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# AKZO AND THE DEBATE ON IN-HOUSE PRIVILEGE IN THE EUROPEAN UNION

*Clinton R. Long\**

## I. INTRODUCTION

Within the realm of rights and privileges that attorneys enjoy, attorney-client privilege is one of the most essential. Some have called this right a “time-honored sanctuary”<sup>1</sup> and “common law’s oldest privilege.”<sup>2</sup> Some say that legal privilege even dates back to the time of the Roman Empire.<sup>3</sup> Indeed, just about “every article, case, and treatise on the attorney-client privilege begins with the observation that the attorney-client privilege is the oldest evidentiary privilege recognized in Anglo-American common law.”<sup>4</sup> It is clear that attorneys take this privilege very seriously and seek its expansion while cringing at any limitations placed thereon. These advocates have had many reasons to cringe lately. Many are claiming that privilege is under attack in the United States.<sup>5</sup> The doctrine is becoming more and more restricted by the federal government as the government faces increasingly complicated crises.<sup>6</sup> Corporate scandals, terrorism, and a number of other issues challenge the U.S. government and many others abroad,<sup>7</sup> which make it understandable that any evidentiary benefit a government can gain in an investigation will be welcomed. However, when this comes at the price of limiting the attorney-client privilege, compromise can be difficult to find between the competing interests of protecting the law and maintaining privacy in the attorney-client relationship.

This debate is not specific to attorneys and the government in the United States. A recent decision by the Court of Justice of the European Union (ECJ) has enlivened a similar debate in the European Union (EU) regarding privilege in the corporate attorney setting. In its recently decided case, *Akzo Nobel Chemicals Ltd. v. Commission*, the ECJ confirmed previous case law<sup>8</sup> and affirmed the General Court’s decision in the immediate case by concluding that privilege does not exist for in-

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<sup>1</sup> Lonnie T. Brown, Jr., *Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Waiver Paradox*, 34 HOFSTRA L. REV. 897, 899 (2006).

<sup>2</sup> Stephen A. Calhoun, Note, *Globalization’s Erosion of the Attorney-Client Privilege and What U.S. Courts Can Do to Prevent It*, 87 TEX L. REV. 235, 265 (2008).

<sup>3</sup> See, e.g., Lieutenant Colonel Norman K. Thompson & Captain Joshua E. Kastenberg, *The Attorney-Client Privilege: Practical Military Applications of a Professional Core Value*, 49 A.F. L. REV. 1, 2–3 (2000) (citing Geoffrey C. Hazard, Jr., *A Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061, 1070 (1978)).

<sup>4</sup> Lance Cole, *Revoking Our Privileges: Federal Law Enforcement’s Multi-Front Assault on the Attorney-Client Privilege (and Why it is Misguided)*, 48 VILL. L. REV. 469, 474 (2003).

<sup>5</sup> See, e.g., *id.*

<sup>6</sup> See, e.g., *id.* at 471.

<sup>7</sup> See, e.g., *id.*

<sup>8</sup> Case 155/79, *AM & S Europe Ltd. v. Comm’n*, 1982 E.C.R. 1575.

house attorneys in relation to the EU and its investigations.<sup>9</sup> Not surprisingly, in-house attorneys in Europe are not pleased with this decision, which renders communications that they have with employees of their corporations completely subject to the investigations of the European Commission (Commission). Competition attorneys, which were at the center of the Commission's investigation in *Akzo*, are particularly impacted by this decision because of the frequency with which they can be subject to Commission investigations. However, this ruling affects all in-house attorneys by limiting the advice they can give and the quantity of written communication they can use without compromising the privacy of their clients' information.

The critics have reason to be upset. *Akzo* appears to be outdated; the ECJ followed case law that was decided in 1982. This case was decided before the advent of e-mail and when the proliferation of in-house counsel was not nearly as great as it is now. *Akzo* not only appears to be outdated, it favors too heavily one policy argument over another. It is understandable that the EU wants to obtain incriminating evidence, especially in competition investigations when evidence might be hard to find. However, the Court favored this far more in *Akzo* than the ability of clients and their in-house attorneys to freely discuss legal issues. This ignores the crippling effect that withholding privilege could have on in-house counsel.

In-house counsel should benefit from privilege at the EU level, as outside counsel already does. However, in order to find the proper balance of protecting the attorney-client relationship and the Commission's ability to investigate potential competition or other legal issues, the Commission should also be able to acquire documents that display evidence of illegal behavior. A decision on what should be disclosed in an investigation should be left to an independent tribunal and not to either party in the investigation. This will balance the policy interests of both sides of the debate by giving in-house attorneys privilege, but also enabling the Commission to override the privilege when a privileged communication manifests illegality.

