

## Antitrust Alert

### Europe's High Court Highlights Differences for In-House Counsel Between Attorney-Client Privilege in Europe and the US

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#### Documents Prepared by In-House Lawyers Can Be Seized in Dawn Raids in Europe

One of the thorny issues inherent for in-house legal counsel of multinational corporations is the applicability of attorney-client privilege in the different jurisdictions in which the company operates. In a [decision](#) that should serve as a stark reminder that different jurisdictions have different practices, on September 14, 2010, the highest court of the European Union, the Court of Justice (ECJ), reaffirmed the European rule that communications between executives and in-house lawyers are not subject to Europe's "legal professional privilege." That ruling was especially significant in this case as it allowed documents containing such communications to be seized and used as evidence against the target company in a European Commission competition investigation.

In February 2003, as part of a competition investigation, the Commission raided the U.K. offices of Akzo Nobel Chemicals and its subsidiary Ackros Chemicals and seized documents. Included among the seized documents were e-mails between executives and in-house counsel. Akzo Nobel sought to prevent the Commission from using the e-mails on the grounds that they were privileged communications with counsel. The documents in question were e-mails between the general manager of Ackros and the competition coordinator for Akzo, a member of the Netherlands Bar who was employed by the Akzo legal department.

The Commission reviewed the documents and decided they were not covered by the privilege. Akzo and Ackros appealed the decision to the European General Court, which dismissed the action as unfounded. The companies then sought review by the ECJ.

#### The ECJ Ruling in Akzo

The ECJ rejected appellants' argument and found no legitimate privilege covered the e-mails. The court applied its rule from *AM&S Europe v. Commission*, which held that the legal professional privilege was subject to two cumulative conditions: 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 in the administration of justice."

The ECJ in *Akzo* held that in-house counsel are not "independent" within the meaning of the test from *AM&S Europe*. Unlike a lawyer working for an external firm, the in-house attorney holds a position as an employee that "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."

It is important to remember that *Akzo* applies only to actions taken by institutions of the European Union, such as the European Commission. Europe consists of multiple jurisdictions within (and outside) the European Union, and the privilege



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law may differ in each of these jurisdictions. For example, several member states, including England, extend privilege protections to in-house lawyers as well as outside counsel. Akzo argued that the ECJ should treat the privilege in a manner consistent with the laws of the member state conducting the investigation (in this case, England) to avoid creating uncertainty. The Court rejected this argument and found no underlying problem with a regime where there is variance in the rules on privilege according to the authority involved.

## Implications for Multinational Firms

Companies with operations outside the United States must keep in mind that the attorney-client privilege may be applied differently in foreign jurisdictions. These differences should inform 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 dawn raids—may be conducted by both the Commission and national authorities in Europe, either acting jointly or alone. Given the differing, sometimes conflicting, laws regarding professional privilege in Europe, companies with European operations must carefully consider the use of in-house versus external counsel, even when operating in those jurisdictions, such as England, that recognize a privilege for in-house counsel.

Companies operating, doing business or considering doing business in Europe and other foreign jurisdictions must consider the extent to which communications with in-house counsel could become known to the government in, for example, the course of a government investigation or as part of required regulatory filing. Those companies must evaluate their legal strategies and determine whether some of the advice traditionally given by in-house counsel in the United States should be obtained from external counsel when operating in Europe and elsewhere.

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