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## European Court of First Instance Decision: No Legal Professional Privilege for In-House Counsel Under EU Competition Law

On September 17, the European Court of First Instance (“the Court”) issued a judgment that may result in severe implications for the role of in-house counsel under Europe competition law.

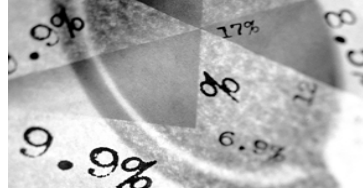
The case<sup>1</sup>, which involved *inter alia*, Akzo Nobel Chemicals Ltd. and Akros Chemicals, started with an investigation by representatives of the European Commission at Akzo’s premises in the United Kingdom. During the investigation, the Commission officials took copies of a considerable number of documents. Among the copied documents was an e-mail correspondence between Akzo’s in-house counsel, a member of the Netherlands Bar, and Akros’s general manager.

Akzo immediately claimed that this e-mail correspondence was protected by legal professional privilege (“LPP”) and could therefore not be taken into account by the Commission. The Commission did not agree with Akzo’s point of view and informed them of their intention to add the debated correspondence to the file.

This resulted in intensive legal procedures, in which, among others, several national Bar Associations sided with Akzo. On September 17, the Court put a temporary end to the procedures by issuing its judgment.

In this judgment, the Court clearly re-explained the standard doctrine, as originally formulated in the AM&S case, regarding LPP<sup>2</sup>. The Court reasoned that:

*“It must be pointed out that in its judgment in AM&S, the Court of Justice expressly held that the protection accorded to LPP under Community law, in the application of Regulation No 17, only applies to the extent that the lawyer is independent, that is to say, not bound to his client by a relationship of employment (paragraphs 21, 22 and 27 of the judgment). The requirement as to the position and status as an independent lawyer, which must be met by the legal adviser from whom the written communications which may be protected emanate, is based on a concept of the lawyer’s role as collaborating in the administration of justice by the courts and as being required to provide, in full independence, and in the overriding interests of the administration of justice, such legal assistance as the client needs (AM & S, paragraph 24).”<sup>3</sup>*



The independence of a lawyer is therefore, according to the Court, a *conditio sine qua non* for LPP.

Thus, internal corporate communications seeking the legal advice of in-house counsel are not covered by the LPP, and can and will be considered by the European competition investigation.

The fact that the in-house counsel is a member of a national bar association does not have any effect on the absence of the LPP. Although the national competition law of a small number of European member states acknowledge an LPP for in-house counsel who are members of their bar associations, the Court considered, and rejected, those arguments as a factor for extending the scope of the LPP to in-house counsel:

*“In particular, first, a comparative examination of laws shows that a large number of Member States still exclude in-house lawyers from protection under LPP. In addition, in certain Member States, the issue seems not to have been decided unequivocally or definitively. Furthermore, various Member States have aligned their regimes with the Community system, following upon the judgment in AM & S. Secondly, such an examination shows that a considerable number of Member States do not allow in-house lawyers to be admitted to the Bar or Law Society and, accordingly, do not recognise them as lawyers established in private practice. In fact, in a number of countries, to be a lawyer employed by a person who is not a lawyer in private practice is incompatible with the status of ‘avocat’. Moreover, even in countries which do permit this possibility, the fact that in-house lawyers are admitted to a Bar or Law Society and are subject to professional ethical rules does not always mean that communications with such persons are protected under LPP.”<sup>4</sup>*

In-house counsel who are active in the European market, including in-house counsel who rely on the U.S. LPP, should be mindful of the Court’s ruling when drafting correspondence regarding the company’s competition-sensitive legal concerns. The implications of correspondence considered to be covered by the LPP turning up as evidence in a competition infringement case can be potentially disastrous.

For competition-related advice, companies active in the European market should seriously consider retaining and consulting an outside, independent lawyer, i.e., a lawyer who is not an employee of the company, and then communicating their confidential requests for legal advice concerning sensitive, competition-related issues to their outside, independent counsel. The risks of “thought to be confidential” communications being used as evidence against the company are just too great.

<sup>1</sup>Joined cases T-125/03 and T-253/03, Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd vs. Commission of the European Communities

<sup>2</sup>Case nr. 155/79 AM&S vs. Commission of the European Communities

<sup>3</sup>Joined cases T-125/03 and T-253/03, Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd vs. Commission of the European Communities, under 166.

<sup>4</sup>Joined cases T-125/03 and T-253/03, Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd vs. Commission of the European Communities, under 171.



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