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Corporate Counsel

Adviser Urges Top EU Court to Affirm Denial of Privilege for In-House Counsel

The protection afforded under European Union law for lawyer-client communications should not be extended by the EU's highest judicial tribunal to cover communications between an entity and its in-house counsel, the court's advocate general recommended April 29 (*Akzo Nobel Chemicals Ltd. v. European Comm'n,* Euro. Ct. Justice, Case C-550/07 P, 4/29/10, recommending affirmance of 23 Law. Man. Prof. Conduct 507).

In an opinion advising what stance the European Union's Court of Justice should take on the ''legal professional privilege'' in a pending appeal, Advocate General Juliane Kokott argued that an in-house lawyer cannot be considered sufficiently independent of the employer-client as to meet the requirements for invoking the privilege—even if the lawyer is admitted to the bar or law society in the particular EU member country and that country itself recognizes the privilege for communications with in-house counsel.

In comments to BNA, Susan Hackett of the Association of Corporate Counsel, which is participating in the case as an interested party, pointed out that the advocate general's position accords with longstanding EU precedent and therefore does not signal any revolutionary change.

But Hackett added that ACC was surprised and disturbed by the tone of Kokott's statements about in-house counsel. ''The opinion is insulting to in-house counsel's roles and responsibilities and displayed a Force 10 lack of understanding about the integrity and independence of in-house lawyers,'' Hackett said.

Hackett warned that if—as she said is widely expected—the Court of Justice goes along with the advocate general's opinion, privilege protection could be impaired in EU regulatory matters for multinational companies and their U.S.-licensed lawyers.

According to the Court of Justice's press statement about the opinion, ''It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible.'' A decision in the case is expected later this year.

European Company Lawyers 'Disappointed.' Due to the importance of the issue presented in the case, more than a few groups are taking part as intervenors. Except for the European Commission, all of the parties want the legal professional privilege to be recognized for communications with in-house counsel.

Not surprisingly, the European Company Lawyers Association is far from thrilled with the Kokott's recommendation. In a statement to BNA, ECLA General Manager Paul de Jonge of The Hague, Netherlands, wrote:

> We are of course disappointed that the Advocate General did not accept the arguments in favour of privilege in the AKZO Nobel case that were made by three Member States and by five important and experienced lawyers' organizations. These are the International Bar Association, the American Corporate Counsel Association, the Council of European Bars and Law Societies, the European Company Lawyers Association, [and] the Netherlands Bar Association [as well as] the governments of Ireland, the United Kingdom and the Netherlands.

The ABA is not among the entities that are taking part in the case. The ABA applied to intervene mid-case but its request to take part was turned down, Hackett said.

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ADVOCATE GENERAL JULIANE KOKOTT

E-Mails Seized in Cartel Investigation. The case before the court germinated seven years ago when investigators of the European Commission—who were examining possibly anti-competitive practices in the plastic additives market—seized two e-mails exchanged between the general manager of Akros Chemicals Ltd., a subsidiary of Akzo Nobel Chemicals Ltd. of the Netherlands,

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and a member of Akzo's in-house legal department who was a member of the Netherlands bar.

In 2007 the EU Court of First Instance (now called the General Court) rejected the companies' claim of privilege. The court relied on a ruling to this effect by the Court of Justice in *AM&S v. Comm'n*, Case 155/79, [1982] ECR 1575, which held that the protection accorded to the legal professional privilege under EU law applies only to the extent that the lawyer is independent—that is, not bound to the client by an employment relationship.

The advocate general concluded that the position announced in *AM&S* rejecting the legal professional privilege for in-house lawyers should continue to apply in EU law. For several reasons, Kokott rejected the arguments of Akzo Nobel and other parties that developments since *AM&S* was decided in 1982 have undermined the viability of that ruling.

Denying that any changes in the ''legal landscape'' warrant reconsidering *AM&S*, Kokott stated:

- Among the 27 EU member states, ''there is no discernible general trend towards treating enrolled in-house lawyers in the same way as lawyers in private practice'' in relation to the legal professional privilege.
- A significant number of EU states continue to prohibit in-house lawyers from becoming members of a bar or law society at all.
- A number of other member states have no established legal position on the privilege for in-house counsel.
- Only in a ''small minority'' of the EU states does the protection afforded by the legal professional privilege apply to internal company communications with in-house lawyers.
- Proposals in the European Parliament to extend the privilege to in-house lawyers in antitrust proceedings were tabled and ultimately not adopted.

Not Equal, So Not Unfair. Kokott disputed the contention that is unfair to accord unequal status to in-house lawyers, stating:

> Both their considerably greater economic dependence and their much stronger identification with the client—their employer—militate against the proposition that enrolled in-house lawyers should enjoy the protection afforded by legal professional privilege in respect of internal company or group communications.

