THE CONTINUED QUESTIONING OF PRIVILEGE

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The European Court of Justice's (ECJ) recent Akzo Nobel decision is not a final setback but a new call for action in the battle for in-house privilege, says Werner Vanderhaeghe

La reciente decisión del TJUE sobre el caso Akzo Nobel no es un retroceso definitivo sino un nuevo reto en la larga batalla por el secreto profesional de los asesores jurídicos de empresa, dice Werner Vanderhaeghe, socio de Vanderhaeghe De Wolf Boelens & Lambrecht. La sentencia del Tribunal establece que en el marco de las investigaciones comunitarias sobre competencia, las comunicaciones internas con los abogados de empresa no están amparadas por el secreto profesional. La posición del Tribunal sólo recalca la necesidad de que las empresas reconozcan la evolución del papel de los asesores jurídicos y busquen nuevos modos de responder a sus necesidades legales internas. In September the European Union's (EU) highest court, the ECJ, handed down a landmark judgment in an appeal brought in the long-running Akzo Nobel case. The ECJ dismissed the appeal in its entirety, in effect reaffirming that any communications between salaried in-house lawyers, irrespective of bar

membership, and their employers will not be regarded as de facto protected by privilege.

Businesses and lawyers alike are disappointed. Commentators have spoken of a missed opportunity to finally clarify the law on in-house privilege and the criterion of lawyers' independence.

Furthermore, there is criticism for failing to give sufficient regard to the modernisation of competition law, while others state that a change in role is now at issue for in-house lawyers in EU cases.

On the basis of 35 years' experience in the competition arena, within law firms and as a General Counsel, I believe that some nuance is required. I would emphasise that the ruling is neither a missed opportunity nor a setback. Rather it is a welcome occasion for in-house counsel to live up to the new challenge and better align their position to the criteria for granting privilege as set forth by the now established ECJ case law.

The ECJ conceded that the definition of privilege must take into account the principles and concepts common to the laws of Member States. Such rules have moved on since the ECJ's first landmark privilege ruling in 1982, but it declined calls for wholesale change on the grounds that it did not find "a predominant trend" towards granting privilege to in-house counsel in all 27 Member States (which is a matter of fact).

The Court concluded that the situation had not evolved to an extent that would justify a change in case law (which is a matter of discretion). A lack of harmonisation was and still is the issue and we all know that the initiative here lies with the EC and the Member States, not the ECJ. One cannot thus be disappointed at something that was not realistic in the first place.

But the ECJ also took a hard line in interpreting the notion of "independence". Akzo argued that its lawyers' membership of the Dutch bar meant that they were subject to the same ethical rules and disciplines as an external lawyer. The Court did not accept that argument and upheld the distinction. This distinction is illusory in practice, since we are all aware of external lawyers who will say what their clients want to hear.

I find it hard to disagree with the ECJ's argument that the essence of any employment relationship is of subordination between employer and employee. However, by drawing the line so clearly on the notion of a lawyer's employment contract, I believe that the ECJ leaves open other forms of relationships, such as an independent consulting agreement, that would pass the test of independence all other things being equal.

The ruling has now prompted some to question the role of in-house counsel in EU competition cases or their ability to perform, for example, compliance functions. Irrespective of the fact that privilege is an issue that transcends the field of competition law, I doubt very much that the ruling will have a significant impact on the way companies deal with legal or compliance issues.

The in-house counsel is no longer the "kept" lawyer of the 1970s and 1980s. The role has evolved into a strategic resource for management and more often than not is a position in senior management. The demands for corporate performance and integrity in particular have become more insistent and made the lawyer's role much more complex and demanding. Privilege is merely one element, albeit an important one, of that complexity.

I believe that the ECJ's ruling has created a window of opportunity and an incentive for management and in-house lawyers to rethink their positions in line with the Court's independence criterion. In-house counsel, at least those at a senior level, should no longer be retained through a contract of employment and all in-house personnel should be members of a Bar Association or Law Society. "Nothing is permanent but change" is a common maxim, but this change is long overdue.

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