

INTRODUCTORY NOTE TO THE COURT OF JUSTICE OF THE EUROPEAN UNION:
THE AKZO NOBEL EU ATTORNEY-CLIENT PRIVILEGE CASE
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The European Union (“EU”) is an economic and political union of twenty-seven Member States. Its powers are set forth in its founding treaties, as supplemented and amended by subsequent treaties. The most recent amendment is the Treaty of Lisbon, which gave the EU a full legal identity.¹

These treaties established a number of different institutions. The judicial institutions include the European Court of Justice (“ECJ”), which is the highest EU court, and the European General Court, which originally was called the Court of First Instance (“CFI”).² Other institutions include the Parliament, the Council, and the Commission.

The Commission participates, through a co-decision process, in the development of competition (antitrust) rules. It investigates and pursues claims that allege a violation of the competition provisions in the EU treaties.³ At the time of the events giving rise to the *Akzo Nobel* case, the relevant antitrust regulations gave the Commission the power to examine books and business records, make copies of those items, ask for oral explanations on the spot, and enter the premises of the investigation target.⁴

To comprehend the *Akzo Nobel* decision and its implications, it is important to understand that currently both the EU and its Member States are entitled to enforce EU antitrust provisions. The EU and its Member States also share responsibility regarding the regulation of the legal profession. The initial lawyer regulation responsibility rests with the Member States.⁵ Each EU Member State has established a set of specific requirements to qualify as a lawyer within that particular Member State. These include differing education, examination, and apprentice requirements. Member State regulations also differ with respect to a lawyer’s employment status. In some EU Member States, if an individual is employed by a corporation as in-house counsel, that individual is not eligible to become a member of the bar and is not considered a “lawyer.” In other EU Member States, however, as in the United States, serving as corporate counsel does not disqualify one from serving as a member of the bar or from entitlement to attorney-client privilege.

In addition to its rules about bar eligibility, each EU Member State has its own set of rules or case-law governing the confidentiality or privileged nature of communications between clients and their lawyers. These national laws vary in some significant respects. For example, in some EU Member States, the privilege belongs to the client, whereas in other Member States, the privilege belongs to the lawyer. In some EU Member States, confidentiality can be waived, whereas in other Member States, this is not possible. Many of these differences have been set forth in the Edward and Fish Reports, which were prepared under the auspices of the Council of the Bars and Law Societies of Europe (“CCBE”).⁶ Although EU Member States differ with respect to the nature, scope, and source of the confidentiality protection, all EU Member States offer some sort of protection. The *Akzo Nobel* decision referred to this type of protection as the legal professional privilege (“LPP”).

Although EU Member States have the primary responsibility for lawyer regulation, they must do so in a way that does not violate the EU treaties. The Court of Justice has found, on a number of occasions, that Member State legal profession regulations were inconsistent with treaty provisions including, *inter alia*, the freedom of establishment, the freedom to provide services throughout the EU, and EU competition provisions. Several EU directives (laws) address lawyer regulation issues, especially mobility and recognition issues. Although these court decisions and directives primarily address cross-border legal practice, they have contributed to significant changes in Member States’ domestic lawyer regulation.⁷

Akzo Nobel involves the intersection of competition law and lawyer regulation. In 1982, the Court of Justice decided *AM&S v. Commission*,⁸ which, similar to *Akzo Nobel*, involved the Commission’s investigation of a company for alleged antitrust violations and its seizure of documents. The ECJ held that there was an EU-level LPP, but that two requirements would have to be satisfied for this EU LPP to apply. First, the communication must have been given for purposes of the client’s defense. Second, the communication must have been with an

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independent lawyer, which would not include in-house counsel. In *AM&S*, the ECJ observed that many EU Member States view the employment status of corporate counsel as fundamentally inconsistent with lawyer independence and thus LPP. In a subsequent matter – *John Deere* – the Commission said that corporate counsel communications could be used as evidence to prove that a company “knowingly” violated the EU competition law.⁹ *AM&S* was controversial when decided and has remained so in the intervening time.

The *Akzo Nobel* case was decided against this backdrop. On February 10, 2003, the Commission ordered Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd., and their subsidiaries, to submit to an investigation seeking evidence of possible anti-competitive practices. Two days later, Commission officials carried out a so-called “dawn raid”—i.e., an investigation at the companies’ UK premises. Despite protests by company representatives on LPP grounds, Commission officials took possession of a number of documents.

