

BEWARE: LEGAL PRIVILEGE RULES DIFFER BETWEEN THE U.S. AND THE EU**I. Introduction**

Jurisdictions in the United States and Europe differ significantly in their approach to the privilege afforded to lawyers to protect against the disclosure of confidential information related to the attorney-client relationship. In an era of increasing globalization, antitrust proceedings and regulatory investigations frequently are multi-jurisdictional, involving parallel actions by authorities on both sides of the Atlantic. The adequate protection of clients' interests in such an environment requires a sound understanding of the distinctions between privilege rules in the U.S. and the EU.

Legal privilege in the United States, which encompasses at least the attorney-client privilege and the work-product protection, is more expansive than in Europe, but is subject to change over time and varies by geographic region and by context. Privileged material in the U.S. is also subject to waiver, with certain exceptions, if it is shared with those outside the attorney-client relationship. This memorandum will note some important differences between privilege law in the United States and Europe, focusing on the practical implications for attorneys involved in cross-border communications and the exchange of confidential information with legal counsel or clients overseas.

In Europe, the attorney-client privilege is called the legal professional privilege ("LPP"), and protects the confidentiality of communications between lawyers and their clients. The doctrine was first formulated in the *AM & S* judgment in 1982¹ and its scope was recently refined in *Akzo Nobel Chemicals and Akros Chemicals v Commission* ("Akzo").² The September 2007 judgment of the Court of First Instance ("CFI") in *Akzo* is currently under appeal to the European Court of Justice ("ECJ").³

¹ Case C-155/79, *AM & S Europe Limited v Commission of the European Communities*, May 18, 1982.

² Joined cases T-125/03 & T-253/03, *Akzo Nobel Chemicals and Akros Chemicals v Commission of the European Communities*, September 17, 2007.

³ Case C-550/07 P: Appeal brought on 8 December 2007 by Akzo Nobel Chemicals Ltd, Akros Chemicals Ltd against the judgment of the Court of First Instance (First Chamber) delivered on 17 September 2007 in Case T-253/03, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v Commission of the European Communities*. No judgment by the ECJ is expected to be issued before 2010.

II. U.S./EU: Distinctions Regarding Scope of Privilege

In the United States, courts recognize both the attorney-client privilege and the work-product doctrine. The attorney-client privilege covers oral and written communications made in confidence between or among privileged persons, including inside and outside counsel and their clients, for the purpose of seeking, obtaining, or providing legal assistance.

The attorney work-product doctrine is broader in scope than the attorney-client privilege, and applies to documents and tangible things that were prepared in anticipation of litigation or for trial.⁴ The work-product protection is qualified in that an adversary may obtain discovery upon a showing of a substantial need for the material and a hardship in obtaining the material by other, less intrusive means. An attorney's mental impressions are typically accorded the most protection under the work-product doctrine.

In Europe, the LPP applies only to *written* communications between lawyers and clients for the purpose of exercising the client's rights of defense. One major difference between the European LPP and privilege rules in the U.S. is that the LPP applies to written legal advice provided only by *outside* counsel and to documents prepared only for the purpose of seeking such advice. Attorneys covered by the European privilege must be "independent" in the sense that they are not bound to their clients by a relationship of employment.⁵

The CFI in *Akzo* expressly refused to extend the LPP to communications between a client and its in-house lawyers. The European privilege does extend to internal written communications (so-called preparatory documents) written by in-house lawyers as long as they are prepared *exclusively* for the purpose of seeking legal advice from an outside lawyer in the exercise of the right of defense. Internal notes circulated within an undertaking, when "confined to reporting the text or the content" of legal advice received from an independent lawyer, are also covered by the privilege.⁶ However, the fact that a document has been discussed with a lawyer is alone not sufficient to trigger the application of the European LPP.

In addition, and importantly, the European privilege extends only to counsel who are *admitted to a bar* in one of the Member States of the European Union. Admission to a bar in the United States is not sufficient to support the application of the LPP in Europe.

Finally, the interplay between the European privilege rules and, to the extent they exist, the national rules on privilege must be considered. If a Member State does not have national legal privilege rules, the national competition authority when conducting a dawn raid for the European Commission might seek, upon application of its national procedural rules, to review all documents. However, the European Commission cannot use as evidence documents that are privileged under EC rules. The law of privilege in Europe is still evolving, and national

⁴ Fed. R. Civ. P. 26(b)(3).

⁵ This interpretation of "independence" is challenged in *Akzo's* appeal to the ECJ.

