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.

What protection is provided by EU privilege?

It is clear from the *AM&S* and *Akzo* judgments that in the context of competition law investigations, materials exchanged with external EU counsel (i) for the sole purpose of seeking legal advice and (ii) that are relevant to a client's "rights of defence" will benefit from privilege. This can include:

- Material that has a link to an administrative procedure being pursued by the EU Commission that may lead to a decision imposing a pecuniary sanction;
- Material exchanged after the beginning of that procedure;
- Material exchanged before the beginning of that procedure as long as it has a relationship to the subject matter of the procedure;
- Preparatory documents, even if they were not exchanged with a lawyer or were not created for the purpose of being sent physically to a lawyer, provided that they were drawn up exclusively for the purpose of seeking legal advice from a lawyer in exercise of the rights of the defense; and
- Internal notes circulated within an undertaking that are confined to reporting the text or the content of communications with independent lawyers containing legal advice.

The concept of material that is relevant to a client's rights of defense has been interpreted narrowly by the EU Commission. For example, we are aware of instances where the EU Commission has asserted during dawn raids that external legal advice on patent enforcement and validity and prospects in patent litigation was not privileged and that the Commission was entitled to seize letters from law firms advising on those matters. Any extensions to the scope of privilege have come from the EU courts, and even the EU courts have been cautious

about extending privilege beyond communications with a fairly close link with the relevant proceedings.

What is the position post-Brexit?

Prior to the end of the transition period, UK-qualified lawyers were able to:

- Provide legal services on a temporary basis in an EU/ European Economic Area (EEA) member state under their home state professional qualification, and
- Provide permanent legal services in an EU/EEA member state under their home state professional qualification if registered as a lawyer in the host state (this included the opportunity to qualify as a lawyer in the host state after at least three years of regular practice of host state law, including EU law).

Following the UK's departure from the EU, neither the Lawyers' Services Directive (77/249/EC)[6] nor the Lawyers' Establishment Directive (98/5/EC),[7] which grant these temporary and permanent rights, apply. As of January 1, 2021, UK-qualified solicitors are therefore no longer able to practice as EU lawyers in EU/EEA member countries and are now classified as third-country lawyers.

The EU–UK Trade and Cooperation Agreement (TCA) makes specific reference to the future provision of legal services and sets out that UK-qualified lawyers can provide legal services in the EU under their home jurisdiction professional title.[8] These legal services can only be practiced in relation to home jurisdiction and public international law (excluding EU law) and are defined as legal advisory services and arbitration, but exclude legal representation before administrative agencies, courts, and tribunals. The main provisions of the TCA must, however, be read in conjunction with the annexes, which essentially provide for discretion by the member states to decide how third-country lawyers may practice in their country. This means that the ability of UK-qualified lawyers to advise from within member states will fall on questions of national law. The TCA does, however, provide that where requalification is required by a member state, the conditions involved cannot be less favorable than those that would be demanded of other third-country lawyers, and cannot amount to a requirement to requalify into the legal profession of the host jurisdiction.

The Law Society of England and Wales has created guidance on qualifying into various member states post Brexit, and it is clear that there is significant divergence as to the requirements.[9] For example, while UK lawyers wishing to qualify as German lawyers will have to take the same qualification process as a German law student, Greece does not provide any opportunity for requalification. While in France the establishment of a UK-qualified lawyer as a "foreign legal consultant" requires obtaining certificates and providing evidence to the French Bar, there is no such requirement in the Netherlands.

Lawyers who were already entitled to practice in an EU/EEA member state and maintain that right after Brexit should continue to benefit from EU privilege rules. These lawyers must be entitled to practice before an EU/EEA state court and be bound by the rules of the relevant national bar to appear before the EU courts. There is, however, now some divergence as to the meaning of "entitlement to practice," and as set out above, UK lawyers are now essentially subject to the 27 different regulatory regimes and rules of national bars determining the provisions applying to third-country lawyers practicing in that country.

