

# The Importance of Privilege and Managing Internal Communications



Susannah Sheppard – Head of Competition & Regulatory

Paul Garland – Head of Litigation

28 October 2009



# Outline of topics to be covered today

## 1. Privilege

- UK legal professional privilege (“LPP”)
  - legal advice privilege
  - litigation privilege
  - preserving privilege in internal / external communications
- EC legal privilege
  - general principles
  - tips for dealing with dawn raids / investigations

## 2. Commercially sensitive information

- Competition law rules
- Practical tips:
  - protecting against information exchange
  - dealing with confidential information received
  - creating documents: mind your language!

# Why are these issues important?

- In civil litigation + investigations by e.g. FSA, OFT, BERR and Inland Revenue, companies are often subject to extensive obligations to disclose sensitive and confidential documents
- Includes any documents that negatively affect their case before the court/regulator
- LPP protects certain sensitive documents from disclosure – it is regarded as being in the public interest for lawyers to be able to give their clients sound, legally accurate and sensible advice with all the facts
- Key element of legal risk management for a company is therefore understanding:
  - when privilege can be claimed, how it can be lost/preserved;
  - how the rules differ in inspections under European competition law;
  - ‘good housekeeping’ tips to avoid creating damaging documents in the first place;
  - what to consider when communicating with competitors so you don’t fall foul of the competition rules

# 1. UK Legal Professional Privilege

## Legal advice privilege

- **confidential** communications
- between a **lawyer** and **client**
- for the purpose of seeking and receiving **legal advice** in the relevant legal context.

# Who is the lawyer?

- In-house lawyers in respect of legal advice only
- In-house lawyers advising on administrative, business or compliance issues are not be deemed “lawyers” for the purpose of privilege
- Solicitors and barristers
- Foreign qualified lawyers
- Properly supervised legal executives, paralegals and trainees

# Who is the client?

## *Three Rivers (No. 5)*

- The Court interpreted “client” narrowly to cover only a small group of company employees charged with instructing the lawyers.

## **What does the case mean in practice?**

- Not all communications between employees and lawyers will be privileged
- Not all internal documents will be privileged
- “Client” needs to be defined carefully

# What is the relevant legal context?

*Three Rivers (No.5)*

*“legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context”*

Per Taylor LJ

- Legal advice is not limited to advice on the clients rights and liabilities, can include connected advice e.g. presentation of evidence, document management
- The relevant legal context will **not** include business advice e.g. advice on financial risk

# How is privilege lost?

- Legal advice privilege can only be waived by the client benefitting from the advice
- By conduct that is inconsistent with the underlying confidentiality that is fundamental to all privileged communications
- BUT disclosure to **third parties** does not necessarily waive privilege:

*“the person who has the right to exercise privilege must be entitled to agree with a third party to give that person access to privileged communication. The agreement might be for general or specified purposes.”*

Per Atkins J, *Winterthur Swiss Insurance Co v AG (Manchester) Limited*

- To ensure privilege is maintained any disclosure must be **confidential**

# Litigation privilege

- **confidential** communications
- between a **lawyer** and **client** and a **third party**
- for the dominant purpose of litigation
- when litigation is **pending** or **contemplated**

# Litigation privilege: who does it cover?

The following communications will be covered:

- A lawyer and client
- A lawyer and a third party
- The client and a third party
- Therefore a lawyer does not need to be involved to claim litigation privilege
- The extension to a third party is essential in litigious circumstances e.g. instructing experts, obtaining witness evidence
- Privilege will extend to agents acting for the lawyer and/or client as long as they are simply a medium of communication

# Litigation pending or in contemplation?

- Must be a **real likelihood** rather than a mere possibility of litigation
- A general apprehension of future litigation or a belief that someone might make an undefined claim is not enough
- The advice must have come into existence for the **dominant purpose** of obtaining information or advice in connection with, or conducting or aiding in the conduct of, the litigation in question

# Without prejudice and privilege

- Prevents any statements/correspondence made in a genuine attempt to settle a dispute from being put before the court
- Allows parties to freely and openly explore the prospect of settlement without worry that discussions could be used against them in court
- Just because correspondence is marked “Without prejudice” does not mean it necessarily is (and vice versa)
- Where parties have reached a without prejudice settlement and there is subsequent dispute as to the terms of that settlement, evidence of the negotiation (oral and written) will lose without prejudice status

# EC Legal Privilege: General Principles

- Developed through ECJ case law
- Protects confidentiality of written communications between lawyer and client if:
  - made for the purpose of the client's rights of defence in relation to the Commission investigation
  - with independent external lawyer qualified to practice in the EEA [*AM&S*]
- Excludes:
  - in-house legal advisors
  - non EEA-qualified lawyers
- Includes:
  - in-house documents that merely report an external lawyer's advice if original advice would have been privileged [*Hilti*]
  - preparatory documents created exclusively to seek legal advice in exercising rights of defence [*Akzo Nobel*]
- There are also differences between EU Member States

