.

places it on the investigation file without putting it in a sealed envelope and without having taken a formal rejection decision, that physical act necessarily entails a tacit decision by the Commission to reject the protection claimed by the undertaking, and allows the Commission to examine the document in question immediately. That tacit decision should therefore be open to challenge by an action for annulment.

(see paras 46-49, 55)

It follows that the Commission's decision rejecting a request for protection of a specific document under legal professional privilege — and ordering, where appropriate, the production of the document in question — brings to an end a special procedure distinct from that enabling the Commission to rule on the existence of an infringement of the competition rules and thus constitutes an act capable of being challenged by an action for annulment, coupled, if need be, with a request for interim relief, seeking, *inter alia*, to suspend its operation until the Court has ruled on the action in the main proceedings.

2. If an undertaking which is the subject of an investigation under Article 14 of Regulation No 17 refuses, by claiming protection under legal professional privilege, to produce, as part of the business records demanded by the Commission, written communications between itself and its lawyer, it must provide the Commission officials with relevant material which demonstrates that the communications fulfil the conditions for the grant of legal protection, while not being bound to disclose their contents. Where the Commission considers that such evidence has not been provided, it must, pursuant to Article 14(3) of Regulation No 17, order production of the communications in question and, if necessary, impose on the undertaking fines or periodic penalty payments under that regulation as a penalty for the

By the same token, where the Commission, during an investigation, seizes a document in respect of which legal professional privilege is claimed and

undertaking's refusal either to supply such additional evidence as the Commission considers necessary or to produce the documents whose confidentiality, in the Commission's view, is not protected in law. The undertaking under investigation may subsequently bring an action for the annulment of such a Commission decision, where appropriate, coupled with a request for interim relief pursuant to Articles 242 EC and 243 EC.

In a significant number of cases, a mere cursory look by the Commission officials at the general layout, heading, title or other superficial features of the document will enable them to confirm the accuracy of the reasons invoked by the undertaking and to determine whether the document at issue was confidential, when deciding whether to put it aside. Nevertheless, on certain occasions, there would be a risk that, even with a cursory look at the document, in spite of the superficial nature of their examination, the Commission officials would gain access to information covered by legal professional privilege. That may be so, in particular, if the confidentiality of the document in question is not clear from external indications.

Therefore, the mere fact that an undertaking claims that a document is protected by legal professional privilege is not sufficient to prevent the Commission from reading that document if the undertaking produces no relevant material of such a kind as to prove that it is actually protected by legal professional privilege. The undertaking concerned may, in particular, inform the Commission of the author of the document and for whom it was intended, explain the respective duties and responsibilities of each, and refer to the objective and the context in which the document was drawn up. Similarly, it may also mention the context in which the document was found, the way in which it was filed and any related documents.

The undertaking is not bound to reveal the contents of the documents in question when presenting the Commission officials with relevant material of such a nature as to demonstrate that the documents fulfil the conditions for being granted legal protection. Accordingly, an undertaking subject to an investigation under Article 14(3) of Regulation No 17 is entitled to refuse to allow the Commission officials to take even a cursory look at one or more specific documents which it claims to be covered by legal professional privilege, provided that the undertaking considers that such a curs-

ory look is impossible without revealing the content of those documents and that it gives the Commission officials appropriate reasons for its view.

Where, in the course of an investigation under Article 14(3) of Regulation No 17, 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, in particular where that undertaking refuses to give the Commission officials a cursory look at a document, the Commission officials may place a copy of the document or documents in question in a sealed envelope and then remove it with a view to a subsequent resolution of the dispute. 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 forming the subject-matter of the investigation and avoiding the risk that the documents will subsequently disappear or be manipulated.

In any event, where the Commission is not satisfied with the material and explanations provided by the representatives of the undertaking for the purposes of proving that the document

concerned is covered by legal professional privilege, the Commission must not read the contents of the document before it has adopted a decision allowing the undertaking concerned to refer the matter to the Court of First Instance.

In that regard, the Commission is bound to wait until the time-limit for bringing an action against the rejection decision has expired before reading the contents of those documents. In any event, to the extent that such an action does not have suspensory effect, it is for the undertaking concerned to bring an application for interim relief seeking suspension of operation of the decision rejecting the request for legal professional privilege.

If an undertaking abuses the above procedure by making requests, merely as delaying tactics, for protection under legal professional privilege which are clearly unfounded, or by opposing, without objective justification, any cursory look at the documents during an investigation, the Commission has the means, where appropriate, to discourage and penalise such conduct. In fact, such conduct may be penalised under Article 23(1) of Regulation No 1/2003 (and previously under Article 15(1) of Regulation No 17) or be taken into account as

aggravating circumstances when calculating any fine imposed in the context of a decision imposing a penalty for infringement of the competition rules.

ensuring that a client is free to consult his lawyer without fear that any confidences which he imparts may subsequently be disclosed. Secondly, its purpose is to avoid the harm which may be caused to the undertaking's rights of the defence as a result of the Commission reading the contents of a confidential document and improperly adding it to the investigation file.

(see paras 79-83, 85, 88, 89)

3. Having regard to the particular nature of the principle of legal professional privilege, the purpose of which is both to guarantee the full exercise of individuals' rights of defence and to safeguard the requirement that any person must be able, without constraint, to consult his lawyer, the fact that the Commission reads the content of a confidential document is in itself a breach of this principle.

