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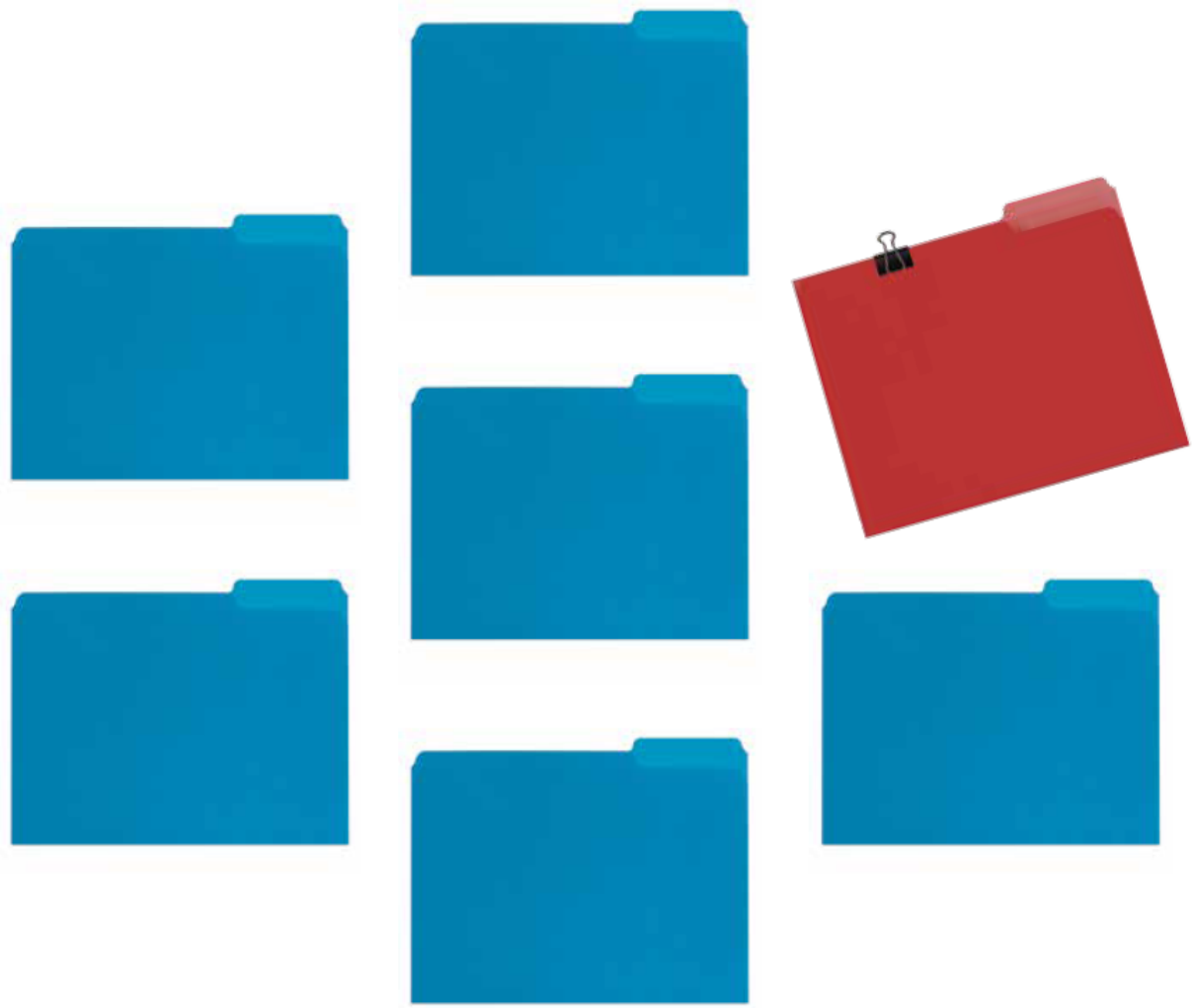
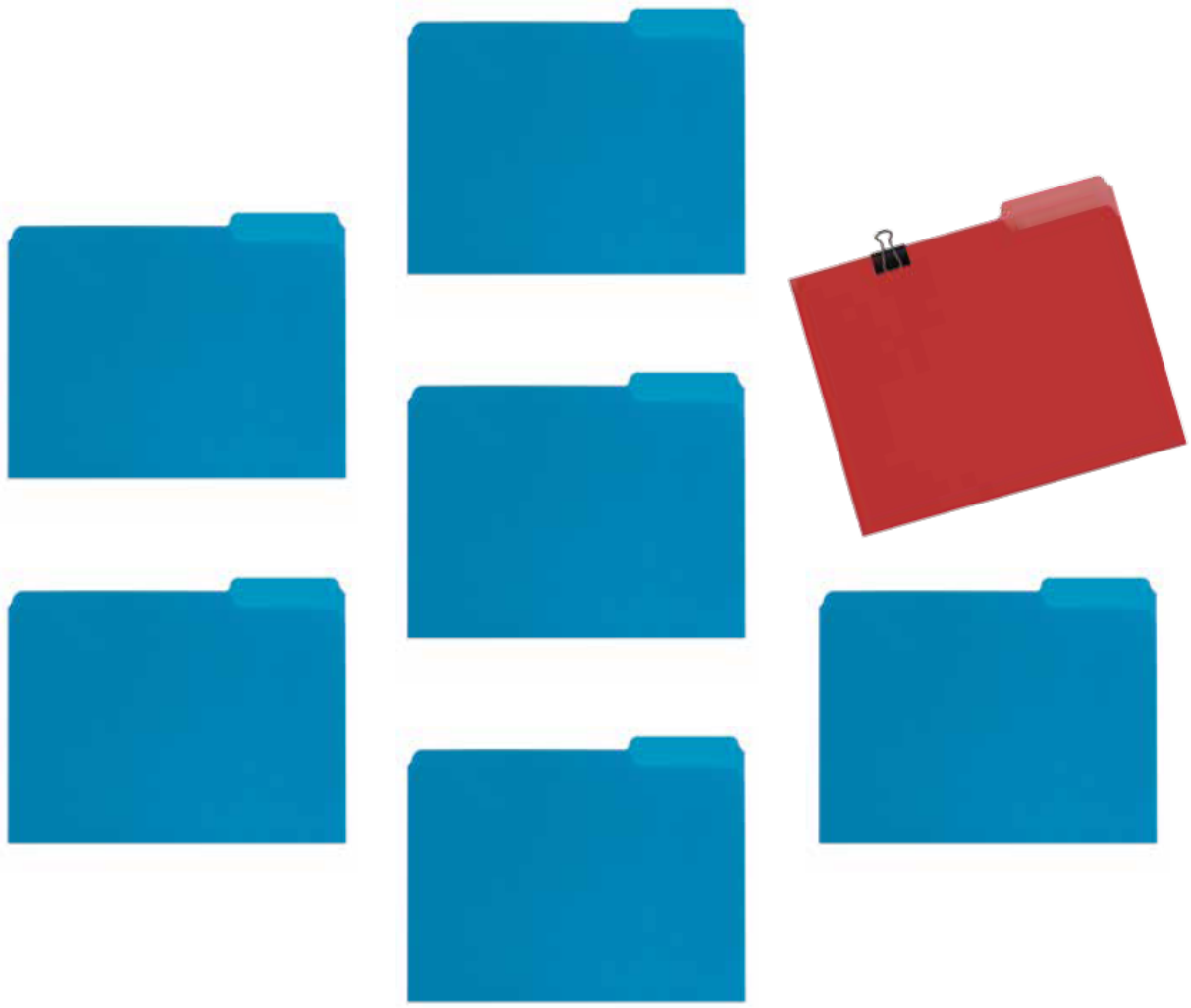
Unweaving the Dawn Raid Waive: Smart Prevention of Privilege Waiver for Multinational Corporations

