

Client Advisory | 14 September 2010

ECJ Confirms No Change to European Rules on Legal Professional Privilege for In-House Lawyers

In a judgment today, in the case of *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission*, the European Court of Justice (ECJ) ruled that, under European Union law, internal company communications with in-house lawyers are not protected by legal professional privilege (LPP).



Becket McGrath, Partner

This appeal to the ECJ arose from an on-site inspection in 2003 at the applicants' premises in the United Kingdom, which was conducted by European Commission officials investigating suspected breaches of EU competition law. During the inspection, the officials seized copies of numerous documents. These included two emails between the Director General of Akcros (a subsidiary of Akzo) and the 'coordinator for competition law' at Akzo ('Mr. S'). At the time, Mr. S was a member of Akzo's legal department and enrolled as an Advocate of the Netherlands Bar. The official leading the inspection took the view that the emails were not protected by LPP and could thus be placed on the Commission's file, potentially for future use in the case against the applicants.

In taking this view, the official was following established EU law, as set out in the ECJ's 1982 judgment in *AM&S Europe v Commission*. That judgment established that, for LPP to apply in EU law, the communication in question must be related to the client's rights of defence and must be from an independent lawyer entitled to practise in a Member State of the EU. An independent lawyer was defined for these purposes as a lawyer who is not bound to his or her client by a relationship of employment. It follows that the requirement of independence means that LPP cannot apply to exchanges between a company and its in-house lawyers.

The Commission dismissed the applicants' objections to seizure of the emails

in question by formal decision in May 2003. The applicants unsuccessfully challenged that decision before the General Court (previously known as the Court of First Instance) in September 2007, and subsequently appealed the General Court's judgment to the ECJ.

On 29 April 2010, the Advocate General of the ECJ issued an opinion categorically rejecting the arguments raised by the applicants. As expected, the ECJ has now followed the Advocate General's advice, holding that, despite the fact that the in-house lawyer in question was enrolled with a Bar that imposed various professional obligations on him, he should not be treated as sufficiently independent for his advice to be protected by LPP. Ultimately, ruled the court, any in-house lawyer is "less able to deal effectively with any conflicts between his professional obligations and the aims of his client" or to ignore the commercial strategies of his employer when providing advice. The ECJ also declined to take this opportunity to revisit the position taken in the *AM&S* case that independence is a necessary condition for LPP. As a result, the appeal was dismissed in its entirety.

This judgment therefore maintains the current EU law position, whereby advice provided by in-house lawyers (or, indeed, by external counsel not admitted to practise within the EU or EEA) will not be protected by LPP and may therefore be used by the Commission as evidence of a competition law infringement. It does not,

however, affect the position under national law, for example in the UK, where communications by in-house lawyers are protected by LPP.

While this outcome may appear hard to justify to lawyers raised in the common law tradition, and has already been publicly criticized by UK

lawyers, it makes a little more sense when viewed in the context of civil law systems, in which LPP has traditionally been more limited. The ECJ may also have one eye to the utility of such communications for those investigating companies for infringements. This approach nevertheless

raises real practical problems for in-house counsel trying to do their job by advising their internal clients on compliance risks, as well as non-EU external counsel advising from within global law firms.

BOSTON MA | FT. LAUDERDALE FL | HARTFORD CT | MADISON NJ | NEW YORK NY | NEWPORT BEACH CA | PROVIDENCE RI
STAMFORD CT | WASHINGTON DC | WEST PALM BEACH FL | WILMINGTON DE | LONDON UK | HONG KONG (ASSOCIATED OFFICE)

This advisory is for guidance only and is not intended to be a substitute for specific legal advice. If you would like further information, please contact the Edwards Angell Palmer & Dodge LLP attorney responsible for your matters or the attorney listed below:

Becket McGrath, Partner

+44.207.556.4125

bmcgrath@eapdlaw.com

This advisory is published by Edwards Angell Palmer & Dodge for the benefit of clients, friends and fellow professionals on matters of interest. The information contained herein is not to be construed as legal advice or opinion. We provide such advice or opinion only after being engaged to do so with respect to particular facts and circumstances. The Firm is not authorized under the UK Financial Services and Markets Act 2000 to offer UK investment services to clients. In certain circumstances, as members of the Law Society of England and Wales, we are able to provide these investment services if they are an incidental part of the professional services we have been engaged to provide.

Please note that your contact details, which may have been used to provide this bulletin to you, will be used for communications with you only. If you would prefer to discontinue receiving information from the Firm, or wish that we not contact you for any purpose other than to receive future issues of this bulletin, please contact us at contactus@eapdlaw.com.

© 2010 Edwards Angell Palmer & Dodge LLP a Delaware limited liability partnership including professional corporations and Edwards Angell Palmer & Dodge UK LLP a limited liability partnership registered in England (registered number OC333092) and regulated by the Solicitors Regulation Authority.

Disclosure required under U.S. Circular 230: Edwards Angell Palmer & Dodge LLP informs you that any tax advice contained in this communication, including any attachments, was not intended or written to be used, and cannot be used, for the purpose of avoiding federal tax related penalties, or promoting, marketing or recommending to another party any transaction or matter addressed herein.

ATTORNEY ADVERTISING: This publication may be considered "advertising material" under the rules of professional conduct governing attorneys in some states. The hiring of an attorney is an important decision that should not be based solely on advertisements. Prior results do not guarantee similar outcomes.

EDWARDS
ANGELL
PALMER &
DODGE

eapdlaw.com