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WHITE-COLLAR CRIME

Expert Analysis

In International Investigations, All Lawyers Are Not Created Equal

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On the issue of whether communications with in-house counsel are privileged, the European Union has spoken. What it has pronounced is not good news for lawyers representing companies facing investigations that involve European authorities or for their clients. The takeaway from a recent opinion from the European Union Court of Justice is, be careful what your client communicates with in-house counsel because the investigators will see it. Indeed, the troubling facts of that case make clear that even protected corporate communications are at risk as European investigators are permitted to make unannounced calls and take it upon themselves to review a company's files to determine what is and is not privileged. The decision serves as a troubling backdrop to European investigations of American companies, such as Microsoft, IBM, and Google, which either have been or currently are the subject of EU investigations.[1]

The decision by the EU Court of Justice, the highest court in matters of EU law, that communications between company executives and in-house lawyers are not protected by the legal professional privilege, the EU equivalent of the U.S. attorney-client privilege,[2] has worldwide impact. As noted by the former chairman of the board of the Association of Corporate Counsel, the EU decision "denies in-house attorneys and multinational businesses in Europe and elsewhere the critical legal counsel on competition law matters that companies working in today's global legal marketplace require."[3]

Although the EU decision arises in the context of a civil antitrust investigation, its implications apply equally in the criminal context, where the stakes of losing privilege protection can be much higher. American defense attorneys and corporate counsel frequently are involved in investigations that cross international borders, engaging in communications with foreign based employees of the client corporation. Already sensitive to the questionable application of the American attorney-client privilege in those cases, and despite attempts to obtain recognition of that privilege in an international context,[4] attorneys in the United States must now contend with the fact that their EU clients' communications with internal counsel are unprotected. The Court of Justice's ruling also suggests that communications with external, non-EU lawyers may not be protected.

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In fact, the EU approach may go so far as to affect the privilege in United States proceedings where a reasonable expectation of privacy is required for the privilege to apply. Communications occurring in Europe between European—or for that matter, American based in-house counsel—and European employees may not be protected by the privilege because no privacy may be expected as a result of EU law.[5] Further, in cases with international dimensions, U.S. federal courts may apply the privilege law of a foreign country if the law of that country has the "'predominant' or 'the most direct and compelling interest'" in whether the communications should remain confidential.[6]

The European Commission

Created by the Treaty of Rome,[7] the EU is an economic and political union of 27 member states committed to regional integration. Articles 85 and 86 of the treaty grant the European Commission, the EU's executive branch, broad powers to propose legislation, enforce EU law, and investigate suspected violations of the same.[8] Where a conflict exists, the laws of the EU are supreme over the national laws of the EU member states.[9] Although the idea of a single European prosecutor has been debated for some time, at least for now, almost all crime continues to be prosecuted in the individual member states.[10] However, the European Commission is closely involved in cross-border criminal investigations through Eurojust, a body established to foster the coordination of investigations and prosecutions among member states dealing with cross-border and organized crime.[11] Further, the commission works closely with non-EU countries, including the United States Department of Justice, to promote judicial cooperation.[12]

Investigations conducted by the European Commission—such as antitrust investigations—are referred to dramatically as "dawn raids" and typically occur with little or no notice to the entity being investigated, although the commission is required to inform the authorities of the member state in whose territory the investigation will be conducted. The commission's exercise of this power is significant. For instance, in 2006, the commission fined 48 companies more than 2,000 million euros for antitrust practices.[13] Further, the commission's reach is wide—US companies operating internationally, such as IBM and Microsoft, have been investigated and fined by the commission for antitrust violations.[14]

Legal Professional Privilege

The legal professional privilege was recognized by the EU Court of Justice in its 1982 decision in *AM&S Europe Ltd. v. Commission*.[15] The privilege

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exists as a basic right where the client-attorney communications 1) are made for the purposes and in the interest of a client's defense; and 2) emanate from an "independent lawyer." This second condition is what has placed communications with in-house lawyers in question.

AM&S, under investigation for antitrust violations, refused to produce certain documents to the commission, including legal memorandum from the company's in-house counsel to certain employees, believing they were privileged. The Court found that written communications between a lawyer and client properly fall within the types of "business records" that may concern the market activities of a company being investigated for a violation of the treaty's competition laws and therefore can be sought by the commission pursuant to its powers under the EU's Articles of Regulation.

Despite the breadth of the regulations empowering the commission to obtain business records, however, the Court noted that the rules did not exclude the possibility that certain documents may be confidential. The Court went on to recognize the existence of the legal professional privilege where the materials are made in furtherance of a client's defense and come from a lawyer who is independent, stating that an "independent" attorney was one "not bound to the client by a relationship of employment." Accordingly, the legal professional privilege did not apply to those documents between AM&S employees and in-house counsel.