Corporate, Securities, and Governance





CHEAT SHEET

- ***A shaky ideal.*** US-recognized attorney-client privilege may not be respected in all jurisdictions, especially during the chaos of a dawn raid.
- ***The special relationship.*** In the UK and other Commonwealth countries with common law traditions, privilege is nevertheless recognized as an absolute right.
- ***Plan ahead.*** Proactively protect privileged documents by identifying them, encrypting privileged materials and maintaining outside counsel on call in the case of a raid.
- ***Hope springs eternal.*** Even after a raid, recovering privileged documents is possible if you list the lost documents and quickly issue a written demand for their return.

In May 2015, Swiss authorities raided FIFA, the world governing body of soccer, seizing electronic data and documents, as well as arresting several FIFA officials in a United States-driven investigation

of racketeering, wire fraud and money laundering conspiracies. As the criminal prosecutions unfold in a case where the US Justice Department's international reach under RICO and money laundering allegations are reported will be contested, one may presume that the FIFA officials' defense lawyers will seek US privilege protections over some of the emails involuntarily collected en masse by the Swiss authorities.

In-house counsel increasingly are confronted by the risk of losing privilege over confiscated emails and other electronic data extracted from their organization's IT networks during government raids. Law enforcement data forensics teams have become a standard component of government high-tech investigations. These surprise office invasions are called "dawn raids" and, while they are best known as an investigative tool of the Directorate-General for Competition of the European Commission (EU Competition Directorate-General), they also are performed by other law enforcement branches and in non-European countries as well (see chart below). As to raids of corporate offices, these typically are related to investigations of antitrust, bribery and corruption.

