



# Herbert Smith

## Competition, regulation and trade e-bulletin

### **Antitrust proceedings and the application of legal privilege under English law: Competition Appeal Tribunal rules that the OFT's *Dairy* investigation was sufficiently "adversarial" for litigation privilege to apply, but areas of uncertainty remain**

In its ruling of 20 March 2012, made in the context of Tesco's appeal of the Office of Fair Trading's (OFT) *Dairy* cartel infringement decision, the Competition Appeal Tribunal (CAT) rejected the OFT's request for disclosure of notes of third party witness interviews which had been carried out by Tesco's lawyers during the OFT's investigation. The CAT held that these materials were subject to litigation privilege under English law, as by the time the witness interviews took place the OFT's investigation could be regarded as "*sufficiently adversarial*" to amount to litigation. This question had not previously been addressed by the English courts (and some commentators had suggested that competition investigations should not be regarded as adversarial), and the CAT's rejection of the OFT's argument that litigation privilege does not apply in respect of any competition investigations is welcome. However, certain questions remain unresolved. Companies under investigation by the competition authorities will therefore still need to take care in respect of communications with third parties (whether witnesses or experts such as economists), and to work with their legal advisers to ensure so far as possible that documents created in the course of competition investigations are appropriately protected by litigation privilege or legal advice privilege.

#### **Background to the case**

The OFT's *Dairy* investigation has a long and complex history, but in summary the facts are as follows. Prompted by a leniency application, the OFT opened in January 2004 an investigation into so-called "ABC" or triangular information exchanges in relation to future retail prices of milk and cheese products. The OFT issued various information requests to supermarkets and dairy processors, and interviewed employees of the leniency applicant (Arla). The OFT issued a Statement of Objections (SO) in September 2007 alleging infringements of the Chapter I prohibition on anti-competitive agreements. Following receipt of the SO

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a number of its addressees entered into "early resolution agreements" with the OFT, admitting liability in exchange for a reduction in fine. Tesco, however, contested the allegations. Following further investigations the OFT issued a Supplementary SO (SSO) in July 2009. The OFT subsequently dropped some of its allegations, but continued to allege infringements in respect of other matters.

Tesco decided to contest these allegations, and informed the OFT in January 2011 that it intended to seek witness evidence from third party witnesses outside Tesco, in particular current and ex-employees of a number of the dairy processors, in order to do so.

Tesco's lawyers subsequently wrote to the OFT in July 2011 (a day after the OFT had taken its infringement decision, but prior to its notification to the parties) enclosing copies of two third party witness statements. The letter also referred to contacts and interviews having taken place with other third party witnesses, who were stated to have supported Tesco's case, but to have been unwilling to become involved in the process or as having only a poor recollection of the facts.

It was the notes made by Tesco's lawyers of these interviews with third parties (the Potential Witness Material) which the OFT subsequently sought disclosure of in the context of Tesco's appeal to the CAT (Case 1188/1/1/11) of the OFT's infringement decision, in which Tesco was fined a total of £10.43m for infringements of the Chapter I prohibition in respect of cheese. The OFT claimed, at a very late stage in the disclosure process, that it required the Potential Witness Material in order to deploy this in cross-examination of the witnesses called by Tesco

#### **The arguments as to disclosure**

Tesco disputed that disclosure was necessary and proportionate (there being no automatic right to disclosure in the CAT), and that in any event the Potential Witness Material was covered by litigation privilege.

The OFT argued that the Potential Witness Material was not covered by litigation privilege on the basis that OFT investigations under the Competition Act 1998 are "inquisitorial" rather than "adversarial" in nature, being directed at investigating the facts, in order to protect the public interest. The OFT further argued that even if litigation privilege applied, it had been waived by Tesco, through its reference to the material within its lawyers' correspondence with the OFT.

#### **CAT judgment (2012 CAT 6)**

The CAT found that disclosure was not necessary and proportionate, and rejected the OFT's application on this basis. Moreover, despite it not being strictly necessary to consider the privilege arguments, the CAT went on to do so.

Focussing on the particular facts of the case, the CAT considered whether by the time Tesco contacted the third party witnesses from around January 2011, the OFT's investigation should be classified as "adversarial" rather than "investigative or inquisitorial" in nature, under the test for the application of litigation privilege established in the *In re L* case and summarised by the House of Lords in its *Three Rivers* decision (see our previous e-bulletin [here](#)).

The CAT rejected the OFT's submission that all investigations at all points under the Competition Act 1998 are inquisitorial, holding that the nature of the proceedings in a particular case needs to be considered, and that proceedings may not be wholly adversarial or wholly inquisitorial. The CAT held that by January 2011 there had been an SO and SSO in which Tesco "*stood accused of wrongdoing*", and that Tesco was contesting the OFT's case that the Chapter I prohibition had been infringed. It concluded that by this stage the OFT's administrative proceedings were confrontational and adversarial in the same manner as civil court proceedings involving equivalent allegations would have been. The CAT was influenced in this respect by the fact that the OFT was about to decide upon Tesco's liability and that Tesco could have been fined very significant sums in respect of the alleged infringements, concluding that therefore the proceedings were "criminal" for the purposes of Article 6 of the European Convention of Human Rights (ECHR). The CAT's view that the proceedings were criminal for Article 6 ECHR purposes was not contested by the OFT (although the OFT contested the relevance of this to the question of whether litigation privilege applied). Furthermore, the CAT noted that a fair procedure under Article 6 ECHR included the right to gather evidence, and as a corollary litigation privilege applied in this instance.

