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REPORT

Managing Cross Border Privilege Issues

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Nearly three decades ago, the U.S. Supreme Court acknowledged a critical question involving legal advice rendered to a business organization:

> An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.

Upjohn Co. v. United States, 449 U.S. 383, 393 (1981).

In today's increasingly global world of antitrust counseling and competition law enforcement in which privilege rules differ from country to country, this admonition seems especially apt. Competition law issues do not necessarily end at the border, but rather are likely to affect a multinational company's operations in multiple jurisdictions. This is true not only for international cartel investigations—which routinely involve contemporaneous and coordinated investigations by more than one enforcement agency—but also a host of other competition law issues such as alleged abuses of dominance. The prevalence of electronic discovery also complicates cross-border privilege issues by making the physical location of the document almost meaningless.

Differences in substantive antitrust law between, for example, the United States and the European Union obviously complicate firms' antitrust compliance efforts. But in an era of increasing convergence on many competition policy issues, the variety and diversity of privilege regimes around the world is all the more striking, and adds a layer of complexity to companies' efforts to manage global competition policy. And, despite well-publicized efforts to coordinate enforcement in key jurisdictions, there appears to be little or no multinational effort to harmonize the approach that courts and enforcement agencies take toward the attorney-client privilege.[1]

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[1] Various authors have identified this problem and proposed frameworks for resolving inconsistent privilege laws across jurisdictions. *See, e.g.*, Lawton P. Cummings, *Globalization and the Evisceration of the Corporate Attorney-Client*

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Two important elements of any privilege law regime are whether the communications of in-house counsel are protected by the attorney-client privilege and the extent to which courts and enforcement agencies will recognize the privilege for communications with foreign lawyers. This article discusses how courts in the United States and the European Union analyze these and related issues and offers tips for managing cross-border privilege issues in the absence of a consistent international approach.

A. International Privilege Issues in the United States

The contours of the attorney-client privilege and work product doctrine in the United States are well known. Like most common law countries, the United States has expansive privilege and work product protections. Although there are some differences across the states and federal common law, U.S. law generally recognizes an attorney-client privilege for all communications relating to legal advice sought from or provided by a lawyer. U.S. law does not distinguish between communications with in-house or outside counsel, although the communications of an in-house lawyer acting in a non-legal capacity would not be protected. The work product doctrine protects from disclosure an even broader class of documents prepared in anticipation of litigation, including documents prepared by non-attorneys to assist the litigation effort. However, the United States also has far reaching discovery obligations in civil litigation. U.S. disclosure rules, particularly in private civil litigation, arguably necessitate strong attorney-client privilege and work product protections.

Whose Privilege Law Applies?

When considering privilege issues involving communications with non-U.S. lawyers, U.S. courts tend to apply traditional choice of law rules to determine whether the privilege question should be answered under U.S. law or the law of another jurisdiction. If foreign privilege law applies, the proponent of the privilege bears the burden of proving the law supporting its claim. The issue arises frequently in patent litigation in addressing whether a foreign patent agent's communications are privileged.[2] In that and other contexts courts typically apply a ''touching base'' or ''contacts'' analysis to decide which jurisdiction's privilege laws should apply:

> If . . . a communication has nothing to do with the United States or, in the court's view, only an incidental connection to this country, the privilege issue will be determined by the law of the foreign nation. If, however, the communication has more than an incidental connection to the United States, the court will undertake a more traditional analysis and defer to the law of privilege of the nation having the most direct and compelling interest in the communication or, at least, that part of the communication which mentions the United States. Such interest will be determined after considering the parties to and the substance of the communication, the place where the relationship was centered at the time of the communication, the needs of the international system, and whether the application of foreign privilege law would be ''clearly inconsistent with important policies embedded in federal law.''

