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Nathan M. Crystal and Francesca Giannoni-Crystal

Abstract

On September 14, 2010, in *Akzo Nobel Chemicals Ltd. v. EU*, the European Court of Justice (ECJ) unanimously decided that communications between in-house counsel and company executives are not subject to the attorney client-privilege, which is called the professional privilege in Europe. Many companies and professionals had hoped that the ECJ would hold that in-house counsel was entitled to assert the professional privilege. In this article, we argue that the decision should not have been either surprising or of great concern to companies based in or doing business in Europe.

The decision in *Akzo Nobel* should not have been surprising because the ECJ was applying well-established principles. In 1982, the ECJ had ruled in *AM&S Europe v. Commission* that to be privileged a communication between attorney and client must relate to the client's right of defense and must be with an independent/external lawyer.

In addition, the decision should not be of great concern to companies in Europe for three reasons. (1) In very few European countries are in-house counsel members of the bar and are granted the professional privilege. Even if the ECJ had recognized the privilege, its decision would only have applied to cases involving the Europe Union, not to cases involving individual countries in Europe. (2) The professional privilege that the ECJ excludes for in-house counsel differs in significant ways from the U.S. attorney-client privilege. Had the ECJ recognized the privilege, the features of this privilege would have been different from those of the attorney-client privilege. (3) In the U.S., the attorney-client privilege is especially important because of the existence of discovery, while in Europe there is no discovery. Because discovery is essentially nonexistent in Europe, the risk of disclosure of communications between in-house counsel and their employers in private litigation is very small. Broad requests for pretrial discovery in Europe emanating from cases pending in the U.S. are limited under reservations adopted by most European countries under Article 23 of the Hague Convention. In public litigation in Europe, the authorities may seek to obtain documents from companies, but these materials will be protected by the professional privilege when they involve confidential communications between outside counsel and the company (subject to similar exceptions that apply in the U.S.), if the company has retained outside counsel,

which is typically the case both because of the significance of the matter and the fact that in-house counsel cannot represent the client at trial.

KEYWORDS: Akzo Nobel, AM&S Europe, attorney-client privilege, professional privilege, in-house counsel, European Court of Justice, discovery, discovery abroad, Hague Convention, blocking statutes, privacy