The public and media frequently largely remain unaware of the frequency of dawn raids globally which, by some accounts, is increasing. Targeted companies have little incentive to publicize a raid on their offices although, sometimes, the media is notified or otherwise becomes aware, as with the high-profile attention paid the recent FIFA raid. Other highly publicized dawn raids occurred in November 2006 when German law enforcement simultaneously raided multiple Munich offices of Siemens AG, as well as the homes of Siemens employees, investigating allegations of bribery of foreign officials. In January 2008, the press reported that European Commission conducted dawn raids of pharmaceutical giants GlaxoSmithKline, AstraZeneca, Sanofi-Aventis, Pfizer and Merck, as part of a broad investigation of possible anti-competitive behaviors. It was reported that, in March 2011,the European Commission conducted a dawn raid on the premises of Deutsche Bahn AG, the German railway company, and some of its subsidiaries, investigating alleged anti-competitive conduct. Italy was reported to have conducted a series of dawn raids in 2014 on pharmaceutical companies, investigating alleged bid rigging and other antitrust and criminal allegations.

Companies sometimes seize the opportunity to prepare for a dawn raid if they learn that an investigation is underway (e.g., when regulators make public that they are investigating competition in a your industry or market). If in-house counsel are unprepared for the raid, it often plays out something like this: Your phone rings at 3:15 am, it's your in-house colleague in the Paris office and she's informing you that agents from the Competition Commission of the European Commission, investigating antitrust suspicions, are raiding the office. And the investigators are downloading emails and electronic documents from users on the local network, some of those being the local in-house legal team. Your colleagues were ordered to back away from their keyboards, and investigators begin culling through the file cabinets. A special technical unit corrals your local IT administrators and demands access to the office computer network. Within minutes they are downloading thousands of emails and electronic documents from the accounts of the office's executives and in-house counsel. Some of these you would consider privileged, however, it is difficult to determine which privileged materials, if any, have been taken. It can all happen in an hour or less, but the risk of loss of privilege can linger for years in litigations and investigations in the United States and around the world.

What is the best advice to provide to your French colleague? While there are publicized procedures in place to allow a target company's lawyers to intervene to shield collection of privileged communications, the procedures are not always followed, usually because the company being investigated has not prepared their legal team to intervene, or simply because the lawyer assigned to intervene to protect collection of privileged materials did not happen to be in the office on the morning of the raid. Or the regulator's agents insist on collecting what they wish.

In-house counsel’s best protection against the risk of loss of privilege is preparation. This article focuses on prevention of waiver of US-recognized privileges over documents collected in unannounced government raids of offices. First, we will identify countries where corporations should be most concerned about dawn raids, and whether or not those countries recognize US privilege protections when they collect evidence during raids. Then we’ll summarize US jurisprudence on whether or not privileges are deemed waived when otherwise-privileged documents are taken by foreign regulators, and what you can do to avoid waiver in US courts on those documents. Finally, we’ll suggest practical ideas corporate legal departments should consider to prevent such waivers.

Risk of government raids in foreign countries

European dawn raids have focused the attention of many legal departments, but governments around the globe have adopted the technique. Multinational corporations implementing programs to prevent privilege waivers are advised to consider the risks of raids posed at their offices throughout the world.

Recognition of US privileges outside the United States

A corporation’s first line of defense against waiver in dawn situations is to prevent the disclosure to

the raiding authority to begin with. One key question: What US privileges will the foreign government regulators recognize, and can be persuaded not to download and take back with them (or agree to return them unread)?

For example, under the procedures of the EU Competition Directorate-General, the target is supposed to provide all the requested privileged documents in a sealed envelope, so that a privilege analysis can take place. Documents that the EU Competition Directorate-General agrees are subject to the legal professional privilege ("LPP") will be returned, the rest will be retained by the Commission. However, the EU Competition Directorate-General does not recognize LPP for in-house counsel, a position reinforced by the European Court of Justice's latest statement on the question in its 2010 ruling in *Akzo Nobel Chems. Ltd. v. Comm'n*. In that case, Anzo Nobel fought to maintain privilege over emails taken by EU Competition Directorate-General agents from one of its UK premises during a dawn raid in 2003. The European Court of Justice relied on its 1982 decision that held that attorney-client privilege would only be recognized when communications "emanate from independent lawyers … not bound to the client by a relationship of employment." The 2010 decision found that "the requirement of independence means the absence of any employment relationship between the lawyer and his client." Thus, if a raid on one of your European offices has been conducted by EU Competition Directorate-General agents, even if your company's lawyers had been able to bundle their privileged documents into a sealed envelope to be screened for privilege protection by the EU Commission, that effort would be unsuccessful with respect to any claim of attorney-client privilege over in-house counsel communications with company executives.