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The CAT therefore concluded that the contacts between Tesco's lawyers and the third party witnesses were covered by litigation privilege, going on to hold that privilege in the Potential Witness Material had not been waived by Tesco

### **Impact of the CAT's judgment**

Although the CAT judge stated that he "*did not regard my conclusion as breaking any new ground*" (commenting that it was likely that both litigation privilege and legal advice privilege have previously been routinely claimed in such investigations without challenge), this is the first time that an English court has confirmed that litigation privilege can apply to a Competition Act 1998 investigation, and indeed some texts on evidence had previously pointed to competition investigations as examples of proceedings which are not adversarial in nature. Therefore the application of litigation privilege to this scenario is welcome clarification. The judgment also usefully reaffirms that such investigations constitute criminal proceedings for ECHR/Human Rights Act 1998 purposes, and therefore that they engage Article 6 ECHR rights. Given the OFT's approach to legal privilege here, the judicial affirmation of the importance of the principle of legal privilege in this context is particularly welcome.

However, the judgment, in light of its focus of the particular facts of the case and emphasis on the stage which had been reached in the investigation, does not address whether all investigations under the Competition Act 1998 can be regarded as adversarial from their initiation. There continues to be no express authority, for example, as to whether litigation privilege could be claimed for documents created at an earlier stage in an investigation, when the OFT's position on infringement is not clear, such as prior to the issuance of an SO (or in respect of issues or time periods not covered by the SO). In this case counsel for the OFT noted that if, contrary to its main arguments, litigation privilege could apply during OFT investigations, it could only do so from the point of the SO onwards. Similarly, given the reference to significant sanctions within the judgment, there remains no express authority that investigations in which the OFT has indicated that it is not minded to impose a fine attract litigation privilege.

Therefore there remains a risk that the OFT could seek access (whether as part of the investigation itself or on appeal, or in respect of another investigation) to communications with or documents created by third parties, including economists' reports, produced in the context of a Competition Act 1998 investigation, in particular those created at an earlier stage in an investigation. This may restrict the ability of the parties under investigation to fully and freely investigate, and seek third party expert advice, in respect of the subject-matter of the investigation in its earlier stages, to determine whether the OFT's suspicions are well-founded. This raises questions as to fairness.

The judgment also does not determine whether other forms of competition investigation, for example market studies conducted by the OFT, or market investigations conducted by the Competition Commission under the Enterprise Act (which do not lead to an infringement finding and fine, but can lead to significant remedies being imposed, and which often have the character of adversarial proceedings, certainly as the inquiry progresses), could be regarded as adversarial such as to attract litigation privilege, although the judgment does suggest that such market proceedings could be regarded as non-adversarial. Similar questions arise in respect of merger investigations.

More generally, it appears that the OFT in particular may be taking an increasingly strict approach to privilege claims, as reflected in this case. For example, within its draft revised guidance on *Applications for leniency and no-action in cartel cases* (published for consultation in October 2011) the OFT stated that it "*will be strict about accepting claims for privilege*", whether in relation to litigation or legal advice privilege. It also emphasised as part of the consultation that "*It should not be assumed that all witness account material falls within the scope of legal professional privilege*".

### **Other privilege issues not addressed in this case**

#### ***Legal advice privilege***

The disputed material consisted of notes of interviews with potential third party witnesses, rather than legal advice to Tesco, and therefore the CAT's judgment was not concerned with legal advice privilege.

However, given the narrow approach taken by the OFT to privilege in this case, it serves as a useful reminder that companies also need to be alive to ensuring that the process of instructing and communicating with their lawyers in respect of Competition Act 1998 and other antitrust investigations, and the preparation of internal documents for this purpose, are structured so as to preserve legal advice privilege so far as possible. For example, there remain issues in identifying the "client" for the purposes of legal advice privilege following the *Three Rivers* litigation. Therefore companies would need to consider carefully who should instruct lawyers and create documents in respect of the investigation, and in what form, to ensure that privilege protection is maximised so far as possible.

### **EU privilege**

The CAT's judgment concerned the English rules on privilege, not the EU rules on privilege applicable to competition investigations being conducted by the European Commission. In relation to European Commission investigations, companies need to bear in mind that the EU rules on privilege are narrower than those under English law. In particular, EU privilege relates only to communications made for the purposes and in the interests of the client's right of defence, and with independent external lawyers entitled to practice in the EEA; it does not extend to communications with in-house lawyers (see our briefing on this point [here](#)) or non-EEA lawyers.

As noted by the CAT in this case, it is also unclear whether litigation privilege would be recognised in the case of EU Commission investigations, as this has not been tested to date before the EU courts.

Guidance in respect of the EU privilege rules can be found in our briefing [here](#).

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12 November 2004

## The House of Lords reaffirms the importance of legal advice privilege – but practical problems remain

### *Three Rivers District Council and Others v The Governor and Company of the Bank of England* [2004] UKHL 48

The House of Lords yesterday handed down its much anticipated judgment in the *Three Rivers* litigation, in which their Lordships allowed the Bank of England's appeal from the Court of Appeal's decision in relation to "presentational" advice. The Lords yesterday gave reasons for that decision, fundamentally rejecting the Court of Appeal's reasoning and re-emphasising the right to seek legal advice in confidence.

