

***Akzo Nobel v. European Commission and in-house privilege, status:***

Update for the ACC European Chapter leadership – 3 February, 2010

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As you are probably well aware, the Akzo case concerns the application of legal professional privilege in the in-house context in Europe, and ACC Europe has filed petitions as intervenors in the case. In the Akzo case, a Dutch in-house lawyer (the Netherlands recognize in-house status and privilege rights) advised his client on a matter that involved EU law and in the course of the case, the adversary sought access to advise that the Dutch in-house counsel gave the client. The court ruled that the Dutch lawyer could not attach his Dutch privilege status to the EU matter if there is no EU policy recognizing privilege. So our argument is and has been that the EU should adopt a status for in-house lawyers - an adoption which would disagree with most member jurisdictions' current policies.

Two lower courts in the EU have ruled against privilege applying in this case. ACC Europe, the Akzo company and several other intervenors assert that privilege should apply, but this finding would overturn the traditional interpretation / caselaw precedent that in-house counsel in European matters cannot carry privilege. Most would suggest that the current status of caselaw under the AM&S decision in the 1980's makes a "win" for us on this issue unlikely.

The importance of this case to in-house counsel is obvious: without a decision for Akzo in this case, there is little or no legal professional privilege for non-EU lawyers (both in-house counsel who are not recognized in the EU even if locally licensed in an EU member state that does recognize status for in-house lawyers, and outside counsel who are not licensed in an EU jurisdiction. There is no question that ACC Europe should have a strong voice in the debate. As things currently stand, the majority of EU member states do not recognize in-house status and privilege and whether we win this case or lose it, we should probably begin to attack those rules state by state.

Additionally, there are elements to this case that could end up applying to both in-house and outside counsel not admitted in an EU jurisdiction and counseling on EU matters across jurisdictions, or wherever they reside. The Dutch lawyer discussed the privileged issue with outside counsel not admitted in the EU. In dicta, the previous Akzo decisions suggest this sharing of information could have created a waiver of privilege if they hadn't ruled that the in-house counsel couldn't carry the privilege on his own in the first place. Therefore, it is quite possible that an adverse ruling could go even further against our interests – codifying the dicta about outside lawyers as well, and suggesting that privilege cannot apply to any non-EU lawyers, including outside counsel providing advice to their clients in Europe.

This case presents a perfect opportunity to illustrate to the EU's highest court the negative impacts of regulations that do not accord practice and privilege rights in individual EU member states. Because EU member states that do not recognize privilege remain in the majority it is difficult to argue they should change their rules. Ultimately, for in-house lawyers this case places long-standing policy against the reality that lawyers do indeed practice across borders and that in-house counsel are increasingly likely to represent their clients in important matters.

Granted, it is an uphill battle, but with a fantastic result if we succeed. We would at long last have a platform to attack privilege status in the EU member states that don't recognize in-house counsel status – and they would be left fighting the tide.

### **What's coming next:**

The court asked for briefing from the parties on a smaller issue in the case, which both Akzo and the EU Commission provided. There is now an oral argument possibility on this and the overall issues in the case – most likely the last chance to deliver arguments before the EU's highest court issues their ruling. The court's highest judge has announced that he will convene a "grand panel" - before all the judges of the EU high court from every member state - to hear the orals. Usually, a smaller panel of a few judges is chosen, so this indicates the court is very seriously interested in getting this case right, and with finality.

After the parties argue, the intervenors, including ACC, will be afforded 15 minutes each to argue their positions. Our counsel is preparing for the orals – we are represented by Covington's Brussels office, which is very highly regarded for their appellate practice in the EU. Georg Berrisch (<http://www.cov.com/gberrisch/>), our counsel, along with David Hull (<http://www.cov.com/dhull/>) who will not argue but advises us and helps to draft, will deliver the argument. Arguments are Feb. 8. No written submissions are allowed, so this is strictly a hearing opportunity.

The intervenors have been meeting by conference call to coordinate strategy and make sure that we are each using our time to add value and build a stronger whole. It appears that our counsel for ACC Europe will deliver the last argument. We'll be unifying the whole and giving the conclusion, since our briefs have been arguing the overall policy issues from the start. The other intervenors, limited to arguing their positions as they have made them previously, will stay more strictly on the specifics of the law, often on the law of individual member state positions.

### **Conclusion:**

There will certainly be much media and member interest in this case and our arguments in the coming weeks and months, even if this hearing does not generate much press. So if you have any questions regarding our arguments or strategy, now or later, please do not hesitate to contact me directly: I would also be happy to connect you with our counsel at Covington if you would like to talk to them, as well. I would be very appreciative if you could mention their great work for us when opportunities arise (such as if you're reporting on this in your newsletters/emails to members); the firm has done this work largely pro bono for many years, and what I think they deserve is our recognition and gratitude as it might be most beneficial to their practice. Thanks!