The standard for privilege recognized by the European Union should be considered separately from that of its member states. The Akzo Nobel decision denying attorney-client privilege to in-house counsel does not extend to European member state courts and regulators because its limited recognition of LPP applies exclusively to matters under the jurisdiction of the European Court of Justice (including its General Court, also known as the Court of First Instance), which interprets European Union law, but not EU member state law, and the regulators of the European Commission. Privilege assertions over documents seized or sought by European member state regulators would be interpreted under the member states' laws' own recognition of the scope of legal privileges for that jurisdiction. For example, the Belgian Supreme Court recently ruled that legal advice provided by in-house counsel in communications seized in a dawn raid carried out by the Belgian Competition Authority (BCA) cannot be accessed and/or used against the employer of the author of the advice and shall be deemed confidential. The BCA was ordered by the Court to delete those emails from the record. However, as the chart [below] shows, the European member states tend to lean closer to the EU Commission's interpretation of LPP, which means efforts to protect privileges — particularly attorney-client privilege over in-house counsel communications with in-house clients — would likely be unsuccessful.

UPPER LEFT QUADRANT
Green = Recognizes Attorney Client Privilege
Yellow = Some Recognition of Attorney Client Privilege
Red = Does Not Recognize Attorney Client Privilege

BOTTOM LEFT QUADRANT
Green = Recognizes In-House Counsel Privilege
Yellow = Some Recognition of In-House Counsel Privilege
Red= Does Not Recognize In-House Counsel Privilege

UPPER RIGHT QUADRANT
Green = Recognizes Work Product Doctrine (Litigation Privilege)
Yellow = Some Recognition of Work Product Doctrine (Litigation Privilege)
Red = Does Not Recognize Work Product Doctrine (Litigation Privilege)

BOTTOM RIGHT QUADRANT
Green = Recognizes Privilege for Foreign Lawyers*
Yellow = Some Recognition for Foreign Lawyers
Red = Does Not Recognize Foreign Lawyers

* IF MEET LICENSING REQUIREMENTS, CAN THEY INVOKE SAME PRIVILEGES AS NON-FOREIGN LAWYERS?

	RECOGNIZES ATTORNEY-CLIENT PRIVILEGE	RECOGNIZES WORK-PRODUCT	RECOGNIZES IN-HOUSE COUNSEL	RECOGNIZES FOREIGN LAWYERS
England/Wales	Green	Green	Green	Green
Canada	Green	Green	Green	Green
United States	Green	Green	Green	Green
Hong Kong	Green	Green	Green	Green
Australia	Green	Green	Green	Green
India	Green	Green	Green	Green
South Africa	Green	Green	Green	Green
Italy	Red	Red	Red	Red
Germany	Yellow	Red	Yellow	Green
France	Yellow	Red	Red	Yellow
Spain	Yellow	Red	Yellow	Green
South Korea	Yellow	Red	Yellow	Yellow
Japan	Yellow	Yellow	yellow	Red
Brazil	Yellow	Red	Yellow	Red
United Arab Emirates	Yellow	Yellow	Red	Yellow
Switzerland	Yellow	Yellow	Red	Yellow
China	Red	Red	Red	Red
Russia	Red	Red	Red	Red
Mexico	Yellow	Red	Yellow	Red
Israel	Yellow	Yellow	Green	Yellow
Sweden	Yellow	Yellow	Red	Yellow
Singapore	Yellow	Yellow	Yellow	Yellow

The bright spot for US multinationals is the recognition of privileges similar to those in the US by England and other Commonwealth countries with common law traditions. In England and Wales, courts and regulators recognize an “absolute right” to legal advice privilege (also known as solicitor-client privilege, similar to US attorney-client privilege) and litigation privilege (similar to the US work-product doctrine). While, in the United States, the work-product doctrine is triggered when litigation is reasonably anticipated, under English law the litigation privilege becomes available when litigation is reasonably in prospect and the document must be created for the dominant purpose of litigation, meaning there must be more than a mere possibility of litigation, although the chance of litigation need not be greater than half. Privileges are recognized equally for both in-house and external counsel, as well as foreign lawyers.

As shown by the above chart, recognition of the full range of US privileges are found nowhere else, with the closest being the common law jurisdictions in the former British Commonwealth nations of Canada, Australia, India and, to some extent, Hong Kong. Each of these common law jurisdictions take somewhat different approaches, summarized in the chart below, you should seek local counsel for more detail. For example, Canadian courts recognize legal advice and litigation privileges much as the England courts, although the contours of the privileges are slightly different, and the general

trend for Canadian courts is to construe privilege narrowly.

Civil law jurisdictions predominate across Europe (e.g., France and Germany) and around the world, and their judicial systems typically engage in little or no discovery during litigation and for whom privilege protections are, consequently, less utilized and appreciated. As a consequence, attempts to retrieve US privileged documents from a national regulator in civil law jurisdictions likely will be unavailing because they do not recognize the privileges, in particular privilege over communications by in-house counsel.

