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III. THE NEGATIVE IMPLICATIONS OF EU PRIVILEGE LAW UNDER AKZO NOBEL AT HOME AND ABROAD.

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One may reasonably ask why the democratic implications resulting from such shielding of NRAs from parliamentary influence at the national level are not perceived by the EU legislator as a real problem?[46] It is submitted that taking into account the provisions on democratic principles introduced by the Treaty of Lisbon to the TEU (articles 9-12 thereof), both the EU legislator and the Court of Justice should now be more sensitive to the need for democratic participation of national legislatures in resolving highly debated regulatory issues (e.g. the promotion of investment in new markets), especially when the necessity of balancing the conflicting essential values is at stake. The need to enhance the democratic legitimisation of the sector-specific regulation and the necessity to better protect fundamental rights of regulated parties should prompt us to think about the future strengthening of the role of national parliaments in regulating network-bound sectors. It is submitted that there are two principal ways of achieving this objective. First, *de lege lata*, national parliaments may already take up some more active steps in the field of supervising, monitoring, controlling and supporting NRAs, but on the understanding that such parliamentary activity does not lead to the limitation of NRAs' discretion or to the taking over of the tasks that are conferred by EU Directives on NRAs. Second, *de lege ferenda*, the EU regulatory framework for network-bound sectors should be amended in such a way so as to enable national parliaments to enact statutory rules that in some strictly defined areas would steer the NRAs' activities, helping them to make the optimal regulatory choices.

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III. THE NEGATIVE IMPLICATIONS OF EU PRIVILEGE LAW UNDER *AKZO NOBEL* AT HOME AND ABROAD

A. Introduction

On 14 September 2010 the Court of Justice of the European Union (ECJ) delivered its judgment in *Akzo Nobel*.[1] The judgment and its preceding opinion focused on the application of legal professional privilege to communications between a client and in-house legal counsel. The less-emphasized aspect of the case was the Court's decision to exclude all lawyers qualified outside of the European Union (EU) from the application of legal professional privilege.[2] Because the application of legal professional privilege to lawyers from third States was not the focus of *Akzo Nobel*, the issue was lost in the extensive debate surrounding privilege and in-house legal counsel. The

and European integration' in J O'Brennan, T Raunio (eds), *National Parliaments Within the Enlarged European Union: From 'Victims' of Integration to Competitive Actors?* (Routledge, London, 2007) 3–4.

[46] Gärditz (n 36) 201.

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[1] Case C-550/07 *Akzo Nobel Ltd and Akcros Chemicals Ltd v European Commission* [2010] ECR [as yet unpublished].

[2] It is unclear whether AG Kokott meant only to exclude foreign in-house counsel, or all foreign lawyers. Presumably, the latter is intended.

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Court unfortunately missed an opportunity to reshape EU privilege law in acknowledgement of its negative consequences on the EU human rights framework and also on the EU's relationships with countries which do not apply a similar bright line rule. These implications will be discussed below with a particular emphasis on the EU's obligations under the European Convention on Human Rights (ECHR) and its relationship with the United States (US).

B. Legal Professional Privilege and Akzo Nobel

Akzo Nobel was not the first instance in which the Court adopted the opinion that legal professional privilege should not be extended to lawyers qualified outside of the EU. The decision of the ECJ in *AM&S Europe* also excluded non-EU lawyers from the application of legal professional privilege. After establishing the principle that legal privilege applies to communications between a client and his independent lawyer, the Court further restricted protection '. . . to any lawyer entitled or practise his profession in one of the Member States, regardless of the Member State in which that client lives' but not 'beyond those limits . . ..'[3] The Court did not, however, elaborate on its finding that privilege applies only to lawyers qualified in any of the Member States.

More than 20 years later, the Court was again faced with questions regarding the scope of legal privilege in *Akzo Nobel*. The focus of the case was whether legal professional privilege applied to communications with in-house legal counsel. In a decision the Court claimed was in line with precedent, it held that the privilege could not be applied to such communications because of the dependency of in-house counsel on their employers, despite the application of professional ethical obligations in the Member State concerned.[4] The judgment followed the opinion of Advocate General Kokott who felt that the absence of an employment relationship between the lawyer and his or her client was a necessity with regard to the determination of independence.[5] She further chose not to allow the application of the privilege to communications between a client and any lawyer qualified outside the EU. Because the focus of *Akzo Nobel*, like *AM&S*, was on whether legal professional privilege applied to in-house legal counsel, the Advocate General did not detail her decision to exclude non-EU lawyers from the privilege. She merely presumed that, 'it would not [. . .] 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.'[6] She further explained that the Courts of the EU do not have the time or resources to conduct an inquiry into the rules and practice of the third State concerned each time the issue presented itself.[7] This position was implicitly adopted by the ECJ in its decision which agreed with the Advocate General's opinion.