The protection of legal professional privilege therefore goes beyond the requirement that information provided by an undertaking to its lawyer or the content of the advice given by that lawyer cannot be used against it in a decision which penalises a breach of the competition rules. First, that protection seeks to safeguard the public interest in the proper administration of justice in

Therefore, even if that document is not used as evidence in a decision imposing a penalty for infringement of the competition rules, the undertaking may suffer harm which cannot be made good or can only be made good with great difficulty. Information covered by legal professional privilege might be used by the Commission, directly or indirectly, in order to obtain new information or new evidence without the undertaking in question always being able to identify or prevent such information or evidence from being used against it. Moreover, harm which the undertaking concerned would suffer as a result of disclosure to third parties of information covered by legal professional privilege could not be made good, for example if that information were used in a statement of objections in the course of the Commission's administrative procedure. The mere fact that the Commission cannot

use privileged documents as evidence in a decision imposing a penalty is thus not sufficient to make good or eliminate the harm which resulted from the Commission's reading the content of the documents.

undertaking which are confined to reporting the text or the content of communications with independent lawyers containing legal advice.

(see paras 86, 87)

4. Regulation No 17 falls to be interpreted as protecting the confidentiality of communications between lawyer and client provided that (i) such communications are made for the purposes of the exercise of the client's rights of defence and (ii) they emanate from independent lawyers. As far as the first of those two conditions is concerned, such protection must, if it is to be effective, be recognised as covering as a matter of law all written communications exchanged after the initiation of the administrative procedure under the regulation which may lead to a decision on the application of Articles 81 EC and 82 EC or to a decision imposing a pecuniary sanction on the undertaking. That protection can also extend to earlier written communications which have a relationship to the subject-matter of that procedure. In view of its purpose, that protection must be regarded as extending also to the internal notes circulated within an

So that a person may be able effectively to consult a lawyer without constraint, and so that the latter may effectively perform his role as collaborating in the administration of justice by the courts and providing legal assistance for the purpose of the effective exercise of the rights of the defence, it may be necessary, in certain circumstances, for the client to prepare working documents or summaries, in particular as a means of gathering information which will be useful, or essential, to that lawyer for an understanding of the context, nature and scope of the facts for which his assistance is sought. Preparation of such documents may be particularly necessary in matters involving a large amount of complex information, as is often the case with procedures imposing penalties for breaches of Articles 81 EC and 82 EC. In those circumstances, the fact that the Commission reads such documents during an investigation may well prejudice the rights of the defence of the undertaking under investigation and the public interest in ensuring that every client is able to consult his lawyer without constraint.

Accordingly, such preparatory documents, even if they were not exchanged with a lawyer or were not created for the purpose of being sent physically to a lawyer, may none the less be covered by legal professional privilege, provided that they were drawn up exclusively for the purpose of seeking legal advice from a lawyer in exercise of the rights of the 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.

unambiguously clear from the content of the documents themselves or the context in which those documents were prepared and found.

In relation to undertakings' competition law compliance programmes, the fact that a document was drawn up under such a programme is not sufficient in itself for that document to benefit from protection under legal professional privilege. Such programmes often encompass in scope duties and cover information which goes beyond the exercise of the rights of the defence. In particular, the fact that an outside lawyer has put together and/or coordinated a compliance programme cannot automatically confer protection under legal professional privilege on all the documents drawn up under that programme or in relation to it.

Protection under legal professional privilege is an exception to the Commission's powers of investigation, which are essential to enable it to discover, bring to an end and penalise infringements of the competition rules. Such infringements are often carefully concealed and usually very harmful to the proper functioning of the common market. For this reason, the possibility of treating a preparatory document as covered by legal professional privilege must be construed restrictively. It is for the undertaking relying on this protection to prove that the documents in question were drawn up with the sole aim of seeking legal advice from a lawyer. This should be

(see paras 117, 122-124, 127)

5. The protection accorded to legal professional privilege under Community law, in the application of Regulation No 17, only applies to the extent that the lawyer is independent, that is to say, not bound to his client by a relationship of employ-

ment. The requirement is based on a concept of the lawyer's role as collaborating in the administration of justice by the courts and as being required to provide, in full independence and in the overriding interests of the administration of justice, such legal assistance as the client needs.

Since in-house lawyers and outside lawyers are clearly in very different situations, owing, in particular, to the functional, structural and hierarchical integration of in-house lawyers within the companies that employ them, no infringement of the principle of equal treatment arises from the fact of treating such professionals differently in respect of protection under legal professional privilege.

The concept of independent lawyer is therefore defined in negative terms in that it stipulates that such a lawyer should not be bound to his client by a relationship of employment, rather than positively, on the basis of membership of a Bar or Law Society or being subject to professional discipline and ethics. The test thus laid down is one of legal advice provided 'in full independence', which it identifies as that provided by a lawyer who, structurally, hierarchically and functionally, is a third party in relation to the undertaking receiving that advice.

(see paras 166-168, 174)

6. The protection of legal professional privilege is an exception to the Commission's powers of investigation. Therefore, the protection directly affects the conditions under which the Commission may act in a field as vital to the functioning of the common market as that of compliance with the rules on competition. For those reasons, the Court of Justice and the Court of First Instance have been at pains to develop a Community concept of legal professional privilege, which does not allow for the personal scope of the Community concept of confidentiality to be governed by national law.

It follows that communications with in-house lawyers, that is, legal advisers bound to their clients by a relationship of employment, are expressly excluded from protection under legal professional privilege.

(see para. 176)