



European Court of Justice Finds In-House Legal Advice Not Protected by Legal Professional Privilege

September 17, 2010

On September 14, 2010, the European Court of Justice (“ECJ”) decided *Akzo Nobel Chemicals, Ltd. and Akcros Chemicals, Ltd. v. Commission* (“*Akzo Nobel*”) and affirmed the European Court of First Instance’s opinion excluding communications between companies and their in-house counsel from protection under the E.U.’s legal professional privilege rules. Case C-550/07 P, *Akzo Nobel* (September 14, 2010) (affirming Joined Cases T-125/03 and T-253/03, *Akzo Nobel Chemicals, Ltd. v. Comm’n* (Sept. 17, 2007)). In the U.S. and many other countries, communications with in-house counsel are protected from involuntary disclosure by attorney-client privilege. *Akzo Nobel* highlights the possibility that for companies subject to scrutiny by European Union institutions, such as the European Commission, communications with in-house counsel may be seized and used as evidence in E.U. courts. We anticipate that this exposure will lead to future disputes about the loss of privilege under U.S. law.

NO PRIVILEGE FOR COMMUNICATIONS WITH IN-HOUSE COUNSEL

In 1982, the ECJ established a legal professional privilege for the E.U. in the 1982 case *AM & S Eur. Ltd. v. Commission*, holding that the privilege exists where: 1) the communication is made for the purpose of and in the interest of a client’s defense, and 2) the communication involves independent lawyers. Case 155/79, *AM&S Eur. Ltd. v. Comm’n*, 1982 E.C.R. 1575. In *Akzo Nobel* the ECJ ruled that an in-house counsel can never be an “independent lawyer” under the rule. The ECJ reasoned that because in-house counsel are employees, they do not have sufficient economic independence from their employer.

In the *Akzo Nobel* case, the European Commission raided and seized documents, including e-mails exchanged between an executive and Akzo’s in-house counsel for competition law. The ECJ found that these emails were not subject to privilege under *AM & S Eur. Ltd. v. Commission* because in-house counsel lacked sufficient independence. On the other hand, communications between in-house counsel and external, independent lawyers may be protected if they are made for the purpose of and in the interest of a client’s defense.

BROAD SCOPE OF THE DECISION AND INTERNATIONAL IMPLICATIONS

Although *Akzo Nobel* began as a competition investigation, the ECJ indicated that it viewed the case as one in which it was “called on to decide . . . the legality of a decision taken by an institution of the European Union on the basis of a regulation adopted at [the] European Union level.” The ECJ’s broad conception of its opinion indicates that it may apply the same rule beyond competition investigations.

Additionally, foreign companies with operations subject to competition law scrutiny by the European Commission may well be subject to the ECJ's broad rejection of privilege for communications with in-house counsel. In *John Deere & Co. v. N.V. Cofabel*, the European Commission seized legal memoranda prepared by John Deere's in-house counsel that had been provided to management in both John Deere's European headquarters in Germany and their main headquarters in the U.S. Commission Decision 85/79/ECC, *John Deere & Co. v. N.V. Cofabel*, 14 December 1984 O.J.L. 35. The Commission relied on these memoranda in concluding that John Deere had intentionally violated European antitrust statutes.

Akzo Nobel places communications between foreign in-house counsel and offices and subsidiaries in Europe at risk. For instance, it is not difficult to imagine a situation in which the European Commission, in the course of an investigation into violations of E.U. competition law, will attempt to access documents containing legal advice transmitted from in-house counsel in Japan to executives in Europe. If *Akzo Nobel* is followed, such advice might not be protected by privilege.

Finally, the implications of the ECJ's decision may raise issues for companies that may also be subject to the jurisdiction of U.S. courts. In the U.S., attorney-client privilege arises when communications are made in confidence for the purpose of obtaining legal advice. In most U.S. courts, a communication is confidential if the client has a reasonable expectation of confidentiality when the communication is made. It is possible that litigants will attempt to seek access to in-house counsel's communications by arguing that companies have no reasonable expectation of confidentiality in communications to and from in-house counsel that are shared with company personnel in Europe because they are subject to seizure by the European Commission.

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To read the decision in *Akzo Nobel*, please [click here](#). For more information, you may contact the following attorneys:

London:

David Vann
44-20-7275-6550
dvann@stblaw.com

New York City:

Kevin Arquit
212-455-7680
karguit@stblaw.com

Ken Logan
212-455-2650
klogan@stblaw.com

Joe Tringali
212-455-3840
jtringali@stblaw.com

Mark Cunha
212-455-3475
mcunha@stblaw.com

Joe Wayland
212-455-3203
jwayland@stblaw.com

Aimee Goldstein
212-455-7681
agoldstein@stblaw.com

Washington DC:

Peter Thomas
202-636-5535
pthomas@stblaw.com

Arman Oruc
202-636-5599
aoruc@stblaw.com

Palo Alto:

James Kreissman
650-251-5080
jkreissman@stblaw.com

Harrison Frahn
650-251-5065
hfrahn@stblaw.com

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UNITED STATES**New York**

425 Lexington Avenue
New York, NY 10017-3954
+1-212-455-2000

Los Angeles

1999 Avenue of the Stars
Los Angeles, CA 90067
+1-310-407-7500

Palo Alto

2550 Hanover Street
Palo Alto, CA 94304
+1-650-251-5000

Washington, D.C.

1155 F Street, N.W.
Washington, D.C. 20004
+1-202-636-5500

EUROPE**London**

CityPoint
One Ropemaker Street
London EC2Y 9HU
England
+44-(0)20-7275-6500

ASIA**Beijing**

3119 China World Office 1
1 Jianguomenwai Avenue
Beijing 100004
China
+86-10-5965-2999

Hong Kong

ICBC Tower
3 Garden Road, Central
Hong Kong
+852-2514-7600

Tokyo

Ark Mori Building
12-32, Akasaka 1-Chome
Minato-Ku, Tokyo 107-6037
Japan
+81-3-5562-6200

SOUTH AMERICA**São Paulo**

Av. Presidente Juscelino Kubitschek, 1455
São Paulo, SP 04543-011
Brazil
+55-11-3546-1000