

LEGAL UPDATES

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In-House Counsel Lose Protection of the Attorney-Client Privilege When Talking to Personnel in Europe

In a move likely to stun most general counsel trained in the American tradition of the attorney-client privilege, the European Court of Justice has upheld a lower court ruling rejecting the application of the attorney-client privilege to communications between in-house lawyers of Dutch chemicals Group Akzo Nobel and its employees in Manchester, England. The court held on September 14, 2010 that because in-house counsel were not “fully independent” of the client, as a result of their employment, their communications were not entitled to be protected from disclosure.

The case arose out of an anti-trust investigation by the European Commission and the UK’s Office of Fair Trading into the competitive practices of Akzo. During a raid, law enforcement officials seized a number of documents including confidential communications between in-house lawyers and employees in which the lawyers gave legal advice about competition law.

The court ruled that in Europe, the attorney-client privilege does not apply to “exchanges within a company or a group with in-house lawyers” if those lawyers are employed by the company. American general counsel should recognize that their confidential communications within their multi-national corporations—including those involving legal advice—may not be protected from disclosure to European authorities. Only communications from outside counsel, who are entirely independent of the client, remain protected by the attorney-client privilege in Europe.

Even in the United States many in-house lawyers overestimate the reach of the attorney-client privilege. Generally the privilege only applies to confidential communications between a lawyer and a client in which legal advice is offered or sought. American courts are skeptical about the role in-house lawyers play

and frequently conclude that general counsel often wear a “business hat,” rather than a “lawyer’s hat.” When this conclusion is reached, American courts refuse to apply the privilege, just as the European Court of Justice did.

For a copy of the Opinion, [click here](#).

What This Means To You

General Counsel with corporate operations in Europe should be vigilant about communications involving employees, officers, or directors in Europe. Those communications will not be protected by the attorney client privilege unless they are made by outside counsel engaged by the corporation. All sensitive investigations should be conducted by outside counsel to ensure they remain protected by the privilege.

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