

WHAT THE DECISION AND THE CURRENT REGULATORY FRAMEWORK MEAN FOR CORPORATE COUNSEL: STATUS AND ISSUES

Corporate counsel must be mindful that the Decision does not change the pre-existing situation, as it confirms the position taken by the ECJ in *AM&S* in 1982, *i.e.* that, in EU competition law investigations, the scope of legal professional privilege excludes communications between company management and in-house counsel, regardless of whether in-house counsel is a member of a Bar or has signed an independence agreement.

Moreover, the Decision relates exclusively to investigative powers granted to the EC under EU law. The *Akzo* case law (as before it the *AM&S* one) does not apply to any other cases in which legal privilege issues may arise, such as non-EU cases at national level and those cases under which national competition authorities enforce competition/competition law rules pursuant to domestic enforcement rules and not EU enforcement rules.

However, the Decision highlights the relevance of the privilege issue to in-house counsel, and – by refreshing and confirming the pre-existing situation – is clearly an unwelcome statement of principle and practice for corporate counsel and their corporations. The Decision may also encourage more aggressive attitudes by legislators, or national enforcement authorities that have so far *de facto* respected the privileged nature of communications between in-house counsel and their internal clients. Further, it could frustrate efforts in individual member states in the EU who are being encouraged to recognize in-house counsel's professional status (the majority of EU member states do not currently do so), suggesting that a decision to recognize in-house counsel as full members of the bars is ill-advised or against the momentum of the times.

A fragmented regulatory landscape

For decades, corporations and their lawyers have operated in an ever-increasingly global landscape. While businesses think of themselves, and often work, as seamless cross-border organizations, their activities take place in national jurisdictions with different legal regimes, sometimes with the additional complication of supranational regulations, as in the case of

EU legislation, *e.g.* in the area of competition law or international sanctions. This fragmentation of legal regimes also applies to the regulation of privilege.

Except for EU competition law investigations conducted by the EC, legal privilege issues are subject to national law. As pointed out by the Advocate General Kokott in her Opinion on the *Akzo* case, “*Of the now 27 Member States of the European Union a significant number continue to prohibit in-house lawyers from becoming members of a Bar or Law Society at all; in the vast majority of those Member States, this automatically means that internal company communications with in-house lawyers do not benefit from the protection afforded by legal professional privilege (...). Only in a small minority of the 27 Member States does the protection afforded by legal professional privilege currently apply also to internal company or group communication with in-house lawyers. This phenomenon is restricted to the common law area (...) and to a small number of other Member States*”. ACC’s website features materials on each member state’s current policies and practices regarding in-house counsel working in their jurisdictions.

A global corporation will in all likelihood include among the members of its legal department lawyers who are members of a Bar, and lawyers who are not. Some of those lawyers will be based in countries that do recognize privilege for in-house counsel, and some in countries that do not. A sizeable proportion of those lawyers will be in the 27 Member States of the EU, and their communications may become the subject of an EU competition law investigation conducted by the EC. Those lawyers will be providing written legal advice (often by email) to internal clients based in the same jurisdiction, and/or in one or more different jurisdictions. In larger or multinational companies, the lawyers of the legal department may work and be admitted in jurisdictions far beyond the EU, as well. Those in-house lawyers are impacted by this decision, as well, including those working in jurisdictions where in-house practice is both recognized and privilege for in-house communications is well-established.

Definitions of privilege vary

What is commonly referred to as legal professional privilege is in fact a concept that can vary significantly from country to country.

In many civil law jurisdictions the rules of legal privilege have been linked primarily to lawyers' rules of professional conduct, and this approach seems to have had an adverse effect on the position of in-house counsel. Reasons for that may lie in the fact that civil law jurisdictions, such as Italy and France, generally do not have discovery procedures (or an extremely limited version of "discovery") so the concept of having to protect documents from disclosure in possible future litigation has not gained the same importance as in common law legal systems, where discovery makes legal privilege of primordial importance in virtually all litigation.

For example, certain European countries have rules designed to safeguard the secrecy of the communications between defense counsel and their clients, as well as the documents necessary for their legal defense. These principles (called the professional secrecy doctrine) only apply to certain professions (*i.e.*, lawyers, journalists, doctors, etc.) and focus on the roles of the persons involved, rather than the nature of the communication itself. The professional secrecy doctrine will apply only to lawyers who are duly registered with a Bar. In these countries (*e.g.*, France and Italy), in-house counsel normally cannot be registered at the Bar and in consequence they are not covered by legal privilege.