As third-country lawyers, advice from UK-qualified lawyers will no longer be covered by EU privilege. As is clear from the *AM&S* and *Akzo* judgments, this privilege does not extend to external lawyers who are not qualified to practice in the EU/EEA.

Ireland: A solution or a red herring?

In an attempt to avoid any issues regarding EU privilege post-Brexit, many UK-qualified lawyers sought to become EU/EEA qualified before the end of the transition period. While UK-qualified lawyers can continue to practice UK and public international law in Ireland as third-country lawyers post-Brexit, a large number of lawyers sought to qualify in Ireland in order to retain EU practicing rights and EU privilege. UK-qualified lawyers were able to transfer relatively easily to the Irish bar, only having to apply for a certificate of admission and provide documentation, including proof of EU/EEA nationality.

Unfortunately, however, the Law Society of Ireland confirmed in November 2020 that an Irish Practising Certificate did not permit practice outside of Ireland and that Practising Certificates would now be issued only to Irish solicitors practicing from an establishment in Ireland.[10] The Guidance document states that "issuing practising certificates to solicitors outside the jurisdiction may create the erroneous impression that the Society permits practice pursuant to the Irish practising certificate outside Ireland." While ultimately what this means for the status under EU privilege of advice given by an external Irish solicitor operating from outside Ireland remains unknown (and is unlikely to be definitively answered pending an appropriate case reaching the EU courts), it must be assumed that clients will be cautious to ensure that advice on sensitive matters from external counsel is properly given by a lawyer with a continuing EU practice right.

A new strategy

The UK now finds itself in a similar position to the US and other third-country lawyers who deal regularly with businesses in the EU. Following Brexit, the EU no longer has jurisdiction in the UK to carry out dawn raids or to exercise investigations, and therefore any UK firms who can advise on both the UK and EU regimes will be well equipped. It is already common practice for third-country lawyers to rely on EU-qualified lawyers within their firm to issue and to approve any advice for EU clients in order to retain EU privilege, and many firms will have taken steps prior to the end of the transition period to ensure that individual lawyers who were entitled to dual qualifications (for example under the Brussels Bar for those with offices in Brussels) regularized their status prior to December 31, 2020. Those law firms that continue to advise on EU law in parallel to UK and international law will need to implement appropriate strategic plans to manage the risk that sensitive advice might otherwise fall to be disclosed to the authorities in appropriate EU investigations.

Takeaways

- The principle of legal professional privilege is a cornerstone of the legal profession, enabling clients to seek confidential and protected advice from their legal advisers.
- The European Union (EU) legal professional privilege doctrine is more limited, allowing only advice given by an external (i.e., not in-house) lawyer qualified in a member state.
- Materials relevant to a client's rights of defense and exchanged with external EU counsel for seeking legal advice will benefit.
- Lawyers qualified solely in one of the three legal jurisdictions of the United Kingdom are third-country lawyers, incapable of benefiting from EU privilege.
- The EU–UK Trade and Cooperation Agreement doesn't address the rights that UK-qualified lawyers have to practice in the EU, leaving 27 member states with questions.

1 Case 155/79, AM & S Europe Limited v Commission of the European Communities, 1982 E.C.R. 1577.
2 Case C-550/07 P, Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission, 2010 E.C.R. I-

8360.
3 Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission, 2010 E.C.R. I-8380 ¶ 37.
4 Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission, 2010 E.C.R. I-8381 ¶ 45.
5 Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission, 2010 E.C.R. I-8385 ¶ 58.
6 Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services, 1977 O.J. L78.
7 Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained. 1998 O.J. L77.
8 Trade and cooperation agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, 2020 O.J. L444/14, 89.
9 "Brexit and the legal profession," The Law Society, accessed April 1, 2021, https://bit.ly/3fy8rB5.
10 Law Society of Ireland, *Irish qualified solicitors based in England and Wales seeking a practising certificate*, November 2020, https://bit.ly/39wqljG.