CEP Magazine - June 2021
Legal professional privilege post-Brexit

By Stephen Smith and Isobel Thomas

Stephen Smith (stephen.smith@bristows.com) is a Partner and **Isobel Thomas** (isobel.thomas@bristows.com) is an Associate at Bristows LLP in London, UK.

The principle of legal professional privilege is a cornerstone of the legal profession—at least in common-law jurisdictions such as those in England and Wales, Ireland, Northern Ireland, the United States, Canada, South Africa, Australia, New Zealand, etc. It enables clients to correspond with their lawyers for the purposes of seeking legal advice in the knowledge that this correspondence is confidential and protected from disclosure. The concept of legal privilege in European Union (EU) law is somewhat narrower, perhaps understandably so given the combination of common- and civil-law jurisdictions that make up the EU (both before and after Brexit). At its narrowest, EU legal professional privilege (EU privilege) has always been concerned with the notion that advice between a company and its legal counsel can be protected from disclosure to the European authorities in the course of an investigation. Typically, this would be in the context of antitrust investigations by the European Commission.

The extent of the EU privilege rules has been a matter of some contention, particularly for in-house lawyers, for some time. There can be no doubt that Brexit has further complicated the situation. Now that the United Kingdom (UK) is no longer a member state of the EU, it follows that lawyers qualified in its constituent legal systems of England and Wales, Northern Ireland, and Scotland will be treated as third-country lawyers for the purposes of EU law. This in turn will raise questions for clients continuing to seek international legal advice from UK solicitors and what protections, if any, such advice will have against disclosure to European authorities in the course of an investigation. In this article, we explore the concept of EU privilege as it has evolved in the case law of the European courts and the impact of Brexit on the status of advice by UK solicitors.

What is EU legal professional privilege?

There is no legislative basis for legal privilege under EU law. The source of the doctrine of EU privilege is a 1982 judgment of the European Court of Justice (ECJ) in the case of *Australia Mining & Smelting (AM&S) Europe Ltd v Commission*.[1] In that case, in the context of a competition law investigation, the Commission sought documents prepared by the lawyers of AM&S. While AM&S claimed that lawyer-client privilege prevented them from disclosing the relevant legal documents, the ECJ held that this privilege only applied in EU proceedings where the documents are connected to the client's right of defense and are exchanged between an independent lawyer, who is not bound to the client by a relationship of employment, and the client. This judgment implied that no privilege could be applied to the communications of in-house lawyers and their clients. AM&S was therefore not required to produce communications with an external lawyer qualified to practice in the EU, but it was required to disclose communications between the company and its in-house lawyers to the Commission.

This principle was subsequently confirmed in a more recent ECJ judgment in 2010[2] in a case involving Akzo Nobel. The issues in the *Akzo Nobel* case arose in the context of a dawn raid carried out by the Commission and the Office of Fair Trading in 2003 at Akzo Nobel's UK premises during which a number of relevant documents were seized. The investigation led to a dispute as to whether or not certain emails exchanged between an Akzo Nobel

senior officer and an in-house lawyer (who was qualified as a lawyer of the Netherlands Bar) were covered by EU privilege. Akzo argued that the seized documents could not be disclosed as they were protected by legal privilege. The Commission disagreed, stating that an in-house lawyer was not capable of being independent of its employer and hence that the test in *AM&S* was not met. At first instance, the General Court had expressed the view that the fundamental quality required of a lawyer in order that communications are privileged is that they are not an employee of their client.[3] On appeal, the ECJ agreed with the judgment, adding that despite the ethical and professional standards of an in-house lawyer having been established by an enrollment with a bar or law society, in-house lawyers do not enjoy the same degree of independence from their employer as a lawyer working in an external law firm.[4] This implies that they are less able to deal effectively with any conflicts in professional obligations and the aims of their client. The ECJ also concluded that the principle of equal treatment had not been breached, as the respective circumstances of in-house and external lawyers are not comparable.[5]

As a result of the judgments in *Akzo* and *AM&S*, clients have typically taken the prudent view that only advice given by an external lawyer, appropriately qualified in a member state, is capable of meeting the test for EU privilege. For US and other third-country lawyers based in the EU, this typically meant involving colleagues with EU qualifications where appropriate.

It is important to clarify that issues of EU privilege have mainly arisen in EU competition law investigations, and EU privilege has a far narrower ambit than the approaches taken under national law in at least some of the member states. (Some member states have only a limited doctrine of privilege in their national systems, while some have the similar, but not identical, concept of "secret professionel.") There are also areas where EU privilege is unlikely to be relevant, for example, the field of data protection where enforcement under the General Data Protection Regulation is a matter for national courts and authorities.