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Recent European Competition Decision Rejects Attorney-Client Privilege for In-House Counsel

An important antitrust case decided by the European Court of First Instance (CFI) last fall should be an urgent wake-up call for companies doing business in the European Community. The CFI decision underscored that there are significant limits on the ability of companies (potentially wherever located) to claim attorney-client privilege. In the so-called *Akzo Nobel* case, the CFI refused to accord the privilege to communications related to legal advice between in-house counsel and its corporate "client" even if the in-house lawyer was a member of one of the bars of a European member state.[1]

This CFI ruling confirmed the continued viability of a 1982 European Court of Justice (ECJ) decision that the attorney-client privilege is ONLY available for communications between "independent" lawyers and their clients made for the purpose of defending the company and then ONLY if the documents for which privilege is claimed were prepared "exclusively" for purposes of legal advice in connection with the defense of that European proceeding.[2]

In addition to broadly precluding the assertion of the privilege for communications to a client from in-house counsel, the CFI decision left in place the long-standing rule that the privilege is not available to protect from disclosure communications between lawyers and clients, even if the lawyer is "independent," if the lawyer is not a member of an EU member state bar. Thus, not only are "client" communications with in-house counsel at risk but communications involving legal advice from non-European lawyers (e.g., U.S. lawyers practicing "European Community" law in Brussels) as well, even if such practice of law is permitted under local bar rules.[3]

The protection of communications between lawyer and client has for centuries been a fundamental part of the legal process, particularly in the United States and the United Kingdom. The purpose of the attorney-client privilege is to encourage full and unencumbered dialogue between clients and their lawyers so that the lawyers may better advise clients how to comply with the law prospectively or how to address compliance problems that have been discovered by the company whether because of an internal investigation, a whistle-blower program, or an

[1] *Akzo Nobel Chemicals and Akcros Chemicals v. Commission*, Joined Cases T-125/03 and T-253/03 September 17, 2007, http://curia.europa.eu.
[2] *European Commission v. AM&S*, Case 155/79, 1982 E.C.R. 1575. In the *AM&S* case, the ECJ ruled that, while a privilege is recognized for communications between a lawyer and client, the privilege is limited to communications related to a client's "right to defense" and only to communications made between a client and "independent" lawyers who are 1) members of the bar of a member state and 2) who are NOT employed by the client.
[3] This issue was not present in the *Akzo Nobel* case and so the CFI did not have to deal with this potentially very controversial issue.

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anonymous compliance hotline. Under traditional Anglo-American jurisprudence, the privilege broadly protects communications related to *legal advice* between a *client* and the client's *lawyer* that was intended by the parties to be *confidential*.[4]

The *Akzo Nobel* Decision

In the *Akzo Nobel* judgment, the CFI reviewed the legality of the European Commission's seizure of in-house counsel memoranda and e-mails during a so-called "dawn raid" to discover evidence of cartel conduct. Under European competition rules, the European Commission may, subject to some very limited exceptions, demand immediate access to the files of a company suspected of European antitrust violations, require production of files and documents from the company's records related to the suspected violation, and question "on the spot" company employees thought to have information pertinent to the law enforcement investigation. Thus, in the course of such a raid conducted at the offices of Akzo Nobel in the United Kingdom, the European Commission staff seized a number of memoranda from in-house counsel and related e-mails that appeared, on examination by the European Commission staff made at the time of "dawn raid," to contain facts relevant to the competition inquiry.

Akzo Nobel protested the European Commission's seizure of these documents and their use in carrying out its law enforcement responsibilities either as a guide to further inculpatory information relevant to the investigation or as evidence in the European Commission's proceeding. The European Commission rejected Akzo Nobel's argument. On an appeal to the CFI of the European Commission's decision that it had engaged in prohibited cartel activity, Akzo Nobel argued that the law on privilege had changed significantly from 1982, when *AM&S* was decided. In particular, they argued that since 1982 additional EU member states had passed legislation extending the attorney-client privilege to in-house counsel and that in-house counsel are now widely recognized, even by the European Commission, as playing an important role in assuring competition law compliance.[5]