[3] Case 155/79 *AM & S Europe v Commission* [1982] ECR 1575, paras 25–26. In para 21 of this case, the Court held that the confidentiality of communications between lawyers and their clients should be protected at the European level, subject to two conditions: (1) the communications must relate to the client's right of defence, and (2) they must come from an independent lawyer, ie, 'lawyers who are not bound to the client by a relationship of employment.'

[4] ibid paras 40–51.

[5] Case C-550/07 *Akzo Nobel Ltd and Akcros Chemicals Ltd v European Commission*, Opinion of Advocate General Kokott, 29 April 2010, paras 60–61.

[6] ibid para 190.

[7] ibid.

The decision to maintain the restriction established in *AM&S* with regard to lawyers qualified outside the EU marks a failure to modernize the law of privilege in the EU in light of ever-increasing international business transactions and multi-jurisdictional investigations. It also carries with it several implications for EU human rights practice.

C. The Implications of Akzo Nobel *for EU Human Rights Practice*

1. The status of privilege in EU law

EU fundamental rights are derived from the traditions of the Member States, the practice of the European Court of Human Rights (ECtHR) in light of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the Charter of Fundamental Rights of the EU (CFREU). The CFREU is only applicable when EU law or the application thereof is under scrutiny and to the extent that the EU has competence over the subject matter.[8] The Member States are bound by the CFREU in their implementation of EU rules and the institutions are bound with regard to any measures enacted. In contrast, the ECHR binds 46 European countries and is not restricted to cases involving EU legislation. The ECHR is binding upon all States party and although all the Member States are party to the ECHR, the EU itself is not. However, the Treaty of Lisbon requires that the EU accede to the ECHR, at which point the institutions will also be bound by the Convention.[9] There is therefore a chance that the ECJ ruling excluding the application of legal professional privilege to non-EU lawyers could implicate the EU's obligations under the ECHR as a future party.[10]

Legal professional privilege is considered a fundamental right that belongs to the client and can be asserted where a breach of that right is suspected. It is protected by the CFREU and by the ECHR under two distinct legal bases: as part of defence rights in article 48 CFREU/article 6 ECHR, and in article 7 CFREU/article 8 ECHR as part of the right to respect for communications/correspondence. Although the former does protect legal privilege, it is unclear whether article 48/article 6 could be used to protect communications with lawyers when litigation is not considered.[11] In the interest of providing the most protection possible, it is argued that article 7/article 8 would be the most effective means of challenging the ruling in *Akzo Nobel*. The rights guaranteed by the ECHR are considered general principles of EU law and the ECJ will generally respect the case law of the ECtHR.[12] For that reason, this Part will examine privilege issues according to the ECHR.

[8] In support of the principle that the application of EU fundamental rights law must respect conferral, see the opinion of Advocate General Sharpston in Case C-34/09, *Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM)* [as yet unpublished] para 156–163.

[9] Art 6(2) Treaty on European Union (TEU).

[10] Of course, this may also be the case with regard to the inapplicability of the privilege to in-house legal counsel.

[11] R Pattenden, *The Law of Professional-Client Confidentiality: Regulating the Disclosure of Confidential Personal Information* (OUP, Oxford, 2003) 62.

[12] Art 6 TEU. See also Draft Charter of Fundamental Rights of the European Union, Convent 49, 2000 p 10: 'The rights guaranteed in Article 7 correspond to those guaranteed by Article 8 of the ECHR. To take account of developments in technology the word "correspondence" has been replaced by "communications". In accordance with Article 52(3), the meaning and scope of this right are the same as those of the corresponding article of the ECHR. Consequently, the

