

European Court Confirms No Legal Privilege for In-House Lawyers in EU Competition Proceeding

September 16, 2010

On September 14, 2010, the Court of Justice of the European Union (the Court) issued its long-awaited decision in *Akzo Nobel Chemicals and Akcros Chemicals v. Commission* (Case C-550/07 P), confirming that communications between company employees and in-house lawyers are not privileged in European Union (EU) competition proceedings.

Akcros Chemicals, Ltd., a subsidiary of Akzo Nobel Chemicals, Ltd., had been the subject of a “dawn raid” by the European Commission, in which their personnel seized copies of communications between Akcros’s general manager and Akzo Nobel’s in-house competition counsel. The specific issue before the Court was whether the European Commission had the power to seize, *inter alia*, communications relating to legal advice given by in-house counsel where the in-house counsel was not simply acting as a conduit between the company and external counsel, but rather where the general manager was seeking legal advice from the in-house lawyer. The General Court (then known as Court of First Instance) decided that there was no basis for overturning the longstanding rule that communications with in-house lawyers are not privileged.

The Court affirmed the judgment, holding that communications between a client and in-house counsel are not privileged because the in-house lawyer’s employment relationship prevents him or her from “*enjoy[ing] a level of professional independence comparable to that of an external lawyer.*” The Court followed the reasoning used in a number of European civil law jurisdictions, not only denying privilege to in-house counsel, but also finding that there was no trend among the legal systems of the EU Member States in favor of extending the attorney-client privilege to communications between in-house lawyers and their clients.

Although most practicing lawyers, whether in-house or external counsel, are likely to find both the outcome and the reasoning disappointing, the impact of the Court’s decision should not be overstated.

- The decision does not change the status quo. The European Commission has consistently taken the position that it is entitled to seize communications between in-house counsel and their clients under the Court’s decision in *AM&S Europe v. Commission* (Case 155/99).
- The judgment only applies to the right of defendants to withhold documents from the European Commission in EU competition law proceedings. It has no impact on their right to withhold

documents from private parties or other governmental authorities, all of which are determined by national law.

- The right to withhold documents in EU competition law proceedings is already very limited. It only extends to communications with outside counsel directly relating to the exercise of the defendant’s “rights of defense” in the matter under investigation. This means that even communications with outside counsel may be subject to disclosure if they do not relate directly to the substance of the investigation. For example, advice on securities fraud or product liability issues (or even unrelated competition matters) will usually be subject to disclosure (although in most cases such documents will not be relevant to the European Commission’s investigation).
- The decision only relates to the production of documents. The European Commission does not have the power to compel testimony on substantive matters.

The Court’s decision, while disappointing to in-house and outside counsel, is neither surprising nor a change to the rules, and largely follows the Advocate General’s opinion in the case, which was handed down earlier this spring (*see* Morgan Lewis’s [LawFlash of May 11, 2010](#), “Advocate General Denies Legal Privilege for In-House Lawyers”).¹

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¹ Available at http://www.morganlewis.com/pubs/ATR_InHouseLawyersPrivilege_LF_11may10.pdf.

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