

Five years after landmark E.U. case, ACC renews European advocacy efforts

By Mary Blatch, Director of Government and Regulatory Affairs

Here's a legal anniversary that seems to have been all but forgotten: Last fall marked five years since the European Court of Justice's decision in *Akzo Nobel Chemicals Limited and Ackros Chemicals Limited v. European Commission*. If you're not familiar with that case, the court held that in-house counsel in the European Union could not assert privilege over their legal advice to company employees in the context of a competition proceeding before the European Commission. While the decision was not a surprise (it confirmed case law from 1982), it was a disappointment to the in-house legal community, which had hoped that changes in the in-house profession might cause the court to take a different view.

While the five-year anniversary of the *Akzo* case has not received much attention in the wider legal industry, at ACC, we remembered the pivotal case by retaining a Brussels-based public affairs consultant to help ACC move the needle on the important issues of in-house counsel role and status and attorney-client privilege in Europe.

Advocacy on attorney-client privilege

The ACC has been heavily focused on advocacy supporting the attorney-client privilege in the corporate context since its inception. In the United States, in-house counsel enjoy the same rights and privileges as their law firm counterparts, but often face a steeper challenge to maintaining privilege over their communication of legal advice than do outside counsel. ACC has intervened in countless cases to protect the ability of in-house counsel to assert attorney-client privilege.

In Europe, where the attorney-client privilege is often called the legal professional privilege (LPP), ACC has been active on the issue since the early 2000s, when European Commissioner Mario Monti began a campaign of aggressive dawn raids in competition investigations that did not

respect LPP for in-house counsel communications of legal advice. Even leaving aside the in-house counsel issue, the contours of the LPP vary widely in Europe, but ACC has consistently advocated that whatever level of protection is afforded communications with outside counsel should also be afforded communications for legal advice with in-house counsel.

When *Akzo Nobel Chemicals Limited and Ackros Chemicals Limited v. European Commission* raised the in-house privilege issue before the European Court of Justice, ACC and ACC Europe intervened in the case in support of the company's assertion of privilege. When the ECJ issued its opinion in September 2010, confirming its position that in-house counsel legal advice was not privileged (even though the in-house counsel in *Akzo* was licensed), many were worried that the ECJ's decision would lead to a gradual erosion of the LPP that would extend beyond European Commission competition proceedings.

Developments since *Akzo* encouraging?

In contrast to post-*Akzo* fear, what has happened in the five years since the *Akzo* decision could be considered encouraging, especially with respect to developments at the national level within Europe:

- In Netherlands, where in-house counsel may assert privilege if they are members of the bar, the Supreme Court of the Netherlands issued a ruling in 2013 refusing to follow the *Akzo* rule and allowing for the assertion of privilege by properly licensed in-house counsel.
- In Belgium, where there is a separate bar that in-house counsel may join and gain the right to assert privilege, the highest court rejected the Belgian Competition Authority's attempt to rely on the *Akzo* decision to discover in-house counsel communications.

- In Germany, where a 2014 decision by the Federal Social Court (pension court) had called into question the ability of in-house counsel to join the German bar associations, legislation was passed in December 2015 confirming the ability of in-house counsel to join the bar and assert LPP under certain circumstances.
- In Switzerland, there are continued attempts to introduce a legislative proposal to extend LPP to Swiss in-house counsel. Although the latest initiative was voted down in March, the committee examining the proposal recognized the need to address the issue.

These developments overall are positive, but the majority of in-house counsel in Europe are still without the ability to become licensed by a bar association or to assert LPP over their legal advice to their employer-client. Moreover, in-house counsel who are licensed and may assert LPP in their countries are still unable to do so in E.U. competition proceedings. Over the next several years, ACC will be working to raise the profile of this issue in Europe and hopefully move the needle so that more jurisdictions, and ultimately the European Union recognize in-house counsel on equal terms to outside attorneys.

ACC's public affairs consultant has been meeting with representatives of European bar associations as well as European business associations to introduce them to ACC and the importance of LPP in the business world. ACC is highlighting the advantages that LPP offers in terms of encouraging robust corporate compliance, as well as the disadvantages that European companies suffer from lack of in-house privilege when they are litigating against companies that can assert privilege over in-house legal advice. We see the LPP as a key issue, not only to our European members, but to any member whose practice involves the European Union.

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Foreign privilege – U.S. problem

U.S. attorneys are sometimes surprised to learn of the unequal status many of their European counterparts are subject to under E.U. and national European laws. They may be even more surprised if they learn of this unequal status in the midst of an international dispute where their European in-house colleagues have provided written advice that is now subject to discovery in U.S. courts.

Such disclosure of legal advice from foreign in-house counsel is not just a theoretical possibility. For example, in *Anwar v. Fairfield Greenwich Ltd*, No. 09 Civ. 118 (S.D.N.Y. July 8, 2013), plaintiffs deposed defendant's Dutch in-house lawyer, and defendant's counsel instructed the Dutch lawyer not to answer certain questions on the basis of attorney-client privilege. On a motion to compel the answers, the court held that because the Dutch lawyer was not licensed in the Netherlands, he was not entitled to assert attorney-client privilege. In the case of *Veleron Holding, B.V. v. BNP Paribas SA*, 2014 WL 4184806 (S.D.N.Y. Aug. 22, 2014), defendant Morgan Stanley was able to compel disclosure of plaintiff's communications with in-house counsel in the Netherlands and Russia, because neither lawyer was licensed or able to assert a privilege in their home jurisdictions.

The privilege laws of other countries can have quite an impact on the legal interests of U.S. companies and their in-house counsel, especially when it comes to litigation involving foreign subsidiaries. This is because when dealing with issues of attorney-client privilege and foreign attorneys, U.S. courts will follow a foreign country's privilege rules if the communication at issue "touches base" with that country – i.e., the foreign country has the most direct and compelling interest in determining whether the communication is privileged. This analysis often results in foreign privilege rules applying to communications advising on foreign legal issues. When the foreign jurisdiction's rules for in-house counsel differ from the U.S. rules, disclosure often is the result.

Towards uniformity

One of the reasons cited by the *Akzo* decision for not recognizing LPP for in-house counsel was that lack of privilege for in-house counsel was the dominant national practice among E.U. member states. Thus, the lack of in-house LPP at the E.U. level is connected to the lack of in-house LPP at the national level in Europe. ACC is pursuing a strategy to raise the profile of the LPP issue at the E.U. level while also supporting national-level efforts to improve the status of in-house counsel



and extend LPP to them. This will be a long-term advocacy and education effort, but one of utmost importance to the in-house profession globally.

As legal systems in developing economies continue to evolve, the issue of in-house counsel privilege may begin to be reconsidered outside of Europe as well. If there is a preference among more developed economies for allowing in-house counsel to assert LPP, that may lead to more jurisdictions choosing to follow the practice as well. The more jurisdictions that recognize the value of in-house counsel legal advice and protect it accordingly, the better for the in-house legal profession worldwide.

If you have a story about how international legal privilege rules have affected your practice or your company, we'd love to hear from you. Please contact Mary Blatch, ACC's director of government and regulatory affairs at m.blatch@acc.com.

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