VLT Corp. v. Unitrode Corp., 194 F.R.D. 8, 16 (D. Mass. 2000) (citation omitted).[3]

Treatment of Communications with Foreign Lawyers

If U.S. law applies, the communications of outside counsel admitted to practice in their home country will be treated as privileged by U.S. courts. U.S. courts also will recognize a privilege for in-house counsel functioning in a legal capacity even where local law might not recognize the privilege. For example, in *Renfield Corp. v. E. Remy Martin & Co.*, 98 F.R.D. 442 (D. Del. 1982), the court determined that the discovery of documents involving communications with in-house French counsel located in Remy Martin's offices in France was subject to the Hague Convention, under which a privilege would apply if it were recognized either by French or U.S. law. The court assumed that a privilege would not apply under French law because in-house counsel are not members of the bar in France. Nonetheless, the court upheld the privilege under U.S. law because the test is ''a functional one of whether the individual is competent to render legal advice and is permitted by law to do so.'' *Id.* at 444. Applying this functional test, the court concluded that French in-house counsel are entitled to the privilege under U.S. law because, ''like their American counterparts, they have legal training and are employed to give legal advice to corporate officials on matters of legal significance to the corporation.'' *Id.*[4]

U.S. courts may stretch to find a privilege where U.S. law would recognize one even though the applicable foreign privilege law would not. In *Astra Aktiebolag v. Andrx Pharmaceuticals, Inc.*, 208 F.R.D. 92 (S.D.N.Y. 2002), the court found that Korean law governed the privilege claims for a group of documents involving communications with Astra's *outside* counsel in Korea and that Korea, a civil law country, did not recognize an attorney-client privilege or work product protection. On the other hand, the court also found that under Korean law an adverse party would not be able to compel the production or inspection of any of the documents at issue. Balancing these issues, the court concluded that ''the absence of Korean attorney-client privilege and

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Privilege: A Re-Examination of the Privilege and a Proposal for Harmonization, 76 TENN. L. REV. 1 (Fall 2008); James McComish, *Foreign Legal Professional Privilege: A New Problem for Australian Private International Law*, 28 SYDNEY L. REV. 297 (2006).

[2] In that context, U.S. privilege protections may be narrower than in some other jurisdictions, as U.S. courts generally do not recognize a privilege for non-attorney patent agents. *See, e.g.*, *In re Rivastigmine Patent Litigation*, 237 F.R.D. 69, 102 (S.D.N.Y. 2006) (declining to extend privilege to communications between client and patent agent).

[3] *See also In re Avantel, S.A.*, 343 F.3d 311, 321-22 (5th Cir. 2003) (suggesting Mexican privilege law would have applied, but proponent of privilege failed to carry burden of proving the nature and extent of the privilege under Mexican law); *In re Rivastigmine Patent Litigation*, 237 F.R.D. at 74; *Tulip Computers Int'l B.V. v. Dell Computer Corp.*, 210 F.R.D. 100, 104 (D. Del. 2002).

[4] *Cf. Honeywell, Inc. v. Minolta Camera Co.*, 1990 WL 66182, at *3 (D.N.J. May 15, 1990) (denying privilege where employee was not functional equivalent of lawyer; employee was not licensed in Japan or any other country either as a lawyer or patent agent and did not have a law degree).

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work product provisions [does not] require[] this court to order the wholesale production of all of the Korean documents in their entirety.'' *Id.* at 102. Rather, ''to apply Korean privilege law, or the lack thereof, in a vacuum—without taking account of the very limited discovery provided in Korean civil cases—would offend the very principles of comity that choice-of-law rules were intended to protect.'' *Id.* The court ultimately held that this tension between Korean privilege and discovery law argued in favor of applying U.S. privilege law to the Korean documents (and upholding the privilege). *Id.*

But U.S. courts do not always come down in favor of the privilege when applying the law of another jurisdiction. In *In re Rivastigmine Patent Litigation*, one issue was whether the production of documents concerning communications with Novartis' Swiss in-house counsel could be compelled. Novartis agreed that Swiss law applied and did not extend the privilege to communications involving in-house counsel, but it pointed out that in-house counsel were bound by a secrecy obligation. 237 F.R.D. at 77. It also argued that ''mandatory disclosure of documents is quite limited in civil litigation in Switzerland, and that a Swiss court would not order production of the documents demanded in this litigation.'' *Id.* at 78. Although the court agreed that it should not analyze the privilege issue ''in a vacuum,'' it rejected any claim of privilege because the problem for Novartis was not ''the lack of comparability of the Swiss and U.S. legal systems, but [] the fact that Swiss law specifically excludes the documents at issue from the privilege it recognizes.'' *Id.* The court therefore ordered the production of all documents governed by Swiss law where the legal professional involved was an employee of the client.

