

Update on the status of legal advice given by in-house Counsel

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Advocate General Kokott's opinion, published yesterday in the long-running case of Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission, recommends that in-house lawyers should remain outside the scope of legal professional privilege under EU law. This will come as a blow to those who hoped that the evolution in the status of employed lawyers over the past three decades in jurisdictions such as England and Wales would be recognised in EU law.

The opinion will be considered by the European Court of Justice (ECJ) before it delivers its judgment some time in the next few months. An advocate general's opinion does not bind the Court, but it is usually followed. If it is followed in this case, it will apply to any proceedings involving enforcement activity by EU institutions. The decision will not, however, affect assertions of privilege in private law proceedings in England and Wales, nor any enforcement activity by the UK authorities.

At the heart of the case are two emails seized, with other documents from offices in Manchester in 2003, by the European Commission, which was investigating possible anti-competitive practices.

The companies say the emails are protected by legal professional privilege as they were exchanged between a general manager and Akzo Nobel's co-ordinator for competition law, an in-house lawyer registered as an Advocaat of The Netherlands Bar. In 2007 the Court of First Instance ruled against them and their appeal to the ECJ has been supported by several Law Societies and Bar Associations.

In the Advocate General's opinion, the companies' legal arguments are unfounded. EU law recognised legal professional privilege as a fundamental right in the case of *AM & S v Commission* (Case 155/79 [1982] ECR 1575). In that case the Court identified two cumulative conditions which it had drawn from a combination of the laws of all the Member States at that time:

- first, that the communication with the lawyer must have a connection with the exercise of the client's rights of defence; and
- second, it must be a communication with an independent lawyer, that is to say with a lawyer who is 'not bound to the client by a relationship of employment'.

Advocate General Kokott did not accept that membership of a Bar Association or Law Society could guarantee a lawyer's independence when the lawyer was typically completely dependent economically on his or her employer and strongly identified with the undertaking, and thereby less able to deal with potential conflicts of interest.

She also dismissed the argument that the status of in-house lawyers has changed sufficiently since the *AM & S* decision to justify a change in EU law. She saw no discernible general trend among the twenty seven Member States toward equal treatment of in-house lawyers, with only a minority of States (including the UK) extending legal professional privilege to internal or group communications with in-house lawyers. Many other arguments were also dismissed robustly.

It remains to be seen whether the ECJ will follow the Advocate General's opinion. If it does, then the powers of the European Commission to seize documents will continue to be more extensive than the national authorities' powers in jurisdictions such as England and Wales. Protection that a local court would recognise will simply not be available against the Commission when exercising its investigative powers.

In-house lawyers, in any EU Member State, will have to take into account that their legal advice to their employer might not be protected by legal professional privilege, at least in relation to proceedings involving EU institutions. The position of external lawyers seconded in-house is also in doubt. Secondment arrangements vary enormously, but often a secondee is absorbed into the host organisation and treated as having much the same duties and loyalties as an employee, albeit on a temporary basis. In such a case, where their independence might be called into question, they too might be caught by the Akzo principle.

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