Before elaborating upon this policy suggestion, this article first presents a brief summary of the facts and procedural posture of *Akzo*. An analysis of whether the ECJ made the proper decision in *Akzo* follows. Next, a discussion of the key public policy arguments both in favor of and against extending privilege to in-house attorneys in the EU is presented. Finally, this article argues for extending privilege to in-house attorneys while also reserving the ability of the Commission and any other EU institution to investigate potential competition law or other legal violations.

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<sup>9</sup> Case C-550/07, *Akzo Nobel Chems. Ltd. & Akros Chems. Ltd. v. Comm'n*, 2010 ECJ EUR-Lex LEXIS 807 (Sept. 14, 2010).

II. BRIEF SUMMARY OF THE FACTS AND PROCEDURAL POSTURE OF  
AKZO

In early 2003, officials from the Commission visited the office of Akzo/Akcros in the United Kingdom to investigate potential violations of EU competition laws.<sup>10</sup> During the investigation, the officials took copies of a large number of company documents.<sup>11</sup> However, a dispute arose over a few of the documents and whether privilege extended to them.<sup>12</sup> Akzo/Akcros said that the documents were privileged and thus not subject to review by the Commission, while the Commission said that they would examine the documents to determine if privilege would apply.<sup>13</sup> The officials at Akzo/Akcros objected, and the Commission told them that this might constitute obstruction of a Commission investigation.<sup>14</sup> The parties agreed that an Akzo/Akcros representative could watch while the Commission investigation's leader determined whether the five documents at issue were privileged.<sup>15</sup>

The Commission deemed three of them definitely not protected by privilege; two of these were e-mails between Akcros' general manager and a Dutch in-house attorney of Akzo's who is a registered *advocaat* in the Netherlands.<sup>16</sup> After the Commission took copies of these documents, Akzo/Akcros attempted, and failed, to persuade the Commission to reconsider its decision through a letter explaining why the documents were privileged.<sup>17</sup> After another opportunity for Akzo/Akcros to prove that the documents were privileged, the Commission made a final decision that the documents were not privileged.<sup>18</sup> The General Court agreed with the Commission when Akzo/Akcros challenged these Commission decisions. The main reason the General Court decided that privilege did not extend to the documents was because the ECJ requires that the attorney involved be independent of the client to receive privilege; in-house counsel does not qualify as independent.<sup>19</sup>

Akzo/Akcros appealed on three grounds. First, Akzo/Akcros argued that the General Court incorrectly interpreted the independence requirement of privilege, and this resulted in unequal treatment of in-house counsel as compared to outside counsel.<sup>20</sup> Instead of a "literal and partial interpretation" of *AM & S Europe*, which is what the parties claim the General Court used, the General Court should have used a

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<sup>10</sup> Case T-125/03, *Akzo Nobel Chems. Ltd. & Akcros Chems. Ltd. v. Comm'n*, 2007 E.C.R. II-03523, ¶ 2.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* ¶ 3.

<sup>13</sup> *Id.* ¶¶ 3–4.

<sup>14</sup> *Id.* ¶ 3.

<sup>15</sup> *Id.* ¶¶ 4–5.

<sup>16</sup> *Id.* ¶¶ 8–9.

<sup>17</sup> *Id.* ¶ 10.

<sup>18</sup> *Id.* ¶¶ 11, 14.

<sup>19</sup> *Id.* ¶¶ 166–69.

<sup>20</sup> Case C-550/07, *supra* note 9, ¶ 30.

“teleological” interpretation.<sup>21</sup> The appellants argued that two paragraphs from *AM & S Europe* actually show that “the Court of Justice does not equate the existence of an employment relationship with a lack of independence on the part of the lawyer.”<sup>22</sup> Also, the appellants said that their attorney was independent:

An in-house lawyer enrolled at a Bar or Law Society is, simply on account of his obligations of professional conduct and discipline, just as independent as an external lawyer. Furthermore, the guarantees of independence enjoyed by an ‘advocaat in dienstbetrekking’, that is an enrolled lawyer in an employment relationship under Dutch law, are particularly significant.<sup>23</sup>

Second, the Akzo/Akcros argued that the ECJ decided *AM & S Europe* at a time when fewer countries recognized in-house counsel communication as privileged, and also that EU law has developed to the point where privilege should extend to in-house counsel communication.<sup>24</sup> The General Court’s decision “lowers the level of protection of the rights of defence of undertakings” and makes advice far less valuable.<sup>25</sup> Furthermore, the appellants argued that the General Court’s decision makes the law less certain because it provides a different standard for evidence and privilege than the standards that many member states have in their domestic competition investigations.<sup>26</sup>

