

EUROPEAN COURT HOLDS THAT INTERNAL COMMUNICATIONS WITH IN-HOUSE COUNSEL ARE NOT PRIVILEGED

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To Our Clients and Friends:

On September 14, the European Court of Justice issued its decision in *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v Commission of the European Communities* (C-550/07 P). By this decision the European Court has ruled that internal communications with in-house counsel are not covered by legal professional privilege.

The case concerned documents that were seized during raids as part of an investigation into anti-competitive practices by the European Commission and the United Kingdom's Office of Fair Trading. At an early stage in the investigation the claimants argued that certain documents that had been collected were subject to legal professional privilege, but the European Commission contested this and included the disputed documents within the general files of the investigation.

The ECJ relied heavily on its earlier decision in *AM & S Europe v Commission* [1982] ECR 1575 (Case 155/79), which had found that for an exchange to attract legal professional privilege it must be connected with "the client's rights of defence" and the exchange must emanate from "independent lawyers." The ECJ in *Akzo Nobel* found that by virtue of the employment relationship an in-house lawyer lacks the necessary independence.

Other arguments were also made by the claimants, including that European competition law had developed since *AM & S* in a way that necessitated in-house legal advice, and that the principle of equal treatment under European law required all lawyers to be treated the same way whether in-house or in private practice. The ECJ rejected both these arguments. It noted that the new powers to investigate anti-competitive practices were designed to increase the Commission's powers of inspection, rather than curtail them. It also noted that in many Member States in-house counsel were prohibited from enrolling in bar associations, such that the principle of equal treatment did not apply.

The decision in *Akzo Nobel*, although on its facts limited to investigations conducted in the competition sphere, may have wider consequences. It will be for the courts of the Member States to determine whether communications with in-house counsel will now be discoverable in civil litigation.

Please feel free to contact us with any questions.

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