How US privileges can be preserved or waived in US courts following a dawn raid

Is it fair or just for a party to lose US privilege when a document's disclosure to the foreign regulator is compelled or involuntary? How do US federal courts decide whether a waiver has occurred when a foreign regulator in a dawn raid confiscates a privileged document? While we are aware of no US law, rule or judicial decision directly on the point, Federal Rule of Evidence 501 states that:

The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise:

- The United States Constitution;
- A federal statute; or
- Rules prescribed by the Supreme Court.
- As it happens, Supreme Court Standard 512 is on point, and reads as follows:

Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was (a) compelled erroneously or (b) made without opportunity to claim the privilege.

Supreme Court Standard 512 was approved by the Judicial Conference and the US Supreme Court for inclusion in the Federal Rules of Evidence, but the US Congress struck it before enacting other proposed rules into law. It remains, however, as Supreme Court Standard 512 and "retains considerable utility as a guide to the federal common law referred to in Rule 501."

Privileged documents taken by foreign regulators in a dawn raid without legal intervention should qualify as a disclosure of privileged material "(b) made without opportunity to claim the privilege." As to how Supreme Court Standard 212 is interpreted by courts, one treatise puts it this way:

> "[C]ourts will look to whether an objection was made and preserved at the time the disclosure was compelled. If such objection was made, it will generally be held that the disclosure did not operate as a waiver with respect to all future parties seeking similar disclosure. The converse, however, is generally equally true. Failure to have made a reservation of the privilege may well be deemed to have constituted a definitive waiver with respect to subsequent parties."

While we have found no US cases concerning privileged documents confiscated by a foreign regulator, other involuntary disclosure cases support the requirement that the holder of the privilege take reasonable steps to reclaim the privileged material. For example, in US v. de la Jara, 973 F.2d 746 (9th Cir. 1992), the Ninth Circuit found waiver where the defendant's privileged communication

with his lawyer was swept up in a search of his home and office by federal and state agents pursuant to a search warrant. The decision states that:

> "When the disclosure is involuntary, we will find the privilege preserved if the privilege holder has made efforts 'reasonably designed' to protect and preserve the privilege…. Conversely, we will deem the privilege to be waived if the privilege holder fails to pursue all reasonable means of preserving the confidentiality of the privileged matter."

The Court went on to find a waiver in that particular case because:

> "[Defendant] did nothing to recover the letter or protect its confidentiality during the six month interlude between its seizure and introduction into evidence. By immediately attempting to recover the letter, appellant could have minimized the damage caused by the breach of confidentiality. As a result of his failure to act, however, he allowed 'the mantle of confidentiality which once protected the document[]" to be 'irretrievably breached,' thereby waiving his privilege."

Similarly, in *US v. Swenson*, 2014 WL 1577765 (D. Id. 2014), the US District Court found privileged waived where, although the privileged documents were seized when a federal trustee removed boxes of documents from the defendant's office, the defendant vigorously asserted privilege over *other* documents but apparently had not noticed the privileged document later at issue and did not pursue privilege protection for it until over four years later when the government included it in its trial exhibit list and, even then, did not claim privilege until nine days later. Other US decisions evaluate circumstances to decide whether the holder of the privilege took sufficient steps to reclaim the privileged and preserve the confidentiality of the material.

As summarized by then-US Magistrate Judge Paul W. Grimm in *Hopson v. Mayor of Baltimore*, in instances of nonconsensual disclosure of privileged material, "provided the holder of the privilege has taken all reasonable measures under the circumstances to prevent disclosure, but was prevented from doing so by matters beyond his control, a finding of waiver would be unfair and improper."

Clearly, the path to non-waiver of privileged documents taken during a dawn raid — relying on Supreme Court Standard 212, and the cases that interpret it, is to take all reasonable measures under the circumstances to reclaim the privilege. The cases inform us that this includes:

- That an objection was made and preserved at the time the disclosure was compelled; and
- Specificity as to the particular privileged document(s) at issue.

Best practices for avoiding waiver in foreign offices

The key to avoiding waiver involves planning and training. Here are some proactive suggestions to consider:

- **Clearly identify privileged documents as such.** Consider having your European in-house lawyers (and executives who regularly communicate with company lawyers) create folders marked "Privileged" for privileged emails and documents, and mandate that all privileged emails have "Privileged" in the subject line. This will make it much easier to screen them out

from collection by the regulators or production by the company. The body of emails and documents should state “Confidential Attorney-Client Communication.”