# What this means in practice

## Even where privilege exists under national law, under EC law:

- written advice given by the in-house lawyer to the company
- written request from the company to its in-house lawyer for legal advice
- correspondence between company and external EEA-qualified lawyer for the purpose of obtaining legal advice for the purpose of right of defence 
  - written communications after Commission A81/82 investigation starts
  - earlier communications if relate to the same subject matter
- request to / advice from non-EEA lawyer
- internal reports of privileged advice received from external lawyers, prepared by in-house counsel or other employee  but not to opinion/amendments
- file notes made by in-house lawyers or other employee
- requests by in-house lawyer to the company for information for the
- purpose of instructing an external lawyer + responses

# Claiming privilege in a competition raid

- Difficult situation – inspectors need convincing but company does not want to disclose documents
- Procedure set out by ECJ in *AM&S* and *Akzo Nobel*:
  - Need not reveal the content of the document BUT do need to satisfy the inspector that the document qualifies for privilege
  - YOU should review document to decide, not investigator
  - If they are unconvinced, formal record will be made + disputed document placed in sealed envelope – can be taken
  - Commission may then seek disclosure by decision – company can appeal to CFI / ECJ for ruling on privilege.
  - In practice – involve Hearing Office to resolve issue
  - Give investigators a list of any privileged documents only

# 2. Commercially sensitive information

## Recap: the Competition Law rules

- Article 81(EC)/Chapter I (UK) prohibit anti-competitive agreements between competitors
- What is an agreement?
  - written
  - verbal
  - gentlemen's agreements + understandings
  - concerted practices
- Anti-competitive object or effect
- Appreciable effect on competition in the UK/EU
- Examples: prices, output, bid-rigging (horizontal), non-competes, exclusivity and resale price maintenance (vertical)
- Fines, director disqualifications, damages, criminal sanctions, bad PR

# Why is this an issue?

OFT Competition Law Guideline explains:

*“In the normal course of business, undertakings exchange information on a variety of matters legitimately and with no risk to the competitive process....The exchange of information may, however, have an adverse effect on competition were it **serves to reduce or remove uncertainties inherent in the process of competition...**”*

*....will depend on the circumstances of each individual case: the market characteristics, the type of information, and the way in which it is exchanged.*

*As a general principle...there is more likely to be an appreciable effect on competition the **smaller the number of undertakings** operating in the market, the more **frequent** the exchange and the more **sensitive, detailed and confidential** the nature of the information that is exchanged [and] where the exchange of information is limited to **certain participating undertakings** to the exclusion of their competitors and consumers.”*

# Contact with competitors

- The competition authorities are sceptical about contact between competitors – generally assume it is for anti-competitive purposes
  - in the course of doing business
  - in 'non-work' situations (e.g. golf course, having dinner)
- Degree of contact is inevitable – but remember there is no such thing as an off-the-record conversation with a competitor
- Exercise caution in any communications from / to competitors, including:
  - surveys and benchmarking studies
  - trade associations
  - standards bodies

# Do NOT exchange business secrets

- Information will be regarded as a ‘competitively sensitive’ if:
  - you would not have access to it during the normal course of business;
  - it isn’t publicly available or easily accessible from a non-confidential source; and
  - knowledge of it could give your company a competitive advantage it would not have had without such information (i.e. it could remove uncertainty as to the competitor’s strategy or competitive behaviour)
- In fact, if any of these apply, you should still consider this carefully – get legal advice if you think it is likely to be sensitive (or find another way)
- Ask yourself: would you usually want to prevent competitors having access to this information about your company?

# Examples

## Types of competitively sensitive information

○ Prices	○ Commercial strategies
○ Terms and conditions	○ Business policies
○ Investment plans	○ Marketing plans
○ Current sales and output data	○ Orders
○ R&D activities	○ Costs or capacity levels
○ Commission rates / licence fees	○ Bid levels
○ Customer details/lists	○ Specific deals / projects you're working on
○ How you organise data collection	○ Technological capabilities

# Examples

## Information that is not usually competitively sensitive:

- Information that is:
  - publicly available *e.g. annual reports/accounts*
  - historic *organisational charts*
  - anonymised *industry research / market research*
  - not individualised *aggregated/historic output or sales data*
  - qualitative
  
- You can discuss information about the market in general – such as:
  - industry issues
  - regulatory changes and compliance e.g. EC legislation
  - governmental/European policy
  - industry lobbying initiatives
  - health and safety information

# Dealing with business secrets received

## What about being sent competitively sensitive data?

- Starting point is that all access to data of competitors could raise potential competition law risks - undertake a proper analysis and assess the legal risks
- Do not
  - receive it – is there any alternative?
  - use it
  - disclose it (or circulate it to other areas of the business)
- Do
  - return it if possible
  - report any irregular contact to your legal advisors
  - make a note of the context/response in case ever queried
  - if still concerns, contact competition authorities
- Even if it is not competitively sensitive, ask the provider to confirm it's not confidential (i.e. who owns the data – the provider or the competitor?)