The *Akzo Nobel* decision focuses on two emails that were exchanged between a company manager and an Akzo in-house lawyer, who was also a licensed Netherlands lawyer entitled to LPP under Dutch law.¹⁰ On February 17, the companies sent the Commission a letter explaining why, in their view, the disputed documents were protected by LPP. On May 8, 2003, the Commission issued its final rejection of the LPP claim. The companies filed suit in the EU lower court seeking an annulment of the Commission’s investigation, an annulment of Commission’s May 2003 decision rejecting LPP, the return of the disputed documents, and the destruction of all copies. In 2007, relying upon *AM&S*, the lower court dismissed these challenges.¹¹

The companies (who are referred to as the “applicants” by the courts) filed an appeal with the Court of Justice and asked it to set aside the lower court’s judgment insofar as it rejected the claim of LPP for correspondence with Akzo’s in-house lawyer. Ireland, the Netherlands, and the United Kingdom intervened on behalf of the companies, joining the entities that had also intervened in the lower court: the Netherlands Bar Association, the CCBE, the International Bar Association, the European Company Lawyers Association, and the American Corporate Counsel Association: European Chapter. (The American Bar Association filed its first-ever application to intervene in an EU case, but its application was denied, along with applications filed by others.¹²) No one intervened on behalf of the Commission. All of these interveners requested LPP protection for the two emails in question, although the legal theories and arguments they offered varied.

The ECJ heard oral arguments on February 9, 2009. On April 29, 2010, the Advocate General issued a lengthy opinion recommending that the Court uphold the lower court decision rejecting annulment and the LPP claim.¹³ On September 14, 2010, the Court of Justice, sitting as a grand chamber of thirteen judges, issued its judgment rejecting the companies’ appeal and their LPP claim.

The Court’s reasoning was similar to much of the reasoning found in the Advocate General’s opinion. First, the Court found that the lower court had not erred in its interpretation of *AM&S*. It stated that *AM&S* recognized an EU-level LPP but only when two conjunctive requirements were met. First, the communication in question must relate to the client’s rights of defense. Second, the communication must be exchanged with an “independent lawyer.” The Court agreed with the Advocate General that “independence” is determined both positively (by reference to professional ethical requirements) and negatively (by the absence of an employment relationship). The ECJ found that the General Court had correctly applied *AM&S*’ second requirement because the lawyer in question was an Akzo in-house lawyer and thus was not independent. Because the Court found employed lawyers to be in a fundamentally different position than non-employed lawyers, the Court also rejected the companies’ “equal treatment” argument.

The companies asserted two alternative grounds of appeal which the Court also rejected. First, they argued that because of significant developments in the legal landscape since 1982, the lower court should have reinterpreted *AM&S*. The cited developments included the evolution of national legal systems and changes in EU competition law. The companies argued that a reinterpretation of *AM&S* was necessary in order to protect the principles of legal certainty and the rights of defense. The Court rejected these arguments, finding that “the legal regime in the Netherlands cannot be regarded as signaling a developing trend in the Member States” and that Member States’ legal situations had not evolved since *AM&S* to an extent which would justify a change in the case-law. The Court acknowledged that in-house LPP was more common in 2004 than when *AM&S* was decided, but concluded that it was “not possible to identify tendencies which were uniform or had clear majority support in the laws of the Member States.” Nor did the Court think that the 2003 changes in the EU antitrust laws justified

a departure from *AM&S* to encourage greater compliance counseling by in-house counsel. It also rejected the arguments that the absence of LPP impinged on the fundamental right of defense and was inconsistent with the principle of legal certainty. The Court also rejected the argument that the lower court's findings impinged on the authority and autonomy of EU Member States. To the contrary, the Court found that "the uniform interpretation and application of the principle of [EU LPP] are essential in order that inspections by the Commission in anti-trust proceedings may be carried out under conditions in which the undertakings concerned are treated equally."¹⁴

Before the ECJ's *Akzo Nobel* decision, a number of commentators had opined that the Court might be willing to recognize LPP—at least in those Member States' jurisdictions that recognized LPP for corporate counsel, especially in light of the passage of almost thirty years since the *AM&S* decision, the growing numbers of European corporate counsel, and the growing acceptance of the advisory and compliance role played by corporate lawyers. As noted above, however, that did not occur.

