The European Court of Justice (ECJ) confirmed in a landmark case on September 14, 2010 that the concept of privilege under EU law does not extend to communications with in-house counsel.

The long-awaited ruling in the case of Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission brings an end to a highly controversial dispute which has far-reaching consequences for businesses operating across Europe.

The European General Court had previously held that Akcros’ internal communications with in-house counsel did not attract legal professional privilege under EU law. On appeal to the ECJ, the appellants asked the court, inter alia, to set aside the judgment of the General Court in so far as it rejected the claim for legal professional privilege over the company’s communications with its in-house lawyer. The ECJ has upheld the General Court’s judgment confirming that the EU rules are different from the rules on privilege that apply in many member states (including the UK).

At the EU level (and in many individual EU member states), communications are not covered by privilege unless they are (i) made for the purposes and in the interests of the client’s rights of defense, and; (ii) with an independent lawyer (i.e., a lawyer not bound to the client by a relationship of employment). This effectively means that communications with in-house counsel will not be privileged unless they are carefully drafted to demonstrate that they are made exclusively for the purpose of seeking legal advice from an external EU qualified lawyer. Note that previous EU case law makes it clear that a lawyer must be entitled to practice in a member state to be able to fit the second criterion, which means that advice from lawyers qualified in other jurisdictions – for example, the US is not covered by privilege.
The ECJ’s ruling follows the reasoning of Advocate General Juliane Kokott, who in an earlier Opinion had reiterated the orthodox point that, because they are economically dependent on their employers, in-house lawyers cannot be regarded as independent whether they are admitted to a professional bar association or not.

The position taken by the ECJ in relation to privilege is in direct opposition to the position under the law in England and Wales (and also some other European jurisdictions such as Scotland, Ireland, Norway, Spain, Portugal and the Netherlands), where communications with in-house counsel are protected by legal privilege as long as the in-house counsel is a regulated legal professional and/or registered with a professional bar association and is acting in their capacity as a lawyer. For companies operating across multiple jurisdictions, the ECJ’s decision confirms the need for separate procedures depending on which authority carries out an investigation. This gives rise to the potential for significant confusion about which rules apply in which cases.2

Moreover, the European Commission’s investigative powers are already considered to be exceptionally broad since they include the power to enter and search the premises and vehicles of businesses (and the private homes of employees). With the EU poised to extend its regulatory reach into the fields of banking, insurance and securities, the inability of companies to claim privilege over communications with in-house counsel is a major concern.

**WHICH RULES APPLY WHEN?**

Representatives of national competition authorities may apply EU competition law (Articles 101 and 102 of the Treaty on the Functioning of the EU) in parallel with national provisions (Chapters I and II of the Competition Act 1998 in the UK). National competition authorities may also assist the European Commission to carry out an investigation under EU competition law and vice versa. In these circumstances, there is the potential for uncertainty about which privilege rules apply.

It is clear from the ECJ’s ruling that the EU rules apply when the European Commission carries out an investigation in a member state. Where a national authority assists the Commission in its investigation, the EU rules will be applicable. However, where a national competition authority undertakes its own investigation under its national legislation or under Article 101 or 102, the national rules on privilege will apply.

This leads to the somewhat arbitrary position that a company’s ability to assert privilege over an internal document can depend on whether it is a national competition authority or the Commission that seeks to remove or be provided with the document concerned. A company under investigation will need to be vigilant, particularly during a dawn raid to ensure that privileged information is not unwittingly provided to a national competition authority in the mistaken belief that it must be surrendered under the EU privilege rules.

The ECJ also did not consider the specific issue of whether internal legal documents prepared in relation to compliance issues (such as the drafting of a compliance program or ad hoc advice to the business regarding a specific project or concern) would satisfy the first EU condition for privilege, i.e. that it is connected with the client’s rights of defense. As stated above, if carefully drafted to demonstrate that they are made exclusively for the purpose of seeking legal advice from an external EU lawyer, such documents should qualify for privilege.

The Advocate General, however, has stated that advice, internal correspondence and documentation prepared by an in-house lawyer for “compliance purposes” is unlikely to be subject to privilege under EU law because much of it is general in nature and has no specific connection with the current or future exercise of the rights of defense.
GUIDANCE ON PROTECTING POTENTIALLY PRIVILEGED INFORMATION POST AKZO

When seeking advice on competition compliance, companies will need to consider carefully whether it is appropriate or necessary for in-house counsel to provide advice in writing. Only in the unlikely case that a company can be certain that national privilege rules would apply during any investigation should advice be sought from an in-house lawyer in writing.

Companies should also review internal compliance documents and dawn raid procedures to make sure that they reflect the ECJ’s ruling regarding privilege.

Privilege may be better protected by following the guidance set out below:

- Ensure that all questions relating to competition law issues are either directed straight to external counsel or marked clearly as having been prepared “for the purposes of seeking external legal advice.”

- Avoid forwarding or copying external legal advice—circulate only on a need-to-know basis.

- Do not summarize or annotate external legal advice. If circulated, written advice from an external lawyer should be provided in its original form without comment or opinion.

- Keep all (electronic and hard copy) privileged communications in separate files marked “Privileged.”

- Mark each page of a privileged document clearly as “Privileged and Confidential – External Legal Advice.” Put the same wording in the subject line of privileged emails.

- Remember that different privilege rules apply in different jurisdictions and to different investigating authorities.

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2 In her opinion, AG Kokott recognized that it would be simpler if the procedural provisions applicable to searches conducted under competition law and the associated rules on legal professional privilege were harmonized throughout the European Union. However, she stated that the issue of harmonization of the different laws relating to legal professional privilege is a question of legislative policy for the European Union legislature alone to decide and it therefore seems likely that any harmonization is likely to result in a blanket loss of privilege for in-house counsel.