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**ASSOCIATION OF CORPORATE COUNSEL “DISAPPOINTED”  
WITH AKZO DECISION**

**Decision Strikes a Blow to Concept of Legal Professional Privilege to In-House Counsel**

**October 4, 2007 (Washington, D.C.)** - Last month, the *European Court of First Instance* announced its ruling in, what’s come to be known in legal circles as the “Akzo Decision,” rejecting demands to extend the scope of legal professional privilege to communications between parties and their in-house lawyers in the context of EU competition investigations. [*Akzo Nobel Chemicals Limited and Akros Chemicals Limited v Commission of the European Communities*] The ruling held that EU law should continue to follow the 1982 judgment of the European Court of Justice (ECJ) in the case of *AM&S Europe v Commission of the European Communities* [1983]. In that case, the ECJ held that privilege did not extend to internal communications involving in-house lawyers and did not protect them from disclosure during competition investigations by the EU Commission. The new case confirms that protection only applies to communications with “independent lawyers” (e.g. external counsel), which does not include lawyers bound by a “relationship of employment.”

The *Association of Corporate Counsel Europe*, with pro bono support from lawyers at Covington & Burling, filed an amicus curiae brief in the Akzo case in support of extending legal professional privilege to in-house lawyers, and strongly believes the European Court missed an important opportunity to recognise the increased status and role of in-house lawyers in today's commercial world and to modernise the concept of legal professional privilege.

Susan Hackett, Vice President and General Counsel at *The Association of Corporate Counsel (ACC)*, has been outspoken on the corresponding issues resulting from Akzo, and while not surprised by the decision handed down, is sorely disappointed.

“ACC’s response to the Akzo case is that we are not surprised, but are extremely disappointed in the result handed down on September 17,” explains Hackett. “The decision strikes a blow, not only to the concept of legal professional privilege in the corporate context, but also to the compliance programs that in-house lawyers are primarily responsible for developing for their corporate clients and for the protection of stakeholders.”

Hackett goes on to explain that ACC finds particular aspects of the case disturbing, specifically:

- 1) DISTINCTION BETWEEN IN-HOUSE V. OUTSIDE COUNSEL:** The distinction drawn between the confidentiality between clients and their outside counsel and confidentiality between clients and their in-house lawyers is not only without merit, but shows a fundamental lack of understanding of the role and professionalism of in-house lawyers. To assume that when a lawyer takes a job as in-house counsel for a company that they check their professional credentials, impartiality, expertise or professionalism at the door, is ridiculous. If the argument is that all lawyers who accept money from their clients are incapable of providing independent counsel, then an interesting debate has ensued. It would be challenging, however, for anyone to make the case that outside counsel are any less motivated to earn their clients' continued business than in-house counsel are.

Further, today's in-house lawyer is drawn from the "cream of the crop," in that, they are the very best of the outside firm bar: they are lawyers who graduated from senior positions at the bench and government. This case presumes that those hired for their recognized integrity, experience, and professionalism are suddenly rendered incapable. One must ask, "Now that they earn their compensation in the form of a pay check, rather than via a retainer check or an hourly bill, they are suddenly their client's patsy?" Companies hire in-house lawyers so they can better comply with the law, not so that they can better avoid it. If a company wanted to ignore the law, then time and money need not be spent on hiring lawyers; outside counsel would only be hired 'after' trouble occurred. That is certainly not a forward thinking strategy; it is a knee-jerk reaction. In-house lawyers are hired to help keep companies out of trouble in the first place -- to prevent legal violations, which is far more productive than the strictly remedial focus allows. The lack of logic in this assumption of the courts is breathtaking, and the presumption that all in-house lawyers are created evil is insulting.

- 2) UNDERLYING MESSAGE SENT BY THE EU:** What message is the EU sending to companies? That the Competition authority (and likely other enforcement agencies that will model their document collection practices on this decision) can ignore fundamental precepts of privilege if the client employs the lawyer to provide advice in real-time, but not if they hire outside firms? Yes, the privilege should not extend to those who work in legal departments but who have not sat for the bar. But for those companies which go the extra distance to hire lawyers who are recognized to help assure compliance and preventive advice, the EU is sending a strong and very negative message. Companies with in-house counsel will be punished for self-investigating problems and for engaging in careful consideration of important legal issues; companies that rely on hiring outside counsel after the fact or only as crises arise will be protected.

The unfortunate result of such a message is an incentive for companies to dumb down their internal safeguards managed by in-house counsel and waste greater amounts of investors' money by paying for more outside legal counsel. Whose interests are served as a result? Not those of the company, nor the employees, not the financial stakeholders, and certainly not the public or the markets. Very clearly, this Court held that the convenience of prosecutors was more important than the deleterious impact of this decision on preventive legal counsel.

- 3) AN UNDERLYING IMPETUS FOR THE DECISION?** Is there a public policy reason supporting the application of the legal professional privilege? If so, then it will only be meaningful if applied consistently and predictably, and without regard for employment status. In-house lawyers recognized by the member states that regulate their practices are entitled to the EU's recognition of their status too. All eyes should rightfully focus on the integrity and performance of the lawyers representing a company struggling with a problem. In-house lawyers are more than capable of withstanding that scrutiny, and if they fall short of their responsibilities, then the target should be painted on the mis-performing lawyers, and should not be a brush used to paint the entire in-house bar as unprofessional.

*The Association of Corporate Counsel (www.acc.com), the in-house bar association<sup>SM</sup>, celebrates its 25th Anniversary in 2007. Serving the professional needs of attorneys who practice in the legal departments of corporations and other private sector organizations worldwide, ACC promotes the common interests of its members, contributes to their continuing education, seeks to improve understanding of the role of in-house attorneys, and encourages advancements in standards of corporate legal practice. The association has grown to over 22,000 members in more than 74 countries, has 48 chapters and 14 committees serving its membership, and represents over 9,500 organizations. ACC's members represent all of the Fortune 50 and Fortune 100 companies. Internationally, its members represent 42 of the Global 50 and 74 of the Global 100 companies.*