

Commercial Disputes EME

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Akzo-Nobel

Background to the case

In 2003, the European Commission (acting as a competition authority) conducted an investigation into Akzo-Nobel Chemicals Ltd ("Akzo") and Akcros Chemicals Ltd ("Akcros"). This included a search of Akzo and Akcros' UK premises, during which the authorities took photocopies of documents that Akzo and Akcros argued were protected by legal professional privilege. Among the documents were two internal email exchanges involving an Akzo in-house lawyer.

The two companies brought proceedings before the European Court of First Instance against the Commission's decision to take copies of the disputed documents. The Court of First Instance dismissed the appeal as unfounded, following the reasoning set out in earlier EU case law that made it clear that legal professional privilege is only available where the lawyer is independent and not bound to his or her client by a relationship of employment.

Akzo and Akcros subsequently appealed the decision to the European Court of Justice (the "ECJ") and the outcome of the appeal is awaited.

The case has caused consternation among lawyers worldwide, and a number of European and international law associations have intervened in support of the companies both at first instance and also in the appeal proceedings. In particular, there has been concern that the effects of the decision are not limited to European Commission cartel investigations, and that the legal professional privilege protecting communications involving in-house lawyers may be in jeopardy.

Recent Developments

Advocate General ("A-G") Kokott has now issued an opinion on 29 April 2010 advocating that the appeal should be dismissed. The role of an A-G is to present reasoned, impartial opinions on all cases brought before the Court. These opinions are advisory and non-binding, but are influential and followed in the majority of cases.

Her opinion stated that, under EU law, legal professional privilege will only apply to communications with a lawyer who can provide legal assistance to his or her client in full independence and in the overriding interests of justice. Salaried in-house lawyers do not have the same degree of independence from their employer as a lawyer working for an external law firm and so do not qualify.

She has also counselled against reconsidering the relevant EU case law and extending the scope of legal professional privilege. Only in a small minority of the 27 EU Member States does the protection afforded by legal professional privilege currently apply to internal communications with in-house lawyers, and so she could not see a requirement for a reappraisal of EU case law on the issue.

The ECJ must now decide on the appeal for itself although it may well follow the A-G's opinion. The ECJ's decision is due later this year.

Implications for legal professional privilege more generally

The wording of the A-G's opinion suggests that it relates only to EU Commission antitrust proceedings and goes no further.

However, fears have already been expressed that an ECJ judgment that followed the A-G's opinion could have implications for internal lawyers' involvement in checking whether planned activities comply with, for example, anti-bribery rules. The A-G's opinion includes discussion of whether in-house lawyers should be denied legal professional privilege in cases involving money laundering and terrorist financing. Although the A-G said that the Akzo proceedings were not the appropriate forum for determining whether the relevant EU law recognises legal professional privilege, she clearly mooted the possibility that it may not.

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