



In-House Lawyer's Communications Not Protected by Legal Professional Privilege in European Commission Competition Case

Insights
11.29.10

Companies doing business in the European Union should take note of a recent case in which the European Court of Justice dismissed an appeal by Akzo Nobel Chemicals Ltd ("Akzo") and Akcros Chemicals Ltd ("Akcros") that challenged a 2007 lower court decision that an in-house lawyer's emails accessed during a European Commission antitrust investigation were not protected by the what the Court refers to as the legal professional privilege, or the attorney-client privilege. *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. European Commission* (September 14, 2010, Case C-550-07 P).

Background of Case. The facts that led to this decision began in February 2003, when the European Commission ("EC") ordered Akzo and Akcros and their respective subsidiaries to submit to an investigation governed by its regulations regarding possible anti-competitive practices. During this investigation of Akzo's and Akcros' United Kingdom premises, EC officials took copies of numerous documents which the applicants' representatives were likely to be covered by the protection of confidentiality of communications between attorneys and their clients. The EC officials, after examining the documents, determined there were three documents which were not privileged, including two emails exchanged between Akcros' general manager and Akzo's coordinator of competition law, an Akzo employee who was a permanent member of Akzo's legal department, and an Advocaat of the Netherlands Bar.

In 2007, a lower European Union (EU) Court rejected Akzo's request to extend the legal professional privilege to the two emails, holding that these communications were not covered by the legal professional privilege in view of the employment relationship between the in-house lawyer and Akzo. Akzo/Akcros appealed the lower court decision to the European Court of Justice ("the Court"), which is located in Luxembourg. There were numerous other parties to this appeal, including, as interveners, the European Company Lawyers Association, the Association of Corporate Counsel Association (ACCA), the International Bar Association, United Kingdom of Great Britain and Northern Ireland, and the Kingdom of the Netherlands.

Court Opinion. On September 14, 2010, the Court rejected the appeal by the parties and interveners to the lower court decision and held that during investigations conducted by the EC governed by its antitrust regulations, communications by in-house counsel are not protected by the legal professional privilege since the requirement of independence under that privilege means the

professional privilege since the requirement of independence under that privilege means the absence of any employment relationship between the lawyer and his client. According to the Court, in-house lawyers, even when enrolled as an attorney in a bar association with professional ethical obligations, do not enjoy the same degree of independence from their employer as do lawyers working in an external law firm in relation to their client, and are therefore less able to deal effectively with any conflicts between their professional obligations and the aims of their clients. The Court stated that in-house lawyers cannot be treated in the same way as external lawyers because they occupy the position of an employee which does not allow them to ignore the commercial strategies pursued by their employers, and therefore affects their ability to exercise professional independence. When a company seeks advice from its in-house lawyer, the Court found that it is not dealing with an independent third party.

In addition, the Court found that under the terms of their employment contracts, in-house lawyers may be required to carry out other tasks, such as in the Akzo/Akcros case, the task of competition law coordinator, which may have an effect on the employer's commercial policy, therefore reinforcing the close ties between the lawyer and his employer.

The Court also rejected Akzo and Akcros's view that the General Court wrongly refused to widen the scope of legal professional privilege on the ground that national laws are not unanimous and unequivocal in recognizing legal professional privilege for communications with in-house lawyers. Instead, the Court found that despite the lack of uniformity at a country level, European Union law could set legal standards for the protection of the rights of defense which are higher than those set in certain national legal orders.

Regarding the specific EC competition regulations, the Court found that these regulations make it clear that the Commission may conduct all necessary inspections of companies, including undertakings, including examining the books and other records related to the business, irrespective of the medium on which they are stored, and also take or obtain in any form copies or extracts of such books or records.

The court also found that all of the parties, including those who entered the case as interveners, would pay their own costs.

Lessons for Multi-National Companies. Multi-national companies should always investigate to what extent the attorney-client privilege or legal professional privileged exists outside of the United States. In many countries, including those in North America, including in Canada, and elsewhere in the world, the attorney-client privilege is either weaker than in the United States or non-existent under certain circumstances. The specific lesson to be learned from the Akzo/Akcros case is that in European Commission antitrust investigations, communications between companies and their in-house counsel, as opposed to outside counsel, will not be afforded the attorney-client privilege. Given this legal ruling, companies governed by European Commission regulations should take the following steps if they believe there is an investigation or other matter that may involve legal or administrative proceedings: 1) use outside counsel for such communications; or 2) closely review

the company's communications process involving in-house attorneys to ensure that such communications, written and otherwise, are not discoverable by the government or through the legal system.