Can the U.S. Privilege Be Waived by Disclosure in Another Jurisdiction?

Another issue of relevance to cross-border privilege issues is the extent to which production of a document in another jurisdiction can waive privilege in the United States with respect to that document or even all documents concerning the same topic. Although U.S. privilege and work product protections are expansive, U.S. courts are also perhaps more likely to find that a privilege has been waived. Under U.S. law, voluntary disclosure of privileged material is generally deemed to waive the privilege as to all communications concerning the same subject matter. Where disclosure was compelled, or where there was no opportunity to assert the privilege, however, a court should not find that the privilege was waived.

This raises the concern that the production of documents in a jurisdiction where the privilege is not recognized could waive the privilege in the United States. The analysis is likely to turn on whether the court deems the production outside the United States to have been voluntary or compelled.[5] In *In re Vitamin Antitrust Litigation*, 2002 U.S. Dist. LEXIS 26490 (D.D.C. Jan. 23, 2002), the court addressed whether the U.S. plaintiffs were entitled to work product that the defendants had provided to government agencies investigating a potential cartel in the market for vitamins outside the United States.[6] The defendants argued that any response to a government authority's request for information should be treated as compelled if a failure to comply would have serious consequences for the company, including with respect to a claim of leniency. The plaintiffs argued that the privilege was waived unless the disclosure was made in response to a court order or other extraordinary circumstances and the defendants had asserted an applicable privilege. The court concluded that ''compulsion avoiding waiver requires that a disclosure be made in response to a court order or subpoena or the demand of a governmental authority backed by sanctions for noncompliance, and that any applicable privilege must be asserted.'' *Id.* at *105. The court emphasized that ''this Circuit distinguishes actions motivated by self-interest from those that are effectively involuntary.'' *Id.* Applying this standard, the court concluded that defendants' submissions to agencies in Switzerland, Brazil, Japan, New Zealand, and the European Union were not compelled and therefore did not enjoy work product protection. As to the EU submissions, the court stated that (1) they were provided without a court order; (2) the defendants did not offer any proof that the failure to provide the information would have subjected them to penalties or sanctions; and (3) the defendants did not state whether they had objected to providing the information. *Id.* at *116. Conversely, the court held that Rhone-Poulenc had not waived work product protection for documents provided to the Federal Competition Commission of Mexico in response to specific requests based on citations to Mexican law and backed by a threat of a fine if the obligations were not fulfilled. *Id.* at *113.[7]

The *Vitamin* case does not expressly address the question of whether there could be a waiver when a firm provides the European Commission copies of documents expressly sought by the Commission pursuant to its investigative authority under Regulation 1/2003 and that are not privileged under EU law (e.g.,

[5] In a somewhat analogous context, most U.S. courts have rejected the notion of a selective waiver for the voluntary production of privileged materials to a government agency such as the SEC. *See In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2d Cir. 1993). *But see Diversified Indus., Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977) (recognizing selective waiver for disclosures to SEC).

[6] Although the case concerned work product (substantive submissions to foreign government agencies), the court stated that the same waiver analysis would apply to documents that otherwise would be protected by the attorney-client privilege. 2002 U.S. Dist. LEXIS 26490, at *96 n.50.