Notably, in The Netherlands the same reasoning applies, but it leads to a materially different outcome: a Dutch *advocaat* is allowed the benefits of the rules on privilege and confidentiality even if he is the in-house counsel of a company, as a direct consequence of his membership to the Dutch Bar, because – and this is the key difference – in The Netherlands an in-house counsel can be admitted to the Bar while at the same time being an employee of a company.

On the contrary, common law jurisdictions (*e.g.*, the UK, Australia, the US, Canada) generally adopt variations of the “attorney-client privilege,” under which confidential communications between the attorney (in-house or external) and his client, or any document, material or information produced by the lawyer (in-house or external) in the exercise of securing or providing legal advice, are protected by privilege and, absent waiver or other extraordinary circumstances (*i.e.*, crime fraud exception), materials prepared in anticipation of litigation cannot be seized, examined or used in criminal investigations nor in the possible arising trial (except certain exceptional cases).

Under the related but separated concept of the “work product doctrine”, materials prepared in anticipation of litigation are generally protected from disclosure to an adversary civil or criminal discovery.

Admission of in-house counsel to the Bar

National rules on the Bar requirements have a significant impact on the applicability of privilege to in-house counsel. As a matter of fact, in other words, *“an essential element of the attorney-client privilege, under any standard, is that an attorney participates in the communication. An attorney is one who is admitted to the bar of a state or federal court. Moreover, the bar membership must be of a type that licenses one to practice law. Thus, the attorney-client privilege contemplates that the client communicates with an individual who is not simply trained in the law, but actually authorized to engage in the practice law”*¹.

Rules that are meant to govern and regulate access to the profession end up providing different legal rights to lawyers who are Bar members and those who are not, and hence triggering different legal consequences.

In many civil law countries, legal privilege applies only to members of the national Bar, and in-house counsel cannot become members of the Bar. The rationale for prohibiting corporate counsel’s membership of the Bar is often the in-house counsel’s perceived lack of

independence from his client. These countries do not allow lawyers who are not members of their Bars to enjoy the protection of privilege.

In other countries, often of a common law tradition (but with notable exceptions such as The Netherlands), in-house counsel are admitted to the Bar, and the communications between them and their internal clients are protected by privilege. However, as *Akzo* illustrates, this protection is not recognized in the context of EU competition law investigations conducted by the EC.

Attitude of courts and enforcement authorities

The attitude of courts and enforcement authorities adds another level of complexity to the situation.

In the US, courts and enforcement authorities have sometimes recognized the protection of privilege for foreign in-house counsel who do not enjoy that protection in their home country. In assessing legal privilege claims with regard to communications that occurred in a foreign country, the US courts apply the law of the country with the most direct and compelling interest in whether the communications should remain confidential. This analysis, which the courts refer to as the "touching base" analysis, is a fact-specific analysis. Among the factors that are considered are whether the communications were with or involved US attorneys, whether the client with whom the attorney was communicating was a US resident attempting to protect a right under US law and whether the relevant investigation or legal proceedings were in the US. Thus, if US law is applied, confidential communications between company management and a foreign in-house attorney who is a member of a Bar regarding legal advice would most likely be deemed privileged, absent unusual circumstances, even if communication would not be recognized as privileged under the laws of the country in which the communication took place.

In a major European country, prosecutors have not hesitated to seize communications between in-house counsel (including foreign corporate counsel protected by privilege in their own countries) and their internal clients or external counsel and use them as evidence against the corporation, the internal clients and – in one case involving three individuals - those in-house counsel themselves. However, in that same country, competition law authorities are generally respectful of communications sent by in-house counsel, even if they are not members of the Bar and technically protected by privilege.

Impact of lack of corporate counsel privilege on competitive position of corporations

The Decision, and certain countries' negation of privilege to in-house counsel, have a negative impact on the principle of equality and on fair competition. Since under EU antitrust/competition law the communications between in-house counsel and their corporate clients are not protected by legal professional privilege, whereas US law in general protects such communications, companies who have offices in EU and conduct business in EU will be in a competitive, disadvantaged position as compared to a US corporation that has no offices in the EU.

Companies doing business in Europe and subject to competition law regulation will experience a strategic disadvantage in litigation – in country or across borders, since material that is garnered in a dawn raid or other EC-led investigation waives privileges they would otherwise be able to assert and that their opponents in litigation may still be able to assert – the playing field is not fair or even.