Third, the appellants argued that the General Court’s judgment violates the “principle of national procedural autonomy and the principle of the conferred powers.”<sup>27</sup> Privilege is an aspect of EU law that has not been fully harmonized across the different member states, which means that this procedural issue should be determined based on the member states’ rules.<sup>28</sup>

In response to Akzo/Akcros’s first item of appeal, the ECJ said that the General Court correctly interpreted *AM & S Europe*: it is clear “both from the in-house lawyer’s economic dependence and the close ties with his employer, that he does not enjoy a level of professional independence comparable to that of an external lawyer.”<sup>29</sup> In-house and outside counsels have different levels of independence and are thus differently situated so that a claim of unequal treatment cannot be brought.<sup>30</sup> Also, the ECJ said that membership in a national bar association, such as the

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<sup>21</sup> *Id.* ¶ 32.

<sup>22</sup> *Id.* ¶ 34.

<sup>23</sup> *Id.* ¶ 32.

<sup>24</sup> *Id.* ¶¶ 65–66.

<sup>25</sup> *Id.* ¶ 90.

<sup>26</sup> *Id.* ¶ 98.

<sup>27</sup> *Id.* ¶ 109.

<sup>28</sup> *Id.* ¶ 110.

<sup>29</sup> *Id.* ¶ 49.

<sup>30</sup> *Id.* ¶¶ 58–59.

Netherlands' bar, cannot guarantee the independence of an in-house attorney.<sup>31</sup>

Regarding the appellants' second claim, the ECJ found no evidence of a change in general movement among the EU member states toward allowing privilege to in-house counsel.<sup>32</sup> Furthermore, while there have been changes in EU competition law, none of those changes require that in-house counsel and outside attorneys be treated equally with regards to privilege.<sup>33</sup> Also, the ECJ did not buy the arguments based on the rights of defense<sup>34</sup> or the principle of certainty.<sup>35</sup>

The ECJ similarly treated the appellants' third ground of appeal. The appellants argued that the EU did not have a rule on privilege, which meant that, under the principle of national procedural autonomy, each member state would decide the procedures.<sup>36</sup> However, the ECJ said that enforcement of EU competition rules requires a uniform application of privilege doctrines.<sup>37</sup> Member states' laws and procedures do not apply unless they assist the Commission in the investigation. For these reasons, there is no basis to apply the principle of national procedural autonomy.<sup>38</sup> The appellants failed to convince the Court to side with any of their claims and the ECJ dismissed the case without any changes to the restriction on privilege for in-house counsel.

### III. IS AKZO CORRECT?

This decision has met a great deal of opposition from the legal industry. *Akzo* is what some consider "an antiquated view of the in-house legal practice"<sup>39</sup> and is puzzling for several reasons. Although the *Akzo* decision correctly follows precedent, it is important to analyze whether the precedent is correct. In *AM & S Europe*, the main precedent relied on in *Akzo*, the ECJ decided on a similar dispute over what documents the Commission could take in a competition law investigation. The ECJ looked at the relevant laws of member states on the issue and decided that the privilege of confidentiality afforded to written communication between an attorney and his or her client should be subject to two conditions: that "such communications are made for the purposes and in the interests of the client's rights of defense and, on the other hand, they emanate from independent lawyers, that is to say, lawyers who are not bound to the client by a relationship of employment."<sup>40</sup>

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<sup>31</sup> *Id.* ¶ 45.

<sup>32</sup> *Id.* ¶¶ 73–76.

<sup>33</sup> *Id.* ¶ 83.

<sup>34</sup> *Id.* ¶¶ 92–97.

<sup>35</sup> *Id.* ¶¶ 100–07.

<sup>36</sup> *Id.* ¶ 113.

<sup>37</sup> *Id.* ¶¶ 114–15.

<sup>38</sup> *Id.* ¶¶ 119–20.

<sup>39</sup> Ass'n of Corporate Counsel, *ACC Says Akzo Decision in European Court Refusing to Recognize Legal Professional Privilege For In-house Counsel is Poor Policy* (Sept. 14, 2010), <http://www.acc.com/aboutacc/newsroom/pressreleases/Akzo-Decision-in-EJC-is-Poor-Policy.cfm>.

<sup>40</sup> Case 155/79, *supra* note 8, ¶ 21.