Disappointingly, their Lordships have not taken the opportunity to comment on the earlier Court of Appeal decision which had cast doubt on whether communications between a lawyer and the client's employees are covered by legal advice privilege.

#### Implications for competition cases

- The judgment is concerned with legal advice privilege under UK law only and does not affect the position under EC law.
- The judgment has removed much of the uncertainty relating to the scope of UK legal advice privilege in the context of investigations by competition/regulatory authorities. Their Lordships have expressly confirmed that advice on assembling material for presentation of a case is a "classic exercise of one of the lawyer's skills." Therefore, correspondence between client and lawyer concerning submissions by the client under investigation to a regulator, whether it be in the context of OFT investigations into anti-competitive conduct or agreements, merger investigations or Competition Commission market references, will now be characterised as advice given in a legal context. Privilege may also be asserted where the client makes submissions as an objector/complainant.
- Unresolved issues on the scope of privilege do however persist, including, the question of whether documents prepared by third parties, such as economist reports, made in the course of a competition inquiry would be covered by litigation privilege. It is, at present, clear that third party reports commissioned where litigation is in prospect or pending, will be covered by litigation privilege. However, the law currently gives a restrictive definition of "litigation" as being proceedings which are "adversarial" in nature, and whether competition investigations should be characterised as adversarial for these purposes has never been addressed by the courts. There is, on this point, some suggestion in two of their Lordships' judgments that it may be necessary to analyse more fully the characteristics of proceedings which attract litigation privilege, but that is for a future case.
- Finally, given that the judgment does not resolve the problem of identifying who is the "client" for the purpose of legal advice privilege, companies making submissions in the course of an antitrust investigation, would be well advised to set up a specific team or task force whose responsibility is documented as being to correspond with the lawyers on behalf of the client and seek to restrict, so far as possible, the creation of documents by employees outside of the team.

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## House of Lords' reasons

### Presentational Advice

The appeal to the House of Lords concerned the question of whether communications between the Bank of England and its legal advisers for advice and assistance in relation to the Bingham Inquiry concerning the collapse of BCCI were protected by legal advice privilege. The Court of Appeal had held (click [here](#) to see the e-bulletin of 1 March 2004 prepared by our litigation department) that legal advice privilege only protects advice as to legal rights and obligations, and that this did not include what it regarded as "presentational" assistance in putting relevant factual material before the Inquiry in an orderly and attractive fashion. In doing so, the Court of Appeal not only appeared to narrow the scope of legal advice privilege, opening up the need for difficult considerations as to whether a lawyer's retainer was for the dominant or primary purpose of genuine legal advice or mere "presentational" advice, but also went so far as to voice doubts as to the justification for legal advice (as opposed to litigation) privilege.

In unanimously rejecting the Court of Appeal's narrow application of legal advice privilege, their Lordships took the opportunity to reaffirm the public policy reasons for it. In comprehensive reviews of the authorities, both Lord Scott and Lord Carswell (who gave the two main speeches) stressed that the rationale for legal privilege is the need for a client to be able to seek advice from a lawyer with absolute candour, which is only possible where the lawyer can give unqualified assurance that whatever the client tells him in confidence will never be disclosed without his consent. In drawing those conclusions, their Lordships rejected the Court of Appeal's doubts as to its justification, emphasised the absolute nature of privilege, and concluded that the Court of Appeal had failed to accord legal advice privilege a wide enough scope.

In determining the proper scope of legal advice privilege, Lord Scott referred to *Balabel v. Air India* [1988] 1 Ch 317 (which was generally referred to with approval by their Lordships), and to Taylor LJ's statement that legal advice includes "advice as to what should prudently and sensibly be done in the relevant legal context". While conceding that there would be marginal cases where it is difficult to determine whether the seeking or obtaining of advice took place in a relevant legal context so as to attract legal advice privilege, Lord Scott concluded that in cases of doubt, an objective test should be applied as to whether the advice relates to the "rights, liabilities, obligations or remedies of the client either under private law or under public law".

In the context of this case the issue was "not in the least marginal". The preparation of the evidence and the submissions to be made to the Bingham Inquiry were for the purpose of enhancing the Bank's prospects of persuading the Inquiry that its discharge of its public law obligations under the Banking Acts in relation to BCCI had been reasonable. Accordingly, although "presentational", the advice was given as to what should prudently and sensibly be done in the relevant legal context of the Bingham Inquiry and the Bank's public law duties under the Banking Acts. In Lord Scott's opinion, such advice fell "squarely within the policy reasons underlying legal advice privilege".

The other Lords made similar points as to the wide scope of the privilege. Lord Rodger putting it as "whether the lawyers are being asked qua lawyers to provide legal advice", or more prosaically, whether they were being asked to "put on legal spectacles". Lord Carswell noted that "presentational" advice of the type given to the Bank was part of "the classic exercise of one of the lawyer's skills", irrespective of the forum, provided that such advice is given in a legal context. Lord Carswell went further in concluding that the principle affirmed in the earlier case of *Minter v. Priest* [1929] 1 KB 655 remained applicable, that case having held that privilege applies to advice within "the ordinary scope of a solicitor's business", and communications for the purposes of obtaining the professional advice of the legal adviser.

