Legal Professional Privilege for In-House Counsel – the ECJ decision in Akzo Nobel Chemicals Limited / Akros Chemicals Limited Appeal

Yesterday saw the ECJ hand down its appeal decision in respect of the long-running Akzo Nobel matter, centred on whether legal professional privilege could validly be applied in respect of two categories of documents obtained by the OFT and Commission during investigations into possible anti-competitive practice at the appellants’ offices in Eccles, Manchester.

The ECJ concluded as follows:

1. The correct means of assessing whether legal professional privilege applied to documents seized during investigations into breaches of EU competition law was to apply the two stage test as follows:
   (a) The communication with the lawyer must be connected to “the client’s rights of defence”; and
   (b) The communication must come from “independent lawyers”, i.e. “lawyers who are not bound to the client by a relationship of employment”;
2. The developments in EU Competition Law, and more particularly Council Regulation (EC) No1/2003 did not justify an extension of the right to claim legal professional privilege in respect of communications between an organisation and its in-house lawyers; and
3. Not extending the right to claim legal professional privilege, in respect of communications between the appellants and their in-house lawyers in the circumstances of this case, did not impact on the general principle of a party’s right of defence and in particular his freedom of choice of a lawyer to provide representation.

The ECJ viewed the key stumbling block as being the lack of independence of in-house lawyers arising as a result of their contracts of employment and what is perceived as the inextricable tie to the commercial objectives of the employer organisation. This is notwithstanding UK requirements for a lawyer’s enrolment with the Bar, Law Society or other professional organisation and compliance with professional ethical obligations of those organisations that specifically address the issue of independence.

The UK position on privilege

This decision obviously applies across the EU in relation to advice given on EU competition law. How this decision is to be interpreted in this country beyond the confines of EU competition law remains to be seen, but it is most likely to only have limited application to much of an in-house lawyer’s work load. Bear in mind that English law still generally provides that:

1. Litigation privilege protects communications between a party and his lawyer, or between the party or his lawyer and a third party, where they are made for the purpose of preparing for legal proceedings; and
2. Advice privilege protects communications made to and from a legal adviser for the purpose of obtaining legal advice. Legal advice is not confined to telling the client the law, and will include advice as to what should prudently be done in the relevant legal context. It will not however cover advice relating to issues of a purely business, management, compliance or administrative nature.

Lawyers and legal advisers in this context include in-house lawyers.
Practical steps

The following are some suggestions as to measures that can be taken by in-house lawyers in order to ensure that documents are protected by legal professional privilege:

1. Be aware of the forum you are operating in. Privilege can attract to advice from in-house lawyers in the UK, however this is not the case in all countries (e.g. Germany), and is not the case in investigations by the EC;

2. Ensure legal advice is provided separately from purely commercial advice and that it remains separate – do not make additions or amendments or copy and paste extracts, as this could cause privilege to be lost in the whole document;

3. Separate out privileged communications and put these in a separate file marked “Privileged and confidential – For the purposes of obtaining legal advice”, and also insert this phrase into the heading of relevant correspondence. If there are any concerns about whether in-house communications would attract privilege, then involve external lawyers in the process of either reviewing / confirming the advice, or maintaining a watching brief. This can be managed cost effectively;

4. Where advice is given regarding an EC investigation, ensure that any advice given by in-house lawyers is given orally. If written advice is necessary, conduct the investigation through an external lawyer, and make sure the external lawyer provides the advice on their headed paper; and

5. If during an EC investigation there is a dispute as to whether a document is privileged, ensure that the document is placed in a sealed envelope, left with a third party, and an application is made to the General Court to assess whether it is privileged.

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September 2010