- **Create a data map** showing where privileged materials are located on the network. This will be useful to guide investigators away from a wholesale collection of data, and at least will provide grounds for an objection to collection of data from where the data map shows privileged materials are held.
- **Discourage European in-house lawyers from using email or other written communication with in-house clients** on sensitive topics that might be the focus of a dawn raid (e.g., antitrust). Train them on which regulators of interest do not recognize in-house counsel privilege, the risk that emails or letters will not enjoy privilege, and encourage them to communicate with their clients verbally.
- **Use only “privilege lawyers”** (i.e., outside counsel, preferably US but also can be outside counsel licensed in the UK or other common law jurisdictions that sufficiently recognize privileges) on matters, like antitrust issues that may be the impetus of a dawn raid. Avoid including European in-house counsel on any such communications but, if you do, also copy “privilege lawyers” as well.
- **Consider encrypting privileged materials.** If they are collected in a dawn raid, they will not be readable. Hence, there was no disclosure. Arrange with the foreign regulator to make a separate production of encrypted materials, which will provide an opportunity to assert privileges.
- **Train your European legal team on strategy, tactics and procedures to implement when a dawn raid occurs.** This should include engaging directly with the investigators to (1) understand what data they may be collecting, (2) showing them the data map of where privileged materials are stored and should not be collected; (3) closely track their data and paper collections the better to quickly know what privileged materials may have been collected; and (4) make any relevant objections verbally during the course of the raid and soon thereafter in writing.
- **Rehearse.** Hold unannounced mock dawn raids at your European offices and practice the tactics and procedures they have been taught to be ready for the real thing. Consider searching data held by your in-house legal team and key executives likely to be investigated to see what the regulators would obtain if they did the same (where data privacy laws are stringent, you may wish to obtain prior consent from those lawyers and executives before searching their data for potentially privileged materials). Involve outside counsel in the mock dawn raid (most global law firms offer guidance and assistance) to preserve privilege and to rehearse outside counsel’s rapid intervention (see next).
- **Have outside counsel on “dawn raid” duty.** You may find it useful to have outside counsel present, as the investigators may be trained not to consider in-house counsel as true lawyers for the company and thus ignore them. Some companies have lawyers from outside counsel available each morning to arrive quickly in the case of a raid. While outside counsel is in a better position than in-house counsel to stand their ground, the regulatory investigators can be aggressive, and have been known to push back even on outside counsel with charges of “obstruction.”

Once a raid has transpired and privileged documents are taken away by the agents:

- **Fully document** the circumstances of the raid, any communications with the agents by legal or IT, and which potentially privileged materials were collected.
- **Review the potentially privileged documents** to provide detailed information to substantiate the claim of privilege. Ascertain whether any appear on privilege logs in any of the company’s litigations and determine whether their disclosure to the foreign regulator

requires so informing the court or other parties.

- **Quickly send the regulators a written demand for the return of the privileged materials.** Detail the basis for the claim of privilege for each.
- **Initiate whatever legal proceeding is available** to contest the disclosure of the privileged materials.
- **Continue to press your demand for the return of the privileged materials**, at least to the point where a US court would find “reasonable.”

Conclusion

With advanced planning and preparation as suggested above, the risk of waiver can be reduced. The aggressiveness of such preparation should be commensurate with the downside risk that privilege waiver poses to your company. Each company will make its own risk assessment, and dedicate resources appropriately.

In any case, it is critical to understand the local jurisdiction’s law as to recognition of privileges and the procedures employed by that jurisdictions regulators that employ dawn raids. This article provides a starting point in that process.

Further Reading

Case C-550/07, Akzo Nobel Chems. Ltd. V Comm’n, 2010 Euro-Lex CELEX LEXIS 62007J0550, P44 (Sept. 14, 2010) (ruling that documents seized during an investigatory raid were not subject to the attorney-client privilege because in-house counsel lack professional independence from their employers).

Case 155/79, AM&S Eur. Ltd. V Comm’n, 1982 E.C.R. 1575, 1611, available at 1982 EUR-Lex CELEX LEXIS 61979J0155.

Akzo Nobel, 2010 EUR-Lex CELEX LEXIS 62007J0550, P 44.

See Andrew R. Nash, In-House But Out in the Cold: A Comparison of the Attorney-Client Privilege in the United States and European Union, 43 S. Mary’s L.J. 453, 469 (2012).

[add cite for Belgian case] (Belgian Court of Appeal clarified that the term “advice” needs to be interpreted broadly. It covers not only final legal advice, but also preliminary internal correspondence preceding the final advice and draft legal advice).

By “absolute right” English courts mean that even probative privileged evidence can be kept from the court, and is not subject to any balancing act of competing public policies. Greenwald & Russenberger, Privilege and Confidentiality: An International Handbook at ¶6.2; Legal Privilege Advice, E. & P. 2005, 9(2), at 132; see *R v Derby Magistrates’ Court*, ex parte B [1996] AC 487.

Greenwald & Russenberger, Privilege and Confidentiality: An International Handbook at ¶¶6.1-.2.

Greenwald & Russenberger, Privilege and Confidentiality: An International Handbook at ¶6.18; see *USA v Philip Morris Inc. and British American tobacco (Investments) Ltd* [2004] EWCA Civ 330.