The opinions therefore amount to a clear rejection of the Court of Appeal's conclusions, not only in relation to the specific circumstances of advice in relation to the Bingham Inquiry, but also in relation to the apparent restriction in scope of, and even questioning the need for, legal advice privilege.

## Employee communications

In an earlier application in the same case (click [here](#) to see the e-bulletin of 10 April 2003 prepared by our litigation department), the Court of Appeal held that legal advice privilege only protected communications between the legal adviser and the Bingham Inquiry Unit ("BIU") within the Bank of England as the "client". It did not protect documents generated by employees of the client for submission to the party's legal advisers, the employees being deemed to be third parties rather than the client for this purpose.

Permission to appeal that decision had previously been refused, and it was not technically in issue before their Lordships. However, given the concern expressed at the implications of that judgment, particularly for corporate clients who can only communicate through employees or officers, the House of Lords had been invited by the applicants, and by the Attorney General, the Law Society and Bar Council, to clarify the approach that should be adopted to determine whether a communication between an employee and his employer's lawyers should be treated for legal advice privilege purposes as a communication between the lawyer and the client.

Disappointingly, however, their Lordships declined to do so. Lord Scott noted that in the present case disclosure had already been given pursuant to the Court of Appeal judgment, so that the issue was moot. He also noted that it was a difficult issue with a dearth of domestic authority; that whatever views were expressed would not bind the lower courts; and that if the issue did come back before the House of Lords, a different view might then be reached. Lord Scott stated that "nothing that I have said should be construed either as approval or disapproval of the Court of Appeal's ruling on the issue". Lord Carswell, however, stated that he saw "considerable force" in the first instance judgment which had found the employee documents to be privileged, and also that "I am not to be taken to have approved of the [Court of Appeal's] decision ... and I would reserve my position on its correctness".

Whatever may be drawn from Lord Carswell's comment as to any future decision, the law remains in this respect in an unsatisfactory state.

## Comment

- Subject to the issue as to employees, the judgment represents a welcome re-affirmation of the importance and breadth of legal advice privilege, and should ensure that parties and courts alike are able to apply a simple and objective test in determining whether a lawyer's correspondence with a client is made in a legal context. Legal advice privilege will apply whenever a lawyer is advising "in a legal context", "qua lawyer", or with his "legal spectacles on". As previously thought, privilege extends to advice as to what to do in such a legal context (including other correspondence within that continuum of correspondence), and is not restricted to advice solely as to "legal rights and obligations".
- In relation to the status of employees, the refusal to give guidance in this area leaves companies and courts faced with what Baroness Hale referred to as "particular difficulties in identifying 'the client' to whose communications privilege should attach". Companies will face difficult issues as to who can be regarded as the lawyer's "client" whenever advice is sought from external legal advisers or in house lawyers. This will hamper the efficient and cost-effective gathering of information for the purpose of obtaining legal advice. The benefit of re-affirming the importance and breadth of legal advice privilege is severely reduced if significant practical doubts remain for corporates as to its applicability to communications with their employees.

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## European Court of Justice confirms that privilege does not apply to in-house lawyers under EU competition law

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The European Court of Justice (ECJ) has today handed down judgment in the *Akzo* privilege case, confirming that legal professional privilege does not apply to protect communications between parties and their in-house lawyers from disclosure during competition investigations by the European Commission (*Akzo Nobel Chemicals Limited and Akros Chemicals Limited v Commission of the European Communities*).

Although the decision will not come as a surprise, following as it does the Advocate General's opinion published on 29 April 2010 (see our [e-bulletin](#) of that date), in-house lawyers and the organisations which employ them will no doubt be disappointed by the court's ruling.

The decision does not affect the scope of privilege as a matter of English law, under which in-house lawyers continue to enjoy the same protection as external lawyers so long as they are acting in their capacity as a lawyer and not an executive.

### Decision

The decision turns on whether or not an in-house lawyer is sufficiently "independent" from his or her employer so as to benefit from legal professional privilege under EU law.

In its 1982 judgment in *AM&S Europe v Commission of the European Communities* [1983] QB 878, the ECJ held that communications between lawyers and their clients should be protected at Community level, so long as the communications were (i) connected to "the client's rights of defence" and (ii) with "independent" lawyers, which was deemed to exclude "lawyers bound to the client by a relationship of employment".

In the present case *Akzo* argued that the criterion of independence cannot be interpreted so as to exclude in-house lawyers, and that an in-house lawyer enrolled at a Bar or Law Society is just as independent as an external lawyer, in light of his or her obligations of professional conduct and discipline.

The ECJ disagreed. It held, following the judgment in *AM&S*: "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."

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The judgment states that an in-house lawyer cannot 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". This lack of independence follows, in the court's view, both from the in-house lawyer's economic dependence on his employer and the close ties with his employer.

The ECJ also rejected an argument that competition law has evolved considerably since the *AM&S* ruling, both at member state level and at EU level, thereby requiring the principles set out in that decision to be reconsidered. Although the court accepted that the role of in-house lawyers has evolved since *AM&S*, it said there is nevertheless no clear trend at member state level towards protection for communications with in-house lawyers which would justify a departure from the principles established in *AM&S*. Further, it held that the new modernised enforcement regime of Regulation 1/2003 does not require in-house and external lawyers to be treated in the same way where legal professional privilege is concerned.