2. The right to confidentiality of communications

In *Campbell v UK*, the ECtHR explored the parameters of the right to attorney–client confidentiality.[13] Although legal professional privilege is protected, the right is not absolute. Interference with communications between lawyers and clients by the State can be considered legitimate if it is: (1) in accordance with the national law (including whether the national courts have upheld the validity of the rule),[14] and (2) necessary in a democratic society.[15] With regard to the first prong, the Court will examine the quality of the law, e.g., the extent of its foreseeability, whether it is clear and whether it has been interpreted by the national courts in such a way so as to offer protection to the privilege.[16] It will also review whether it is in accordance with the rule of law, e.g., especially in the context of searches and seizures, the law must protect the individual from arbitrary interference with his or her article 8 rights.[17] As to the second measure of compatibility, the Court will inquire as to whether the interference corresponds to a pressing social need that is proportionate to the legitimate aim pursued. Such legitimate aims include national security, public safety or the economic well-being of the country, the prevention of disorder or crime, the protection of health or morality, or the protection of the rights and freedoms of others.[18]

Assuming the EU is a party to the ECHR, the decision of the ECJ can be considered 'national law' for purposes of the above evaluation. Under the conditions set forth, the holding in *Akzo Nobel* with regard to non-EU lawyers fails the test, despite the satisfaction of the first condition. The ECJ's ruling that legal professional privilege does not apply between a client and a non-EU qualified lawyer is both foreseeable and clear because it is a bright line rule with no conditions attached to it. There is therefore no question as to whether the privilege attaches in circumstances where a client is represented by a lawyer qualified outside of the EU. The evaluation also considers whether the national law sufficiently protects against arbitrary interference with article 8 rights. Looking only at the aspect of the judgment relating to non-EU counsel, the total exclusion of privilege appears to be arbitrary and not very protective of the right to confidentiality. However, the right to privilege still remains with regard to all lawyers qualified in the EU who are not in-house counsel. Therefore, the exclusion is not absolute. Moreover, the logic behind the Court's decision is based on its own desire to preserve the rule of law by ensuring that lawyers are sufficiently independent and subject to proper regulation. Based on these facts, the ECtHR is likely to pass the ECJ's holding through the first level assessment.

However, when it comes to the second prong, i.e., whether the law is necessary in a democratic society, the judgment is less likely to pass muster. In its evaluation of this aspect, the ECtHR asks whether there is a pressing need of social importance. Advocate General Kokott responded by citing the preservation of the rule of law. She

limitations which may legitimately be imposed on this right are the same as those allowed by Article 8 of the ECHR. . ..'

[13] *Campbell v UK* (1992) 15 EHRR 137.

[14] ibid para 37. The ECtHR states that it is the task for the national courts, rather than the ECtHR, to determine whether the law at issue is valid. Where the national courts have upheld the validity of the law, the ECtHR is unlikely to disagree.

[15] ibid para 34.

[16] *Kopp v Switzerland* ECtHR judgment of 25 March 1998, No 23224/94, paras 55–75 and *Foxley v United Kingdom* judgment of 20 June 2000, No 33274/96 ibid, *Kopp*, paras 31–47.

[17] *Petri Sallinen and Others v Finland*, ECtHR judgment of 27 September 2005, No 50882/99, para 82.

[18] Art 8(2) ECHR.

states that it will be impossible in many cases to confirm whether the third country has a tradition for the rule of law sufficient to ensure that its lawyers are independent.[19] She then goes on to explain that verification would require 'considerable expense' and yield difficulties resulting from the fact that administrative cooperation with third countries is not a guarantee in every case.[20] In assessing these reasons in light of article 8(2), it could be argued that the ECJ's interference with the right to legal professional privilege and confidentiality is based on the protection of the morals of the EU (i.e., the rule of law and the independent exercise of the legal profession) and public safety (i.e., lawyers are viewed as an integral part of the administration of justice, which is essential for the maintenance of public safety and the prevention of crime and disorder). While this rationale may be acceptable with regard to the non-application of the privilege to in-house legal counsel whose independence is not guaranteed in many EU Member States,[21] it should not be extended to cover lawyers who are not in-house counsel and whose independence is most certainly regulated, such as lawyers in the US.

The US and the EU have an established history of cooperation in many areas, such as security, trade and foreign policy. In fact, Herman van Rompuy, the President of the Council of the EU, recently highlighted that the US is the EU's 'closest and most important partner' and that it shares the 'same values, interests and objectives'.[22] Further, many of the enterprises implicated by this decision have significant presences in both jurisdictions. Were the decision to result only in the non-application of the privilege to all in-house legal counsel in the EU and in third countries, it would be more likely to withstand an article 8 challenge. However, the ECJ (and the Advocate General) has excluded communications with all third country lawyers, regardless of whether or not they are in-house legal counsel. It is somewhat understandable that it cannot engage in an analysis every time this becomes an issue in matters before it, but to refuse even a cursory analysis of the relationship between the EU and the third country at issue (especially when it is the US) to determine whether a sufficient relationship exists, is an exclusion by the ECJ that should not be tolerated in light of the ECHR.

