

## Advocate General Denies Legal Privilege for In-House Lawyers

May 11, 2010

On April 29, German Advocate General Juliane Kokott at the Court of Justice of the European Union (Court of Justice) handed down her opinion in *Akzo v. European Commission* (Case C-550/07 P). The opinion argues that the communications by in-house lawyers are not protected by the legal professional privilege (LPP) in European Union (EU) antitrust proceedings. The Advocate General's opinion will be considered by the Court of Justice when it decides the *Akzo* case. If history is a guide, the Court of Justice is highly likely to adopt the Advocate General's position.

The *Akzo* case raised expectations of a change in the EU's stance on application of the LPP to communications by in-house counsel. But the Advocate General stuck to the traditional position of the EU: the LPP only covers communications between *EU-qualified external* counsel and their clients in the context of the clients' defense.

At issue was an email exchange between the general manager of Akzo's subsidiary, Akcros Chemicals, and Akzo's in-house lawyer. The email exchange was seized by the European Commission in a dawn raid. Akzo claimed that the email exchange was protected by the LPP because its in-house counsel was a member of the Netherlands bar. The Court of First Instance (now the General Court) held that the email exchange was not protected from disclosure by the LPP, and Akzo appealed to the Court of Justice.

According to the Advocate General, the LPP should not apply to in-house counsel because those counsel lack the independence from their client (i.e., their employer) that outside counsel have in relation to their clients. Even if an in-house counsel is subject to ethical obligations through bar membership, the Advocate General argued, that is not sufficient to guarantee independent thought and action. Accordingly, she stated that an "*in-house lawyer is less able to deal effectively with any conflicts of interest between his professional obligations and the aims and wishes of this client than an external lawyer.*" In fact, she suggested that a company's internal legal department could be used as a "*place for storing illegal documents such as cartels agreements and records of meetings between the parties to those cartels and of the modus operandi of a cartel.*"

The Advocate General's opinion, if adopted, will leave in place the current system, in which application of LPP protections varies depending on which sovereign's law applies. As noted above, the EU currently refuses to recognize LPP protections for in-house lawyers. Some member states, however, do protect such communications. Others do not. This creates substantial practical problems for companies engaged in business in the EU, making application of the LPP subject to the vagaries of which entity is

charged with investigating an antitrust violation. While the Advocate General conceded that the difference in rules is “*an entirely understandable concern*,” she argued that “*neither the principle of legal certainty, nor the rights of defence require that EU law and national law should apply the same standards.*” According to Kokott, this is a problem of harmonization for the EU legislature to resolve, not the Court of Justice; so far the EU legislature has not taken the opportunity to do so.

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