Brexit and the rules on legal privilege: what has changed and how it might affect you

Clare Reeve Curatola, Senior Associate at Bryan Cave Leighton Paisner LLP, explains how the legal professional privilege environment has changed post-Brexit, and suggests ways to minimise the new risks

Lawyers and compliance professionals alike often grapple with the issue of whether documents and communications are protected by legal privilege when undertaking investigations in response to a regulatory enquiry or threatened litigation. Now, courtesy of Brexit, there is a new issue to consider.

In this article, the current English law and EU law rules on legal privilege are considered against the background of a change in status for UK lawyers post-Brexit. For compliance professionals undertaking investigations and/or dealing with matters involving potential anti-competitive behaviour, there are some key points on privilege to keep in mind, as well as practical steps that can be taken to minimise risk in the new environment.

Background

The issue of legal professional privilege is a complex one under English law. Legal privilege provides an exception to the general rule that a party in litigation should have access to relevant documents held by its opponent. The same exception applies to disclosure of documents in regulatory proceedings, including those related to potential competition law issues investigated by the European Commission and/or the UK's Competition and Markets Authority.

In broad terms, there are two types of legal privilege under English common law:

- legal advice privilege, which protects confidential communications between a client and his legal adviser made for the purpose of giving or seeking legal advice; and
- litigation privilege, which, by contrast, is capable of extending beyond advice given by legal advisers. Litigation privilege attaches to all communications with third parties provided the communication is made for the dominant purpose of actual or contemplated litigation.

The rules of privilege under EU law are not the same. As a result of Brexit, since 1 January 2021 firms must consider, more carefully than ever before, the different EU and UK approach to the rules on privilege when dealing with any matter that might involve potential competition law issues.

Legal privilege in England

The application of English law rules on legal privilege is regularly debated in court. And rightly so: it is a fundamental human right, central to the administration of justice. It is in the public interest that individuals and firms should be permitted to seek and receive legal advice, investigate, and gather evidence, in confidence, and do so without losing the benefit of privilege.

In 2020, a number of hotly contested privilege disputes were determined by the English courts, including the following cases addressing the issues of scope of legal advice privilege, and waiver of privilege:

Civil Aviation Authority v R (ex p Jet2.com Ltd) [2020] EWCA Civ 35
In this instance, the Court of Appeal considered the issue of multi-addressee emails and re-confirmed the scope of legal advice privilege. The judgment confirmed that only communications created for the dominant purpose of obtaining or giving legal advice will be protected from disclosure on the grounds of privilege.

In *PCP Capital Partners LLP and another v Barclays Bank Plc [2020] EWHC 1393 (Comm),* the English Commercial Court clarified what constitutes a waiver of privilege. In that case, the judge held that a bank had waived privilege in all contemporaneous communications with its lawyers relating to particular transactions, since the bank had already referenced and deployed certain documents containing legal advice in order to support a certain part of its case.

Further, in *PJSC Tatneft v Bogolyubov and others [2020] EWHC 2437 (Comm)*, the Court confirmed that legal advice privilege under English

law extends also to communications with foreign lawyers, whether or not they are "in-house", provided they are acting in the capacity or function of a lawyer.

Practical guidance

These recent UK decisions highlight the following important points to keep in mind when communicating internally about a compliance matter:

- Multi-addressee emails: if the dominant purpose of an email is to obtain a view from a non-lawyer then it will not be protected by privilege, even if a subsidiary purpose is simultaneously to obtain legal advice from a lawyer who also receives the email;
- Attachments: an attachment to a privileged email will not automatically be protected by privilege as well;
- Sharing or referring to legal advice in communications with a third-party: in most cases, the risk of losing privilege will outweigh the benefit of making any reference to legal advice. Making any reference to legal advice in any communications with third-parties should be approached with caution to avoid inadvertently losing the protection of privilege.