D. The Implications of Akzo Nobel *for Transatlantic Relations*

1. Legal privilege in the United States

In the US privileged communication is considered necessary for the 'ascertainment of truth for the ends of justice.'[23] It is protected in order 'to encourage full and frank communication between attorneys and their clients and thereby promote broader public

[19] Above (n 5) para 190. [20] ibid.

[21] On this issue see, Eversheds, 'Attorney-Client Privilege in Europe' (2007), available at <https://www.eversheds.com/documents/AttorneyClientPrivilege.pdf>; accessed 26 November 2010; J Fish, Council of the Bars and Law Societies of the European Union, 'Regulated legal professionals and professional privilege within the European Union, the European Economic Area and Switzerland, and certain other European jurisdictions' (2004), available at <http://elixir.bham.ac.uk/Free%20Movement%20of%20Professionals/Links_docs/fish_report_en.pdf> (last accessed 26 November 2010).

[22] EU–USA Summit Press Statement of Herman van Rompuy, 20 November 2010, available at <http://vloghvr.consilium.europa.eu/?p=3203> accessed 26 November 2010.

[23] CT McCormick, *McCormick on Evidence* (6th edn, Thomson/West Group, St, Paul, Minnesota, 2006) ss 87–97, 386–445. See also JH Wigmore, *Evidence in Trials at Common Law* ('Wigmore on Evidence') (John T McNaughton rev, Little, Brown and Co, 1961) vol 8, s 2290.

interests in the observance of law and administration of justice.'[24] The law of privilege is considered a rule of evidence, which may differ among states and at the federal level. The federal courts follow Federal Rule of Evidence 501, which allows them to determine the application of privilege on a case-by-case basis.[25] Therefore, at the federal level, federal common law will determine the scope and application of legal privilege. Most federal districts follow the rule established in *United States v United Shoe Machine Corp*, which requires that the legal advisor be 'a member of the bar of a court, or his subordinate.'[26]

At the state level, the general law on privilege has been summarized by *McCormick on Evidence* as follows:[27]

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client:
>
> (1) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
> (2) between the lawyer and a representative of the lawyer;
> (3) by the client or a representative of the client or the client's lawyer or a representative of the lawyer to a lawyer or a representative of the lawyer representing another party in a pending action and concerning a matter of common interest therein;
> (4) between representatives of the client or between the client and a representative of the client; or
> (5) among lawyers and their representatives representing the same client.

Communications are considered confidential 'if, at the time and in the circumstances of the communication, the communicating person reasonably believes that no one will learn the contents of the communication except a privileged person. . ..'[28] As will be discussed below, this test becomes important in light of the decision in *Akzo Nobel* regarding communications with non-EU lawyers and the legitimacy of the expectation that communications made within the jurisdiction of the EU will be privileged. State law on privilege is therefore very broad, granting privilege not only to communications between the lawyer and his client, but also between the lawyer's representative and the client or the client's representative. The communications protected are those that are

[24] *Upjohn Co v United States*, 499 US 383, 389 (1989).

[25] Rule 501 reads as follows: 'Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.' Note that where a case is in federal court under diversity jurisdiction, state privilege law will apply.

[26] *United States v United Shoe Machine Corp*, 89 F Supp 357, 358–359 (D Mass 1950).

[27] Above (n 23) s 87, 391 (n 19) (citing the Uniform Rule of Evidence 502(b)). *Wigmore on Evidence*, ibid, supplies the traditional rule of privilege: (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

[28] Restatement (Third) of the Law Governing Lawyers s 71 (2000).

considered 'confidential' according to the subjective beliefs of the communicator. The rules do not differ when it comes to lawyers qualified outside of the US. The typical procedure is for the courts to first determine whether the lawyer is competent or licensed to practice the law in his or her home state. Once that determination has been made, the courts will move on to consider whether communication at issue should be privileged.

