

October 15, 2010

Court of Justice of the European Union Rejects Privilege for In-House Counsel Communications in European Commission Antitrust Investigations

In a September 14, 2010 decision, the Court of Justice of the European Union ("ECJ") reaffirmed that for the purposes of a European Commission ("Commission") competition investigation, legal professional privilege does not extend to communications between a company and its in-house counsel. The Court held that because in-house counsel are fundamentally different from external lawyers, and are not sufficiently independent in the performance of their duties, privilege cannot be used to shield internal communications from disclosure. The ruling confirmed a 2007 lower court judgment, and was consistent with the opinion of the Advocate General Juliane Kokott issued in April, which recommended rejecting such a claim for privilege.

Background

In 2003, the Commission opened an investigation into potential cartel activity in the plastic additives market involving Akzo Nobel Chemical Ltd. ("Akzo") and its subsidiary Akcros Chemical Ltd. Commission authorities raided Akzo's headquarters. Akzo disputed the Commission's right to inspect five of the documents based on privilege. These documents included e-mails between a general manager and in-house counsel. After review, the Commission rejected Akzo's privilege claim and refused to return the documents.

Akzo appealed the decision to the European Court of First Instance (now known as the General Court). The court rejected Akzo's claim of privilege, relying on a 1982 ECJ judgment, Case 155/79 AM & S Europe Ltd. v. Commission [1982], that distinguished between in-house counsel, who are dependent on their employers, and external lawyers, who retain independence from their clients, and established the rule under EU law that legal professional privilege only applies to communications with "independent" lawyers. Akzo then appealed to the ECJ, arguing that in-house counsel are sufficiently "independent" to justify the protection of legal professional privilege.

Akzo Nobel Chemical Ltd. v. Commission

On appeal, the ECJ upheld the lower court's decision. In Case C-550/07 P Akzo Nobel Chemical Ltd. v. Commission [2010], the ECJ reaffirmed that legal professional privilege does not apply to communications between a company and its in-house counsel during a Commission investigation. The Court stated that there are two requirements for legal professional privilege: the communication (1) must be related to the "client's rights of defence," and (2) "must emanate from independent lawyers [that are] not bound to the client by a relationship of employment."

The Court explained that "independent" necessarily "means the absence of any employment relationship between the lawyer and his client." The Court referenced AM & S Europe and stated that the conception of an "independent lawyer" is someone that collaborates in the administration of justice and

provides legal assistance to a client in full independence. According to the Court, in-house counsel cannot perform these duties as well as external lawyers because they are economically dependent on clients. The Court noted that in-house counsel occupy "the position of an employee which, by its nature, does not allow [them] to ignore the commercial strategies pursued by [their] employer, and thereby affects [their] ability to exercise professional independence." Unlike external lawyers, "in-house counsel [are] less able to deal effectively with any conflicts between [their] professional obligations and the aims of [their] client . . . and [are] not able to ensure a [comparable] degree of independence."

The Court rejected Akzo's arguments that its in-house counsel was sufficiently "independent" by virtue of his membership in the Netherlands national bar association, which imposes professional and ethical obligations, and his employment contract, which authorized him to comply with these obligations and respected his freedom to independently perform his duties. While professional and ethical obligations may "positively" demonstrate independence, the Court wrote, independence must also be shown "negatively" by the absence of an employment relationship.

Implications

The Akzo decision further entrenches the 1982 rule that communications between a company and its in-house counsel during the course of a Commission investigation are not protected from disclosure. The ECJ did not take the opportunity to revisit prior caselaw in light of the modern role in-house counsel often play in directing and managing compliance programs. As a result, companies should examine their internal policies to ensure there is adequate protection against the risks of disclosure, and the confidentiality of legal advice is maintained to the greatest extent possible.