The judgment is contrary to the submission of various parties who intervened in the case including the British, Irish and Dutch governments, the Council of Bars and Law Societies of Europe and the International Bar Association (IBA).

### Comment

This decision will be disappointing for in-house lawyers and the organisations which employ them. Although the decision was foreshadowed by the opinion of the Advocate General, it had been hoped that the ECJ might give proper recognition to the professional and ethical obligations that in-house lawyers share with their counterparts in private practice.

It must however be remembered that this decision affects legal professional privilege **only** in the context of EU competition law investigations led by the European Commission. The national laws of privilege which apply in respect of litigation conducted before member states' courts are unaffected.

With regard to EU competition investigations, there are two possibilities:

- Where the investigation is conducted by the European Commission, even if assisted by national competition authorities (such as the OFT), the EU rules of privilege will apply (and, following *Akzo*, communications with in-house lawyers will not be privileged).
- Where the investigation is conducted by the national competition authorities on behalf of the European Commission, the national rules of privilege will apply.

This highlights the need for companies under investigation to establish at the start of a dawn raid what type of investigation is taking place.

*Akzo* was advised by Christof Swaak of Stibbe, our Dutch alliance firm. Jacques Buhart and Isabelle Michou of our Paris office represented the IBA.

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## Advocate General's opinion that privilege should not apply to in-house lawyers under EU competition law

The Advocate General's Opinion in the Akzo privilege case was published today. In her Opinion, Advocate General Kokott takes the view that legal professional privilege should not be extended to protect communications between parties and their in-house lawyers from disclosure during competition investigations by the European Commission (*Akzo Nobel Chemicals Limited and Akcros Chemicals Limited v Commission of the European Communities*).

The Advocate General agrees with the ruling to this effect handed down by the General Court (formerly the Court of First Instance, or CFI) on 17 September 2007, in which it decided that EU law should continue to follow the 1982 judgment of the European Court of Justice (ECJ) in *AM&S Europe v Commission of the European Communities* [1983] QB 878 (see our [e-bulletin](#) on the CFI judgment). In that case, the ECJ held that legal professional privilege only applies to communications with "independent" lawyers, which is deemed to exclude lawyers bound by a "relationship of employment".

The case does not affect the scope of privilege as a matter of English law, under which in-house lawyers continue to enjoy the same protection as external lawyers so long as they are acting in their capacity as a lawyer and not an executive.

The Advocate General has reached this Opinion contrary to the submissions of various parties who intervened in the case including the British, Irish and Dutch governments, the Council of Bars and Law Societies of Europe and the International Bar Association.

The Opinion notes that legal professional privilege serves to protect communications between a client and a lawyer who is independent of that client, but that there is a "fierce dispute" between the parties as to how the criterion of independence is to be understood.

The appellants and intervenors argue in favour of a "positive" definition of independence, by reference to the professional and ethical obligations to which lawyers admitted to a Bar or Law Society are generally subject. The Advocate General, however, takes the view that such obligations are necessary but not sufficient to provide the required independence; there must also be the absence of an employment relationship. She states:

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"The reasoning behind this is that an enrolled in-house lawyer, despite his membership of a Bar or Law Society and the professional ethical obligations associated with such membership, does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his clients. Consequently, an enrolled in-house lawyer is less able to deal effectively with any conflicts of interest between his professional obligations and the aims and wishes of his client than an external lawyer." (paragraph 61)

In support of this view, the Advocate General states that in-house lawyers are for the most part "economically dependent" on their employer and, in addition, usually exhibit a considerably stronger "personal identification" with their employer and its corporate policy and strategy than would be true of external lawyers in relation to the business activities of their clients. Both of these factors are said to militate against the proposition that in-house lawyers should enjoy the protection of legal professional privilege in respect of internal company or group communications.

The Opinion goes so far as to say that the "susceptibility" of an in-house lawyer to conflicts of interest makes it difficult for him to raise an effective opposition to any abuses of legal professional privilege, such as handing evidence to the company's legal department under cover of a request for legal advice for the purpose of preventing the competition authorities from gaining access to it. It continues: "At worst, the functional departments of an undertaking may be tempted to misuse the company's or group's internal legal department as a place for storing illegal documents such as cartel agreements and records of meetings between the parties to those cartels and of the modus operandi of a cartel." (paragraph 150)

The appellants also argue that the evolution of competition law since the AM&S case requires this decision to be reconsidered. The new modernised enforcement regime of Regulation 1/2003 leads to an increasing need for internal corporate legal advice by in-house lawyers, who have the necessary intimate knowledge of the business, but unless such advice can benefit from legal professional privilege companies will feel the need to turn to external counsel. The Advocate General dismisses this closeness as a double-edged sword and argues that it is precisely this proximity to the undertaking concerned which calls the independence of the enrolled in-house lawyer seriously into question. A departure from the case-law in AM&S can therefore not be justified by reference to these procedural reforms.

Finally, the Advocate General also rejects the argument that it is solely up to the Member States to determine the precise scope of legal professional privilege, by virtue of their procedural autonomy. According to Advocate General Kokott, EU law would be adversely affected if decisions on the lawfulness of acts adopted by EU institutions were made by reference to principles of national law. She states: "Differences in the substance and scope of legal professional privilege depending on the Member State in which the Commission conducts an investigation would ultimately lead to a legal patchwork which would not be compatible with the principle of the internal market. The very purpose of making the Commission the supranational competition authority was to subject all undertakings in the European Union to uniform rules in the field of competition law and to create equal conditions of competition for them in the internal market." (paragraph 169)

The Opinion concludes that the appeal must be dismissed.

