

September 27, 2007

European Court of First Instance Holds Communications  
by Company Executives With In-House Lawyers are Not Privileged

Last week, the European Court of First Instance (“CFI”) ruled in [\*Akzo Nobel Chemicals Ltd v Commission, Cases T-125/03 and T-253/03 \(Sept. 17, 2007\)\*](#), that legal professional privilege (LPP) does not apply to communications between corporate executives and in-house lawyers. The fact that the privilege issue was hotly contested — with multiple Bar groups supporting the claim of privilege that the Court rejected — underscores the potential significance of this decision.

Notably, this ruling dealt with communications with an in-house lawyer who acted only as a legal advisor to the company and did not hold any management position in the company, was a member of his country’s Bar and subject to the Bar’s professional and ethical rules, and was covered by an agreement on employment conditions under which his corporate employer had agreed that the lawyer’s obligation of independence and compliance with the Bar rules under national law prevailed over loyalty to the company. The Court stated that it was applying the principle set forth in a 1982 European Court of Justice decision “that the protection accorded to LPP under Community law, ... only applies to the extent that the lawyer is independent, that is to say, not bound to his client by a relationship of employment”. CFI rulings on questions of law may be appealed to the European Court of Justice.

The CFI specifically rejected the argument that if the communications between the in-house lawyer and company executives are protected under their national laws (here, The Netherlands and the U.K.), Community law should also afford such protection under LPP. The CFI reasoned that such a result would be at odds with the development of a “Community concept of LPP” and the “uniform application of the Commission’s powers in the common market”.

The CFI expressly suggests that in order to protect privilege, companies wishing “to examine their conduct and to define legal strategies in respect of competition law” should utilize outside counsel, not employed by the company. Such “exercises of self-assessment and strategy definition may be conducted by an outside lawyer in full cooperation with the relevant departments of the undertaking, including its internal legal department”. The CFI stated that “[i]n that context, communications between in-house lawyers and outside lawyers are in principle protected under LPP, provided that they are made for the purpose of the undertaking’s exercise of the rights of defence”.

The CFI’s ruling in *Akzo Nobel Chemicals* that communications between corporate executives and in-house counsel are not privileged is contrary to privilege law in the United States. As for the impact of this ruling on communications involving in-house counsel in the United States, there may be practical and legal constraints on the ability of the European Commission to pursue documents located outside the EC (as distinct from documents located in a European office of a company). In addition, it is not clear to what extent, if any, efforts will be made to apply this ruling to otherwise privileged communications involving in-house counsel in the United States that may be sought in a European Commission proceeding. However, this ruling suggests that seeking the advice of outside counsel may well be critical to preserving privilege in a European Commission proceeding. This decision provides a telling reminder of the care and diligence that may be necessary to protect corporate privileges.

Peter C. Hein  
John F. Savarese  
David A. Katz  
Ilene K. Gotts

*If your address changes or if you do not wish to continue receiving these memos,  
please send an e-mail to [Publications@wlrk.com](mailto:Publications@wlrk.com) or call 212-403-1487.*