

THE DECISION OF THE EUROPEAN COURT OF JUSTICE ON THE AKZO-NOBEL CASE**Background**

Much has been said and written about the issues at stake since two Dutch companies brought action against the EC in 2003 to assert the legal professional privilege (as it is called in the case, *i.e.* legal privilege) to prevent disclosure and discovery of communications involving in-house attorneys, in what is known as the *Akzo Nobel Chemicals* case or more simply *Akzo*.

On September 17, 2007, the EU's lower court in Luxembourg, European Court of First Instance (whose name has since been changed by the Lisbon Treaty to the General Court), issued a first ruling in *Akzo*, by which it held, *inter alia*, that legal professional privilege is not available to protect from discovery and disclosure in an EU competition law case internal communications between company management and an in-house lawyer admitted to the Bar and member thereof.

The case was then appealed before the European Court of Justice ("ECJ") as case *C-550/07P Akzo Nobel Chemicals Ltd. & Akros Chemicals Ltd. v. Commission*.

Before the ECJ, an all-day hearing – involving not only Akzo Nobel Chemicals / Akos Chemicals Ltd. and the EC as parties to the case, but also various professional associations (including the ACC through its European Chapter)ⁱ and several EU Member Statesⁱⁱ as interveners – was held in Luxembourg on February 9, 2010. On April 29, 2010, Advocate-General Juliane Kokott delivered her Opinion before the ECJ, by which she recommended that the appeal of the General Court's decision be dismissed. All of these documents are available online on ACC's Akzo webpages at <http://www.acc.com/advocacy/professional-privilege-in-the-eu.cfm>.

The final ruling in this case was handed down by the ECJ solemn Grand Chamber (13 judges) on September 14, 2010; the ECJ affirmed the Advocate-General opinion and recommendation, as discussed below.

The issue of legal professional privilege has been consistently debated in Europe for almost thirty years now, since the seminal 1982 ECJ ruling on privilege in case 155/79, *AM&S Europe v. Commission*. In that case, the Court ruled that privilege was not available to prevent disclosure and discovery in competition law investigations of communications involving in-house lawyers where the lawyer was “bound to the company by a relationship of employment” and backed the Commission’s contention that it had the power during surprise investigations at a company’s premises (infamously dubbed “**dawn raids**”) to copy and use as evidence of an infringement of EU competition/competition law rules documents emanating from in-house counsel even where the documents contain only legal advice to company management.

One shall bear in mind that, from the viewpoint of the company management involved, dawn raids involve unannounced visits by law enforcement authorities to the facilities of unsuspecting companies for the purpose of collecting damaging documents. The company probably had no notice and the Commission does not need to justify its decision to target the company – they may seize documents as they wish, including for the purpose of what many would call “fishing expeditions.” All too often, the dawn raid is only the beginning: the Commission is viewed by some to be the investigator, prosecutor, judge and jury, all in oneⁱⁱⁱ.

Shortly after the ruling in *AM&S*, another landmark case was brought as a result of attorney communications seized during a dawn raid, namely the Commission *John Deere* decision in 1984. In that case, the Commission had seized a memorandum from John Deere Inc’s general counsel to company managers in Europe – in which the general counsel expressed the view that company policies may have been violating EU law. The Commission used the

memorandum as **evidence**^{iv} that John Deere, Inc. not only willingly violated EU competition/competition law rules, but it did so *knowingly*^v as well.

Since the ECJ's AM&S ruling in 1982 and the Commission's John Deere decision in 1984, the debate on legal professional privilege has raged, even though the actual issue at stake in AM&S has arisen only rarely in practice. It should be emphasized that the principle as defined in AM&S and in Akzo is defined in narrow terms: it applies only in the specific EC, setting of an EU antitrust/competition law investigations, and it does not extend to other situations in which privilege could be invoked (which, as we will see *infra*, would be subject to the national law of the EU Member States concerned, not EU law *per se*).

Therefore, when the events in *Akzo* arose in 2003, they offered a rare opportunity to revisit the principle set out more than 20 years earlier in *AM&S*. The facts relevant to the case, as appealed before the ECJ in *Akzo*, are not identical. In *Akzo*, the Commission refused to honor the privilege even though the documents it seized from the premises of an Akzo Nobel subsidiary emanated not only from an in-house counsel bound by an employment agreement to Akzo Nobel but an in-house lawyer who was *also* a member of the Amsterdam Bar. After the dawn raid the company asserted that legal professional privilege applied to the internal emails sent by the in-house lawyer to company management. The in-house counsel had signed an agreement with the Akzo Nobel subsidiary which specifically acknowledged his independence^{vi}, which would have permitted the company to assert privilege under Dutch law. But the EU's Court of First Instance (now the General Court) in its lower court ruling of September 17, 2007^{vii} ruled that no such protection applied under EU law. The EU's lower court ruled that a lawyer employed by a company could not be sufficiently independent to satisfy the independence requirement previously laid down in the seminal *AM&S* judgment and expressly rejected the notion that a lawyer's independence for purposes of privilege in EU competition/competition law investigations should be determined by reference to such lawyer's membership in a Bar and the professional and ethical requirements deriving therefrom.

Summary of the Decision

As illustrated above, the ECJ in its ruling followed the Opinion of Advocate-General Kokott to dismiss the appeal and thus confirmed that the protection of communications between lawyers and their corporate clients under EU competition/competition law (known in the EU as “legal professional privilege”) extends *only* to communications between a company and an external lawyer admitted to the Bar of a Member State of the European Economic Area (“EEA”)^{viii}, and that all other communications are not protected, including internal exchanges between company management and an in-house lawyer (employed by the company) who is a member of a professional Bar.

