



## Competition newsletter

Latest updates from the Competition law team - July 2010

### No legal privilege for in-house lawyers in EU competition investigations?

**Advocate General Kokott takes view that in EU competition investigations communications with in-house lawyers are not protected from disclosure by legal professional privilege.**

#### Summary

Advocate General Kokott has advised the judges of the European Court of Justice (ECJ) that in her opinion internal communications with in-house lawyers are not protected from disclosure in EU competition investigations by legal privilege. Her opinion was given on 29 April 2010 in the case of Akzo Nobel Chemicals Limited and Akcros Chemicals Limited v. European Commission. It does not bind the judges of the ECJ, who are now deliberating their judgment. It is quite possible that the ECJ will reach a different conclusion to the Advocate General when it issues its judgment.

#### Background

In February 2003 the European Commission (Commission) conducted an inspection (or 'dawn raid') at the offices of Akzo Chemicals Limited (Akzo) and Akcros Chemicals Limited (Akcros) in Eccles, Greater Manchester. During the search, the Commission's officials took photocopies of certain documents which Akzo and Akcros considered were exempt from seizure on the grounds that they were covered by legal privilege.

Legal privilege protects communications between a lawyer and his client from disclosure. It is based on the idea that legal advice between lawyer and client should be given clearly, openly and without reserve. That would not be possible if those communications were subject to disclosure in legal proceedings (or competition investigations), so legal privilege rules have been developed to protect communications containing or relating to legal advice.

The rules on privilege in EU competition investigations were set out by the ECJ in the 1982 case of AM&S Europe Limited v. Commission.

In AM&S the ECJ endorsed the concept of an EU privilege rule, stating that EU law "must take into account the principles and concepts common to the laws of [Member States] concerning the observance of confidentiality, in particular as regards certain communications between lawyer and client. That confidentiality serves the requirements, the importance of which is recognised in all of the Member States, 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".

The ECJ emphasised that the EU privilege rule was based on what the national rules on privilege in the Member States had in common, and for that reason confined the application of legal privilege to circumstances where two conditions were satisfied: first, that "such communications are made for the purposes and in the interests of the client's rights of defence", and second, that "**they emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment**".

The second condition has meant that for the purposes of EU competition investigations, communications with and advice from in-house lawyers are not protected by from seizure by legal privilege.

Akzo and Akcros appealed the Commission's decision to place on its file the documents that they considered were protected by legal privilege to the Court of First Instance (CFI). Those documents included two emails sent by Akcros's general manager and Akzo's competition law co-ordinator, an Advocaat of the Netherlands Bar who was employed by Akzo permanently as a member of its in-house legal department.

In its September 2007 judgment the CFI dismissed the appeal as unfounded. That led Akzo and Akcros to lodge a further appeal to the ECJ against that judgment. Akzo and Akcros asked the ECJ to set aside the CFI's judgment to the extent that it rejected the claim for privilege in respect of the communications with Akzo's competition law co-ordinator (an in-house lawyer).



We hope that you find the articles interesting and informative, and if they raise any questions that you would like to discuss, please do not hesitate to contact **Toby Tyler**, Associate & Head of Competition Law on **01865 262614** or [toby.tyler@morgan-cole.com](mailto:toby.tyler@morgan-cole.com)

Akzo's appeal to the ECJ is in effect a challenge to the 'no privilege for in-house lawyers' rule set out in the ECJ's AM&S judgment.

### Facts

The Advocate General's (non-binding) opinion is that under EU law the protection of communications between lawyer and client (legal privilege) applies only to communications between a client and an independent lawyer, and does not extend to communications with in-house lawyers. In brief, the Advocate General has proposed to the ECJ that in its judgment it should uphold the AM&S rule.

The Advocate General's reasoning is, in outline, as follows:

- Privilege is not only based on protecting the client's rights of defence. It is also based on the lawyer's role as 'an organ of the administration of justice', who has to provide independent legal assistance to his client in the overriding interests of justice.
- Irrespective of Bar or Law Society membership, in-house lawyers do not enjoy the same degree of independence as external lawyers in relation to their client.
- There is a structural risk that an in-house lawyer will encounter a conflict of interest between his professional obligations and the aims of his company, on which he is more economically dependent and with which he identifies more strongly than an external lawyer.
- There is no trend in the 27 EU Member States towards extending legal privilege to in-house lawyers. Only in a small number of Member States (including the UK, the Netherlands and Ireland) does legal privilege apply to communications with in-house lawyers. That in itself does not justify a reappraisal of the EU position.
- Recent developments in EU legislation, and in particular the modernisation of EU competition law resulting from Regulation 1/2003, do not give cause for reaching a different view.

