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Court of Justice of the European Union Decision: No Legal Professional Privilege for In-House Counsel Under EU Competition Law

On September 14, the European Union’s (EU) highest court, the Court of Justice of the European Union (the “Court of Justice”) dismissed the appeal of a judgment of the General Court (formerly the Court of First Instance of the European Communities), a judgment with major implications for the role of in-house counsel under EU competition law.

The case,¹ which involved Akzo Nobel Chemicals Ltd. (Akzo) and its subsidiary Akcros Chemicals Ltd., started with an investigation by representatives of the European Commission (the “Commission”) at Akzo’s premises in the United Kingdom. During the investigation, Commission officials took copies of a number of documents. Among the copied documents was e-mail correspondence between Akzo’s in-house counsel, a member of the Netherlands Bar, and Akcros’s general manager.

Akzo immediately claimed that this e-mail correspondence was protected by legal professional privilege (LPP) and could therefore not be taken into account by the Commission. The Commission did not agree and informed Akzo of its intention to add the correspondence to the investigation file.

In September of 2007, the General Court examined the governing principles of LPP, as originally formulated by the Court of Justice in the AM&S case.² The Court reasoned that:

“It must be pointed out that in its judgment in AM&S, the Court of Justice expressly held that the protection accorded to LPP under Community law, in the application of Regulation No 17, only applies to the extent that the lawyer is independent, that is to say, not bound to his client by a relationship of employment (paragraphs 21, 22 and 27 of the judgment). The requirement as to the position and status as an independent lawyer, which must be met by the legal adviser from whom the written communications which may be protected emanate, is based on a concept of the lawyer’s role as collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interests of the administration of justice, such legal assistance as the client needs (AM & S, paragraph 24).”³

The independence of a lawyer was therefore, according to the General Court, a condition sine qua non for LPP.

Thus, internal corporate communications seeking the legal advice of in-house counsel are not covered by the LPP, and can and will be considered in EU competition investigations.

Dismissing Akzo's appeal of the General Court's findings with respect to two documents reflecting in-house counsel's advice, the Court of Justice agreed with the rationale of the General Court and reaffirmed its interpretation of the LPP, as articulated in the AM&S case, and declined Akzo's invitation to broaden the scope of the LPP to include internal corporate communications with in-house counsel. Instead, the Court of Justice embraced its holding in AM&S, finding that lawyers who are employees of corporations have conflicted loyalties that are distinguishable from outside counsel's relationship with their clients, and in-house counsel lack the requisite independence from the employer/corporation to qualify for the protections of the LPP.

In-house counsel who are active in the European market, including in-house counsel who rely on the U.S. LPP, should be mindful of the Court of Justice's ruling when drafting correspondence regarding the company's competition-sensitive legal concerns. The implications of correspondence considered to be covered by the LPP turning up as evidence in a competition infringement case can be potentially disastrous.

For competition-related advice, companies active in the European market should seriously consider retaining and consulting an outside, independent, European qualified lawyer, i.e., a lawyer who is not an employee of the company, and then communicating their confidential requests for legal advice concerning sensitive, competition-related issues to their outside, independent counsel. The risks of "thought to be confidential" communications being used as evidence against the company are just too great.

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¹ Case nr. C-550/07P, Akzo Nobel Chemicals Ltd and Ackros Chemicals Ltd vs. Commission of the European Communities.

² Case nr. 155/79 AM&S vs. Commission of the European Communities ("AM&S").

³ Joined cases T-125/03 and T-253/03, Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd vs. Commission of the European Communities, under 166.

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