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BUSINESS LITIGATION UPDATE

EU Court Continues to Deny Legal Privilege to In-House Lawyers

Whether communications between business persons and their in-house counsel enjoy the attorney-client privilege is an important question. The issue is more acute, and more complicated, when those communications cross national borders. The EU's highest court has reaffirmed that there is no privilege for corporate communications with in-house counsel under European law. Given the critical importance of maintaining and preserving the legal protections for communications with counsel, companies should understand the import of this decision and obtain appropriate counsel for sensitive matters.

The European Court of Justice handed down a much-anticipated ruling on September 14 in the case of *Akzo Nobel Chemicals Ltd. v. EU* (Case C-550/07). The decision unambiguously confirmed that communications between Akzo Nobel's employees and its in-house counsel do not enjoy the benefit of legal professional privilege, known in the United States as attorney-client privilege. This differs dramatically from the protection extended to communications between in-house counsel and employees of a company in the U.S.

The debate over the protection to be given to communications between company employees and in-house counsel has continued for decades in the EU. In 1982, the same European court in *AM & S Europe v. Commission* (Case 155/79) set guidelines for privilege that excluded in-house lawyers. The 1982 ruling basically states that employed counsel cannot provide unbiased advice.

The Association of Corporate Counsel, in-house counsel and many companies were hoping that the Court of Justice would take the opportunity presented by *Akzo* to overturn the 1982 ruling, but an 11-judge panel of the Luxembourg-based EU court ruled that "[an] in-house lawyer cannot, whatever guarantees he has in the exercise of his profession, be treated in the same way as an external lawyer." And being an employee "by its very nature, does not allow him to ignore the commercial strategies pursued by his employer." The court held that its ruling does not violate the principle of equal treatment since in-house lawyers are in a fundamentally different position from external lawyers.

"We are dismayed that the ECJ did not seize the opportunity to recognize the independent judgment and value of the in-house profession," says Susan Hackett, ACC general counsel. "The court instead relies on conjecture from opinions in the *AM* case of nearly 30 years ago, thereby ignoring the realities of modern in-house practice." The court addresses this argument, which was put forth in the *Akzo* case, stating "that the legal situation in the Member States of the European Union has not evolved, since the judgment in *AM & S Europe v. Commission* was delivered, to an extent which would justify a change in the case-law and recognition for in-house lawyers of the benefit of legal professional privilege."

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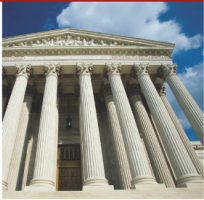
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Companies should be careful when confiding in in-house counsel and seeking legal advice internally. EU companies must rely on outside counsel, if their communications are to be privileged. However, when such companies seek the advice of outside counsel they need to realize that legal professional privilege does not extend to outside counsel who are not members of an EU Member State bar.

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