The policy implications of encouraging attorney independence are clear.<sup>41</sup> However, the ECJ—both in *AM & S Europe* and *Akzo*—advanced the idea that outside attorneys are independent and used little concrete evidence to support its position. While in-house attorneys are directly employed by their client, outside attorneys are also employed by the client. The main difference is that outside attorneys have multiple clients. However, it is hard to see how being an outside attorney makes him or her sufficiently independent so as to benefit from privilege. An outside attorney who has been a company's main counsel for fifty years may be less independent than an in-house counsel who is one year removed from finishing his or her legal studies. One commentator stated that the ECJ “has locked into place the notion that in-house lawyers are not capable of independent judgment under EU professional standards.”<sup>42</sup> Furthermore, “the idea that professional independence stems from the type of office a lawyer works in, rather than from their moral and professional compass, evidences a deep misunderstanding of legal professionalism and lawyers.”<sup>43</sup> It does not make sense to keep an artificial distinction that cannot be relied upon to determine whether or not a lawyer will act independently.

Despite the appellants' claims that the legal situation in the EU has changed, the ECJ gave no consideration to how the world, the EU, and the law have evolved since 1982. The EU has evolved since 1982, when *AM & S Europe* was decided. There have been multiple EU treaties that have had a very significant impact on many areas of EU law, and the number of member states—ten in 1982—has now grown to twenty-seven.

Perhaps the most significant of these changes over the past thirty years, however, is the advent of electronic communication. This alone should be a tremendous factor in support of reconsidering *AM & S Europe*. With an outdated law on communication that does not take into account the volume of electronic communication that exists today, the ECJ effectively removed the ability of in-house counsel to use e-mail, or other electronic communication for a great deal of purposes. The ECJ's decision in *Akzo* seems dated in another sense: “The ECJ has not recognised that there has been any increase of importance of in-house lawyers nor their close involvement in competition compliance.”<sup>44</sup> The ECJ correctly followed precedent; however, it seems that the *Akzo* decision is incorrect because it fails to take into account the myriad technological and political changes that have occurred since the early 1980s.

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<sup>41</sup> In the United States these policy implications are embedded in the Model Rules of Professional Conduct. MODEL RULES OF PROF'L CONDUCT R. 2.1 (2010) (“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice.”).

<sup>42</sup> Ass'n of Corporate Counsel, *supra* note 39.

<sup>43</sup> *Id.*

<sup>44</sup> *ECJ Rules on Privilege for In-House Lawyers*, REEDSMITH (Sept. 21, 2010), [http://www.reedsmith.com/our\\_people.cfm?cit\\_id=28860&faArea1=customWidgets.content\\_view\\_1&usecache=false](http://www.reedsmith.com/our_people.cfm?cit_id=28860&faArea1=customWidgets.content_view_1&usecache=false).

## IV. POLICY IMPLICATIONS OF AKZO

There are a large number of additional policy arguments in favor of extending privilege to in-house counsel. For example, not extending privilege harms clients, attorneys, and may even hinder the Commission in its role of enforcing competition laws. The ECJ in *Akzo* failed to see the potential harm, believing instead that withholding privilege means more effective regulation of EU law. Finding the proper balance between allowing attorney-client privilege and Commission interests in effective regulation will better benefit both parties.

Withholding privilege from the in-house attorney-client relationship harms corporations in many ways. Without privilege, corporate clients are faced with an impossible dilemma. They either must not exchange any documents or e-mails with their in-house counsel, effectively ignoring efficiency enhancing tools essential in the twenty-first century, or they can choose to be put “at a disadvantage by forcing [themselves] to divulge confidential communications to the Commission, thus jeopardizing their standing in litigation matters, as well as day-to-day business.”<sup>45</sup> Neither of these outcomes is desirable.

In addition, clients must be able to freely and openly discuss and explore all of their legal options with their in-house counsel without the fear of the Commission scouring the information for possible illegalities. Withholding privilege “weakens, from a competition law perspective, the relationship between in-house lawyers and their employers.”<sup>46</sup> By granting privilege, the client would not be disadvantaged by using in-house counsel. In no area of the law is this truer than in competition law, where attorneys give legal advice that will be relied upon to determine whether a proposed action is legal or illegal.

A potentially drastic effect of not extending privilege is that the corporate client can face liability in other jurisdictions based on what the Commission can discover. “Consequences are potentially far reaching, as, for example, with U.S. privilege law, where disclosure to the Commission could be seen to amount to voluntary disclosure resulting in a waiver of privilege in U.S. legal proceedings.”<sup>47</sup> This could be disastrous for multinational companies that are subject to laws in both the EU and the U.S., especially companies dealing with competition investigations. Competition authorities are becoming increasingly aggressive as companies and industries are becoming increasingly global in nature. A number of authorities around the world would jump at

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<sup>45</sup> Ass’n of Corporate Counsel, *supra* note 39.

