

# Competition Alert

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## Privilege in-house?

The eagerly awaited Opinion of Advocate General (“AG”) Kokott in *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission*<sup>1</sup> (the “**Akzo case**”) has concluded that communications with in-house counsel are not to be afforded the same privilege as that which arises in communications with external legal counsel.<sup>2</sup> While not binding, the Opinion is expected to have a significant bearing on the decision of the European Court of Justice (“**ECJ**”) on this important issue. We expect there to be concerted lobbying from in-house legal groups in the European Union (“**EU**”) in a bid to prevent the Opinion being adopted by the ECJ. In the view of the European chapter of the Association of Corporate Counsel, the Opinion of the AG is “extremely disappointing, reflecting a fundamental misunderstanding of both the role and responsibilities of in-house counsel, and the impact of financial remuneration on any lawyer retained by a client to represent the client’s legal interests.”<sup>3</sup>

### Background

In early 2003, the European Commission (“**Commission**”) began investigations into Akzo Nobel Chemicals Ltd (“**Akzo**”) and Akros Chemicals Ltd (“**Akros**”) on suspicion of anticompetitive practices. In the course of their investigations, the Commission’s officials carried out a search on the premises of Akzo and Akros in Eccles, Manchester. Akzo and Akros objected to the seizure of two emails exchanged between Akros’ general manager and Mr. “S”, Akzo’s competition law coordinator, on the basis that these were protected by legal professional privilege.

Legal professional privilege provides for the protection of communications between a client and their legal advisor from disclosure to any other party, and is intended to encourage full and frank disclosure by clients so that they can be represented appropriately. Legal professional privilege is confined to the legal profession; it secures rights to the client, but also encompasses a lawyer’s role in administration

of justice, sitting alongside lawyers’ professional obligations and duties to the Court. EU law provides for the traditional protection of legal professional privilege. This privilege is recognised in the legal systems of all 27 European Member States (“**Member States**”). The key complication, in relation to in-house counsel, is that because the protection only properly attaches to their role in providing legal advice, not commercial advice, the line can at times be difficult to draw.<sup>4</sup>

Counsel in the Akzo case argued that changes in the legal landscape, including law changes in some Member States, should have seen a departure from the outdated precedent in *AM & S Europe v Commission of the European Communities*<sup>5</sup> and as such, legal professional privilege should be extended to lawyers employed in an in-house capacity. In addition to this, they raised the argument that under Netherlands Law (Mr S. was a registered member of the Netherlands Bar Association) an advocate is expressly exempt from the scope of the instructing party when providing legal advice. However despite this, the Opinion of the AG asserts that:

Ethical obligations alone are not sufficient to secure for enrolled in-house lawyers an independence comparable to that of self-employed lawyers...<sup>6</sup>

...they are not capable of guaranteeing that enrolled in-house lawyers enjoy a degree of independence equal to that of external lawyers.<sup>7</sup>

*“[AG Kokott:] Ethical obligations alone are not sufficient to secure for enrolled in-house lawyers an independence comparable to that of self-employed lawyers.”*

The view of the AG was that in-house counsel are susceptible to conflicts of interest, and as such should not be afforded legal privilege. In her view in-house counsel possess insufficient economic independence, as they are employed by the client directly, and will also typically possess some personal connection to the client through this employment. With this in mind, businesses that employ in-house counsel have the ability to undermine the investigative powers of

the Commission by communicating evidence to the legal department in the form of a request for legal advice. This has curtailed the proposed extension of the protection of professional legal privilege to internal company communications with in-house counsel.

If the Opinion is upheld by the ECJ, communications with in-house counsel will continue to be susceptible to compulsory production, including seizure, in Commission investigations in Europe. The European chapter of the Association of Corporate Counsel have pointed out that the failure to extend legal professional privilege for in-house counsel limits their ability to advise their clients on the proper application of the EU competition rules and jeopardizes compliance with those rules. With the significant fines imposed on companies for competition law violations, it is crucial that in-house lawyers are in a position to play a leading role in handling compliance issues. This is far more difficult without the benefit of legal professional privilege.

