



European Rejection of Attorney–Client Privilege for Inside Lawyers

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In a striking example of formalism over realism, the European Court of Justice on September 14, 2010 ruled that the attorney-client privilege applied only when a communication was connected to the “client’s right of defense” and when the exchange emanated from “‘independent lawyers’, that is from ‘lawyers who are not bound to the client by a relationship of employment’.”

In rejecting the privilege for in-house lawyers in *Akzo Nobel Chemicals Ltd I v. European Commission*, the ECJ was affirming the holdings of a 1982 case (*AM & S Europe Ltd v. European Commission*) and rejecting the arguments not just of Akzo but of numerous intervenors, both national entities (the governments of the UK, Ireland and the Netherlands) and legal groups (including the Netherlands Bar Association, the International Bar Association and the Association of Corporate Counsel).

At issue were two emails about antitrust issues – obtained in a dawn raid aimed at enforcing EU competition laws – exchanged between a general manager and an in-house lawyer who was a member of the Netherlands bar. Although the in-house Dutch lawyer was just as bound by the ethical rules of the bar association as outside lawyers, the European Court of Justice held the emails were not privileged on the sole ground of in-house employment.

Before critiquing the opinion and assessing its impact, it is important to note that the holding applies only under the Commission’s pan-European competition law authority – in both enforcement actions and merger clearance cases. It does not, by its terms, apply to other EU inquiries many of which (as in the trade area) may be undertaken through requests for voluntary submission of information rather than compulsory process. Nonetheless, the logic of the opinion would deny application of the privilege to

inside lawyers in other areas of law where important Community interests were served and compulsory process authorized.

The most striking aspect of the ECJ decision is its failure to understand the reality of contemporary law practice and its failure to adduce any facts to support its sweeping conclusions. Let me focus on its most egregious failings.

First, the Court gives no weight to the purpose of the attorney-client privilege in the inside counsel setting. These goals may be summarized as:

- Encouraging clients to be completely truthful with their attorneys, so that the attorney's legal advice can be based on all relevant facts;
- Overcoming client's reluctance to seek legal advice because of fear that imperfect, questioning communications will be revealed to others and misunderstood; and
- Empowering inside lawyers to lead internal company efforts to promote strong compliance programs – prevention, detection and response – which seek adherence to law and regulation.

The ECJ is oblivious to the importance of talented inside lawyers being part of the corporate culture – and thus more effective than outside lawyers in embedding compliance systems and processes in business operations to advance the fundamental corporate goals of high performance with high integrity. The Court is also oblivious to the marked trends in the past 25 years – in the United States but also in Europe – of increasing the quality of inside lawyers to equal the quality of outside counsel. Without belaboring the now well-understood points, I would simply refer to a blue paper I authored which was published by the Harvard Law School Program on the Legal Profession and republished by the Forum (“The General Counsel as Lawyer-Statesman”, available [here](#)).

Second, the Court makes the remarkable assertion that inside lawyers are far less “independent” than outside counsel (“an independent third party”), even though both inside lawyers and outside lawyers may be members of the same bar association and bound by the same rules. (I discuss below the fact that not all European inside lawyers are allowed to be members of the bar.) Although the Court does not analyze this issue, it assumes that an employment relationship (insider lawyers) creates significantly more dependence than a contractor relationship (outside lawyers).

As law firms have moved in recent decades from an emphasis on being professional associations to an emphasis on being business organizations, outside lawyers are affected by powerful economic incentives to please the client in order to maximize revenues, profits and his/her own draw. Both inside and outside lawyers have to resolve the tension between being “partner” to the business leaders and “guardian” of the corporation (see my essay, “Caught in the Middle”, *Corporate Counsel*, April 2007). Both need to overcome the seductions of an economic relationship (employee/contractor) and, based on personal integrity, to provide professional advice, counseling and decision-making in the service of guarding the company. The Court’s naiveté on the dynamics of private law firms and outside lawyers is remarkable.

