

# *The Akzo ruling*

## *What does it mean for legal privilege?*

September 2010



The European Court of Justice (ECJ) has recently handed down its much-anticipated ruling in *Akzo v European Commission*, which deals with legal privilege.

### **What did the ECJ decide?**

Somewhat predictably, the ECJ has confirmed its longstanding position that, in relation to EU competition law investigations and in line with its earlier ruling in the *AM&S* case, legal professional privilege does not attach to communications between in-house lawyers and their non-lawyer colleagues in the same firm/group.

The key consequence in practice is that privilege cannot be used to stop investigators on a so-called "dawn raid" from reading and taking copies of communications between in-house lawyers and their internal "clients", nor can such documents be withheld on the grounds of privilege in responding to a Commission decision requiring the production of documents.

### **How significant is the ruling?**

The ECJ's ruling is disappointing because it refuses to acknowledge that (a) in-house lawyers are capable of providing genuinely independent advice to their employers; and (b) that UK in-house lawyers have the same professional obligations as "independent" external lawyers. But it is important to keep the ruling in perspective:

- It does **not** affect the courts' approach to the privilege to be afforded to in-house or external lawyers' communications under English law.
- The ruling **does** apply to investigations carried out under EU competition law by the European Commission and/or national regulators (such as the UK Office of Fair Trading) that are "assisting" it. However, even in these situations, communications to and from external, EEA-qualified lawyers remain privileged, provided they relate to the rights of defence of the party under investigation.
- If the investigation is being carried out by the UK Office of Fair Trading on its own account or "on behalf of" the European Commission (rather than "assisting" it), the position on privilege will be governed by English law (or Scottish law, if applicable). So far as English law is concerned, communications between in-house lawyers and their internal "clients" which involve seeking or giving legal advice will generally be privileged (provided, of course, that the other conditions for privilege under English law are met).

### **The broader picture**

That said, privilege is a complex area of law which is relevant not just to competition law. All businesses need to have procedures in place to ensure that they do not inadvertently lose the benefits of legal professional privilege (for example, the ease with which emails can be forwarded around an organisation means that it is all too simple inadvertently to create non-privileged copies of documents which started life as privileged correspondence).

### **How we can help**

If you would like us to run a workshop for your staff on privilege or on dealing with competition "dawn raids" and/or other regulatory investigations, please speak to your usual contact at the firm or contact any of the partners listed overleaf.

*In a 'dawn raid',  
privilege cannot be used  
to stop EU officials  
reading communications  
between in-house lawyers  
and their internal  
'clients'.*

## What others say about us

### About the Litigation Department

*Travers Smith is 'sophisticated, precise and creative - all the things you like to see in a law firm' ... Sources say that it 'most definitely holds its own.'*

Chambers Guide to the UK Legal Profession (2009)

### About the Competition Department

*'Top-notch firm' Travers Smith LLP is 'outstanding' and 'willing to go the extra mile' ... Margaret Moore ('exceptional', 'very bright', 'a joy to work with') and Nigel Seay ('faultless') are both recommended.*

Legal 500 (2010)

### About Travers Smith

*Partner involvement, strength in depth, deep industry knowledge and commercial savvy.*

Legal Week Client Satisfaction Report (2009)

*[Travers Smith] fights only the battles that are worth winning, focusing all the time on the results it can achieve for its clients rather than the points it can score.*

Chambers Guide to the UK Legal Profession (2009)

---

Travers Smith LLP  
10 Snow Hill  
London EC1A 2AL  
T +44 (0)20 7295 3000  
F +44 (0)20 7295 3500



**Jonathan Leslie**  
Partner, Litigation Department  
+44 (0)20 7295 3211  
jonathan.leslie@traverssmith.com



**Toby Robinson**  
Partner, Litigation Department  
+44 (0)20 7295 3035  
toby.robinson@traverssmith.com

www.traverssmith.com



**Margaret Moore**  
Partner, Competition Department  
+44 (0)20 7295 3255  
margaret.moore@traverssmith.com



**Nigel Seay**  
Partner, Competition Department  
+44 (0)20 7295 3416  
nigel.seay@traverssmith.com