# Creating documents

- Documents can be helpful and unhelpful - since businesses often need to generate documents to protect their interests, it's important to make sure that only helpful documents are generated
- Consider the “newspaper headline” test

*"I am becoming sick and tired about lying, about the extent of our reserves issues and the downwards revisions that need to be done because of far too aggressive/optimistic bookings"*

- 
- Head of Exploration & Production, SHELL 2004 (in *The Times*)

- A single piece of evidence can be sufficient for an infringement finding
- Remember: it could be made public one day

# Creating documents

## Ask yourself: do you need to write anything down?

- If you think it might be a sensitive matter, speak to your legal advisor before committing to paper, PC files or emails
- Follow the same rules if annotating copies of papers produced by others – handwritten notes are often relied on as evidence
- Applies to any form in which information is recorded
- Remember: even if you delete and trash an email it can still be recovered – pay as much attention when using email as you would with other correspondence
  
- DO keep notes of all meetings/discussions with competitors
- DO state clearly the source of all price, or other commercially sensitive information, so there is no false impression that it came from a competitor

# Creating documents

- Remember: even if you don't write it down, someone else may make a note of what you say
- Once you have the document/email:
  - consider who really needs a copy
  - do destroy draft documents – and clearly mark them as 'draft for internal discussion only'/'subject to legal review' where this the case
  - do not keep papers for longer than provided for in the company's document retention policy
- Both email and voicemail can be accessed – even when they have been deleted – so exercise the same caution

ALWAYS consider how what you say might be viewed by a competition regulator

# Mind your language – some guidelines

- Avoid suggesting a strategy to drive a competitor out of business

*“Finally, please keep your foot on their necks.”  
“To considerably enforce our existing activity with a  
view to denying the Independent commercial oxygen”*

Evidence used by the OFT to fine Aberdeen Journals £1.3m in July 2001

# Mind your language – some guidelines

- Do not use guilty vocabulary such as “please destroy” or “delete after reading”.....

*“to be destroyed after reading ....  
EU case looks bad. Be careful for Christ’s sake”*

Handwritten note on memo at ABB offices – company fined £50m for its part in a pricing cartel

# Mind your language – some guidelines

- Do not speculate in writing about whether an activity is illegal or legal – never describe anything as “not in compliance”

*“Ian... This is a great initiative that you and Neil have instigated!!!! However, a word to the wise, never ever put anything in writing, it's highly illegal and it could bite you right in the arse!!! suggest you phone Lesley and tell her to trash? Mike”*

Evidence in OFT Toys decision

# Practical tips on legal advice privilege

- Consider face-to-face meeting before putting anything in writing
- Establish who the “Client Group” will be
- Ensure that any written instructs are prepared and sent by employees that are part of the Client Group
- Ensure that communications are not sent outside the Client Group
- Label documents “Confidential & Privileged: [Request for] Legal Advice”
- Only disclose privileged material on confidential terms
- Obtain written undertakings from a third party if required to provide privileged material

# Practical tips on Competition Privilege

- Adopt an appropriate competition compliance manual and policy to explain clearly the competition rules and how to deal with raids by competition authorities
- Provide training so employees are aware of the rules and risks – enable them to spot the issue BUT try to avoid it arising in the first place
- Establish an effective (informal) channel through which employees can express concerns and raise problems
- Make employees aware that careless exchanges, particularly via email, on the telephone or at informal meetings, could be misinterpreted or used in evidence
- Consider compliance audits – especially in high risk areas of the business or e.g. those representing the company at trade association meetings
- Adopt a document retention policy
- Also take care with indirect information exchange e.g. through suppliers/customers

# Questions

## **Susannah Sheppard**

Head of Competition and Regulatory

Kemp Little LLP

[susannah.sheppard@kemplittle.com](mailto:susannah.sheppard@kemplittle.com)

Tel. +44 (0) 20 7710 1659



## **Paul Garland**

Head of Litigation

Kemp Little LLP

[paul.garland@kemplittle.com](mailto:paul.garland@kemplittle.com)

Tel. +44 (0) 20 7710 1617

