A Timely Analysis of Legal Developments

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The European Court of Justice Reaffirms that Communications with In-House Counsel May Not Be Privileged in Europe

By Nick Linn

On September 14, 2010, the European Court of Justice ("ECJ") disappointed many in the legal community when it issued its long-awaited decision in *Akzo Nobel Chemicals*.[1] In that case, the ECJ reaffirmed its long-standing position that under European Union law communications with in-house lawyers in antitrust matters are not protected by the attorney-client privilege (or the legal professional privilege as it is known in the European Union). Although issued only days ago, the court's decision in *Akzo* has already been much maligned by legal commentators and many in the blogosphere.

Although the ECJ's decision does not alter the existing legal landscape with regard to the legal professional privilege, it does reinforce what many view as an outdated and offensive view of the professionalism of in-house counsel. In essence, in its 23-page opinion, the ECJ concluded that, because they are employed by the companies they represent, in-house counsel lack sufficient professional independence to permit the attorney-client privilege to be applied to their communications. Indeed, in an opinion deemed demeaning to in-house counsel by some, the ECJ repeatedly expressed a viewpoint consistent with the following statement:

> . . .an in-house lawyer cannot, whatever guarantees he has in the exercise of his profession, be treated in 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 pursued by his employer, and thereby affects his ability to exercise professional independence.[2]

While European Union law regarding the legal professional privilege associated with antitrust matters remains unchanged,[3] the court's ruling in *Akzo* provides an explicit caution to all HR professionals and lawyers. Before undertaking any sort of investigation and to avoid potentially devastating disclosure of privileged communications, they must carefully consider the application of the attorney-client privilege in the jurisdiction in question. In many instances, the only effective means of protecting information from disclosure is to involve outside counsel.

History of the *Akzo* Case

The *Akzo* case began in February 2003 when the European Commission conducted an antitrust raid of Akzo's U.K. offices. During that raid, officials seized emails, notes and other documents, some of which Akzo argued were privileged communications with in-house counsel. Akzo later challenged the European Commission's right to have access to the documents it claimed were privileged. In 2007, Akzo's arguments were rejected by the European Union Court of the First Instance.[4] Akzo subsequently appealed that decision.

On April 29, 2010, the Advocate General of the ECJ issued a lengthy advisory opinion in the *Akzo* case, in which she concluded that in-house counsel lack sufficient independence to warrant extending protection to their communications. In so concluding, the Advocate General stated:

> With regard to their respective degrees of independence when giving legal advice or providing representation in legal proceedings, there is therefore usually a significant difference between a lawyer in private practice or employed by a law firm, on the one hand, and an enrolled in-house lawyer, on the other. The fact that they are significantly less independent makes it more difficult for enrolled in-house lawyers to deal effectively with a conflict of interests between their professional obligations and the aims and wishes of their undertaking.[5]

While the Advocate General's opinion was purely advisory, and not in any way binding on the ECJ, the court historically has relied on such opinions, which is precisely what occurred.

Practical Suggestions

As highlighted by the *Akzo* decision, when dealing with cross-border matters of all types, HR professionals and in-house counsel need to be particularly cognizant that in many jurisdictions their internal communications are not protected by any form of attorney-client privilege. As a result, and to minimize the risk of unintentionally disclosing confidential information in such matters, it is important to consider the following:

- Take the time to understand the application of the attorney-client privilege in the jurisdiction(s) in question – do not assume the U.S. model is applicable.
- Retain outside counsel – in many instances, this is the only effective means of protecting communications from disclosure.
- When permitted by the facts, enhance the likelihood of U.S. law applying by increasing connections to the U.S. (involve U.S. lawyers – both internal and external – in the matter) and where possible, clearly state in applicable retention letters that counsel (both foreign and domestic) are being retained, at least in part, because of legal issues/exposure in the U.S.

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[1] *Akzo Nobel Chemicals Ltd. v. EU* (Case-550/07).

[2] *Id.* at paragraph 47.

[3] See European Court of Justice's 1982 opinion in *AM&S Europe v. Commission* (Case-155/79), in which the ECJ enunciated the standard affirmed by the Court in *Azko* – to be privileged, communication must be both (1) related to client's rights of defense, and (2) be with an independent/external lawyer.

[4] Joined Cases T-125/03 and T-253/03, *Akzo Nobel Chemicals and Ackros Chemicals v. Commission.*

[5] *See* Advocate General Kokott's April 29, 2010 advisory opinion in *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd. v. European Commission* (Case-550/07P), at paragraph 82.