2. Application of the privilege to non-US lawyers

There is no evidence from statutory law or case law to imply that US courts would treat lawyers qualified outside of the US differently than they would treat lawyers licensed in a US state other than the forum state.[29] As is the case generally with regard to privilege, it is up to each state to regulate how the privilege is applied with respect to non-US lawyers.[30] In some states, the test is that of competency. For example, in *Renfield Corp v E Remy Martin & Co*,[31] the court employed a functional test to determine the application of legal privilege. In order for the privilege to apply, the foreign lawyer must be 'competent to render legal advice' and be 'permitted by law to do so' in his or her home State.[32] Therefore, the emphasis is not on whether the foreign lawyer is admitted to the bar or licensed in his or her own State; it is whether, under the laws of his or her home State, the lawyer is deemed competent to render legal advice and has permission to do so. This has been called the functional equivalence test for legal privilege. The test in *Renfield* can be contrasted with the rule established in *Honeywell, Inc v Minolta Camera Co Ltd.*[33] In *Honeywell*, the court rejected the functional equivalence test and required that the foreign legal adviser be a de facto attorney as determined by a review of the individual's educational history, as well as whether he or she has a license to practice law in any State.

As the foregoing illustrates, US state and federal courts decide whether to apply legal privilege to foreign lawyers on a case-by-case basis, and according to an evaluation of specific factors. The courts by no means apply a bright line rule rejecting the application of the privilege to non-US lawyers.[34] Where privilege is denied, the denial

[29] American Bar Association, Report No 2 of the Section of International Law and Practice, Reports of the American Bar Association, Vol 108 (1983) 681.

[30] For other commentaries on this issue see: LP Cummings, 'Will Globalization be the Death Knell for the Corporate Attorney-Client Privilege in the US? An Opportunity to Re-Examine the Privilege as it Applies to In-House Counsel', speech given at the 61st annual meeting of the Southeastern Association of Law Schools, 27 July – 2 August, 2008, available at http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=lawton_cummings; D Yoshida, 'The Applicability of the Attorney-Client Privilege to Communications with Foreign Legal Professionals', (1997–1998) 66 Fordham Law Review 209; J Marin, 'Invoking the US Attorney-Client Privilege: Japanese Corporate Quasi-Lawyers Deserve Protection in US Courts Too' (1997–1998) 21 Fordham International Law Journal 1558.

[31] 98 FRD 442 (D Del 1982). [32] ibid 444. [33] 1988 WL 68932 (DNJ 1988).

[34] In fact, Congress rejected a proposed Federal Rule of Evidence that purported to define 'lawyer' for purposes of legal privilege as 'a person authorized, or reasonably believed by the client to be authorized, to practice in any state or nation.' (Proposed Federal Rule of Evidence 503). This was rejected in favour of the common law approach and so that the law of privilege would not become inflexible. HL Richardson, 'US Law of Attorney-Client Privilege as Applied to Non-US Lawyers: A Reciprocity Issue?' (1985) 7 Michigan Yearbook of International Legal Studies 325, 333.

is typically due to the fact that the foreign legal adviser is not considered a 'lawyer' under the relevant test.[35] There appears to be no circumstances under which a foreign lawyer is denied legal privilege purely because he or she is not qualified to practice law in the US. US courts are generally willing to undergo an evaluation of whether the foreign lawyer is indeed considered competent or legally qualified to practice in his or her home jurisdiction, despite the sometimes time-consuming nature of such an evaluation.

The issue of attorney–client privilege and foreign lawyers was brought to the fore in 2003 during the US Securities and Exchange Commission's (SEC) draft ruling under section 307 of the Sarbanes-Oxley Act.[36] Section 307 required that the SEC establish minimum standards of professional conduct applicable to all lawyers appearing before the Commission, including foreign lawyers, and including a rule requiring lawyers to notify the SEC of any material violation of securities law.[37] The draft rule required lawyers to make what was known as a 'noisy withdrawal' if their clients committed wrongful acts under US law. When it came time to adopt the final rule, the SEC abandoned the idea of noisy withdrawal in light of opinions from US and foreign parties who opposed the rule because of how it undermined attorney–client privilege and the relationship of trust between attorney and client.[38] In light of these opinions, the 'noisy withdrawal' provision was removed from the final version, indicating that the SEC did not wish to regulate the conduct of professionals licensed outside its jurisdiction.

