

NEGOTIATING THE PRIVILEGE MINEFIELD: SOME DIFFERENCES BETWEEN ATTORNEY-CLIENT PRIVILEGE IN THE U.S. AND EUROPE

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One of the bedrock principles in the U.S. legal system is that conversations between a lawyer and a client are, with a few exceptions, granted a broad privilege from disclosure.¹ And a client can, of course, be a corporation.² In the U.S., the privilege can cover communications between executives of a corporation and its outside counsel, as well as communications between executives and the in-house legal department.³ In Canada, the rule is similar to that in the U.S.

In Europe, however, the law of privilege can be very different. Each jurisdiction in Europe applies its own privilege laws. Moreover, the European Commission (EC) has privilege rules separate from the member states that apply to transnational activities in Europe that come within the jurisdiction of the EC. Thus, what is taken for granted in the U.S. – that legal advice rendered to a company by in-house counsel enjoys a privilege from disclosure – is far from certain in Europe.

Below we discuss a recent and highly anticipated decision from the highest court of the European Union (EU), the Court of Justice (ECJ), addressing privilege. The Court declined to take the opportunity to reassess the long-standing European rule that communications between executives and in-house lawyers are not subject to Europe's "legal professional privilege."⁴ We then provide some insight regarding the privilege rules in the member states of Europe, noting how they differ from the rules in the U.S. And we conclude with some practice tips that should be considered by companies engaged in multinational transactions involving Europe to ensure that legal advice regarding the transactions is, to the fullest extent possible, protected from disclosure.

I. The European Commission's Investigation of Akzo Nobel

In the EU, competition investigations—the equivalent of antitrust investigations conducted by the Department of Justice or Federal Trade Commission in the U.S. —may be conducted by the competition authorities of the various member countries, or by the EC, the executive body of the

¹ See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981) ("An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.").

² See *id.* at 389.

³ See, e.g., *United States v. United Shoe Machinery Corp.*, 89 F.Supp. 357, 360 (D. Mass. 1950) ("On the record as it now stands, the apparent factual differences between these house counsel and outside counsel are that the former are paid annual salaries, occupy offices in the corporation's buildings, and are employees rather than independent contractors. These are not sufficient differences to distinguish the two types of counsel for purposes of the attorney-client privilege.").

⁴ Case C-550/07P, *Akzo Nobel Chemicals Ltd. and Akros Chemicals Ltd. v. European Commission*, Sept. 14, 2010.

EU. Competition investigations are undertaken by the EC in a variety of contexts when a matter involves more than one jurisdiction in Europe.

In Europe, competition investigations often begin with what is known as a “dawn raid”—a surprise, on-site inspection of the company’s premises. In February 2003, as part of a competition investigation, the EC raided the U.K. offices of Akzo Nobel Chemicals, a Netherlands corporation, and its subsidiary Akcros Chemicals and seized documents. Included among the seized documents were emails between executives and in-house counsel.

Akzo Nobel sought to prevent the EC from using in its investigation three e-mails containing communications with in-house counsel. The company argued that the communications were privileged legal advice that was protected from disclosure. The documents in question were emails between the general manager of Ackros and the competition coordinator for Akzo, a member of the Netherlands Bar who was an employee of the Akzo legal department.

The EC reviewed the documents and decided that although they contained advice from a lawyer, they were not covered by the privilege. Thus the EC was free to use the information as evidence against Akzo and Ackros in its competition investigation.

The companies appealed the decision to the European General Court, which dismissed the action as unfounded. The companies then sought review by the ECJ.

The rule applied by the EC in deciding that the documents were not privileged comes from the 1982 case *AM&S Europe v. Commission*,⁵ which appeared to proscribe application of the legal professional privilege to communications with in-house counsel. In *AM&S Europe*, the ECJ held that for a communication to be protected by the legal professional privilege two conditions must be present: *first*, the communication must be connected to the client’s right of defense, and *second*, the exchange must emanate from “independent” lawyers. The concept of “independence” was described in *AM&S Europe* as relating to a lawyer’s ethical obligations in “collaborating the administration of justice.”

Because the concept of “independence” in *AM&S Europe* was tied to the existence of ethical obligations, the parties in *Akzo* felt their facts were sufficiently distinguishable from *AM&S Europe*. Akzo argued that the ECJ should take the opportunity to clarify its prior position. In *Akzo*, unlike in *AM&S Europe*, the in-house counsel who had rendered the advice was a member of the Amsterdam professional bar. As a bar member, the in-house lawyer was subject to the bar’s ethical and professional obligations. The in-house lawyers in *AM&S* had not been members of a similar professional society. Thus there was an opportunity for the ECJ to find that membership in a professional bar with certain ethical obligations allows an in-house attorney to be sufficiently “independent” of the company that employs the lawyer to preserve the privileged nature of the advice.

⁵ Case 155/79, *AM & S Europe v. Commission*, 1982 E.C.R. 1575.

