



10 May 2010

www.klgates.com

Authors:**Neil A. Baylis**

neil.baylis@klgates.com
+44.(0)20.7360.8140

Vanessa C. Edwards

vanessa.edwards@klgates.com
+44.(0)20.7360.8293

Robert V. Hadley

robert.hadley@klgates.com
+44.(0)20.7360.8166

Dr Wilhelm Hartung

wilhelm.hartung@klgates.com
+49.30.220.029.220

Scott S. Megregian

scott.megregian@klgates.com
+44.(0)20.7360.8110

Rachel Stephens

rachel.stephens@klgates.com
+44.(0)20.7360.6534

K&L Gates includes lawyers practicing out of 36 offices located in North America, Europe, Asia and the Middle East, and represents numerous GLOBAL 500, FORTUNE 100, and FTSE 100 corporations, in addition to growth and middle market companies, entrepreneurs, capital market participants and public sector entities. For more information, visit www.klgates.com.

AKZO Nobel In-House Lawyer Privilege Case – Attorney General's Opinion Handed Down

Akzo Nobel and Akcros Chemicals –v– Commission (Case C-550/07P)

In a development in the Akzo Nobel case working its way through the European Court of Justice ("ECJ") Advocate General Kokott has handed down her Opinion in the appeal brought by Akzo Nobel Chemicals and Akcros Chemicals Ltd ("Akzo Nobel") against the General Court's decision given on 17 September 2007. Akzo Nobel's appeal concerns the question of whether legal professional privilege protects communications between in-house lawyers and their employer against disclosure to the European Commission (the "**Commission**") in competition investigations. The appeal was supported by the Netherlands, the UK and Ireland, and numerous lawyers' professional bodies, including the International Bar Association.

The Advocate General has recommended that the ECJ dismiss Akzo Nobel's appeal, on the basis that in-house lawyers in an employment relationship with their client are not sufficiently independent from their employer to justify the extension of legal professional privilege to communications between them.

The Advocate General found in her Opinion that "*As an employed person, an in-house lawyer is typically – rather than only exceptionally – characterised by complete economic dependence on his employer*" (paragraph 69) and that "*In addition to their economic dependence on their employer, ... in-house lawyers usually exhibit a considerably stronger personal identification with the undertaking for which they work, as well as with its corporate policy and corporate strategy than would be true of external lawyers in relation to the business activities of their clients*" (paragraph 70). The asserted dependence of in-house counsel on, and identification with, their employer will come as scant comfort to the employer who employs in-house counsel, expecting that the advice will be both independent and privileged. If the ECJ follows the Advocate General's Opinion, the Commission will continue to be able to seize, and use, such advice and other communications between employer and in-house lawyer.

In the Advocate General's view, it is immaterial that in-house counsel are enrolled with a national Bar or Law Society which imposes professional and ethical duties of independence upon them. They remain in her view insufficiently independent from their employer for their in-house advice and other communications to be protected by legal professional privilege in Commission investigations.

The Advocate General also stated in her Opinion that it is "*more difficult for... in-house lawyers to deal effectively with a conflict of interests between their professional obligations and the aims and wishes of their undertaking*" (paragraph 82).

The Commission had argued that Akzo Nobel did not have sufficient interest in the case to bring an appeal to the ECJ, because the investigation in which it had seized the documents at issue had been concluded and fines had been imposed. The Commission said its decision in the investigation had been reached without relying on the two emails with Akzo Nobel in-house counsel which were the subject matter of the appeal. The Advocate General dismissed this argument, stating that "*any breach of legal professional privilege during an investigation represents a serious interference with a fundamental right which is committed ... as soon as a Commission official removes a document or takes a copy of it*" (paragraph 41) and that this interference cannot be put right by the Commission not relying on the particular document.

The Advocate General's Opinion is just that: it is not legally binding on the ECJ, being instead a reasoned recommendation. It would however be surprising if the ECJ's decision, expected later this year, differed in outcome from the recommendation of the Advocate General. The ECJ follows the Advocate General's Opinion in the vast majority of cases.

In-house counsel and their employers therefore need to be alert to the fact that in investigations conducted by the Commission legal professional privilege will not attach to their communications.

On sensitive matters which might be subject to investigation by the Commission, companies will wish to avoid reducing concerns to writing (including email) other than in communication with independent, external legal advisers who are qualified to practise within the European Economic Area (the "EEA"). Companies will want to ensure that staff are notified and regularly reminded about the sensitivity of communications in this area and the risk of disclosure in due course of documents created. Companies should make sure that compliance policies and procedures in relevant areas adequately take the risk of disclosure into consideration.

It is also important to note that the Advocate General does not recommend that the ECJ make any change to the law established by *AM&S Europe Limited –v- Commission* [1982] ECR 1575, in which it decided that legal professional privilege does not protect communications between a client and its independent external legal adviser if that legal adviser is not qualified to practise within the EEA. Companies wanting to ensure that legal advice from outside the EEA is protected against inspection by the Commission in a competition investigation must ensure that such advice is provided through and signed off by a lawyer who is qualified to practise within the EEA.

Anchorage Austin Beijing Berlin Boston Charlotte Chicago Dallas Dubai Fort Worth Frankfurt Harrisburg Hong Kong London
Los Angeles Miami Moscow Newark New York Orange County Palo Alto Paris Pittsburgh Portland Raleigh Research Triangle Park
San Diego San Francisco Seattle Shanghai Singapore Spokane/Coeur d'Alene Taipei Tokyo Warsaw Washington, D.C.

K&L Gates includes lawyers practicing out of 36 offices located in North America, Europe, Asia and the Middle East, and represents numerous GLOBAL 500, FORTUNE 100, and FTSE 100 corporations, in addition to growth and middle market companies, entrepreneurs, capital market participants and public sector entities. For more information, visit www.klgates.com.

K&L Gates is comprised of multiple affiliated entities: a limited liability partnership with the full name K&L Gates LLP qualified in Delaware and maintaining offices throughout the United States, in Berlin and Frankfurt, Germany, in Beijing (K&L Gates LLP Beijing Representative Office), in Dubai, U.A.E., in Shanghai (K&L Gates LLP Shanghai Representative Office), in Tokyo, and in Singapore; a limited liability partnership (also named K&L Gates LLP) incorporated in England and maintaining offices in London and Paris; a Taiwan general partnership (K&L Gates) maintaining an office in Taipei; a Hong Kong general partnership (K&L Gates, Solicitors) maintaining an office in Hong Kong; a Polish limited partnership (K&L Gates Jamka sp. k.) maintaining an office in Warsaw; and a Delaware limited liability company (K&L Gates Holdings, LLC) maintaining an office in Moscow. K&L Gates maintains appropriate registrations in the jurisdictions in which its offices are located. A list of the partners or members in each entity is available for inspection at any K&L Gates office.

This publication is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.

©2010 K&L Gates LLP. All Rights Reserved.