<sup>46</sup> Dechert LLP, *Legal Privilege Rule: ECJ Affirms Akzo Nobel No Privilege for Communications with In-House Counsel in EU Investigations*, DECHERTONPOINT, 3 (Sept. 2009), [http://www.dechert.com/library/Antitrust\\_59\\_9-10\\_Legal\\_Privilege\\_Rule.pdf](http://www.dechert.com/library/Antitrust_59_9-10_Legal_Privilege_Rule.pdf).

<sup>47</sup> Bryan Cave, *The European Court Of Justice Dismisses Appeal For Legal Professional Privilege For In-House Lawyers*, BRYAN CAVE BULLETINS, 2 (Sept. 17, 2010), <http://bryancave.com/bulletins/list.aspx?Date=2010> (scroll down to the publication date; then follow “The European Court of Justice Dismisses Appeal For Legal Professional Privilege For In-House Lawyers” hyperlink).



information and communications waived mandatorily by companies in the EU. To prevent these disastrous results, the ECJ should allow in-house attorneys the benefit of privilege. The EU should consider this possibility in its policy-making decisions by looking at the adverse impact that withholding privilege could bring to its citizens and companies in competition investigations abroad.

Furthermore, the withholding of privilege from in-house counsel harms companies by discouraging them from hiring or keeping in-house counsel. It is not desirable to encourage corporations to shy away from hiring in-house counsel because in-house counsel benefits both the corporation and the individual attorney and is both efficient and cost-effective. Similarly, the legal profession will suffer if there are fewer jobs available in-house based on a fear of hiring attorneys because of lack of privilege.

Lack of privilege limits the effectiveness of in-house counsel. Because many companies will likely shy away from full disclosure to their in-house counsel, attorneys will not be able to fully advocate; information is vital to helping the attorney fully perform his or her duties.<sup>48</sup> Furthermore, in-house attorneys often provide an “invaluable role in the daily work of their employers, in particular their intimate knowledge of the business, their ability to meet the needs of their employer for time-critical advice, and their need to be involved in internal compliance programs.”<sup>49</sup> By encouraging attorneys to not work in-house or by discouraging full disclosure, attorneys will lose much of their niche. They might be able to use it in a law firm setting, but they also might not be able to as effectively or at all. With multiple clients, outside attorneys cannot give the same attention to the corporation as in-house counsel. The resultant harm is that both the client and attorney lose the expertise provided by in-house counsel. In all areas of the law, including the competition setting, expertise on the laws and procedures is essential. Discouraging such expertise and focus afforded by in-house counsel is a bad policy result of *Akzo*.

In the aftermath of *Akzo*, one firm advises that in-house attorneys do the following: “Conduct company investigations orally; Resist preparing notes, minutes or files related to company investigations; Review electronic mail policies related to communications; Instruct external lawyers to provide advice in the context of defense.”<sup>50</sup> Attorneys cannot do their job properly with these restrictions. It is not a good idea to discourage attorneys from taking notes or to limit their use of necessary means and devices to properly effectuate their duties. Without privilege,

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<sup>48</sup> See, e.g., *Trammel v. United States*, 445 U.S. 40, 51 (1980).

<sup>49</sup> Jones Day, *Antitrust Alert: European Court of Justice Upholds Judgment That EU Legal Professional Privilege Does Not Extend to In-house Lawyers*, JONES DAY PUBLICATIONS (Sept. 2010), <http://www.jonesday.com/antitrust-alert--european-court-of-justice-upholds-judgment-that-eu-legal-professional-privilege-does-not-extend-to-in-house-lawyers-09-15-2010/>.

<sup>50</sup> Robert Campbell & Kathleen Smith Ruhland, *ECJ Decision in Akzo Nobel: Missed Opportunity to Extend In-House Privilege*, FAEGRE & BENSON (Oct. 12, 2010), <http://www.faegre.com/12144>.

attorneys and the corporations they serve will feel required to adopt these types of poor business practices to protect the legitimate privacy interests of the company. If in-house attorneys had privilege, they would be able to effectively advocate through taking notes in meetings, sending e-mails, and so forth.