### Comment

In-house lawyers and the organisations which employ them will no doubt be disappointed at the views expressed by the Advocate General and her conclusion that their communications should not be covered by privilege in the context of EU competition law.

The ECJ is not bound to follow the opinion of the Advocate General in reaching its decision on the appeal and it is hoped that the Court will afford greater weight to the professional and ethical obligations shared by in-house lawyers with the rest of the profession than the Advocate General has seen fit to do.

The views expressed by the Advocate General may, however, make it more likely that the ECJ will decide in favour of maintaining the status quo. We expect



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the ECJ judgment to be published in the next three to six months. We will issue a further update once it is available.

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## CFI ruling in Akzo – No privilege for in-house lawyers

In its ruling of 17 September 2007 in the long awaited [Akzo case](#), the Court of First Instance (CFI) has refused to extend the protection of legal privilege for communications between a company and its external lawyers to communications with in-house lawyers. The CFI has chosen to follow the European Court of Justice (ECJ) which, in the AM&S case, held that 'the protection only applies to the extent that the lawyer is independent, that is to say not bound by a relationship of employment'. In respect of the rights of defence however, the CFI makes it clear that companies are entitled to refuse to allow Commission officials to take even a cursory look at those documents which they claim to be privileged, provided they give the Commission officials appropriate reasons for their view.

### Background

The case, *Akzo Nobel Chemicals Ltd and Akros Chemicals Ltd v Commission*, arose from a dispute over privilege of a series of documents uncovered during the course of a Commission investigation.

The first group of documents, set A, consisted of a memo from one of the general managers to his superiors with information gathered for the purpose of obtaining legal advice in connection with a competition law compliance programme, and a second copy of this memo with handwritten notes referring to contacts with one of the lawyers representing the companies. The Commission agreed to place these documents in a sealed envelope until a final conclusion as regards their status could be reached. After reviewing the companies' arguments, the Commission adopted a decision in respect of set A, stating its intention to open the sealed envelope and to add the documents to the Commission's file.

The second group, set B, consisted mainly of email exchanges between the company and its in-house lawyer, who was enrolled as an Advocaat of the Netherlands Bar and was employed by Akzo on a permanent basis. The Commission officials took the view that this group was definitely not the subject of legal professional privilege and took copies of the documents, placing them with the rest of the file without isolating them in a sealed envelope. Akzo and Akros appealed to the CFI for annulment of the Commission's decision rejecting their request for protection of those documents on grounds of legal professional privilege. They also applied for interim measures to prevent the Commission from viewing the set A documents until the case was decided.

In an interim order, the President of the CFI ordered the sealed envelope to be kept at the Registry of the CFI pending the outcome of the case and suspended that part of the Commission's decision stating they would open the envelope. This order was subsequently annulled by the ECJ on the basis that the urgency test required for interim measures was not satisfied. The Commission had accepted that, if its decision were held to be unlawful, it would be required to remove from its file the documents affected and would be unable to use them as evidence. The ECJ therefore took the view that the possibility of the unlawful use of the set A documents was purely theoretical and that, in any event, the Commission officials had already examined, albeit cursorily, the documents in set

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A during the investigation.

### **The CFI's ruling in the main proceedings**

#### Procedure to be followed during an investigation

In their first plea, the applicants alleged a breach by the Commission of procedures relating to the application of the principle of legal privilege. They submitted that during the investigation, the Commission forced them to divulge the contents of the documents at issue, even though they had claimed that they were covered by privilege. They complained in particular that the Commission officials examined those documents on the spot, in spite of protests on the part of their legal representatives.

Although the Commission has been given wide powers of investigation, the ECJ, in the AM&S ruling, set out the procedure to be followed by the Commission in cases where an undertaking subject to an investigation refuses to produce certain business records by relying on legal privilege. Following the ECJ's case law, the CFI confirms that, despite the Commission's wide powers of investigation, the fact remains that confidentiality of communications between lawyers and their clients must be protected, subject to certain conditions. That confidentiality serves the requirement that every person must be able to consult a lawyer whose profession entails the giving of independent legal advice to all those in need of it, and is an essential corollary to the full exercise of the rights of defence. An undertaking concerned does therefore not have to reveal the contents of such documents for which it claims privilege, as long as it presents the Commission officials with relevant material which demonstrates their confidential nature justifying protection.

The CFI further clarifies that an undertaking is entitled to refuse to allow the Commission officials to take even a cursory look at the documents which it claims to be privileged, provided that such a cursory look is impossible without revealing the content of those documents and that it gives the Commission officials appropriate reasons for its view.

The CFI concludes that the Commission infringed this procedure for protection under legal privilege, first by forcing the companies to allow a cursory look at certain documents, despite claims and supporting justification by their legal representatives that such examination would require the contents of those documents to be disclosed, and secondly by reading the documents in set B without having given the companies the opportunity to contest the rejection of their claim to protection before the CFI.