One may summarize Advocate General Kokott’s position as follows:

- In *AM&S*, the ECJ “unequivocally linked” the requirement of independence “to the fact that the lawyer in question must not be in a relationship of employment with his client”.
- Independence of a lawyer had been defined in *AM&S* as having two cumulative components: (i) ethical obligations and (ii) absence of an employment relationship with the company.
- The dual condition set out in *AM&S* should be maintained because in-house counsel – albeit a member of the Bar and thus subject to professional and ethical obligations – cannot enjoy the same degree of independence as outside counsel. This is due to (i) the propensity to follow the company’s work instructions, and indeed the “considerably stronger personal identification with the undertaking for which they work (...) than would be true of external lawyers in relation to the business activities of their clients” which could cause the in-house lawyer to orient legal advice towards being “acceptable” to the company as employer; (ii) the “*complete economic dependence*” of an in-house lawyer as a full-time employee of the company (whereas external lawyers typically having a plurality of clients, can more freely “*withdraw [their] services of [their] own accord in order to safeguard [their] independence*”; and (iii) an in-house lawyer lacks “*the necessary distance from the client – his employer – that would characterize genuinely*

independent legal advice”, including with regard to management of conflicts of interest issues (worst case scenario): *“The functional departments of an undertaking [being] tempted to misuse the company’s or group’s internal legal department as a place for storing illegal documents such as cartel agreements and records of meetings between the parties to those cartels and of the modus operandi of the cartel”*.

In its ruling, the ECJ Court followed the Opinion of Advocate General Kokott and dismissed the appeal. In practical terms, this means that the *status quo* remains in force, as it derives from the original *AM&S* ruling in 2007 and the first instance ruling in *Akzo* in 2007.

Scope of the Decision: competition proceedings and investigation conducted by the Commission

In practical terms, the ECJ ruled that:

- In competition / competition law investigations conducted by the EC, the scope of legal professional privilege will continue to exclude communications between company management and in-house counsel, regardless of whether in-house counsel is a member of a Bar or has executed an independence agreement with his/her employer. In such EU cases, pursuant to a distinction deriving from the *AM&S* ruling, the scope of legal professional privilege also excludes external counsels who are admitted only to a Bar outside of the EEA and not the Bar in an EU Member State or Iceland, Lichtenstein or Norway.
- The Court’s ruling will relate exclusively to investigative powers granted to the EC under EU law. The *Akzo* case law will not apply to any other cases in which legal privilege issues may arise, including those cases under which national competition authorities enforce competition/competition law rules pursuant to domestic enforcement rules and not EU enforcement rules. Actually, since the time that the *AM&S* judgment was handed down almost thirty years ago, incidents of legal professional privilege such as that giving rise to the *Akzo* ruling have been rare. *In concrete terms, this means that the overwhelming majority of potential legal*

privilege cases or incidents will not be affected by the Akzo ruling at all.

Except for the very limited scope of cases in which the *Akzo* ruling will apply, corporate counsel working in or with the European Union will have to deal with the hodge-podge of rules in legal privilege in the 27 Member States, some of which – according to Advocate General Kokott – are not even clearly established in 2010.

- However, materials produced in an EC Competition law investigation are now waived for other purposes, and materials that most attorneys and clients would assume are privileged because they were generated by lawyers recognized by their “home” jurisdictions – such as US, Canadian or Australian lawyers, to name a few, both inside and outside counsel, can be seized in a raid since the EC’s position is that only documents created by an EU recognized counsel can carry privilege, and that excludes all non-EU admitted lawyers and all in-house counsel. There are those who are concerned that such a radical policy will incite other regulators or jurisdictions to copy this policy in the future, since it has such prominence and convenience for prosecutors and regulators, even as it has limited applicability to competition law investigations currently – the concern is that this becomes the “template” for future EU legal decision-making in other areas of law.
- Last but not least, it should be noted that under EU enforcement rules, the EC may ask officials of the national competition authority – and often does – to assist it in carrying out its investigations: in such cases, the *Akzo* ruling will apply, not the national rules on legal privilege.

Thus, the technical principle as defined first in *AM&S* and then in *Akzo* is narrow in terms: it applies only to the power of the EC in its EU competition/competition law investigations and it does not extend to other situations in which privilege could be invoked. In these other situations privilege claims are evaluated in reference to the national law of the countries concerned, not EU law.

Although the ruling by the ECJ in *Akzo* has limited legal effect outside EU competition law investigations conducted by the EC, it could have *symbolic consequences* on a global scale, as an

alternative to applying the disparate rules on professional privilege worldwide. The complexity of legal privilege on a worldwide scale is discussed below.

ⁱ In addition to the ACC, European Chapter: Conseil des barreaux européens (CCBE), Algemene Raad van de Nederlandse Orde van Advocaten, European Company Lawyers Association (ECLA), International Bar Association (IBA).

ⁱⁱ Ireland, Netherlands, United Kingdom.

ⁱⁱⁱ Burkard, P.H., “Attorney-Client Privilege in the EEC: The Perspective of Multinational Corporate Counsel”, 20 Int’l Law 677 (Spring 1986).

^{iv} “Deere and Company knew that such conduct and, in particular, the contractual export ban, was contrary to EEC and national competition law. It was advised on this by its in-house counsel”. Commission in the John Deere case, note 1, at point 21 (emphasis supplied).

^v Cf. Commission decision of December 14, 1984 (« John Deere »).

^{vi} Under Dutch law, Amsterdam bar membership and signature of the independence agreement entailed protection of legal advice by the in-house counsel by Dutch rules in attorney-client privilege.

^{vii} Joined cases T-123/03 and T-253/03, Akzo Nobel Chemicals and Akros Chemicals v. Commission.

^{viii} The EEA comprises the 27 Member States of the European Union plus three countries which are members the European Free Trade Association: Iceland, Lichtenstein and Norway.