

**EXECUTIVE SUMMARY**

The more the legal world changes, the more it stays the same. In the *Akzo*, case, the European Court of Justice (“ECJ”) chose the status quo rather than taking the opportunity to expand the protections of the legal professional privilege in European Union (“EU”) competition law investigations by the European Commission (“EC”) and beyond. As it stands, internal communications between company management and in-house lawyers, even those who are duly admitted and members of the Bar, are not protected from disclosure or discovery in EU competition law cases or investigations by the EC. Indeed, the ECJ’s limited ruling issued 14 September 2010, follows the law as set forth in the seminal 1982 *AM&S* case.

*Akzo* provided an opportunity for the ECJ to expand the scope of legal privilege to in-house attorneys, in EU competition law investigations and more broadly. Since the ECJ’s decision in 1982 in the *AM&S* case, the state of the law has been that for the legal privilege to apply to an attorney’s communications, the advice must be connected to the “client’s rights of defence,” the company’s lawyer has to be a member of the Bar with professional and ethical obligations, and must not be employed by the company to which the attorney is providing advice. The rationale applied in the EU for requiring the absence of an employment relationship is the notion that such a relationship prevents the attorney from having a sufficient degree of independence from the company. In *Akzo*, the in-house attorney was a member of the Dutch bar and recognized to practice, as such. He had signed an agreement of independence with the company. Under Dutch law, the attorney’s bar membership and independence agreement would have permitted *Akzo* to assert the legal privilege, despite the existence of an employment agreement. Thus, the ECJ could have found that the in-house attorney had a sufficient degree of independence from the company because of the independence agreement, or it could have deferred to Dutch law, the national law of the EU member state where the dispute arose, as the EU courts do in cases other than those involving the EC and EU competition law investigations. The ECJ refused to budge and the law remains the same in the context of EU competition law investigations and beyond.

Besides this missed opportunity, the ECJ's ruling in *Akzo* is very limited in its practical impact. It only applies to EU competition law investigations by the EC. It does not apply to the myriad other cases or incidents in which potential legal privilege claims are routinely made, which are subject to the national law of the countries concerned.

The ruling might, however, have symbolic significance, as the ECJ chose to apply the EU's case law on privilege rather than deferring to the rules of the member state concerned, perhaps signaling an aversion to applying the disparate rules regarding legal privilege of countries in the EU and worldwide, or an aversion to an in-house attorney legal privilege.

Further, materials waived / produced in a competition law matter will be accessible to plaintiffs or other regulators in the future, including those in non-EU jurisdictions, who would never have had access to these files because of their privileged status under US, or Canadian or other jurisdictional standards. There is growing evidence that regulators from multiple jurisdictions are willing to scratch each others' back, and request access to files in the EU that would not have been subject to production under privilege in the client's home jurisdiction or in the location in which they are currently being sued.

Finally, the ruling is disappointing in that the ECJ missed an opportunity to create a fully recognized in-house attorney legal privilege, which would have benefited companies based or with operations in the EU, which are as a result at a competitive disadvantage by the lack of such a privilege, as well as at greater risk in litigation and less well-suited to address issues and problems as they arise.

Companies and their in-house and external counsel need to be vigilant in their understanding of the implications of the rules governing legal privilege in each jurisdiction in which they do business. There should be an established protocol for communicating legal advice, whether orally or in written communications and memoranda, and decisions need to be made with

regard to communicating certain kinds of legal advice across borders or in shared files, communications, or on servers. Other steps should also be taken, as described in the accompanying material, including assessing the manner in which records are kept, which could lead to unintended consequences.