

European Court of Justice confirms that in-house legal advice is not protected by legal privilege

On 14 September 2010, the European Court of Justice rejected a bid to change the legal status of advice given by in-house counsel, confirming its 1982 decision in the AM&S case¹, that legal privilege should extend only to advice provided by external lawyers who are qualified in one of the EU Member States.

The present case concerns a cartel investigation in 2003 and a challenge by Akzo Nobel to the European Commission's powers to seize and retain emails between the company and its in-house lawyer. The Court's judgment follows the advice of Advocate General Kokott in her opinion of 29 April 2010, confirming that, as a result of the *"in-house lawyer's economic dependence, and the close ties with his employer, ... he does not enjoy a level of professional independence comparable to that of an external lawyer."*²

Although widely expected, the judgment, will come as a blow to the international business and legal communities. Communications with in-house legal counsel, even qualified in house lawyers who are members of one of the national bar associations of the European Union, cannot attract legal professional privilege. The Court's unequivocal finding is that *"an in-house lawyer cannot, whatever guarantees he has in the exercise of his profession, be treated in the same way as an external lawyer, because he occupies the position of an employee which, by its very nature ... affects his ability to exercise professional independence."*³

The Court also rejected the suggestion that the legal systems of the Member States showed a clear trend towards conferring legal professional privilege on communications with company lawyers. It took the view that, despite some changes to national rules and procedures for the enforcement of EU competition law since modernisation in 2004, had not evolved sufficiently since the 1982 judgment of the Court in the AM&S case to warrant a change in the law.

However, unlike the Advocate General, the Court did not take the opportunity to comment on the position of external counsel qualified in countries outside the European Union. In her opinion in April, Advocate General Kokott adopted a strong stance: *"the inclusion ... of lawyers from third countries would not under any circumstances be justified"*⁴. Despite the Court's silence on this point, it is clear that communications between clients and external counsel who are members of a bar or law society in a third country will, as is presently the case, not attract legal professional privilege.

Going forward, the judgment confirms the ability of the European Commission (and national regulators operating under European law) to request and review documents and advice prepared by in-house counsel (and communications with lawyers from third countries) in the course of an investigation. Given the categorical nature of the Court's decision, this position seems unlikely to change for some time. As a consequence, companies will need to continue to take care over how sensitive in-house legal advice is sought and recorded, in the knowledge that it cannot be shielded from regulatory oversight.

If you have any questions about any of the issues raised in this legal update, please contact your usual European antitrust contact:

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Footnotes

- 1 Case 155/79 *AM&S Europe v Commission* [1982] ECR 1575. That case also concerned the question of privilege and the Commission's access to documents emanating from in-house lawyers.
- 2 Case C-550/07 P, judgment of 14 September 2010, at paragraph 49.
- 3 Case C-550/07 P, judgment of 14 September 2010, at paragraph 47.
- 4 Opinion of Advocate General Kokott in Case C-550/07 P, delivered on 29 April 2010, at paragraph 189.

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