

The Brits just don't get it! You can sue your emerging competitors without provoking the Justice Department's Antitrust Division, so why isn't that enough to keep the EU Competition authorities off your back? You have just read a great analysis from the premier antitrust lawyer in NYC, who, at a cost of a zillion dollars, has opined to that effect. Heck, just send it to your subsidiary in London and let them read it! They do read English, you muse. "No... wait," a small voice cries out to you from your bookshelf. "There is danger in this. Pull down an old *Docket* and brush up on the risks."

An Uncertain Privilege Is a Little Better Than Venturing Across the Pond Without a Life Preserver After AKZO

BY JOHN K. VILLA

Good idea, Yank. There are some unseen dangers on the other side of the pond, and it is far from clear whether the memorandum will remain confidential from those most hostile to your company. This should not come as a big surprise. While we accept the existence of an internal corporate attorney-client privilege as an article of faith, the fact is that American jurisprudence has recognized the corporate attorney-client privilege for only 50 years.¹ True — the application of the privilege in the United States is far from predictable because of the wide range of work performed by corporate lawyers, but there is no longer a per se rule against applying the privilege to communications between corporate employees and

in-house counsel.² The same cannot necessarily be said in other countries, as reflected in *Akzo Nobel Chemicals Ltd. and Akros Chemicals Ltd. v. Commission*.³ A recent decision of the Court of Justice of the European Union, *Akzo* has potentially far-reaching implications for in-house legal departments of multinational corporations with operations in the European Union. Indeed, the arguments before the Court of Justice echoed the debate in the American courts a half-century ago when the internal corporate privilege was recognized.

The *Akzo* decision and rationale

In *Akzo Nobel*, the corporate plaintiffs appealed the judgment of the

General Court, which rejected their claim of legal professional privilege for certain email exchanges between the general manager of Akros and Akzo group's coordinator for competition law, an in-house lawyer who was a member of the Netherland's Bar. The emails had been seized by the Commission at the plaintiffs' premises in the United Kingdom during the course of a Commission investigation into whether the plaintiffs had engaged in anti-competitive conduct.⁴ Following the Commission's determination that the emails were not covered by the legal professional privilege, the company plaintiffs brought an action against the Commission seeking, inter alia, annulment of the Commission's ruling.⁵

On appeal from the adverse judgment of the General Court, the corporate plaintiffs (in effect appellants) first argued that the lower court misinterpreted the second condition for application of the privilege as set forth by the Court of Justice in its 1982 decision of *AM & S Europe v. Commission*.⁶ As a consequence, the plaintiffs continued, the General Court breached the principle of equality,⁷ which prohibits treating comparable situations in different ways.⁸

In *AM & S*, the Court of Justice ruled that application of the legal professional privilege required that the communication with the lawyer relate to the client's right of defense, and that it involve independent lawyers, i.e., "lawyers who are not bound to the client by a relationship of employment."⁹ According to the plaintiff companies, the General Court erred in giving a literal interpretation to the standard, and instead, should have given it a teleological interpretation, focusing on the spirit and purpose of



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the privilege.¹⁰ In short, the corporate plaintiffs argued that the *AM & S* decision did not rule that the existence of an employment relationship always resulted in a lack of independence.¹¹ The plaintiffs, together with several of the intervenors, argued that there was independence for inside counsel based on professional conduct rules; an in-house lawyer is a member of a bar or law society, and is subject to the same professional conduct obligations and disciplinary rules as external lawyers.¹² The plaintiff companies argued that the contract of employment executed in accordance with Dutch law required the employer to agree to the lawyer's freedom to perform his functions independently without interference from the employer, and authorized the lawyer to comply with the professional obligations imposed by the Netherlands Bar.¹³

Rejecting the plaintiffs' argument, the Court of Justice found that the repeated statement in the *AM & S* opinion, that the communications must be exchanged with "an independent lawyer, that is to say one who is not bound to his client by a relationship of employment," clearly shows "that the requirement of independence means the absence of any employment relationship between the lawyer and his client, so that legal professional privilege does not cover exchanges within a company or group with in-house lawyers."¹⁴ As explained by the court, notwithstanding professional conduct obligations and the contractual guarantees of professional freedom, an in-house lawyer does not enjoy the same degree of professional independence as an external lawyer since, as an employee, the in-house lawyer is economically dependent on the employer and is too closely tied to the interests of the employer when carrying out his duties.¹⁵ Thus, "an in-house lawyer is less able to deal effectively with any conflicts between his professional obligations and the aims of his client."¹⁶

