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PRIVILEGE

'Akzo Nobel': Implications For American Lawyers

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On Sept. 14, 2010, the European Court of Justice (ECJ) handed down its judgment confirming that legal professional privilege does not apply to communications between a company and its in-house lawyers in the context of European Union antitrust investigations (*Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. Commission,* Case C-550/07 P). This decision, which has disappointed many observers, re-emphasizes the necessity for companies to take precautions when communicating with their own legal team if they want to ensure those communications are not disclosed in the context of regulatory investigations conducted by the European Commission (EC).

Legal Professional Privilege

Privilege is the protection the law provides to maintain the confidentiality of communications between a lawyer and his client. Legal professional privilege is, broadly speaking, the European equivalent of the attorney-client privilege.

Within the European Union (EU), the precise legal boundaries of privilege protection are not consistent. They vary both from jurisdiction to jurisdiction, and between individual jurisdictions on the one hand and pan-EU institutions on the other. So far as those EU institutions are concerned, the relevant treaty that governs the operation of the EU, including the powers of the EC to investigate antitrust behavior (The Treaty on the Functioning of the European Union) does not include any provisions on legal privilege. Instead, the principle has been developed through European case law.

The leading European case is *Australia Mining & Smelting Europe Ltd v. Commission*, Case 155/79 [1983] 1 All ER 705 ("*AM&S*"). In *AM&S*, the ECJ, the highest court in the EU, held that communications between a lawyer and his client would be protected at an EU level if those communications (i) were made for the purposes, and in the interests of, the client's right of defense; and (ii) emanate from independent lawyers entitled to practice in Europe (that is to say, lawyers who are not "bound to the client by a relationship of employment").

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The key issue in the *Akzo Nobel* case was whether the second prong of the *AM&S* test effectively excluded communications with, amongst others, in-house counsel from the protection of privilege, and, if so, whether it remained good law in the EU context. This issue was of particular interest to lawyers and clients in those EU jurisdictions (such as the UK) in which the national rules of privilege do not distinguish between in-house and outside counsel.

Facts in 'Akzo Nobel' Case

In February 2003, the EC carried out "dawn raids" on the UK premises of two chemical companies, Akzo Nobel Chemicals Ltd and Akcros Chemicals Limited (together, "Akzo Nobel") seeking evidence of antitrust activity. During that raid, EC officials seized documents that Akzo Nobel claimed were legally privileged communications, including e-mails exchanged between Akzo Nobel's managing director and its in-house coordinator for competition law (a qualified Dutch lawyer). In May 2003, the EC rejected the claim for privilege with respect to these communications.

Akzo Nobel brought a case challenging the EC's decision in this regard. In September 2007, the European Court of First Instance upheld the EC's decision (*Akzo Nobel Chemicals Ltd v. Commission of European Communities* (T-125/03) [2007] E.C.R. II-3523). Akzo Nobel appealed that judgment to the ECJ. On April 29, 2010, Advocate-General Juliane Kokott, senior legal adviser to the ECJ, delivered her opinion which, as is usual, the ECJ very largely followed in this case.

A significant number of parties, including the governments of the UK, The Netherlands and Ireland, the International Bar Association, the American Corporate Counsel Association and the European Company Lawyers Association all intervened in support of Akzo Nobel. The case was heard on Feb. 9, 2010, and, on Sept. 14, 2010, the ECJ handed down its judgment dismissing the appeal. Although not raised in the ECJ's decision, it is perhaps relevant to note that, by the time the case was heard by the ECJ, Akzo Nobel had already been fined for antitrust activity, without any reference to or reliance on the offending communications. Accordingly, it was difficult for Akzo Nobel to show any real prejudice from privilege not being extended to the communications in question.

Judgment in 'Akzo Nobel'

The ECJ concluded that the second prong of the *AM&S* test did indeed exclude communications with in-house counsel from the scope of legal professional privilege, and that the exclusion remained good law. The ECJ's view was that in-house lawyers, despite their enrollment with their professional regulatory body and the professional ethical obligations to which they are subject, do not enjoy a sufficient degree of independence from their employer (or the same degree of independence as an outside counsel does from his client) to justify the extension of privilege protection to them. The ECJ found that an in-house lawyer cannot ignore the commercial strategies pursued by his employer and, indeed, may

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be part of the process of formulating those strategies. Further, an in-house lawyer's economic dependence on the employer also compromises his ability to exercise professional independence.

The ECJ considered, but also dismissed, Akzo Nobel's arguments that the role of in-house lawyers had evolved and privileged communications with such lawyers was relatively more common today than when the *AM&S* judgment was handed down in 1982, such that, even if the case had been correctly decided then, a change in the law was in any event justified now. Finally, the ECJ also rejected a range of other arguments raised by Akzo Nobel, including arguments based on the principle of legal certainty, the principle of national autonomy, and the right (enshrined in the European Convention of Human Rights) to a fair trial. As is usual with ECJ judgments, the reasoning is sparse.

