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European Union Competition Law

European Court of Justice Refuses to Apply In-House Legal Privilege

*By Doug Nave and Neil Rigby**

On September 14, 2010, the European Court of Justice ("ECJ"), the European Union's highest court, ruled that communications with in-house lawyers are not protected by legal privilege, as attorney-client communications or attorney work product, in the context of a competition law investigation by the European Commission (Case C-550/07 P, *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. Commission*). The ECJ based its ruling on the view that in-house lawyers are not sufficiently independent from their employers to benefit from the privilege. In so holding, the ECJ rejected arguments that legal privilege should be extended because of the growing importance of in-house lawyers and the existence of in-house legal privilege in a number of EU Member States.

** Doug Nave is a partner, and Neil Rigby is an associate, in the firm's Competition Law practice in London.*

Background

In February 2003, the European Commission conducted a "dawn raid" at the premises of Akzo and Akcros in the United Kingdom, as part of its investigation into an alleged cartel in heat stabilizers, and took copies of a large number of documents. During the inspection, Akzo and Akcros claimed that two sets of documents were protected by legal privilege:

- Set A: a memorandum from the general manager of Akcros to his superior, which contained information gathered as part of an internal investigation, in order to obtain external legal advice on competition law compliance; and a copy of the same memorandum with notes that referred to contact with the external lawyer.
- Set B: notes written by the general manager of Akcros during discussions with employees that was used to prepare the memorandum in Set A; and two emails exchanged between the general manager of Akcros and a member of Akzo's legal department who was an Advocaat of the Netherlands Bar.

The Commission placed copies of the Set A documents in a sealed envelope, as it was not in a position to determine whether legal privilege might apply, and determined after a brief examination of the Set B documents that privilege would not attach to those. Akzo and Akcros challenged the seizure of both sets of documents and applied for them to be returned or destroyed. When the Commission rejected the request, Akzo and Akcros went to court for relief.

In September 2007, the lower court rejected the parties' appeal and upheld the Commission's decision, based on an earlier denial of privilege by the ECJ in Case 155/79, *AM & S Europe v. Commission* [1982] ECR 1975. In this regard, the lower court rejected entirely the possibility of in-

house legal privilege, and further held that legal privilege would cover documents preparatory to seeking external legal advice only if the documents were created exclusively for that purpose. Privilege was found not to apply to the preparatory documents because the memorandum and related documents at issue had been created for and sent to a manager, and made no mention of legal advice. However, the General Court also held that if a company is able to present the Commission with information about a document that is sufficient to establish legal privilege (relating, *e.g.*, to its author, addressee, and context), the Commission may not look at the document, even cursorily, in order to decide for itself whether the document is privileged. Akzo and Akcros further appealed to the Court of Justice.

Judgment

In ruling for the Commission, the ECJ rejected a number of arguments raised by Akzo and Akcros.

First, Akzo and Akcros argued that in-house lawyers have professional ethical obligations that require and enable them to be independent notwithstanding their employment relationship with their client. Moreover, the parties argued that to deny such in-house lawyers the benefit of legal privilege would violate the principle of equal treatment. The ECJ held that even if in-house lawyers are subject to professional obligations, similar to those imposed on external lawyers, the economic dependence arising from the employment relationship means that in-house lawyers cannot be regarded as independent. The ECJ was not persuaded by the parties' arguments that it should revisit its views in light of the fact that some EU Member States recognize legal privilege for in-house lawyers.

Second, the parties argued that it would be appropriate to extend the legal privilege because in-house lawyers have become more heavily involved in the provision of legal advice since the earlier *AM & S* judgment was issued, and that denial of the privilege would undermine the value of in-house advice. In this regard, the parties argued that the Commission's adoption of a "self-assessment" approach to competition law enforcement under Regulation 1/2003 has increased the need for legal advice from lawyers with an intimate knowledge of the client's business – something that in-house lawyers are well placed to provide. However, the ECJ rejected these arguments, noting that the majority of Member States do not apply legal privilege to in-house lawyers, that Regulation 1/2003 aimed to reinforce the Commission's powers of inspection rather than to curtail them, and that companies can retain external lawyers where confidentiality is an issue.

Third, the parties argued that, as investigations may be carried out by either the Commission or a national authority, it would be arbitrary to make a party's rights dependent on which regulator conducted the investigation. This was of particular significance in the case at hand, because the Commission refused to recognize an in-house legal privilege even though that privilege is often respected in England (where the companies were based and the Commission conducted its inspection) and the Netherlands (where the in-house lawyer was legally qualified). In response, the ECJ emphasized the importance of uniformity in Community law, and held that legal certainty would be protected because, at the time of the inspection, companies would know which regulator was involved and which privilege rules applied. This reasoning obviously failed to address the more fundamental issue – namely, that the company would be unaware of this, and therefore would be unable to know the likelihood of legal privilege, when creating such documents in the first place.

Comment

The EU rules on in-house legal privilege have been subject to controversy over recent years, particularly in jurisdictions where such a privilege is recognized under national law. The *Akzo* appeal introduced some uncertainty in the area by raising the prospect that the ECJ might re-consider its earlier ruling in *AM&S*. However, this new

decision essentially confirms the old rule. Disappointingly, the ECJ showed little willingness to reconsider the key issue, namely, the extent to which in-house lawyers are ethically obliged and competent to offer independent legal advice in the context of an employment relationship. The court also failed adequately to consider the important role played by in-house lawyers, and the extent to which an absence of legal privilege undermines that role. In practical terms, denial of privilege may cause companies to involve their in-house lawyers less effectively, or to seek and take legal advice orally, thereby hindering development of the culture of compliance that the EC institutions are seeking to promote under the competition laws.

If you would like more information about the ECJ's ruling or about Weil's Competition Law practice, please speak to your regular contact at Weil, or to:

Doug Nave	(doug.nave@weil.com)	+ 44 20 7903 1288
Neil Rigby	(neil.rigby@weil.com)	+ 44 20 7903 1277