The plaintiffs further argued that, in not recognizing the applicability of the legal professional privilege to in-house lawyers, the court infringed on the plaintiffs' right of defense by interfering with their right to choose counsel, which includes the right to the provision of confidential legal advice.¹⁷ Rejecting this argument as well, the court first noted that consultation with an in-house lawyer is not consultation with an independent third party, notwithstanding professional ethics obligations.¹⁸ The court then observed that, even assuming that the right of defense applied to consultations with in-house lawyers, the extent to which the in-house lawyer could represent his employer was still subject to any restrictions imposed by the law of member states, some of which prohibit an in-house lawyer from appearing in court.¹⁹

The plaintiffs contended that the General Court's decision undermined the principle of legal certainty: Since the Commission and national authorities often worked together in conducting competition investigations, the existence of the privilege should not depend on which governmental authority is undertaking the investigation. Finding the argument untenable, the court noted that because there was a clear division of authority with respect to competition (antitrust) investigations and a clear set of procedural rules to which each authority was subject, a company was able to determine its position with respect to the privilege at the commencement of any investigation.²⁰

Finally, the plaintiffs argued that the General Court's decision violated the principles of national procedural autonomy and conferred powers: In the absence of a harmonized definition of legal professional privilege by the European Union legislature, procedural aspects of an investigation carried out by the Commission, including the applicability of

the privilege, are subject to national rules.²¹ The Court found the principle inapplicable to the instant case, which involved a decision of an institution of the European Union that was based on a regulation adopted at the European Union level.²² Under these circumstances, the Court explained, uniformity in the interpretation and application of the privilege at the European Union level was "essential" to ensure the equal treatment of companies subject to competition investigations by the Commission.²³

Akzo's reach

Under the decision in *Akzo*, therefore, there is no privilege applicable to communications between company employees and in-house lawyers with respect to competition (or antitrust) investigations by the European Commission. While the decision does not affect the internal law of privilege in constituent countries of the European Union,²⁴ the reasoning underlying its holding that the status of an in-house lawyer as an employee — economically dependent on, and closely tied to, the employer — determined the privilege's applicability, may be indicative of how the Court would rule on privilege issues arising in similar areas governed by European Union law. Indeed, it may influence both corporate law and practice even in jurisdictions that recognize an internal attorney-client privilege.

The analogies between the arguments in *Akzo* and past American jurisprudence are striking.²⁵ There can be little doubt that the primary concern of the Court of Justice was its view that internal corporate lawyers were economically reliant on their employers and therefore were not independent. Thus, extending the privilege to them would not be protecting true advocates, who are essential to the adversary system, but simply insulating another species of corporate employees who primarily give advice.

In short, the EU's view of lawyers tilts heavily toward seeing true lawyers as advocates, not advisors. For years, American courts struggled with similar concerns in that the courts did not want a large "zone of sanctuary" or "zone of silence" protecting corporate information from discovery.²⁶ The Court of Justice also was not impressed with the notion that the internal privilege should be honored so that there would be "legal certainty" — to inspire confidence that communications would remain secure so as to encourage those communications. It took American courts nearly 20 years after recognition of the internal corporate attorney-client privilege in *Radiant Burners*²⁷ to identify, in *Upjohn Co. v US*,²⁸ the need for certainty and predictability in the application of the privilege: "An uncertain privilege ... is little better than no privilege at all."²⁹ Even now, that certainty is sorely missing in that every state (like every EU nation!) can, and many states do, have their own formulation of the corporate privilege. Finally, one discerns in *Akzo* an unwillingness to recognize the importance of the advisory role of lawyers in the corporate world, and to view only the independent advocate or litigator as entitled to full privilege protection. That same distinction between advisors and litigators shows up repeatedly in American jurisprudence.

Whether we agree with *Akzo* or not, however, we must learn to live with it. It does inject a great deal of uncertainty in dealings both wholly within the EU countries and beyond. It appears, for example, that unless the Commission is itself seeking the internal attorney-client communications, the law of various EU member countries will control. Some countries recognize an internal corporate attorney-client privilege but many do not: "a comparative examination ... shows that a large number of Member States still exclude correspondence with in-house lawyers

from protection ... [and] a considerable number of Member States do not allow in-house lawyers to be admitted to a Bar or Law Society, and accordingly, do not recognize them as having the same status as lawyers established in private practice."³⁰ If one is giving legal advice within a company that does all of its business in England, for example, can one be assured that the advice will remain privileged? Yes, provided that there is no EU Commission inquiry. That's a big proviso. What assurance does an in-house lawyer have that the information will remain privileged, and how does this affect conduct? Once again, the words from *Upjohn* echo loudly. Thus, because of this uncertainty, a prudent in-house lawyer in England would be wise to assume the absence of privilege for matters where the EU Commission may have investigative interest.