Although a number of commentators have publicly expressed their disappointment with the *Akzo Nobel* decision, they have also been quick to point out the narrow reach of the decision. As they have correctly observed, *Akzo Nobel* does not invalidate or change the legal professional privilege that applies in Member State proceedings: Member States' LPP will continue to apply in those circumstances. Moreover, *AM&S* and *Akzo Nobel* were limited to the *Commission's* competition investigations, not competition proceedings by Member States.

One of the unanswered questions after *Akzo Nobel* is the extent to which the EU competition LPP excludes non-EU lawyers. On the one hand, both the *AM&S* decision and the *Akzo Nobel* Advocate General's opinion include language that arguably limits LPP to lawyers located within the EU and the European Economic Area (Iceland, Lichtenstein, and Norway).¹⁵ On the other hand, the *Akzo Nobel* decision itself refers to the "positive" and "negative" indicators of "independence" but does not use language that would automatically exclude from LPP protection communications with independent, non-employed lawyers from non-EU/EEA nations. Until this question is explicitly resolved, however, it would be prudent for U.S. and other non-EU/EEA lawyers to assume that their communications with their clients will *not* be protected by LPP if these communications are seized by the Commission. It is certainly possible that, in light of the many global recognition initiatives in which the EU participates, as well as the Court's jurisprudence which sets forth common factors necessary for LPP, the Court would be willing in the future to grant LPP to communications with independent third country lawyers. At present, however, the parameters of the EU LPP are unclear.

In sum, although the *Akzo Nobel* decision was a disappointment to many and is clearly very important, its significance is lessened due to its reaffirmation of the *AM&S* status quo. In other words, *Akzo Nobel* represents a lost opportunity rather than a change in the law. The decision likely means that in-house counsel will be reluctant to offer written analyses and prescriptive advice to their clients because these documents might be subject to seizure and viewed as evidence of wrong-doing. The case also serves as a reminder to clients and lawyers to review their electronic distribution practices and to recognize the risks involved in communicating with, or distributing documents to, those other than "independent" EU or EEA lawyers.

ENDNOTES

1 See *About the European Union*, Europa, http://europa.eu/about-eu/index_en.htm (last visited Jan. 21, 2011).

2 See, e.g., *EU courts*, E-Justice, <https://e-justice.europa.eu/contentPresentation.do?idTaxonomy=15&lang=en&vmac=aEfWomTTcGxsG9ktvfBP6tzjZ750h-jdlKaMdTlxWZJRiyK6VlssZnXzABICRbeq5GBzIHJF1TmPDQhrINDQVQAAJH8AAAGy> (last visited Jan. 21, 2011).

3 See Consolidated Version of the Treaty on the Functioning of the European Union arts. 3, 105, Sept. 5, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

4 See Case C-550/07 P, *Akzo Nobel Chems. Ltd. v. Comm'n*,

nn.8-9 and accompanying text (Sept. 14, 2010), available at <http://curia.europa.eu/juris/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-550/07>; Court Proceedings, Nov. 6, 2010, 2010 O.J. (C 301) 2, available at <http://curia.europa.eu/juris/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-550/07> [hereinafter *Akzo Nobel*].

5 See Laurel S. Terry, *The European Commission Project Regarding Competition in Professional Services*, 29 *Nw. J. INT'L L. & Bus.* 1, 11-13, 16-20 (2009).

6 John Fish, *Regulated Legal Professionals and Professional Privilege Within the European Union, the European Economic Area and Switzerland, and Certain other European Jurisdic-*

tions (Feb. 27, 2004), available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/fish_report_enpdf1_1184145269.pdf; D.A.O. Edward, *Report on the Professional Secret, Confidentiality and Legal Professional Privilege in the Nine Member States of the European Community* (Oct. 1976), available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/edward_enpdf1_1182334460.pdf; see also Council of Bars and Law Societies of Europe [CCBE], *Update of the Edward's Report on the Professional Secret, Confidentiality and Legal Professional Privilege in Europe* (Sept. 2003), available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/update_edwards_repor1_1182333982.pdf.