⁶ Case T-30/89, *Hilti v Commission of the European Communities* [1990] ECR 163.

authorities in some EU Member States are considering whether to incorporate the EC case law on privilege into their national regulations.

III. Practical Considerations

Given the important distinctions between privilege law in the U.S. and Europe, caution should be exercised by U.S. counsel in transmitting documents and sharing information with counsel and client personnel overseas. For example, while confidential advice on U.S. law given by U.S. outside counsel to a European company in connection with a U.S. proceeding generally should be privileged in a U.S. proceeding, it may not be protected from disclosure in an EU Member State in connection with a European proceeding.⁷

In the context of a dawn raid or EC investigation, requests from the Commission may be broad enough to include documents that would be subject to the attorney-client privilege or the work-product doctrine in the U.S. Depending on the jurisdiction, providing confidential materials to the Commission voluntarily — without a formal objection and order of disclosure — might constitute a waiver of the privilege in the U.S.⁸

Counsel in the U.S. should also be aware that confidential communications with their client and company personnel in Europe will not be privileged under European rules, unless such communications are prepared for the purpose of seeking or reporting legal advice from outside counsel admitted to a bar in Europe. U.S. counsel thus may wish to consider retaining an independent lawyer in Europe who is admitted to the bar in an EU Member State to serve as outside counsel and to ensure that confidential attorney-client communications are protected by the European LPP.

The following measures may assist in-house counsel in preserving the LPP in Europe with respect to documents that are prepared for the purpose of seeking legal advice in connection with a cross-border investigation or proceeding:

- State on the face of the document that it has been prepared to seek or provide legal advice at the request of the client;
- Label the document as “privileged” and maintain it in a file separate from business documents, preferably in the legal department;

⁷ See Julian Joshua, “It’s A Privilege: Managing Legal Privilege in Multijurisdictional Antitrust Investigations,” *Comp. L. Insight* (Dec. 11, 2007).

⁸ Compare *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1978) (limited waiver of privileged materials provided to SEC pursuant to subpoena did not constitute universal waiver) with *Permian Corp. v. United States*, 665 F.2d 1214, 1220-21 (D.C. Cir. 1981) (rejecting notion of limited waiver).

- If documents are prepared at the request of outside counsel, ensure that they are forwarded to outside counsel and maintained in a file separate from business documents, preferably in the legal department;
- In-house personnel should not add internal comments or recommendations to documents containing external legal advice; and
- Restrict the internal circulation of such documents to those who need to consider and/or act on the legal advice.⁹

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⁹ See Michael Frisby, "Between Ourselves: Post Akzo," 157 New L.J. 1492 (Oct. 26, 2007).

COMPARISON OF LEGAL PRIVILEGE RULES IN THE U.S. AND EU

	U.S.		EU
TYPE OF PRIVILEGE	ATTORNEY-CLIENT PRIVILEGE	WORK-PRODUCT DOCTRINE	LEGAL PROFESSIONAL PRIVILEGE
WHO?	Communications between or among clients and their attorneys (in-house or outside counsel), communicating agents, and agents of the attorney for the purpose of the representation	In-house or outside counsel or a party's representative (if assisting counsel in preparing for litigation)	Outside counsel admitted to a bar in one of the EU Member States
WHAT?	Oral or written communications made in confidence	Documents and tangible things prepared in anticipation of litigation, especially those reflecting an attorney's thought processes	Written communications concerning the right of defense, including documents prepared <i>exclusively</i> for the purpose of seeking legal advice
WHEN?	When legal advice is sought or received	When prepared in anticipation of litigation or for trial	When legal advice is sought or received from outside counsel
WHERE?	U.S. jurisdictions (although interpretations of privilege law vary by jurisdiction)	U.S. jurisdictions (although interpretations of privilege law vary by jurisdiction)	EU jurisdiction (national laws apply in investigations conducted by a national competition authority)
HOW?	By a determination by a court (when in dispute) whether the communication meets the requirements of the attorney-client privilege and has not been waived	By a determination by a court (when in dispute) whether the document is subject to work-product protection, and whether the adversary shows substantial need for the material and hardship in obtaining it by less intrusive means	By a determination by the European Court of First Instance (when in dispute) whether the document is subject to the legal professional privilege (During dawn raids, a special procedure applies in case of a dispute as to the applicability of the LPP.)
WHY?	To encourage full and frank communication between attorneys and their clients	To protect the thought processes, opinions, mental impressions, and beliefs of an attorney and his or her agents preparing for litigation	To protect the client's right of defense