3. Rules of conduct in the US

It may be that the reason behind the EU denial of privilege to non-EU lawyers is a fear that EU clients will choose to elicit the services of foreign professionals who may not respect confidentiality.[39] However given the exalted position of professional rules of conduct and codes of ethics in the US, this is unlikely to be the case. In the US codes of conduct are legally binding rules, rather than standards of professional behaviour, as is often the case in Europe.[40] The value placed on ethics and lawyerly conduct is demonstrated by their centrality in legal education. Professional responsibility is taught from the outset in law schools across the US and reinforced in all bar qualification exams. Although each state's rules of professional conduct will differ, they all more or less follow the rules as suggested in the American Bar Association's 1983 Model Rules

[35] See eg *Status Time Corp v Sharp Electronics Corp*, 95 FRD 27, 32–33 (SDNY 1982). However, some courts go so far as to grant the privilege to non-lawyers, e.g. professionals specialising in the fields of tax or patent law. See also Yoshida (n 30).

[36] 15 USC 7245 (2002).

[37] SEC, 'Implementation of Standards of Professional Conduct for Attorneys', File No S7-45-02, available at <http://www.sec.gov/rules/final/33-8185.htm> accessed 26 November 2010.

[38] ibid s 205.3(d) Issuer Confidences. In particular, see the opinion of the Council of Bars and Law Societies of the European Union, opposing the extraterritorial regulation of members of the bar resident in Europe (Part 3(1)), available at <http://www.sec.gov/rules/proposed/s74502/ccberesponse.htm> accessed 26 November 2010.

[39] Richardson (n 34) 336.

[40] MC Daly, 'The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers' (1999) 32 Vanderbilt Journal of Transnational Law 1117.

of Professional Conduct. Moreover, professional rules of conduct are often invoked before courts as a means of disqualifying lawyers for specific reasons such as conflicts of interest, or more pertinent to this discussion, breaches of the duty of confidentiality. These issues will be litigated publicly before courts of law or professional tribunals in order to ensure that lawyers are held accountable for any ethical violations. In light of the above, it is unclear, at least with regard to US lawyers, how the non-application of legal professional privilege can be justified by an inability or unwillingness to verify the quality of legal qualifications and professional ethical obligations, as Advocate General Kokott stated in her opinion.[41] It seems clear that this particular reservation would not present an issue in cases where EU individuals are represented by attorneys qualified in the United States.

4. The possible effect on US privilege law

As noted above, communications are privileged if they are confidential. Confidentiality is generally determined according to a standard of reasonableness, i.e., whether the communicating person reasonably believes that what he or she is communicating will be heard only by a privileged person.[42] The privilege is waived if either the client or the attorney discloses the communication to a third party, unless communication with the third party is also privileged.[43] There is a general discontent among US practitioners that not only will they not be granted privilege with respect to their European clients, but also that any communications that are not eligible for the privilege in Europe may be considered in the US to have been disclosed to a third party.[44]

By way of illustration, imagine that certain communications have been denied privilege in EU litigation because they were made between the client and its US representation.[45] Subsequently, a case is brought in the US involving the same communications that would normally be privileged in the forum state. Knowing that the EU denies the application of attorney-client privilege to non-EU lawyers, is it reasonable to believe that the communications were made confidentially?[46] If the answer is negative, it may be the case that the forum court will deny legal privilege to the communications at issue. This is especially a concern where American companies act in both Europe

[41] Above (n 5) para 190.

[42] An alternative test is whether the speaker intended for the communication to be confidential. See eg Uniform Rule of Evidence 502(a)(2): 'A communication is 'confidential' if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.' However, as Calhoun notes, most courts that use the subjective test, also require some degree of reasonableness (SA Calhoun, 'Globalization's Erosion of the Attorney-Client Privilege and What US Courts Can Do to Prevent It' (2008–2009) 87 Texas Law Review 235, 246.

[43] See eg Restatement (Third) of the Law Governing Lawyers s 79 comment c: An attorney's unintentional disclosure does not operate as a waiver. Waiver may be express or implied, although most jurisdictions require that the waiver be voluntary (as opposed to in error) (McCormick (n 23) s 93, 418, 419).

[44] On this issue see Cummings (n 30); Calhoun (n 42).

[45] The judgment in *Akzo Nobel* also makes this a problem where communications were made between the client and its in-house counsel. It is arguable that such communications would not be deemed confidential by several US courts.