Third, the false supposition about the significantly greater “independence” of outside lawyers is important because it leads to the Court’s summary rationale for denying the privilege to inside lawyers: “an in-house lawyer is less able to deal effectively with any conflicts between his professional obligations and the aims of his client.” The ECJ goes on to say that the conception of an “independent” lawyers role, which only outside counsel may fulfill, is collaboration “in the administration of justice and...being required to provide, in full independence and in the overriding interests of that cause, such legal assistance as the client needs.”

But, although this is the pivot point in the decision, the Court never says what “professional obligations” might be compromised by inside lawyers compared to outside lawyers who, the Court acknowledges, must serve the client. Surely, the concept of the “administration of justice” does not require either outside lawyers or inside lawyers to be agents of the enforcement authorities. Surely that concept does not require either outside lawyers or inside lawyers to agree with enforcement authorities. Surely, when outside and inside lawyers are both members of the same bar, they both equally face sanctions if they violate the relevant canons of ethics. Surely, in most jurisdictions, even if inside lawyers are not members of the bar, the most serious violations of the canons of ethics which would affect the administration of justice are also violations of the law (e.g. fraud or false statements, withholding information sought by enforcement authorities, suborning perjury, etc.). Surely, at the end of the day, the administration of justice is served when lawyers represent the interests of their clients in a lawful way – a task no less important to inside lawyers than outside lawyers and no more or less likely to be fulfilled by those in firms than those in companies. Certainly, the ECJ produces no

facts or studies or other evidence to the contrary—just saying it over and over in conclusory fashion does not make it so.

Indeed, the ECJ decision could be Exhibit A in a law school course on formalism v. realism – as a poorly reasoned and poorly supported judicial opinion on a matter of significant import and complexity. This is not to say that the attorney-client privilege for inside lawyer communications does not have issues of application in jurisdictions where it is recognized. For example, courts in the United States have had to take evidence on whether the corporate lawyer is acting as a lawyer or as a business person (and, when I was general counsel, we wanted lawyers to give both business and legal advice but to make clear which role they were playing in order to protect the privilege). Also, some companies have sought to secure the privilege for a range of communications just by putting lawyers names on documents and courts have been developing rules to allow the privilege only when the primary purpose of the communication was to seek or give legal advice. But, of course, given its blinkered view of the issues, the ECJ did not get into these nuances of inside lawyering and the evidentiary privilege which U.S. courts have capably addressed.

Although the intervenor nations and legal associations had hoped that the European Court of Justice would understand the realities of modern practice and would sanction the use of the attorney-client privilege for inside lawyers, the ECJ decision in *Akzo Nobel* will simply mean that companies facing EU competition law inquiries will continue to follow current practices. These include: using outside counsel in conjunction with inside counsel when conducting internal competition law inquiries or advice-giving (so that inside lawyer as well as corporate manager statements are privileged); doing this outside the EU in matters that may be pursued inside the EU; providing robust education and training for inside lawyers and managers on the need to use outside lawyers in settings that could implicate competition laws; taking care in the creation of internal documents; and making sure that inside lawyers separate privileged documents relating to their work with outside counsel from non-privileged documents so as to minimize disputes with enforcement authorities.

Finally, what should those concerned about establishing the privilege for inside lawyers do in the future? They should espouse the conception of strong, knowledgeable and capable inside lawyers to help companies achieve the fundamental goal of fusing high performance with high integrity (even today many inside lawyers in Europe report to the CFO, not the CEO, and provide ministerial services rather than complex lawyering,

counseling and leadership). They should seek to change national bar rules which do not allow inside lawyers to be member of associations—or privilege inside lawyers advise—so that there is a greater consensus in the 27 European Community nations. They could begin discussions in the European Parliament or Council of Ministers about the powerful compliance rationale for according communications with inside lawyers the attorney-client privilege, in the hope of putting pressure on the Commission, and DG Comp, to change the rule administratively (a long-term, and long-shot, project to say the least).

If the European Court of Justice's empty opinion stimulates those activities, then it can have some salutary effect, rather than just being a rigid and wrong-headed decision which undercuts its own interest in competition law compliance.

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