[7] Similarly, in *Reinfeld v. Riklis*, 1991 WL 41659, at *1 (S.D.N.Y. March 2, 1991), the court found that Guinness had waived the attorney-client privilege as to documents in its possession ''voluntarily'' produced to English authorities. Although the factual context is not clear from the opinion, given the similarities between U.S. and English privilege protections, it is unlikely that these were documents that were not privileged under English law but otherwise would have been privileged under U.S. law. Moreover, the court upheld work product protection for other documents that had been given to the English authorities because, unlike the attorney-client privilege, work product protection ''is not waived by disclosure to third parties 'unless such disclosure, under the circumstances, is inconsistent with the maintenance of secrecy from the disclosing party's adversary'.'' *Id.* (citation omitted). Guinness apparently had provided the documents to the English authorities on the condition that the privilege would be maintained and they would be used only to assist the investigation. *See Information Resources, Inc. v. Dun & Bradstreet Corp.*, 999 F.Supp. 591, 592 & n.1 (S.D.N.Y. 1998).

in-house counsel communications). Assuming that the company appropriately objected to the disclosure, and there was no suggestion of self-interest on the part of the company in providing the documents, finding a waiver in those circumstances would seem very harsh.[8]

B. Privilege Issues in the European Union

The European Union has developed its own privilege law for use in competition law enforcement proceedings by the European Commission.[9] Because there was no single approach to attorney-client privilege in the member states, the European Union needed to develop new law if it wished to apply consistent privilege rules. EU members include common law countries such as the United Kingdom and Ireland, whose privilege regimes resemble that of the United States. Common law jurisdictions typically define the attorney-client privilege expansively and do not distinguish between in-house and outside counsel for purposes of the privilege. They also have work product protection or a litigation privilege, but, on the other hand, allow broad discovery in civil litigation. Conversely, civil law jurisdictions on the Continent may lack a clearly defined attorney-client privilege. They typically have relied on stringent professional obligations of secrecy for lawyers to protect client communications. Secrecy rules arguably were sufficient since these same jurisdictions usually permitted little or no discovery in civil litigation. Because in-house lawyers were not always members of the local bar in civil law jurisdictions, and in some cases were not permitted to be members of a bar, the same duties of professional secrecy did not necessarily apply to in-house lawyers.[10]

Against this backdrop, the European Court of Justice (ECJ) first defined the scope of EU privilege in the *AM & S* decision in 1982, which is discussed below. Since that time, companies' operations as well as antitrust enforcement have become increasingly global, arguably calling into question some of the privilege rules set forth in *AM & S*. The ECJ will have an opportunity to revisit these issues in its decision in the pending *Akzo* matter, which is also discussed below.

AM & S

In *Australian Mining and Smelting Europe Ltd v. Commission*, Case 155/79 [1982] ECR 1575 (''*AM & S*''), the ECJ held that communications are privileged if (1) they were made for the purpose of exercising the client's ''rights of defense'' and (2) they involved an ''independent lawyer,'' i.e., not an in-house counsel. As to the first condition, the court explained that ''the protection of the confidentiality of written communications between lawyer and client is an essential corollary'' to the right of defense. *Id.* ¶ 23. And, an effective right of defense requires protection for ''all written communications exchanged after the initiation of the administrative procedure'' by the Commission and it ''must also be possible to extend [the privilege] to earlier written communications which have a relationship to the subject matter of that procedure.'' *Id.*

Regarding the second condition, the court believed that in-house counsel are not sufficiently ''independent'' from their employer such that a privilege should attach to their communications. The ''independence'' requirement was based on ''a conception of the lawyer's role as collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interests of that cause, such legal assistance as the client needs.'' *Id.* ¶ 24. ''The counterpart of that protection lies in the rules of professional ethics and discipline'' applying to independent lawyers. *Id.* According to the court, the independence requirement ''reflects the legal traditions common to the member states.'' *Id.*

The court further explained that the privilege would apply ''without distinction to any lawyer entitled to practice his profession in one of the member states, regardless of the member state in which the client lives.'' *Id.* ¶ 25. Although the question of how the EU privilege would apply to communications with non-EU lawyers was not specifically at issue in *AM & S*, the ECJ added that ''[s]uch protection may not be extended beyond those limits.'' *Id.* ¶ 26. In other words, communications with outside counsel not licensed to practice in the EU are not protected. This remains the Commission's official position whether or not the Commission applies it in practice in every situation. EU courts have not addressed the comity issues that this raises.