What about transactions or communications between companies in different EU countries, or between EU countries and the United States? Will EU or US law govern the availability of the attorney-client privilege? While American courts generally follow a "touching base" analysis in determining what law of privilege to apply with respect to communications that occur in a foreign country,³¹ "[h]ow foreign courts or tribunals will resolve the question of privilege in cases involving international players is less clear."³² As one practitioner has observed, "[t]he policy rationale underlying the non-application of the privilege to in-house counsel leads one to believe that American attorneys will not have privilege protection in those countries that do not extend the privilege to in-house counsel."³³ It would be surprising, indeed, if foreign courts treated US lawyers more favorably than they did their own lawyers, although there is every jurisprudential basis to do so.

Recommendations

So what is the lesson from *Akzo*? What steps can a lawyer take to protect her company?

It is pointless to counsel that the uncertainty of the reach of *Akzo* means that all corporate legal advice involving EU countries must be conducted as if the privilege is uncertain, and thus non-existent. Clearly, there are degrees of risk.

Communications in substantive areas, which have historically been the focus of Commission investigative interests, are clearly the highest risk. One should be very cautious in sending such documents to EU countries except when absolutely necessary.

If possible, documents can be marked "Attorney-Client Privileged Document prepared by US lawyers in the United States and entitled to the protection of US law."

There are various FTP and similar websites, electronic databases and corporate intranets that allow corporate employees in foreign countries to access and read, but not copy or possess (even electronically), documents that are held in the United States where the corporate law protection for the privilege is probably the greatest.

On extremely important or sensitive matters, the final advice that leaves US shores may come from outside counsel, or at least co-authored by outside counsel. ☒

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Editors Note: Endnotes can be found in the ACC Digital Docket at www.acc.com/docket.

