CORPORATE COUNSEL

What GCs Need to Know After EU Court Limits Attorney-Client Privilege for In-House Counsel

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September 17, 2010


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The European Court of Justice issued a landmarkdecision *(pdf)* on Tuesday, confirming that legal privilege does not extend to communications with in-house legal counsel in European Commissioncompetition investigations.

Although the court's ruling largely confirms long-standing case law on this issue, the court's unequivocal ruling has implications for the ways in which companies seek and obtain legal advice and should be carefully considered. This article sets forth a summary of the decision and provides practical guidance for in-house counsel to seeking to maximize the application of legal privilege in commission investigations.

Factual Background: Seizure of Internal E-Mails

The case, styled *Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd. v. Commission*, arose in 2003, when the commission conducted dawn raids at the premises of Akzo and its subsidiary Akcros, on suspicion that they participated in a cartel. In the course of the inspections, the

commission seized two e-mails exchanged between the general manager of Akcros and an in-house lawyer in Akzo's legal department, who was admitted to the Netherlands Bar.

Akzo disputed the seizure of the e-mails on the basis of legal privilege, and later appealed the seizure to the General Court. The General Court, however, dismissed their appeal on the grounds that legal privilege does not apply to communications with in-house lawyers, relying on the Court of Justice's 1982 ruling of *AM&S Europe v. Commission*. Akzo subsequently appealed to the Court of Justice.

Enrolled In-House Lawyers Are Not Entitled to Privilege

In-House and External Lawyers Are Not Equally Independent

The "independence" of in-house and external counsel was central to the Court of Justice's decision. In the 1982 ruling in *AM & S Europe*, the court ruled that a communication in a competition investigation could only be protected by privilege if it is connected to a company's rights of defense and is made with an "independent" lawyer.

Drawing on the concept of "independence," Akzo argued that an in-house lawyer that is admitted to a bar or law society of an EU member state and an external bar-admitted lawyer are equally independent. This is because both are equally bound by rules of professional ethics and discipline. In other words they argued that a lawyer's independence is determined by membership of a bar, not by whether he or she is in an employment relationship with a client.

The court disagreed, concluding that an in-house lawyer is economically bound to his or her employer and is more closely linked to its commercial policy. This dependence means that membership in a bar or law society does not ensure that an in-house lawyer's independence is comparable to that of an external lawyer.

As a result, the court unequivocally ruled that "independence means the absence of any employment relationship between the lawyer and his client." The court relied upon the same reasoning to conclude that communications with in-house counsel and external counsel are not entitled to be treated equally with respect to legal privilege.

No Trends Toward Offering Privilege to In-House Counsel

Beyond the existing test for privilege in *AM & S*, Akzo argued that the concept of privilege in competition investigations should be re-interpreted — and broadened — for two reasons.

First, broadening the reach of privilege to communications with in-house counsel would reflect what Akzo argued is a growing trend toward EU member states offering privilege to communications between a company and its in-house counsel. The court, however, disagreed, finding that there is no predominant trend toward recognizing privilege for in-house counsel in EU member states.

Second, Akzo argued that interpreting privilege is warranted following the introduction of Regulation 1/2003, which obliges companies to assess for themselves whether their conduct complies with EU competition law.

In other words, companies face an even greater need to obtain candid legal advice from the lawyers best placed to provide it — in-house counsel that know the business well. The court, however, rejected this argument, stating that the aim of Regulation (EC) 1/2003 was to enhance the commission's power of inspections, and was not intended to deal with legal privilege.

No infringement of the rights of defense

Akzo and Akcros argued that the rights of defense include the freedom of choice as to the lawyer who will provide legal advice and representation, and that privilege forms part of those rights regardless of whether the lawyer involved is an employee or external counsel.

The Court of Justice, however, rejected this argument, stating that when an individual seeks advice from a lawyer, the individual must accept the restrictions and conditions applicable to the exercise of that profession — including rules on privilege.

Erosion of Legal Privilege Available in Member States

Finally, the Court of Justice concluded that denial of privilege to enrolled in-house lawyers in commission investigations would not erode legal privilege offered to the same lawyers at member state level.

Akzo and Akcros argued that substantive rules of privilege would effectively be determined by the commission, irrespective of member states' rules, if legal privilege simply did not apply at all to enrolled in-house counsel in commission investigations. The Court of Justice rejected this view, stating that there is no requirement for EU law and national law to apply the same standards on the protection of legal privilege.

Practical Implications

The Court of Justice's decision confirms existing case law, and likewise confirms the care with which companies should consider how they seek and obtain legal advice in Europe.

Companies must be aware that their communications with their in-house lawyer will not be given legal privilege in a European Commission competition investigation — regardless of whether their lawyer is admitted to a bar.

This creates direct conflicts with the privilege that may be accorded at a national level (for example, in the U.K.). There may be some latitude with respect to communications that are made with an intent to receive advice from external counsel, even if the external lawyer was not a recipient of the communication.

But in any event, *Akzo* underscores the importance of carefully considering and planning how legal advice is sought and received in competition-related matters.

In that respect, companies can take affirmative steps to protect their communications with their in-house lawyers. *For example, company management should ensure that all consultations with in-house counsel about the application of competition rules are oral, not written.* At that point, in-house counsel can consider whether to consult with external counsel, which can be done in writing and both the in-house lawyer's written request for advice and the advice received will be privileged.

Companies should also ensure that communications between the company and its external counsel (including internal documents made for the purpose of obtaining external legal advice) are clearly designated as "privileged" communications. These documents should be kept in a separate file that is also clearly designated as containing privileged communications. In the event of a dawn raid, these documents can be readily identified and privilege asserted.

Finally, although not part of the court's ruling, companies should be careful in their communications with external counsel that are not admitted to the bar or law society of an EU member state.

The advocate general's opinion *(pdf)* in this case, although not binding, took a clear position based on existing case law that privilege does not extend to external counsel that are not admitted to the bar of an EU member state. *Companies should therefore also consider including an external lawyer admitted to the bar or law society of an EU member state in connection with competition matters of a global nature, such as cartel matters.*

Conclusion

The Court of Justice has unequivocally ruled that communications with in-house counsel, regardless of whether they are members of the bar or law society of an EU member state, are not entitled to legal privilege.

In the modern era of EU competition law, companies are expected to assess the legality of their conduct for themselves vis-à-vis EU competition law. The Court of Justice's ruling thus raises serious concerns as to how a company can seek and obtain the legal advice needed to achieve compliance.

Nevertheless, companies can take this opportunity to consider the ways in which they seek and obtain legal advice and maximize the possibility that their communications will be protected by legal privilege.

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