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Europe's Highest Court Reconfirms Limitations of Legal Privilege in the European Union

In its judgment *Akzo Nobel and Akcros v. Commission* (Case C-550/07 P), the EU's highest court today clarified the scope of legal privilege in the EU. The Court of Justice ruled that communications between a company and its in-house lawyers are not protected by legal privilege.

1. Findings of the Court

The Court upheld the lower court's 2007 judgment and confirmed that legal professional privilege is not extended to the advice prepared by in-house lawyers. The requirement of independence on the part of the lawyer in order for communications between that lawyer and the client to be privileged precluded the presence of an employment relationship.

The Court emphasized that even when an in-house lawyer is enrolled with a Bar and is subject to ethical obligations and Bar disciplinary procedures, that lawyer does not enjoy the same degree of independence from his or her employer as an outside counsel does in relation to its client.

By its very nature, in the Court's view, the employment relationship between a corporation and its in-house lawyers did not allow those lawyers to ignore the commercial strategies pursued by their employer,

and it thereby affected their ability to exercise professional independence.

Accordingly, communications between in-house lawyers and other employees of the same business (or group of businesses) may be seized by European Commission officials in the course of an investigation of suspected violations of competition law, and used as evidence in the administrative proceedings.

2. Background

The facts of Akzo Nobel

In 2003, officials from the European Commission raided the premises of Akzo and Akcros in Manchester. During the course of the inspections, officials seized certain documents which Akzo claimed were protected by attorney-client or legal professional privilege. The documents included:

- a memo prepared by the general manager of Akcros containing information gained in internal interviews with company employees, and a subsequent version of the same memorandum with handwritten notes referring to contact with an external lawyer; and
- handwritten notes of the general manager's interviews with employ-

ees for the purposes of preparing the memorandum, and emails between the general manager and Akzo's in-house counsel who, critically, was a member of the Dutch Bar.

The Commission officials "briefly" examined the documents, concluded that they were not privileged and took copies, which were added to the Commission's file. When Akzo subsequently challenged the position adopted by the officials, the Commission adopted a formal decision rejecting privilege for all of the relevant documents.

Arguments of the applicants

The legal action brought against the Commission by Akzo and Akcros challenged the Court of Justice's existing interpretation of the law on legal privilege as laid down in the 1982 case *AM & S*, in which it had ruled that written communications between a lawyer and a client were protected by privilege where

- the communications were made for the purposes of exercising the client's right of defense, and
- the communications emanate from independent lawyers.

Both before the General Court (previously called the Court of First Instance) and the Court of Justice, Akzo (supported by a number of interveners including Member States and lawyers' associations) argued that the criterion that the lawyer must be independent cannot be interpreted to exclude in-house lawyers enrolled at a Bar or Law Society.

The applicants argued that membership of legal professional organizations equally subjected external and in-house lawyers to rigorous ethical and professional standards, making the employment relationship for in-house lawyers fully compatible with the concept of an independent lawyer.

Therefore, in the applicants' view, the distinction should be drawn between those lawyers who are subject to such professional requirements and those who are not, rather than based on the employment relationship. The European courts disagreed and ultimately re-confirmed the existing legal standard.

3. Consequences for corporations doing business in Europe

Today's judgment thus reaffirms the law as set down in *AM & S* and settles

the controversial discussions over legal privilege for in-house lawyers' advice in favor of the Commission's position. The judgment does not, however, resolve certain outstanding questions with significant implications for multinational corporations in times of intense international cooperation between competition authorities:

- First, the judgment does not resolve the problem of conflicting privilege regimes within the EU. If an inspection occurs, companies should immediately verify the legal basis for the inspection, in order to determine whether EU law (as laid down in today's judgment in *Akzo*) or national rules will apply to the question of privilege protection.
- Second, in the United States, communications with in-house legal counsel are also covered by legal privilege. However, the *Akzo* ruling denying the same privilege protection for in-house counsel during investigations by the European Commission exposes in-house counsel in the United States to the risk of losing legal privilege coverage.