The 'Akzo/Akcros' Decision

Despite opposition from organizations such as the European Company Lawyers Association, the Association of Corporate Counsel, and the International Bar Association, on Sept. 14, 2010, the EU Court of Justice reaffirmed this hard and fast approach to the non-application of the legal professional privilege to in-house counsel in A*kzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd. v. European Commission*. In 2003, the European Commission initiated an investigation into possible anti-competitive practices at Akzo Nobel Chemicals Ltd. and its subsidiary, Akcros Chemicals Ltd. During a dawn raid on the offices of Akcros, the commission seized a number of documents that the company believed to be covered by the legal professional privilege. Commission officials insisted they would review the documents to determine whether the privilege applied.

Ultimately, the commission rejected the companies' assertion of privilege and the companies sought an annulment of that decision. The Court of Justice focused only on the privileged nature of two specific e-mails exchanged between Akcros' general manager and a lawyer within Azko's legal department. The companies argued that the documents were protected by the legal professional privilege because the *AM&S* condition of "independent" counsel was satisfied, pointing to the employment contract between the company and "Mr. S.," the in-house lawyer, as evidence of the lawyer's independence.

The contract specifically provided that the company was to "respect the lawyer's freedom to perform his functions independently and to refrain from any act which might affect that task." Further, it noted the lawyer's obligation to comply with his professional obligations as imposed by the bar to which he was admitted.

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The Court of Justice interpreted the independence requirement articulated in *AM&S* as "the absence of any employment relationship between the lawyer and his client, so that legal professional privilege does not cover exchanges within a company or group with in-house lawyers." The Court was not persuaded that an in-house lawyer's ethical obligations imposed by membership to a bar or legal society provided the required independence from his employer. Moreover, the Court rejected the argument that distinguishing between in-house counsel and external counsel violated the principle of equal treatment, finding that in-house lawyers were in a "fundamentally different position" of "economic dependence and personal identification of a lawyer in an employment relationship with his undertaking" and were intimately connected to the "commercial strategies pursued by his employer."

Regardless of the literal application of *AM&S*, appellants and a number of interveners argued that the Court should develop a rule reflecting the modern development of the legal professional privilege and set a higher legal standard for the protection of the "rights of defense" by recognizing such privilege. The Court declined, noting that although more European countries accorded the privilege to in-house lawyers in 2004 than in 1982, no clear majority had developed.

Further, a large number of countries excluded correspondence with in-house counsel from the sphere of communications deemed privileged and prohibited in-house attorneys from admission to the bar or law society. Accordingly, European in-house lawyers generally were not recognized as having the same status as lawyers in private practice.

Practical Application

The EU Court's application of the legal professional privilege is in direct opposition to the laws of certain member states, including the United Kingdom, Scotland, Ireland, Norway, Spain, Portugal, and the Netherlands. This means that documents privileged in a national context would not be privileged in the context of an investigation conducted by the European Commission. Further complicating matters, where the European Commission and national authorities cooperate in an investigation, a company is left in the impossible position of having to determine whether production of the document is being made to national authorities (meaning the privilege may apply) or EU authorities (meaning no privilege exists) and whether production to the national authority in the context of a commission investigation results in a waiver of any applicable privilege.

U.S. lawyers working for multi-national companies must be sensitive to these varying rules and the implications for any communications they may have with their employer-client and its in-house lawyers. Interestingly, the Court in *Akzo* did not address the status of non-EU qualified lawyers. An April 2010 opinion issued in that case by Advocate General Juliane Kokott[16] expressed the view that extension of the legal professional privilege to lawyers from non-EU countries "would not under any circumstances be justified." As reasoned by the Advocate General, the commission and courts of the EU cannot be expected to verify that the country in question "has a sufficiently established rule-of-law tradition which would enable lawyers to exercise their profession in the independent manner required."[17] The Court of Justice's opinion is silent on this matter.

The question arises, therefore, as to communications from a non-EU attorney hired as external counsel to an EU company under investigation by the commission. Arguably, the *AM&S* condition of "independence" is satisfied in this instance, although Advocate General Kokott's comment about the commission's inability to assess a third country's rule-of-law regarding the independence of lawyers leaves one wondering. Thus, the only attorney-client communications guaranteed a level of protection in EU cases are those with an outside attorney qualified to practice in the EU.

Who Makes Determination?

Another issue presented in the EU cases is the question of who makes the determination whether a document is privileged. In *AM&S*, the company conceded that it was the "prima facie right" of the commission to seek the documents in question, but argued that permitting the very authority seeking the information to make the privilege determination was inappropriate. The Court of Justice found that where an undertaking asserts that materials sought by the commission are confidential, the company must "provide the Commission's authorized agents with relevant material of such a nature as to demonstrate that the communications fulfill the conditions."

