

FOCUS: IN-HOUSE ETHICS

# The Privilege Divide

*It's not like the Atlantic Ocean or the Alps, but it can be a challenge to conduct cross-border business*

**By Carsten Lueers / Association of Corporate Counsel (ACC)**

**I**n-house lawyers today advise their companies on new regulations, provide counsel regarding business plans in emerging markets and multiple jurisdictions, and operate in a global environment fraught with risk and ever-evolving legal challenges.

Although all in-house counsel face these universal challenges, there is no universal right to privilege. The right to legal privilege varies greatly by jurisdiction – a troubling fact for in-house counsel whose companies operate across borders. In fact, according to the newly released Global Perspectives: ACC In-house Trends Report (June 2017), only 39 percent of survey respondents in Europe say they possess legal professional privilege.

In-house lawyers who do enjoy privilege value it greatly. More than half of the European respondents to the survey stated that there would be negative consequences if they were to lose it.

Standing in stark contrast to the results in Europe, the ACC survey found that 74 percent of U.S.-based in-house counsel said that communications between them and other employees at their companies *are* afforded privilege.

This U.S./European disparity has consequences for cross-border legal practice. Companies typically conduct business between the two regions with ease, but lack of privilege can quickly become a large business hurdle. For

example, in-house counsel at global corporations face fundamentally different compliance challenges depending on where their communications occur and with whom. With these roadblocks in place, legal decisions slow, outside counsel costs rise and business is interrupted.

To combat this unequal access to privilege and the negative implications it has on the practice of law and business operations, ACC has taken up a number of initiatives globally, with a special focus on Europe. At the heart of ACC's efforts is the need to educate governments and other stakeholders on the importance of privilege to corporate compliance.

For example, at the end of May, ACC spoke in support of a European Commission proposal regarding whistleblower protections. The ACC position paper promoted incentives for strong corporate compliance programs and recommended that the commission recognize the important role of legal professional privilege in ensuring robust whistleblower protections. Indeed, strong corporate ethics and compliance programs educate and encourage employees to come forward with allegations of corporate misconduct.

ACC believes that by promoting cultures of compliance, European organizations can play a crucial role in encouraging business ethics across the continent. This same perspective is true in the United States – businesses and regulators both benefit when there are policies and procedures in place that allow companies to serve as good corporate citizens.

Without strong privilege, in-house lawyers are unable to investigate

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alleged wrongdoing. They are hampered from holding confidential conversations regarding sensitive information. They are blocked from doing their jobs. While corporations may still obtain this information by engaging with outside counsel, this is a time-consuming and costly solution.

Because the laws on privilege for in-house counsel vary at the national level

throughout Europe, there is often the risk that EU legislation will not respect these national differences (especially since the 2010 European Court of Justice decision in *Akzo Nobel Chemicals Ltd. v. European Commission* denied in-house counsel the right of privilege in competition proceedings before the European Commission).

To protect legal privilege for in-house counsel at the national level, ACC is promoting legislation on the empowerment of Europe's national competition authorities and on the establishment of a single market information tool to ensure that privilege is respected where it exists, and to initiate an in-depth debate of the societal benefits of legal professional privilege.

Additionally, ACC is lending support to national efforts to secure greater privilege rights for European in-house counsel. In Switzerland, ACC is supporting legislation meant to strengthen the in-house profession and grant limited privilege rights, and the organization has also supported early efforts to establish an in-house designation in Hungary.



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