Although the decision does not change the national law of Member States,<sup>8</sup> harmonization of EU law has been a contributing factor in the decision of many Member States which have already moved to limit privilege for communications with in-house lawyers.<sup>9</sup> Restrictions of privilege in other Member States may be a likely reaction if this Opinion receives affirmation by the ECJ.

**Effect on New Zealand**

In New Zealand, the protection of legal privilege remains reasonably broad, covering all communications between a member of the legal profession and a client that are fairly referable to the giving and receiving of legal advice.<sup>10</sup> The protection of legal professional privilege is not confined to the specific request for legal advice, and will also attach to factual narratives, if they are part of the necessary exchange of information in relation to the legal advice. Communications between businesses and in-house counsel will attract the protection of legal professional privilege where communications relate directly to the performance of the legal adviser in his or her professional capacity as a legal adviser.<sup>11</sup>

The protection of legal professional privilege applies to proceedings brought under the Commerce Act 1986 (“Act”) and investigations by the New Zealand Commerce Commission

(“NZCC”) under that Act, notwithstanding the wide ranging powers of the Commission to obtain evidence provided under sections 98 to 98H of the Commerce Act.

An issue, however presented by the Opinion of the AG is whether communications between a New Zealand based (or qualified) in-house lawyer and business people will be protected by privilege if these business people are in Europe. This scenario will not be uncommon given that a number of New Zealand businesses have operations in Europe, but headquarters and legal teams based in New Zealand.

The Opinion of the AG has suggested that there is no adequate basis for recognition of legal professional privilege for in-house counsel who are members of a Bar or Law Society in a country outside the European Economic Area. This is on the premise that the Commission and the European Courts should not be burdened with verifying that privilege, by reference to that country’s specific rules and practices, in every case.

*“[C]ommunications between in-house counsel in New Zealand and clients conducting business in Europe should proceed with caution, particularly with respect to communications relating to competition compliance.”*

In light of these developments, communications between in-house counsel in New Zealand and clients conducting business in Europe should proceed with caution, particularly with respect to communications relating to competition compliance. These types of communications do attract legal professional privilege in New Zealand, and are likely to be protected in the event of an investigation by the NZCC. However, on affirmation of this Opinion, this type of communication is unlikely to be afforded that same protection of legal professional privilege in European Law, making those communications susceptible to seizure by the Commission in an investigation.

In the context of an increasingly global economy, it will be important for companies with international operations to keep across these developments.

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1. Opinion of the Advocate General Kokott, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission*, Case C-550/07 P [2007] ERC II-3523.  
 2. United Kingdom and Ireland (in particular).  
 3. Susan Hackett, *Akzo Decision Denies Legal Privilege Protections (LPP)/Confidentiality to Clients of EU In-House Counsel*, Association of Corporate Counsel, <http://www.inhouseaccess.com/2010/04/articles/inhouse-practice/akzo-decision-denies-legal-privilege-protections-lppconfidentiality-to-clients-of-eu-inhouse-counsel/> (posted on 29 April 2010).  
 4. In the 1980s the European Court of Justice held in *AM & S Europe v Commission of the European Communities* [1982] ECR 1575 that parties in that proceeding could not claim privilege for communications with in-house counsel due to issues surrounding their independence.  
 5. *AM & S Europe v Commission of the European Communities* [1982] ECR 1575.  
 6. Opinion of the Advocate General Kokott, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v European Commission*, Case C-550/07 P [2007] ERC II-3523, at [153].  
 7. *Ibid.* at [64].  
 8. Competition authorities in Member States where privilege extends to in-house counsel, will operate as normal, with communications attracting legal professional privilege.  
 9. Currently in Bulgaria, Czech Republic, Estonia, Greece, Finland, France, Italy, Cyprus, Luxembourg, Hungary, Austria, Romania, Slovenia, Slovak Republic and Sweden all prevent in-house lawyers from admission to the Bar or Law Society. While German law does allow admission, legal professional privilege is not granted where there is communication with their employer.  
 10. *Miller v Commissioner of Inland Revenue* (1997) 18 NZTC 13,001., *Jeffries v Attorney General* [2009] NZCA 567.  
 11. *Commerce Commission v Caltex NZ* (1999) 9 TCLR 305.  
 12. *Commerce Commission v Fuller’s Cruises Northland Limited* [privilege] (1999) 9 TCLR 127, 131.

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