Kokott also disagreed that an in-house lawyer's intimate knowledge of the client justifies extension of the legal professional privilege. On the contrary, she said, this very closeness ''calls the independence of the enrolled in-house lawyer seriously into question.''

The economic dependence of in-house lawyers and their strong identification with the employer creates a ''structural danger,'' Kokott said, that even a well-intentioned in-house attorney ''will encounter a conflict of interests between his professional obligations and the aims and wishes of his company.''

This conflict would make it difficult, the advocate general said, for the enrolled in-house lawyer to oppose abuses of the legal professional privilege, such as a company's ploy to keep damaging information or evidence away from EU investigators by channeling it to in-house counsel or storing it within the company's internal legal department.

As for the argument that in-house lawyers need the protection of the privilege to carry out their key role in implementing compliance programs, the advocate general said that much internal corporate legal advice given under those programs is general in nature rather than connected with ''rights of defence,'' and therefore would not meet the conditions for asserting the legal professional privilege.

Opinion Reflects 'Huge Disconnect.' In her comments to BNA, Hackett strongly objected to the way in-house lawyers are characterized in the advocate general's opinion. Kokott essentially posits that in-house counsel ''are mini-lawyers not capable of confidential communications,'' in Hackett's view.

Hackett said she sees a ''huge disconnect'' between the advocate general's views and the realities of how in-house counsel actually do their work. There is no evidence that in-house counsel are somehow less ethical than lawyers in private practice, she insisted.

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SUSAN HACKETT
ASSOCIATION OF CORPORATE COUNSEL

Moreover, Hackett said, the advocate general missed the boat as to what in-house lawyers can do to foster corporate compliance and responsibility. Whereas outside counsel often are brought in to remedy a problem after it has developed, in-house counsel can work to prevent problems in the first place, she contended.

Lawyers Licensed Outside EU. The advocate general rejected ACC's argument that EU law should extend the legal professional privilege to communications with in-house lawyers who are members of a bar in a jurisdiction outside the EU.

''[T]he inclusion . . . of lawyers from third countries would not under any circumstances be justified,'' Kokott declared. She reasoned as follows:

> [U]nlike in the relationship between the Member States, in the relationship with third countries there is, generally speaking, no adequate basis for the mutual recognition of legal qualifications and professional ethical obligations to which lawyers are subject in the exercise of their profession. In many cases, it would not even be possible to ensure that the third country in question has a sufficiently established rule-of-law tradition which would enable lawyers to exercise their profession in the independent manner required and thus to perform their role as collaborators in the administration of justice.

In Hackett's view, U.S.-licensed lawyers who work for multinational companies in matters that may come under EU regulatory scrutiny need to be concerned about the potential implications of the *Akzo* case if the Court of Justice accepts the advocate general's views. For both in-house and outside counsel who are not admitted in the EU, she said, the legal professional privilege for their communications with a multinational client may not be available if the materials are seized by EU investigators.

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To illustrate this concern, Hackett posited a scenario in which EU cartel investigators conduct a predawn raid on an international company's office in an EU member country, go into the company's internal legal department there, and pull sensitive documents from the company's intranet—including confidential communications to and from U.S.-licensed lawyers.

The legal professional privilege may not protect those materials, she said, if it is construed to apply only to communications with EU-admitted outside lawyers.

This result, she added, would be contrary to the assumption that U.S.-licensed lawyers' communications with multinational organizations are privileged provided that the lawyers are admitted in the jurisdiction where they're counseling their clients. Limiting the privilege to EU-admitted outside counsel would also be contrary to the growing trend to cross-border practice, she pointed out.

What Opinion May Portend. Hackett suggested that if the Court of Justice follows Kokott's recommendation, companies need to be prepared for their in-house lawyers' work to be targeted in EU competition investigations or other EU regulatory matters.

Lawyers need to think hard, she said, about what is important to protect by way of privilege. For that narrow group of critical attorney-client communications, it may be necessary to ''hold hands with outside counsel''—probably outside counsel licensed in the EU—to ensure that the legal professional privilege will apply, she said.

If the Court of Justice rules in accordance with the advocate general's opinion, Hackett said more lawyers may become interested in pushing back against a restrictive view of privilege in EU matters. ''We welcome them to the party,'' she joked.

''We have to figure out how to push back and not just wait for another case to wend its way through the courts,'' Hackett said. Seeking change on the privilege issue within the EU member jurisdictions could be one idea, she suggested.

Hackett also said she foresees the possibility of retaliation in U.S. jurisdictions against privilege claims for corporate communications with EU-licensed lawyers if the privilege is deemed to be unavailable in EU regulatory matters for U.S. lawyers' communications with their multinational clients.

BY JOAN C. ROGERS

Full text at http://op.bna.com/mopc.nsf/r?Open=kswn-84ym8f.

The court's press release on the opinion is at http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-04/cp100040en.pdf.