Legal Privilege Rule: ECJ Affirms Akzo Nobel
No Privilege for Communications with In-House Counsel in EU Investigations

Key Points

- The European Court of Justice (“the ECJ”) confirms that legal advice given by in-house counsel will not be protected by legal privilege for EU investigations.

- National rules, which treat advice from in-house counsel as being legally privileged (contrary to the EU position), will continue to be valid for national investigations (e.g., in the UK, Ireland and the Netherlands).

- The EU rules of privilege will always apply to the Commission in its EU antitrust investigations, irrespective of whether the Commission is assisted by a national competition authority.

- The ECJ did not make any special reference to the existing rule that legal privilege does not apply to communications with lawyers qualified outside of the EU. The current rule denying privilege to communications from non-EU outside counsel remains in place.

The ECJ on September 14, 2010 handed down its much-awaited decision in the Akzo Nobel Chemicals Ltd. v. Commission case putting an end to the uncertain question of what legal communications will be covered by legal privilege in an EU antitrust investigation.

Akzo Nobel (“Akzo”), a chemicals company headquartered in the Netherlands, submitted a claim for legal privilege to the Commission in February 2003 in the context of a dawn raid carried out by the Commission at Akzo’s UK operations. During the raid, Akzo resisted the production of five documents that it claimed were privileged. Two of these documents were e-mail exchanges between Akzo’s in-house counsel (a member of the Dutch Bar) and one of Akzo’s general managers. In May 2003, the Commission formally rejected Akzo’s privilege claim and declined Akzo’s request to return these documents.

In July 2003, Akzo challenged the Commission’s decision before the Court of First Instance (now the General Court) and in 2007, the General Court rejected the appeal. The General Court stressed the importance of protecting the confidentiality of communications between clients and their lawyers in order to ensure unrestricted access to independent legal advice. However, it established some limits to this protection. The judgment stated that because there is no legal privilege in communications between a company and its in-house counsel, the Commission can, during its investigations, seize these types of communications. Akzo disagreed with the General Court’s position and in December 2007 appealed to the ECJ this decision.

The ECJ’s decision not only upholds the General Court’s position, but also re-affirms its own prior position stated 28 years ago in its AM&S Europe decision. The ECJ’s decision represents the conclusion of a long-standing
judicial debate delineating the position of in-house lawyers and of external law firms in a competition law context. Based on this judgment, communications between a company and its in-house counsel will not be covered by legal privilege. Companies will thus need to recognize that e-mails and memos sent to or by internal lawyers, regarding competition law advice on a possible case against the company, will not be protected, whereas the same documents might have been legally privileged if they had been sent to or by external EU lawyers.

Importantly, the ECJ’s decision does not discuss an area of protection which was afforded to companies previously: legal professional privilege should apply to internal company documents that are drawn up exclusively for the purpose of seeking legal advice from an independent lawyer (that is, external) in the exercise of a company’s rights of defence. This protection may apply even if these documents have not been exchanged with a lawyer or have not been created for the purpose of being sent physically to a lawyer. Equally importantly, the mere fact that a document has been discussed with a lawyer is not sufficient to give it such protection.

Finally, internal documents which merely summarise or report the text or content of an external lawyer’s advice, whether prepared by an in-house lawyer or other company employee, may also be protected by legal professional privilege if the communication from the external lawyer would also have been privileged. However, if such reports include the opinion or commercial judgment of the in-house lawyer or employee, or other additions or amendments, they run the risk of falling outside the ambit of legal professional privilege.

The 2010 ECJ’s Decision

In a nutshell, neither communications with in-house counsel nor advice from non-EU qualified lawyers will be considered legally privileged by the Commission when conducting any type of antitrust investigation (i.e., cartels, merger control and state aid).

The ECJ confirms through this decision, the two cumulative conditions established in its AM & S Europe case (1982) that should be met for legal professional privilege to apply at an EU level:

a) the exchange with the lawyer must be connected to “the client’s rights of defence” (i.e., it must be a communication made for the purposes and in the interests of the client’s rights of defence); and

b) the exchange must emanate from “independent lawyers.”

Independence Requirement

With regard to the requirement of independence, the ECJ defines this as “the absence of any employment relationship between the lawyer and his client.” The in-house counsel’s economic dependence and close ties with the company (i.e., its employer), puts him in a different position to that of the external lawyer. The ECJ’s rationale, following Advocate General Kokott’s (“the Advocate General”) opinion of 29 April 2010, is that regardless of an in-house lawyer being registered with a Bar or Law Society and the professional ethic obligations that he is subject to, his position as an employee of the company (and not as an independent lawyer) does not allow him to ignore the commercial strategies pursued by his client, thereby, affecting his ability to exercise professional independence. On this basis, communications between commercial managers and their in-house counsel should not be subject to legal professional privilege.