#### Types of documents protected by privilege – Preparatory documents

In order to benefit from legal privilege in accordance with the principles as set out in the AM&S case, communications must be made for the purpose of the exercise of the client's rights of defence as well as emanate from independent lawyers. This includes all written communications exchanged after the initiation of an administrative procedure which may lead to a decision on the application of Articles 81 and 82 EC Treaty, and can also extend to earlier written communications which have a relationship to the subject-matter of that procedure.

The CFI explains that the possibility of treating a preparatory document as privileged should be construed restrictively, and that it should be for the undertaking claiming the privilege to prove that the documents in question were drawn up with the sole aim of seeking legal advice from a lawyer. This should be unambiguously clear from the content of the documents themselves or the context in which the documents were prepared and found.

The applicants argued that the memorandum in set A was drawn up in connection with their competition law compliance programme by an external lawyer and should therefore clearly benefit from the protection of legal privilege. The CFI however concludes that the applicants failed to prove in this case that the memorandum was drawn up for the exclusive purpose of seeking legal advice from a lawyer in exercising rights of defence. The mere fact that a document has been put together under a competition law compliance programme does not suffice in itself to confer protection on that document. Compliance programmes often cover information which goes beyond the exercise of the rights of defence and the fact that an external lawyer has put together and coordinated a compliance programme does not automatically mean that all of the

documents drawn up under the programme are privileged. In this case, the CFI finds that the evidence provided did not prove that the memorandum was drawn up for the exclusive purpose of seeking legal advice, and therefore concludes that the Commission did not err in considering that the memorandum was not protected under legal privilege.

#### Extension of the scope of legal professional privilege to in-house lawyers

In claiming privilege in respect of the email exchanges between the company and its in-house lawyer (the set B documents), the applicants argued that communications with in-house lawyers who are members of the bar or Law Society of a Member State must be protected under the principles laid down in AM&S. In the alternative they argued that the scope of the protection provided in AM&S should be widened so as to extend the protection of legal privilege to communications with in-house lawyers.

As regards the first argument, the CFI points out that in AM&S, the ECJ expressly held that the protection accorded to legal privilege under Community law only applies to the extent that the lawyer is independent, that is to say, not bound to his client by a relationship of employment. It reached a conscious decision on the exclusion of communications with in-house lawyers, given that the issue had been debated at length during the proceedings, and could therefore not be interpreted in such a way as to include communications with in-house lawyers who are members of the bar or Law Society.

As regards the argument that it should extend the scope of privilege beyond that which the ECJ had accepted in AM&S, the CFI points out that, although specific recognition of the role of in-house lawyers and the protection of communications with such lawyers under legal privilege is relatively more common today than when the AM&S judgment was handed down, it is not possible to identify tendencies which are uniform or have clear majority support in that regard in the laws of the Member States. A large number of Member States still exclude in-house lawyers from protection under legal privilege, and various Member States have in fact aligned their regimes with the EU system. The Court also refused to accept the applicants' argument that the evolution of competition law since that judgment justifies an alteration of that case-law, given that it is neither contrary to the principle of equal treatment nor to that of the free movement of services.

The CFI therefore held that the exchange of emails with a member of Akzo's legal department should not be covered by the protection of legal privilege.

Finally the Court held that the procedural infringement committed by the Commission has not unlawfully deprived the applicants of the protection of privilege in respect of the disputed documents, as the Commission did not err in deciding that none of those documents fell within the scope of that protection.

#### **Comment**

Despite the Court's refusal to extend the scope of legal privilege to communications with in-house lawyers, its findings in respect of the procedure to be followed by the Commission during an investigation will be welcomed by companies and their advisers. It spells a clear end to the current procedure whereby Commission officials claim that they can read the documents over which a company claims privilege, without the company's consent, in order to check that they are indeed privileged. All too often companies feel pressured into submitting to such requests as they fear that failure to do so may result in a breach of their duty not to obstruct the investigation, which can result in penalty charges. The CFI makes it clear that pending resolution of disputes on legal privilege, which is to be resolved by the CFI itself, the Commission does not have the right to read the content of the documents in question.

The CFI's judgment also provides clarification on the types of preparatory documents covered by legal privilege. It serves as a useful reminder that companies should take great care when preparing documents in the context of seeking legal advice by external lawyers. This should be accurately and expressly recorded on the documents themselves so that they are easily identifiable during Commission investigations and privilege for such documents can be more easily claimed on the spot.

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Akzo and Akros were advised by Christof Swaak of Stibbe, our Dutch alliance firm. Jacques Buhart of our Paris office represented the IBA, an intervener in the case.

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## Privilege after Akzo - a checklist for in-house lawyers

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The recent European Court of Justice (ECJ) decision in the Akzo case (see our [e-bulletin](#) of 14 September) has sparked renewed interest in legal professional privilege issues.

The judgment has not altered the legal position in respect of privilege in the context of EU competition law investigations. Privilege continues to be denied for communications between in-house lawyers and their clients.

There are nonetheless a number of practical steps that can be taken in order to maximise any protection that is available.

The judgment does not affect the scope of privilege as a matter of English law, under which communications with in-house lawyers are privileged so long as they are acting in their capacity as a lawyer and not an executive.

### Legal advice privilege under EU competition law

Privilege is the way in which the law protects the confidentiality of communications between legal advisers and their clients. There are various categories of privilege but this guide focuses on legal advice privilege under EU competition law. Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) and their implementing and procedural regulations do not contain any provisions on legal privilege. Instead, the principle has been developed through the case law.