Surprisingly, extending privilege could also benefit rather than hinder the Commission in its competition and other enforcement. Some argue that the ruling in *Akzo* could actually make it more difficult for the Commission to fulfill its responsibilities:

The rigid position taken by the ECJ will also likely impede the regulatory compliance roles increasingly performed by experienced in-house counsel and shift the role in internal investigations to outside law firms who retain the benefits of legal privilege but who often lack a thorough knowledge of the business and the implications of various business practices.<sup>51</sup>

Reliance on the vital role that in-house counsels play in competition compliance will be reduced.<sup>52</sup> Furthermore, shifting regulatory compliance to less-experienced outside law firms may result in more infringements of the law, while inhibiting the Commission's ability to effectively investigate those infringements. Extending privilege to in-house counsel would be an excellent way for the EU to promote the important, expert role that many in-house attorneys play.<sup>53</sup> While extending privilege would restrict the amount of documents Commission investigators could view, the role of in-house counsel would prove more useful because they would help their companies comply with regulations and willingly participate in Commission investigations.

Although there are a number of strong arguments in favor of extending privilege, there is an important reason for not doing so: withholding privilege will likely discourage illegal behavior. For good reason, EU courts "want to ensure that deeply hidden facts in cases involving clandestine behavior are uncovered. The top European courts want to limit any exception to that rule, and to confine privilege to advice from external lawyers."<sup>54</sup> The Commission's evidence gathering will be much easier if there are no privilege restrictions. More documents will be available and, with this evidence, the Commission's role of enforcing competition laws will likely be more effective. This might have a strong deterrence effect on those who consider violating the competition and

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<sup>51</sup> Hugh F. Bangasser et. al, *EU's Highest Court Refuses to Extend Privilege to Communications with In House Lawyers*, K & L GATES (Sept. 17, 2010), <http://www.klgates.com/eus-highest-court-refuses-to-extend-privilege-to-communications-with-in-house-lawyers-09-17-2010/>.

<sup>52</sup> ReedSmith, *supra* note 44.

<sup>53</sup> Ass'n of Corporate Counsel, *supra* note 39.

<sup>54</sup> John Spano, *No In-House Counsel Privilege in Europe — EU High Court*, LAW FORWARD (Sept. 14, 2010, 4:54 PM), <http://lawforward.legalzoom.com/competition/no-in-house-counsel-privilege-in-europe-eu-high-court/>.

other laws because investigations and enforcement will likely be more frequent and the Commission will act with confidence of the outcome. Furthermore, one could say that there should not be a problem with viewing a company's documents if the company is observing the law. A stronger privilege would give cartels more opportunities to avoid consequences while hiding behind the protection of confidentiality.

Furthermore, it can be said that arguments against *Akzo* are overstated because, in reality, *Akzo* changes nothing. In-house attorneys in EU member states did not have privilege in Commission competition investigations since *AM & S Europe*. The ECJ is not taking anything away from in-house attorneys because they did not have the privilege before the *Akzo* decision. All of the dire consequences that will supposedly result from this decision might not even happen if they have not already.

#### V. SHOULD THE ECJ HAVE EXTENDED PRIVILEGE OR SHOULD IT IN THE FUTURE?

The EU is faced with the dilemma of balancing the need for in-house counsel's freedom to communicate and the need to allow EU investigators the ability to conduct thorough investigations. A U.S. court concisely explained why the United States has adopted privilege: "The privilege's central concern, and its ultimate justification, is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice."<sup>55</sup> While there are clear benefits of having the privilege, the government also needs to have evidence in order to punish illegal activity. This is especially true in cases of potential competition law violations, where evidence is often scarce. The EU recognizes this: outside lawyers and their clients already enjoy the benefits of privilege. The main issue is whether it should extend to in-house counsel.

This decision comes down to what the EU values more—confidentiality and the ability of attorneys to advocate without hesitation or the ability to sufficiently enforce competition law. The ECJ published their preference in *Akzo*: enforcement of competition law is paramount. Because this is important to the functioning of the EU and the welfare of companies and consumers, it is hard to dispute. As a result, clients of in-house attorneys will suffer. While the ECJ did not decide so, it is possible to find a compromise that will extend privilege to in-house attorneys while also allowing the Commission to discover documents that show illegal intent or behavior.