Notes

- 1 The attorney-client privilege was first explicitly extended to corporations in a 1963 decision of the Seventh Circuit. See *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314, 322-23 (7th Cir. 1963).
- 2 See generally, J. Villa, *Corporate Counsel Guidelines*, § 1:1 (2009).
- 3 Case C-550/07P, *Akzo Nobel Chemicals Ltd. and Akros Chemicals Ltd. v. Commission*, (14 Sept. 2010).
- 4 See *id.*, ¶ 14, at I-8. Under European Union law, the Commission is authorized to conduct all necessary investigations into undertakings and their associations, and in the course of such an investigation, to enter their premises, to examine and make copies of all books and records, and to ask for oral explanations on the spot, provided that prior written authorization from the Commission is presented to the undertaking that specifies the subject matter, the purpose of the investigation and the date on which it is to commence, and provides notice of the undertaking's right to have the Commission's decision authorizing the investigation reviewed by the Court of Justice. *Id.*, ¶ 2, at I-3.
- 5 *Id.*, ¶¶9-14, at I-4 to I-5.
- 6 Case 155/79 *AM & S Europe v. Commission* [1982] ECR 1575.
- 7 *Akzo Nobel*, ¶ 30, at I-10.
- 8 See *id.*, ¶ 55, at I-14.
- 9 *Id.*, ¶ 41, at I-11 to I-12 (quoting, in part, *AM & S*, ¶¶21-22).
- 10 *Id.*, ¶ 32, at I-10.
- 11 *Id.*, ¶ 33, at I-10.
- 12 *Id.*, ¶¶34-35, at I-10 to I-11.
- 13 *Id.*, ¶ 35, at I-11.
- 14 *Id.*, ¶ 44, at I-12.
- 15 *Id.*, ¶¶45-49, at I-12 to I-13 (stating, at ¶ 47, that "an in-house lawyer cannot, whatever guarantees he has in the exercise of his profession, be treated in the same way as an external lawyer because he occupies the position of an employee which, by its very nature, does not allow him to ignore the commercial strategies pursued by his employer and thereby affects his ability to exercise professional independence.").
- 16 *Id.*, ¶ 45, at I-12.
- 17 *Id.*, ¶ 90, at I-18.
- 18 *Id.*, ¶ 94, at I-19.
- 19 *Id.*, ¶ 95, at I-19. While a few member states have departed from the decision in *AM & S* and now recognize a legal professional privilege for in-house lawyers, not all have done so; this lack of uniformity among member states, the Court ruled, also supported its rejection of the plaintiffs' argument for extension of the privilege to in-house lawyers. *Id.* ¶¶71-76, at I-16.
- 20 *Id.*, ¶ 104, at I-20.
- 21 *Id.*, ¶¶109-110, at I-21.
- 22 *Id.*, ¶ 114, at I-21.
- 23 *Id.*, ¶ 115, at I-22.
- 24 See *id.*, ¶¶114-115 (noting that the issue before the Court involves the legality of a decision by the European Commission that was based on a regulation adopted at the European Union level, and stating that uniform interpretation and application of the principle of legal professional privilege at the European Union level is necessary in order to ensure that companies being investigated by the Commission are treated equally); see also ACC, *ACC Member Briefing on Akzo Decision – What the Decision and the Current Regulatory Framework Mean for Corporate Counsel: Status and Issues*, at 1 (Sept. 2010), www.acc.com/advocacy/keyissues/privilege.cfm. (noting that *Akzo* "does not apply to any other cases in which legal privilege issues may arise, such as non-EU cases at national level[.]").
- 25 See n. 2, *supra*.
- 26 See, e.g., *First Chicago Intern. v. United Exchange Co. Ltd.*, 125 F.R.D. 55, 57 (S.D.N.Y. 1989) ("Any standard developed, therefore, must strike a balance between encouraging corporations to seek legal advice and preventing corporate attorneys from being used as shields to thwart discovery."), citing note, "Where Do We Go After *Upjohn*," 81 Mich. L. Rev. 665, 667-68 (1983); *American Cyanamid Co. v. Hercules Powder Co.*, 211 F. Supp. 85, 88 (D. Del. 1962) ("This Court does not feel a corporation should be able to insulate vital facts by using the privilege in a perverting manner. However, in my opinion, the proper approach lies in tailoring the ordinary rules to the peculiar cloth of this legal entity.").
- 27 See n. 1, *supra*.
- 28 *Upjohn Co. v. U.S.*, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981).
- 29 *Id.*, 449 U.S. at 393, 101 S. Ct. at 684.
- 30 Case C-550/07P, *Akzo Nobel Chemicals Ltd. and Akros Chemicals Ltd. v. Commission*, at ¶ 72 (14 Sept. 2010).
- 31 See ACC, *ACC Member Briefing on Akzo Decision – What the Decision and the Current Regulatory Framework Mean for Corporate Counsel: Status and Issues*, at 6 (Sept. 2010), www.acc.com/advocacy/keyissues/privilege.cfm. (noting that this analysis is fact-specific and focuses on factors such as whether US attorneys were involved, whether the client was a US resident seeking to protect a right under US law, and whether the relevant investigation or proceeding was in the United States).
- 32 Robert J. Anello, *Preserving the Corporate Attorney-Client Privilege: Here and Abroad*, 27 Penn. St. Int'l L. Rev. 291, 312 (Fall, 2008). Under Articles 11 and 21(e) of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (18 March 1970), a person requested to give evidence in a proceeding may invoke the privilege laws of the forum state or of the state where the documents originated. See *Renfield Corp. v. E. Remy Martin & Co., S.A.*, 98 F.R.D. 442 (D. Del. 1982) (involving a claim of privilege protection to documents exchanged between defendant's employees in the United States and its French in-house counsel, and holding that, while French law does not recognize the applicability of the privilege to in-house counsel, the Hague Convention governed the issue, and therefore, the defendants were entitled to assert a claim of privilege under American law as the country from which the documents originated). However, as one commentator has observed, the Convention provides "little comfort" where a European Union investigatory body seizes the documents in a member state. See Stephen R. Reynolds, *Management of International Litigation*, 826 PLI/Lit 409, 421 (2010).
- 33 *Id.* at 312. At the European Union level, the fact that a legal opinion authored by in-house counsel in the United States and sent to company offices in Europe was privileged under relevant American law did not preclude its seizure and use against the company in proceedings before the European Commission. See *Re Deere & Co. v. Cofabel NV*, Comm. Dec. of 14 Dec. 1984, 2 CMLR 554.