Where the commission is not satisfied that the materials sought are confidential, the Court rejected the proposal offered by AM&S and various intervenors that a neutral arbitrator or authority could resolve any questions, finding that the solution of such disputes "may be sought only at Community level." Further, the Court found the commission was authorized to order production of the materials in question and, if necessary, impose fines or penalties if the undertaking continued to refuse.

The notion that a government or similar prosecuting authority would be permitted to review the privileged materials flies in the face of the secrecy the privilege is intended to protect. This issue arises in the United States where the government seizes evidence that may include privileged communications. Although the government sometimes attempts to shield the privileged information from the eyes of the prosecutors assigned to the investigation by setting up a "taint team" of walled-off government attorneys to review the materials, this procedure has drawn criticism in the United States as undermining the zealously protected attorney-client privilege.[18] In EU cases, not even the pretense of shielding authorities from potentially privileged documents exists.

Conclusion

After *Akzo/Akcros*, it is clear that communications with in-house counsel are not protected by the legal professional privilege in an EU investigation, even if such communications would be deemed privileged in the Member State in which the undertaking is located. Attorneys practicing internationally should be aware of these conflicts, adequately prepare their clients, and make every effort to shield client confidences to the extent possible.

1. James Kanter and Eric Pfanner, "Europe Opens Antitrust Inquiry Into Google,"New York Times (Nov. 30, 2010).

2. *Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd. v. European Commission*, Case No. 550/07, 2010 E.C.R. 00000.

3. Marcia Coyle, "Court of Justice Declines to Recognize Privilege for In-House Lawyers," NYLJ (Sept. 16, 2010).

4. Robert J. Anello, "Preserving the Corporate Attorney-Client Privilege: Here and Abroad," Penn State International Law Review (Fall 2008).

5. Stephen A. Calhoun, "Globalization's Erosion of the Attorney-Client Privilege and What U.S. Courts Can Do to Prevent It," Texas Law Review (November 2008).

6. Robert G. Morvillo and Robert J. Anello, "Attorney Client Privilege in International Investigations," NYLJ (Aug. 5, 2008).

7. Treaty Establishing the European Economic Community arts. 85-86, March 25, 1957, 298 U.N.T.S. 11.

8. See European Union Web site, Europa.eu (available at: http://europa.eu/index_en.htm).

9. Louis Altman and Malla Pollack, Callmann on Unfair Competition, Trademarks and Monopolies (4th Edition) at §28:5.

10. Hugo Brady, "Does the EU Need a Public Prosecutor?" Centre for European Reform Bulletin (February/March 2010); Renata Goldirova, "Brussels Seeks More Powers for EU Crime Body," EUObserver.com (April 17, 2007).

11. EU Web site, "Agencies of the European Union: Eurojust," (available at http://europa.eu/agencies/pol_agencies/eurojust/index_en.htm).

12. Department of Justice Press Release, "U.S./EU Agreements on Mutual Legal Assistance and Extradition Enter Into Force" (Feb. 1, 2010) (authorizing the participation of U.S. investigators and prosecutors in joint investigative teams in the EU).

13. 50th Annual Antitrust Law Institute, "Are You Prepared for a Dawn Raid? An Essential Guide to Handling European Commission Investigations." PLI Order No. 18840 (May-June 2009).

14. See EU Press Release, "Antitrust: Commission Initiates Formal Investigations Against IBM in Two Cases of Suspected Abuse of Dominant Market Positions" (July 26, 2010); Buhr, et al., "The Commission Decision in the Microsoft Internet Explorer Case and Recent Developments in the Area of Interoperability," Competition Policy Newsletter, No. 1 at p. 37 (2010).

15. Case No. 155/79, 1982 E.C.R. 1575.

16. The EU Court of Justice is assisted by eight "advocates-general" whose role is to present "reasoned opinions on the cases brought before the Court." These opinions are merely advisory, but their impartiality is "beyond doubt" and their opinions carry great weight with the Court. See Europa Web site, "European Union Institutions and Other Bodies: The Court of Justice" (last visited on Nov. 22, 2010) (available at: http://europa.eu/institutions/inst/justice/index_en.htm).

17. Case No. 550/07, 2010 E.C.R. 00000 at ¶¶189-190.

18. See, e.g., Rice, 2 Attorney-Client Privilege in the U.S. §11:17.1 ("[T]he confidentiality supposedly ensured by the Chinese Walls constructed around ['taint teams'] are not as strong a safeguard as the name might suggest. Such walls have proven to be porous in an environment where colleagues and associates within a U.S. Attorney's office are working toward the same goals"); *In re Search Warrant for Law Offices Executed on March 19, 1992*, 153 F.R.D. 55, 59 (S.D.N.Y. 1994) ("It is a great leap of faith to expect that members of the general public would believe any such Chinese wall would be impenetrable; this is not withstanding our own trust in the honor of an AUSA.").