- 7 See CCBE, *Free Movement of Lawyers Committee*, http://www.ccbe.eu/index.php?id=94&id_comite=8&L=0 (includes a list of EU cases and links to the relevant directives); see also Terry, *supra* note 5; Laurel S. Terry, *The Bologna Process and Its Impact in Europe: Much More Than Degree Changes*, 41 VAND. J. TRANSNAT'L L. 107, 147-52 (2008) (discussing these developments).
- 8 Case 155/79, *AM & S v. Comm'n*, 1982 E.C.R. 1575.
- 9 Case 85/79/EEC, Commission Decision of 14 December 1984 Relating to a Proceeding under Article 85 of the EEC Treaty (John Deere Ltd.) Common Mkt. Rep. (CCH) ¶ 10,652, 1985 O.J. (L 35) 58.
- 10 The contract between Akzo and its in-house counsel specifically acknowledged the in-house counsel's freedom and independence. Under Dutch law, this agreement and the lawyer's status as a member of the bar meant that Dutch LPP applied. See *Akzo Nobel*, *supra* note 4, ¶¶ 34-36; Advocate General Opinion, *infra* note 13, ¶¶ 63-64, 103.
- 11 See Joined Cases T-125/03 & T-253/03, *Akzo Nobel Chems. Ltd., Akcros Chems. Ltd. v. Comm'n*, Judgment of the Court of First Instance (First Chamber, Extended Composition) of Sept. 17, 2007, O.J. C 269/43 (Nov. 10, 2007). Additional information is available on the *Curia* website, <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=T-125/03>. At the time the lower court's decision was issued, the court was known as the Court of First Instance. The *Akzo Nobel* decision refers to the lower court by its new name, which is the General Court.
- 12 See Terry et al., *Transnational Legal Practice: 2008 Year-in-Review*, 43 Int'l L. 943, 956-57 (2009); Advocate General Opinion, *infra* note 13, ¶ 28.
- 13 Opinion of Advocate General Kokott, Case C 550/07 P, *Akzo Nobel Chems. Ltd. & Akcros Chems. Ltd. v. Comm'n* (Apr. 29, 2010), [http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=](http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-550/07)

EN&Submit=rechercher&numaff=C-550/07 [hereinafter Advocate General Opinion]. This introductory note does not provide a thorough review of the Advocate General's Opinion, which was 198 paragraphs long with 138 footnotes. The Advocate General's Opinion addressed a number of interesting points that were not included in the Court's decision, including the effect of the lawyers Establishment Directive 98/5, the Financial Action Task Force recommendations, and the European Court of Human Rights' jurisprudence.

- 14 *Akzo Nobel*, *supra* note 4, ¶ 115.
- 15 See Advocate General Opinion, *supra* note 13, ¶ 189 ("Even if – contrary to the solution which I have proposed – legal professional privilege were to be extended to internal company or group communications with in-house lawyers who are members of a Bar or Law Society within the European Economic Area, the inclusion, in addition, of lawyers from third countries would not under any circumstances be justified."). Read in context, however, this language seems limited to in-house counsel from third countries, rather than independent lawyers from third countries. Paragraph 190, on the other hand, included the following language which bodes poorly for the recognition of LPP by independent third country lawyers:

[U]nlike in the relationship between the Member States, in the relationship with third countries there is, generally speaking, no adequate basis for the mutual recognition of legal qualifications and professional ethical obligations to which lawyers are subject in the exercise of their profession. In many cases, it would not even be possible to ensure that the third country in question has a sufficiently established rule-of-law tradition which would enable lawyers to exercise their profession in the independent manner required and thus to perform their role as collaborators in the administration of justice. It cannot be the task of the Commission or the Courts of the European Union to verify, at considerable expense, that this is the case on each occasion by reference to the rules and practices in force in the third country concerned, particularly since there is no guarantee that there will be an efficient system of administrative cooperation with the authorities of the third country on every occasion.

See also *AM&S*, 1982 E.C.R. ¶ 3 ("The protection thus afforded must apply without distinction to any lawyer entitled to practise his profession in one of the member states, regardless of the member state in which the client lives."); *id.* ¶ 24 (noting that the requirement of an independent lawyer reflects the legal traditions common to Member States, the statutes of the Court of Justice of the EEC and the EAEC and the Court of Justice of the ECSC) (emphasis added).