Communications with Non-EU Qualified Lawyers

Regarding communications with non-EU qualified lawyers, although the ECJ did not specifically address this issue, it is expected that the ECJ’s position on this issue, defined in its AM & S Europe judgment, will remain valid. There is some clarification given by the Advocate General of the rationale for not considering these communications as protected by legal privilege. Advocate General Kokott justifies not extending the legal professional privilege to communications with non-EU qualified lawyers on the basis of the lack of “mutual recognition of legal qualifications and professional ethical obligations to which lawyers are subject in the exercise of their profession” and the uncertainty of whether the respective rule-of-law tradition of the third country enables lawyers to exercise their profession independently. The Advocate General also underlines a
potential lack of administrative cooperation between the Commission and the authorities of non-EU countries.

The Advocate General’s position and the tacit confirmation by the ECJ on this matter is at odds with the position in the US where the protection afforded by legal professional privilege can be extended to communications with both in-house lawyers and non-US qualified lawyers.

**EU Law v. National Law with Regards to Legal Privilege**

Competition investigations can be carried out in the EU by the Commission or by national competition authorities. In each case, it will be clear from the decision ordering the investigation (which has to be presented to the undertaking concerned in writing prior to the inspection), what authority has ordered the search. The applicable privilege rules will be governed by the rules of the country whose competition authority is conducting the investigation. In summary:

- **If the inspection is carried out by the Commission:** the rules governing the investigation (legal privilege included) are determined by EU law. Therefore, in-house lawyer communications will not fall under the protection of legal privilege and the Commission should be allowed to access them.²
- **If the inspection is carried out by a national authority:** the investigation will be governed by national law, and this remains the case even if the national authority is carrying out the investigation on behalf of the Commission. Therefore, depending on the jurisdiction concerned and the applicable law, the corresponding national competition authority may or may not be able to access communications with in-house counsel. In countries such as the UK, Ireland and the Netherlands, in-house counsel communications are covered by legal privilege.

² National law may be applicable only in so far as national authorities lend their assistance, in particular through the use of direct coercion for an uncooperative company (i.e., police intervention), but the question of which documents and business records the Commission may examine/copy is determined exclusively in accordance with EU law.

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<tr>
<th>Asserting Legal Professional Privilege During an EU Raid</th>
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<tr>
<td>- Clearly identify legally privileged documents at an early stage to avoid accidental disclosure. If in doubt, consult lawyers.</td>
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<tr>
<td>- Inform inspectors if asserting legal privilege and do not give over documents.</td>
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<tr>
<td>- Inspectors may insist on taking privileged documents. If so:</td>
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<td>- Take into account that there is no requirement to allow investigators even a cursory look at these documents;</td>
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<td>- Ensure the documents are placed in a sealed enveloped;</td>
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<tr>
<td>- This will be resolved at a later stage: the company’s lawyers will be able to argue that the documents should not be disclosed.</td>
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<td>- Note any difference in opinion about a claim for privilege.</td>
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**Implications of the Decision**

Going forward, companies should be cautious when instructing their in-house lawyers to render competition law legal advice. In the case of a suspected breach of the competition rules, the company should evaluate at an early stage whether it will be better served to consult an external EU-qualified lawyer (whose communications will be covered by legal privilege) or to seek internal legal advice. Requesting the in-house counsel’s opinion may cause significant risk due to the disclosure obligations affirmed by the ECJ.

If providing internal advice for competition law issues, even if potentially compromising the quality and usefulness of his advice, an in-house lawyer should consider giving its opinion orally. If it is necessary to produce something in writing, in-house lawyers should also always be at pains to draft advice which will not bear any harmful significance if viewed by the authorities.

This case weakens, from a competition law perspective, the relationship between in-house lawyers and their employers and between non-EU qualified lawyers and...
their clients based in the EU. It will consequently be important not only for companies, but also for in-house and non-EU qualified lawyers, to understand the risks highlighted by this case, to carry out the appropriate arrangements and to take suitable measures to avoid the consequences of disclosure.

Practice group contacts

If you have questions regarding the information in this legal update, please contact the Dechert attorney with whom you regularly work, or any of the attorneys listed. Visit us at www.dechert.com/antitrust.

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