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## No legal privilege in EU competition law investigations for in-house lawyers: The ECJ's *Akzo Nobel* Judgment

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The European Court of Justice (ECJ) has issued its judgment in a long-running and highly anticipated appeal concerning the extent of legal professional privilege in EU competition law investigations. Yesterday, in *Akzo Nobel Chemicals Ltd v. Commission*,<sup>1</sup> the Court confirmed long-standing EU case law, under which communications between in-house lawyers and their clients are not covered by legal professional privilege in EU competition law investigations.

**Background.** The EU rule on legal professional privilege was first established in the *AM&S*<sup>2</sup> case, where the ECJ stated that legal professional privilege only applies to written communications between a lawyer and a client when two cumulative conditions are met. First, the communications must be made for the purpose and in the interest of the client's rights of defense (*i.e.*, due process). Second, the communications must emanate from "an independent lawyer, that is to say, one who is not bound to the client by a relationship of employment." According to this reasoning, in-house lawyers, since they are economically dependent on their employers, are not sufficiently independent to deal effectively with conflicts of interest between their professional obligations—including collaboration with the courts in the administration of justice—and the aims and wishes of their

client (*i.e.*, their employer).

***Judgment firmly confirms existing law.*** In *Akzo Nobel*, the ECJ reaffirmed this reasoning. It rejected an argument that in-house lawyers enrolled in a Bar or Law Society are just as independent as external lawyers, since they are subject to the same obligations of professional conduct and discipline. The Court confirmed its previous case law, finding that independence requires the absence of any employment relationship between a lawyer and his client. Thus, legal professional privilege does not extend to communications with in-house lawyers within a company or group. The judgment states that an in-house lawyer's position as an employee, by its very nature, does not allow him or her to ignore the commercial strategies pursued by his or her employer, thus affecting his or her ability to exercise professional independence. For the same reasons, the Court rejected the claim that refusing to apply legal professional privilege to correspondence exchanged with an in-house lawyer violates the principle of equal treatment, *i.e.*, that in-house counsel admitted to a Bar organization should be treated equally with external counsel.

The Court also rejected Akzo Nobel's alternative claim that *AM&S* should be reinterpreted due to significant developments in the legal landscape since that ruling. The ECJ found that the legal situation in the EU Member States has not evolved enough to justify a change in case law. The Court rejected the argument that the 'modernization' of EU competition law through Regulation 1/2003, which requires companies to self-assess compliance with EU competition rules, has increased the need for open and candid in-house legal advice, thereby justifying extending the privilege to communications with in-house lawyers. Indeed, the ECJ made a point of noting that Regulation 1/2003 does not address the subject of in-house legal privilege, but instead "aims to reinforce the extent of the Commission's powers of

inspection, in particular as regards documents which may be the subject of such measures." (*Akzo Nobel*, point 86.) In addition, the Court stated that there was no predominant trend in the EU's 27 Member States to extend legal professional privilege to in-house counsel, which could justify a change of approach to this issue at EU level.

The Court found that the rights of defense, which include the right freely to choose a lawyer to provide legal advice, are not impaired by applying certain restrictions and conditions regarding the practice of law, such as the rules on legal professional privilege.

### ***Implications for in-house lawyers***

The operational result of the Court's ruling is that in-house compliance must continue to be anchored to external counsel, in preparation for the protection of rights of defense, in order to benefit from EU legal professional privilege. Unfairly in the eyes of many, in-house lawyers still cannot benefit from legal professional privilege when the European Commission is conducting a competition law investigation. It is important to bear in mind the following points, however:

The Court leaves the door open for privilege to protect one specific type of in-house lawyer communication. Documents written by in-house lawyers with the sole purpose of seeking external legal advice in the exercise of a company's rights of defense may be covered by privilege even if they have not been exchanged with an external lawyer or have not been created for the purpose of sending to an external lawyer. The Court's ruling does not address this issue, which was decided in *Akzo* at the previous instance.<sup>3</sup> Also, the Court's ruling does not change the principle, recognized after *AM&S*, that in-house communications within a company that are limited to

summarizing the advice of external counsel benefit from legal privilege.

The Court did not discuss whether communications between lawyers admitted only in a jurisdiction outside the European Union, in-house or external, and their clients are covered by legal professional privilege. There was no reason for it to address this issue, since the facts of the appeal did not raise it. However, the Advocate-General's opinion in the appeal broadly denied legal privilege for any communication by a lawyer admitted in a jurisdiction outside the EU, whether an outside attorney or an in-house counsel, in line with *AM&S*.

The Commission's practice since the *AM&S* case has been not to grant privilege for communications between in-house lawyers admitted in jurisdictions outside the European Union and their clients. This can lead to conflicts with the law in jurisdictions such as the United States, where such communications would be covered by privilege, but may lose their privilege if disclosed to third parties. Particularly given that courts in the United States and other jurisdictions have varying views regarding whether disclosure of privileged documents to an administrative agency waives the privilege, these issues require careful analysis and planning in consultation with counsel.

The EU rule on legal professional privilege applies only in the context of EU competition investigations led by the European Commission. Where a competition law investigation is conducted by national competition authorities, national privilege rules apply, some of which recognize legal professional privilege for in-house counsel admitted to a national Bar or Law Society.

In sum, the rules on EU legal privilege continue to pose potential traps for

the unwary. The European Court of Justice has rejected an opportunity to revisit the law governing this issue, instead emphasizing the importance of ensuring that the Commission has effective investigative powers. Managing privilege issues to be as prepared as possible in the context of EU competition law proceedings will continue to require careful planning and attention by in-house counsel.

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<sup>1</sup> Case C-550/07P, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v. Commission*.

<sup>2</sup> Case 155/79, *AM&S v. Commission*.

<sup>3</sup> Case T 125/03, *Akzo v. Commission*, point 123.

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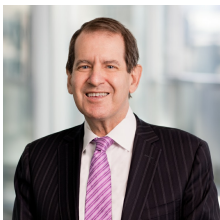


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