A middle-road approach better balances the competing interests at issue, and the extremes of absolute rejection and absolute adoption of the privilege for in-house counsel are not desirable. A complete privilege

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<sup>55</sup> *In re Sulfuric Acid Antitrust Litig.*, 235 F.R.D. 407, 414 (Ill. 2006) (quoting *Upjohn v. United States*, 449 U.S. 383, 389 (1981)).

would bar the Commission from using any attorney-client communication, a primary source of evidence in competition investigations. On the other hand, having no privilege would also be undesirable because companies need to have assurance that they can keep communications with their in-house attorneys confidential in order to do business. Using a system similar to the U.S. system would answer all of these concerns: privilege exists for all attorneys—outside or in-house—in their communications with clients, but “does not extend to communications ‘made for the purpose of getting advice for the commission of a fraud’ or crime.”<sup>56</sup> With a “crime-fraud exception,” as it is called in the United States, for in-house attorney-client communication, the supposed lack of independence would not matter because the Commission could discover the communications. Any motive that an in-house counsel—or outside attorney—might have to conceal the client’s illegal behavior would be countered by the threat that those communications may not be protected by privilege. The U.S. crime-fraud exception has another benefit: an independent judiciary should decide whether a document is privileged.<sup>57</sup> U.S. District Courts have discretion to determine whether a document is a part of the crime-fraud exception or if privilege protects it.<sup>58</sup>

While the U.S. system does not always provide the best solution for competition enforcement, the crime-fraud exception offers a solution that gives both sides the most they can get out of a difficult situation where compromise is necessary. The Commission can get documents that show illegal intent, and the attorneys can rest assured that courts will protect legal behavior. Courts will not protect documents that show intent to do illegal behavior; No attorney can legitimately claim otherwise. This exception might even benefit the EU because attorneys aiding companies in illicit competition will feel more confident expressing opinions. This might lead to a slip up that the Commission can later discover due to a manifestation of intent to carry out illegal behavior. With no privilege, attorneys and clients in in-house settings will write significantly less, and exchange fewer e-mails, which will make the Commission’s job of finding evidence of cartels and other competition law violations extremely difficult.

One might legitimately ask whether privilege for in-house counsel should depend on whether the attorney is a member of the national bar. Dependence on national bars would create several difficulties for the EU and member states. This issue arose in *Akzo*, as the appellants claimed that the Dutch attorney in question had a duty to stay independent based on his membership in the Netherlands’ bar.<sup>59</sup> With a union of twenty-

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<sup>56</sup> United States v. Zolin, 491 U.S. 554, 563 (1989) (quoting O’Rourke v. Darbishire, 1920 A.C. 581, 604 (P.C.)).

<sup>57</sup> See *infra* Part V (last few paragraphs) for more discussion on this topic and how it could be used to resolve future claims of privilege by companies facing European Commission investigations.

<sup>58</sup> *In re Sulfuric Acid Antitrust Litig.*, 235 F.R.D. at 420.

<sup>59</sup> Case C-550/07, *supra* note 9, ¶ 36.

seven countries and without an EU bar association, it is difficult to base any EU rights or privileges on national bar association membership because there are differences between the laws and obligations governing attorneys in one member state of the EU as compared to another. Considering the frequency with which legal business and attorneys cross borders, especially in the common market of the EU (as seen in *Akzo*), any attempts to base privilege on membership of a national bar would become quite confusing. Furthermore, because some countries have established a national bar where privilege for in-house counsel does exist, these attorneys would become very desirable for companies across the EU because they could then rely on privilege. Also the member states that allow privilege would likely be flooded with applications to join their national bar.

In addition, to allow privilege to be determined based on national bar association membership might lead to discrimination in Commission competition investigations, which could violate the Treaty on the Functioning of the European Union (TFEU). Ever since the EU's foundational treaty, the Treaty of Rome, a prohibition on discrimination on the basis of nationality has existed under Article 18 of the TFEU, which reads: "Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."<sup>60</sup>

Thus, allowing the Commission to discover documents from attorneys of one country who do not enjoy the benefits of privilege while not discovering the documents of attorneys from another country who do have privilege, though unintentional, would still be discriminatory. Discrimination under Article 18 need not be overt and intentional; it can be covert, and still illegal, as long as discrimination occurs.<sup>61</sup> It is unclear if the EU would find that the Commission violated this article because the Commission could argue that it is just following member state bar regulations. Nevertheless, such an argument goes against basing privilege on membership in a national bar association. Further, basing privilege on nationality could also create problems with the TFEU's provisions regarding the free movement of workers<sup>62</sup> and the freedom to provide services.<sup>63</sup>

However, to require that an in-house attorney be a member of the national bar of any EU member state—not just one specifically—would not constitute discrimination under the TFEU because nothing prevents the EU from treating non-EU nationals differently than EU nationals. The issue of membership in a national bar is a concern of many in-house attorneys in the United States regarding their work in the EU because they find no protection for their communications with EU companies in

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<sup>60</sup> Treaty on the Functioning of the European Union art. 18, Dec. 13, 2007, 2010 O.J. (C 83) 01 [hereinafter TFEU].

