

Akzo Case and In house Lawyer Independence
Grand Chamber of the European Court of Justice Decision
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The difference in approach on the two sides of the Atlantic to in-house counsel's attorney-client privilege has been crystallized by the recent decision of the Grand Chamber of the European Court of Justice in the *Akzo* case¹.

In many civil law countries, professional secrecy is a duty that the lawyer owes to the lawyer's client and to the State, rather than a privilege and is seen as the most fundamental of the lawyer's duties. Only the client (and, in some cases, the local Bar) can relieve the lawyer of this obligation; and even when the lawyer has been so relieved, the lawyer cannot be compelled to reveal such a secret if the lawyer believes it necessary for the interest of the client to keep the secret. It is, however, a notion that often applies only to attorneys in private practice. Under national law in most European civil-law countries – Belgium being a notable exception – it does not apply to in-house counsel, and in-house counsel cannot refuse to reveal confidences of the company. In those countries, generally, the notion of professional secrecy is one that applies only to members of the Bar (*i.e.* those authorized to appear before the local courts) and in-house counsel are not permitted to be members. This distinction is generally justified by the argument that in-house counsel lacks independence because in-house counsel's "client" is also the lawyer's employer, thus the in-house lawyer is financially dependent on the employer, and for that reason alone the in-house lawyer does not benefit from the same autonomy of judgment as that of an attorney in private practice.

Under the new ECJ decision, that argument now has the force of law within the EU, at least with respect to Commission investigations. In paragraph 44 of the decision, the court held "that the requirement of independence means the absence of any employment relationship between the lawyer and client, so that legal professional privilege does not cover exchanges within a company or group with in-house lawyers" and in paragraph 45 the court wrote:

¹ Case C-550/07 P., *Akzo Nobel Chemicals Ltd v. Commission*, Judgment of September 14, 2010.

An in-house lawyer, despite his enrolment with a Bar or Law Society and the professional ethical obligations to which he is, as a result, subject, does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his client. Consequently, an in-house lawyer is less able to deal effectively with any conflicts between his professional obligations and the aims of his client.

The Court further held that the fact that an in-house lawyer may be responsible for other tasks with more commercial effects will necessarily bring the lawyer into a closer relationship with the company, thereby concluding, in paragraph 49 “It follows, 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.” The language could not be clearer. Independence, as that term is understood in the civil law, is the pre-requisite for privilege, and a salary (as opposed to the payment of fees) negates independence.

Although Switzerland flirted with the idea of creating some form of professional secrecy for in-house counsel, at least in part in the hopes of leveling the playing field with the United States, Switzerland eventually chose the same path as the ECJ has now chosen. In Switzerland, lawyers who practice in house are not permitted to be members of the Bar and, as a result, are neither regulated, in general nor, in particular, subject to professional secrecy. Moreover, the Swiss Criminal Procedure law does not allow in-house lawyers to refuse to testify in criminal proceedings.

In April of 2009, the Swiss Federal Council proposed new legislation that would have instituted an optional professional status and inscription in a cantonal register for in-house counsel. This status, available to persons with a professional legal degree and at least one year of professional experience, as well as the ability to engage in legal analysis without being bound by instructions of non-lawyers, would have resulted in a limited professional secrecy being applicable to them. This would have allowed companies not to reveal, in the context of a civil, criminal, or administrative procedures, the analytical results reached by their in-house counsel. During the comment period, however, it became clear that a majority of the Swiss cantons, as well as several political parties, were opposed; and in June of 2010, the project was abandoned. In retrospect, that decision made Swiss law Euro-compatible.