Greenwald & Russenberger, Privilege and Confidentiality: An International Handbook at ¶6.11.

Greenwald & Russenberger, Privilege and Confidentiality: An International Handbook at ¶3.2.

Weinstein's Federal Evidence at ¶512.02; Saltzburg, Federal Rules of Evidence Manual § 501.02[3] ("Most Courts have held that the recommendations of the Advisory committee and the Supreme court are a useful guide, though not controlling in determining the existence and scope of a federal privilege."); see also then US Magistrate Paul Grimm's discussion of Supreme Court Standard 512 and cases discussing it in *Hopson v Mayor and City Council of Baltimore*, 232 F.R.D. 228, 240-46 (D. Md. 2005).

Epstein, The Attorney-Client Privilege and the Work-Product Doctrine (5th Ed., Volume 1) at pp. 412-413.

But see In re Vitamin Antitrust Litigation, 2002 U.S. Dist. LEXIS 26490 (D.D.C. Jan. 23, 2002) (Special Master found, albeit as a close question, that production of privileged documents by Rhone-Poulenc to the Mexican Federal Competition Commission was compelled and, thus, no waiver occurred, where the production was under threat of the imposition of a fine if the "obligations" were not fulfilled).

US v de la Jara, 973 F.2d at 750, *citing* Transamerica Computer v. International Business Machines, 573 F.2d 646, 650 (holding privilege no waived where IBM produced privileged documents pursuant to a court order, pursuant to an order that reserved the right to pursue privilege claims).

US v de la Jara, 973 F.2d at 750 (citations omitted).

[cite cases from Epstein, pp. 412-413, others?]

Hopson v. Mayor of Baltimore, 232 F.R.D. 228, 243 (D.Md. 2005).

See John Heaps and Paul Smith, Fighting to Gain and Retain In-House Privilege, Metropolitan Corporate Counsel, November 1, 2006.

The authors wish to thank Spence Packer and Giancarlo Capurro for their invaluable assistance with this article.

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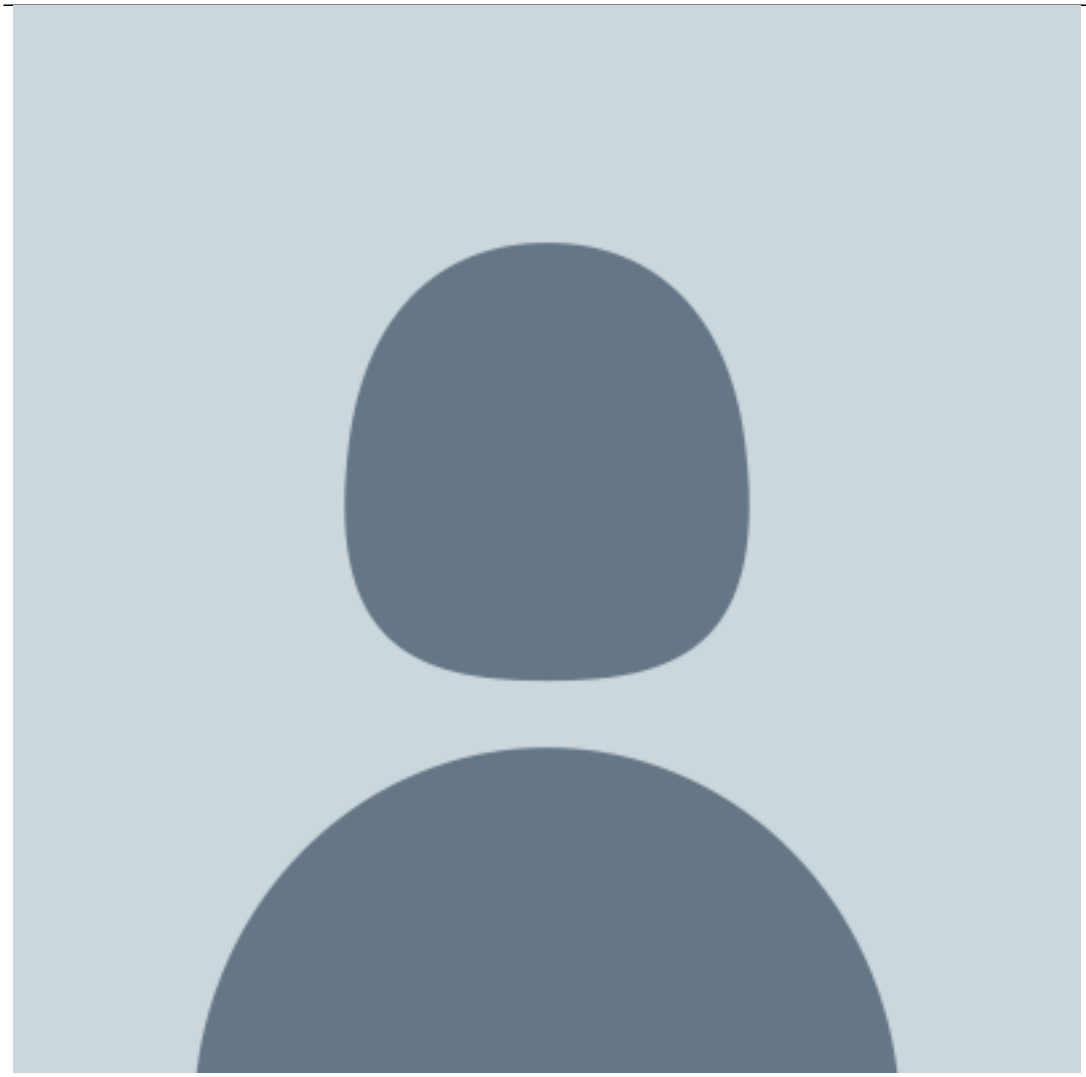