<sup>61</sup> See, e.g., Case C224/00 Comm'n v. Italy, 2002 E.C.R. I-2965, ¶ 15.

<sup>62</sup> TFEU, *supra* note 60, art. 45.

<sup>63</sup> *Id.* art. 56.

the text of *Akzo*.<sup>64</sup> However, nothing compels the EU to extend privilege to non-EU nationals and that is not likely to change. A policy based on the U.S. crime-fraud exception, where all EU member-state attorneys enjoy privilege with their clients except in situations of illegality or fraud, would not violate the TFEU articles.

Another aspect of *Akzo* that the EU should fix in regards to Commission competition investigations is the authority that the Commission has to determine whether documents are privileged. One of the more troubling aspects of *Akzo* is that the Commission took upon itself the decision of whether privilege applied to the documents in question. When *Akzo/Akcros* objected, the Commission essentially threatened *Akzo/Akcros* with an obstruction of investigation claim if they did not allow the investigators to examine the documents.<sup>65</sup> The parties agreed that an *Akzo/Akcros* representative could watch while the investigator looked at the documents to determine whether privilege applied to the documents.<sup>66</sup> Because the Commission is acting for the EU government it surely has interests and motives that bring into question its ability to impartially judge whether it can take documents. The Commission wants as much evidence as it can find and likely cannot judge independently whether documents are privileged. However, the ECJ has said that the Commission can decide whether or not privilege applies to a document because it has the power to take any documents related to the investigation.<sup>67</sup> Although its ruling upheld the Commission's decision, the General Court took issue with the Commission's infringements into the realm of privilege. In somewhat strong language, the General Court condemned the Commission's behavior by considering its decision to read the documents as a breach of the principle of privilege.<sup>68</sup> Not only was this contrary to the "proper administration of justice," but it also may have irreparably harmed the rights of those involved in the investigation.<sup>69</sup> Such harm is likely to be inflicted because if privilege applied to the documents the Commission looked at, the documents likely contained information that the Commission should not have seen.<sup>70</sup> Whether the information is protected would not matter; someone from the Commission would still know what the document says based on his or her reading of it to determine its status. He or she could use that information to obtain other information or turn the focus of the investigation to one issue or another.<sup>71</sup>

When the Commission does not know if a document is protected by privilege, it "must not read the contents of the document before it has

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<sup>64</sup> See, e.g., Bryan Cave, *supra* note 47.

<sup>65</sup> Case C-550/07, *supra* note 9, ¶ 3.

<sup>66</sup> *Id.*

<sup>67</sup> Case 155/79, *supra* note 8, ¶ 17.

<sup>68</sup> Case T-125/03, *supra* note 10, ¶ 86.

<sup>69</sup> *Id.* ¶ 87.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

adopted a decision allowing the undertaking concerned to refer the matter to the Court of First Instance [now the General Court], and, if appropriate, to make an application for interim relief.<sup>72</sup> The General Court proposed a sound alternative: an independent judiciary rather than one of the parties to the investigation—like the Commission—should decide whether a document is privileged.<sup>73</sup> The Commission would likely balk at the idea of letting the companies determine whether a document is privileged; likewise it should not be opposed to ceding this power to an independent court. The General Court would be in an excellent position to independently judge whether documents are privileged.

## VI. CONCLUSION

Privilege is a vital part of the attorney-client relationship, and the ECJ should have extended it to in-house attorneys in the *Akzo* decision. While the ECJ may have been right in *Akzo* to follow precedent, the precedent—*AM & S Europe*—seems to be outdated and unreliable for resolving such a complicated issue in the twenty-first century. While the policy arguments in favor of extending privilege are clear, the opposing arguments are also strong: privilege should not be a shield to protect illegal behavior. This is especially true with cartels and other competition law violations, which would thrive on the secrecy and confidentiality that a privilege would provide.

The ECJ did not find a balance between these competing interests in *Akzo*. Instead, it favored the Commission and its ability to enforce EU law, a worthy pursuit. However, *Akzo* does not give attention to the reality that privilege does not need to be, and probably should not be, an unlimited right. It can be restricted to prevent abuse. Yet privilege should not be restricted to the point of preventing an entire group of attorneys—in-house counsel—from enjoying vital protections based on the misperception that they cannot offer independent advice. A proper balance, such as a policy modeled after the U.S. crime-fraud exception, would fit the purposes of both sides of the debate. When the issue arises again before the ECJ, it should consider this balance and the benefits of extending privilege—though not unlimited—to in-house attorneys.

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<sup>72</sup> *Id.* ¶ 85.

<sup>73</sup> *Id.* ¶ 67.