[46] Where the test is simply subjective, this may not be a problem. However, as indicated above, most courts employ a reasonableness standard in conjunction with the subjective test.

and the US and are represented by US firms. What's more, it may be the case that US courts will deny application of the privilege to US companies simply due to the fact that they operate within an EU Member State. The US courts may presume that any communications made therein between the US client and his US attorney would not be confidential in nature.[47] As a consequence, such companies may not only lose their privilege in proceedings before national courts in Europe, but they may also lose their privilege before their home courts due to the application of EU privilege rules.[48]

One method of handling this issue would be for US courts to follow the District Court for the District of Columbia's holding in *In re Vitamins Antitrust Litigation.*[49] In that case, foreign governmental agency investigations into 20 defendant companies resulted in the production of documents that would have been privileged in US courts. When the case was litigated in the US, the defendants sought to suppress the production of those documents on the basis that foreign production had been compelled. The District Court pronounced a test to determine whether the defendants had in fact been compelled: 'disclosure [must] be made in response to a court order or subpoena or the demand of a governmental authority backed by sanctions for non-compliance, and [. . .] any available privilege or protection must be asserted.'[50] The defendants who argued implied compelled disclosure failed because the consequences of non-disclosure at the time were only that the authorities would make further demands and that the defendants' cooperation with the European Commission would be in jeopardy. Now, however, the ruling in *Akzo Nobel* makes the test to determine compelled disclosure seem like a sensible means of circumnavigating the issue because claimants may be capable of arguing compulsion by law.

That EU evidentiary rules might impact similar rules in the US is obviously an unsatisfactory outcome from the perspective of US attorneys and their US clients. It is doubtful that the ECJ intended that its decision produce such extraterritorial consequences.

5. The possible effect on transatlantic commerce

The extent of economic integration between the US and the EU is undeniable. The interdependence of US and European markets is on the rise, as well as the amount of international business activity and foreign investment between the US and EU. Transatlantic commercial activity generates approximately US$3.75 trillion in sales yearly and employs 14 million people directly in Europe and America.[51] This global activity necessitates international legal advice, especially where ascertaining foreign law is a key aspect of a business venture. If foreign clients are unable to consult US lawyers without fear that their communications will later be exposed, either in the EU or in the US through some manipulation of US privilege law, the consequences for and burdens on international business could be vast. Likewise, US clients doing business in the EU should be able to consult their US lawyers confidentially.

[47] Calhoun (n 42) 249.
[48] ibid.
[49] 2002 US Dist LEXIS 25789 (DDC Feb 7, 2002).
[50] ibid 105.
[51] D Hamilton and JP Quinlan, 'The Transatlantic Economy 2009' (Brookings Institution Press, Washington DC, 2009). The US and the EU are each other's number one source of foreign direct investment. See European Council on Foreign Relations, 'Towards a Post-American Europe: A Power Audit of EU–US Relations' (ECFR 2009) 24.

In this connection, it should be briefly noted that prior to the entry into force of the Treaty Establishing the European Economic Community in 1958, the US entered into several bilateral commercial agreements, still in force today, with foreign States that are now EU Member States.[52] The majority include language permitting the parties to consult foreign professionals, such as accountants or lawyers, of their own choosing.[53] For the example, the Treaty of friendship, establishment and navigation between the US and Belgium includes the following language in article 8(1): 'Nationals and companies of either Contracting Party shall be permitted to engage, within the territories of the other Party, the services of accountants and technical experts of all kinds, executive personnel, attorneys, agents and other specialists of their choice.'[54] Article 351 TFEU (ex article 307 TEC) states that rights and obligations arising from agreements entered into before 1 January 1958 (or before the date of accession for new Member States) will not be affected by the Treaties. Nineteen of the agreements satisfy this condition. What is the fate of these international agreements in light of the decision in *Akzo Nobel*? Will this right be preserved in accordance with article 351 TFEU, or will the