Legal privilege in European Commission proceedings

The rules on legal privilege in respect of competition law-related administrative or enforcement procedures conducted by the European Commission differ from those that apply under English law.

In these circumstances, EU law dictates that legal privilege will only apply to documents if both of the following conditions are met:

- The communications were made for the purposes and in the interests of the firm's right to defend itself in actual or potential EU and EEA competition proceedings; and
- The communications emanate from independent (i.e. not in-house) lawyers entitled to practice in the EEA.

If both the conditions are met, the documents are protected from disclosure, but if the conditions are not fully satisfied (for example, because the communications are internal ones between the board and its in-house legal advisers), then the European Commission can require that they be disclosed.

The key authorities on this aspect of the EU privilege rules are: *Case 155/79 AM & S v Commission [1982] ECR 1575* and *C-550/07 P - Akzo Nobel Chemicals and Akcros Chemicals v Commission [2010] 2 A.C 338* These decisions firmly establish the European rule that the attorney-client privilege does not attach to communications with an attorney who holds a position of employment with a client.

"If the European Commission does not recognise UK legal advice as privileged, then contrary to the position pre-Brexit, firms may be obliged to disclose legal advice to the European Commission that might otherwise be protected from disclosure to regulators and other third- parties (such as counter-parties in litigation) in other jurisdictions, including the UK"

The impact of Brexit

This particular nuance of the EU legal privilege rules has created an issue for in-house lawyers for some time, but Brexit adds another dimension to the problem.

From 1 January 2021, and in the context of actual or potential EU and EEA competition proceedings, UK lawyers are third-country lawyers since they are no longer "lawyers entitled to practice in the EEA". This introduces a real, significant risk that the European Commission will refuse to recognise any communications that seek or provide legal advice from lawyers qualified in the UK as privileged communications.

If the European Commission does not recognise UK legal advice as privileged, then contrary to the position pre-Brexit, firms will not be able to resist handing communications with legal advisers to the Commission if requested during an investigation or request for information. Clearly, this will mean that firms may be obliged to disclose legal advice to the European Commission that might otherwise be protected from disclosure to regulators and other third-parties (such as counter-parties in litigation) in other jurisdictions, including the UK.

When might the EU issue be relevant?

The European Commission manages extensive administrative procedures and exercises wide enforcement powers, which can reach business organisations based outside the EEA, and will therefore still be relevant to UK businesses post-Brexit.

There are a number of potential scenarios where firms, which continue to make sales or a have a business presence in the EU and/or EEA post-Brexit, may be required to disclose legal advice from UK qualified lawyers to the European Commission in the context of a European Commission investigation

(Continued on page 10)

(Continued from page 9)

or procedure.

For example, where:

- legal advice has been given by UK lawyers to companies based in EU or EEA member states;
- one or more of the recipients of legal advice are physically based in the EU or EEA (e.g. Chief Compliance Officer or director is based in Germany);
- legal advice has been given to a UK subsidiary of an EU parent company, which could be deemed to have access to its UK subsidiary's documents.

Practical steps to minimise risk of forced disclosure

To avoid the risk of being forced to disclose communications against the firm's interest, careful consideration must be given to how legal advice is procured, provided, and shared when you are investigating or considering any issue that might touch on competition law requirements and may, ultimately, therefore involve the European Commission.

Firms should consider:

- reviewing all active or potential cases and investigations with an EU cross-border element to assess the associated risk of this change in legal privilege protection;
- creating and implementing a policy or communications protocol that will be applied when any potential EU cross-border competition issue arises;
- procuring legal advice from external UK firms with lawyers who are entitled to practice in an EU or EEA member state;
- updating internal training sessions on privilege to enhance understanding across all levels of potentially affected personnel; and
- reinforcing good practices that increase the likelihood that communications are protected by privilege, including in particular ensuring early engagement with the legal and compliance team where possible competition law issues might arise or where disputes are on the horizon.

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