

Dispute Resolution

May 2010

Advocate General's Opinion issued in Akzo Nobel: in-house lawyers not covered by legal privilege

UK law recognises a client's right to communicate with their lawyer without fear that those communications might later be used against them. This applies to in-house lawyers and to external advisers. However, the opinion issued last month by the Advocate General in Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission of the European Communities¹ takes the view that legal professional privilege does not apply to communications with in-house lawyers.

Particular care should therefore be taken with document creation and circulation if there is a competition and/or international element. In such cases it continues to be sensible to consider using external lawyers if the protection of privilege is important.

Background to Akzo

During an investigation into alleged anti-competitive practices, the Commission searched the UK premises of Akzo and Akcros. The Commission copied two emails between the general manager of Akcros and a member of the Akzo in-house legal team, who was a lawyer at the Netherlands bar. The emails were created for the purpose of obtaining external legal advice. Akzo and Akcros argued that the Commission were not entitled to refer to the emails. The Court of First Instance disagreed.

The decision meant that a company could not assert that privilege covered advice from its in-house lawyers in cartel investigations by the Commission, even though it could rely on this privilege against its national competition authority. The decision was appealed to the ECJ on this point, but an Opinion from the Advocate General issued on 29 April 2010 agrees with existing EU case law; communications with in-house lawyers do not attract privilege. The Opinion proposes that the ECJ should dismiss the appeal.

¹ Case C-550/07 P

² In particular, Regulation 1/2003

This Alert! is correct to the best of our knowledge and belief at the time of going to press. It is however written as a general guide, so it is recommended that specific professional advice is sought before any action is taken. We are required by law to protect personal data.

© May 2010, Dundas & Wilson CS LLP and Dundas & Wilson LLP. All rights reserved.

The Advocate General's reasoning

Central to the Advocate General's Opinion is the degree of independence enjoyed by in-house lawyers:

"...an enrolled in-house lawyer.... does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his clients. Consequently, an enrolled in-house lawyer is less able to deal effectively with any conflicts of interest between his professional obligations and the aims and wishes of his client than an external lawyer."

In the Advocate General's view this difference between in-house and external lawyers means that equal treatment in relation to privilege is not required as a matter of law.

Additionally, an extension of privilege to in-house lawyers could not be justified by developments in competition law² or the resulting increased significance of internal corporate legal advice.

The Advocate General also dismissed the argument that each Member State should be able to define the substance and scope of privilege. This would "lead to a legal patchwork which would not be compatible with the principle of the internal market."

What now?

The Advocate General's Opinion, although persuasive, is not binding on the Court. The ECJ has commenced deliberations and its judgement is expected later this year. We will report on the judgment when available.

Read the Advocate General's Opinion [here](#).

If you would like any further information on this Alert!, or any other Dispute Resolution issues, please call the person at D&W with whom you normally liaise, or one of the following specialists:

Colin Hutton
Gemma Lampert

colin.hutton@dundas-wilson.com 0131 200 7517
gemma.lampert@dundas-wilson.com 020 7759 3657