Having received the Advocate General's opinion, the ECJ is now considering its judgment, which can be expected later in 2010.

### Comment

The Advocate General's opinion does not bind the ECJ. The ECJ may reject the Advocate General's conclusions and overturn AM&S by conferring legal privilege on communications with in-house lawyers in the context of EU competition investigations.

Although the Advocate General's opinion is not favourable to the cause for 'in-house privilege' in EU competition investigations, it would be wrong to conclude that the ECJ's judgment is a foregone conclusion. It remains possible that AM&S will be overturned when the judgment is delivered.

Under UK domestic law applicable in competition investigations conducted by the Office of Fair Trading (OFT), communications between in-house lawyers and their clients are privileged.

For that reason, in-house lawyers in the UK face two conflicting privilege regimes:

- if their company undergoes an investigation by the European Commission investigating a suspected infringement of EU competition law, their advice (for the time being, under the AM&S rules) is not privileged and can be seized and used by the Commission in its investigation;
- conversely, if their company is investigated by the OFT under the Competition Act 1998, the same advice would be privileged and protected from seizure or disclosure.

Although the ECJ does not lightly overturn its own established case-law, we hope that the ECJ's judgment will resolve this discrepancy in favour of privilege for in-house lawyers.

## European Commission fines for DRAM producers

**In its first use of its new settlement procedure for cartel cases, the European Commission has fined a group of DRAM (memory chip) producers a total of €331 million.**

### Summary

A group of 10 memory chip producers have received fines ranging from €1.8 million to €145.7 million for their participation in an alleged four-year cartel to co-ordinate the prices at which the chips were sold to PC and server manufacturers.

This is the first use of the EC's settlement procedure for cartel investigations, which it hopes will allow it to resolve these investigations more quickly and cheaply than under its standard procedure. Settlement may be used where the parties involved are prepared to admit their involvement and preparedness to pay the likely fine, and in return for this co-operation the EC may grant a 10% reduction in the final fine, in addition to any other reductions under the existing leniency regime.



## Background

In 2008 the EC introduced a settlement procedure for cartel cases. The aim of this simplified procedure was to reduce the length and cost of proceedings, and to avoid litigation which was often not concerned with the existence of a cartel, but rather with the level of fines or the liability of parent companies for the actions of subsidiaries. Parties that use the settlement procedure can receive a 10% reduction in fines (in addition to any reductions under the leniency programme for voluntary disclosure of the existence of a cartel or evidence).

A party may indicate that it is willing to settle as soon as it becomes aware that an investigation is underway, and settlement discussions will be opened with the EC, during which the EC will make available evidence supporting its objections and the range of fine applicable. Where consensus is reached on the scope of the objections and the range of the fine, the party must submit a formal request to settle, in which it must:

- acknowledge liability for the infringement
- indicate the maximum fine anticipated in settlement
- confirm that it has received satisfactory information on the EC's objections and opportunity to make its views known to the EC
- confirm that it will not request access to the file or request an oral hearing after the statement of objections has been issued; and
- agree to receive the statement of objections and final decision

The EC will then issue its statement of objections and, following confirmation by the parties that this corresponds to the settlement submissions, issue its final decision.

## Facts

Ten producers of memory chips or DRAMS (Dynamic Random Access Memory) were involved in the alleged cartel, which the EC claims was active between 1998 and 2002. According to the EC, the cartel operated to co-ordinate the price levels of these memory chips (which were sold to PC and server manufacturers) through a network of contacts and information sharing. The DRAM producers involved were Micron, Samsung, Hynix, Infineon, NEC, Hitachi, Mitsubishi, Toshiba, Elpida and Nanya. Only one of these was a European company (Infineon), but EU competition law applied because the products involved were sold within the EEA. Micron, as the party that revealed the existence of the cartel to the EC in 2002, benefited from complete immunity from fines under the EC's leniency programme. Some other participants benefited from leniency to varying extents for co-operation in the investigation and mitigating circumstances.

In addition, all companies were granted a 10% reduction for settling the case with the EC.

## Comment

The new settlement procedure at EU level is similar in its aims to the Office of Fair Trading's 'early resolution' approach for cartels and other Competition Act 1998 cases where the parties involved admit the infringement in question. The EC settlement procedure is formalised in a detailed Commission Notice (2008/ C 167/01), unlike the OFT's informal 'early resolution' approach – the OFT has so far resisted calls to draw up detailed guidelines on how it will use early resolution.

## New block exemption for motor vehicle sector

**Simplified new rules in force from 1 June 2010 herald more liberal regime for agreements in the automotive industry.**

### Summary

On 1 June 2010 the new motor vehicle block exemption regulation (the New BER) came into force. It significantly simplifies the competition rules that apply to vertical agreements in the automotive sector.

