

Akzo Nobel Chemicals Ltd. v. Commission: The European Court of Justice Reaffirms that Communications with In-House Lawyers Are Not Covered by Legal Professional Privilege

On September 14, 2010, the European Court of Justice (“ECJ” or “the Court”) issued a judgment in Case C-550/07P, *Akzo Nobel Chemicals Ltd. and Akros Chemicals Ltd. v. Commission*, refusing to modify or overturn prior precedent that communications with in-house lawyers are not accorded legal professional privilege under European law in the context of an investigation of violations of competition law by the European Commission.¹ The Court declined to reconsider the 1982 decision that articulated this restrictive interpretation of privilege.

I. Background

Akzo Nobel Chemicals Ltd. (“Akzo”) and its subsidiary, Akros Chemicals Ltd. (“Akros”) (collectively, “the appellants”), claimed certain documents collected by the European Commission (the “Commission”) during a “dawn raid” were subject to legal professional privilege. Two of these documents were e-mails exchanged between Akros’ general manager and a “Mr. S,” Akzo’s coordinator for competition law, who was a member of the Netherlands Bar and was employed by Akzo in its legal department. The documents were exchanged in connection with a request for legal advice from Mr. S.

II. The ECJ’s Decision

The ECJ disagreed with the appellants’ position “that the General Court wrongly refused to apply legal professional privilege to the two e-mails exchanged with Mr. S.”² The ECJ relied in large part on the 1982 *AM & S Europe v. Commission* decision, which had held that legal professional privilege for communications between lawyers and their clients is subject to two conditions: First, “that the exchange with the lawyer must be connected to ‘the client’s rights of defence’ and, second, 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.’”³

The Court in *AM & S* had explained that the latter requirement regarding the lawyer’s independence “is based on a conception of the lawyer’s role as collaborating in the administration of justice and as being required to provide, in full independence and in the overriding interests of that cause, such legal assistance as the client needs.”⁴ Thus, clarified the Court in *Akzo*, “[i]t follows that the requirement of independence means the absence of any employment relationship between the lawyer and his client, so that legal professional privilege does not cover exchanges within a company or group with in-house lawyers.”⁵

¹ The text of the decision can be found at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-550/07>.

² Case C-550/07P, *Akzo Nobel Chemicals Ltd. and Akros Chemicals Ltd. v. Commission*, at ¶ 28.

³ *Id.* at ¶ 41 (citing Case 155/79, *AM & S Europe v. Commission*, 1982 E.C.R. 1575).

⁴ *Id.* at ¶ 42.

⁵ *Id.* at ¶ 44.

Some commentators had suggested that *AM & S* might have been decided differently if the in-house attorney at issue had been a member of the bar. However, the Court in *Akzo* rejected this distinction and observed that regardless of an in-house lawyer’s membership in a Bar or Law Society and the professional ethical obligations that come along with it, an “in-house lawyer does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his client”; an in-house lawyer is economically dependent on his or her employer and moreover, as an employee, an in-house lawyer cannot ignore the commercial strategies pursued by his or her employer.⁶

The appellants also contended that the General Court should have taken into consideration recent developments in the legal landscape with regard to the principle of legal professional privilege and reinterpreted *AM & S* accordingly. The Court noted that there was no clear change in the laws of the Member States of the European Union and that, in fact, “a large number of Member States still exclude correspondence with in-house lawyers from protection under legal professional privilege” (and some do not even allow in-house lawyers to be admitted to a Bar or Law Society).⁷

III. Significance of the Decision

The ECJ’s decision serves as a reminder that the protection of legal professional privilege is not accorded to communications with in-house lawyers, at least in the context of the Commission’s competition investigations, and likely in the context of other investigations and proceedings within the Commission’s purview as well.⁸ Accordingly, counsel and their European clients must carefully plan the manner by which they communicate.

* * *

If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Laurence T. Sorkin at 212.701.3209 or lsorkin@cahill.com; or Elai Katz at 212.701.3039 or ekatz@cahill.com; or Yafit Cohn at 212.701.3089 or ycohn@cahill.com.

⁶ *Id.* at ¶¶ 45, 47, 49.

⁷ *Id.* at ¶ 72. The Court clarified that its decision was limited to European Union law and did not detract from more generous application of privilege in some Member States under their national laws. *Id.* at ¶ 102.

⁸ The Court did not address the opinion of the Advocate General that communications with either in-house or external lawyers admitted in a jurisdiction outside the European Union are likewise not protected by legal professional privilege.