

Recent Developments

European Court of Justice Rules That Communications By Company Personnel With In-House Lawyers Are Not Privileged

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The European Court of Justice issued its long-awaited ruling in the *Akzo Nobel Chemicals Ltd.* case on September 14, 2010. The Court held that legal professional privilege does not apply to communications within a company with in-house lawyers. This was the same conclusion reached in the prior decision in this case by the European Court of First Instance (see our September 27, 2007 memorandum) and in the opinion delivered in this case earlier this year by the Court's Advocate General (see our May 1, 2010 memorandum).

The European Court of Justice chose to follow an earlier 1982 decision of the Court, and adhere to the conclusion that no privilege protected communications by company personnel with in-house counsel. In doing so, the Court rejected arguments advanced in support of extending privilege to in-house counsel made by the United Kingdom, Ireland and The Netherlands, as well as multiple Bar groups.

The European Court of Justice reasoned that an in-house lawyer, despite his enrollment in a Bar or Law Society and his attendant professional ethical obligations, 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 and, consequently, is less able to deal effectively with any conflicts between his professional obligations and the aims of the client. In the Court's view, an in-house attorney cannot 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.

The decision in the *Akzo Nobel* case, which arose out of an European Commission competition investigation, underscores that in many jurisdictions outside the United States the scope of privilege may be significantly narrower than one may expect to be recognized by courts in the United States. Indeed, the Court of Justice itself observed that a large number of European Union member states still exclude communications with in-house lawyers from protection under legal professional privilege, and that no predominant trend towards protection under privilege of communications within a company with in-house lawyers could be discerned in the legal systems of the 27 European Union member states.

As we have previously warned (see our May 1, 2010 and September 27, 2007 memoranda relating to earlier decisions in the *Akzo Nobel* case), corporations with global worldwide operations cannot assume United States privilege principles apply in other countries. Rather, availability of privilege must be considered on a jurisdiction-by-jurisdiction and subject area-by-subject area basis. Multinational companies should consider whether it is feasible to avoid sending potentially sensitive communications involving inside counsel to recipients in, or through computer servers located in, jurisdictions that do not recognize privilege for such communications. In addition, where the matter is sensitive, early involvement of outside counsel (including, where appropriate, outside counsel in the relevant non-United States jurisdiction) may enhance a company's ability to assert privilege for communications, including communications involving inside counsel and corporate executives.

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