In the leading case, *AM&S (AM&S Europe Ltd v Commission, Case 155/79)*, upheld in the recent Akzo ruling, the ECJ held that communications between lawyers and their clients should be protected at EU level, so long as these communications:

- i. are made for the purposes and in the interests of the client's right of defence; and
- ii. emanate from independent lawyers entitled to practise in the EEA who are not bound to the client by a relationship of employment.

The appeal before the ECJ in Akzo was mainly concerned with the issue of independence of lawyers (i.e. the second condition), and the ECJ confirmed that legal professional privilege does not apply to protect communications between parties and their in-house lawyers. However, it is useful to note that, at first instance, the General Court provided some useful guidance in respect of the procedure to be followed during an investigation and on the position of privilege for preparatory documents.

### Procedure during a dawn raid

In the Akzo case, the General Court confirmed that, despite the Commission's

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wide powers of investigation, a company under investigation by the Commission does not have to reveal the contents of those documents for which it claims privilege, as long as it presents the Commission officials with appropriate reasons which demonstrate the confidential nature of the document justifying protection (for example by providing information such as the author of the document, the addressee, the duties and responsibilities of the correspondents, the objective of the document and the context in which the document was drafted). A company is entitled to refuse to allow the Commission officials to take even a cursory look at the documents which it claims to be privileged, provided such a cursory look is impossible without revealing the content of those documents.

### Types of documents protected by legal privilege

In order to be privileged, the communications must be made for the purpose of the exercise of the client's rights of defence and must emanate from independent lawyers. This will include all written communications exchanged after the initiation of an administrative procedure which may lead to a decision on the application of Articles 101 and 102 TFEU, and can also extend to earlier written communications which have a relationship to the subject matter of that procedure.

#### *Internal notes*

In-house documents which simply report the text or content of an external lawyer's advice are covered by legal privilege if that advice would have been privileged if received in writing from the external lawyer (*Hilti v Commission*, Case T-30/89). Any opinions expressed on or amendments made to the external lawyer's advice by the in-house lawyer or employee of the company will however not be privileged.

#### *Preparatory documents*

At first instance, the General Court's judgment in *Akzo* also clarified what type of preparatory documents may be covered by privilege. The Court made it clear that the possibility of treating a preparatory document as privileged should be construed restrictively and that it will be for the company claiming the privilege to prove that the documents in question were drawn up with the sole purpose of seeking legal advice from a lawyer. This should be unambiguously clear from the content of the documents themselves or the context in which the documents were prepared and found.

#### *Expert reports*

Communications between the company and professional advisers other than an external lawyer entitled to practise in the EEA will not be privileged under EU law. It may however be possible to argue that expert reports prepared for the purposes of obtaining legal advice in connection with EU competition proceedings are privileged. Although the status of such expert reports is potentially a grey area, it may be easier to argue that they should be privileged where the external lawyer instructs the expert and incorporates the report in its legal advice before sending it on to the company.

### External lawyer for the purpose of EU privilege

In order to be privileged, communications must emanate from an independent lawyer not bound to the client by a relationship of employment, who is entitled to practise in an EEA Member State. Whether or not a lawyer is entitled to practise in one of the EEA Member States is governed by the Directive on legal services (Council Directive 77/249).

### Applicable rules

The EU rules on privilege apply in the context of an EU competition law investigation that is led by the European Commission (conducted by the Commission on its own or assisted by national competition authorities).



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Where the investigation is conducted by the national competition authorities on behalf of the European Commission, or where the national authorities are carrying out an investigation under their own competition rules, the national rules of privilege will apply. In that case, as long as the national regime recognises privilege for communications between in-house lawyers and their clients, documents that fall into the relevant category will not have to be disclosed by the company.

#### **Dos and Don'ts to try and maintain privilege**

- Do make sure that privileged documents are clearly marked as such and are kept on a separate file marked 'privileged and confidential'.
- Do make sure that any advice of a sensitive nature provided by the in-house lawyer is given orally.
- If written advice of a sensitive nature is required, do consider instructing an external lawyer entitled to practise in the EEA (referred to below as an "external EEA lawyer"). This can be done in writing and should state that you are seeking legal advice and should be marked 'Legally Privileged and Confidential'.
- Do clearly label preparatory documents which are created with the sole purpose of seeking legal advice from an external lawyer as being created for this purpose. This can be difficult to prove and will be assisted by clearly setting out the purpose of the documents when they are created.
- Do instruct non-legal experts through your external EEA lawyer and ensure that their reports are transmitted and signed off by external counsel.
- Do only circulate advice received from your external EEA lawyer in its original form. Avoid creating a new document, such as a summary or a commentary on the advice, as this may not be privileged.
- When circulating legal advice from external lawyers, do make it clear that recipients must treat the advice as confidential and make sure that the document is not circulated more widely than is absolutely necessary.
- When subject to a dawn raid, **do not** allow the Commission to take even a cursory look at privileged documents, if you consider that such a cursory look is impossible without revealing the content of those documents and provided that you give the Commission officials appropriate reasons to support your view.
- In the event of disagreement over the privileged nature of a document during the course of an investigation, **do not** hand over such documents but provide details as to why you are claiming privilege over the document and if necessary ensure the document is placed in a sealed envelope marked 'legally privileged and confidential – do not open'.

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