[52] Treaty of friendship, commerce, and consular rights, May 27, 1931, US–*Austria*, 47 Stat 1876; Treaty of friendship, establishment and navigation, October 3, 1963, US–*Belgium*, 14 UST 1284; TIAS 5432; 480 UNTS 149; Treaty concerning the encouragement and reciprocal protection of investment, June 2, 1994, US–*Bulgaria*, S Treaty Doc No 3, 103d Cong, 1st Sess (1993); Treaty concerning the reciprocal encouragement and protection of investments, January 1, 1993, US–*Czech Republic*, S Treaty Doc No 31, 102d Cong, 2d Sess (1992); Treaty of friendship, commerce, and navigation, July 30, 1961, US–*Denmark* (Convention of 1826 was in force prior to this date) 12 UST 908; TIAS 4797; 421 UNTS 105; Treaty of friendship, commerce, and consular rights, May 22, 1926, US–*Estonia*, 44 Stat. 2379; Treaty of friendship, commerce, and consular rights, August 10, 1934, US–*Finland*, (E-1) 49 Stat 2659. Protocol of amendment, December 1, 1992 (E-2) S Treaty Doc No 34, 102d Cong., 2d Sess (1992); Convention of establishment, December 21, 1960, US–*France*, 11 UST 2398; TIAS 4625; 401 UNTS 75; Treaty of friendship, commerce, and navigation, July 14, 1956, US–*Germany*, 7 UST 1839; TIAS 3593; 273 UNTS 3; Treaty of friendship, commerce, and navigation, October 13, 1954, US–*Greece*, 5 UST 1829; TIAS 3057; 224 UNTS 279; Treaty of friendship, commerce and navigation, September 14, 1950, US–*Ireland*, (E-1) 1 UST 785; TIAS 2155; 206 UNTS 269, Protocol of amendment, November 18, 1992, (E-2) S Treaty Doc No 35, 102d Cong, 2d Sess (1992); Treaty of friendship, commerce and navigation, July 26, 1949, US–*Italy*, 63 Stat. 2255; TIAS 1965; 79 UNTS 171; Treaty of friendship, commerce, and consular rights, July 25, 1928, US–*Latvia*, 45 Stat. 2641; Treaty for the encouragement and reciprocal protection of investment, January 14, 1998, US–*Lithuania*, TIAS 12918; Treaty of friendship, establishment and navigation, March 28, 1963, US–*Luxembourg*, 14 UST 251; TIAS 5306; 474 UNTS 3; Treaty of friendship, commerce and navigation, December 5, 1957, US–*Netherlands*, 8 UST 2043; TIAS 3942; 285 UNTS 231; Treaty concerning business and economic relations, August 6, 1994, US–*Poland*, S Treaty Doc No 18, 101st Cong, 2nd Sess (1990); Treaty concerning the reciprocal encouragement and protection of investment, January 15, 1994, US–*Romania*, S. Treaty Doc No 36, 102d Cong, 2d Sess (1992); Treaty concerning the reciprocal encouragement and protection of investments, January 1, 1993, US–*Slovak Republic*, S Treaty Doc No 31, 102nd Cong, 2d Sess (1992) (The Treaty with the Czech and Slovak Federal Republics collectively entered into force on December 19, 1992, but entered into force for the Czech Republic and Slovak Republic as separate states on January 1, 1993; Treaty of commerce, November 15, 1882, US–*Slovenia*, 22 Stat 963; Treaty of friendship and general relations, April 14, 1903, US–*Spain*, 33 Stat 2105; Convention to regulate commerce, US–*United Kingdom*, July 3, 1815, 8 Stat 228.

[53] See also agreement between the US and: Denmark (Art VII); France (Protocol 1(b)); Germany (Art VIII); Greece (Art XII); Ireland (Art VI); Italy (Art V); Luxembourg (Art VIII); Netherlands (Art VIII); Slovenia (Art IV); Spain (Art VI).

[54] This appears to be standard boilerplate text used in this type of agreement; however, the extent to which these provisions are relied on in practice is outside the scope of this paper.

decision override the Treaty in this regard? Neither Advocate General Kokott nor the ECJ addressed the disposition of the case in light of prior existing international agreements that could be affected by the holding. Nevertheless, it appears there could be a problem with the Court's decision in terms of compliance with article 351.

E. Conclusion

The ECJ's failure to re-examine the law regarding legal professional privilege with respect to lawyers qualified outside the EU is unfortunate. Its holding is anachronistic and does not take into account the extent to which the EU does business with third countries, especially the US. Nor does the decision adequately address the scope of legal professional privilege in light of the framework of the ECHR. The economies of the US and the EU have become heavily integrated and interdependent marked by the continued development of transnational corporations and multi-jurisdictional business ventures. This global activity requires global expertise to advise on international issues, such as advice regarding US law for foreign investment by European clients. The exclusion of communications with non-EU lawyers may negatively impact the commercial relationship between the US and the EU by complicating international business relationships and weakening lawyer-client trust and communication. The EU's position should therefore be reassessed not only in light of its effect on EU–US relations, but also in light of its implications for fundamental rights.

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