Companies can take affirmative steps to preserve the confidentiality of legal advice. Most importantly, companies should avoid internal written communications with in-house counsel (including e-mail) on matters relevant or potentially relevant to a Commission investigation. In addition, companies should obtain legal advice from external lawyers wherever possible. While written communications and advice from external lawyers are entitled to legal professional privilege, companies should take the additional precaution of clearly marking such documents. Commission investigators increasingly rely on surprise inspections (frequently known as "dawn raids"), and efforts to identify documents as privileged because they contain advice from external lawyers and storing these documents in separate files and folders beforehand, makes it more likely that they will not be disclosed. It should also be noted that the Akzo ruling did not address prior caselaw upholding legal professional privilege for communications involving in-house counsel made exclusively for the purpose of seeking legal advice from external lawyers, and for an internal summary of the legal advice provided by an external lawyer, so these documents presumably remain privileged. In light of the risks of disclosure, however, companies should take similar precautions and clearly mark these documents, and store them in separate files and folders.

Akzo also has a potential impact on attorney privilege in countries like the United States and the United Kingdom, where privilege rules are at odds with EU law. In the United Kingdom, the compulsory seizure by the Commission of documents which are privileged under English law is, without more, unlikely to be considered a waiver of privilege, as against parties other than the Commission, in any proceedings subject to English law. However, if the Commission were to subsequently make the documents and their contents public, the document could potentially lose the confidentiality necessary to maintain a claim to privilege in English law. Thus far, national courts have not yet entertained such arguments. Nevertheless, this prospect raises concerns about how multi-national companies should manage their affairs, especially in the context of large, multi-jurisdictional government investigations. As government authorities in many nations continue to increase the number, size, and scope of enforcement

actions, and also increase their cooperation with other jurisdictions, this issue will likely be raised in the near future.

It should be emphasized that this decision does not affect Member States' national rules. In a Member State which recognizes privilege with respect to communications between a company and its in-house counsel, these communications will continue to be privileged if a competition investigation takes place at a purely national level. For example, the Office of Fair Trading in the United Kingdom would be unable to obtain disclosure of communications between a company and its in-house counsel (in relation to legal advice or litigation) when undertaking an investigation under the Competition Act 1998 and Enterprise Act 2002 where there is no Commission involvement. Certain Member States, such as France and Hungary, however, do not recognize privilege with respect to in-house counsel.

In the United States, a particularly aggressive opponent could argue that the compulsory seizure by the Commission of privileged documents constituted a waiver. That opponent would certainly argue that the disclosure of those documents to the public constituted a waiver. Whether such arguments would be persuasive, even in part, in a United States court is unclear. We suspect United States courts would be reluctant to find a waiver, and if parties attempted to end-run the privilege rules in any meaningful measure, Congress would get involved. Nonetheless, companies should remain vigilant.

Finally, in regard to seeking external counsel, the Akzo decision did not address the separate requirement for privilege under EU law that the "independent lawyer" be qualified to practice in the European Economic Area. Advocate General Kokott did not recommend any changes to this rule in her advisory opinion. Therefore, companies should presume this requirement remains in effect, and consider this factor when examining their internal policies and procedures to preserve the confidentiality of legal advice rendered by external counsel.

###

**Our client alerts are for general informational purposes and should not be regarded as legal advice.
If you would like additional information or have any questions, please contact:**

David H. Evans
+1 (202) 974-5620
devans@chadbourne.com

Richard Oliver
+44 (0) 20-7337-8176
roliver@chadbourne.com

Christopher Cusmano
+1 (212) 408-5442
ccusmano@chadbourne.com

About Chadbourne & Parke LLP

Chadbourne & Parke LLP, an international law firm headquartered in New York City, provides a full range of legal services, including mergers and acquisitions, securities, project finance, private funds, corporate finance, venture capital and emerging companies, energy/renewable energy, communications and technology, commercial and products liability litigation, arbitration/IDR, securities litigation and regulatory enforcement, special investigations and litigation, intellectual property, antitrust, domestic and international tax, insurance and reinsurance, environmental, real estate, bankruptcy and financial restructuring, employment law and ERISA, trusts and estates and government contract matters. Major geographical areas of concentration include Russia, Central and Eastern Europe, the Middle East and Latin America. The Firm has offices in New York, Washington, DC, Los Angeles, Mexico City, São Paulo, London, Moscow, St. Petersburg, Warsaw, Kyiv, Almaty, Dubai and Beijing. For additional information, visit: <http://www.chadbourne.com/>

www.chadbourne.com

New York Washington Los Angeles Mexico City
São Paulo London Moscow St. Petersburg Warsaw
Kyiv Almaty Dubai Beijing

CHADBOURNE
& PARKE LLP