EUROPEAN COURT OF JUSTICE ON ATTORNEY-CLIENT PRIVILEGE

As you may know, the revised European Patent Convention (EPC 2000) introduced the attorney-client privilege under Rule 153(1), which reads that “Where advice is sought from a professional representative ... all communications between the professional representative and his client ... are permanently privileged from disclosure in proceedings before the European Patent Office”. The privilege is obviously important for European patent attorneys, but its actual scope is still uncertain and the issue is not ruled univocally by the national laws of member states.

It may therefore be interesting to note that on September 14, 2010, the European Court of Justice (“ECJ”) rendered its decision in the Akzo Nobel Chemicals Ltd. & Akcros Chemicals LTD. v. European Commission case, confirming that written communications with in-house counsel are not covered by legal professional privilege.

The case originated from an investigation into anti-competitive practices performed by the European Commission, and focused on e-mails exchanged between a company manager and a lawyer admitted at the Netherlands bar and, at the time of the facts, employed by the company, which e-mails had been treated as not privileged by the investigating team.

The attorney-client privilege rule was set in a 1982 ECJ decision, which held that protection of the confidentiality of written communications between clients and lawyers was subject to the conditions that the exchange had to relate to “client’s right of defence” and had to be with “independent lawyers”.

Akzo and Akcros claimed that the status of independence stemmed from a lawyer’s obligations of professional conduct and, consequently, that also in-house lawyers were independent as external ones.

The ECJ did not accept this view and stated that the “requirement of independence means the absence of any employment relationship between the lawyer and his client”. The Court’s reasoning was that an “in-house lawyer, does not enjoy the same degree of independence from his employer as a lawyer working in an external law” because “the position of employee ... does not allow him to ignore the commercial strategies pursued by his employer”, influencing his ability to remain professionally independent. The Court furthermore noted that an in-house lawyer could be entrusted with tasks affecting the commercial policy of the employer (in the case at stake, the counsel was competition law coordinator), thus reinforcing “the close ties between the lawyer and his employer”.

While this decision refers to EU competition law, it nevertheless reconfirms the principle that in-house counsels are not independent and that their communications are not privileged in the EU. It is to be seen how such principle will affect other areas or jurisdictions. It could perhaps influence the interpretation given to Rule 153(1) EPC mentioned above. As it is unclear whether the privilege set by this rule applies also to a representative employed in a company’s patent department, we may not exclude that the decision of the ECJ could tip the scales in favor of a restrictive definition of the privilege.