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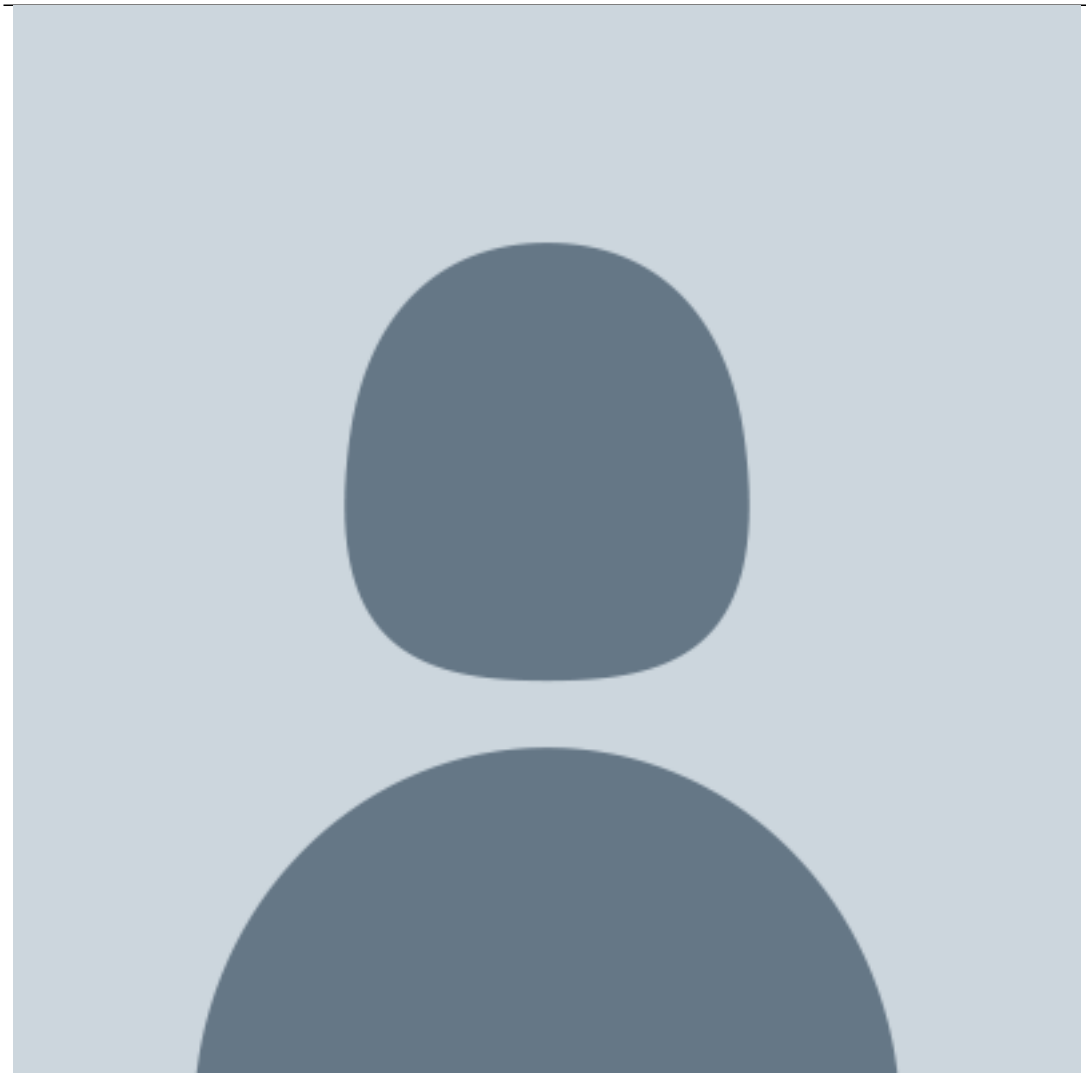

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