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European Court of Justice Rejects Attorney-Client Privilege for In-House Counsel

In a much anticipated decision, issued on September 14, 2010, the European Court of Justice reconfirmed that communications with in-house counsel are not privileged under European Union law (E.U.) Case C-550/07, *Akzo Nobel Chemicals Ltd. & Akros Chemicals Ltd. v. European Commission*. The decision firmly establishes the European rule that the attorney-client privilege does not attach to communications with an attorney who holds a position of employment with a client. Please click [here](#) for the opinion.

The case, *Akzo Nobel Chemicals Ltd. & Akros Chemicals Ltd. v. European Commission*, arose out of a European Commission (EC) investigation into anti-competitive practices. The EC conducted a dawn raid at the companies' premises in the United Kingdom and seized various documents, including information gathered for the purpose of obtaining legal advice and emails between a company manager and an in-house lawyer who was a member of the Netherlands bar. On September 14, 2010, the Court of Justice affirmed the decisions of lower courts that these communications were not privileged under the rule established in *AM&S Europe Ltd v. Commission* (1982).¹ Under E.U. law, the attorney-client privilege only exists where the lawyer is independent, and the Court of Justice held that "the requirement of independence means the absence of any employment relationship between the lawyer and his client, so that legal professional privilege does not cover exchanges within a company or group with in-house lawyers."² The Court reasoned that despite the professional ethical obligations of an in-house lawyer, the commercial strategies of the employer would affect the lawyer's ability to exercise professional independence. Finally, the Court added that an in-house attorney may serve in roles other than as legal adviser, which would further lessen the in-house attorney's independence.

The result is that attorney-client privilege does not attach to communications with in-house counsel under E.U. law. Notably, however, this standard only applies under E.U. law, and each of the member states has developed its own separate law of privilege, which varies widely. In general, there is divergence between common law and civil law jurisdictions. Common law jurisdictions, such as the U.K., tend to have attorney-client privilege more closely aligned with U.S. law. In civil law jurisdictions, by contrast, the concept of privilege is less developed because there is not a broad discovery process. Further, the privilege rules in civil law jurisdictions are often tied to rules of professional conduct for members of the bar, which often do not include in-house counsel. The result is that in civil law jurisdictions there is often no attorney-client privilege for communications with in-house counsel. For example, in Italy and France, the privilege rules apply only to members of the bar, and in-house counsel are precluded from membership. In addition, because privilege in European states is often dependant on the outside counsel being licensed to practice in the member state, it is often advisable to include outside counsel from the foreign jurisdiction on sensitive matters.

¹Case 155/79, *AM&S Europe Ltd. v. Commission of the European Communities*, ECR 1575 (1982). To be protected, communications must also be made for purposes of, and in the interests of, the clients' right of defense, and the attorney must be licensed to practice in one of the member states.

² *Akzo Nobel Chemicals Ltd* ¶ 44.

Although the decision in *Akzo Nobel Chemicals* does not change E.U. law, it further weakens the attorney client privilege in foreign jurisdictions by reconfirming that communications of in-house counsel are not privileged in Europe.



If you have any questions about this development, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

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