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Hot Issues Alerts

Challenges For In-House Counsel In Multinational Corporations: Preserving The Attorney-Client Privilege In The Aftermath Of *Akzo Nobel Chemicals Ltd. v. European Commission*

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As businesses go global, the nature and scope of what constitutes a "privileged communication" between in-house counsel and a corporate client is being put to the test. Of particular interest to a multinational corporation is whether communications between U.S. in-house lawyers and their foreign affiliates are protected by the attorney-client privilege. The answer to this question can have significant implications as it has become relatively common for in-house counsel located in the U.S. to collaborate with corporate counsel of a related foreign entity or affiliate. Where there is no corresponding in-house lawyer, U.S. counsel often advise the related foreign affiliate directly.

In the U.S., client communications with in-house counsel are covered by the attorney-client privilege when they are made for the primary purpose of seeking or rendering legal advice. *See Upjohn v. United States*, 449 U.S. 383 (1981). While the privilege is not absolute, it is firmly rooted in American jurisprudence. Several European countries, however, including France, Italy and Sweden, do not recognize a privilege between in-house counsel and their clients. Other countries such as the United Kingdom, Germany, the Netherlands and Belgium recognize a limited privilege.

A recent decision by the Court of Justice of the European Union ("the Court") exposed the fragility of the privilege when it affirmed a long-standing rule that communications between in-house counsel and corporate employees are *not* privileged in European Union ("EU") anti-competition (*i.e.* antitrust) proceedings brought by the European Commission. *See Akzo Nobel Chemicals, Ltd. v. European Commission* (Case C-550/07 P) [2010] ("*Akzo*"). While limited in scope, this decision has implications for in-house counsel in the U.S. who give legal advice to non-U.S. affiliates. This article discusses the *Akzo* decision and explores its implications. It also identifies best practices for U.S. in-house counsel seeking to preserve attorney-client communications with foreign affiliates.

The *Akzo* Decision

In *Akzo*, investigators from the European Commission raided the United Kingdom offices of Akzo Nobel Chemicals and a subsidiary, seeking evidence of possible anti-competitive practices. Among the documents seized were copies of two emails between Akzo's managing director and a member of the company's legal department, responsible for coordinating the company's compliance with antitrust laws. The in-house lawyer was a member of the Netherlands Bar.

Akzo demanded return of the emails arguing that the emails contained legal advice from the company's in-house counsel, and were therefore privileged. The company challenged a prior decision, *AM&S Europe v. Commission* (Case No. 155/79) [1982], which severely limited recognition of an attorney-client privilege in anti-competition proceedings. Several national entities and legal groups, including the governments of the UK, Ireland and the Netherlands, the International Bar

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Association and the European Chapter of the American Corporate Counsel, joined Akzo's appeal, arguing that the modern realities of business should lead the Court to re-evaluate the *AM&S* decision.

In *AM&S* the Court ruled that in an anti-competition proceeding, a communication is protected by the "legal professional privilege" if two conditions are satisfied: (1) the communication is related to the government's investigation and is made for the purpose of defending the company's rights; and (2) the communication involves "independent lawyers" who are not bound to the company by an employment relationship. Akzo argued that the concept of an "independent lawyer" covered its in-house counsel. The company maintained that its in-house counsel was just as independent as an outside lawyer because he was subject to the same rules of professional conduct and disciplinary rules that are applicable to members of the Netherlands bar. *See Akzo v. European Commission*, at ¶ 33-36. Akzo also argued that its in-house counsel's employment contract specifically provided that "the company was to respect the lawyer's freedom to perform his functions independently and to refrain from any act which might affect that task." *Id*. at ¶ 35.

The Court rejected Akzo's position finding that no attorney-client privilege attached to the emails and that the investigators rightfully seized them. In affirming the *AM&S* decision, the Court ruled that communications between in-house counsel and corporate employees are not privileged in EU anti-competition law proceedings. The Court determined that the employment relationship between an in-house lawyer and a client was not compatible with the concept of "independence" as articulated in *AM&S*:

> An in-house lawyer, despite his enrollment with a Bar or Law Society and the professional ethical obligations to which he is, as a result, subject, does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his client. Consequently, an in-house lawyer is less able to deal effectively with any conflicts between his professional obligations and the aims of his client. *Id*. at ¶ 45.

What Does *Akzo* Mean For U.S. In-House Counsel?

The *Akzo* ruling does have implications for U.S. in-house counsel who render legal advice to foreign affiliates in EU anti-competition proceedings. One can easily envision a scenario in which a U.S. lawyer in a multinational company sends an email to a business colleague in a non-U.S. affiliate regarding strategy to defend allegations of anti-competition practices. As the law currently stands, these emails would be discoverable.

While the effort to overturn *AM&S* fell short, in-house counsel can take some comfort in the fact that the decision has limited application. First, it applies only to EU anti-competition law investigations by the European Commission. It has no impact on a company's right to withhold privileged documents from private parties during litigation or other government authorities. Second, the decision relates only to the production of documents. In-house counsel cannot be compelled to testify as to privileged matters.

Best Practices

For the U.S. practitioner, it is difficult to imagine an environment where most, if not all, of his or her legal advice is discoverable. Given the state of the law, however, in-house counsel who advise foreign affiliates should consider the following best practices:

Educate yourself on the privilege laws in the countries in which you have responsibility and/or your company has operations.

Useful resources include the following:

- Privilege Review 2009 (www.linklaters.com/pdfs/publications/Corporate/092017PrivilegedReview.pdf)
- Attorney-Client Privilege For In-House Counsel Is Not Absolute In Foreign Jurisdictions (http://www.metrocorpcounsel.com/current.php?artType=view&EntryNo=7275)
- What Every Corporation Needs to Know About Legal Privilege (www.crowell.com/newsevents/article.aspx?id=314)

Familiarize yourself with the AM&S *and* Akzo *decisions*.

Read the decisions and monitor related developments. Consider how the Court's rulings may be applicable to the business and legal issues facing your company.

Develop a strategy to address EU allegations of anti-competitive practices that maximizes your ability to protect communications with in-house counsel as privileged.

A central part of this strategy will likely be the retention of outside counsel when the company believes that an EU anti-competition investigation is likely or has begun. Pair outside counsel with in-house counsel as appropriate. Privilege issues aside, in-house counsel are often a rich source of historical information, and helpful facilitators.

Be mindful that the right to withhold documents in EU competition law proceedings is limited even when it comes to communications with *outside counsel*. To be covered by the "legal professional privilege," the written communication must relate to the subject of the investigation and be made for the purpose of defending the company's rights.

Educate and train your colleagues regarding the limits of the privilege in applicable countries and legal proceedings.

Knowledge is power. Provide regular education and training for inside lawyers and managers on privilege issues and the need to use outside lawyers in settings that could implicate anti-competition laws. Counsel your colleagues on the discoverability of internal documents that request or respond to inquiries for legal advice, and the need to consult outside counsel.

Logistics.

Segregate privileged documents relating to work with outside counsel from non-privileged documents to minimize disputes with enforcement authorities. Limit distribution of the written communications only to those employees who truly need the information. For day-to-day routine legal advice in those jurisdictions where the privilege may not apply to in-house counsel, consider providing your legal advice orally and not by email.

Conclusion

The *Akzo* decision increases the challenges in-house counsel face in modern day legal practice. Unless and until there is a fundamental change in the way the EU views in-house counsel, multinational companies will have to retain outside counsel and spend resources to preserve what should be treated as privileged communications. While less than ideal, this approach is preferable to the surrender of the privilege in its entirety.