Akzo

The ECJ will revisit the scope of the legal professional privilege in the *Akzo* matter currently pending before the court. *Akzo* raised both procedural and substantive privilege issues arising out of the Commission's 2003 dawn raid at Akzo Nobel Chemicals Ltd's and Akcros Chemical Ltd's (individually and collectively, Akzo) facilities near Manchester, U.K. as part of an investigation of an alleged cartel in the tin stabilizer industry.[11] Counsel present at the raid asserted a privilege as to five documents:

- Set A: Two copies of an internal memorandum created by business people at Akzo for purposes of obtaining legal advice from outside counsel

[8] For a discussion of whether the Commission's investigative powers are compulsory, *see* Eric Gippini-Fournier, *Legal Professional Privilege in Competition Proceedings Before the European Commission: Beyond the Cursory Glance*, 28 FORDHAM INT'L L. J. 967, 1031-35 (Apr. 2005); Julian Joshua, *It's a Privilege*, COMPETITION LAW INSIGHT 14, 16 (Dec. 11, 2007).

[9] EU privilege law applies *only* to enforcement actions initiated by the European Commission, e.g., in the context of dawn raids under Articles 20 and 21 of Regulation 1/2003 and information requests from the Commission pursuant to Article 18. National privilege rules apply in actions in the national courts of EU member states or in enforcement actions initiated by national competition law authorities.

[10] In France, for example, in-house counsel (*juristes d'entreprise*) are clearly distinguished from outside counsel (*avocats*) and may not be members of the bar. Outside counsel are subject to an obligation of absolute professional secrecy, a breach of which can be a criminal offense. The attorney-client privilege attaches to communications between outside counsel and their clients. Outside counsel can refuse to provide information about communications with their clients in the course of a government investigation. In-house counsel are also required to respect professional secrecy, and an obligation of secrecy applies to any legal opinions they provide to their employer. However, the attorney-client privilege is not extended to communications between in-house counsel and employees, officers, or directors of their employer.

[11] As a result of the underlying investigation, which is now closed, the EU imposed fines totaling €174 million on 24 plastic additives producers including Akcros and several other companies in the Akzo Nobel group. *See Akzo Nobel Chem. Ltd v. Comm'n*, Case C-550/07 P, Opinion of Advocate General Kokott ¶ 30 (Apr. 29, 2010) (''Kokott Opinion'').

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concerning Akzo's competition compliance program.

- Set B: Handwritten notes made by Akzo's general manager in the U.K. during meetings with Akzo employees for purposes of preparing the document in Set A; and two emails between Akzo's general manager and its in-house counsel for competition law, ''Mr. S.,'' who was enrolled as an Advocaat of the Netherlands Bar.

The Commission representatives on site at the raid immediately determined that the documents in Set B were not privileged, and took copies of those documents along with the rest of the non-privileged documents. As to Set A, the Commission representatives on site were unable after a cursory review to determine whether the documents were privileged. Over Akzo's objections,[12] they took copies of the Set A documents and placed them in a sealed envelope. The Commission later determined that those documents also were not privileged. Akzo appealed to the Court of First Instance (CFI, now known as the ''General Court'').

The CFI first addressed whether the Commission had followed the proper procedure when a company asserts privilege in a dawn raid. It held that once the company explains the basis for a privilege claim, the Commission may not engage in even a cursory review of the document before making a formal decision on the asserted privilege. *Akzo*, [2007] ECR II 3523 ¶ 82 (A company ''is entitled to refuse to allow the Commission officials to take even a cursory look at one or more specific documents which it claims to be covered by [the privilege], provided that the undertaking considers that such a cursory look is impossible without revealing the content of those documents and that it gives the Commission officials appropriate reasons for its view.''). The Commission must not read the documents until it has adopted a decision allowing the company to appeal the privilege decision including seeking interim relief from the General Court. *Id.* ¶ 85. In the case of *Akzo*, all five of the documents should have been placed in a sealed envelope prior to any review by the Commission.