It was relevant to the ECJ's decision that not all 27 member states of the EU have a system (such as the UK's) that allows in-house counsel to be admitted to the appropriate lawyers' professional body. Nor do all member states structurally guarantee the independence of in-house counsel, or accord them the same status as lawyers in private practice. Indeed, the ECJ found that only a minority of EU states extend legal professional privilege to in-house counsel. Accordingly, the ECJ concluded that outside and in-house counsel were not sufficiently comparable for the principle of equal treatment to be applied in this case.

One of the issues raised by the *AM&S* decision was that the second prong of the test suggested that communications even with outside counsel will not benefit from privilege if those lawyers are not admitted to practice within the EU (e.g., American lawyers). This issue was not addressed by the ECJ in the *Akzo Nobel* case (although the Advocate-General's opinion concurred with the approach taken by the Court in the *AM&S* case).

Practical Implications

The ECJ's decision in *Akzo Nobel* has no automatic impact on the national rules of privilege of the EU member states (although at least one state has sought to change its national rules to bring them into alignment with the ECJ's decision). In England, for example, the existing recognition of privilege protection for in-house lawyers will continue unaffected (including in relation to domestic antitrust investigations). In the EU antitrust context, however, the only way in which privilege could be extended to in-house counsel now would be by legislative change. Despite the widespread concern that the ECJ's decision effectively weakens the ability of in-house counsel to ensure the company's compliance with the antitrust rules (thus undermining the purpose of the EC's powers in this regard), the prospect of any legislative change in the foreseeable future seems remote.

Accordingly, in-house counsel need to consider carefully the issue of protection of communications in the context of EU regulatory investigations. As a preliminary point, given the continuing application of national rules, it is important—in the event of a dawn raid by a domestic antitrust regulator—to understand whether the domestic regulator is conducting investigations on its own account or as part of an EU investigation.

If the EU laws of privilege do apply, then, given EC's wide-ranging powers to obtain access to a company's systems and files (including those of its in-house legal team), care (and advance planning) is vital to restrict the creation of potentially damaging documents and ensure protection of sensitive legal advice.

The safest course of action in light of the *Akzo Nobel* decision is of course either to have in place a system under which all antitrust advice is given, and all such investigations are conducted, by outside counsel, or, alternatively, for in-house counsel to conduct investigations, or give advice, orally. However, such approaches are by no means always practical (and it is theoretically possible that the EC could request details of oral advice, although this issue has not arisen and grounds for refusal may be available).

The ECJ found that an in-house lawyer cannot ignore the commercial strategies pursued by his employer and, indeed, may be part of the process of formulating those strategies. Further, an in-house lawyer's economic dependence on the employer also compromises his ability to exercise professional independence.

If documents are created over which privilege will be sought in the event of an EU antitrust investigation (or, potentially, any investigation pursuant to the European Commission's information gathering powers), steps should be taken that will assist in identifying and segregating such material in the event of a dawn raid. As a basic point, all documents for which privilege may be sought should be clearly marked as being privileged. For highly sensitive material, such material should be filed separately (i.e., not simply maintained on the in-house lawyer's file which is likely to be subject to inspection).

A company is entitled to refuse to allow EC officials to review privileged documents (i.e., communications with outside counsel) where the company can justify the claim to privilege by reference to the basic details of the documents (e.g., author, recipient, purpose, etc). If there is a dispute, the document should be placed in a sealed envelope. Under no circumstances should the document be provided to the EC officials (otherwise any privilege in the document may in any event have been lost).

There are a number of types of documents where the privileged status is not clear, or where particular care should be taken. For example, privilege should cover instructions for external counsel prepared internally, although the Court in the *Akzo Nobel* case specifically noted that the extent to which privilege covers such preparatory documents should be applied restrictively (and so any such documents should make clear on their face that their purpose is to instruct external counsel). Privilege should also extend to in-house documents that report advice received. However, the position is less clear if the in-house summaries seek to comment on or refine the advice. Accordingly, if a summary might be required for internal purposes, the prudent approach would be to request the external lawyers to produce it. Another grey area is the status of communications with experts in connection with antitrust investigations. For this category, the appropriate course of action would be to communicate with the experts through external counsel.

As with all privileged communications, the claim for privilege is likely to fail if the communication in question has not been kept confidential—accordingly, disclosure of potentially privileged material should be kept to a minimum and recipients should be specifically required to treat the material as confidential.

As the *Akzo Nobel* case did not deal with the position of non-EU lawyers, the most prudent course of action would still be to route (at least written) advice from non-EU qualified outside counsel through EU qualified outside counsel.

The *Akzo Nobel* decision is a disappointing decision to global companies with presence within the EU and the EC's jurisdiction. It also leaves open a number of issues, such as the position of non-EU lawyers referred to above, and the legal implications of inconsistent privilege rules being applied in the context of parallel EU and domestic investigations. Nonetheless, as it confirms what was in any event understood to be the legal position, the compliance manuals of a number of companies are already drafted to address the difficulties the decision causes. Those companies that have not yet done so would be well-advised to update their systems and procedures in this regard. Moreover, American lawyers who communicate regularly with a company's European employees or lawyers should be aware that such communications will not be subject to privilege if they are relevant to an investigation by the EC.