

# SIDLEY AUSTIN SIDLEY

BEIJING BRUSSELS CHICAGO DALLAS FRANKFURT GENEVA HONG KONG LONDON LOS ANGELES NEW YORK SAN FRANCISCO SHANGHAI SINGAPORE TOKYO WASHINGTON, D.C.



## Dawn raids and Legal Privilege

Kristina Nordlander  
Sidley Austin LLP, Brussels

# Privilege in EC investigations

## Background

- 1982 AM&S ECJ judgment
- September 2007 CFI judgment in Akzo (under appeal to ECJ)
  - Note different rules in Member States

# Akzo: CFI on in-house lawyers

- Refusal to extend scope of legal privilege to employed lawyers despite arguments by Akzo and interveners
  - changes in Member State laws
  - modernization and current practice
  - fundamental rights
  - policy arguments for competition law enforcement
- Is employment the right test for independence?
- Status of advice from non-EU outside lawyers?

# Akzo: CFI on procedure

- Commission not entitled to read disputed documents before adopting decision that undertaking can appeal to the Court (harm upon disclosure)
- Cursory look not allowed if requires contents to be disclosed
- Sealed envelope procedure

# Akzo: CFI on preparatory documents

## Discussing with a lawyer is not enough!

- Preparatory documents can be covered by privilege if drawn up exclusively for seeking legal advice from an outside counsel in exercise of the right of defence
- It has to be unambiguously clear either from the content or from the context that the document was created for the purpose of seeking legal advice

# Situation after Akzo

## Personal scope of protection

- Privilege not extended to in-house lawyers, even if members of a Bar or a Law Society
- Privilege does not extend to external counsel who are not members of a Bar or a Law Society in an EU Member State? (not at issue in case)

## Material scope of protection

- Preparatory or working documents can be covered by privilege, but strict conditions have to be met and the burden of proof is on the company

## Procedural safeguards

- An inspecting agency is in principle not entitled to cast even a “cursory look” at the documents potentially covered by privilege before allowing the chance to raise the privilege claim before the Court

# EU vs. Member State rules

Member State rules on whether privilege applies to in-house counsel communications differ:

- Belgium, Germany, UK, Netherlands ...
- Austria, Italy, France, new Member States ...

# Implications in cross-border investigations

- Article 12 of Regulation 1/2003 allows the Commission or a National Competition Authority (NCA) to receive and use as evidence information that it could not have collected itself
- Information can be collected by a NCA which is later forwarded to the NCA of a Member State with a higher standard of legal privilege
  - the OFT of the UK has noted that if it is sent the communications of in-house counsel by an NCA of another Member State where such communications are not privileged, it may use them in its investigation
- Companies should not assume that the standard of legal privilege of the Member State where the information is used by the NCA as evidence will necessarily apply



# Practical Advice

- Documents should contain a clear indication that advice from an outside counsel is sought and be clearly marked as “privileged and confidential”
- Ideally, all such documents should be addressed and sent directly to an outside counsel
- Keep privileged documents separate from others
- To the extent companies rely on certain communications being legally privileged, outside counsel should be instructed
- Watch email practices!
- US discovery

# Examples of Documents

- Compliance program materials
- Interview transcripts
- Summaries of facts to be provided to lawyers
- Law firm memoranda
- E-mails

**Questions?**