On the question of whether the documents were privileged, the CFI's decision addressed two key issues. First, the court concluded that preparatory documents for seeking legal advice, even if not shared with a lawyer, may be privileged ''provided that they were drawn up *exclusively* for the purpose of seeking advice from a lawyer in exercise of the rights of the defence.'' *Id.* ¶ 123 (emphasis added). The fact that a document is shared with counsel is insufficient. The court found that Akzo could not meet that standard because the memorandum at issue was not written solely for the purpose of seeking legal advice. In particular, the court noted that it was not addressed to outside counsel and it was apparent from the text of the document itself that it was prepared at the request of the general manager, not a lawyer. *Id.* ¶ 129. As an exception to the Commission's investigatory powers, the court cautioned that the rule allowing certain preparatory documents to be protected from disclosure should be construed narrowly. *Id.* ¶ 124.

Second, the court held that the emails between the general manager and ''Mr. S.,'' Akzo's in-house competition counsel, were not protected from seizure under *AM & S even though they were privileged under Dutch law*. *Id.* ¶¶ 169, 176. The court acknowledged that some member states allowed for broader privilege protection than was the case when *AM & S* was decided, but said that allowing the privilege to attach to in-house counsel communications was not the dominant view. The court disagreed that not extending the privilege to communications with in-house counsel would impede competition law compliance, stating that ''such exercises of self-assessment and strategy definition may be conducted by an outside lawyer in full co-operation with the relevant departments of the undertaking, including its internal legal department.'' *Id.* ¶ 173.

Akzo's pending appeal to the ECJ addresses only whether the two emails exchanged between Mr. S. and Akzo's general manager are covered by the privilege. The court allowed the Netherlands, Ireland and the United Kingdom, as well as various attorney groups, to intervene in the appeal in support of Akzo. On April 29, 2010, Advocate General Kokott issued her opinion following oral argument to the court on February 9, 2010.[13] She strongly rejected the argument that in-house counsel who are members of a local bar should be entitled to the privilege, asserting that what matters is not the ethical obligation imposed by membership in a bar, but the employment relationship ''characterised by complete economic dependence on his employer.'' Kokott Opinion ¶ 69. ''The fact that they are significantly less independent makes it more difficult for enrolled in-house lawyers to deal effectively with a conflict of interests between their professional obligations and the aims and wishes of their undertaking.'' *Id.* ¶ 82. Finding no trend among member states to extend the privilege to communications with admitted in-house lawyers, she took the view that ''the legal position in the now 27 Member States of the European Union, even some 28 years after *AM & S*, has not developed in such a way as would require—today or in the foreseeable future—the case-law at European Union level to be changed so as to recognise enrolled in-house lawyers as benefiting from legal professional privilege.'' *Id.* ¶ 104. She was not especially troubled by the anomaly that the same document could be privileged under national law but not under EU law, noting that harmonization of the various privilege rules simply does not exist. *Id.* ¶ 134. Finally, addressing an argument raised by an intervenor, the American Corporate Counsel Association—European Chapter, she flatly rejected the argument that EU law must extend the privilege to communications with in-house lawyers who are members of a bar in a third country. ''Even if—contrary to the solution which I have proposed—legal professional privilege were to be extended to internal company or group communications with in-house lawyers who are members of a Bar or Law Society within the European Economic Area, *the inclusion, in addition, of lawyers from third countries*

[12] The Court of First Instance stated that the ''Commission informed the applicants that any further delay in the handing over and examination of the documents would amount to obstruction of the investigation and could constitute a criminal offence under § 65 of the United Kingdom Competition Act 1998, which is punishable by a term of imprisonment and a fine. It was only under strong protest that the applicants handed the Set B documents to the Commission for examination.'' *Akzo Nobel Chem. Ltd v. Comm'n*, Joined Cases T-125/03 and T-253-03, [2007] ECR II 3523 ¶ 63.

[13] The ECJ is not obligated to follow AG Kokott's guidance, although it may inform the court's decision.

would not under any circumstances be justified.'' *Id.* ¶ 189 (emphasis added). There would be ''no adequate basis for the mutual recognition of legal qualifications and professional ethical obligations to which lawyers are subject in the exercise of their profession.'' *Id.* ¶ 190.

The ECJ's decision is expected later this year.

C. Finding a Way Through the International Privilege Tangle

Multinational companies would benefit from greater clarity in how privilege laws will be applied in cross-border contexts.