The New BER eliminates the sector-specific competition rules for the distribution of new motor vehicles with effect from 1 June 2013. From that date onwards, the competition rules for such agreements will be those set out in the general vertical agreements block exemption (Regulation 330/2010, the Vertical Agreements BER). The 3-year period until 1 June 2013 is a transitional period for manufacturers and dealers to prepare for the start of the new regime, during which the competition rules on the distribution of new motor vehicles set out in the previous motor vehicle block exemption (Regulation 1400/2002) will continue to apply. The New BER also revises the competition rules that apply to;

1. vertical agreements for the sale of spare parts (including lubricants), and
2. vertical agreements for the provision of repair and maintenance services.

It stipulates that with immediate effect such agreements are exempted if they comply with the Vertical Agreements BER, provided that they do not contain any of the three specific extra hardcore restrictions of competition that are set out in the New BER.



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## Background

Under EU and UK competition law, agreements that have as their object or effect the prevention, restriction or distortion of competition are prohibited. However, it is possible for certain agreements to benefit from an exemption to that prohibition, for example where they improve production or distribution.

To help businesses to decide whether specific types of agreement can benefit from exemption, the European Commission (Commission) has introduced a number of 'block exemption' regulations. If an agreement complies with the terms of a block exemption, then it will be exempt from the prohibition on anti-competitive agreements. That means that it will be within a 'safe harbour' for competition law purposes – any competitive restrictions that it contains will not infringe competition law.

There has been a sector-specific block exemption for motor vehicle distribution since 1985. Since then, dealer and repairer agreements have been drafted to comply with the block exemption in force to avoid competition law infringement. Over the last 25 years the different motor vehicle block exemptions have had a significant impact on the terms agreed between vehicle manufacturers, dealers and repairers.

## Facts

In July 2009 the European Commission published a Communication setting out "policy orientations for the future legal framework for motor vehicle distribution and after-sale services agreements" (the Communication), ahead of the expiry on 31 May 2010 of the previous motor vehicle block exemption (Regulation 1400/2002).

In it the Commission expressed its view that the primary market for the sale of new vehicles is competitive, being characterised by overcapacity and falling real prices. For that reason, the Commission signalled its intention to withdraw the sector-specific motor vehicle block exemption from the primary market for new vehicle sales after a three-year transitional period ending on 31 May 2013, with the general provisions of the Vertical Agreements BER applying to agreements between manufacturers and dealers for the sale of new motor vehicles from that date. The Commission has now put that policy orientation into law with the New BER. It is important to remember that the tighter regulatory approach of Regulation 1400/2002 will nonetheless continue to apply to agreements for the distribution of new vehicles until 31 May 2013.

Separately, the Commission observed in the Communication that the market for repair and maintenance is less competitive, due to its brand-

specific nature which means that the manufacturers' authorised networks enjoy high market shares.

The New BER reflects that concern. It provides that (with immediate effect) agreements for the sale of spare parts or the provision of repair and maintenance services are exempted if they comply with the Vertical Agreements BER, provided that they do not contain any of the following hardcore restrictions:

- a restriction that prevents authorised spare parts distributors (appointed under a selective distribution system) from selling those spare parts to independent repairers
- a restriction agreed between a vehicle manufacturer and a supplier of spare parts, repair tools or diagnostic or other equipment, which prevents the supplier from selling those products to independent or authorised resellers or repairers or end users
- a restriction agreed between a vehicle manufacturer and a components supplier, which prevents the components supplier from placing its trade mark or logo effectively and in an easily visible manner on the components supplied or on spare parts

These rules will apply for the next 13 years, with the New BER expiring on 31 May 2023.

## Comment

The New BER will liberalise the EU motor vehicle sector, for manufacturers in particular. The future competitiveness of the sector will be driven by market forces rather than regulatory control. The changes in the industry that these legal changes will bring should not be underestimated. A number of legal protections enjoyed by dealers and repairers since 2002 have either gone or will go in 2013 (such as the right to 'multi-brand', and to open showrooms within a selective distribution system anywhere in the EU).

The period to 31 May 2013 now seems likely to be period of significant transition in the sector, as existing contracts are renegotiated and replaced by those that reflect the new competition law regime. Parallels can be found in the motorcycle sector, which is already subject to the general rules under the Vertical Agreements BER (the motor vehicle block exemptions applying only to vehicles 'having three or more road wheels'). From 2013 the competition law regime that applies to all motor vehicle distribution will be the same as that which already applies to motorcycle distribution.

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