The CFI rejected the arguments made by Akzo Nobel and ruled that the European Commission was entitled to have access to and to use the putative privileged documents in connection with its law enforcement responsibilities. While acknowledging that there had been some changes since the 1982 *AM&S* decision in the status of in-house counsel and their legal compliance responsibilities, the CFI stated that there were still many EU member states that did not consider a company in-house lawyer's position as being different than any other company employee and thus not independent. In essence, the appellate court confirmed the existence of a two-tier system when it comes to the attorney-client privilege. That is to say, the same advice from in-house and outside counsel would be treated completely differently from the perspective of required disclosure. For example, a memorandum summarizing the findings of an internal investigation (or an e-mail providing advice on how to proceed) would be arguably protected from disclosure if written by outside counsel who is a member of a EU member state bar, while the same identical advice from a company in-house lawyer would not.[6]

Implications

Given this potentially serious situation, how can companies protect themselves? The privilege belongs, after all, to the client not the attorney (whether in-house or outside). First, it is imperative that companies examine carefully *in advance* how they seek, receive, and memorialize legal advice in connection with legal issues in the European Community, particularly in competition cases. While many companies have provisions in their antitrust compliance policies that discuss what to do when a government inquiry is made, these policies must state clearly and specifically to relevant company personnel the essential steps to be taken if a company is confronted with a European Commission dawn raid.[7] At a minimum, even in the absence of a dawn raid's demand for immediate access to a company's files and personnel, this can be a very daunting challenge, particularly if the need for legal advice arises in the context of a company's discovery that its employees had been engaged in possible illegal activity and a company's desire to

[4] It is beyond the scope of this client alert to deal with questions of who or what constitutes the "client." Suffice to say that the CFI decision in *Akzo Nobel* did not deal question "who could seek protected legal advice" in the context of communications seeking legal advice when the advice is sought from employees of a corporation as had been discussed by the U.S. Supreme Court in *United States v. Upjohn*, 449 U.S. 383 (1981). Moreover, the *Akzo Nobel* decision does not resolve issues on the protection available for material generated by lawyers that fall short of legal advice, e.g., attorney work-product.

[5] See, e.g., European Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L/1, 04.01.2003, p.1-25).

[6] The CFI did not accord any attorney-client privilege protection to advice from "independent" outside counsel who is not admitted to the bar of a member country state. Thus, for example, clients receiving advice on "European competition law" matters from U.S. lawyers, whether located in Brussels, London, New York, or Washington, should be aware that such advice may well likely have absolutely no protection from disclosure on attorney-client privilege grounds. What are the territorial (geographic) limits of the decision? For example, if the European Commission were to commence a sectoral inquiry seeking to investigate how competition works in a particular industry (e.g., pharmaceuticals) and sought to take a "world market" view of relevant competition questions, would advice given by a U.S. lawyer to a multi-national pharmaceutical company on global competitive guidelines be protected?

[7] At a minimum, there should be a careful and systematic effort to ensure that legal advice from an "independent legal advisor," which would qualify for attorney-client protection under the rule in *Akzo Nobel*, is segregated from advice and communication to business clients from in-house counsel. The European Commission normally will permit a company asserting privilege to request such a document to be sealed by its staff until the contents and asserted privileged nature has been verified by an independent European Commission representative.

conduct an internal investigation of suspect conduct to determine how best to proceed to protect its interests (e.g., seeking leniency or immunity).

The ruling in the *Akzo Nobel* case arose in the context of a European Community competition case involving alleged horizontal cartel activities raising potential Article 81 implications. However, it would be a serious mistake to think that the ruling on the attorney-client privilege is limited to cartel cases. It surely is the law in the European Community applicable to all competition cases. This would mean that these same risks and concerns may arise in the context of merger/acquisition investigations as well as in other competition contexts, like distribution, intellectual property licensing, or standardization disputes in which the European Commission is conducting an investigation. The decision is not clear as to whether this rule is limited to European Commission proceedings or if it has implications for an investigation or proceeding commenced by a national competition authority or even in private litigation.[8]

Perhaps the most troubling implication of the CFI's *Akzo Nobel* decision relates to the threat to the availability of the attorney-client privilege in the context of investigations of matters involving a multitude of international jurisdictions. Today, competition authorities around the world cooperate closely on cartel enforcement. If a company is required by the European Commission to disclose documents reflecting legal advice from its in-house counsel, such disclosure could be viewed as a waiver of the privilege in the U.S. government investigation or in parallel treble damage litigation.

Finally, while the ruling seems to apply in a "competition law" context for now, would it be prudent to assume that this challenge to the availability of the attorney-client privilege might not move to other areas of regulatory scrutiny (e.g., corrupt practices, export controls, trade)?

Clearly, it is desirable to plan in advance on how to deal with this very significant new development.

[8] Most continental EU member states do not permit discovery in private litigation and do not yet permit the recovery of treble damages or attorneys' fees.

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