In particular, the EU courts and the Commission should reflect international comity principles in their decisions and enforcement practices when it comes to issues such as, for example, whether communications with outside counsel from non-EU countries will be treated as privileged and whether and when the EU will apply foreign privilege law in assessing whether communications with non-EU in-house lawyers are privileged.

But differences in privilege rules are not by any means limited to the United States and the European Union. Every important jurisdiction has its own privilege rules and laws, which often reflect differences in how the legal profession is regulated and administered as well as the fundamental distinction between common law and civil law regimes. In China, for example, the law provides that attorneys shall protect the confidential information of their clients, but is silent on the attorney-client privilege. Although the number of different privilege regimes around the world can seem overwhelming, there are some basic strategies for minimizing the possibility that privileged communications will be disclosed outside the United States or that the privilege will be waived in the United States because of disclosure elsewhere.

First, when seeking advice on important antitrust and competition issues, firms should assess which jurisdictions are most relevant to their business and the practices at issue and familiarize themselves with the privilege laws of those jurisdictions. The most relevant privilege laws should inform, at least in part, the selection of lawyer from whom advice will be sought. For example, if a particular issue is directly connected to a civil law jurisdiction that does not recognize the privilege for in-house counsel, sensitive legal advice should be sought from outside counsel both to preserve the privilege in the other jurisdiction and to increase the likelihood that a U.S. court would uphold the privilege if it applies the privilege law of the other country. Of course, in selecting counsel, privilege considerations ultimately may be less important than specialized expertise or in-depth understanding of the company's business. Nonetheless, consideration of the privilege issues upfront could help ensure that the privilege is maintained later.

Second, for multinational firms, advice regarding particularly sensitive competition law issues should be sought from outside counsel. If the competition issues relate in significant part to business practices in Europe, the company should engage outside counsel admitted to practice in an EU member state. Although it is possible the ECJ will clarify in *Akzo* that outside counsel in other jurisdictions will be given equal treatment, that does not seem likely. Until there is clarity on this issue, using non-EU counsel to advise on EU issues involves a degree of risk. If outside counsel from multiple countries are involved, outside counsel from the EU should coordinate the representation and handle all direct client communications where feasible.

Third, to the extent U.S. counsel (outside or in-house) are advising a client regarding issues in Europe, their communications should be disseminated to a minimum number of employees within Europe to minimize the risk of disclosure in the event of an investigation in Europe. If practical, it may be prudent to limit the communications of non-EU counsel to in-house counsel in Europe (i.e., not allow them to communicate directly with business people in Europe). The Commission does not necessarily go out of its way to seek documents relating to legal advice, and it is more likely to come across potentially privileged documents if they are in the files of key business people rather than solely in the files of in-house counsel.

Fourth, internal company analyses for purposes of seeking competition law advice should be addressed directly to counsel (outside counsel preferably, especially in Europe) and should not be widely disseminated. It may be easier to establish that the document was created exclusively for the purpose of seeking legal advice, and therefore privileged under EU law, if it was not sent to a large number of business people. Even in the United States, following such procedures (although addressing the communication to in-house counsel would be sufficient) will help avoid privilege disputes. In general, legal communications should not be provided to anyone who does not need them. Wide dissemination suggests that confidence was not carefully maintained, that the document may have had a dual legal-business purpose, and could support an argument that the privilege was waived if it existed at all.

Fifth, legal communications should be segregated and marked appropriately. In-house counsel should maintain separate files for legal communications. The mingling of business and legal advice documents may undermine any claim of privilege. Business people, too, should keep communications from counsel in a separate location.

Sixth, the privilege should be asserted as early and frequently as possible in any investigation. Consistent with *Akzo*, parties should not permit the Commission to review documents prior to a formal privilege ruling unless there is no colorable privilege claim under EU law. Objecting to disclosure in all appropriate circumstances may be necessary to preserve the privilege in U.S. litigation and guard against claims of waiver. Furthermore, in disputes relating to assertions of privilege in U.S. litigation for documents already produced to other countries' enforcement agencies, firms should carefully document their objections to the production of the privileged communications and the penalties that they would have faced for failure to comply with the investigative demands.

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