We have seen cases arise just in the last few months where the DOJ and SEC in the US, for instance, called upon information that would not be discoverable here but that was produced in a competition law investigation, subverting the ability of the company under the microscope to assert its rights under US law and presumptions. There are also cases in Europe wherein plaintiffs in country law actions are able to have access to information divulged in EU competition law investigations that would not have been available and would

have been privileged if they were simply on the basis of plaintiff and defendant operating under member state law/rules. These rules are skewing the long-established rights and practice presumptions of Member State and other country's bars and legal professions by creating policies of disclosure that hurt companies.

“Leakage” of privilege

Since many countries do not provide privilege for communications between in-house and corporate management, multinationals who have offices in those countries might find themselves in the inconvenient circumstance in which local prosecutors or other enforcement agencies ask for, obtain and use as evidence documents and communications with such in-house counsel.

Through the mechanisms of international judicial cooperation contemplated by a growing number of bilateral treaties and multilateral conventions, a communication between a non privilege-protected in-house counsel and his internal client seized legitimately in a country that does not recognize the privileged nature of such communication could be provided to the enforcement agencies of a country where the same communication would be protected by privilege, even though such receiving agencies would themselves have been unable to seize it directly because of its national privilege rules.

In a recent anti-bribery case, the enforcement authorities of a country have been able to obtain documents that would have been privilege-protected in that country, but were seized by prosecutors of a country that does not recognize privilege for in-house counsel.

Risks of weakening of corporate compliance systems

Society and regulation and compliance are not well served when policies set by countries or the EU end up discouraging or frustrating compliance, rather than encouraging it and helping companies effectively avoid (rather than remedy) the problems or failures that are

likely to arise to some degree. Even the prospect that the privilege might not apply [as noted in the famous US Supreme Court privilege case (*Upjohn v. US*), “an uncertain privilege is the same as no privilege at all”], can chill vital communications or cause clients to rethink their good intentions of routinely engaging their in-house counsel in the most sensitive and difficult discussions and decision-making.

Denying privilege to in-house counsel inhibits a company’s management from seeking candid and clear legal advice on whether a proposed or current business activity is appropriate. Company’s management, frightened of losing legal professional privilege, will avoid disclosing sensitive information to in-house lawyers. Decisions need to be based on candid advice and unvarnished analysis of the facts on which such advice is sought. The seeking and giving of legal advice will be inhibited by concerns that written communications with in-house counsel will not be protected by legal privilege. And should that concern extend to outside counsel who regularly advise the company on matters pertaining to how a matter will be viewed in “foreign” jurisdictions or in cross-border transactions, since they, too, under AM&S are not recognized by the EC for purposes of carrying confidentiality, the impact is worsened.

What’s more, the ECJ decision could have the perverse (and undoubtedly unintended) impact “of chilling corporate compliance efforts, by discouraging clients from investing in the important *preventive* role that in-house counsel play in helping their clients navigate increasingly complex legal regulations, which if ignored or misunderstood might lead to harmful and potentially massive corporate compliance failures”ⁱⁱ.

The “leakage” of privilege as illustrated above and its practical consequences in corporate managements’ decisions imply a breach of the relationship of confidence between a lawyer and his client.

“The decision of the ECJ puts the EU in the backward position of discouraging, rather than encouraging, the crucial provision of preventive legal services to clients by those lawyers best

placed and suited to prevent failures from happening: and all at a time when the public, in the EU and around the world, is more concerned than ever about assuring the highest standards of corporate compliance and ethical corporate culture.”ⁱⁱⁱ Likewise, those countries that do not grant privilege to in-house counsel put their corporations at a material disadvantage when they litigate against companies that are established in countries that do provide that protection.

Increased costs

“The Decision simply punishes companies that try to prevent legal problems by hiring in-house legal talent to work 24/7, onsite, to keep them out of trouble.”^{iv} The ruling obliges companies to hire external lawyers for complex legal advice because the external lawyers’ communications will be protected by legal privilege.

Consequently, the Decision creates a perverse disadvantage for companies that are obliged to defend themselves by calling in outside lawyers after problems have already emerged.

“Clients must call their counsel with daily questions and requests, especially when the client is not even sure if a legal problem exists. Lawyers hire in-house lawyers from their outside law firms for precisely these reasons: with in-house counsel, they can have institutionally knowledgeable, top-quality, affordable, real-time, highly relevant legal advice that relates to their day-to-day business needs”^v.

ⁱ Gucci America Inc. vs. Guess?, Inc., S.D.N.Y, June 29, 2010

ⁱⁱ ACC Akzo Message points – Akzo – June 2010.

ⁱⁱⁱ ACC Member Newsletter – Akzo – June 2010.

^{iv} ACC Akzo Message points – Akzo – June 2010.

^v ACC Akzo Message points – Akzo – June 2010.