

English Tribunal Confirms Litigation Privilege Can Apply in Competition Authority Investigations

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The UK Competition Appeal Tribunal recently confirmed that litigation privilege may attach to documents prepared for an investigation by a national competition authority, if the proceedings were adversarial rather than inquisitorial at the time the documents were prepared. The judgment brings clarity to the wider issue of whether competition authorities should be allowed access to this kind of evidence in order to prove anti-competitive conduct.

In a judgment handed down on 20 March 2012, the UK Competition Appeal Tribunal (CAT) refused to order disclosure of witness statements and related evidence to the national competition authority, the Office of Fair Trading (OFT) (*Tesco Stores Ltd, Tesco Holdings Ltd, & Tesco Plc v Office of Fair Trading* [2012] CAT 6). The CAT confirmed that litigation privilege may attach to documents prepared for an investigation by a national competition authority, if the proceedings were adversarial rather than inquisitorial at the time the documents were prepared. The judgment brings some welcome clarity to the wider issue of whether competition authorities should, or could, be allowed access to this kind of evidence in order to prove anti-competitive conduct.

The case concerned an investigation by the OFT into allegations that Tesco and other parties had exchanged information about future cheese pricing. The OFT found that Tesco had engaged in unlawful practices and imposed fines on the company as a result. Tesco appealed the decision to the CAT. In the course of the appeal, the OFT sought an order for disclosure by Tesco of witness statements and other related evidence, which had been collected by Tesco at the time of the OFT's investigation. The CAT had to decide (a) whether a disclosure order was appropriate, and (b) if it was, whether any of the documents were privileged.

Tribunal Chairman Lord Carlile QC refused the OFT's application. In relation to issue (a), he found that a disclosure order was not appropriate in the circumstances. However, although not strictly necessary, he also went on to address issue (b). His judgment on that issue is the first to clarify the scope of litigation privilege in the context of an investigation by a national competition authority. As a result, it is likely to have a significant impact on future cases concerning privileged communications.

Types of Privilege

English law recognises two different types of legal professional privilege:

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- **Legal advice privilege** protects any communication between a lawyer and his or her client, concerning the seeking or giving of legal advice. This type of privilege does not attach to communications with third parties.
 - **Litigation privilege** is much wider in scope and attaches to all communications between a lawyer and his or her client—or between either the lawyer or the client and a third party—as long as those communications are produced for the dominant purpose of litigation. However, this type of privilege only arises once litigation has been commenced or contemplated.

In the *Tesco* case, the question faced by the CAT was whether the relevant documents were covered by litigation privilege. However, where similar disclosure issues have been considered by the European courts, the focus has been solely on legal advice privilege.

This is well demonstrated by ***AKZO Nobel Chemicals Ltd and others v European Commission*** (C-550/07 P), the most recent European case on the subject, in which the court considered whether legal advice privilege applied to documents seized in a European Commission investigation into alleged anti-competitive practices. The court confirmed that there are two prerequisite conditions for legal advice privilege to apply. First, the communication with the lawyer must be connected to the client's rights of defence. Second, the exchange must emanate from lawyers who are independent, *i.e.*, who are not bound to the client by a relationship of employment. In that case, it was concluded that the second condition was not satisfied and therefore no privilege could be claimed in respect of the relevant evidence. No issues of litigation privilege were considered.

The Findings of the CAT

In English law, litigation privilege attaches to documents prepared for proceedings that are adversarial, but not to those prepared for proceedings that are inquisitorial. Although under section 30 of the Competition Act 1998, the OFT is not empowered to compel parties to disclose documents covered by either type of privilege, Rule 19 of the Competition Appeal Tribunal Rules 2003 (SI 1372/2003) confers upon the CAT a broad discretion to require parties to produce documentation.

In his judgment in the *Tesco* case, Lord Carlile QC did not refer to any specific European case law. He did cite the Commission's Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU (OJ C308, 20.10.2011, p.6), but pointed out that this was solely concerned with legal advice privilege. He also commented that the existing cases which concerned privilege did not assist him, as the European courts had at no time considered whether litigation privilege applied to investigations undertaken by the European Commission.

He therefore framed the issue in terms of the English law on litigation privilege. This meant that the key question was whether, at the time the relevant documents were prepared, the investigation process was inquisitorial or adversarial.

Lord Carlile QC concluded that it was adversarial, and therefore that the relevant documents would have been privileged. His reasoning for this was twofold. First, the OFT had already issued not only a statement of objections but also a supplementary statement, indicating its belief that Tesco's actions were anti-competitive. Its approach would necessarily be informed by this view, and therefore "the investigation was not simply an inquiry to get to the bottom of the facts . . . by this point the character of the administrative procedure was no less confrontational than ordinary civil proceedings involving the same alleged infringements." Second, the OFT's powers of enforcement

included the ability to impose a fine on Tesco. Both parties agreed that the imposition of such a fine fell under the “criminal” head of Article 6 ECHR, and therefore Tesco’s Article 6 rights were engaged. While Lord Carlile QC acknowledged that this fact alone was insufficient to conclude that privilege applied, he considered that it was “a factor which is relevant to characterising the nature of the investigation.”

While Lord Carlile QC was keen to emphasise that his decision was a narrow one, based solely on the facts of the instant case—echoing similar sentiments expressed in previous English judgments on the same issue—it seems likely that, in the absence of any European decision on litigation privilege, his comments will be referred to by any undertaking seeking to rely on such privilege in competition cases. Whether the European courts will adopt the English approach, however, remains to be seen.

Tesco’s appeal against the OFT decision imposing the fine is due to be heard by the CAT on 26 April 2012.

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