European Court of Justice Re-Affirms Principle That Communications Between Employees and In-House Lawyers Are Not Covered by Legal Professional Privilege

Insights
9.29.10

In an opinion issued on September 14, 2010, the European Court of Justice ("ECJ") affirmed the principle of EU law that communications between in-house counsel and corporate employees are not protected by the legal professional privilege.

The judgment in the case entitled Azko Nobel Chemicals Ltd. and Akros Chemicals Ltd. v. Commission, Case C-550/07P, interpreted the long-standing rule, first enunciated in the 1982 AM & S v. Commission judgment, that the legal professional privilege does not cover communications between in-house counsel and corporate employees. See Case No. C-550/07P, 1982 E.C.R. 1575. By way of bri ef background, the Azko appeal arose from a ruling made as part of an investigation by the European Commission into suspected anti-competitive practices by Azko. In the course of the Commission's investigation, Azko was required to turn over two e-mail messages between its in-house competition lawyer and its general manager. Azko filed an appeal with the General Court contending that the e-mails were protected by the privilege; the General Court ruled in the Commission's favor, and A zko appealed to the ECJ, essentially asking the ECJ to re-examine the AM & S case.

The AM & S judgment held that communications between lawyers and client are generally privileged, subject to two caveats: (1) "that the exchange must be connect to &l squo;the client's right of defense", and (2) "that the exchange must emanate from 'independent lawyers,' that is to say 'lawyers who are not bound to the client by a relationship of employment," and applied the second caveat to exclude communications between in-house counsel and corporate employees. Azko's appeal centered on two arguments seeking to establish that this application of the second caveat should be reconsidered: first, that a lawyer's "professional ethical obligations" are sufficient to establish his independence from his employer-client, and second, that there had been a "remaking" of the legal landscape among EU member states such that the application of the lawyer-client privilege to in-house counsel was now the norm among member states, and EU law shoud be revised to reflect this evolution of the law.

In rejecting Azko's arguments, the Court focused on the lack of independence which it found inherent in the employment relationship. The court noted that, despite the existence of professional ethical obligations, "an in-house lawyer cannot, whatever guarantees he has in the exercise of his profession, be treated the same way as an external lawyer, because he occupies the position of an

profession, be treated the same way as an external lawyer, because he occupies the position of an employee which, by its very nature, does not allow him to ignore the commercial strategies pursed by his employer, and thereby affects his ability to exercise professional independence." The Court further rejected the idea that there had been a marked change in the laws of members states since the AM & S judgment, noting that "a comparative examination…shows that a large number of Member State still exclude correspondence with in-house lawyers from protection under legal professional privilege," and noting further that some Member State do not permit in-house lawyers to admitted to their state Bar or Law societies, a limitation that undercut Azko's argument that an in-house lawyer's professional ethical obligations create the "independence" from their corporate employers that the rule of AM & S requires. Accordingly, the Court upheld the exclusion of AM & S.

Perhaps the most interesting question raised by the appeal, whether the privilege exclusion for in-house communications applies outside the context of an investigation by the Commission's sta ff, was left unanswered. This uncertainty presents a significant risk that communications between in-house lawyers and corporate employees in the EU are not privileged, especially in jurisdictions which do not by their own regulations protect such communications. It may be a best practice, then, for corporations doing business in the EU to engage outside counsel for sensitive communications that it suspects may later be subject to disclosure. Also left unanswered by the ECJ's judgment in the matter is whether communications between a European corporate representative and an in-house lawyer in a non-member state which takes a more stout view of the lawyer-client privilege, such as the U.S., would not be protected by the legal professional privilege. This, too, creates a potential trap for the unwary cross-border corporation.

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