II. The Ruling in Akzo

The ECJ rejected appellants' argument and found no legitimate privilege covering the legal advice in the e-mails. The court applied its rule from *AM&S Europe*, and held that in-house counsel, whether or not admitted to a member state Bar, cannot be "independent" within the meaning of the test from *AM&S Europe*. The court felt that the employment relationship between the "client" and the attorney inherent in an in-house legal department created an economic dependence on the "client" that was inconsistent with the *AM&S Europe* concept of independence. Unlike a lawyer working for an external firm, the in-house attorney's position as an employee "does not allow him to ignore the commercial strategies pursued by his employer" according to the court. The court reasoned that an in-house attorney's inability to ignore the company's commercial strategies "affects his ability to exercise professional independence" That the attorney giving the advice was a member of the Netherlands Bar, subject to its ethical rules, did not, in the court's view, provide a sufficient basis for finding that the attorney could act independently of the company.

III. Differences in Privilege Law in Member Countries

The *AM&S Europe* rule applied in Akzo is not the last word on whether the advice of in-house counsel in the EU is protected by privilege. The EU is comprised of 27 member countries: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and United Kingdom. Somewhat like the relationship between state law and federal law within the U.S., EU member countries maintain their own laws, including laws of privilege.

The relevant privilege law to be applied – member state law or EU law – can vary based on the circumstances. The privilege law of the EU is applied to cross-border activities within the jurisdiction of the EU, such as in competition investigations by the EC.

Thus, *Akzo* applies only to actions taken by institutions of the EU like the EC. The national authorities of EU member states may independently conduct competition investigations, either independently or jointly with the EC. The application of the *Akzo* rule will depend on which authorities are involved.

Several member states, including England, Ireland, Norway, Spain, Portugal, and the Netherlands, extend privilege protections to advice given both by in-house lawyers and external lawyers. Other jurisdictions such as Belgium take a hybrid approach and afford protection only to communications with attorneys who are members of an independent association of corporate lawyers.

To determine which law applies to advice given by in-house counsel in the EU, practitioners should consult the law of the specific country in which the advice is given. But two general observations are worth noting. First, under the national laws of most EU member states, the legally privileged advice is typically restricted to advice received from external law firms.⁶

⁶ Even countries such as Switzerland, which are not part of the EU, have similar laws limiting the application of attorney-client privilege to communications with external lawyers.

Second, it is easy to over-generalize the law of privilege in the various European jurisdictions – there are often subtleties to the privilege laws of a jurisdiction that may seem peculiar from a U.S. perspective. In Austria, for example, conversations between a client and an attorney are protected, but a communication directed from an attorney to a client found in the possession of the client is not necessarily protected.

To avoid creating uncertainty, Akzo argued that the EC should treat privilege in a manner that is consistent with the privilege laws of the member state in which the investigation was conducted (in that case England). The ECJ rejected this argument and found no underlying problem with a regime in which the privilege afforded communications with in-house counsel varies depending on which authority is conducting the investigation.

IV. Practical Tips for Multinational Firms

Companies with operations outside the United States – especially those that may be subject to competition investigations in the EU – must keep in mind that the attorney-client privilege (or similar privileges) may be applied differently in jurisdictions outside the U.S. These differences should inform the companies' legal strategies.

Despite the ECJ's brisk treatment of the issue of legal certainty in the law of professional privilege, confusion in this area is a very real risk. Enforcement activity—including, for example, dawn raids—may be conducted by the EC and national authorities in Europe, and authorities around the world, either acting alone or in a coordinated effort. Given the differing, sometimes conflicting laws regarding professional privilege, companies with European operations must carefully consider the use of in-house versus external counsel. Because the application of privilege can vary depending on the authority considering the matter, companies operating even in those jurisdictions such as England that recognize a privilege for in-house counsel must be aware that communications with in-house counsel are not privileged under all circumstances.

In addition, advice by a non-EU qualified attorney is not recognized as privileged by the EC. Although this point was not specifically raised by Akzo, the Opinion explains that the exclusion stems from the variance in ethical and professional standards for attorneys amongst different countries. Hence, it is likely that the rule rejecting the extension of privilege to communications with non-EU qualified lawyers remains the same after *Akzo*.

Even companies that limit their European operations exclusively to jurisdictions with privilege laws similar to the U.S. (such as the England) should not become complacent in their use of in-house counsel. There may come a time when the company finds itself within the jurisdiction of the EU, in which EU privilege laws will apply.

V. Conclusion

Companies faced with the prospect of doing business in Europe must carefully evaluate their legal strategies. Although legal advice given by in-house counsel is generally afforded a broad privilege from disclosure in the U.S., there is a good chance that in Europe such advice may not receive similar protection from disclosure when provided by in-house counsel. The protection from disclosure afforded advice from in-house counsel in Europe will vary depending on the jurisdiction and investigating authority. For the most critical advice, the disclosure of which

could do significant damage, companies operating in Europe are well-advised to rely only on outside counsel.

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